

EUROPEAN REGIONAL MASTER'S DEGREE IN DEMOCRACY AND HUMAN RIGHTS IN SOUTH-EAST EUROPE

Sarajevo - Bologna



DEMOCRACY AND HUMAN RIGHTS IN SOUTH EAST EUROPE: SELECTED MASTER THESES

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A.Y. 2012- 2013

**MASTER THESES SUBMITTED IN PARTIAL FULFILLMENT OF THE
REGIONAL MASTER'S DEGREE IN DEMOCRACY AND HUMAN
RIGHTS IN SOUTH-EAST EUROPE IN OCTOBER 2013**

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PREFACE

The European Regional Master's Program in Democracy and Human Rights in South-East Europe is established through the joint efforts of eleven participating universities and research centres and is coordinated by the Centre for Interdisciplinary Studies of the University of Sarajevo and the Institute for the Central-Eastern and Balkan Europe of the University of Bologna.

The Program is an educational activity that promotes the development and realisation of a generation of young people from the region of South-East Europe and the European Union. Its structure is defined in a way emphasising among its participants, both students and Faculty, a shared consciousness that the development of democracy and human rights in the region depends on a plural interdependence of factors. All of the relevant issues in South-East Europe, stability, democracy, and development are mutually correlated and influence each other which gives this common regional effort in addressing them more chance of success in a context of inclusive policies and in the framework of a wider European integration process.

Much of the foundation for the establishment of the European Regional Master's Programme had been laid down in the mid-1990s when a team of prominent Academic Faculty gathered around the idea of organizing region specific educational activities. Its first practical embodiment was the Cervia International Summer School, which started in 1995, and was supported by the European Commission. For the first five years of its existence, it provided the necessary background of specific teaching and research experience that subsequently moved to the region of South-East Europe once conditions allowed.

The Master's programme is co-financed by the European Union and the Italian Ministry of Foreign Affairs through its DGCS/UTL Offices. Its structure and academic content reflect on topical issues common for the region of South-East Europe and account for the wider conceptual framework of the process of European integration. Each year the Programme produces around 30 young graduates organized in an active Alumni Association (ACIPS) who find employment in national governments, national and international governmental and non-governmental organizations, think tanks, research institutes and universities within Europe.

What follows are the best four Master Theses of academic year 2012/2013. The selection criteria adopted by the Academic Faculty of the Program include originality and relevance of the topic and the author's argumentation, structure and clarity of the exposition, innovative approach and skillful academic engagement. They are an accessible material, which is a useful read for students of human rights and for all who are interested in the issues emerging from the processes of their protection and violation in the region of South-East Europe.

We would like to use this opportunity to congratulate our graduates on successfully completing this Program and wholeheartedly thank the staff for their immeasurable support and enthusiasm for the past 12 years.

TABLE OF CONTENTS

Julia Dowling FACING THE PAST IN PRIJEDOR: A CASE STUDY OF LOCAL TRANSITIONAL JUSTICE INITIATIVES.....	1
Ajla Memišević THE OUTSIDERS: EDUCATION OF ROMA CHILDREN IN CROATIA.....	89
Jasna Pekić PROTECTION OF HUMAN RIGHTS OF ARMED FORCES PERSONNEL: CASE STUDY OF THE EXISTING NATIONAL MECHANISMS IN BOSNIA AND HERZEGOVINA AND MONTENEGRO	189
Aarif Sarigat Abraham THE REVOLVING DOOR OF REFORM: ADDRESSING THE DILEMMA OF CONSTITUTIONAL CHANGE IN BOSNIA AND HERZEGOVINA	263

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AND HUMAN RIGHTS IN SOUTH-EAST EUROPE

**BY
JULIA DOWLING**

SUPERVISOR: PROFESSOR ZORAN PAJIC

SARAJEVO, BOSNIA AND HERZEGOVINA

11 OCTOBER 2013

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I dedicate this modest work to the Prijedor’s Concentration Camp victims, survivors, and all those who were forced to flee because of violence and terror. *Prijedorians* passionate activism throughout the globe is an inspiration. I also dedicate this work to my mother, Abby Dowling, who has spent many a Skype call encouraging me in my studies and research.

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Contents

Acknowledgements	2
List of Abbreviations.....	4
Introduction.....	5
Research Aims, Questions, and Framework	7
Methodology: Research Methods, Constraints, Potential for Future Work	9
1. Literature Review and Theoretical Framework	12
1.1 Transitional Justice as a Product of the Liberal Paradigm.....	16
1.2 The Global, Fourth Phase of Transitional Justice	18
1.3 Infighting and Victim Hierarchies: Complications of the Fourth Phase	23
2. Prijedor Past and Present: The War and Civil Society's Emergence	26
2.1 The War and Terror	26
2.2 Return and Rebuilding	31
3. Transitional Justice in Bosnia-Herzegovina	36
3.1 Court Justice: How Judicial Mechanisms Remain Insufficient	36
3.2 Regional and National Efforts: Inertia and Skepticism	41
4. Today's Prijedor: Denial and Discrimination	44
4.1 "Uncommonly Profound Forms of Denial"	45
4.2 What Would Justice Look Like in Prijedor? "We Need an Earthquake."	50
4.3 Waging War without Guns: Institutionalized Discrimination ...	54
4.4 Discrimination and its Discontents: Pushing Back Against Systemic Intolerance.....	59
5. Our Own Worst Enemy: How Internal Politics of Prijedor's Civil Society Jeopardize Transitional Justice	61
Conclusion	69
Bibliography	72
Appendix A. Interview Subject Profiles	81

List of Abbreviations

BiH	Bosnia-Herzegovina
ICC	International Criminal Court
ICTJ	International Center for Transitional Justice
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDP/s	Internally Displaced Person/s
NGO/s	Non-Governmental Organization/s
OSCE Europe	Organization for the Security and Cooperation of Europe
PTSD	Post-Traumatic Stress Disorder
RECOM	The Regional Commission Tasked with Establishing the Facts about All Victims of War Crimes and Other Serious Human Rights Violations Committed on the Territory of the Former Yugoslavia in the period from 1991-2001
RS	Republika Srpska
SDA	Social Democratic Alliance
SDP	Social Democratic Party
SDS	Serb Democratic Party
TJ	Transitional Justice
TRC	[South African] Truth and Reconciliation Commission
UN	United Nations
UNDP	United Nations Development Program
UNHCR	United Nations High Commissioner on Refugees
USIP	United States Institute of Peace

Introduction

More than 100,000 individuals were killed between 1992 and 1995 in Bosnia-Herzegovina (BiH). An estimated 2 million more were displaced.¹ The country's inhabitants experienced long-lasting sieges, a policy termed "ethnic cleansing," systematic rape, genocide, and concentration camps – the first in Europe since World War II. At war's end, the international community set forth to rebuild and reconcile the country and the region as a whole with the Dayton Peace Agreement and countless projects aimed at *facing the past* or promoting *Transitional Justice*. Despite skepticism over the efficacy of these initiatives, efforts to address BiH's recent history remain a priority for the international community. A 2011 United Nations Development Program (UNDP) report summarizing the results of a country-wide survey affirmed the desire of Bosnian-Herzegovinians to find truth and engage in public dialogue about war-time events. It states, "The recent war continues to represent an inseparable part of the present for most citizens of BIH."²

Despite vast amounts of time, money, and energy spent on Transitional Justice (TJ) – a process meant to come to terms with a difficult past – in the Former Yugoslavia, many local communities remain untouched by or distanced from regional or international reconciliation and TJ efforts. The Municipality of Prijedor, located in the Republika Srpska (RS) territory of the Bosanska Krajina region, is one such case. The UN Commission of Experts tasked in 1994 with investigating the war in BiH reported that 52,811 non-Serb individuals were either killed or deported from Prijedor between 1992 and 1994, the majority of crimes occurring in 1992.³ An additional 31,000 individuals were forcibly detained in concentration camps, most notoriously

¹ Cutts, Mark. "The Humanitarian Operation in Bosnia, 1992-1995: Dilemmas of Negotiating Humanitarian Access." *UNHCR Working Paper 8*: (1999). www.unhcr.org/3ae6a0c58.pdf.

² United Nations Development Programme in BiH. *Facing the Past and Access to Justice from a Public Perspective*. Sarajevo, 2011. 9.

³ U.N. Security Council – Letter from the Secretary General. Final Report of the Commission of Experts Established Pursuant to the Security Council Resolution 780 (1992) (S/1994/674). 27 May 1994.

Omarska, Trnopolje, and Keraterm.⁴ *Time* magazine's cover photo of Fikret Alic behind Trnopolje's barbed wire made Prijedor infamous. The region's concentration camps became a symbol for the Bosnian Serb government's goal of "the homogenization of the country."⁵

Yet, human and financial resources for *facing the past* continue to be disproportionately focused on the country's urban centers, regardless of the trauma inflicted on Prijedor and equally humble towns dotting the countryside.⁶ As site of the war's largest massacre, deemed genocide, Srebrenica remains the one non-urban center to receive significant foreign aid and support. Yet while areas like Sarajevo, Banja Luka, Mostar, and Srebrenica deserve reconstruction, development aid, and TJ, smaller and lesser-known communities continue to be ignored academically⁷ and in policymaking.

Even with the third highest number of casualties in any municipality after Sarajevo and Srebrenica,⁸ the horror of the camps, and the mass exodus of the area's non-Serb population, little has been done to rebuild or reconcile Prijedor's community. Redress for survivors of torture, illegal detainment, homicide, genocide, and other offenses is prescribed under international conventions ratified by BiH and within the national law, yet there is no official recognition of crimes by local

⁴ Subasic, Haris. "The culture of denial in Prijedor." *TransConflict*. , January 29, 2013. Accessed May 13, 2013. <<http://www.transconflict.com/2013/01/the-culture-of-denial-in-prijedor-291/>>.

⁵ Dennis Gratz, interview with Julia Dowling, Sarajevo, BiH, August 26, 2013.

⁶ United Nations Development Programme in BiH. *Facing the Past and Access to Justice*. 58-59.

⁷ David Backer argues that the majority of empirical research undertaken on Transitional Justice sidelines civil society efforts in favor of more official channels like those of the UN, international NGOs, or national governments. He states "Civil society takes a backseat in most scholarly investigations of this realm, as well as many official undertakings." Backer, David. "Civil Society and Transitional Justice: Possibilities, Patterns and Prospects." *Journal of Human Rights* 2. (2003): 297.

⁸ Nalepa, Monika. "Reconciliation, Refugee Returns, and the Impact of International Criminal Justice: The Case of Bosnia and Herzegovina." *Transitional Justice*. New York: New York University Press, 2012. 336.

authorities.⁹ Compensation for survivors and victims' families remain inconsistently delivered, over one thousand Prijedor citizens are still missing, court justice has fostered impunity for perpetrators,¹⁰ genocide denial is rampant, and memorial construction for non-Serb victims is actively hindered by the local Republika Srpska (RS) government.¹¹ Without signs of positive change, the atmosphere in Prijedor today is bleak.

In response to dissatisfaction with official TJ efforts, victims' families and Concentration Camp survivors in Prijedor have, in recent times, developed local initiatives to "fill the gap" left by national, regional, and international projects. Prijedor is thus an important case in understanding how ordinary citizens are creating local efforts to *deal with the past* in BiH. In what follows, I explore the transformation of TJ from a state-based, judicially focused subfield into a rapidly evolving discipline that continues to become more diverse in both its actors and implementation mechanisms. Prijedor's activists have benefited from the global trend in which civil society takes center stage in *facing the past* efforts. But as this new stage of TJ develops and matures, new challenges also arise. The unsuccessful monument-building process for Omarska camp illustrates that local non-state actors can actively contribute to problems unique in the so-called "fourth" or "global" phase of TJ that have yet to be explored by academic literature.

Research Aims, Questions, and Framework

This research aims to contribute to a modest but growing collection of literature affirming civil society's new and paramount role in TJ efforts. The growth of grassroots work in what some academics term the "fourth" or "global" phase of TJ brings with it new dynamics

⁹ U.N. General Assembly, 60th Session. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (A/Res/60/147). 21 March 2006.

¹⁰ United Nations Development Programme in BiH. *Facing the Past and Access to Justice*.

¹¹ Subasic, Haris. "The culture of denial in Prijedor." *TransConflict*.

between civil society, the state, and the international community.¹² Because TJ efforts at a localized, grassroots level are relatively young, little research has been done on the positive or negative consequences of broadening the scope of *what* and *how* TJ mechanisms are utilized, and *who* implements them. The case study of local TJ in Prijedor, a community that has also been academically neglected, will reveal intricacies and nuances of TJ's fourth phase that may inform future grassroots efforts in BiH, the region, and globally.

It should be noted that though there are conceptual differences between *Transitional Justice* and *facing the past/dealing with the past* in some academic or practitioner literature, I will be using these terms interchangeably. TJ was, in part, created to move forward by *dealing with the past*. Local communities I've worked with are sometimes unfamiliar with the overly technical term *Transitional Justice*. Therefore, it was fitting to also utilize the concept of *facing the past* during this case study.¹³

The research questions in this paper attempt to uncover a deeper understanding of how a local community affected by violence can or cannot, through its own efforts, begin to face their past. Throughout the research I posed questions for myself and research subjects that addressed:

1. *What* local initiatives are occurring within the community?
2. *Why* are initiatives being undertaken?
3. *Who* is undertaking Transitional Justice projects and *what sort* of internal dynamics drive said projects?
4. *How* are local initiatives successfully or unsuccessfully addressing the issues of justice and *facing the past*?

¹² For the remainder of this work, I will utilize the *fourth* or *global* phase terms interchangeably. In some cases, in respect for the authors who developed said notions (Teitel and Rangelov, and Sharp respectively), I combine the terms into the *fourth, global phase* or *global, fourth phase*.

¹³ This decision has been made over a number of conversations with interview subjects about what terminology best communicates the nature of the research subject. For example, Adis Hukanovic, one of *Izvor's* Psychologists stated, "It's easier to use *facing your experiences from the last war* [than using *Transitional Justice*] when you're speaking with regular people. It's more real, not as abstract when you face the experiences of the war." Adis Hukanovic, interview with Julia Dowling, Prijedor, BiH, July 5, 2013.

Through primary and secondary research, I address the Prijedor case as unique in the specific context but sharing characteristics typical of many other initiatives classified as part of this newest stage of TJ. After reviewing relevant TJ literature, I will situate the case within the theoretical framework of the global, fourth phase. Next, I provide an overview of the recent war in Prijedor and the town's post-conflict recovery. Because the international, regional, and national TJ context shapes the reasons why and ways in which Prijedor activists *face the past*, I describe the successes and shortcomings of justice in BiH. The final two chapters address the situation in Prijedor in 2013; chapter four explains the difficult local context and the consequent reaction of grassroots actors. Chapter five explores nuanced challenges to localized, grassroots initiatives that, if TJ is to succeed in Prijedor, need to be critically addressed in the future.

In short, this research will propose that *facing the past* initiatives in Prijedor have become the realm of local grassroots actors in lieu of municipal, entity, or national-level programs designed to implement TJ. Civil society initiatives combine judicial and non-judicial mechanisms in an attempt to heal individuals and provide justice for the community. Despite realities on the ground, there are few holistic academic analyses of *TJ within the domain of civil society*. This research affirms the theoretical underpinnings of the emergence of the fourth, global phase of TJ. Civil society actors, particularly on a local level, have increased their endeavors to *face the past* because of shortcomings of more orthodox TJ efforts. Yet, the present state of TJ in Prijedor furthers the current fourth, global phase theory. This case study suggests that civil society's increasingly powerful role in TJ has the potential to cause internal divisions, intragroup conflict, and tension over resource allocation. If mishandled, the opportunities provided to civil society may ultimately hamper efforts at *facing the past*.

Methodology: Research Methods, Constraints, Potential for Future Work

The research for the Prijedor case study was conducted over the course of four months and includes a mixed-methodological approach.

A number of secondary resources were consulted, but as there is a lack of substantial academic literature on the nexus between TJ and civil society, particularly within the Balkans, the majority of data for the project was gathered in the field.

The sensitive nature of this case study required significant preparation to ensure research would “do no harm.”¹⁴ I referred to anthropological and sociological ethnographic approaches because of their strict ethical guidelines. There were a number of challenges in researching a post-conflict community; the most cited being the risk of re-traumatization in vulnerable populations. A related risk was the potential for interview subjects to feel their hardships and trauma exploited by my research. I witnessed this phenomenon between interviewers and interview subjects during previous work in Sanski Most and Srebrenica. These concerns factored greatly into my selection of Prijedor as case study and my approach to field research. I previously visited and lived in Prijedor’s neighboring town, Sanski Most. Therefore, I already had a number of contacts in Prijedor, a grasp of the context, and a working knowledge of the language. These factors provided me with relatively easy buy-in by the local community and greater assurance that I could conduct ethical research.

I conducted my field research through a mix of semi-structured interviews and participant observation¹⁵ at key events such as memorials and conferences.¹⁶ All interview subjects were fully informed about the research topic and provided oral consent. I reiterated that, should they wish, their identity would be kept anonymous. I conducted a total of seventeen semi-structured interviews the majority of which were in-person though a select few were through email or Skype

¹⁴ Wood, Elisabeth Jean. “The Ethical Challenges of Field Research in Conflict Zones.” *Qualitative Sociology* 29, no. 3 (2006): 373-386.

¹⁵ Kawulich, Barbara B. “Participant Observation as a Data Collection Method.” *Forum: Qualitative Social Research*, 6.2 (2005). <<http://nbn-resolving.de/urn:nbn:de:0114-fqs0502430>>

¹⁶ During 2012 and 2013, I attended memorials for the Keraterm, Trnopolje, and Omarska concentration camps, accompanied survivors’ associations on visits to Trnopolje and Omarska for educational purposes, participated in the 2012, the August 5 Prijedor “Genocide” protest, and the 2013 May 31 White Armband Day Protest. I also attended the *Srcem do Mira* jubilee conference in May 2013 and the Atlantic Initiative roundtable discussion on returnee security in August 2013.

communication. I also used email communication with two individuals, one of whom also provided an in-person interview. If interviews were conducted in Bosnian/Croatian/Serbian (BCS), a translator was used during the session itself. Information gleaned from interviews will be used primarily to *measure behaviors, perceptions, and attitudes* related to *facing the past* in Prijedor.

The interview subjects consist of local, national, and international experts, and key local figures from the Prijedor Municipal government and grassroots activists. I also spoke with two individuals who were raised in Prijedor and survived concentration camps but no longer reside in the town. The limitations of the study primarily relate to interviews; because of time, I was unable to fulfill the original goal of thirty interviews. Furthermore, I initially aimed to collect quantitative data through close-ended surveys administered to one hundred survivors. Again, time was the major limitation obstructing the fulfillment of this goal.

Due to the sensitive nature of some topics covered in my research analysis, I use real identities of interview subjects strategically. Chapter five specifically addresses challenges arising from internal struggles and infighting within Prijedor's civil society. While this is a critical issue to explore it is also one that, if handled improperly, could negatively contribute to the already difficult local context. Therefore, despite interview subjects not requesting anonymity, I do not refer to specific individuals or name organizations in chapter five that are used throughout the rest of the research.

In the future, this case study would be well served by further interviews with key Prijedor stakeholders, such as Mayor Marko Pavic, as well as with a larger sample of Concentration Camp survivors. Future consideration might also be given to a comparative analysis of current TJ initiatives with other regions of BiH to gain a broader understanding of the state of justice in the country as a whole.

1. Literature Review and Theoretical Framework

When societies emerge from violent conflict or repressive regimes, individuals, communities, and governments rely on a set of mechanisms, collectively known as Transitional Justice (TJ). Today, TJ's goal and means of achieving redress for human rights violations have become an international norm. TJ as a concept predates the term itself, which was purportedly coined by Ruti Teitel during the "third wave of democracy"¹⁷ in the 1980s and 1990s.¹⁸ Its ambitious purpose is to assist transitioning societies come to terms with repressive and violent pasts while building new societal foundations based on democratic governance and human rights.¹⁹ It does this through a number of "mechanisms;" the four most commonly agreed upon include criminal trials, truth-finding, institutional reform, and reparations.²⁰

According to Teitel's seminal "Genealogy of Transitional Justice," TJ developed in three distinct phases shaped by equally distinct global contexts.²¹ The post-war Nuremberg trials constitute the first phase, the second phase occurred towards the end of the Cold War neared its end, and the third phase emerged when the conflicts of the 1990s erupted, resulting in mass violations of human rights and civilian deaths.

The first modern notion of TJ appeared upon the establishment of the Nuremberg Trials to address atrocities committed by Nazi Germany. At the time, TJ was narrowly understood through international criminal law and court proceedings.²² TJ's second phase addressed the need for states surfacing from cold war dictatorships to process oppressive pasts

¹⁷ Huntington describes this transitional period of accelerated democratization as the "third wave" of democracy: Huntington, Samuel. "Democracy's Third Wave." *Journal of Democracy* 2.2 (1991): 12-34.

¹⁸ Teitel, Ruti. "Transitional Justice Genealogy." *Harvard Human Rights Journal* 16 (2003): 69-94.

¹⁹ Andrieu, Kora. "Transitional Justice: A New Discipline in Human Rights." *Online Encyclopedia of Mass Violence*. 1 ed. 2010. Online Encyclopedia of Mass Violence: 2.

²⁰ "What is Transitional Justice?" *International Center for Transitional Justice*. Accessed 3 Apr. 2013. <<http://ictj.org/about/transitional-justice>>.

²¹ Teitel, Ruti. "Transitional Justice Genealogy." 69-94.

²² *Ibid.*, 70.

in order to fully transition to new democratic systems.²³ Rangelov and Teitel point out that TJ, until more recent years when conflict resolution and peacebuilding became *in vogue*, was inextricably linked to post-authoritarian statebuilding.²⁴ As more democratic governments replaced authoritarian ones, Paige Arthur claims that human rights advocates fighting state oppression lost their previous *raison d'être*.²⁵ Advocates' shift away from traditional "shaming and naming" techniques created an empty space that *facing the past*, as a means of ensuring respect for human rights, would come to occupy.

Second phase initiatives were funded and implemented by democratic, transition governments through criminal trials, rewriting constitutions to enshrine liberal values and human rights²⁶ and, to a lesser extent, truth commissions.²⁷ A major debate arose in this phase due to perceived tensions between justice and stability, later coined the "Truth vs. Justice" debate.²⁸ Criminal proceedings aimed at halting impunity for human rights violations were believed to put transitioning states at risk; prosecution of figures from the transitioning authoritarian government could become "spoilers," who might compromise or collapse of fragile war-peace or authoritarian-democracy shifts. To avoid forgoing justice altogether, truth commissions became the softer mechanism *du jour* in lieu of trials.²⁹ The efforts of post-authoritarian governments in Latin and South America are prime examples typical of the second phase of TJ. Instead of trying those responsible for crimes against civilians like torture and forced disappearance, the new governments of Chile³⁰ and

²³ Ibid., 71.

²⁴ Rangelov, Ivaor, and Ruti Teitel. "Global Civil Society and Transitional Justice." In *Global Civil Society 2011: Globality and the Absence of Justice*. Basingstoke: Palgrave Macmillan, 2011. 59.

²⁵ Aruthur, Paige "How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice." *Human Rights Quarterly* 31.2 (2009): 334-335.

²⁶ Ibid.

²⁷ Lundy, Patricia, and Mark McGovern. "Whose Justice? Rethinking Transitional Justice from the Bottom Up." *Journal of Law and Society* 35.2 (2008): 270.

²⁸ Sharp, Dustin. "Interrogating the Peripheries: The Preoccupations of Fourth Generation Transitional Justice." *Harvard Human Rights Journal* 26 (2013): 155.

²⁹ Ibid.

³⁰ Backer, David. "Civil Society and Transitional Justice: Possibilities, Patterns and Prospects." 302.

Argentina³¹ undertook state-sponsored truth commissions to establish the truth – but not punish the perpetrators – about past gross violations of human rights.

Between the second and third phases, TJ saw an expansion of its mechanisms, as well as its broader application to new, emerging contexts. In reaction to violent conflicts during the 1990s and early 2000s, TJ became increasingly normalized.³² Policies and strategies aimed at non-military targets and civilian populations spurred the international community to action: the creation of two ad-hoc tribunals in 1993 and 1994³³ became the foundation, for better or worse, of our modern conception of justice for atrocities.³⁴ In both cases, the International Criminal Tribunal for the Former Yugoslavia (ICTY) and The International Criminal Tribunal for Rwanda (ICTR) were meant to end impunity of those guilty of planning and committing wartime atrocities and genocide. Furthermore the judgments of these courts, and later of the International Criminal Court (ICC), set important legal precedents for humanitarian and international criminal law that aimed to deter future crimes of the same nature from being committed.³⁵

Other mechanisms were developed during the second phase, such as truth-seeking, institutional reform, and amnesty, but it was in the third phase that such mechanisms were more often creatively implemented *in tandem*.³⁶ For example, criminal proceedings and truth finding/telling came to be viewed as complementary processes, addressing issues

³¹ Lundy, Patricia, and Mark McGovern. “Whose Justice? Rethinking Transitional Justice from the Bottom Up.” 270.

³² Teitel, Ruti. “Transitional Justice Genealogy.” 71.

³³ Snyder, Jack and Leslie Vinjamuri. “Trials and Errors: Principle and Pragmatism in Strategies of International Justice.” *International Security* 2.3 (2003/2004): 20-25.

³⁴ Andrieu, Kora. “Transitional Justice: A New Discipline in Human Rights.” 4.

³⁵ Recent research puts in question the efficacy of international trials at deterrence of future atrocities. Snyder and Vinjamuri found that trials were only effective in curbing violence when specific conditions existed – including a lack of “spoilors” unrealistic to most protracted violent conflicts. Furthermore, their research purports that trials do not, in fact, deter future atrocities. See: Snyder, Jack and Leslie Vinjamuri. “Trials and Errors: Principle and Pragmatism in Strategies of International Justice.”

³⁶ Roht-Arriaza, Naomi, and Javier Mariezcurrena. *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice*. Cambridge: Cambridge University Press, 2006. 9.

related to both victims and perpetrators. Other mechanisms too, such as institutional reform, amnesty, and reparations, were coupled together in “in a single multifaceted process.”³⁷ Additionally, scholars Teitel, Andrieu, and Sharp agree that TJ shifted away from solely retributive justice to include victim-centered, often locally administered restorative justice attributes.³⁸ Perhaps the best-known example of integration of TJ mechanisms – particularly those focused on restorative justice – is South Africa’s Truth and Reconciliation Commission (TRC).³⁹ In addition to fact-finding investigations to uncover and report Apartheid-era violations of human rights, the TRC provided victims a space to tell their stories to the public, including to perpetrators. The process aimed to play a cathartic role for both individuals and communities deeply affected by the policy of racial oppression and segregation.⁴⁰ Amnesties and reparations for victims were also a part of the TRC strategy, although the success of these strategies continues to be debated.⁴¹

During the third phase a new debate emerged. Some worried that measures designed to punish perpetrators still in power—particularly through criminal trials—might prevent the same individuals from negotiating peace, choosing instead to “fight it out” until they won the conflict therefore avoiding future prosecution.⁴² In policy and academic circles, this “Peace vs. Justice” debate led wary critics to propose a

³⁷ Roht-Arriaza, Naomi, and Javier Mariezcurrena. *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice*. 9.

³⁸ Andrieu, Kora. “Transitional Justice: A New Discipline in Human Rights.” 9, and Sharp, Dustin. “Interrogating the Peripheries: The Preoccupations of Fourth Generation Transitional Justice.” 155, and Teitel, “Transitional Justice Genealogy.” 78.

³⁹ Andrieu, Kora. “Transitional Justice: A New Discipline in Human Rights.” 10.

⁴⁰ The long-term effects of victim testimonies during the TRC remains hotly debated. Many claim the process re-traumatized victims and created a hierarchy of victims within communities. Others believe the opportunity was an important opportunity to work through past crimes. See: Lundy, Patricia, and Mark McGovern. “Whose Justice? Rethinking Transitional Justice from the Bottom Up.” 270.

⁴¹ Mamdani, Mahmood. “Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa (TRC).” *Diacritics*, 32.3 (2002): 32-59.

⁴² “The Effects of Transitional Justice Mechanisms: A Summary of Empirical Research Findings and Implications for Analysts and Practitioners.” CIPS Working Paper, University of Ottawa, April 2008. 155.

return to amnesties in the place of trials.⁴³ The tension between peace and justice was eventually dismissed as a false dichotomy; instead, a careful “sequencing” of justice and peace measures emerged as the standard approach that could be tailored to a specific context.⁴⁴

1.1 Transitional Justice as a Product of the Liberal Paradigm

In the second half of the twentieth century, the TJ field solidified its standing in study and practice, alongside Rule of Law, Democratization, and other related disciplines.⁴⁵ However, the major weakness of the field is its foundations in the liberal democratic paradigm. Arthur states that “‘Transition’—and, more specifically, ‘transition to democracy’—was the dominant normative lens through which political change was viewed at this time, and thus attending to its distinctive contents should shed some light on the emergence of the field.”⁴⁶ The initial TJ goals were to foster state security and stability in transition.⁴⁷ Because of this, first and second phase mechanism implementation was not focused on healing communities or building positive peace but instead on asserting the rule of law and human rights as the foundation of governance.

The liberal lens through which TJ was conceptualized and realized proved insufficient in addressing the deeply complex realities facing post-oppression and post-conflict societies.⁴⁸ The over-emphasis on court justice and top-down processes in place of holistic, inclusive solutions involving broad strata of society were particular weaknesses of TJ’s liberal framework.⁴⁹ Moreover, the overly legalistic approach

⁴³ Sharp, Dustin. “Interrogating the Peripheries: The Preoccupations of Fourth Generation Transitional Justice.” 155.

⁴⁴ Andrieu, Kora. “Civilizing Peacebuilding: Transitional Justice, Civil Society And The Liberal Paradigm.” *Security Dialogue* 41.5 (2010): 545.

⁴⁵ Iavor Rangelov, interview with Julia Dowling, Sarajevo, BiH, April 29, 2013.

⁴⁶ Aruthur, Paige “How ‘Transitions’ Reshaped Human Rights: A Conceptual History of Transitional Justice.” 325-326.

⁴⁷ Iavor Rangelov, interview with Julia Dowling, Sarajevo, BiH, April 29, 2013.

⁴⁸ Sharp, Dustin. “Interrogating the Peripheries: The Preoccupations of Fourth Generation Transitional Justice.” 157.

⁴⁹ Andrieu, Kora. “Civilizing Peacebuilding: Transitional Justice, Civil Society And The Liberal Paradigm.” 554.

of TJ in the first, second, and third phases has been criticized as too narrow by practitioners and academics alike.⁵⁰ Even with the shift towards restorative justice mechanisms alongside court proceedings, TJ remained a predominantly legal project until recently. The ICTY and ICTR, as well as a number of internationally supported hybrid courts like in Sierra Leone, manifest the ideological emphasis the international community has placed on law proceedings.⁵¹ There are a number of significant contributions the ICTY has made to TJ in BiH, particularly relating to establishing an official truth through thorough investigations. Its relevance to Prijedor will be explored in more detail later on. Legal responses to mass atrocities however, can transform crimes that devastate communities into technical and, ideally, impartial proceedings dependent on high-level experts.⁵² This often means that victims participate little, local specificities are sidelined in favor of due process, and funding is channeled to cities like The Hague – reinforcing victims' sense of "distant justice."⁵³ Dozens of academics have criticized the international community's overzealous support for the Tribunals while simultaneously neglecting TJ processes at the national and local levels.⁵⁴ Lundy and McGovern highlight the criticisms in their own study on *justice from the bottom up*:

There is a growing debate about the appropriate model and level... at which transitional justice measures should be adopted... The tendency to exclude local communities [in international justice and rule of law initiatives] as active participants in transitional justice measures is a primary flaw, raising fundamental questions of legitimacy, local ownership, and participation. Simply involving local people at the

⁵⁰ Sharp, Dustin. "Interrogating the Peripheries: The Preoccupations of Fourth Generation Transitional Justice." 150.

⁵¹ Rangelov, Ivaor, and Ruti Teitel. "Global Civil Society and Transitional Justice." 164.

⁵² Andrieu, Kora. "Transitional Justice: A New Discipline in Human Rights." 21.

⁵³ Andrieu, Kora.. "Civilizing Peacebuilding: Transitional Justice, Civil Society And The Liberal Paradigm." 554.

⁵⁴ Akhavan, Payam. "Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal." *Human Rights Quarterly*, 20.4 (1998), 742., and Lundy, Patricia, and Mark McGovern. "Whose Justice? Rethinking Transitional Justice from the Bottom Up." 278.

implementation stage of these initiatives is not enough.⁵⁵

Despite today's rapid evolution away from one-size-fits-all policy prescriptions based on officially sanctioned trials, Dustin Sharp argues that earlier phases remained entrenched in liberal, state-based solutions that came into tension with the involvement of more diverse actors like civil society.⁵⁶ And though there has been some movement past the "Truth vs. Justice" and "Justice vs. Peace" debate, TJ experts in the 1990s and early 2000s still viewed the role of the state and the role of civil society as competitive rather than complimentary; local initiatives spearheaded by communities were only "alternatives" to justice at a national or international level.⁵⁷

Recent literature recognizes TJ's historical shortcomings and academics including Andrieu,⁵⁸ McGovern and Lundy,⁵⁹ Rangelov and Teitel,⁶⁰ and Sharp⁶¹ encourage fuller development of the "fourth generation or "global phase" of TJ, described in detail below.

1.2 The Global, Fourth Phase of Transitional Justice

Although previous TJ phases reflected a liberal bias, the recent shift towards a broader set of actors, mechanisms, and implementation strategies suggests the realization that individual political and civil rights are simply not enough for a society recovering from mass violence. Sharp observes "small but increasing signs at the level of both theory and practice that transitional justice is diversifying some of its

⁵⁵ Lundy, Patricia, and Mark McGovern. "Whose Justice? Rethinking Transitional Justice from the Bottom Up." 266.

⁵⁶ Sharp, Dustin. "Interrogating the Peripheries: The Preoccupations of Fourth Generation Transitional Justice." 155.

⁵⁷ Andrieu, Kora. "Transitional Justice: A New Discipline in Human Rights." 7.

⁵⁸ Andrieu, Kora.. "Civilizing Peacebuilding: Transitional Justice, Civil Society And The Liberal Paradigm." 544.

⁵⁹ Lundy, Patricia, and Mark McGovern. "Whose Justice? Rethinking Transitional Justice from the Bottom Up." 265.

⁶⁰ Rangelov, Ivaor, and Ruti Teitel. "Global Civil Society and Transitional Justice." 162, and Teitel, "Transitional Justice Genealogy." 89-90.

⁶¹ Sharp, Dustin. "Interrogating the Peripheries: The Preoccupations of Fourth Generation Transitional Justice." 152.

approaches” in what he terms the “fourth generation” of TJ.⁶² Teitel and Rangelov describe this phenomenon as the “global phase” of TJ.⁶³ Despite differing terminology, the content of this new era of TJ remains the same; TJ has moved away from its legalistic beginnings towards more holistic solutions that incorporate locally appropriate, non-legal mechanisms that are implemented by the affected community. This phase also addresses a broader range of rights. “Justice vs. Peace” and “Truth vs. Justice” debates have been recognized as misguided in theory and practice – both justice and peace must be satisfied, and without truth there be no justice.⁶⁴

The state-centric, donor-driven, and technocratic processes of earlier phases created what Lundy and McGovern term a “democratic deficit” in TJ.⁶⁵ But because the contexts in which TJ is needed the most “go to the heart of questions of identity and politics,” *facing the past* is an inherently contested process that demands public discourse and involvement.⁶⁶ Therefore, a democratization of sorts in the fourth phase has resulted in an increase in how, what, and who is involved in the process.

Rangelov admits that previously, academics and policymakers incorrectly assumed that mechanisms were “zero-sum.”⁶⁷ In reality, mechanisms are interconnected and support the same goal of *facing the past* – tools can and should be used in coordination to create holistic TJ strategies.⁶⁸ While this theory and practice began during the third phase, it fully matured in the fourth phase. Today, for example, it is recognized that retributive criminal trials, for example, are stronger when paired with a restorative justice mechanism focused on victims’ healing. Only intentional harmonization of TJ mechanisms will start constructively grappling with the complex nature of post-conflict and post-repression

⁶² Ibid.

⁶³ Rangelov, Ivaor, and Ruti Teitel. “Global Civil Society and Transitional Justice.” 162-177.

⁶⁴ Lutz, Ellen. “Chapter 13: Transitional Justice: Lessons Learned and the Road Ahead.” *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice*. Cambridge: Cambridge University Press, 2006. 327.

⁶⁵ Lundy, Patricia, and Mark McGovern. “Whose Justice? Rethinking Transitional Justice from the Bottom Up.” *Journal of Law and Society* 35.2 (2008): 275.

⁶⁶ Iavor Rangelov, interview with Julia Dowling, Sarajevo, BiH, April 29, 2013.

⁶⁷ Ibid.

⁶⁸ Ibid.

societies.⁶⁹ Another paradigm shift seen in the fourth phase relates to what violations might be addressed through a TJ strategy. Andrieu argues that, similar to the earlier shift in favor of restorative justice and victim-centered healing, TJ is starting to encompass a fuller range of human rights, including social and economic rights.⁷⁰ TJ's earlier liberal approach restricted which human rights violations were deemed legitimate enough to address through trials, truth commission, reparations, or other mechanisms. The narrow focus on violations of first generation civil and political rights excluded economic and social violence from the dialogue. This was especially problematic for individuals and communities suffering from poverty purposefully created and used by oppressors to exclude them from society.⁷¹ Roger Duthie of the ICTJ suggests for expanding the list of violations that merit redress through TJ because "the objectives of TJ should include protection and redress for gross violations of all human rights... Also economic, social and cultural rights... The harms caused by such crimes to individuals and society can be just as serious as those caused by any other crimes."⁷² In the fourth phase, violations *other than* political and civil abuses are perceived as equally important for *facing the past*, resulting in a more inclusive TJ framework.

The most relevant shift in the TJ paradigm to the Prijedor case study is the fourth phase's conceptualization of *who* participates in justice processes. From local victims associations, to international non-governmental organizations (NGOs), to multilateral institutions, the number of actors allowed and actively encouraged to shape TJ initiatives has broadened significantly.⁷³ Not only do more actors play a part, but we see an inverse relationship between the state and civil society's importance in TJ processes. In this global phase, the justice infrastructure has grown and through its increasing complexity, civil society has more ability to appeal directly to, or even go around the

⁶⁹ "What is Transitional Justice?" *International Center for Transitional Justice*.

⁷⁰ Andrieu, Kora. "Transitional Justice: A New Discipline in Human Rights." 3.

⁷¹ Lundy, Patricia, and Mark McGovern. "Whose Justice? Rethinking Transitional Justice from the Bottom Up." 273.

⁷² Duthie, Roger. "Toward a Development-sensitive Approach to Transitional Justice." *The International Journal of Transitional Justice* 2.3 (2008): 292-309.

⁷³ Rangelov, Ivaor, and Ruti Teitel. "Global Civil Society and Transitional Justice." 60.

state apparatus.⁷⁴ This is a result of what some scholars describe as “justice from below”⁷⁵ or “justice from the bottom up,”⁷⁶ in which grassroots actors assist or replace the state as the main force behind *facing the past*. Grassroots actors, indigenous perspectives, and community-based initiatives provide an alternative viewpoint of TJ that can augment that of the official, state narrative. It also allows projects to occur despite a government’s inability or unwillingness to undertake necessary measures to *deal with the past*.⁷⁷ Lundy and McGovern advocate for increased local engagement and ownership on all levels of TJ initiatives: “Community members should not only ‘advise’ on the shape and direction of the research but must have the opportunity to ‘at least’ collaboratively control. It relies on a conception of human rights promotion that understands control over decision-making as itself a key to the achievement of those rights.”⁷⁸ From Guatemala’s Project to Recover the Historical Memory⁷⁹ to Rwanda’s Gacaca,⁸⁰ fourth phase TJ is significantly more open to less westernized, state-centric interpretations of justice and *facing the past*. The Prijedor case study demonstrates the arrival and flourishing of fourth phase priorities.

These elements contribute to what Sharp⁸¹ as well as Rangelov and Teitel⁸² call the “normalization” of Transitional Justice. TJ no longer sits on the periphery of international justice nor is viewed as a mere sub-field of human rights. The United Nations (UN) has embraced TJ

⁷⁴ Iavor Rangelov, interview with Julia Dowling, Sarajevo, BiH, April 29, 2013.

⁷⁵ Dudai, Ron. “Deviant Commemorations: Civil Society and Dealing with the Past in Active Conflicts,” Paper for The Potential Role of Transitional Justice in Active Conflicts conference, Queens University Belfast, November 2011.

⁷⁶ Lundy, Patricia, and Mark McGovern. “Whose Justice? Rethinking Transitional Justice from the Bottom Up.”

⁷⁷ Dudai, Ron. “Deviant Commemorations: Civil Society and Dealing with the Past in Active Conflicts,” 1.

⁷⁸ Lundy, Patricia, and Mark McGovern. “Whose Justice? Rethinking Transitional Justice from the Bottom Up.” 281.

⁷⁹ Backer, David. “Civil society and transitional justice: possibilities, patterns and prospects.” 304-305.

⁸⁰ Lundy, Patricia, and Mark McGovern. “Whose Justice? Rethinking Transitional Justice from the Bottom Up.” 272.

⁸¹ Sharp, Dustin. “Interrogating the Peripheries: The Preoccupations of Fourth Generation Transitional Justice.” 152.

⁸² Rangelov, Ivaor, and Ruti Teitel. “Global Civil Society and Transitional Justice.” 162.

in its most significant and widely accepted documents; the International Covenant on Civil and Political Rights, International Convention on the Elimination of All Forms of Racial Discrimination, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Convention on the Rights of the Child all contain articles on the “right to a remedy for victims of violations of international human rights.”⁸³ In addition, the Hague Conventions and the Rome Statute also contain provisions affording these rights to victims.⁸⁴

The current prioritization of local communities as critical actors in TJ presents new dynamics and challenges. David Backer’s research explores the changing relationship between civil society and governments within this latest context. He argues that engagement between the two is critical in and of itself, but also a “salient indicator” of the TJ process.⁸⁵ The main roles undertaken by civil society in fourth phase TJ are typically “parallel” or “substitute” to the state.⁸⁶ In particular, non-state actors have been successful in evidence or fact collection, advocacy, and local consultation.⁸⁷ His article presents six scenarios of civil society-government relations, each illustrating circumstances in which the two sectors exist, how they interact, and the implications on political collaboration, particularly coordination (or lack thereof) of TJ.⁸⁸ Two scenarios are especially salient to the BiH case.

Backer’s theoretical third and six schemes, “At Arm’s Length” and “Hands Off the Wheel” describe contexts in which civil society and government are at odds and, because of this, overall TJ suffer from the lack of a coordinated implementation strategy. In scenario three, he points out that TJ processes can widen the gap between civil society and government, a trend particularly common in Eastern Europe.⁸⁹ Government remains inactive and, in some cases, hostile

⁸³ U.N. General Assembly, 60th Session. Basic Principles and Guidelines on the Right to a Remedy and Reparation.

⁸⁴ Ibid.

⁸⁵ Backer, David. “Civil society and transitional justice: possibilities, patterns and prospects.” 300.

⁸⁶ Ibid., 304.

⁸⁷ Ibid., 302-304.

⁸⁸ Ibid., 306.

⁸⁹ Ibid., 308.

to civil society in scenario six as well; because of political deadlock, local communities take on formal or informal TJ processes in place of official government efforts. Initiatives spearheaded by civil society in this scenario though, lack the financial and social capital required to make significant change.⁹⁰

1.3 Infighting and Victim Hierarchies: Complications of the Fourth Phase

Emerging literature on the new phase of TJ is important, but little has addressed the nuances of *how* civil society operates in its more important role in *facing the past*. Backer recognizes the gap in the literature, “What is rare are studies of transitional justice that highlight civil society, or vice versa. Most of the relevant material offers fragmentary detail, with little or no theoretical reflection... [However] one can raise questions about the practices, accountability, partisanship and dependency of NGOs and civic groups.”⁹¹ Backer’s own research also fails to fully explore the consequences of the increasing emphasis on civil society. However, complex realities on the ground deserve greater attention. Civil society, particularly in post-conflict societies, is not a homogenous unit and does not always operate in favor of the most vulnerable citizens. Even when civil society has effectively addressed local justice needs through TJ projects, significant hurdles remain from local or national governments who may view *facing the past* as a threat. Despite the lack of academic literature on the subject, the fourth phase’s spotlight on non-state initiatives has undoubtedly altered the dynamics between all those involved, the impact on local communities, and efficacy of project implementation.

Because of this lack of relevant academic literature, the Prijedor case study draws on more general political psychology and political sociology. Bakke and colleagues’ work on opposition-movement infighting in civil wars is particularly relevant to Prijedor’s divided civil sector. In short, the authors address splintering of opposition movements

⁹⁰ Ibid., 310-311.

⁹¹ Ibid., 298-301.

and propose a number of key elements that may predict the degree of future infighting.⁹² As chapter five in this thesis will demonstrate, civil society in Prijedor shares many elements highlighted by Bakke et al. with civil war opposition movements, such as lack of coordination, disagreements over personal and professional power, resource conflicts, and contention on decision-making processes.⁹³

Coupled with the work of Bakke et al., this research draws on victim-centered theory developed by number of practitioner-academics in conflict or post-conflict settings. Many survivors of conflict cannot view themselves as victims without “the other” on which to focus their frustration, anger, or trauma, argues Robert Meister.⁹⁴ This does not necessarily mean individuals perceive themselves as victims only in the presence of those who committed the crimes, but that an individual wanting or needing to be a victim can *project* perpetrator status onto any other individual.⁹⁵ Andrighetto et al highlight the challenges victimization poses to reconciliation and *dealing with the past* in Kosovo.⁹⁶ They discuss the need of identity groups to compete with one other for bigger-victim status. According to their research, antagonism over recognition of suffering more than “the other” is similar to competition over material resources.⁹⁷ This suggests that the need for victimhood is an equally important and contested resource to political power, money, or territory. Such research primarily explores the effect of victimhood competition on intergroup conflict, however the Prijedor case study will prove that more research needs to be done on the effect of victim status’ on intragroup conflict, and consequently community and societal reconciliation, as well.

Despite the limited literature on the complicated inner workings of civil society in their new, ascendant role in TJ, this combination

⁹² Bakke, Kristin, Kathleen Gallagher Cunningham, and Lee Seymour. “A Plague of Initials: Fragmentation, Cohesion, and Infighting in Civil Wars.” *Perspectives on Politics* 10.2 (2012): 265-283.

⁹³ Ibid., 265-283.

⁹⁴ Meister, Robert. 2002. “Human Rights and the Politics of Victimhood.” *Ethics & International Affairs* 16, no. 2: 91-108.

⁹⁵ Ibid., 102.

⁹⁶ Andrighetto, Luca, Silvia Mari, Chiara Volpato, and Burim Behluli. “Reducing Competitive Victimhood in Kosovo: The Role of Extended Contact and Common Ingroup Identity.” *Political Psychology* 33.4 (2012): 513-529.

⁹⁷ Ibid., 514.

of theory serves well for a basis of a few cautious assumptions. First, intragroup conflict is a common phenomenon, though under-researched, that occurs within political parties, opposition movements, and therefore logically also within portions of civil society. Actors and groups within civil society fight over resources and decision-making, which may hinder their efficacy to achieve a unified goal. Second, in settings of conflict – particularly identity-based conflict – victim status is a critical resource that can be equally important to more concrete or material resources. Because victimhood is a non-material resource in conflict and post-conflict settings, it can contribute to and escalate infighting amongst members of the same identity group under particular circumstances.

TJ on the ground is progressing far more quickly than the academic field. Therefore, the case study of localized TJ in Prijedor helps to bridge the gap between practice and theory and bring a deeper understanding of the intricacies of this new phase of TJ. Shortcomings of earlier TJ mechanisms, particularly the international community's over-emphasis on court justice, triggered the emergence of grassroots initiatives that rely on non-judicial, non-foreign methods. The country's vibrant civil society has undertaken dozens of *facing the past* initiatives to compensate for the ICTY's overly legalistic approach and the deadlocked national government. Yet despite shared goals and, in many cases, shared ethno-national identity, local civil society groups are at odds with each other, just as their role in TJ becomes more important. Resources, unresolved trauma, and seemingly insurmountable challenges from the local government's denialist policies in Prijedor have led to severe infighting and have hindered grassroots TJ. Therefore, the successes and failures in *dealing with the past* in this local community reveal elements – some yet to be fully explored – unique to the fourth, global phase of TJ.

2. Prijedor Past and Present: The War and Civil Society's Emergence

The war in Prijedor continues to shape the lives of the city's inhabitants, regardless of ethnicity and despite official and unofficial attempts to forget the past. The Municipality was an especially brutal site of killings, torture, rape, and detainment. Because of this, *facing the past* is a critical element of shaping a positive present and hopeful future. An entire book could be, and indeed has been, written about Prijedor's wartime narrative.⁹⁸ The scope of this thesis however restricts the war to one chapter that creating backdrop to explain why localized TJ initiatives become increasingly prevalent in today's Prijedor.

2.1 The War and Terror

Approximately 1,500 individuals were killed in Prijedor Municipality in 1992.⁹⁹ Local civil society groups claim that up to 3,777 individuals were killed and disappeared, the majority of whom were non-Serbs and, in particular, Bosniaks.¹⁰⁰ Despite differences in figures, it is agreed upon that over one thousand Prijedor's citizens were killed, around 30,000 detained in camps, and approximately 50,000 ethnically cleansed from the town in the spring and summer of 1992.¹⁰¹

Before the war, Prijedor was a modestly-sized city that had social and economic ties to cities diverse as Zagreb, Banja Luka, and Bihac.¹⁰² The population of Prijedor was highly educated, urbanized,

⁹⁸ Wesselingh, Isabelle, and Arnaud Vaulerin. *Raw Memory: Prijedor, Laboratory of Ethnic Cleansing*. London: Saqi in association with the Bosnian Institute, 2005.

⁹⁹ "Bridging the Gap in Prijedor, Bosnia and Herzegovina." ICTY Outreach. International Criminal Tribunal for the Former Yugoslavia, Accessed August 21, 2013. <<http://www.icty.org/sid/10169>>.

¹⁰⁰ *Uzdruzenje Prijedocanki Izvor* (Association of Women from Prijedor "Izvor") provides the number 3,777 killed and missing, including 1,099 still missing. See: Subasic, Haris. "The culture of denial in Prijedor."

¹⁰¹ In his article, Subasic uses *Izvor's* figures of 31,000 individuals detained in concentration camps and 53,000 deported. Subasic, Haris. "The culture of denial in Prijedor." *TransConflict*

¹⁰² Dennis Gratz, interview with Julia Dowling, Sarajevo, BiH, August 26, 2013.

and economically prosperous. Ethnically, the Municipality's was almost evenly split, with Bosniaks as a slight majority at 44%, Serbs following at 42.5%, and Croats with 5.7%.¹⁰³ It was a highly integrated city that embodied the concept of *suzivot*.¹⁰⁴ Therefore, it was difficult to convince local Serbs they were in danger from their non-Serb neighbors with whom they had peacefully lived for decades.¹⁰⁵ But Slobodan Milosevic's political aims and propaganda for a Greater Serbia through cleansing, imprisonment, and mass executions extended far beyond Belgrade.¹⁰⁶ In March and April 1992, the first tensions arose between Prijedor's ethnic groups as roadblocks were set up and Mount Kozara's Television transmitter was taken over by Serbs.

Plans for Prijedor's ethnic cleansing began months before the official outbreak of war; the *Krizni Stab* ("Crisis Staff" or "Crisis Headquarters") was established in February 1992 to create local parallel institutions that excluded all Bosniaks, Croats, or other non-Serbs.¹⁰⁷ On April 30, 1992, the takeover of Prijedor town was signified by posters from the Crisis Staff announcing the replacement of the Social Democratic Alliance (SDA) with the Serb Democratic Party (SDS). SDS alleged that the majority-Bosniak party was leading the town to economic disaster.¹⁰⁸ Overtly planned months in advanced, the ICTY described this takeover by SDS as an illegal coup d'état in its case against Dr. Milomir Stakic, President of the Prijedor's Crisis Staff.¹⁰⁹ Non-Serbs were immediately dismissed from their jobs, children and

¹⁰³ U.N. Security Council – Letter from the Secretary General. *Final Report of the Commission of Experts Established Pursuant to the Security Council Resolution 780 (1992) (S/1994/674)*. 27 May 1994.

¹⁰⁴ *Suzivot* is the Yugoslav and Bosnian concept of living together in harmony, interconnectedness and tolerance. It embraces diversity and multiethnic existence. Sarajevo is often used as an example of true *suzivot* before the war began in 1992.

¹⁰⁵ Dennis Gratz, interview with Julia Dowling, Sarajevo, BiH, August 26, 2013.

¹⁰⁶ Prosecutor v. Dusko Tadic (Opinion and Judgment), IT-94-1-T, International Criminal Tribunal for the Former (ICTY), May 7, 1997 <http://www.icty.org/x/cases/tadic/tjug/en/tad-tsj70507JT2-e.pdf>. (Paragraph 130).

¹⁰⁷ Wesselingh, Isabelle, and Arnaud Vaulerin. *Raw Memory: Prijedor, Laboratory of Ethnic Cleansing*. 222.

¹⁰⁸ *Ibid.*, 41.

¹⁰⁹ Prosecutor v. Milomir Stakic (Trial Judgment), IT-97-24-T, International Criminal Tribunal for the Former (ICTY), July 31, 2003, <http://www.icty.org/x/cases/stakic/tjug/en/stak-tj030731e.pdf>. (Paragraph 128).

youth were barred from attending school, and non-Serb individuals were forced to wear white armbands to mark them as Bosniaks or Croats.¹¹⁰

Yet, a new political system excluding non-Serbs in Prijedor was not enough to force Bosniaks and Croats away from the homes they had lived in for generations. In 1991 and early 1992, Serbia released many criminals from its jails in preparation for war, and these criminal elements started a campaign of terror that was fuelled and sustained by instrumentalizing ethno-nationalism. Gratz argues that paramilitary units utilizing Serbian criminals were needed “to cross the line” and start the violence. According to one ICTY witness, notorious paramilitary groups led by Arkan and Seselj were part of the 5,000 soldier-strong force that attacked the town of Kozarac on May 23-24.¹¹¹ Following initial incidences, many Serbs in the local community was easily convinced of the necessity of removing Bosniaks and Croats by force.¹¹²

One of Prijedor’s “Left Bank” communities, Hambarine, was also heavily shelled on May 23-24. During this period too, the deportation/ concentration camps of Trnopolje, Omarska, and Keraterm began operating.¹¹³ Non-Serb communities such as Hambarine, Ljubija, Carakovo, Biscani, and Rizanovici were fully cleansed by late summer.¹¹⁴ Bob Reid, Deputy Chief of Investigations with the Office of the Prosecutor at the ICTY, described his experience in the area of Brdo: “There was nothing left in Brdo, every single house had been totally destroyed.”¹¹⁵ Similarly, Kozarac was completely leveled with machinery after the assault.¹¹⁶

Residents who survived the initial assault immediately left the Prijedor region or were rounded up and brought to detainment

¹¹⁰ Askin, Kelly. “Omarska Camp, Bosnia: Broken Promises of ‘Never Again’.” *Human Rights* 30.1 (Winter) (2003): 12.

¹¹¹ Prosecutor v. Milomir Stakic (Trial Judgment). Paragraph 142.

¹¹² Dennis Gratz, interview with Julia Dowling, Sarajevo, BiH, August 26, 2013..

¹¹³ Wesselingh, Isabelle, and Arnaud Vaulerin. *Raw Memory: Prijedor, Laboratory of Ethnic Cleansing*: 222-223.

¹¹⁴ Wesselingh, Isabelle, and Arnaud Vaulerin. *Raw Memory: Prijedor, Laboratory of Ethnic Cleansing*. and *Bridging the Gap: Between the ICTY and Communities in Bosnia and Herzegovina (Conference Series: Prijedor)*, 25 June 2005. The Hague, Netherlands: The Communications Service, Registry, ICTY.

¹¹⁵ *Bridging the Gap: Between the ICTY and Communities in Bosnia and Herzegovina (Conference Series: Prijedor)*. 11.

¹¹⁶ Prosecutor v. Milomir Stakic (Trial Judgment). Paragraph 145.

centers, most of whom spent at least one night in one of Prijedor's three major concentration camps. According to ICTY Outreach, men and women detained in camps experienced severe mistreatment and torture, including rape and sexual assault, physical and psychological humiliation, beatings and executions.¹¹⁷ This was part of the policy of discrimination and violence aimed at expelling or eliminating non-Serbs from the Municipality.¹¹⁸ What's more, the systematic use of terror and torture on both individuals and infrastructure was meant to make return to Prijedor physically and psychologically impossible for any surviving Bosniaks or Croats.¹¹⁹ In addition to terrorizing the general non-Serb population, camps were a means of eliminating Bosniak and Croat elites; without these leaders to rally survivors, preserve social and cultural values, and organize a return, the non-Serb population would be permanently cleansed.¹²⁰

Omarska Concentration Camp, a former mine located in the Ljubija mine complex, was recognized by the ICTY as the cruelest camp established during the entire course of the war in BiH.¹²¹ Between May 25 and August 6, 1992, Omarska held over 3,000 individuals – mainly Bosniak and Croat men, though 36 or 38 women were also detained and systematically raped during this time period.¹²² Camp prisoners were subjected to inhumane conditions including insufficient food and shelter, regular beatings, torture, and executions. The worst events arguably occurred in the “White House,” where Prijedor's non-Serb elites, a group of intellectuals and prominent society members, were

¹¹⁷ “Bridging the Gap in Prijedor, Bosnia and Herzegovina.” ICTY Outreach.

¹¹⁸ Ibid.

¹¹⁹ Dennis Gratz, interview with Julia Dowling, Sarajevo, BiH, August 26, 2013.

¹²⁰ Ibid.

¹²¹ *Bridging the Gap: Between the ICTY and Communities in Bosnia and Herzegovina (Conference Series: Prijedor)* 13.

¹²² The exact number of inmates interned at Omarska remains debated. According to the ICTY's findings in the Kvočka et al. case the Bosnian Serb authorities recorded 3,334 inmates and guards working there claim a minimum of 2,000 individuals. Witnesses for the case confirm an estimated 3,000 detainees were held during Omarska's operation. See: Paragraph 21 of Prosecutor v. Miroslav Kvočka, Mlado Radic, Zoran Zigic, Dragoljub Prcać (Trial Judgment), IT-98-30/1-A, International Criminal Tribunal for the Former (ICTY), November 2, 2001, <http://www.icty.org/x/cases/kvočka/tjug/en/kvo-tj011002e.pdf>.

targeted for particularly brutal torture and killings.¹²³ It's widely known that if you went into the White House, you were extremely unlikely to emerge alive.¹²⁴ The decimation of community leaders has created present-day challenges in the civil society sector. Namely, elitocide negatively impacted effective governance of local organizations and associations working on TJ, the state of which will be covered in depth in chapter five.

Keraterm Camp held a smaller number of individuals who experienced the same brutality as seen in Omarska. Sexual assault on the mostly-male detainees, as well as forcing inmates to perform degrading sexual acts on each other, was a common form of torture in Keraterm.¹²⁵ The height of violence at Keraterm Camp occurred on July 24, 1992, when more than 200 individuals were killed by a machinegun set up outside of Room Three within the camp.¹²⁶

The third Camp in Prijedor Municipality, Trnopolje, is occasionally referred to as an internment or deportation camp instead of a concentration camp.¹²⁷ While Trnopolje had more porous borders than the other camps, a former Trnopolje detainee stated, "even if there had been just a line on the ground, nobody would have dared to cross it."¹²⁸ Leaving the camp for any reason meant a treacherous walk past heavily armed Serb guards and machine-gun nests. The camp held women, children, and the elderly, as well as adult men in transit from other camps and central Bosnia.¹²⁹ While beatings and executions did occur,

¹²³ Prosecutor v. Miroslav Kvočka, Mlado Radic, Zoran Zigic, Dragoljub Prcać. Paragraph 14.

¹²⁴ Dennis Gratz, interview with Julia Dowling, Sarajevo, BiH, August 26, 2013.

¹²⁵ *Bridging the Gap: Between the ICTY and Communities in Bosnia and Herzegovina (Conference Series: Prijedor)*. 14-15.

¹²⁶ Ibid.

¹²⁷ Omarska and Keraterm also, have been subject to debates on terminology – the most famous of which was between Ed Vulliamy of ITN TV and *Living Marxism* when the former won a libel suit against the latter for claiming the news station had falsified reports about the existence of Trnopolje and the other camps. For a brief overview about the discussion, see pages 62 – 65 in Wesselingh, Isabelle, and Arnaud Vaulerin. *Raw Memory: Prijedor; Laboratory of Ethnic Cleansing*. For the remainder of the thesis, I will refer to these three places as "sites of detention," "concentration camps," or simply "camps."

¹²⁸ Prosecutor v. Milomir Stakic (Trial Judgment). Paragraph 187.

¹²⁹ Wesselingh, Isabelle, and Arnaud Vaulerin. *Raw Memory: Prijedor; Laboratory of Ethnic Cleansing*. 56-57.

they were somewhat less frequent than at Omarska or Keraterm.¹³⁰ However, Trnopolje is notorious for the widespread, systematic, and repetitive sexual assaults and rapes of the girls and women imprisoned there. Young girls and teenagers,¹³¹ as young as thirteen years of age,¹³² were especially at risk.

In August 1992, the world was introduced to Prijedor. It “became famous as a paradigm of suffering of non-Serbs”¹³³ thanks to reporting by *Newsday*’s Roy Gutman and the discovery and documentation of the three camps by British Reporters from ITN, the *Guardian*, and the *Observer*.¹³⁴ The media coverage and subsequent international outcry led to the closings of Omarska and Keraterm in mid-August; remaining detainees were transferred to Trnopolje or Manjaca, a fourth camp near Banja Luka.¹³⁵ By December 1992, the major camps in Bosnian Krajina were shut down and survivors relocated as refugees through the Red Cross.¹³⁶

2.2 Return and Rebuilding

The policy of ethnic cleansing of Prijedor succeeded in part; with the leveling of entire communities, concentration camps, and massacres throughout 1992, the ethnic make-up of the Municipality drastically shifted to a large Serb majority. This process was supported by the Dayton Peace Agreement’s territorial divisions of BiH, which created two entities and one district within the territory.¹³⁷ The

¹³⁰ *Bridging the Gap: Between the ICTY and Communities in Bosnia and Herzegovina (Conference Series: Prijedor)* 15.

¹³¹ Wesselingh, Isabelle, and Arnaud Vaulerin. *Raw Memory: Prijedor, Laboratory of Ethnic Cleansing*. 57.

¹³² Prosecutor v. Milomir Stakic (Trial Judgment). Paragraph 244.

¹³³ Sudbin Music, interview with Julia Dowling, Prijedor, BiH, July 26, 2013.

¹³⁴ Wesselingh, Isabelle, and Arnaud Vaulerin. *Raw Memory: Prijedor, Laboratory of Ethnic Cleansing*. 51

¹³⁵ *Ibid.*, 95-96, 223.

¹³⁶ Other, smaller places of detention existed until the end of the war throughout BiH. Wesselingh, Isabelle, and Arnaud Vaulerin. *Raw Memory: Prijedor, Laboratory of Ethnic Cleansing*. 223.

¹³⁷ *Ibid.*, 10.

Republika Srpska (RS) has a majority Serb population while Bosniaks and Croats make up a majority of residents in the Federation of Bosnia and Herzegovina. Prijedor, though located in the RS, sits extremely near the entity border. In October 1995, the Army of BiH came close to capturing Prijedor and driving the Serb army back, but Dayton stopped the mission in Sanski Most – only 40 kilometers short of Prijedor. This makes Prijedor *just out of reach* for many non-Serbs who lived there before the war, as residing in a Serb-majority city within the RS would be too difficult. Despite these factors and recent government efforts to dissuade non-Serbs from residing there, Prijedor has seen a remarkable rate of return. By 2005, only ten years after war's end, over 13,000 individuals returned to Prijedor.¹³⁸ Since then the total has risen – approximately 15,000 citizens have returned, about 10% of the prewar population – which represents the largest amount of any Bosniak returnee community in BiH.¹³⁹ Return and its related challenges have precipitated the emergence of a large number of civil society projects, initiatives, and organizations in the city. While Prijedor civil society is diverse, organizations focused on TJ are of particular interest because of the town's violent historical context.

Prijedor's civil society includes a variety of subcategories that reflect the organization of non-state actors in BiH more generally. NGOs in BiH total 12,000 and Prijedor has its fair share.¹⁴⁰ The organizations with the greatest social capital in Prijedor are inarguably the *Uzdruzenje* ("Associations") of citizens or camp survivors, most of which are located in Prijedor city or in nearby Kozarac. *Uzdruzenja Zena BiH Inicijative "Srcem do Mira"* (Association of Bosnian Women's Initiative "Heart Through Peace") was created to protect human rights and empower women and children in returning to Kozarac. The organization was unofficially founded in 1993 in a Croatian refugee camp and played a critical part of the return process in the late 1990s and early 2000s.

¹³⁸ Nalepa, Monika. "Reconciliation, Refugee Returns, and the Impact of International Criminal Justice: The Case of Bosnia and Herzegovina." 327.

¹³⁹ Edina Becirevic, interview with Julia Dowling, Prijedor, BiH, August 9, 2013.

¹⁴⁰ US Agency for International Development, Bureau for Europe and Eurasia, Office of Democracy, Governance and Social Transition, *The 2011 CSO Sustainability Index for Central and Eastern European and Eurasia*, 2011. 44 <http://transition.usaid.gov/locations/europe_eurasia/dem_gov/ngoindex/reports/2011/2011CSOSI_Index_complete.pdf>

Through workshops, lectures, training, and education, Director Emsuda Mujagic and her staff prepared women to face devastated Prijedor, come to terms with missing loved ones and began to rebuild the community.¹⁴¹

The *Uzdruzenja Logorasa Kozara* (Association of Kozarac Concentration Camp Detainees) is another example of the blossoming civil society in Kozarac. The Association, similar to other camp inmate organizations, aims to realize the rights of survivors who, in Kozarac, comprise 80% of the town's population.¹⁴² Yet another effort is the *Uzdruzenja Optimisti Kozarac* (Citizens Association "Optimists Kozarac"). Also located in Kozarac, it aims to help rebuild the town through humanitarian projects like basketball courts and camp memorials.¹⁴³ These organizations are a physical manifestation of the determination and will of survivors to overcome their suffering and restart their lives.

In Prijedor city itself, two associations have become known nation-wide because of their deep engagement in *facing the past*. Staff members of both groups have even provided input to the BiH Transitional Justice Strategy. *Uzdruzenja Prijedorcanki "Izvor"* (Association of Women Citizens of Prijedor "Izvor") and *Uzdruzenja Logorasa "Prijedor '92"* (Association of Concentration Camp Detainees "Prijedor '92") work on critical human rights and TJ issues at both individual and communal levels. According to *Prijedor '92* Secretary, Subdin Music, *Prijedor '92*'s mission is to "keep memories of what happened in the concentration camps."¹⁴⁴ To do so, *Prijedor '92* works with its members – more than 2,000 camp survivors – to ensure they receive the compensation due to them, assist them in obtaining official documents from the local government, and provide a link to other survivors living throughout the world. Collectively, they organize commemorations for the concentration camps and other

¹⁴¹ Emsuda Mujagic, interview with Julia Dowling, Kozarac (Prijedor), BiH, July 7, 2013.

¹⁴² According to Trnopolje survivor Elmina Kulasic, the majority of Kozarac citizens – 80% or more - spent at least one night in one of the camps. Elmina Kulasic, written (email) communication with Julia Dowling, September 27, 2013.

¹⁴³ Satko Mujagic, interview with Julia Dowling, Kozarac (Prijedor), BiH, July 23, 2013.

¹⁴⁴ Sudbin Music, interview with Julia Dowling, Prijedor, BiH, July 26, 2013.

events from the war.¹⁴⁵

Izvor addresses similar problems through projects for a broader group of Prijedor citizens, including camp detainees but also families of missing persons, widows and children of those killed, and victims of ethnic cleansing. The President of *Izvor*, Edin Ramulic, emphasized *Izvor's* role in providing psychological support for traumatized people – which it does through employing two trained psychologists and facilitating psycho-social support groups led by a psychiatrist.¹⁴⁶ Additionally, *Izvor* advocates for better treatment of witnesses testifying in war crimes trials and helps individuals obtain state services.¹⁴⁷

The other civil society actors engaged in local TJ efforts are less formally or officially organized but perhaps more widely known because of their strong online presence and use of social media. Groups, individuals, campaigns, and projects not linked or registered NGOs or Associations are a new but interesting phenomenon in advocacy and social change, including the struggle for justice in Prijedor. The *Stop Genocide Denial* group, which orchestrated the *White Armband Day Campaign*, uses media and communications to educate people and combat denial of war-time crimes in Prijedor. *Jer me se Tice* (“Because I care”) was co-founded by Emir Hodzic, also the co-founder of *Stop Genocide Denial*, who believes advocacy through media attention is one of the ways to both bridge the gap between regular individuals regardless of ethnicity and create systemic change.¹⁴⁸ Similarly, the *Guardians of Omarska* is an informal activists’ network based on social media, particularly Facebook. Its founder, Satko Mujagic of Kozarac, also founded the *Uzdruzenja Optimisti* but decided to focus on advocacy towards constructing a memorial at the Omarska camp through *Guardians*. With over 7,000 Facebook followers, *Guardians* disseminates information about the concentration camps in Prijedor and throughout BiH, promotes memorialization for victims, and engages on critical issues relating to camp survivors.¹⁴⁹

Online activism through social media is a new facet to civil

¹⁴⁵ Ibid.

¹⁴⁶ Edin Ramulic, interview with Julia Dowling, Prijedor, BiH, August 22, 2013.

¹⁴⁷ Ibid.

¹⁴⁸ Emir Hodzic, interview with Julia Dowling, Prijedor, BiH, August 1, 2013.

¹⁴⁹ Satko Mujagic, interview with Julia Dowling, Kozarac (Prijedor), BiH, July 23, 2013.

society's work and has not been properly researched through the lens of global TJ. It is clear in the case of Prijedor though, that there are strengths and weaknesses. The potential number of people reached through Facebook, Twitter, and activist blogs is significantly larger than through traditional advocacy methods. Social networks and online media have helped increased knowledge about and interest in Prijedor's case, particularly engagement on the issue of the camps.¹⁵⁰ In BiH, social media activism is a particularly interesting development because of the opportunities it affords to diaspora who want to stay connected with their home communities and contribute to pressing issues of peace and justice. On the other hand, local actors have criticized online activism or *activism from abroad* of weakening in-person advocacy. Prijedor '92's Sudbin Music posed the question, "How many of them [online activists] are voting? They have the opportunity to vote from abroad. We have 26,000 Bosniaks abroad with personal ID cards from Prijedor, with the possibility to vote, and only 5,000 who are voting."¹⁵¹ He argued that the overemphasis on virtual life, such as "liking" a Facebook post about building a memorial in Omarska, makes people feel as if they are making a difference when in reality, they are contributing very little.

In short, Prijedor's recent past is a troubled one that has radically transformed the community. The physical and psychological scars imposed on the city through a systematic, well-coordinated policy of terror created a lingering atmosphere of fear and distrust. As in much of BiH, the violence inflicted on the population demands active measures to confront and work through the past. A diverse set of mechanisms have been created over the last two decades to *face the past*, some international and some local, but most with both significant contributions and significant shortcomings. In reaction to disappointment over high-level TJ efforts in BiH highlighted below, Prijedor's non-Serbs have gone on to create alternative local solutions to *deal with the past*.

¹⁵⁰ Emir Hodzic, interview with Julia Dowling, Prijedor, BiH, August 1, 2013.

¹⁵¹ Sudbin Music, interview with Julia Dowling, Prijedor, BiH, July 26, 2013.

3. TRANSITIONAL JUSTICE IN BOSNIA-HERZEGOVINA

According to activist Goran Zoric, “*Facing the past* seems like one of the viable ways of solving the nationalist deadlock and changing the overall situation in our society.”¹⁵² TJ’s third phase developed alongside the conflict in BiH and its post-war recovery, making the country and region an experiment for testing ways to face a violent past for a peaceful future. There are a number of high-profile TJ endeavors that directly affect or, in many cases, inspire alternatives at the local level. These efforts and, more critically, their perceived shortcomings are one reason why Prijedor’s seen a flourishing of grassroots projects. Many activists view their own work as a means of “filling the gap” when national, regional, and international TJ is inadequate in addressing problems confronting their community.

3.1 Court Justice: How Judicial Mechanisms Remain Insufficient

Justice in the Balkans is often characterized by the work of the ICTY in The Hague. In many ways The Hague Tribunal has contributed to physical and social reconstruction in BiH, while also setting an international precedent in combating impunity for the worst crimes known to man. Extensive investigations and lengthy trials have created a huge resource of factually reliable and impartial findings regarding the events that occurred during the conflicts in the Former Yugoslavia.¹⁵³ Through the ICTY’s verdicts, genocide in Srebrenica has become an indisputable fact to all but the most hardline nationalists looking to revise history. The Tribunal has established the existence of Prijedor’s concentration camps and assaults on its surrounding communities. In fact, the ICTY has seen

¹⁵² Goran Zoric, written (email) interview with Julia Dowling, submitted August 28, 2013.

¹⁵³ “Outreach Activities 2012: Audience left speechless by ICTY documentary.” *ICTY Outreach*. International Criminal Tribunal for the Former Yugoslavia, May 23, 2012. Accessed August 21, 2013. <<http://www.icty.org/sid/11078>>.

the greatest number of accused stand trial for crimes committed in Prijedor – twenty-four individuals in fourteen cases have been tried at The Hague or, in some circumstances, transferred to the National Court of BiH.¹⁵⁴ In Prijedor itself, activists have mixed sentiments about The Hague and its role in justice. However, many agree that the ICTY is the only source at present that provides facts supporting an official truth about the events in the Municipality.¹⁵⁵ “If [the ICTY] hadn’t been involved, then nothing would have happened [in Prijedor] in the sense of justice and recognizing these crimes. Otherwise there would have been a black hole.”¹⁵⁶

In addition to simply establishing detailed, factual accounts of crimes committed throughout the Former Yugoslavia, the ICTY’s judgment on the Dusko Tadic case set a critical legal precedent recognizing rape as a crime against humanity.¹⁵⁷ The importance of the judgment – that rape can be used as a means of persecution (a crime against humanity) instead of simply a *side effect* of war – should not be underemphasized.¹⁵⁸ In these ways, the ICTY has been an important means of truth-finding and truth-telling. The rulings continue to be used to combat denial and demand rightful reparations for victims throughout communities in BiH, including Prijedor. Yet, the fourth, global phase of TJ recognizes the shortcomings of over-reliance on legalistic approaches created and implemented by the international community. Many grassroots initiatives have emerged in Prijedor Municipality and around the country because criminal

¹⁵⁴ The following cases are related to Prijedor Municipality: 1. Predrag Banovic, 2. Radoslav Brdanin, 3. Momcilo Krajisnik, 4. Kvočka et al (charged a total of five people), 5. Mejakic et al. (charged a total of four people, and transferred to the Court of BiH), 6. Darko Mrda, 7. Sikirica et al. (charged a total of three people), 8. Milimir Stakic, 9. Dusko Tadic. The following cases relate to the broader geographic area (including Prijedor) of Krajina, BiH, or the whole of Former Yugoslavia: 10. Radovan Karadzic, 11. Ratko Mladic, 12. Slobodan Milosevic, 13. Biljana Plavsic, 14. Stanistic and Zupljanin (charged a total of two people). See: “Interactive Map.” *International Criminal Tribunal for the Former Yugoslavia*. September 26, 2013. <<http://www.icty.org/sections/TheCases/InteractiveMap>>

¹⁵⁵ Emir Hodzic, interview with Julia Dowling, Prijedor, BiH, August 1, 2013.

¹⁵⁶ Edin Ramulic, interview with Julia Dowling, Prijedor, BiH, August 22, 2013.

¹⁵⁷ Prosecutor v. Dusko Tadic (Opinion and Judgment).

¹⁵⁸ Askin, Kelly. “Omarska Camp, Bosnia: Broken Promises of ‘Never Again’.” 12.

trials are not a holistic solution to *facing the past* in the Balkans.

One of the most prevalent criticisms of the ICTY is that its approach is not victim-centered enough. From its engagement with victims-as-witnesses to the overdue development of the local outreach program in 1999, six years after the Tribunal was founded,¹⁵⁹ the ICTY's primary goal was not recognition of victimhood but establishing facts and criminal liability based on a fair procedure respecting civil liberties.¹⁶⁰ Bosnian TJ expert Goran Simic emphasizes that court justice is insufficient for the challenges facing BiH and for victims, because trials are not meant to promote memorialization or create reparation schemes, which serve the victim more than the rule of law.¹⁶¹ Eduardo Gonzalez-Cueva, Director of Truth and Memory at the ICTJ, questions the relevance of the ICTY and trials in Prijedor's context. Victims in Prijedor who suffered incredibly egregious human rights violations have a difficult time comprehending the use of the Tribunal, according to Gonzalez-Cueva, because local individuals and communities prioritize *substantial justice over procedural justice*. In other words, Prijedor citizens "want to ensure that the bad guys are punished" while The Hague's priority is criminal liability through strict due process.¹⁶²

As previously mentioned, ICTY outreach efforts began late in the game and remain weak. Prijedor native and emerging academic Haris Subasic expressed frustration with ICTY Outreach activities after their second film on crimes in Bosnia was released. The film featured investigations and trials for war crimes committed in Prijedor Municipality.¹⁶³ Despite the film's subject, ICTY Outreach

¹⁵⁹ "Outreach Program." ICTY Outreach. International Criminal Tribunal for the Former Yugoslavia, Accessed September 11, 2013. < <http://www.icty.org/sections/Outreach/OutreachProgramme>>.

¹⁶⁰ Eduardo Gonzalez-Cueva, online phone (Skype) interview with Julia Dowling, conducted August 1, 2013.

¹⁶¹ Simic, Goran. "Searching for Reparation: Has the ICTY Brought Real Justice for the Victims in Bosnia and Herzegovina?" Insight on Conflict. July 20, 2013. Accessed August 2, 2013. <<http://www.insightonconflict.org/2013/07/ict-bosnia-and-herzegovina/>><<http://www.insightonconflict.org/2013/07/ict-bosnia-and-herzegovina/>>

¹⁶² Eduardo Gonzalez-Cueva, online phone (Skype) interview with Julia Dowling, conducted August 1, 2013.

¹⁶³ Haris Subasic, interview with Julia Dowling, Prijedor, BiH, July 2, 2013.

did hold a screening in Prijedor but instead in Sarajevo, Belgrade, and Novi Grad, Serbia.¹⁶⁴ The belated nature of local engagement factors into activists' skepticism and distrust, of the ICTY's work. Regardless of exactly how much one or another of these aspects contributes to overall dissatisfaction, it is unquestionable that many communities in BiH and throughout the region see the Tribunal as a manipulative political tool. Instead of individualizing criminal liability and diminishing collective guilt, the court is viewed as a means of scoring points for one ethnic group or another.¹⁶⁵ Recent decisions have only reinforced the belief that the court is not impartial but instead an ad hoc tool used by politicians in the Balkans and internationally. Satko Mujagic expressed deep disappointment with the ICTY, particularly under the guidance of President Meron, and suggested he leave his position because of allegations about external influences from actors like the United States and Israel.¹⁶⁶

Court proceedings at the Bosnian state and entity levels have encountered similar challenges in delivering justice to local communities and individuals. The Court of Bosnia-Herzegovina's war crimes chamber has been deeply criticized as neglecting the role of victims in the process.¹⁶⁷ What's more, witness protection laws in entity-level and municipal courts remain improperly implemented.¹⁶⁸ Physical protection, non-disclosure of identity, privacy measures, and psychological support are not fully applied. To make matters worse, the criminal codes in BiH's two entities

¹⁶⁴ "Outreach Programme documentary on crimes in Prijedor premieres in Novi Sad, Belgrade and Sarajevo."

¹⁶⁵ Eduardo Gonzalez-Cueva, online phone (Skype) interview with Julia Dowling, conducted August 1, 2013.

¹⁶⁶ Satko Mujagic, interview with Julia Dowling, Kozarac (Prijedor), BiH, July 23, 2013.

¹⁶⁷ According to Goran Simic, "90 per cent of the 400 articles of the Criminal Procedure Code of Bosnia and Herzegovina refer to the perpetrator and their rights instead of those of the victim. The perpetrator has the right to the presumption of innocence, to a fair trial, to defence, to communication." See: "Searching for Reparation: Has the ICTY Brought Real Justice for the Victims in Bosnia and Herzegovina?" Insight on Conflict.

¹⁶⁸ United Nations Development Programme in BiH. *Transitional Justice Guidebook for Bosnia and Herzegovina: Executive Summary*. Sarajevo, 2009: 23.

remain unreconciled. The Federation's Municipal courts currently use an updated code, while municipalities in the Republika Srpska (RS) rely on the Yugoslav Criminal Code which, to many victims' dismay, is more favorable towards the defendant.¹⁶⁹ A maximum sentence of 15 years¹⁷⁰ in the RS means that many war criminals who were found guilty, sentenced, and have since served their time are returning to their home communities where they committed the crime. Furthermore, Prijedor returnees who find the courage to testify as witnesses against accused war criminals have been disappointed and even re-traumatized by the court proceedings in both Sarajevo and RS capital Banja Luka. One of *Izvor's* psychologists expressed deep concern for the survivors she works with during court cases: [Concentration Camp survivors] say it's hard for them to see those perpetrators walking in Prijedor freely. Some of the perpetrators are on trial in Sarajevo - at the national court - but they are free to walk here [in Prijedor].¹⁷¹

Relying exclusively on judicial efforts to serve justice in BiH is inadequate and ill-suited to the nature of the conflict, which took an especially hard toll on non-combatants. TJ must take a holistic approach that, if necessary, overemphasizes the role of the victim. Mirsad Duratovic, the President of *Prijedor '92* holds a sober opinion of the ICTY and other internationally-encouraged initiatives, "We've lost hope in international justice. We still believe in local justice, in comparison."¹⁷² Because of this, other initiatives from regional and national actors have developed that also influence the emergence of grassroots, local efforts in Prijedor.

¹⁶⁹ Ibid. 23

¹⁷⁰ Kamber, Ajdin. "One War Crime, Two Lawbooks in Bosnia: Application of different legal frameworks results in disparate sentencing for similar offences." *Institute for War and Peace Reporting: International Justice – ICTY TRI729* (February 15, 2012). <<http://iwpr.net/report-news/one-war-crime-two-lawbooks-bosnia>> Accessed September 27, 2013.

¹⁷¹ Azra Karabasic, interview with Julia Dowling, Prijedor, BiH, July 3, 2013.

¹⁷² Mirsad Duratovic, interview with Julia Dowling, Prijedor, BiH, August 9, 2013.

3.2 Regional and National Efforts: Inertia and Skepticism

The Regional Commission Tasked with Establishing the Facts about All Victims of War Crimes and Other Serious Human Rights Violations Committed on the Territory of the Former Yugoslavia in the period from 1991-2001 (RECOM) is an ambitious effort that advocates for national and regional solutions to *dealing with the past* within the Western Balkans.¹⁷³ RECOM has involved civil society actors from each Yugoslav successor state, including a number of activists from the Prijedor region. Despite involvement in the initiative, Prijedor actors and many others in BiH have lost faith in RECOM as a mechanism for *facing the past*. A number of reasons contribute to this conclusion. RECOM has had an increasingly challenging time in reaching BiH's communities outside of Sarajevo.¹⁷⁴ One activist for TJ shared the feeling that RECOM was irrelevant to the local context:

In Sanski Most [a town nearby Prijedor] people that were collecting signatures for RECOM told me “please write a letter to the president of Serbia, Macedonia, of Croatia.” Those citizens of Sanski Most thought “why should I write a letter to the President of Macedonia? How can Macedonia as a country help reconciliation in Sanski Most? We have problems with our neighbors... Who is in charge of the neighbors? Macedonia as a country is not in charge of them.”¹⁷⁵

Each town in BiH has its own unique wartime narrative – from the genocide in Srebrenica, to the siege of Sarajevo, or the concentration camps in Prijedor.¹⁷⁶ While RECOM's goal of *facing the past* through a regional process is completely valid, the mandate does not as easily translate to the lives of individuals in small, divided communities like

¹⁷³ “Proposed RECOM Statute.” *Inicijativa za REKOM*. September 27, 2013. <<http://www.zarekom.org/documents/Proposed-RECOM-Statute.en.html>>.

¹⁷⁴ Goran Zoric, written (email) interview with Julia Dowling, submitted August 28, 2013.

¹⁷⁵ Adis Hukanovic, interview with Julia Dowling, Prijedor, BiH, July 5, 2013.

¹⁷⁶ Ibid

those in Bosnian Krajina. Regional actors started and sustained the war, but to many, their own experience of violence was perpetrated by neighbors, and therefore requires local solutions.

Six of the seven interview subjects who were asked about their opinion of RECOM suggested that its beginnings were promising, but at present the initiative lacks the capacity to spur the political and social progress needed to address the past.¹⁷⁷ RECOM's meetings and conferences are perceived as seemingly endless, repetitive, stagnant, and resulting in few concrete actions outside of the hotel lecture halls in which they occur. The inefficiency of these meetings and conferences is symbolic of RECOM's broader and deeper flaws that cripple their attempts to work through the region's history. Mevludin Rahmanovic, a peacebuilder originating from Prijedor who lives and works in Sanski Most, noted, "RECOM broke down, they became politically corrupted... I haven't heard about them in the last year."¹⁷⁸ Tragically, RECOM is viewed as a mechanism of manipulation for BiH politicians, which disheartens but does not shock Prijedor activists. TJ activists' widely-held criticisms of RECOM reflect deep disappointment and discouragement about a process they viewed with initial optimism. The major weakness of RECOM was its insistence that national governments play an instrumental role in its proposed scheme for *facing the past*. For the deadlocked politics of BiH, a regional TJ process establishing truth and justice is too radical and progressive to gain governmental support.

The Bosnian government has, in theory, identified a need to undertake appropriate, state-sponsored efforts to face the past—although it has not addressed RECOM specifically. As a result, a National Strategy on Transitional Justice was drafted in 2007 by the BiH Ministry of Justice and Human Rights and the BiH Ministry of Refugees, with assistance from the UNDP. Yet, the draft remains

¹⁷⁷ This sentiment was expressed by six interview subjects from Prijedor during my field work. Each individual is an activist on peace and justice in Bosnian Krajina and expressed the shared belief that RECOM started strong but has since lost its way. This was also a comment in University of Goldsmith's Prijedor Focus Group for the "Bosnian Bones, Spanish Ghosts" Project.

¹⁷⁸ Mevludin Rahmanovic, interview with Julia Dowling, Sanski Most, BiH, July 18, 2013.

controversial and at an impasse in Parliament.¹⁷⁹ Among the most contentious issues are material reparations, particularly for civil victims of war, as well as memorial and monument building guidelines.¹⁸⁰ As with anything regarding the national state of BiH, the TJ legislation suffers from political deadlock between politicians from the Federation and the RS, whose representatives feel the strategy favors Bosniaks and Croats as victims while Serbs are portrayed as aggressors.¹⁸¹ Civil society also remains skeptical because some view its drafting process as exclusionary and too costly.¹⁸² This assumption is made, in part, because of the UNDP's role as facilitator. The extensive technical and administrative components of the drafting project and the utilization of an expert group and numerous working groups caused many to ask "how much [does] their strategy cost?"¹⁸³ Sudbin Music, of *Prijedor '92*, referred to the expert group as "UNDP babies" who go "hotel to hotel, having conferences with the same people."¹⁸⁴ The elite group of individuals involved, the high-level and high-cost meetings, combined with few tangible outcomes seen on the ground in places like Prijedor, leads locals to beg the question – what now?

Without movement on the National TJ Strategy for the foreseeable future, Bosnians have been forced to *face the past* on their own. As Backer's sixth scenario "Hands off the Wheel," theorizes, BiH civil society has intervened to replace an inefficient and paralyzed government. The situation is far from ideal, and yet it remains the reality in Bosnia. Prijedor civil society's active role in *dealing with the past* is enabled, in part, by the increasing diversity of actors working on TJ which, as a new global phenomenon, has come to be understood as the fourth phase in the maturation of TJ's genealogy. According to the UNDP in Sarajevo, "There is general public agreement in BiH that without [civil society], the process of documenting violations of

¹⁷⁹ United Nations Development Programme in BiH. *Transitional Justice Guidebook for Bosnia and Herzegovina: Executive Summary*. 4.

¹⁸⁰ Dzidic, Denis. "Bosnia's Transitional Justice Strategy Requires Political Support." *TransConflict*. October 9, 2012. Accessed July 7, 2013. <http://www.transconflict.com/2012/10/bosnias-transitional-justice-strategy-requires-political-support-090/>

¹⁸¹ Ibid.

¹⁸² Ibid.

¹⁸³ Sudbin Music, interview with Julia Dowling, Prijedor, BiH, July 26, 2013.

¹⁸⁴ Ibid.

human rights and war crimes would not even exist.”¹⁸⁵ Emir Hodzic’s *White Armband Day Campaign* is a direct reaction to the inertia of TJ in BiH – because “nothing has worked to this point”¹⁸⁶ he and his fellow activists created a project to push leaders at local and national levels towards justice. Of course, the unique challenges facing Prijedor today and consequent community-based efforts are deeply localized. Yet, BiH’s frozen political scene and stymied TJ attempts have undoubtedly inspired a broad range of actors throughout the country to take action in one way or another. And only today, well into the fourth, global phase of TJ is it possible that the *White Armband Day Campaign* and similar initiatives can make more significant inroads in *facing the past* than their political counterparts.

4. Today’s Prijedor: Denial and Discrimination

Today, Prijedor appears to have fared better than many other BiH towns, as it lacks the countless deserted and decrepit buildings sitting unoccupied from heavy artillery fire and fighting twenty years ago. The pedestrian walkway has bakeries, book shops, and cafes that give the appearance everything is and *has been* normal for a very long time. This is the local government’s goal. Without admitting that crimes were committed against the non-Serb population during the war, politicians have been able to adopt a narrative affirming that indeed, *nothing violent against non-Serbs took place*, consequently making TJ efforts unnecessary. *Facing the past* could incriminate certain political parties and individuals currently in power for war crimes, while recognition of crimes might create uncomfortable guilt for regular Serb citizens living in Prijedor. There is a systematic, institutionalized policy of denial and discrimination that hinders any attempts to *deal with the past* and, after coming to terms with the past, movement towards reconciliation.

Prijedor’s political and social reality contributes to the mushrooming of local initiatives as a means of responding to the past’s repression and the present’s oppression. As previously mentioned,

¹⁸⁵ United Nations Development Programme in BiH. *Transitional Justice Guidebook for Bosnia and Herzegovina: Executive Summary*. 58.

¹⁸⁶ Emir Hodzic, interview with Julia Dowling, Prijedor, BiH, August 1, 2013.

the sense that national, regional, and international justice has fallen short has spurred on grassroots initiatives. However, the specific local conditions created by actors within the Municipal government are also a catalyst for grassroots TJ initiatives.

The major perpetrators of this strategic policy are local and entity-level politicians who fear for their jobs should their political parties come under fire. The typical ethno-national rhetoric used before, during and, still, after the war of “us” vs. “them” – in the case of Prijedor, “Serbs” vs. “non-Serbs” – is used by Mayor Marko Pavic and other representatives in the local assembly.¹⁸⁷ The official response from the local government to such criticisms, though, is contradictory. Dorde Jez, the Municipal government’s contact point with local communities,¹⁸⁸ identified politicians at the entity and state levels as the main problem regarding discriminatory laws or policies of denial. He reaffirmed that if a law was agreed upon to halt these practices at a federal level then the town would implement it.¹⁸⁹ In the same interview though, Mr. Jez denied any influence Banja Luka might have over Prijedor’s TJ and reconciliation policies, stating “Banja Luka has no control over the reconciliation process in Prijedor, because each city has its own specific story. It’s always up to local municipalities to deal with these issues.”¹⁹⁰ The conflicting statements that Pavic’s government bureaucrats provide about the situation in Prijedor demonstrate a larger trend of officials toeing the line between outright discrimination and quiet denial.

Azra Pasalic, A non-Serb Social Democratic Party (SDP) member who worked for two terms in the local Prijedor assembly claimed that Serb representatives remain adamant in denying the events

¹⁸⁷ Goran Zoric, written (email) interview with Julia Dowling, submitted August 28, 2013.

¹⁸⁸ Dorde Jez’s position was created in 2006 by the Municipal government. Currently, he works under Mayor Marko Pavic as a representative for the local government to Prijedor’s many *mjesnih zajednica* (“local communities,” “neighborhoods,” or “suburbs”). In this way, he works as a sort of public relations/communications specialist who goes between the government and neighborhoods that are often made up of non-Serb returnees. His interview and any other public statements are representative of the government and, in particular, Mayor Pavic’s policies.

¹⁸⁹ Dorde Jez, interview with Julia Dowling, Prijedor, BiH, August 15, 2013.

¹⁹⁰ Ibid.

of 1992.¹⁹¹ Upon sharing her personal war story – how her parents were killed in their Prijedor house - her fellow Assembly members, including those from the Alliance of Independent Social Democrats (SNSD, Milorad Dodik’s Party), ignored her. This experience shaped her opinion that many politicians use denial of crimes against non-Serbs in the war as a political strategy.¹⁹² Furthermore, the reinterpretation of the past by local politicians influences regular Serbs living in the city, leading many to buy-in to a denialist narrative.¹⁹³ As local Serb and non-Serb civilians have different understandings of the crimes that unfolded during the war, efforts to *face the past* collectively are likely to be in vain.

4.1 “Uncommonly Profound Forms of Denial”¹⁹⁴

Prijedor’s Municipal government uses tools to repudiate the occurrence of systematic violence against non-Serbs in 1992 while also creating a new history that favors Serbs as victims. They do this by denying atrocities, prohibiting freedom of speech and assembly of TJ activists, hijacking memorials and commemorations, and manipulating the educational curriculum. Though typically outspoken critics of the ICTY, Serb politicians in the RS paradoxically use The Hague’s verdicts stating that crimes in Prijedor did not constitute genocide to their advantage.¹⁹⁵ President Dodik and Mayor Pavic continue to “deny the capacity of the victims to call their [own] experience in the way they see fit,” namely to use the word *genocide* in reference to the ethnic cleansing campaign and concentration camps.¹⁹⁶

Denial of the events in 1992 invalidates survivors’ experiences,

¹⁹¹ Azra Pasalic, interview with Julia Dowling, Prijedor, BiH, August 20, 2013.

¹⁹² Ibid.

¹⁹³ Both Emsuda Mujagic and Sudbin Music expressed concern over a portion of the local Serb population to ignore the facts of what occurred in Prijedor during the war during their interviews.

¹⁹⁴ Haris Subasic on Prijedor’s strategies of denial through memorial culture. “The culture of denial in Prijedor.” TransConflict.

¹⁹⁵ Eduardo Gonzalez-Cueva, online phone (Skype) interview with Julia Dowling, conducted August 1, 2013.

¹⁹⁶ Ibid.

particularly when it coincides with active governmental manipulation and remaking of truth and memory. Non-judicial memory and truth efforts have long been seen as critical to the psycho-social recovery of traumatized communities because they focus on the victim and acknowledge their suffering.¹⁹⁷ Furthermore, individual and collective memory and truth projects assist people to process and address trauma, and integrate it into their perceived life story.¹⁹⁸ Without opportunities to ritualize mourning the loss of those killed, houses burned, or a previous way of life, survivors sometimes feel stuck in the past. In short, memorials, truth-telling forums, and commemorations help people to make sense of what happened and move on. These opportunities are denied to the non-Serb population of Prijedor in multiple ways.

First, construction of memorials for concentration camps around Prijedor remains forbidden.¹⁹⁹ Trnopolje lies in ruins, a vacant building overgrown with weeds and strewn with trash, without any indication that almost 7,000 non-Serbs²⁰⁰ were detained, tortured, raped, and killed there. Omarska, perhaps even more distressing to survivors, was bought by British steel company ArcelorMittal in 2004 and has resumed operations as an iron ore mine.²⁰¹ The company initially agreed to preserve part of Omarska for a future memorial. “On December 1st, you can see Mittal speaking about building a memorial for us... But the moment they announced that, maybe a week later, Marko Pavic showed up on the local media and said ‘no way.’”²⁰² Mittal currently owns 51% of the mine, but the RS government controls the remaining 49%.²⁰³ It is not in the political or economic interest of Mittal nor Mayor Pavic to allow preservation and construction of a memorial. What’s more, while his public statements

¹⁹⁷ Ibid.

¹⁹⁸ Adis Hukanovic, interview with Julia Dowling, Prijedor, BiH, July 5, 2013.

¹⁹⁹ Subasic, Haris. “The culture of denial in Prijedor.” *TransConflict*.

²⁰⁰ Wesselingh, Isabelle, and Arnaud Vaulerin. *Raw Memory: Prijedor, Laboratory of Ethnic Cleansing*: 56.

²⁰¹ “News and Media (2012): ArcelorMittal Prijedor announces additional dates for access at Omarska mine – ArcelorMittal.” ArcelorMittal. Accessed September 29, 2013. <<http://corporate.arcelormittal.com/news-and-media/news/2012/may/15-05-2012>>.

²⁰² Satko Mujagic, interview with Julia Dowling, Kozarac (Prijedor), BiH, July 23, 2013.

²⁰³ “News and Media (2012): ArcelorMittal Prijedor announces additional dates for access at Omarska mine – ArcelorMittal.” ArcelorMittal.

may be ambiguous, Mayor Pavic's actions communicate his opposition to efforts providing permanent reminders of the past. He simultaneously attends mass burials of identified missing persons while also preventing memorialization based on claims that the local government has neither the funds nor legal framework to allow the building of new monuments.²⁰⁴

Commemorations and advocacy actions are another point of contention in Prijedor. Public mourning and remembrance of the dead helps survivors to move forward and allows society to channel trauma in a structured but cathartic way. According to the President of *Izvor*, Edin Ramulic, the local police purposefully create complications making organizing public commemorations difficult.²⁰⁵ A high-profile example of interference was the arrest of Sabahudin Garibovic during a public event on August 5, 2012 meant to both commemorate those who died and to advocate for official recognition of crimes in Prijedor.²⁰⁶ Garibovic, the President of the *Uzdruzenja Logorasa Kozarac*, was arrested because he supposedly did not arrange for an ambulance to be present at the protest. Other Prijedor activists claim it was retaliation against spelling the word "genocide" with children's backpacks displaying the names of children killed in the cleansing campaign after Mayor Pavic had specifically forbidden the word be spoken out loud.²⁰⁷

The suppression of rights to assembly and expression, such as spoken word, holding protests and commemorations, or building victims' memorials, is only part of the denialist policy in Prijedor. The authorities also actively promote a narrative that refutes non-Serbs' experience, replacing it with the "Serbian Defensive Liberation War." Memory, particularly collective memory, is an especially contested resource in post-conflict communities where reconstruction is actively underway. Through memorials, monuments, and history curriculum, officials can construct shared myths and beliefs that shape political and social life. Brito et al. state, "Control over the narrative of the past means

²⁰⁴ Azra Pasalic, interview with Julia Dowling, Prijedor, BiH, August 20, 2013.

²⁰⁵ Edin Ramulic, interview with Julia Dowling, Prijedor, BiH, August 22, 2013.

²⁰⁶ US Department of State, Bureau of Democracy, Human Rights, and Labor. *2012 Human Rights Reports: Bosnia and Herzegovina*. 2012 Country Reports on Human Rights Practices Report, April 19, 2013.

²⁰⁷ US Department of State, Bureau of Democracy, Human Rights, and Labor. *2012 Human Rights Reports: Bosnia and Herzegovina*.

control over the construction of narratives for an imagined future.”²⁰⁸ The RS entity and municipal-level politicians actively recreate a history that relativizes past wrongdoings, glosses over the worst atrocities committed in establishing the territory, and justifies present and future socio-political policies discriminatory towards non-Serbs.

Serb authorities have instrumentalized memorials as a particularly virulent means of revising Prijedor’s past. Presently, the Municipality has sixty monuments dedicated to Serb soldiers who gave their lives for the unification of the Serb homeland.²⁰⁹ The large orthodox cross standing across the street from the Municipal Government building sends a clear and intimidating sign that the town belongs to Serbs and that non-Serbs are unwelcome.²¹⁰ At Trnopolje another Orthodox cross was erected by the local government and is inscribed with a dedication to “All Serb Soldiers who were killed.”²¹¹ In his article about denialism through memorialization, Subasic describes the atmosphere in Prijedor as one of “uncommonly profound forms of political and cultural strategies of denial” in which “the mass production of monuments for Serb victims is disproportionate in relation to the marginalized representation of non-Serb victims in Prijedor.”²¹²

Coopting memorials is common during circumstances of protracted identity conflict, as the United States Institute of Peace (USIP)’s report on TJ and memorialization points out. Authorities use memorials to promote an in-group’s political agenda, satisfy the need for victimhood status, and marginalize the out-group as the “other” or “enemy.”²¹³ The monopoly over memorials by Serbs in Prijedor is a physical manifestation of the new narrative asserting that TJ is unnecessary because non-Serbs’ claims about war crimes are false. Local activists continue to be outraged by the process of memorial

²⁰⁸ Brito, Alexandra Barahona de., Carmen Enríquez, and Paloma Fernández. *The Politics of Memory: Transitional Justice in Democratizing Societies*. Oxford: Oxford University Press, 2001. 38

²⁰⁹ Subasic, Haris. “The culture of denial in Prijedor.” *TransConflict*.

²¹⁰ Satko Mujagic, interview with Julia Dowling, Kozarac (Prijedor), BiH, July 23, 2013.

²¹¹ Subasic, Haris. “The culture of denial in Prijedor.” *TransConflict*.

²¹² Subasic, Haris. “The culture of denial in Prijedor.” *TransConflict*.

²¹³ Barsalou, Judy and Victoria Baxter, “The Urge to Remember: The Role of Memorials in Social Reconstruction and Transitional Justice.” *Stabilization and Reconstruction Series, United States Institute of Peace* 5 (2007): 4.

building, which is funded by the Municipality through citizens' taxes, and its nationalistic results.²¹⁴ Consequently, grassroots initiatives have emerged to combat denial and to demand the commencement of projects and policies that actively *deal with the past*.

4.2 What Would Justice Look Like in Prijedor? "We Need an Earthquake."²¹⁵

Grassroots civil society in Prijedor is pushing back. Persistent denialist policies result in the creation of more projects to *face the past*. Truth initiatives provide evidence of past human rights abuses so as to prevent denial or revision of history. Memory work transforms facts into spaces in which the truth can be seen, heard, and felt, where dialogue can be encouraged, and victims feel acknowledged.²¹⁶ For Prijedor, the value of such efforts is twofold: "[truth and memory initiatives] are validating and help victims not feel re-victimized and, because efforts of memory and truth are collective and reinforces collectivities, [it provides] an opportunity to get together, share stories, and reinforce the links [in communities that have been stigmatized and displaced.]"²¹⁷ For these reasons organizations, associations, and individuals have undertaken myriad projects that preserve memory and provide a space for victims' individual or collective truths.

As mentioned, the ICTY has provided some level of truth-finding for BiH and Prijedor in particular. Despite this, the process of *truth-telling* has been limited to those few individuals who gave testimony to The Hague and, even in these cases, the ICTY's method focuses on procedure instead of healing for the victim. Recording local narratives, including personal truths, has become a priority amongst local civil society. Chapter three highlighted *Izvor's* work with families of the

²¹⁴ Mirsad Duratovic, interview with Julia Dowling, Prijedor, BiH, August 9, 2013.

²¹⁵ Edin Ramulic, interview with Julia Dowling, Prijedor, BiH, August 22, 2013.

²¹⁶ "Truth and Memory." *International Center for Transitional Justice*. Accessed September 30, 2013. <<http://ictj.org/our-work/transitional-justice-issues/truth-and-memory>>.

²¹⁷ Eduardo Gonzalez-Cueva, online phone (Skype) interview with Julia Dowling, conducted August 1, 2013.

missing. Their first project – the book of missing persons from Prijedor – reflects efforts undertaken in response to shortcomings of official truth-finding sources like the ICTY or state. *Izvor*'s newest project, the “Video Archive of Crimes Against Humanity,” was launched in 2013 to record testimonies from individuals who survived the war in Prijedor, consequently providing a place in which regular survivors can share their unique story and outlook on their experience, be heard, and know that their memories are preserved for the next generation. The project is open to all citizens of Prijedor, not only Croats or Bosniaks, the hope being that the archive will create a multi-faceted, nuanced view of shared experiences of the time – something to combat the mono-ethnic narrative pushed by politicians in Prijedor.²¹⁸ Similar projects have been undertaken in divided communities in Northern Ireland and have been remarkably effective empowering individuals and communities because their voices and their stories “become part of public discourse.”²¹⁹

In addition to preserving multiple truths for the next generation to listen and learn from, *Izvor*'s oral history project plays a critical role in trauma healing. Israeli psychiatrist and academic Dan Bar-On pioneered a type of trauma healing based on storytelling or providing testimony. Victims in contact groups in Israel, the USA, and Germany felt recognized through others, including individuals from “the other” group, bearing witness to their trauma and helping them “work through” their past.²²⁰ In contrast, those who survived Prijedor's concentration camps often live in silence, particularly individuals who experienced sexual assault and rapes, fearful of reliving the trauma and societal stigma. Adis Hukanovic, *Izvor* psychologist, relayed an example about a woman relieved to tell her story to him over the phone. “She used to live here in one village near Prijedor. She was talking about how she's living under psychological trauma because of the things she survived. . .

²¹⁸ Azra Karabasic, interview with Julia Dowling, Prijedor, BiH, July 3, 2013 and Adis Hukanovic, interview with Julia Dowling, Prijedor, BiH, July 5, 2013.

²¹⁹ Lundy, Patricia and McGovern, Mark. “Community-Based Approaches to Post-Conflict ‘Truth’ Telling: Strengths and Limitations.” *Shared Future: A Research Journal on Peace, Conflict and Community Relations in Northern Ireland* 1 (2005): 42-47.

²²⁰ Bar-On, Dan, and Fatma Kassem. “Storytelling As A Way To Work Through Intractable Conflicts: The German-Jewish Experience And Its Relevance To The Palestinian-Israeli Context.” *Journal of Social Issues* 60.2 (2004): 290.

She told me ‘I appreciate what you are doing, please continue, I want to tell you my story but over the phone, off the record.’”²²¹ These “untold stories”²²² in Prijedor, as elsewhere in BiH, prevent reconciliation on a societal level because they hinder the individual’s ability to first come to terms with their own trauma. Both psychologists working on the oral history project highlighted the dual nature of the archive, as a means of preserving a diverse narrative that combats denial while also giving space for individuals to speak through the events of 1992 in a safe and therapeutic environment.

Personal truth-telling is not the only mechanism grassroots actors utilize to address broader issues of truth and memory. Commemorations are an important manifestation of the rebellion against denial in Prijedor, as they publically demonstrate the refusal of non-Serbs to be ignored or forgotten. Of course, there are also less political elements to commemorations – they allow communities to mourn victims, many of whose remains are still missing, in solidarity with other vulnerable people.²²³

However, “commemorations are the first step,” stated Satko Mujagic. “Tomorrow we go to Keraterm Camp, and we’ll go to Omarska. We visit empty places. We visit factories. We visit shops. It’s very nice, but let’s be very honest, after 30, 40, 50 years, none of the survivors will be alive... You have to have stories, images, something.”²²⁴ For this reason, most of the organizations or associations in Prijedor advocate for the construction of memorials. *Srcem do Mira*’s founder and head, Emsuda Mujagic, suggested that marking places of political and social significance with monuments allows victims to move on with their lives.²²⁵

Since 2005, numerous Prijedor activists have pushed for an Omarska monument but, as previously mentioned, civil society has come up against a number of challenges from ArcelorMittal, Mayor

²²¹ Adis Hukanovic, interview with Julia Dowling, Prijedor, BiH, July 5, 2013.

²²² Ibid.

²²³ Eduardo Gonzalez-Cueva, online phone (Skype) interview with Julia Dowling, conducted August 1, 2013.

²²⁴ Satko Mujagic, interview with Julia Dowling, Kozarac (Prijedor), BiH, July 23, 2013.

²²⁵ Emsuda Mujagic, interview with Julia Dowling, Kozarac (Prijedor), BiH, July 7, 2013.

Pavic's government, and even themselves. In the early years of Omarska monument advocacy, much of Prijedor's non-Serb civil society came together to pressure Mittal and Pavic for their support.²²⁶ After heavy advocacy efforts, in 2005 Mittal publically announced it would allow a memorial while also maintaining the ability to effectively operate the mines. The company brought in a foreign NGO – the *Soul of Europe* – to consult and work with local TJ advocates on the design.²²⁷ However, as Satko Mujagic expressed, the project was halted, in part, by local authorities early into this process. It is important to note that internal complications also hindered progress, which will be analyzed in greater detail in chapter five.

Roadblocks to the memorial-building process from Mayor Pavic and the Municipality have been discouraging and frustrating to activists, but Government official Jez insists that local non-Serb actors were “unreasonable” in their demands.²²⁸ He explained that a portion of the advocates demanded preservation of both the White House and the Hanger, where the majority of inmates were kept. However, including the large Hanger in the memorial might have hindered some of the mine's operations. This demand, in Mr. Jez's view, prioritized memory and history over economic opportunities in the future.²²⁹

In engineering a new narrative that erases the very existence of concentration camps, cleansing, and murder in Prijedor, the town's Serb authorities rob non-Serb victims of their status both psychologically and physically. The political strategy continues to be a combination of willful ignorance and placing the blame elsewhere: “All the organizations working on victim's rights, returnees that exist in Prijedor, have full support of the local administration... The local administration is trying to help them to heal their memories, bad experiences. But it's always impossible to put everything in that process.”²³⁰ In claiming the process of reconciliation depends on factors out of their control, like the budget

²²⁶ In 2005, the process included Sudbin Music and Mirsad Duratovic of *Prijedor '92*, Edin Ramulic of *Izvor*, Satko Mujagic and his cousin “Schwabo” of *Optimisti* (Satko would later start *Guardians of Omarska*), as well as other individuals not described in detail in this work such as Kemal Pervanic.

²²⁷ Ibid.

²²⁸ Dorde Jez, interview with Julia Dowling, Prijedor, BiH, August 15, 2013.

²²⁹ Ibid.

²³⁰ Ibid.

or federal legislation, Prijedor Municipality can surreptitiously replace one narrative with another. However, the psychological warfare on truth and memory is not the only method of ensuring 1992's cleansing becomes permanent; the local government has also institutionalized systematic discrimination against the Bosniak and Croat returnee population.

4.3 Waging War without Guns: Institutionalized Discrimination

The ethno-nationalist political structure that orchestrated violence in Prijedor remains in place in today; though the bombs have stopped, the war continues with systematic discrimination of non-Serbs. This is particularly implemented through public employment and social services, as well as the education system. The denialist policy is paired with discrimination to erase the past while ensuring a future Prijedor that non-Serbs find unappealing and unsustainable. Sudbin Music of *Prijedor '92* believes that continuing discrimination from 1992 especially affects diaspora living abroad who come back to visit Prijedor. "Our people from abroad are still traumatized - they are still in 1992. Many of them are scared to go to the police or the Municipality to ask for something."²³¹ This is a huge challenge for returnees and diaspora both, as the fear felt in 1992 remains because hatred towards Bosniaks and Croats is channeled into a form of violence using discrimination instead of guns.

Public employment is a contested issue in Prijedor because of both who does and who does not hold positions within the Municipality. Some Bosniaks and Croats assume that Serbs in public positions do not hire non-Serbs unless they are required to fill a quota.²³² According to Sudbin Music, there are nine non-Serbs working in the Prijedor Municipality out of an approximate two hundred and nine total

²³¹ Sudbin Music, interview with Julia Dowling, Prijedor, BiH, July 26, 2013.

²³² Boyle, Katherine. "Bosnia: A House Divided." *Institute for War and Peace Reporting: International Justice ICTY TRI* 484 (January 12, 2007). < <http://iwpr.net/report-news/bosnia-house-divided> > Accessed July 10, 2013.

employees.²³³ In the local assembly too, there is an underrepresentation of non-Serbs; only five of thirty members are Bosniak.²³⁴

More egregious to survivors than underrepresentation of non-Serbs in public institutions is the high-level employment of individuals accused (by either a court or by the community as a whole) as war criminals. Vetting²³⁵ has not been properly implemented in BiH. Only a select number of officials were made to reapply after a background check, namely judges and police officers. Local actors claim that even this basic mechanism has not been fully implemented or adhered to in their community. President of *Prijedor '92*, Mirsad Duratovic, claims, "Police officers were directly involved in war crimes, but they are still working as police officers."²³⁶ For the former camp detainees that *Prijedor '92* works with, walking down the street and seeing those who tortured them as police officers – paid by public funds, in possession of a weapon, and wielding power – is not only morally unacceptable but severely re-traumatizing.

The National Strategy proposes a broader vetting process for all individuals holding public office to ensure jobs are not provided to war criminals.²³⁷ But this document has not yet become legislation, and so a number of known war criminals hold positions in public institutions in Prijedor. Misa Rodic was an investigator at Keraterm who decided the fate of countless inmates, but today he directs the center that handles veterans' affairs, social security, and services for the handicapped or disabled. The head of Prijedor's Center for Social

²³³ Sudbin Music, written (email) communication with Julia Dowling, September 18, 2013.

²³⁴ Haris Subasic, interview with Julia Dowling, Prijedor, BiH, July 2, 2013.

²³⁵ In BiH, the term *lustracija* is used to describe vetting and lustration interchangeably because no proper translation has been made to describe the procedure of vetting. The UNDP Transitional Justice Guidebook for BiH states there is a lack of understanding of the concept in addition to the poor translation (see p. 53). I will use vetting and lustration in the way English-language TJ scholars do, meaning vetting is a process affecting individuals through requiring they reapply to a position after a background check affirms they were not involved in war crimes.

²³⁶ Mirsad Duratovic, interview with Julia Dowling, Prijedor, BiH, August 9, 2013.

²³⁷ Dzidic, Denis. "Bosnia's Transitional Justice Strategy Requires Political Support." *TransConflict*.

Work too, was involved in the war effort as a member of the Crisis Staff.²³⁸ Civil society actors in Prijedor agree that war criminals must be removed from public office and prevented from holding any in the future: “The main institutions, the *Opstina* (Municipality), the hospital, school, police, post office, should not have officials from the 1992 government in positions today.”²³⁹ In allowing such individuals to hold positions paid by the public budget, the local government condones war crimes from 1992, prevents traumatized non-Serb survivors from fully utilizing much-needed government services, and forces survivors to recede from public life out of fear of encountering former perpetrators.

The entity-level government also plays a critical role in reinforcing the disenfranchisement of non-Serbs returning to their pre-war communities located in the RS territory. Redress for the war-time rights violations best demonstrates this. The RS’s policy on compensation, which differs from that of the Federation, initially imposed an application deadline of 2001. As this was early on in the return process, many Bosniaks and Croats had not registered a permanent address in the RS, making them ineligible to file for or receive compensation paid by the entity. In 2007, an amended version of the law provided an additional five month window for individuals to apply for compensation.²⁴⁰ Locals in Prijedor claim that there were few efforts made to inform non-Serbs of this five-month period, and the filing process itself was opaque and complicated.²⁴¹ Today, because the time period for applications has closed, individuals can only receive compensation by claiming disability in *helping* the Liberation war or through individual legal suits against the entity.²⁴² Concentration Camp survivors cannot get reparations for their experiences because it “has

²³⁸ Edin Ramulic, interview with Julia Dowling, Prijedor, BiH, August 22, 2013.

²³⁹ Emsuda Mujagic, interview with Julia Dowling, Kozarac (Prijedor), BiH, July 7, 2013.

²⁴⁰ International Commission on Missing Persons, “Guide for Civilian Victims of War: How to enjoy the right to protection as a civilian victim of war in the Republika Srpska.” Sarajevo, 2007, 15. <http://www.ic-mp.org/wp-content/uploads/2008/02/guidebook-wictim-of-war-rs.pdf>; and International Center for Transitional Justice, *Bosnia and Herzegovina Submission to the Universal Periodic Review Of the UN Human Rights Council Seventh Session: February 2010*. New York, September 8, 2009, 3.

²⁴¹ Sudbin Music, interview with Julia Dowling, Prijedor, BiH, July 26, 2013.

²⁴² Ibid

no relation to the liberation war.”²⁴³ Even when compensation has been successfully received, problems remain. Many survivors feel that the reparations scheme is unjust towards civil victims of war – especially survivors of concentration camps, torture, and rape – because current RS legislation requires 60% invalidity directly caused by war-time events (as compared to 20% invalidity for compensation eligibility for war veterans).²⁴⁴ The UNDP Guidebook highlighted the dissatisfaction among camp survivors who, similar to victims of war-time rape, feel the level of physical and mental trauma they survived is not adequately recognized with the current disability standards.²⁴⁵ Post-Traumatic Stress Disorder (PTSD) is also only ambiguously covered in the Federation’s reparations/compensation legislation,²⁴⁶ while the RS’s law does not recognize PTSD at all as a basis for disability. The RS has succeeded in minimizing individual’s rights to compensation – both in how much civilian victims receive and what ailments may qualify.²⁴⁷

The local government denies there is discrimination against Bosniaks and Croats living in Prijedor today. Mr. Jez pointed to the budget as the main obstruction to fully realizing the right to compensation for returnees in the RS. He claimed that these hardships are shared equally by everyone – IDPs, returnees, and all other citizens get the same amount, large or small, as others with the same status or level of disability.²⁴⁸ What’s more, the Municipal Government is unable to affect their annual allotment determined by Banja Luka. According to Prijedor’s official, those who criticize the amount provided to individuals should first consider the financial and political reality in which the RS and BiH more broadly exist.²⁴⁹

Finally, the education system in Prijedor perpetuates institutional discrimination through *what* students learn and *how* they are treated in the classroom. It is well known that classrooms are segregated and

²⁴³ Ibid.

²⁴⁴ Bosna i Hercegovini Ministarstvo za Ljudska Prava & Izbjejljice i Bosna i Hercegovini Ministarstvo Pravde, *Strategija Tranzicijske Pravde u Bosni I Hercegovini 2012-2016 (Radni Tekst)*, Sarajevo, 49.

²⁴⁵ United Nations Development Programme in BiH. *Transitional Justice Guidebook for Bosnia and Herzegovina: Executive Summary*. 41-42.

²⁴⁶ Ibid., 38.

²⁴⁷ Ibid., 39.

²⁴⁸ Dorde Jez, interview with Julia Dowling, Prijedor, BiH, August 15, 2013.

²⁴⁹ Ibid.

curricula adapted according to mono-ethnic preferences throughout much of BiH. In Prijedor Municipality, there are not *two schools under one roof* as in parts of central Bosnia or Herzegovina, but discrimination towards minorities can still be found. Mirsad Duratovic spoke in a roundtable discussion about the challenges his Bosniak children face each day in going to a Serb-majority school in a neighborhood of Prijedor.²⁵⁰ Bosniak and Croat children are often denied the opportunity for Islamic or Catholic religious instruction because, teachers claim, the parents ask schools not to teach their children any religious subjects at all.²⁵¹ However, instruction for Serb students on Christian Orthodoxy is readily available. Minorities are also obliged to studying classroom subjects that tend to be revisionist in nature, like history and language (Serbian, in the case of Prijedor). Scholar Edina Becirevic suggested that directives from Banja Luka guide Prijedor's discriminatory approach, but that state-sponsored discrimination may have a silver lining; the high level of centralization in the RS makes it so that if President Dodik, or any other political leader, signaled the need for change, it could occur quickly and thoroughly.²⁵² Therefore, the major problem with discrimination stems from the political leadership and their ambitions in maintaining the status quo as the majority ethnic group in the RS.

Through the most influential institutions in society, entity and Municipal-level governments in the RS are working to disempower and disenfranchise non-Serbs in the post-war space. In essence, the policies of discrimination that manifest in the education, employment, and social service systems are playing out those originating from 1992. Despite a high rate of return, the politics and practices of the RS are such that they continue to attempt to erase non-Serbs from Prijedor through making life extremely difficult. Surprisingly, such erasure from the historic narrative, erasure from the public, political, and economic spheres, and erasure from the town itself has inspired non-Serbs to dig in their heels and launch new projects to challenge the status quo.

²⁵⁰ The Atlantic Initiative, "Security Law and Integration of Returnees in Prijedor" Roundtable Discussion, Prijedor, July 2013.

²⁵¹ Ibid.

²⁵² Edina Becirevic, interview with Julia Dowling, Prijedor, BiH, August 9, 2013.

4.4 Discrimination and its Discontents: Pushing Back Against Systemic Intolerance

Actions, or more accurately, reactions by Prijedor activists to the Municipality's systemic and systematic discrimination occur on two levels – collective and individual. Advocacy campaigns have flourished in the recent years, pushing for holistic change. Complimenting this work are civil society's efforts to obtain individual rights through mainly legal means.

Campaigns *Jer me se Tice* and *The White Armband Day* aim to end discrimination against non-Serbs in Prijedor and, more broadly, the political impasse in BiH that prevents many citizens from fully enjoying basic human rights. These campaigns illustrate why and how new ways of *facing the past* emerge from local communities during the fourth, global phase of TJ. Co-founder Hodzic pointed to the poor implementation of the 2008 Anti-Discrimination Law, stating that, "As long as when I go to the city council I have the same rights as anyone else" he would be satisfied with progress made by the projects.²⁵³ As this law has yet to be properly implemented and no results are seen on the ground, Hodzic and others' work is a *real life example* of Backer's scenario "Hands Off the Wheel" in taking action when the government won't or can't. Using art, protests, gatherings, and other grassroots actions, Hodzic and Prijedor-based colleague Zoric use *Jer me se Tice* and *White Armband Day* to gain media attention that puts pressure on politicians. Their grassroots, bottom-up approach was a conscious choice; instead of hoping for change at the top, their initiatives bring together individuals from all ethnic communities with the shared goal of a BiH that adheres to and implements the Rule of Law.²⁵⁴

In order to respect the Rule of Law, however, Prijedor's Serb population must first accept the past. "It seems to me that Serbs as a community have to face the war events and come to terms with them, firstly among themselves but also to participate in public dialogue with other ethnic communities whose members were civilian

²⁵³ Emir Hodzic, interview with Julia Dowling, Prijedor, BiH, August 1, 2013.

²⁵⁴ Ibid.

victims of war.”²⁵⁵ Zoric explained that, in the campaigns but also his personal life, he has lobbied members of his own community to become involved in the processes of *facing the past*. These elements contribute to strategic advocacy campaigns that achieve two different, but interconnected objectives. First, they create a foundation on which Rule of Law can be effectively applied, mainly through encouraging all ethnicities to *deal with the past* and account for human rights violations committed during the war. Second, advocacy campaigns look towards the future of the Prijedor Municipality. They promote a local government that does not discriminate on any basis, including ethnicity, as part of the official policy.

However, these advocacy efforts do not address the immediate, everyday difficulties concerning Prijedor’s non-Serbs. As such, local associations have also filled the gap purposefully created by the government through empowering individuals, families, and communities to receive basic public services denied them on the basis of their ethnicity. *Izvor* and *Prijedor ‘92* have helped hundreds of families with filing court cases against the RS government to receive the compensation that civil victims of war are entitled to.²⁵⁶ Edin Ramulic and Sudbin Music both refer to the process of filing for and winning reparations in terms of its effect on *status*. Reparations come to represent official recognition of victimhood by the RS government, and therefore individuals with “unresolved status” face the same psycho-social challenges associated with outright denial of the camps and crimes addressed earlier.

Despite making progress on helping civil victims receive due compensation, Sudbin Music points out that the legal process is subject to political manipulation. Because case reviews are opaque, he stated that many individuals’ claims had been purposely overlooked.²⁵⁷ Time is running out for survivors: “It’s normal for an Omarska detainee to

²⁵⁵ Goran Zoric, written (email) interview with Julia Dowling, submitted August 28, 2013.

²⁵⁶ In 2012, *Izvor* worked with 90 families to realize their rights based on the status of civil victim. *Prijedor ‘92* spoke of 418 individual cases filed against the RS government for reparations. Edin Ramulic, interview with Julia Dowling, Prijedor, BiH, August 22, 2013., and Sudbin Music, interview with Julia Dowling, Prijedor, BiH, July 26, 2013

²⁵⁷ Sudbin Music, interview with Julia Dowling, Prijedor, BiH, July 26, 2013.

die earlier. They are destroyed psychologically, physically. People are dying before they can get compensation.”²⁵⁸ This means that many who survived camps or equally horrific experiences in Prijedor may never see their basic rights realized. Institutional discrimination in Prijedor is succeeding in many ways, even with civil society fighting for victim and survivor rights. Despite local organizations’ and associations’ work, their capacity remains limited and the RS officials do all they can to slow or hinder efforts.

Clearly, there are a multitude of challenges facing Prijedor survivors and the organizations, associations, or campaigns working to help and empower them. The local government puts up roadblocks at every turn in hopes of discouraging returnees from settling in and demanding substantial changes that might equalize their status in the RS. Policies of denial and discrimination create the possibility that the mono-ethnic Prijedor envisaged by Serbs in 1992 becomes a reality, however distant it may be. As theorized about the fourth, global phase, civil society is both filling in the gaps for non-Serbs left by official TJ efforts and also pushing for changes in local government that would support *facing the past*. Yet, the local political climate explored here is only part of the problem. Internal disagreements and a lack of unity amongst civil society actors in Prijedor has much more potential to destroy their own efforts than anything done by Mayor Pavic or RS politicians.

5. Our Own Worst Enemy: How Internal Politics of Prijedor’s Civil Society Jeopardize Transitional Justice

While a number of reasonably successful local TJ projects have been implemented, it remains critical to understand if inter/intragroup dynamics alter the efficacy of civil society initiatives. The elitocide perpetrated through the concentration camps eliminated many of the community’s leaders. “[Prijedor] is a perfect example of how fragmented the local community there is. You’re lacking true leaders, even in politics.”²⁵⁹ Without intellectuals to help guide the community

²⁵⁸ Ibid.

²⁵⁹ Dennis Gratz, interview with Julia Dowling, Sarajevo, BiH, August 26, 2013.

and negotiate amongst themselves and local politicians, organizations and associations promoting efforts at *facing the past* have struggled.

The discriminatory actions of the local government are not the only factors contributing to an obstruction of TJ in Prijedor. The sense of “having one’s back up against the wall” has created a defensive and insecure atmosphere between non-Serbs. Each organization, association, or group struggles to survive, resulting in fighting over resources seen as, or actually, limited. Within Prijedor Municipality, there is a perception that *dealing with the past* is a zero-sum game - a limited space in which only a few actors can take part – because of contestation over financial resources but also victimhood. For these reasons, civil society infighting has become one of the greatest hindrances to TJ in today’s Prijedor. According to Bakke et al., “Infighting undermines a movement’s capacity for collective action and diverts energy away from the pursuit of public, political aims and towards the pursuit of private advantage.”²⁶⁰ The UNDP in Sarajevo highlights the lack of strategic planning and inter-organizational coordination as a major weakness of BiH civil society.²⁶¹

This phenomenon is particularly prevalent amongst Prijedor’s victim associations. At present there are a number of factions fighting for influence, resources, and victim status in Prijedor:

These [local actors] are divided into a few categories - you have the concentration camp survivors, the missing persons’ families, the women’s associations, associations for returnees. Everything is split, so when you have so many categories of organizations, it’s difficult to establish communication. Without communication, every organization is supporting their own side, a one-sided story... Every organization is fighting for resources.²⁶²

Prijedor’s victim infighting stems from a mix of professional and personal conflicts. The UNDP does not allude to the personal nature

²⁶⁰ Bakke, Kristin, Kathleen Gallagher Cunningham, and Lee Seymour. “A Plague of Initials: Fragmentation, Cohesion, and Infighting in Civil Wars.” 265.

²⁶¹ United Nations Development Programme in BiH. *Transitional Justice Guidebook for Bosnia and Herzegovina: Executive Summary*. 58.

²⁶² Interview with grassroots activist with Julia Dowling, Prijedor, BiH, July-August, 2013.

of civil society infighting in the TJ Guidebook,²⁶³ but it is understood by internationals and locals alike as a major source of tension and weakness throughout BiH. Another new element adding to the local complexities is online activism or initiatives launched by diaspora. The results of the diaspora's participation in matters of *facing the past* are ambiguous, but it is clear that local actors living in Prijedor year round are disdainful of involvement from abroad. Some locals argue that diaspora activists misrepresent the situation on the ground and create unnecessary tensions between Bosniak and Serb individuals in the town without having to live with the ramifications of stirring up trouble.²⁶⁴

The theories on infighting within movements, as well as victim-relationships in protracted conflict, point to a number of complex root causes. However, the research for this particular case study produced one definite contributor to internal tensions within Prijedor's civil society: resources. As previously mentioned, resources do not simply mean financial or material goods, but also influence and, perhaps specific to conflict-prone societies, victimhood. Actors may try to achieve personal and professional goals simultaneously, compromising the goals of the movement or community because of their desire for private gain.²⁶⁵ This, then, creates an atmosphere in which coordination between various factions of civil society break down, competition for control over resources transforms into conflict for personal influence, and infighting increases.

Unsurprisingly, capacity is a challenge for Prijedor's grassroots actors; both in finances and staff, it is increasingly difficult to find the means to properly and effectively run an organization or association. In fact, throughout the country, international donors have reduced their

²⁶³ Instead, the UNDP's guidebook states " There is an insufficient level of cooperation among CSOs, which is sometimes due to political affiliation of some civil society organisations." However, it can be assumed that those who have worked in BiH for a significant amount of time have come to understand, at least on some level, the problems emerging from personality clashes and personal conflicts between heads of civil society. See: United Nations Development Programme in BiH. *Transitional Justice Guidebook for Bosnia and Herzegovina: Executive Summary*: 58.

²⁶⁴ Interview with grassroots activist with Julia Dowling, Prijedor, BiH, July-August, 2013

²⁶⁵ Bakke, Kristin, Kathleen Gallagher Cunningham, and Lee Seymour. "A Plague of Initials: Fragmentation, Cohesion, and Infighting in Civil Wars." 273

funding or fully withdrawn from the country, making civil society more vulnerable to minimizing staff and projects, or closing completely.²⁶⁶ The diminishing monetary support is exacerbated by the oversaturation of BiH with NGOs, many of which were established as a means of earning money in the immediate aftermath of the war. Today though, with the excess of non-profits but decreasing grants and prizes available, the competition to fund projects is fierce. One Goldsmith University focus-group participant pointed out that funding was usually provided to organizations that could write grants or hold a conference, even if they did not necessarily provide valuable services to communities – particularly those living outside the capital of Sarajevo.²⁶⁷ Lack of capacity leads to unsustainable organizations left to operate project-to-project.²⁶⁸ Many civil society organizations operating in Prijedor today have managed to continue their work despite decreases in funding, perhaps because organizations based in Bosnian Krajina had little international funding for TJ to begin with. However projects with promise, such as *Izvor*'s oral history truth-telling archive, are contingent on renewed grants. If foreign foundations or governments are unable to unwilling to produce capital to continue the project, it will cease to exist.²⁶⁹

Funding, however, is arguably the least contentious resource in Prijedor. Power politics over influence and decision-making affect the local and national in BiH. Mr. Jez mentioned a problematic relationship between one local association and their national counterpart. He views the local group in a positive light, yet claimed that the national association was hindering reconciliation by pressuring Prijedor citizens to undertake solutions inappropriate to local problems.²⁷⁰ This begs the question, how can *local actors* work towards *local solutions* with the influence of the “mothership”²⁷¹ consistently pushing their own,

²⁶⁶ CIVICUS World Alliance for Citizen Participation. *Civil Society Organisations in Situations of Conflict*. Dufranc, Mathilde and Adele Poskitt, 2011: 18

²⁶⁷ “Prijedor – Focus Group – NGO Activists” *Bosnian Bones, Spanish Ghosts: ‘Transitional Justice’ and the Legal Shaping of Memory after Two Modern Conflicts*: 16.

²⁶⁸ United Nations Development Programme in BiH. *Transitional Justice Guidebook for Bosnia and Herzegovina: Executive Summary*. 58.

²⁶⁹ Interview with grassroots activist with Julia Dowling, Prijedor, BiH, July-August, 2013.

²⁷⁰ Dorde Jez, interview with Julia Dowling, Prijedor, BiH, August 15, 2013.

²⁷¹ Dorde Jez referred to the national-level association in this way.

national priorities?

Prijedor-based organizations also struggle amongst each other for control over decision making in matters of *facing the past*. Bakke and colleagues point out that multiple organizations replicating the same work and goal within one movement (or in this case, one town) may indicate internal divisions over “over collective interests or the means to achieve them.”²⁷² Not only is the end result a matter of contention amongst non-state actors in Prijedor, but so is the *process of dealing with the past* itself. Influence over these developments means unofficial authority over much of the Prijedor community. As such, any amount of political, social, or cultural influence is highly sought after.

The least measurable and concrete resource fought over in Prijedor is perhaps the most controversial. When asked “what is the most important element for survivors in Prijedor?” one key local contact responded “Being accepted as a victim.”²⁷³ The lack of recognition has caused a sort of *economy of victimization* to emerge, where victimhood is a commodity to be competed for, traded, shared, or sold. The exclusion of non-Serb victims in the dominant, official narrative of Prijedor has, in a way, increased the very value of being a victim. Like supply and demand, the less recognition, the more individuals and communities yearn for it. Studies on victimhood in Northern Ireland, where the phenomenon has been more fully explored, recognize that declaring victim status is a weighty political act.²⁷⁴ As a victim, one’s actions – even violent actions – are justified. Furthermore, victim as an identity is often loaded with heavy political and social consequences. Robert Meister writes, “Socrates and Jesus, whose

²⁷² Bakke, Kristin, Kathleen Gallagher Cunningham, and Lee Seymour. “A Plague of Initials: Fragmentation, Cohesion, and Infighting in Civil Wars.” 268.

²⁷³ Interview with grassroots activist with Julia Dowling, Prijedor, BiH, July-August, 2013.

²⁷⁴ McDowell, Sara. “Who are the victims? Debates, Concepts and Contestation in ‘Post-Conflict’ Northern Ireland.” *Conflict Archive on the Internet* (2007). <http://cain.ulst.ac.uk/victims/introduction/smcd07whoarethevictims.pdf> [Accessed September 24, 2013]. For other resources on victims and victimhood, please see Patricia Lundy and Mark McGovern’s “Community-Based Approaches to Post-Conflict ‘Truth’ Telling: Strengths and Limitations,” Diane Enns’ “Identity and Victimhood: Questions for Conflict Management Practice,” or a number of other studies from the Conflict Archive on the Internet database, created by the University of Ulster.

teaching stressed (in different ways) that identifying oneself as the innocent victim of persecution corrupts the soul, even (or *especially*) if one *is* such a victim.²⁷⁵ Victims associations advocate for individuals and communities, fight discrimination, and address deep-seeded trauma. This is critical in healing, reconciliation, and reconstruction of any post-conflict society. However, when victimhood becomes the *only* identity and is commodified and coopted by interested parties, then indeed it hinders the healing process it aims to help.

As described above, victimization is often politicized and used as one might use other non-material resources for personal or professional gain. When Victimization is taken to an even more extreme socio-political level, a *hierarchy of victims* emerges; a scale of suffering against which individuals and groups are measured, and those who suffered the most “win” the title for most victimized within the hierarchy. A report on victims of terrorism from the Organization for the Security and Cooperation of Europe (OSCE) emphasizes that victim hierarchy can cause deep social divisions that are particularly counterproductive in post-conflict regions.²⁷⁶ *Who is the bigger victim* is the key question, whether it is posed to “the other” or one’s own group. In Prijedor, there is a hierarchy of victimization affecting both intergroup and intragroup relations. The competition between who suffered most between different ethno-national identity groups is relevant in Prijedor, as it is throughout the country. However, much more salient but less explored is the competitive victimhood *within* the non-Serb community of Prijedor. It would be naïve not to recognize that victim hierarchy affects the efforts of civil society. In particular, competitive victimhood between the local leaders in TJ causes entire organizations or associations to quarrel, gossip and, in extreme cases, cease communications and coordination. The Omarska monument example will demonstrate acutely how detrimental this dynamic is to *facing the past*.

This phenomenon is not confined to Prijedor. The CIVICUS World Alliance for Participation highlighted this same issue in their Western Balkans section on civil society in conflict situations. Some

²⁷⁵ Meister, Robert. 2002. “Human Rights and the Politics of Victimhood.”: 103.

²⁷⁶ Organization for the Security and Cooperation of Europe. *High-level Meeting Victims of Terrorism: Background Paper*. Vienna: Office for Democratic Institutions and Human Rights, 2007.

of the main hindrances to a well-working civil society in the Balkans includes, “Lack of coordination within civil society due to a lack of trust, [which] has several pervasive effects: 1) no sharing of information and no mutual learning, particularly between new and old CSOs, and 2) more competition for legitimacy and resources than collaboration.”²⁷⁷

As stated previously, the perception that resources – particularly that of victimhood – are zero-sum leads to infighting.

There are also deeper factors at play that lead individuals and groups to view the victim hierarchy as an objective, indisputable social status. Those living with unhealed war-time traumas have difficulty reconciling with the “other.” As Prijedor’s policy of denial suppresses the individuals’ need for recognition as a victim, perhaps anger and frustration is projected onto others in close contact, mainly from their own group. This misdirection of energy is further exacerbated by the high levels of trauma experienced by all survivors. War-time experiences have left an indelible mark on individuals and groups and, because efforts to work through trauma have been inadequate throughout BiH, individuals are unable to reconcile the past with themselves and others. The psychological processes necessary for reconciliation have not yet taken hold in Prijedor despite many efforts producing tangible yet shallow outputs that give the appearance of “reconciliation.”²⁷⁸ Unaddressed trauma and untreated psychological wounds have increased the frequency that individuals – including those leading grassroots efforts at *facing the past* – lash out at one another because they have not yet found peace within themselves. Untreated trauma among civil society leaders may not be directly responsible for infighting in Prijedor. A resource conflict is probably the primary catalyst for intragroup tensions. That said, the lack of personal reconciliation and healing does exacerbate infighting. Even worse though, unhealed traumas prevent civil society and its constituents from being open or fully committing to the process of interpersonal conflict resolution. As the following case demonstrates, the refusal to work through disagreements or make necessary compromises has led to diminishing efficacy of local TJ initiatives.

²⁷⁷ CIVICUS World Alliance for Citizen Participation. *Civil Society Organisations in Situations of Conflict*. 41

²⁷⁸ Interview with psychologist with Julia Dowling, Prijedor, BiH, July-August, 2013.

The Omarska monument construction project is perhaps the most notable example of unproductive infighting in Prijedor. ArcelorMittal and Mayor Pavic did not make memorializing the former concentration camp easy; however conflict between two factions of victims remains the main cause of the failed process. According to interviews, the divide emerged because of a disagreement over the substance of the monument as well how a design might materialize. One faction withdrew from the negotiations with Mittal and NGO facilitator *Soul of Europe* because it was “too opaque.” The other party to the conflict agrees that the process lacked transparency, but claims that it was the only way in which to operate at that time.

Arguments over the size of the memorial too, became a point of contention. In particular, one faction asserted that the preservation of the White House would be a proper memorial for the time being, while another side demanded the immediate preservation of the Hanger as well. The concentration camp victims associations came to an impasse which has since been unresolvable. According to an individual privy to memorial negotiations, “It was the ‘golden time’ for Omarska to be resolved, for a monument to be built. But, [between] the civil society representatives there were different approaches to the memorial. They divided the victims between their different visions - they are much guiltier for [its failure] than political enemies like Pavic.”²⁷⁹ In February 2006, ArcelorMittal froze the project indefinitely, mainly because of civil society’s inability to internally compromise and move forward in a unified decision over monument design and construction. Local politicians knew about the personal and professional rifts and still speak about them today. In this way, Mayor Pavic and the local government have enjoyed the benefits of a “divide and conquer” strategy that civil society has inflicted upon itself. As long as the perpetrators continue to deny crimes committed and traumas caused, Prijedor’s civil society will construct harmful hierarchies, compete over victimhood status, and attack itself in lieu of working through psychological wounds. The lack of a cohesive, strategic approach to TJ in Prijedor plays to the advantage of the Municipal government – who need only to sit back and wait for grassroots actors to hinder their own progress.

²⁷⁹ Interview with grassroots activist with Julia Dowling, Prijedor, BiH, July-August, 2013

Conclusion

The war in BiH was particularly brutal in Prijedor, producing images that echoed the Nazi-run camps of World War II. The total physical destruction of the city's non-Serb communities however, did not inhibit a significant portion of survivors from returning at the turn of the 21st Century. In efforts to rebuild, rehabilitate, and reconcile, a vibrant civil society emerged and continues to mature to address these challenging tasks. At the same time, Prijedor's Mayor Marko Pavic and other local politicians impose a strategic combination of denying past atrocities and discriminating against those who suffered most. Prijedor government's overall policy of denial and discrimination culminates into a lack of recognition for non-Serb victims, a concept that is wholly detrimental to the local society. Without recognition of a factually accurate past, no foundation for reconciliation can be built,²⁸⁰ justice is ill served, and rights based on equality before the law are nonexistent.²⁸¹ Though the camps have closed and some communities have been rebuilt, municipal and entity-level political goals remain aimed at sustaining a Serb-majority territory. All evidence points to manipulation of truth and memory as a means of achieving this objective which, to the disadvantage of activists in Prijedor, translates into obstructing grassroots efforts determined to *deal with the past*.

Coinciding with a difficult local context, broader, officially sanctioned efforts on *facing past* in BiH have hit a snag. What's more, despite significant post-war international aid, projects established and implemented by outsiders have remained insufficient to handle the crimes seen in the territory of the Former Yugoslavia. Similarly, regional and national actors have undertaken a number of state, entity, and community-level TJ projects, but most have stalled or fallen short of high expectations.

As Backer's theoretical scenarios suggest, civil society in Prijedor has moved to the forefront of TJ efforts because, in part, of these official processes' shortcomings. Prijedor's particularly caustic

²⁸⁰ In an interview, Satko Mujagic stated, "You can't build reconciliation without recognition." Satko Mujagic, interview with Julia Dowling, Kozarac (Prijedor), BiH, July 23, 2013.

²⁸¹ Sudbin Music, interview with Julia Dowling, Prijedor, BiH, July 26, 2013.

atmosphere provides the second, equally important catalyst for civil society assuming a preeminent role in *facing the past*. This combination of external and internal factors has resulted in an budding renaissance of locally-owned TJ initiatives in Prijedor. Governmental efforts are essential, but as is seen in other fourth phase TJ examples throughout the world, civil society can offer effective, alternative sources of justice that help traumatized societies to process historical violence and oppression. For these reasons, Prijedor's flourishing of civil society is hopeful – it recognizes the need for *facing the past*, provides a local perspective appropriate to the unique context, and refuses to wait for official action.

However, the Prijedor case study also demonstrates weak elements of the fourth phase. In particular, it expounds on the consequences of civil society's rapid transformation into a major player in highly contentious but deeply needed TJ efforts. According to Robert Belloni, "The mushrooming of local NGOs does not lead per se to the establishment of a healthy civil society."²⁸² Due to the Municipal government's aforementioned policies regarding non-Serb victimhood there is a perception that, however seemingly irrational, victim status is a finite resource. Consequent competitive victimhood and victim hierarchies have led to civil society's unwillingness to cooperate on critical *facing the past* projects in Prijedor. The Omarska monument building process is one such example, as tensions rooted in competitive victimhood snowballed into a conflict over decision-making which, ultimately, halted the entire project.

In conclusion, the situation in Prijedor in 2013 is an example of modest gains but also unfulfilled potential. Each project undertaken by local actors in the community adds value to the overall TJ efforts, but the impact would be tenfold should civil society work together. Until civil society's various factions make the effort to unify or, at the very least, coordinate their initiatives, Prijedor will make only marginal progress in *dealing with its past*. The local government's policy of denial and discrimination originates from a central authority with clear goals and powerful instruments. Successful localized, grassroots endeavors on *facing the past* requires the deconstruction of intragroup victim

²⁸² Belloni, Roberto. "Civil Society And Peacebuilding In Bosnia And Herzegovina." *Journal of Peace Research* 38.2 (2001): 177-178.

hierarchies through, in part, processing individual and community traumas. Furthermore, there must be a dismantling of victimhood as the primary identity of civil society activists, and a transformational shift towards being a *survivor*. Empowering individuals, particularly grassroots leaders, as survivors will create a foundation on which constructive collaboration can begin. Only can a civil society that is unified in its projects, strategies, and goals effectively demand *facing the past* in order to create a meaningful future for Prijedor.

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Appendix A. Interview Subject Profiles

Expert Interviews

Name: Dr. Dennis Gratz

Profession: Scholar/Professor (University of Sarajevo), Lawyer, President of *Nasa Stranka* (“Our Party”) Political Party

Expertise: Legal Dimensions of Genocide, War Crimes, Prijedor's "Elitocide"

Date and Location of Interview: August 26, 2013, Sarajevo, BiH

Name: Dr. Edina Becirevic

Profession: Scholar/Professor (University of Sarajevo), President of the Atlantic Initiative

Expertise: Genocide and Crimes against Humanity, Peace and Security, Returnee Issues

Date and Location of Interview: August 9, 2013, Prijedor, BiH

Name: Dr. Iavor Rangelov, Transitional Justice Scholar, London School of Economics

Profession: Global Security Research Fellow, Civil Society and Human Security Research Unit, London School of Economics

Expertise: Transitional Justice and International Justice, Human Security, Globalization & Civil Society

Date and Location of Interview: April 29, 2013, Sarajevo, BiH

Name: Eduardo Gonzalez-Cueva

Profession: Director of Truth and Memory, International Center for Transitional Justice

Expertise: Truth and Memory in Transitional Justice, Truth Commissions, South America, Memorialization

Date and Location of Interview: August 1, 2013, online phone (Skype) interview

Name: Haris Subasic

Profession: Emerging Scholar and PhD Candidate (originating from Prijedor)

Expertise: Prijedor, Cultures of Denial, Memorialization and Monument Building

Date and Location of Interview: July 2, 2013, Prijedor, BiH

Local Activists

Name: Adis Hukanovic

Profession: Oral History Staff and Psychologist, Uzdruzenja Prijedorcanki 'Izvor'/Association of Women Citizens of Prijedor 'Izvor'

Location Born: Vrhpolje, Sanski Most, BiH

Current Residence: Sanski Most, BiH

1992-1995 Experiences: Adis was ethnically cleansed from Sanski Most during which he was brought by trucks to Prijedor and then to Gracanica. After a few weeks in Gracanica, he moved to a refugee camp in Zagreb. At the end of 1993, he moved to Germany. In December 1997, Adis returned to Sanski Most.

Date and Location of Interview: July 5, 2013, Prijedor, BiH

Name: Azra Karabasic

Profession: Oral History Staff and Psychologist, Uzdruzenja Prijedorcanki 'Izvor'/Association of Women Citizens of Prijedor 'Izvor'

Location Born: Prijedor, BiH

Current Residence: Kozarac, Prijedor, BiH

1992-1995 Experiences: Azra left to Zagreb in April 1992 with her mother. She resided in Austria throughout the war. She returned to BiH in 1996, to Sanski Most, because returning to Prijedor was not initially safe. She eventually returned to Kozarac in 2005.

Date and Location of Interview: July 3, 2013, Prijedor, BiH

Name: Dr. Azra Alic Pasalic

Profession: Pediatrician and General Practitioner, SDP Party Member and Former President, Prijedor Municipal Assembly

Location Born: Prijedor, BiH

Current Residence: Prijedor, BiH

1992-1995 Experiences: Azra moved to central Bosnia in a Convoy in 1992. She then moved to Zagreb where she worked with other women to provide services to refugees (psychological and medical help, including for women who were raped in Omarska). In 1993, Azra moved to Germany and returned to BiH in 1996. She initially moved to Sanski Most, but returned to Prijedor in 1999.

Date and Location of Interview: August 20, 2013, Prijedor, BiH

Name: Edin Ramulic,

Profession: President, Uzdruzenja Prijedorcanki 'Izvor'/Association of Women Citizens of Prijedor 'Izvor'

Location Born: Rakovcani, Prijedor, BiH

Current Residence: Sanski Most and Prijedor, BiH

1992-1995 Experiences: Edin was taken from family home in Rakovcani and spent three nights in Trnopolje in spring 1992. He was taken on a convoy to Travnik, and joined the Army of BH in Travnik. He was heavily wounded several times during the war. In 1996, Edin began volunteering with Izvor, which was based in Sanski Most at that time.

Date and Location of Interview: August 22, 2013, Prijedor, BiH

Name: Emir Hodzic

Profession: Activist and co-Founder for *Stop Genocide Denial, White Armband Day Campaign*, and *Jer me se Tice/Because I care*

Location Born: Prijedor, BiH

Current Residence: Prijedor, BiH

1992-1995 Experiences: Emir was living in Prijedor in 1992, and in 1993 left as a refugee to New Zealand

Date and Location of Interview: August 1, 2013, Prijedor, BiH

Name: Emsuda Mujagic

Profession: Director and President, *Uzdruzenja Zena BiH Inicijative "Srcem do Mira"*/Association of Bosnian Women's Initiative "Heart Through Peace"

Location Born: Kozarac, Prijedor, BiH

Current Residence: Kozarac, Prijedor, BiH

1992-1995 Experiences: Emsuda was deported on a convoy to Travnik in 1992. After two days in Travnik, she left for refugee camp in Zagreb. Lived in Croatia until 1996, during which she helped organize "Zene B-H" (Women B-H) for women from the Bosnian Krajina in the refugee camp. She returned to BiH in 1996.

Date and Location of Interview: July 7, 2013, Kozarac, Prijedor, BiH

Name: Goran Zoric

Profession: Activist and co-Founder, *Jer me se Tice/Because I care*

Location Born: Prijedor, BiH

Current Residence: Prijedor, BiH

1992-1995 Experiences: Goran remained in Prijedor for the duration of the war.

Date and Location of Interview: Written communication submitted August 28, 2013

Name: Mevludin Rahmanovic

Profession: Co-Director, *Centar za Izgradnju Mira*/Center for Peacebuilding

Location Born: Kotor Varos, BiH, but moved to Rizvanovic, Prijedor at the age of three

Current Residence: Sanski Most, BiH

1992-1995 Experiences: Mevludin and his family were living in one of the Left Bank communities in Prijedor when the war broke out. He was eleven when he, his siblings, and his mother spent one night in Trnopolje before being transported to Travnik. They remained in Central Bosnia for the rest of the war, moving to a number of towns and cities in the territory held by the Army of BiH. In 2001, he and his family returned to Prijedor Municipality. He eventually relocated to Sanski Most to work full time with the Center for Peacebuilding.

Name: Mirsad Duratovic

Profession: President, *Uzdruzenja Logorasa "Prijedor '92"*/Association of Concentration Camp Detainees "Prijedor '92"

Location Born: Biscani, Prijedor, BiH

Current Residence: Biscani, Prijedor, BiH

1992-1995 Experiences: On July 20, 1992, Serb forces entered Biscani and killed Mirsad's younger brother (aged 15 years), father, and ten other members of his family. After being used as a human shield by the RS army, he was brought to Omarska Camp. After that, he was moved to Manjaca Camp and Trnopolje Camp. He was eventually released to Travnik and from there he went to Croatia and eventually to Germany. In 1999, he returned to Sanski Most, BiH, and returned to Prijedor in 2002.

Date and Location of Interview: August 9, 2013, Prijedor, BiH

Name: Satko Mujagic

Profession: Lawyer for Dutch Immigration Services, Activist/Founder,

Guardians of Omarska Advocacy group

Location Born: Kozarac, Prijedor, BiH

Current Residence: The Netherlands

1992-1995 Experiences: In 1991, Satko was in the Yugoslav National Army and fought in the war with Croatia. In 1992 he had returned to Kozarac. On May 24, 1992, Kozarac was attacked by Serb forces, and Satko and his family were brought to Prijedor city. On May 30, 1992, Satko was brought to Omarska Camp for three months. On August 21, 1992, he was brought to Manjaca Camp until December 6, 1992. After this, he was sent as a refugee to Croatia, and eventually made his way to the Netherlands.

Date and Location of Interview: July 23, 2013, Kozarac, Prijedor, BiH

Name: Sudbin Music

Profession: Secretary, *Uzdruzenja Logorasa "Prijedor '92"*/Association of Concentration Camp Detainees "*Prijedor '92*"

Location Born: Carakovo, Prijedor, BiH

Current Residence: Carakovo, Prijedor, BiH

1992-1995 Experiences: On July 23, 1992, Sudbin survived the ethnic cleansing of his village Carakovo in Prijedor. He spent a number of weeks in Trnopolje with his younger brother and mother. Eventually he was transferred to Travnik, from where he left for Czechoslovakia with assistance from the Red Cross. After two years, he moved to Germany, and returned to BiH in 1998.

Date and Location of Interview: July 26, 2013, Prijedor, BiH

Others

Name: Dorde Jez

Profession: Prijedor's Municipal Government's Official Contact Point for Local Communities

Location Born: Bosanska Krupa, BiH

Current Residence: Prijedor, BiH

1992-1995 Experiences: Dorde lived joined the Army of RS in 1992 when he was living in Bosanska Krupa. He was the commander of a battalion. In 1995 he was heavily wounded, and he moved to Prijedor

after the war.

Name: Elmina Kulasic

Profession: Sarajevo-based Human Rights Advocate

Location Born: Kozarac, Prijedor, BiH

Current Residence: Sarajevo, BiH

1992-1995 Experiences: Elmina and her family were forced to leave their home in Kozarac when the town was captured by the Serb army on May 24, 1992. She, her mother, and two of her sisters were interned in Trnopolje for seven weeks, while her father and eldest sister were transferred out of the camp at an earlier point. Her family reunited in Croatia as refugees, after which they spent three and a half years in Germany. When given the opportunity, her family relocated from Germany to Chicago, USA.

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CHILDREN IN CROATIA**

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AND HUMAN RIGHTS IN SOUTH-EAST EUROPE

**BY
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Table of Contents

LIST OF ABBREVIATIONS	90
INTRODUCTION	93
1. THEORETICAL FRAMEWORK	98
1.1 Defining the concepts.....	99
1.2 The theory of minority rights.....	102
1.3 The right to education.....	109
2. THE PROTECTION OF THE ROMA AT THE INTERNATIONAL, REGIONAL AND NATIONAL LEVEL... 114	
2.1 United Nations Framework for the protection of the rights of Roma people.....	116
2.2 Relevant documents for the protection of the Roma at the European level.....	120
2.3 Croatia's national legislation and policies.....	125
3. ROMA IN CROATIA	131
3.1 General situation of Roma in Croatia.....	131
3.2 Primary education of Roma children.....	134
3.2.1 Classroom segregation and discrimination.....	138
3.2.2 Quality education.....	142
3.2.3 General-wide strategies.....	146
4. MEĐIMURJE: AN EXAMPLE FOR THE REST OF CROATIA?	150
4.1 Oršuš and Others v. Croatia.....	151
4.1.1 Out with the old, in with the new?.....	154
4.1.2 Programmes and funding.....	159
4.2 Analysis.....	162
CONCLUSION	167
BIBLIOGRAPHY	170

LIST OF ABBREVIATIONS

CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CERD	Committee on the Elimination of Racial Discrimination
CoE	Council of Europe
CRC	Convention on the Rights of the Child
ECRI	European Commission against Racism and Intolerance
ECtHR	European Court of Human Rights
ERTF	European Roma and Travellers Forum
EU	European Union
FCNM Minorities	Framework Convention for the Protection of National Minorities
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
IO	International Organisation
MoSES	Ministry of Science, Education and Sports
NGO	Non-Governmental Organisation
OSCE	Organisation for Security and Co-operation in Europe

REF	Roma Education Fund
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNICEF	United Nations Children's Fund

INTRODUCTION

This thesis investigates discrimination and segregation of the Roma children in education in Croatia, based on ethnicity and language, particularly in primary schools. Discrimination and segregation are prohibited as it is a violation of human rights. In accordance with the amendments made to the Constitution in 2010, the Roma are now recognized as one of Croatia's twenty-two national minorities that are entitled to special minority protection.¹ The Roma that make up 0.40% of the population according to the last census² continue to face discrimination in different spheres of life, including the educational sector. The Roma as well as their children have been frequently negatively stereotyped; such practices by schools, teachers, and students might further increase their social exclusion. According to the country's constitution, legislation and international standards the Roma children should have the same rights as all the other children, but they are often left out and segregated from the rest of the society. The right to education is one of the fundamental human rights. As Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) states, a state party should guarantee that "education is directed to the full development of the human personality and the sense of its dignity" and "enable all persons to participate effectively in a free society". Furthermore, education is seen both as a human right and as "an indispensable means of realizing other human rights".³

While there have been positive developments in education of the Roma children in Croatia, discrimination on the basis of racial and/or ethnic belonging is still a persistent issue that needs to

¹ European Commission against Racism and Intolerance. ECRI Report on Croatia – fourth monitoring cycle. 25 September 2012. 32. <http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Croatia/HRV-CbC-IV-2012-045-ENG.pdf>.

² Croatian Bureau of Statistics. *Population by Ethnicity, 1971-2011 Censuses*. http://www.dzs.hr/Eng/censuses/census2011/results/htm/usp_03_EN.htm.

³ Economic and Social Council. Implementation of the international covenant on economic, social and cultural rights. General Comment No. 13, The Right to Education (Art. 13) 08.12.1999. E/C. (General Comments), 8 December 1999. [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/ae1a0b126d068e868025683c003c8b3b?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/ae1a0b126d068e868025683c003c8b3b?Opendocument).

be addressed.⁴ As a party to the ICESCR⁵ Croatia shall ensure the prohibition of discrimination immediately and fully. For this reason discrimination of the Roma in the educational system is particularly problematic. The proper education of the Roma children is of great importance, not only for these children and for the implementation of children's rights, but also for democracy in the country, particularly for democratic participation of its citizens. The topic is relevant due to the central role that the full respect of minorities' rights, as defined in international treaties, has within the process of democratization and EU accession. One of the main requirements of the EU is that all states seeking EU membership must fulfil the Copenhagen criteria that were established in 1993. One of the accession (political) criteria that must be fulfilled by any country that wants to join the EU states that the "stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities" must be satisfied.⁶ Croatia became the 28th member of the EU on 1 July 2013, but the minority issue as well as discrimination and segregation of the Roma children within the educational system and particularly primary education continue to be important issues. It is relevant to recognise if the accession process affected providing quality education for the Roma children in Croatia. Recently, the verdict granted of the Grand Chamber of the European Court of Human Rights (ECtHR) in the case *Oršuš and Others v. Croatia* confirmed that the segregation of the Roma children into separate classes based on language is unlawful discrimination that violates the European Convention on Human Rights.

If Croatia does not resolve this issue of unlawful discrimination by implementing proper mechanisms, the Committee of Ministers that oversees the execution of the judgments brought by the ECtHR has the power to denote a case back to the Court and to ask for a declaration

⁴ Amnesty International. *Annual Report 2012 - Croatia*. <http://www.amnesty.org/en/region/croatia/report-2012>.

⁵ International Covenant on Civil and Political Rights (New York, 16 December 1966) 999 U.N.T.S. 171 and 1057 U.N.T.S. 407, entered into force 23 March 1976 (the provisions of article 41 (Human Rights Committee) entered into force 28 March 1979). Article XXVII.

⁶ European Union. "The accession process for a new Member State." http://europa.eu/legislation_summaries/enlargement/ongoing_enlargement/114536_en.htm.

that the State has failed to realize the requirements under Article 46 of the European Convention on Human Rights. However, if the State continues to violate the Convention, by not executing the judgment, the outcome may lead to sanctions, such as suspension or expulsion from the Council of Europe (CoE).⁷ Consequently, the non-implementation of such verdicts could lead to the country's reputation being damaged in relation to the protection of minority rights.

Croatia held the presidency from 1 July 2012 to 30 June 2013 of the Decade of Roma Inclusion 2005-2015 which is a political commitment by the European governments and it is important to assess in which way the Croatian government stepped up and embraced its priority within the educational sector.⁸ The four core priorities that Croatia focused on during its presidency are the following: linking the Decade of Roma Inclusion and the EU Framework; linking Decade Success in Education with EU Education Policy and the status of the Romani language; historical experiences of Roma in Europe with the advancement of the tolerance and non-discrimination of the Roma and Roma Youth in Action for Tolerance and Recognition.⁹ As can be seen, these priorities are relevant for this thesis that focuses on education, non-discrimination, preparing the Roma for an equal start in education, putting in place mechanisms to ensure that all of the Roma children receive quality education in primary schools, etc.

The aim of this thesis is to analyse the educational rights of the Roma children and their integration into the educational system in terms of abolishing classroom segregation and discrimination, access to quality education (resources and teachers) and the positive measures being taken for the inclusion of the Roma children into this system.

⁷ Cali, Basak, and Nicola Bruch. *Monitoring the Implementation of the Judgements of the European Court of Human Rights - A Handbook for Non-Governmental Organisations*. May 2011. 15. http://ecthrproject.files.wordpress.com/2011/07/monitoringhandbook_calibruch1.pdf.

⁸ Decade of Roma Inclusion 2005-2015. "Decade of Roma inclusion 2005-2015 Croatian Decade Presidency Work Plan July 1, 2012 – June 30, 2013." 5. http://www.romadecade.org/cms/upload/file/9292_file3_croatia-decade-presidency-program-pdf.pdf.

⁹ Decade of Roma Inclusion 2005-2015. "Decade of Roma inclusion 2005-2015 Croatian Decade Presidency Work Plan July 1, 2012 – June 30, 2013." 5. http://www.romadecade.org/cms/upload/file/9292_file3_croatia-decade-presidency-program-pdf.pdf.

Furthermore, the focus is placed on the implementation of international and national legislation and standards and their impact on enabling adequate education of the Roma children in Croatia.

The central research question of this thesis is: *“Does the implementation of international and national legislation mechanisms in Croatia, enable quality education of the Roma children?”* The assumption of the research is that these mechanisms and standards have not been implemented to a satisfactory level considering the 2010 judgment of the ECtHR that confirmed that the segregation of the Roma children into separate classes based on language is unlawful discrimination. In order to be able to answer my main research question and test my hypothesis, I have focused on the following sub-questions: *What actions is the country undertaking to ensure and improve the Roma’s right to education? What were the court’s recommendations in regards to the above-mentioned verdict; what has been done and what has not been done so far? What are the main challenges in addressing classroom segregation and discrimination in the country? Do the national strategies favouring the right to education of the Roma children adequately address the existing challenges?* My claim is that while some may say that Croatia is a “success story” in terms of having the proper legislation and strategies, it still has a long way to go in the implementation phase since in the education of the Roma children, discrimination and classroom segregation is still present within the primary schools. Thus, the study aims to assess what actions the country has carried out to ensure that the Roma children have access to quality education without discrimination and segregation compared to the non-Roma children in the country.

The methodological approach that this thesis follows is a qualitative research design. By conducting interviews and doing the research on the existing sources, it has helped to provide the necessary information and statistics in terms of financial, institutional, and technical support for the respect of the fundamental right to education of the Roma children. This design has enabled an analysis of the content of legal and political documents, as well as the collected existing reports and surveys, etc. The empirical data has been collected through interviews with representatives from IO’s and local NGO’s using open-ended questions. Due to the lack of time and resources, I was not able

to carry out quantitative research. Consequently, I utilized the existing documents such as secondary sources, documents, statistics, etc. I had several difficulties in collecting primary data since a number of relevant officers and persons relevant for my research were not willing or able to answer my questionnaires.¹⁰ The data has been collected; an analysis of the content and narrative data and a proper interpretation of the analysed data has helped with the thesis claim.

In order to properly address the research questions I have used primary, secondary and tertiary sources. I have reviewed and analysed academic sources on minority rights, the right to education, education of minorities, relevant conventions, on-line scholarly publications, records and reports of organisations and government agencies, etc. In addition, journals, shadow reports, lectures and existing written papers have been used accordingly to provide a clear picture of the environment surrounding education rights of the Roma children, both generally and in the Croatian case. I have drawn conclusions from theoretical concepts, such as educational rights, minority's rights and inherent limitations (of rights). The research has also relied on national and international legislation, treaties and reports, monitoring reports prepared by non-governmental organisations (NGO's), international organisations (IO's) on this specific issue, etc.

The first chapter provides the theoretical framework in order to be able to understand the overall state of affairs of minority rights and the right to education, particularly regarding the Roma pupils. The theoretical background has been shaped by the works of different authors, such as Will Kymlicka, Ronald Dworkin, Tibor Varady, Florian Bieber¹¹, etc. In the second chapter, I have underlined the characteristics of the legal framework in the field of protection of minority rights and the right to education (i.e. Roma pupils), which will enable the analysis

¹⁰ After several attempts of trying to reach one of the Roma assistants in one of the primary schools in Međimurje County, unfortunately, I could not get into touch with them. Although I sent interview questions to a government official from the Ministry of Science, Education and Sport (MoSES), the person did not respond to the questions but rather sent me a document regarding the education of Roma children.

¹¹ At this point, these authors have been selected and are relevant to my thesis due to the reason that they are among the authors who have published significant literature on the topic of minorities, equality for all persons, the right to education, etc.

of the implementation and effectiveness of the laws and policies, both at the national, regional and international level.

The third chapter presents the general situation of the Roma in Croatia and their right to education. Thus, it explores classroom segregation and discrimination, access to quality education (resources and teachers) and the general measures taken to improve the overall situation of the Roma children within the educational system. Finally, the fourth chapter is devoted to the presentation of the situation of the Roma children in Međimurje in connection with the case, *Oršuš and Others v. Croatia*, in order to examine the effectiveness and outcomes of the concrete steps by the Croatian government in terms of legislation, policies and measures that have been undertaken to ensure the implementation of the 2010 judgment delivered by the ECtHR. A recent phenomenon occurring currently in Croatia, termed “white flight” is acknowledged due to the fact that it started to transpire after the verdict given by the ECtHR. This phenomenon is a result of non-Roma parents taking their children out of the schools that enrol several Roma children and sending them to schools in the neighbouring towns and villages, which results in “deprivation of equal quality schooling in a multicultural environment and *de facto* segregation of schools”.¹² It examines financial investments and other measures that are intended for the better inclusion of the Roma children, in primary schools, in terms of providing adequate and better educational standards. The last part is devoted to the analysis and recommendations for Croatia.

1. THEORETICAL FRAMEWORK

Before I approach the analysis of the right to education of Roma children, as one of the primary rights of every human being, I will present the theoretical framework that is used in this study in order to present and explain the overall state of affairs of this right. In this

¹² Council of Europe. *Human Rights of Roma and Travellers in Europe*. Strasbourg: Council of Europe Publishing, February 2012. 123-124. http://www.coe.int/t/commissioner/source/prems/prems79611_GBR_CouvHumanRightsOfRoma_WEB.pdf.

chapter, I have defined the key theoretical concepts which will enable my analysis of the right to education and its importance. I have also considered a number of theoretical concepts, which will enable my analysis of the importance of right to education. Moreover, I elaborate on the concepts of minority rights and the right to education by focusing on the works of various.

1.1 Defining the concepts

The following definitions will be adopted for the clarification of the concepts that will be used throughout the thesis. The term ‘national minority’ has been controversial due to the predicament of striving to find a universal definition for it. An agreement exists that a state’s government shall accept and recognize the existence of national minorities and that minority rights are a part of the general human rights standards and “human rights community”.¹³ Due to the complexity of this term, I will define it as follows, relying on the definition elaborated by the former Special Rapporteur for the Commission on Human Rights, Francesco Capotorti. Minorities are groups “numerically inferior to the rest of the population of a state, in a non-dominant position, whose members – being nationals of a state – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show if only implicitly a sense of solidarity directed towards preserving their culture, traditions, religion, or language”.¹⁴ Capotorti proposed the usage of this definition, only, if applying it with the definition found in Article 27 of the ICCPR, “in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right in community with the other members of their group, to enjoy their own culture, to profess and practice their

¹³ Thornberry, Patrick, and Maria Amor Martin Estebanez. *Minority Rights in Europe: A Review of the Work and Standards of the Council of Europe*. Strasbourg: Council of Europe Publishing, 2004. 99.

¹⁴ Capotorti, Francesco. *Study on the Rights of Persons Belonging to Ethnic, Religious or Linguistic Minorities*. New York: UN Publications, 1979. 96.

own religion, or to use their own language”.¹⁵ For the purpose of my research, I will also include the following elements from the definition of Mitja Žagar, who states that ethnic minorities are a “specific and formed group of persons”, that “they became an ethnic minority due to a specific historic development in the territory of their traditional settlement” and that “this distinct community autochthonously lives in a certain territory of its traditional settlement”.¹⁶ It is also important to recall, though, that those essential characteristics of a minority fluctuate significantly from state to state, and from context to context. For example, Croatia in Article 5 of the Constitutional Law on the Rights of National Minorities defines a national minority as “a group of Croatian citizens whose members have been traditionally inhabiting the territory of the Republic of Croatia and whose ethnic, linguistic, cultural and/or religious characteristics differ from the rest of the population, and who are motivated to preserve these characteristics”.¹⁷

Minority rights are crucial for long-term stability and sustainable development within diverse societies. Special minority protection is given in order to prevent forced integration and assimilation of a particular group. Baldwin, Chapman and Gray define minority rights as “an international legal term which denotes not only to the rights of minorities as groups, but also the rights of those individuals within them”. In terms of their existence, they suggest that minority rights stem from basic international law on human rights, as well as specific treaties and declarations on minority rights.¹⁸ In order to protect national

¹⁵ International Covenant on Civil and Political Rights (New York, 16 December 1966) 999 U.N.T.S. 171 and 1057 U.N.T.S. 407, entered into force 23 March 1976 (the provisions of article 41 (Human Rights Committee) entered into force 28 March 1979). Article XXVII.

¹⁶ Žagar, Mitja. “Some Newer Trends in the Protection and (Special) Rights of Ethnic Minorities: the European Context.” in Miroslav Polzer, Liana Kalčina and Mitja Žagar (eds.), *Slovenija & evropski standardi varstva narodnih manjšin* (Zbirka Slovenija in Svet Evrope, št. 21) (Informacijsko dokumentacijski center Sveta Evrope pri NuK, Inštitut za narodnostna vprašanja, Avstrijski inštitut za vzhodno in jugovzhodno Evropo, Ljubljana, 2002), 78-79.

¹⁷ Republic of Croatia. *Constitutional law on the rights of national minorities*. (Official Gazette no. 155/2002). Zagreb, December 13, 2002. 3. http://www.vsrh.hr/CustomPages/Static/HRV/Files/Legislation__Constitutional-Law-on-the-Rights-NM.pdf.

¹⁸ Baldwin, Clive, Chris Chapman and Zoe Gray. *Minority Rights: The Key to Conflict Prevention*. *Minority Rights Group International*. May 2007. 4.

minorities, legal provisions have to be set up and implemented by countries. Equally important to define is the ‘legal framework’ aimed at the protection of national minorities. Attributable to the topic of this paper, legal framework will be referred to as the “legislative provisions for the protection of minorities designed to ensure that a specific group which is in a vulnerable, disadvantaged or marginalized position in society and is able to achieve equality and to fully participate in the social, economic and political life of the country of residence.”¹⁹

Another key concept is the education of minorities. Although, there is no uniform definition for such a concept, it is of crucial importance for this study and in general as well. For example, a UN body, the Committee on Economic, Social and Cultural Rights²⁰, stated that states must, “respect, protect and fulfil the acceptability of education by taking positive measures to ensure that education is culturally appropriate for minorities and indigenous peoples, and of good quality for all.”²¹ A definition provided by the United Nations Educational, Scientific and Cultural Organization²² (UNESCO) 1978 Declaration on Race and Racial Prejudice declares that states should make “the resources of the educational system available to all groups of the population without racial restriction or discrimination; and [take] appropriate steps to remedy the handicaps from which groups suffer with regard to their level of education and standard of living and in particular to prevent such handicaps being passed on to children”.²³ It

¹⁹ Yusuf, Barrister Rizwana. “World Conventions and Minority Rights.” Presented at the conference of Symposium of Minorities in the Globalization Era. May 2007. 3.

²⁰ The CESCR is the body of independent experts that monitors implementation of the International Covenant on Economic, Social and Cultural Rights by its States parties. The Committee was established under ECOSOC Resolution 1985/17 of 28.

²¹ Economic and Social Council. Implementation of the international covenant on economic, social and cultural rights. General Comment No. 13, The Right to Education (Art. 13) 08.12.1999. E/C. (General Comments), 8 December 1999. [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/ae1a0b126d068e868025683c003c8b3b?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/ae1a0b126d068e868025683c003c8b3b?Opendocument).

²² UN Educational, Scientific and Cultural Organisation (UNESCO). *Constitution of the United Nations Educational, Scientific and Cultural Organisation (UNESCO)*, 16 November 1945.

²³ UNICEF. *An MRG International Report Education Rights and Minorities*. Minority Rights Group, May 1994. 12.

signifies that the principle of non-discrimination in access to unbiased, quality education for minorities should be one of the main priorities for a state and that states should not allow the undermining of minorities' fundamental human rights.

1.2 The theory of minority rights

Establishing and maintaining a shared sense of equality between the majority and minority is a handful task in some countries. This task is occasionally even hard to regulate in democratic countries. One of the reasons for this is due to the fact that democracy can lead to inclusion as well as, on the other hand, to the exclusion of some. Charles Taylor, in his article, *Democratic exclusion (and its remedies?)*, explains precisely the nature of this effect. Taylor explains that a democratic country needs a common identity in order to have mutual trust and solidarity which preserves the democratic legitimacy. Furthermore, he explains that one of the reasons as to why nationalism occurs in some countries is that some groups within a country may feel like they are not seen as important when it comes to the decision-making process.²⁴ Meaning that the minority group might feel like they are being left out, in other words, they are being excluded. Taylor underlines that ultimately this common identity can also create exclusion of some groups within democratic countries that do not deal with the aspect appropriately. He says that exclusion also occurs due to the reason that the 'others' are seen as a threat to the dominant political identity. When a country has to create equality between the majority and minority group, many elements have to be 'reinvented', such as mutual trust, mutual understanding and mutual commitment.²⁵ This, as Taylor explains, is not an easy task due to the fact that sometimes it is easier to "fall back on the old ways and deny the problem instead of focusing on the new reinvented methods", either by excluding the minorities completely or by creating a division between "us and them".²⁶ Unfortunately, if a country starts to create

²⁴ Taylor, Charles. "Democratic exclusion (and its remedies?)." *Eurozine magazine* (February 2002): 4.

²⁵ Ibid, 6.

²⁶ Ibid, 6.

the division between ‘us and them’ and only focuses on the rights of the majority group, this can result in a state favouring one group over the other.

One of the core pillars of minorities is the protection and promotion of minority rights in every sphere of their life. Overall, minorities and the rights of minorities play an essential part in a country and are a vital pre-condition for a modern democratic country. The true meaning of a democratic country is meant to promote the inclusion of diversity (i.e. giving minorities’ education rights) and it is needed in order for a democratic country to “properly” secure stability and stimulate the concept of multiculturalism as a way of equally unifying the plural societies. As Taylor says, “democracies work well when people know each other, trust each other, and feel a sense of commitment towards each other”.²⁷ In such a situation, where all these essentials are present, inclusion will most likely be the result rather than exclusion.

On the other hand, John Stuart Mill says that in order for a democracy to provide stability within the country, multiculturalism is not the answer. He claims that it is the common identity of the people within the country that creates this stability.²⁸ Kymlicka disagrees. Mill explains that there is no room for dissimilarities between the people within a country because assimilation can be seen as the only solution to the different nationalities that are present, since free and effective institutions can only be successful in that type of environment. Kymlicka considers the idea of multiculturalism a valuable component of a democratic country. He goes on further to explain that when minorities request to be included in a specific area of interest, it is their way of reflecting their desire to integrate into the society without having to give up their own culture. Kymlicka focuses on the illustration that democracy should be “two sides of the same coin” meaning that minorities, like the majority group, should have rights, but as long as they do not interfere with the autonomy and tolerance of that liberal democracy.²⁹ Therefore, Kymlicka explicated that by giving minorities their rights to practice, you are creating solidarity and democratic participation

²⁷ Ibid, 6.

²⁸ Kymlicka, Will. *Multicultural Citizenship*. New York: Oxford University Press, 1995. 67.

²⁹ Ibid, 158.

between the people which in the end creates a sustainable democratic country.³⁰ According to Bhikhu Parekh, if a country does not promote multiculturalism and allow the different identities to flourish and use their specific identities in a globalized world, that specific country will only have a “limited appeal and chance of being successful”.³¹ As mentioned above, democratic countries can also be characterized by the exclusion element which may actually lead to unfavourable results. As Horowitz says, when a democratic country consists of “ascriptive majorities and minorities, they can hardly be conducive to democratic rule”, because in the end they can end up being one of the causes of the failure of a democratic country.³²

The concept of minority rights has had its ups and downs throughout history and it has taken years in order to provide a somewhat ‘stable’ system for the protection of minorities. Although, there are different views on when minority rights emerged, the modern concept entered the arena in 1648 (Peace Treaty of Westphalia) with the introduction of the protection of religious minorities.³³ After the Congress of Vienna (1814-1815), there was an important change from the protection of only religious minorities to the protection of national minorities. Individual rights entered the international arena, after World War I when due to the high increase of national minorities and oppression at that time also minority protection regimes were established in new and defeated states.³⁴ During this time, the League of Nations was formed and it was intended to deal with the protection and promotion of minority rights internationally, but it did not function the way that the

³⁰ Kymlicka, Will. *Multicultural Citizenship*. New York: Oxford University Press, 1995.

³¹ Parekh, Bhikhu. “Redistribution or recognition? A misguided debate.” *In Ethnicity, Nationalism and Minority Rights*. Edited by Stephen May, Tariq Modood, and Judith Squires. New York: Cambridge University Press, 2004. 207.

³² Horowitz, Donald L. *A Democratic South Africa? Constitutional Engineering in a Divided Society*. Berkeley: University of California Press, 1991. 244.

³³ Petričušić, Antonija. “The Rights of Minorities in International Law: Tracing Developments in Normative Arrangements of International Organizations.” *Croatian International Relations Review* Vol. XI, No.38/39 (2005): 2. http://bib.irb.hr/datoteka/421246.CIRR_Petricusic_MR_IL.pdf.

³⁴ Ibid, 2.

drafters had intended it to.³⁵ After World War II, the issue of minorities was on the rise again and something had to be done in order to create equality between the majority and minority groups. Unfortunately, minority rights are absent from both the Charter of the United Nations and the Universal Declaration of Human Rights (UDHR) (1948), which has impacted the protection of minority rights.³⁶

Today, there are various conventions, documents, treaties, etc. that protect and assist minority rights in the case of individual protection and individual rights. Legally binding documents only establish individual protection and choose to ignore the collective rights of minorities. Even in the modern times, both states and international documents have provoked resistance and rejected this 'collective principle' in minority protection and have established minority protection within the individualistic sphere.³⁷ States believe that collective rights of minorities could lead to "disintegration through the process of minorities requesting cultural autonomy, which eventually could lead to administrative and local political autonomy, and in the end this could erupt into secession".³⁸ A further argument in the case of liberal individualism is that a person should not be looked at as being a member of a group, but rather their own individual merits should matter and not their group affinity.³⁹ It is my belief that both types of rights should be accepted in the international arena and that collective rights should be as important as individual rights and as Kymlicka said, "group-specific rights regarding education, local autonomy, and language help ensure that national minorities are not disadvantaged in these decisions, thereby enabling the minority, like the majority, to

³⁵ Wippman, David. "The Evolution and Implementation of Minority Rights." *Fordham Law Review* 66, Issue 2 (1997): 602. <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=3399&context=flr>.

³⁶ Ibid, 603.

³⁷ Petričušić, Antonija. "The Rights of Minorities in International Law: Tracing Developments in Normative Arrangements of International Organizations." *Croatian International Relations Review* Vol. XI, No.38/39 (2005): 2. http://bib.irb.hr/datoteka/421246.CIRR_Petricusic_MR_IL.pdf.

³⁸ Giorgi, Jacopo. "Minorities Protection: Between Legal Framework and Political Mechanisms." *Pubblicazioni Centro Studi per la Pace* (2004): 4-5.

³⁹ Young, Iris Mario N. "Together in Difference: Transforming the Logic of Group Political Conflict." In *The Rights of Minority Cultures*. Edited by Will Kymlicka. New York: Oxford University Press, 1995. 162.

sustain ‘a life of its own’.”⁴⁰

Some states are still reluctant to introduce and implement minority rights claiming that giving minorities “special rights and establishing special provisions” could lead to inequality and intolerance. One of the main reasons for their reluctance is often the concept of (single) nation-states that often see the diversity within their boundaries as an obstacle to the desired homogeneity, while minority protection and rights are seen as being unnecessary and additional costs for the state. As Oommen said, “the single most important project of a nation-state was, and continues to be, homogenization”.⁴¹ This creates a vast concern for the recognition of minorities in some states and the implementation of provisions for the special protection of minorities. Some countries believe that it is easier to ignore the diversity rather than to actually face it and applicably deal with it. One reason homogenization is preferred as less costly is that, as Walzer emphasized, “homogenisation of the different groups would open the way for the assimilation of their members into a prevailing or evolving national culture”.⁴² On the other hand, authors such as Narang emphasize that although each individual is protected by universal human rights, minorities need special protection in order to both refrain states from intruding on the collective rights of minorities and to also provide active support for the enjoyment of such rights because without this special protection, minorities will continue to face shortcomings in a society.⁴³ Therefore, minority’s plurality should be cared for and accommodated within the wider society. Kreuzer, said that “the state should accommodate the ethno-cultural diversity through a strategy of neutrality of respect for the ethnic groups in the public institutions of the state and the policies

⁴⁰ Kymlicka, Will. *Multicultural Citizenship*. New York: Oxford University Press, 1995. 52.

⁴¹ Oommen, T. K. “New nationalisms and collective rights: the case of South Asia.” *In Ethnicity, Nationalism and Minority Rights*. Edited by Stephen May, Tariq Modood, and Judith Squires. New York: Cambridge University Press, 2004. 121.

⁴² Walzer, Michael. “Pluralism: A Political Perspective.” *In The Rights of Minority Cultures*. Edited by Will Kymlicka. New York: Oxford University Press, 1995. 151.

⁴³ Narang, A.S. “Ethnic Conflicts and Minority Rights.” *Economic and Political Weekly* 37, No. 27 (6 July 2002): 2698. <http://www.jstor.org/stable/4412319>.

passed in the law-making institutions”⁴⁴.

Whereas minorities are covered by various international and regional treaties, conventions, etc., they still seem to be neglected and at times are not implemented properly. In a 2010 publication, the Office of the United Nations High Commissioner for Human Rights listed some of the important UN international documents regarding the protection of minority rights and they are the following: the main universal source for the protection of minorities is the ICCPR; ICESCR, the United Nations Minorities Declaration by consensus (resolution 47/135); Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); Article 30 of the Convention on the Rights of the Child (CRC); the Convention on the Prevention and Punishment of the Crime of Genocide⁴⁵; the ILO Discrimination (Employment and Occupation) Convention⁴⁶; the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions⁴⁷; General comment No. 14 (2000) of the Committee on Economic, Social and Cultural Rights on the right to the highest attainable standard of health⁴⁸; the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law⁴⁹; etc.⁵⁰ Although these documents exist, we have to keep in mind that

⁴⁴ Kreuzer, Peter, and Mirjam Weiberg. “Framing Violence: Nation-and State-Building.” Peace Research Institute Frankfurt Reports, No.72 (2005): 7.

⁴⁵ UN Commission on Human Rights. *Convention on the Prevention and Punishment of the Crime of Genocide*, 28 April 1999, E/CN.4/RES/1999/67.

⁴⁶ International Labour Organization (ILO). *Discrimination (Employment and Occupation) Convention, C111*, 25 June 1958.

⁴⁷ UNESCO. *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*. Paris, 20 October 2005, in force 18 March 2007.

⁴⁸ UN Committee on Economic, Social and Cultural Rights (CESCR). *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4.

⁴⁹ UN General Assembly. *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law: resolution / adopted by the General Assembly*, 21 March 2006, A/RES/60/147.

⁵⁰ United Nations Human Rights Office of the High Commissioner. “Minority Rights: International Standards and Guidance for Implementation.” New York and Geneva, 2010. http://www.ohchr.org/Documents/Publications/MinorityRights_en.pdf.

other relevant documents of other organisations exist. There have been various mechanisms set up to help implement and monitor them, yet the implementation challenges remain controversial at times, particularly in situations where a government has limited facilities because of low economic development, weak institutions, etc.

Diversity should be welcomed with open arms and by not denying minorities their rights it shall provide a possibility of co-existence within a multicultural community. As Varady said, “the purpose of minority rights is to neutralize, rather than reflect and emphasize, changes in the status of a territory.”⁵¹ The only way that the majorities and minorities can peacefully co-exist with each other is through the encouragement of a free life that presupposes the freedom and acceptance of the different identities, languages, etc.⁵² By not implementing the fundamental and inalienable human rights, the diversity within and between the people(s) will not be accepted or tolerated. Kymlicka advocates the rights of minorities, but we have to be aware that his concept is not the only existing approach and theory, since there are other points of views. Minorities need to be protected, because if they are not, they will not be able to have the same ability to live and work in the conditions that the members of the majority group enjoy and sometimes take for granted.⁵³ This type of thinking also belongs to the Rawlsian and Dworkin’s egalitarian liberalism, which emphasizes the importance of giving minorities special rights in order to protect their right to the self-constitution of their individual lives.⁵⁴ Dworkin emphasized that, one part of treating all equally and with equality is recognizing that all citizens are entitled to a just share of resources, but also the promotion of internal tolerance is needed.⁵⁵ This means that each citizen should be given the same amount of resources from the state in order for their needs to be equally represented.

⁵¹ Varady, Tibor. “Minorities, Majorities, Law and Ethnicity: Reflections of the Yugoslav Case.” *Human Rights Quarterly* Vol.19 (1997): 11.

⁵² Croatian Helsinki Committee for Human Rights. *Serbs in Croatia: Yesterday, Today, and Tomorrow*. Zagreb, 1998.

⁵³ Kymlicka, Will. *The Rights of Minority Cultures*. New York: Oxford University Press, 1995. 105.

⁵⁴ *Ibid*, 105-106.

⁵⁵ Dworkin, Ronald. “What is Equality? Part 2: Equality of Resources,” *Philosophy and Public Affairs* 10, (1981b) pp. 283-345, reprinted in: R. Dworkin, *Sovereign Virtue. The Theory and Practice of Equality*, Cambridge: Harvard University Press 2000, 114.

1.3 The right to education

In order to understand the education of minorities, we first have to understand the notion of the right to education. In a report, the United Nations Children's Fund (UNICEF)⁵⁶ emphasized that "the right to education infers certain duties on the state and, like all other rights that are found within the UDHR, it must be applied without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".⁵⁷ This entails that the state should provide free, equal and non-discriminatory education to every child that requires it. As it is stated in the UDHR,

Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.⁵⁸

Unfortunately, the right to education has often been seen as a controversial topic due to its hierarchy in the international legal system. The right to education is categorized as one of the second generation rights, which requires states to fully realize this right, and entails active and resource demanding action by the state. A factor such as resources, at times, can have negative outcomes simply, because some governments claim that due to their economic difficulties they cannot implement the appropriate laws and provide financial support which may lead to several violations of the right to education.

⁵⁶ UN General Assembly. *United Nations Children's Fund*. 19 December 1966, A/RES/2214.

⁵⁷ UNICEF. *An MRG International Report Education Rights and Minorities*. Minority Rights Group, May 1994. 10.

⁵⁸ United Nations General Assembly. *Universal Declaration of Human Rights*. 10 December 1948, 217 A (III). <http://www.refworld.org/docid/3ae6b3712c.html>. (Accessed 24 May 2013).

Education is imperative for all human beings and can lead to many benefits such as, economic efficiency, improvements in social welfare, the ability to coordinate with others for mutual social advantage, standards of living, a stable social society, etc.⁵⁹ The right to education can surely be used as a sustainable development mechanism for a country. By protecting the identity and rights of minorities, minorities can play a role in helping a country transform its society into a rich, diverse and efficient economy. As Sharon E. Lee said, by promoting and implementing education as a fundamental human right “individual countries would be able to coordinate and improve international and national efforts to provide children with the skills and knowledge necessary to maximize their personal and intellectual development, which, in turn, will maximize each individual country’s social and economic returns”.⁶⁰ On the other hand, if a state does not strive to provide minority education by considering the factors such as ethnicity, socio-economic status, etc., as it does for the majority group, in the long-run, this can create various gaps between the population in regards to employment status, poverty, health status, development skills, literacy, etc.

When we speak of minority education, Bieber presented the following four essential components: “access of the individual to education through the ability to use her/his mother tongue; promotion and upkeep of minority identity through education; inclusion of minorities into society through education; and majority awareness of diversity through education”.⁶¹ Bieber accentuated that minority education can only be successful if it is a three way street. This means that the education of minorities has to consist of cooperation between the state, the majority group and the minority group, because without this cooperation there can be no positive effects.⁶² Two examples, Bieber gives, are minority language training, which can enable majorities to also learn the minority languages which is different from traditional systems in which only minorities have to learn the dominant language, and also the content of education which should be the same for both the

⁵⁹ Lee E., Sharon. “Education as a Human Right in the 21st Century.” *Democracy & Education* 21, no. 1 (2013): 5. <http://web.ebscohost.com/>.

⁶⁰ Ibid, 4.

⁶¹ Bieber, Florian. *Guide to Minorities and Education*. A joint publication of Civic Initiatives and the King Baudouin Foundation, October 2007. 16.

⁶² Ibid. 18.

minority and majority because it would be useful to learn all truths in order to avoid presenting only one perception, usually of the dominant group, and to not undermine minorities, nor their rights to their own truth. Therefore, education has to take every aspect into consideration including the social, cultural, economic, non-discriminatory and equality aspects. If everyone is doing their job in accordance with the appropriate policies and standards, these factors can be determined at the level of the school, the national level and the international level.

As it has been seen throughout history, the assimilation concept functions differently in different environments and has many faults; in my view, the integrative concept is much more effective. There are many reasons as to why assimilation cannot have positive results in a globalized and diverse world. For example, Young says that the idealism of assimilation, in order to function, requires a person to voluntarily give up all elements of his/hers life and identity, which therefore makes this concept unrealistic.⁶³ No person will feel attached to a certain society if they have not chosen the society or group themselves. Furthermore, if the assimilation system is in force and the dominant group is in charge while the rest of the minorities are oppressed, it can only create inequality and lead to disadvantaged groups in the society.⁶⁴ The concept of integration has been seen as having productive results when it comes to multicultural societies. While assimilation is seen as the ‘melting pot’, integration is seen as a concept in which minorities, usually, do not have to give up their culture, tradition, etc. in order to achieve equality.

An approach to minority education that was presented above with Bieber’s recommendations, yet various other approaches exist. For instance, one such proposal presents a case in which minority rights and education have to consider a ‘multilevel approach’ that takes into account the following elements:

A clear policy at the macro-level for the democratic and harmonious integration of minorities on a national state

⁶³ Young, Iris Mario N. “Together in Difference: Transforming the Logic of Group Political Conflict.” In *The Rights of Minority Cultures*. Edited by Will Kymlicka. New York: Oxford University Press, 1995. 163.

⁶⁴ Ibid, 163.

fostering inter-group solidarity, national stability and progress; constitutional guarantees and rights for minorities to preserve their language and culture; a supportive educational policy to implement constitutional rights; an avoidance of “minoritisation” and group isolation by promoting out-group contacts and inter-group learning; and the self-determination of minorities at the micro-level, including the option to leave a group.⁶⁵

Several authors⁶⁶ have fostered the idea of integration through education, but yet many countries have avoided doing this and have been getting zero results. However, considering the problems that different countries that avoid the concept and policies of integration are facing, it might be suggested that the only successful approach for dealing with the Roma population might be the integrative approach through the inclusion of Roma children into the educational system. As Posavec highlighted that, one of the ways that the education of the Roma can be achieved is by improving their socio-economic status and by taking into consideration their national, cultural and religious background when it comes to education methodology.⁶⁷

Unfortunately, while the situation differs from country to country, one common factor that is usually found among countries in their educational system is the fact that many of the schools do not have adequate and diverse staff, including principals, teachers, assistants, etc. from other ethnic backgrounds (i.e. the Roma ethnicity).⁶⁸ Curriculum as backbone of educational systems usually do not contain “values, ideas and perspectives” of the minorities themselves. Often these values, ideas and perspectives are omitted and all students have to learn particularly

⁶⁵ Bačlija, Irena. “Positive Discrimination“ Policies for Inclusion of Europe’s Largest Minority: Examples of Educational Policies for the Roma Minority in Europe. *Politička misao Vol. XLV, No. 5 (2008): 177.*

⁶⁶ Through their scholarly works, authors such as Lisa Catto, Adrian Marsh, H. O’Nions, Irena Bačlija, etc., have fostered the idea of integration and inclusion of the Roma population through the various educational systems.

⁶⁷ Posavec, Koraljka, and Neven Hrvatic. “Intercultural education and Roma in Croatia.” *Intercultural Education* 11, No. 1 (2000): 97-98.

⁶⁸ Marsh, Adrian. “Intercultural education as a process of developing social inclusion? Roma and education: a case study.” GRT HM Newport (2011): 2. <http://romaniarts.co.uk/wp-content/uploads/2011/05/Dr-Marshs-2011-lecture-PDF-file.pdf>.

the ‘truth’ of the dominant group in a country. Resources, such as text books, reading material, teaching methodologies, and pedagogy often contain no attachment to the non-dominant groups, which basically excludes and pushes away most of the non-dominant groups from the educational system.⁶⁹ Unless such barriers are completely removed from the classrooms, successful integration of the non-dominant groups (i.e. the Roma) into the society might be difficult.

Particularly, the Roma population needs to be paid attention to due to its situation and status in the European societies. As Catto accentuated, “there is a vast difference when comparing the treatment and education of Roma children and non-Roma children in Europe, particularly in regards to the quality and access to education.”⁷⁰ It is estimated that around 70 to 80 % of the Roma population in Europe have not completed elementary (primary school) education.⁷¹ Catto stated that, due to the non-adequate quality of the education of the Roma group, their integration into the society has been stalled for some time now and states are looking for an excuse anywhere they can. Some of the main excuses that have been used are that the Roma do not consider education as their primary goal in life nor do the parents consider schooling necessary for their children.⁷² But why is this stereotype constantly only used for the Roma population? It seems like an excuse of states and societies to avoid the problem and to place the blame on the Roma population itself. This type of stereotyping eventually leads to segregation and discrimination of Roma children and as Catto said, “although segregation is not the policy of the European countries it has certainly remained the common practice within the educational system”.⁷³

Regrettably, not only are the Roma children segregated, but when they are put into the different classrooms from the non-Roma children, their chances to gain the same knowledge and education decrease extremely. For example, the availability of school facilities, equipment and educational tools on a daily basis are substandard and they may even receive unqualified teachers, crowded classrooms and zero assistance from anyone.⁷⁴ If all human beings are supposed to have

⁶⁹ Ibid, 2.

⁷⁰ Catto, Lisa. “Xenophobia and Structural Violence: Barriers to Education for Roma Youth.” *PURE Insights* 1, Iss. 1, Article 5 (2012): 21.

⁷¹ Ibid, 21.

⁷² Ibid, 21.

⁷³ Ibid, 21.

⁷⁴ Ibid, 21-22.

the same rights, why should the Roma children be the outcastes? The integration and inclusion of the Roma children should be a priority at the international and national level (at all levels of the government). In conclusion, in the long-run, if countries were to put in a little more effort in the inclusion and integration of the Roma, including their equal integration into education it would help integrate them effectively into the society and to provide a better future and position for the Roma population in all aspects of their lives.

2. THE PROTECTION OF THE ROMA AT THE INTERNATIONAL, REGIONAL AND NATIONAL LEVEL

In the present day, there are several conventions and legal provisions that are related to the protection of human rights. International documents and standards have established human rights as individual rights, particularly following the individualistic Western traditions. As Young said, “liberal individualism does not believe in, nor does it care for, group rights, thus it suggests that group rights are fictions, whose only goal is to justify extra privileges”.⁷⁵ Unfortunately, if human rights continue to be mostly presented as individual rights that might not be enough therefore individual and collective rights should be combined. Particularly minority rights cannot be accommodated adequately only through the individual aspect.

The focus of this chapter is on the legislation and standards aimed at the protection of minority rights and the right to education, specifically the Roma population, which includes also the collective dimension of these rights. I have addressed the legal framework at the level of the United Nations (UN), CoE, the European Union (EU) and the Organisation for Security and Co-operation in Europe (OSCE). The last part is favouring the national legislation and policies of Croatia that are crucial in the elimination of obstacles limiting effective rights of every citizen.

Educational rights are identified and protected by the national, regional and international provisions, but we have to keep in mind that

⁷⁵ Young, Iris Mario N. “Together in Difference: Transforming the Logic of Group Political Conflict.” *In The Rights of Minority Cultures*. Edited by Will Kymlicka. New York: Oxford University Press, 1995. 162.

different authors establish different lists in regards to the documents both in the sense of legal documents as well as commonly shared opinions and public views. Amongst the relevant international instruments within which the right to education can be found at the universal level are the following: the UDHR, the ICESCR, ICCPR (Article 18), CRC (Articles 28, 29), Convention on the Elimination of all forms of Discrimination against Women (Article 10), UNESCO Convention against Discrimination in Education, etc.⁷⁶ There are also various regional⁷⁷ and continental⁷⁸

⁷⁶ United Nations Human Rights-Office of the High Commissioner for Human Rights. "International Standards." <http://www.ohchr.org/EN/Issues/Education/SREducation/Pages/InternationalStandards.aspx>.

⁷⁷ For reference see: Beiter, Klaus Dieter. *The Protection of the Right to Education by International Law*. The Netherlands: Koninklijke Brill NV, 2006. 155-157. In regards to some of the other regional instruments, the CoE, EU and OSCE have also provided various protection mechanisms. The CoE has several documents that protect the right to education and some of them are: the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, the European Social Charter, article 2 of Protocol No.1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1952. Educational rights of migrants and their families are shielded by articles 14 and 15 of the European Convention on the Legal Status of Migrant Workers of 1977. The EU has also put in place instruments that deal with the right to education. Some of those are Articles 149 and 150 of the Treaty Establishing the European Community of 1957; Articles 7(2) and (3) and 12 of Regulation 1612/68 and Directive 77/486 deals with the education of migrant workers and their children; article 16 of the Declaration of Fundamental Rights and Freedoms and article 14 of the Charter of Fundamental Rights of the European Union. Another organisation that has incorporated the right to education is OSCE and its policies consist of the Final Act of Helsinki of 1975; the Concluding Document of the Vienna Follow-up Meeting of the CSCE in 1989; the Hague Recommendations Regarding the Education Rights of National Minorities, etc.

⁷⁸ For reference see: Beiter, Klaus Dieter. *The Protection of the Right to Education by International Law*. The Netherlands: Koninklijke Brill NV, 2006. 155-157. In regards to the continental instruments, two examples that protect the right to education within its policies are the Organisation of American States and the former Organisation of African Unity and the African Union. In regards to the American framework, the right to education is protected by articles 34(h), 49 and 50 of the Charter of the Organisation of American States of 1948, article 13 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988, etc. The African Union has some of the following policies that protect the right to education: article 17(1) of the African Charter on Human and People's Rights of 1981, article 12 of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa of 2003 and article 11 of the African Charter on the Rights and Welfare of the Child of 1990.

documents that are relevant for the right to education.

The right to education is one of the most important rights of an individual. It is elaborated in various conventions, treaties, laws, etc. Education is seen as a connection between other rights, such as civil and political rights. For example, General Comment No. 13 of the ICESCR states that, “as an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities”.⁷⁹ Education can be seen as a process through which an individual acquires the necessary skills and knowledge needed for both himself and society in order to overcome exclusion, marginalization, poverty, etc. In Croatia many have emphasized that the education of the Roma is seen as the best way to deal with the various problems and to successfully integrate the Roma community into the Croatian society.⁸⁰ Unfortunately, whereas various countries have ratified the above-mentioned documents, only a small number of the countries have actually implemented this right in practice.

2.1 United Nations Framework for the protection of the rights of Roma people

The issue of discrimination and marginalization of the Roma has been addressed at the universal, regional and national levels. Affirmative protection has developed in the recent years, but the Roma deserve the supplementary protection. One of the main reasons is that they are one of the most vulnerable groups in the European society. Also, they are the most numerous minority in Eastern Europe, in countries such as Bulgaria, Hungary, Romania, and Slovakia. Though the exact

⁷⁹ United Nations Economic and Social Council. Implementation of the international covenant on economic, social and cultural rights. General Comment No. 13, The Right to Education (Art. 13) 08.12.1999. E/C. (General Comments), 8 December 1999. [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/ae1a0b126d068e868025683c003c8b3b?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/ae1a0b126d068e868025683c003c8b3b?Opendocument).

⁸⁰ Sležak, Hrvoje. “Uloga Roma u demografskim resursima Međimurske županije.” The role of Roma in the demographic resources in the County of Međimurje] (2013): 37. http://www.idi.hr/images/stories/publikacije/SIP_195/2_Slezak.pdf.

number is hard to define, the Roma make up around 10 to 12 million of the population in Europe.⁸¹ The Roma need special protection and affirmative action in order to safeguard their rights due to their low status in society reflected in their high rate of infant mortality, lower life expectancy, lower per-capita income, higher unemployment and a low(er) education level.⁸²

Within the UN the protection of the rights of the Roma has been in effect since 1977 and in 1979, the Economic and Social Council gave recognition to the International Romani Union as a non-governmental organisation representing the Roma population.⁸³ Organisations, such as, UNESCO and UNICEF continue to play a role in the discussions on the education of the Roma children and are involved in projects promoting the Romani language.⁸⁴ One should mention also the UN instruments, such as the ICCPR, ICESCR, ICERD⁸⁵, CRC⁸⁶, Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)⁸⁷ and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)^{88, 89}.

For instance, one of the UN human rights treaty bodies, the

⁸¹ European Commission. *EU and Roma*. http://ec.europa.eu/justice/discrimination/roma/index_en.htm.

⁸² Bačlija, Irena. "Positive Discrimination" Policies for Inclusion of Europe's Largest Minority: Examples of Educational Policies for the Roma Minority in Europe. *Politička misao Vol. XLV, No. 5 (2008): 175*.

⁸³ Council of Europe. *The Council of Europe: Protecting the rights of Roma*. 2011. 21. http://www.coe.int/AboutCoe/media/interface/publications/roms_en.pdf.

⁸⁴ Ibid.

⁸⁵ UN Committee on the Elimination of Racial Discrimination (CERD). *Implementation of the International Convention on the Elimination of All Forms of Racial Discrimination*. ECOSOC Resolution 1985/17.

⁸⁶ The Convention on the Rights of the Child was adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989. It entered into force on 2 September 1990, in accordance with article 49.

⁸⁷ UN General Assembly. *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations.

⁸⁸ UN General Assembly. *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations.

⁸⁹ Icelandic Human Rights Center. "Roma/Gypsies/Sinti". <http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/humanrightsconceptsideasandfora/Undirflokkur/romagypsiesinti/>.

Committee on the Elimination of Racial Discrimination (CERD), which monitors the implementation of one of the core international human rights conventions, the ICERD, notifies countries to enable it better to address the problems where there are proven cases of discrimination against the Roma.⁹⁰ This Committee has put great emphasis on the protection and equal inclusion of the Roma by recognizing that the most important provisions for the Roma population are the ones preventing racial discrimination. In 2000, it adopted the General Recommendation 27, which focuses on discrimination against the Roma and urges the state parties to implement practical national strategies and programmes in order to improve and protect their living standards and to eliminate the racial violence against this particular group.⁹¹

Some other examples of the safeguarding of the Roma rights are the 1991 and 1992 provisions against racial discrimination. In 1991, the Sub-Commission on the Promotion and Protection of Human Rights in Resolution 1991/21, expressed that “in many countries, various obstacles exist to the full realization by persons belonging to the Roma community of their civil, political, economic, social and cultural rights and that such obstacles constitute discrimination directed specifically against that community, rendering it particularly vulnerable”.⁹² Later, in 1992, the UN Human Rights Commission adopted the Resolution 1992/65 on the ‘Protection of Roma’ in which it advised the Sub-Commission’s Special Rapporteur on minorities “to pay special attention to and provide information on the specific conditions in which the Roma communities live”.⁹³

It might seem like the minority groups are protected, but one area that still remains a challenge for the Roma population is in the

⁹⁰ Council of Europe. The Council of Europe: Protecting the rights of Roma. 2011. 22. http://www.coe.int/AboutCoe/media/interface/publications/roms_en.pdf.

⁹¹ Icelandic Human Rights Center. “Roma/Gypsies/Sinti”. <http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/humanrightsconceptsideasandfora/Undirflokkur/romagypsiesinti/>.

⁹² Commission on Human Rights Sub-Commission on the Promotion and Protection of Human Rights. *Prevention of discrimination against and the protection of minorities: The human rights problems and protections of the Roma*. Working paper prepared by Mr. Y.K.J. Yeung Sik Yuen, pursuant to Sub-Commission decision 1999/109. Distr. GENERAL E/CN.4/Sub.2/2000/28, 23 June 2000. 2.

⁹³ Ibid, 2.

field of education in which segregation and discrimination continues to exist as well as the presence of a high dropout rate among the Roma children.⁹⁴ Recognizing the attention that the Roma population, as well as other minority populations deserve and require in order to prevent discrimination against them, the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, states that members of minorities “should have educational system based on their own language, tradition, history and culture”.⁹⁵ Article 4 states that “states should, where appropriate, take measures in the field of education, in order to encourage knowledge of the history, traditions, language and culture of the minorities existing within their territory. Persons belonging to minorities should have adequate opportunities to gain knowledge of the society as a whole”.⁹⁶ General Recommendation 27 put emphasis on the educational sphere of life, by promoting a more flexible method towards the education of the Roma in order to make it slightly less complicated for the children of travellers to enrol temporarily in schools, while on the other hand, the possibility of distance-learning and the organisation of classes in camps should also be explored by the state parties.⁹⁷

Some of the UN conventions that provide and protect the right to education of minorities are: the ICCPR, ICESCR and the CRC.⁹⁸ Some other ways the UN is involved in the protection of minorities is through its general human rights provisions, by protecting children’s rights and through the regular reporting of instruments of all of the international human rights conventions and offices, such as the UN High Commissioner for Human Rights. The UN Working Group on Minorities, through its work, addresses education in the minority languages and the issue of the proper implementation of intercultural

⁹⁴ Bieber, Florian. *Guide to Minorities and Education*. A joint publication of Civic Initiatives and the King Baudouin Foundation, October 2007. 32.

⁹⁵ UN General Assembly. *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*. 18 December 1992, A/RES/47/135. <http://www.refworld.org/docid/3ae6b38d0.html>.

⁹⁶ Ibid.

⁹⁷ Icelandic Human Rights Center. “Roma/Gypsies/Sinti”. <http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/humanrightscasesideasandfora/Undirflokkur/romagypsiesinti/>.

⁹⁸ Bieber, Florian. *Guide to Minorities and Education*. A joint publication of Civic Initiatives and the King Baudouin Foundation, October 2007. 22.

and multicultural education which will in the long-run promote tolerance and understanding between the various groups in society.⁹⁹

2.2 Relevant documents for the protection of the Roma at the European level

This section presents the work and relevant minority protection documents and standards of the CoE, the EU and the OSCE that are particularly relevant to the Roma and their minority rights, including the right to education of the Roma children. The connection between the minority rights standards at the European level and the protection of national minorities in individual countries has been evident. The CoE developed and adopted several imperative documents that deal with human rights and the protection of the rights of minorities, among them: the Framework Convention for the Protection of National Minorities (FCNM); the European Convention on Human Rights, the European Social Charter, which protects minorities in social and economic fields; the European Charter for Regional or Minority Languages, which focuses on the protection and promotion of minority languages. Within the CoE exists the European Commission against Racism and Intolerance (ECRI), also one of the key institutions for the protection of the Roma.

The FCNM was the first legally binding multilateral instrument dedicated to the protection of national minorities worldwide and its Article 12 affirms that “the Parties undertake to promote equal opportunities for access to education at all levels for persons belonging to national minorities”.¹⁰⁰ The CoE has had the protection of the national minorities on the agenda for over two decades. For example, the ECRI deals with the fight against discrimination of persons belonging to minorities and universal individual rights that are determined by the European Convention on Human Rights that can also be claimed by

⁹⁹ Ibid, 22.

¹⁰⁰ Council of Europe. *Framework Convention for the Protection of National Minorities*. Strasbourg, 1.II.1995, entered into force 1/2/1998.

persons belonging to national minorities.¹⁰¹ The CoE, particularly within the ECRI deals with the reporting of anti-Gypsyism and discrimination that occur in the member states. The General Policy Recommendation No.13 on combating anti-Gypsyism and discrimination against the Roma defines anti-Gypsyism as “a specific form of racism, an ideology founded on racial superiority, a form of dehumanisation and institutional racism nurtured by historical discrimination, which is expressed, among others, by violence, hate speech, exploitation, stigmatisation and the most blatant kind of discrimination”.¹⁰² It recommends to the governments of the member states to “employ, under a national plan, a comprehensive multidisciplinary approach to issues concerning Roma; enhance mutual trust between the Roma and public authorities, in particular by training mediators from, among others, the Roma community; combat anti-Gypsyism in the field of education, and accordingly”, etc.¹⁰³

The CoE deals with the Roma population directly through various strategies and activities. In 2005, the CoE and the European Roma and Travellers Forum (ERTF) set up an agreement, which gives the ERTF an opportunity to deal with issues regarding the Roma within the bodies of the CoE and aims to promote a “common voice within the European politics”.¹⁰⁴ In 2011, the CoE created a transversal team led by the Special Representative of the Secretary General for dealing appropriately with several of the Roma issues, such as the creation of trust, overcoming prejudice, etc.¹⁰⁵

The CoE has been involved in the education of the Roma since 1983. The CoE constantly stresses that discrimination and prejudice are present in regards to the Roma’s access to education and in 2000, the CoE Committee of Ministers adopted a Recommendation on the

¹⁰¹ Council of Europe. *Factsheet: Protection of National Minorities.1.* http://www.coe.int/t/dghl/monitoring/minorities/6_Resources/PDF_NatMin_FactSheet_final_2012_en.pdf.

¹⁰² European Commission against Racism and Intolerance. *ECRI General Policy Recommendation No.13 on combating anti-Gypsyism and discrimination against Roma.* Strasbourg, 2011. 3. http://www.coe.int/t/dghl/monitoring/ecri/activities/gpr/en/recommendation_n13/e-RPG%2013%20-%20A4.pdf.

¹⁰³ *Ibid*, 5.

¹⁰⁴ Council of Europe. *Factsheet: Protection of National Minorities. 2.* http://www.coe.int/t/dghl/monitoring/minorities/6_Resources/PDF_NatMin_FactSheet_final_2012_en.pdf.

¹⁰⁵ *Ibid*, 2.

education of Roma/Gypsy children in Europe. This Recommendation had the following goals in mind: “the recognition of the Roma as a minority, training for teachers and the other Roma education staff, development and distribution of teaching material, language teaching, studies and dissemination of information on the Roma history and culture, involvement of families, highlighting positive experiences, setting up a European study programme and a training center”.¹⁰⁶ In order to improve the implementation of the Recommendation and the project “Education of Roma children” that started in 2002, the CoE produced a ‘Reference Framework’, which consists of concrete proposals on how to make the goals into actual government policy in order to have effective outcomes, especially in regards to the educational strategies.¹⁰⁷

The EU started to be active within the minority rights area in the 1990’s, however it still does not have a specific minority rights protection regime within the legal framework. It acts within this area through elements such as the Copenhagen criteria, regular reports, strategies, economic, social, financial documents and discussions.¹⁰⁸ The issue of the fortification of minority rights within the EU holds an important conditionality for both stability and security. Unfortunately, the wording of this Copenhagen criteria leaves a wide area for interpretation, which sometimes leads to the improper implementation of such standards. As Bieber said, “as the EU neither sets the standards nor monitors minority rights systematically, the impact is constrained to the enforcement capacity of the EU”.¹⁰⁹ Therefore, if the EU does not start ‘pushing’ for the proper implementation and enforcement of minority rights, the member states will surely not be in a hurry to protect these rights on their own.

Specifically, when it comes down to the protection of the Roma rights, the EU has tried to include them within the EU agenda and the work of the EU institutions. For example, the European Parliament

¹⁰⁶ Council of Europe. *Education of Roma Children in Europe: Implementation of the Recommendation 2000(4) on the education of Roma children in Europe*. 2. http://www.coe.int/t/dg4/education/roma/Source/leaflet_EN.pdf.

¹⁰⁷ Ibid, 2.

¹⁰⁸ Müller, Stephan, and Zeljko Jovanović. *Pathway to Progress? The European Union and Roma Inclusion in the Western Balkans*. March 2010. 105.

¹⁰⁹ Bieber, Florian. *Guide to Minorities and Education*. A joint publication of Civic Initiatives and the King Baudouin Foundation, October 2007. 26.

has adopted various resolutions, implemented programmes, such as the Phare programmes and organised seminars to endorse policies in regards to the protection of the Roma rights since the 1970's.¹¹⁰ One of the various resolutions, adopted by the European Parliament in 2008, named "A European Strategy for Roma" deals with the preservation and promotion of rights such as, the right to education, employment, health and housing and takes into account both the Member States and the candidate countries.¹¹¹ Another EU institution that has tried to integrate the Roma into the EU and its policies is the European Commission. In 2011, when they implemented an EU Framework for National Roma Integration Strategies up to 2020. This Strategy calls upon the Member States to prepare and/or revise their 'National Roma Integration Strategies' in order to be able to deal with the modern day issues and to effectively address the challenges of the integration of the Roma, in addition to providing an inclusive integrated and sustainable approach in regards to the every-day problems of the Roma.¹¹²

In regards to education, the EU does not have 'direct competency' within this area, but according to Articles 149 and 150 of the Rome Treaty, the EU Member States have to provide and contribute to the full development of quality education.¹¹³ In 2005, the European Parliament adopted a resolution which specified that there is a need for implementing adequate measures in order to overcome segregation of the Roma in education.¹¹⁴ Although the EU is trying to be committed to minority rights, some of the European governments and pan-European institutions have often 'misunderstood, misapplied or underutilized' minority rights as a supervisory pattern in the policy-making field, particularly regarding policies related to the Roma. Regrettably, the Roma within the EU are rarely recognized as a minority group that is

¹¹⁰ Council of Europe. *The Council of Europe: Protecting the rights of Roma*. 2011. 21. http://www.coe.int/AboutCoe/media/interface/publications/roms_en.pdf.

¹¹¹ Müller, Stephan, and Zeljko Jovanović. *Pathway to Progress? The European Union and Roma Inclusion in the Western Balkans*. March 2010. 58.

¹¹² European Union. *National Roma Integration Strategies: a first step in the implementation of the EU Framework*. COM (2012) 226, 21 May 2012. 6. http://ec.europa.eu/justice/discrimination/files/roma_nat_integration_strat_en.pdf.

¹¹³ Bačlija, Irena. "Positive Discrimination" Policies for Inclusion of Europe's Largest Minority: Examples of Educational Policies for the Roma Minority in Europe. *Politička misao Vol. XLV, No. 5 (2008): 178*.

¹¹⁴ Ibid.

entitled to the full package consisting of minority rights.¹¹⁵

The significance of minority issues at the regional level is also reflected in the work of the OSCE. In 1990, with the Copenhagen Document, it was essentially the first IO to recognize the issues of the Roma such as proliferation of racial and ethnic hatred, xenophobia and discrimination. OSCE, through its various documents, recognizes the need for the protection of minorities particularly in the following documents: the Document of the 1990 Copenhagen Meeting of the Conference on the Human Dimension of the Conference for Security and Cooperation in Europe; the Hague Recommendations regarding the Education Rights of National Minorities (1996); the Oslo Recommendations regarding the Linguistic Rights of National Minorities (1998); and the Lund Recommendations on the Effective Participation of National Minorities in Public Life (1999).¹¹⁶

An actor within the OSCE that plays an important role in the field of minority protection is the High Commissioner on National Minorities who addresses the education rights of minorities through his work, as well as its importance for effective minority protection. For example, the High Commissioner with a team of experts drafted and adopted the “Hague Recommendations Regarding the Educational Rights of National Minorities“. Their main goal is to merge international law and national practice into clear cut principles and practical recommendations for states and other actors.¹¹⁷ An important novelty that the different Hague Recommendations bring is the recognition of the need to address the majority groups/populations in order to create acceptance towards minorities and promote equality between the various groups.¹¹⁸

Regrettably, while these three organisations have tried to put into effect some of the proper policies and strategies as well as legally binding documents for the protection of minority and particularly Roma rights, there still continues to be a lack of effective implementation of these policies. As the CoE Commissioner for Human Rights stressed,

¹¹⁵ Kostadinova, Galina. “Minority Rights as a Normative Framework for Addressing the Situation of Roma in Europe.“ *Oxford Development Studies* Vol. 39, No. 2 (June 2011). 168.

¹¹⁶ Ibid, 171.

¹¹⁷ Bieber, Florian. Guide to Minorities and Education. A joint publication of Civic Initiatives and the King Baudouin Foundation, October 2007. 24.

¹¹⁸ Ibid.

“although the Roma issue has been put on several agendas of national governments and various organisations, there continues to be a shameful lack of implementation concerning the human rights of Roma”.¹¹⁹

2.3 Croatia’s national legislation and policies

In addition to the UN and regional efforts, the necessity of addressing minority rights at the national level is of crucial importance. Croatia’s legal framework is essential due to the fact that it is now officially an EU Member State. In this context it is important to see how the country has played its role in regards to the full respect of minority’s rights, such as the right to education. Croatia is a diverse country which sometimes, along with the other Western Balkan countries, faces challenges when dealing with minority rights, such as education rights. According to the 2011 census¹²⁰, the Serbs make up 4.36% of the population, the Bosniacs 0.73%, the Roma 0.40%, and the Hungarians 0.33%.¹²¹ The Croatian Bureau of Statistics reports 9,463 Roma persons living in Croatia, which amounts to 0.21% of the total population.¹²² Several Croatian laws and regulations guarantee the protection of minority rights, but the country’s significant ethnic diversity has put forward challenges to try to accommodate the demands of its minority communities.

Croatia is a state party to many of the mentioned international and

¹¹⁹ Commissioner for Human Rights. “Positions on the human rights of Roma/ Position Paper from the Commissioner for Human Rights.” Strasbourg, 30 May 2010. <https://wcd.coe.int/ViewDoc.jsp?id=1631909>.

¹²⁰ Some of the other minorities include: Albanians 17,513 (0.41%) of the population, Austrians 297 (0.01%), Bulgarians 350 (0.01%), 4,517 Montenegrins (0.11%), Czechs 9,641 (0.22%), 4,138 Macedonians (0.10%), Germans, 2,965 (0.07%), Poles 672 (0.02%), Romanians 435 (0.01%), Russians, 1,279 (0.03%), Russians in 1936 (0.05%), Slovaks, 4,753 (0.11%), Slovenes 10,517 (0.25%), Italians 17,807 (0.42%), Turks 367 (0.01%), Ukrainians, 1,878 (0.04%), Blaise 29 (0.00) and 509 Jews (0.01%).

¹²¹ The Croatian Bureau of Statistics. *Population by ethnicity, 1971-2011 Censuses*. http://www.dzs.hr/Eng/censuses/census2011/results/htm/usp_03_EN.htm.

¹²² The Croatian Bureau of Statistics. *Population by Ethnicity, Towns, Municipalites. Census 2001*. http://www.dzs.hr/Eng/censuses/Census2001/Popis/E01_02_02/E01_02_02.html.

regional conventions and treaties such as the: ICESCR; ICCPR; ICERD; CRC; UNESCO Convention against Discrimination in Education; FCNM; the European Charter on Regional and Minority Languages, etc.¹²³ As the state party to the ICESCR Croatia must implement the four A's¹²⁴ of the right to education which are the following: availability, accessibility, acceptability and adaptability.¹²⁵ This means that it has to provide for the appropriate legislation and resources for the realization of the right to education.

Croatia's legal system for minority protection consists of an inclusive set of national norms and a number of other vital documents. Some of the main instruments used for the protection of the rights of national minorities are the following: Constitutional Act on the Rights of National Minorities, the Act on the Use of Languages and Scripts of National Minorities, the Law on Education in the Language and Script of National Minorities (this law grants national minorities the right to education in their mother tongue at all

¹²³ Ministry of Foreign and European Affairs of the Republic of Croatia. "Multilateral Relations - Human Rights in the Republic of Croatia." <http://un.mfa.hr/?mh=154&mv=2786#3>.

¹²⁴ The four A's can be found in the General Comment no. 13 on the right to education. The first one, availability implies that, the "educational institutions and programmes have to be available for everyone and that it has to be provided within the satisfactory quantity". Accessibility, means that once again the "educational institutions and programmes have to be accessible to everyone, without the practice of discrimination and it contains three significant elements which are non-discrimination, physical accessibility and economic accessibility". These three elements within accessibility mean that "the right to education must be accessible to all, especially the most vulnerable groups; it must be held within a reasonable distance; and it must be affordable for every human being. The third one, acceptability states that education must be acceptable when it comes to the 'form and substance', which includes the curriculum and teaching methods and both have to consist of good quality. The fourth A, is adaptability and this indicates that due to the constant changes in the society and communities, education must be flexible so that it can accommodate everyone, including the diverse social and cultural identities.

¹²⁵ United Nations Economic and Social Council. Implementation of the international covenant on economic, social and cultural rights. General Comment No. 13, The Right to Education (Art. 13) 08.12.1999. E/C. (General Comments), 8 December 1999. [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/ae1a0b126d068e868025683c003c8b3b?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/ae1a0b126d068e868025683c003c8b3b?Opendocument).

levels of education if the required conditions are met), the Asylum Act, the Anti-discrimination Act, the Primary and Secondary School Textbooks Act, the National Plan to Combat Discrimination 2008 – 2013, etc.¹²⁶ For example, the protection of the rights of national minorities is guaranteed in Article 15 of the Constitution and this protection is outlined in detail in the special Constitutional Law.¹²⁷ The adoption of the Constitutional Law on the Rights of National Minorities in 2002 has helped to fairly progress the situation in regards to the Roma situation as well.¹²⁸ In regards to the state institution that has been the most involved in the protection of minority rights, it would be the Office for National Minorities of the Republic of Croatia in cooperation with the Council of National Minorities.

One law that is crucial for minorities is the Law on Education in the Language and Script of National Minorities that regulates education in the minority's language and national language and it shall provide equality and non-discrimination in education for children and adults. The education of national minorities in Croatia is carried out by three basic and some special models of schooling: education in the minority's language and script; bilingual education and nurturing their language and culture. In the 2011/2012 school year, it was calculated that 62% of the primary school pupils used their minority language as the language of instruction.¹²⁹ Croatia aligned its legislation in the area of anti-discrimination through the adoption of amendments to the Anti-discrimination Act in September 2012.

Of great importance for the minorities is the Anti-Discrimination Act, adopted in 2008 that establishes the Ombudsman as the central

¹²⁶ Government of the Republic of Croatia. "Republic of Croatia National Programme for the Alliance of Civilisations (2010 – 2012)". Adopted in 2010. 10.

¹²⁷ Ministry of Foreign and European Affairs of the Republic of Croatia. "Multilateral Relations - Human Rights in the Republic of Croatia." <http://un.mfa.hr/?mh=154&mv=2786#3>.

¹²⁸ Minority Rights Group International, *World Directory of Minorities and Indigenous Peoples - Croatia: Overview*, July 2008, available at: <http://www.unhcr.org/refworld/docid/4954ce1ec.html>.

¹²⁹ Directorate-General for External Policies-Policy Department. *Mainstreaming Human and Minority Rights in the EU Enlargement in the EU with the Western Balkans*. December 2012. 47.

body for the suppression of discrimination.¹³⁰ It is significant for minorities due to the fact that it detects cases of discrimination, which can be present in all areas of everyday life. One example in which this law was used in practice occurred in September 2012 in Gornji Hrašćan (Međimurje County), when 50 local non-Roma parents prevented 44 Roma children from attending their first day of pre-school at a local school. This was a clear cut case of discrimination according to the Anti-Discrimination Act and in accordance with the Act the situation was resolved immediately on the day of the incident.¹³¹ Despite this legislation, a 2013 report stated that there have to be further initiatives implemented that deal with the promotion of raising awareness of non-discrimination, creation of tolerance and mutual respect between communities and in regards to combating discrimination against minorities.¹³²

The Law on Primary and Secondary School Education, which has been in force since 2008, is another law that should be mentioned due to the fact that all schools, in accordance with this Law should provide quality education as well as a social and cultural environment for all children. According to the recent amendment of this law in 2010, the schools have a duty to provide special assistance to children with low knowledge of the Croatian language and it can be used as a legal basis for the introduction of tests that are designed to evaluate the command of the Croatian language.¹³³ This is a useful tool in preventing further discrimination and segregation of the Roma

¹³⁰ European Commission against Racism and Intolerance. *ECRI Report on Croatia – fourth monitoring cycle*. 25 September 2012. 7. <http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Croatia/HRV-CbC-IV-2012-045-ENG.pdf>.

¹³¹ Decade of Roma Inclusion 2005-2015. *Progress Report 2012 – Croatia*.5. http://www.romadecade.org/cms/upload/file/9276_file2_decade-progress-report-hr.pdf.

¹³² Vlada Republike Hrvatske. *Nacionalni program zaštite i promicanja ljudskih prava za razdoblje od 2013. do 2016.* [Translated by the author: National Programme for the Protection and Promotion of Human Rights for the period of 2013 until 2016]. April 2013. 24. http://www.uljppnm.vlada.hr/images/nap_2013-2016.pdf.

¹³³ European Commission against Racism and Intolerance. *ECRI Report on Croatia – fourth monitoring cycle*. 25 September 2012. 19. <http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Croatia/HRV-CbC-IV-2012-045-ENG.pdf>.

children, who shall be enrolled in classes according to their actual language skills.

Some of the more specifically Roma oriented political documents are the National Strategy for the Creation of a Sustaining Environment for Civil Society Development 2006-2011, the National Plan of Activities for the Rights and Interests of Children 2006-2012, the Strategy for the Development or Vocational Education in the Republic of Croatia 2008-2013, the National Programme for Roma, the Action Plan for the Decade of Roma Inclusion 2005-2015, etc.¹³⁴ In 2003, the Government of the Republic of Croatia adopted the National Programme for Roma which was based on the need to deal with the specific problems of the Roma community in Croatia. It aimed to provide organised support to the Roma thus improving their basic living conditions and to make improvements in their overall participation in the social life and decision-making processes at the state and local level.¹³⁵ It was also designed to help with the main problems that the Roma population deals with on a daily basis. It provides both short-term and long-term goals and tasks that Croatia should undertake in the field of health, education, social welfare, employment, housing and status issues. These measures should be implemented in order to deal with the unresolved problems and to achieve the integration of the Roma into the Croatian society, thereby improving the situation of the Roma community.

A 2013 report by the Croatian Government's Office for Human Rights and the Rights of National Minorities stated that since the adoption of the National Programme for Roma, there has been progress made in regards to the implementation of measures in all specific areas, especially when it comes to education. It was made evident that the number of the Roma children attending the regular school system had increased when comparing it to the previous enrolment data. Accordingly, Ministry of Science, Education and Sport (MoSES) has been active in integrating the minority children by launching special

¹³⁴ Government of the Republic of Croatia. "Republic of Croatia National Programme for the Alliance of Civilisations (2010 - 2012)". Adopted in 2010. 10.

¹³⁵ Government of the Republic of Croatia. *The National Program for the Roma*. Zagreb, 2003. 3.

programmes for the inclusion of the Roma students in the education system and through the active participation in the implementation of the National Programme for Roma.¹³⁶ The Decade Action Plan has been designed by the Croatian government in each of the envisaged areas in order to eliminate marginalization and discrimination of the Roma minority, to reduce poverty, increase the economic development of its members and ensure their higher standard of living.¹³⁷

As presented, Croatia has certainly applied some crucial steps for the implementation of the policies which are in line with the international and regional standards for the provision of adequate and equal education for the Roma children. However, Croatia still faces problems in regards to the protection of national minorities, especially when it comes to the proper integration of the Roma into the society.¹³⁸ In 2007, Bieber highlighted that Croatia faced uncertainties in areas such as, intercultural dialogue between the different groups, discrimination and segregation and trying to receive full support from all levels of the government.¹³⁹ Unfortunately, a 2012 progress report showed that the same uncertainties still applied and indicated that one of the biggest human right problems continues to be societal discrimination against ethnic minorities, such as violence directed against members of the ethnic minorities, specifically the Serbs and Roma.¹⁴⁰ Discrimination against the Roma population within the educational system still persists, with many of the Roma children still being sent to special classes, due to their low knowledge of the Croatian language. In these type of classes they receive an inferior level of education, which in the long-run reduces their opportunity to continue with secondary and possibly

¹³⁶ Bieber, Florian. *Guide to Minorities and Education*. A joint publication of Civic Initiatives and the King Baudouin Foundation, October 2007. 46.

¹³⁷ Government of the Republic of Croatia. "Republic of Croatia National Programme for the Alliance of Civilisations (2010 – 2012)". Adopted in 2010. 18.

¹³⁸ Tatalović, Siniša. "National Minorities and Croatian Democracy." *Politička misao* Vol. XLIII, No. 5 (2006): 58.

¹³⁹ Bieber, Florian. *Guide to Minorities and Education*. A joint publication of Civic Initiatives and the King Baudouin Foundation, October 2007. 49.

¹⁴⁰ United States Department of State. *2012 Country Reports on Human Rights Practices – Croatia*. 19 April 2013. <http://www.refworld.org/docid/517e6e4a18.html>.

tertiary education.¹⁴¹ Therefore, while some may say that Croatia is a “success story”, it still has a long way to go. However, Croatia can definitely be considered as an example of using good practices when dealing with such vulnerable matters.

3. ROMA IN CROATIA

As explained, in this chapter I analyse the case of Croatia in regards to the right to education of the Roma children. I present the general situation of the Roma in Croatia particularly their socio-economic circumstances and their right to education in the primary schools. Thus, the chapter explores classroom segregation and discrimination, access to adequate education and the general-wide strategies that have been used to evoke positive measures. All persons, as presented in various legal provisions, should get adequate and equal education to which particularly all children should have access to in Croatia. Therefore, why should exclusion of the Roma children portray Croatia in the 21st century?

3.1 General situation of Roma in Croatia

The Roma have had quite a long history in Croatia. Since their arrival in Croatia in the 14th century, they have lived not only as nomads, but they have mainly settled in and developed their homes in Croatia.¹⁴² The number of the Roma present in Croatia increases each year and yet the group still faces marginalization and discrimination in their lives in areas such as: economic, social, cultural, and political.¹⁴³ When we compare the population census in 2001 with the recent population census conducted in 2011, the number of the Roma in 2001 was 9, 463 and in the recent census that

¹⁴¹ Directorate-General for External Policies-Policy Department. *Mainstreaming Human and Minority Rights in the EU Enlargement in the EU with the Western Balkans*. December 2012. 47.

¹⁴² Posavec, Koraljka, and Neven Hrvatic. “Intercultural education and Roma in Croatia.” *Intercultural Education* 11, No. 1 (2000): 93.

¹⁴³ Roma Education Fund. *Needs Assessment Study for the Roma Education Fund Background Paper – Croatia*. Paris, 3 December 2004. 1.

number increased to 16,975 Roma living in Croatia.¹⁴⁴ The Roma in Croatia have throughout the years tried to structure and preserve their specific culture and national identity based on their family roots.¹⁴⁵ On the other hand, the Roma in Croatia are heterogeneous communities, differing in their lingual, socio-economic and religious situations and affiliation.¹⁴⁶ One example I have mentioned is the difference in their language. The Roma in Croatia consist of two lingual groups and those are the ‘Ijimba d’bjaš’ and the ‘Romani Chib’.¹⁴⁷ As Tin Gazivoda said, “the diversity within the Roma community is the most evident in Croatia”. There is also a large concentration of the Roma population in the Međimurje County and it has grown, as it can be seen from the 2011 population census.¹⁴⁸

The general situation of the Roma population varies from country to country, nevertheless one common factor that is most likely to be found within the community is their inferior and marginalized socio-economic position in a specific country. Due to the specificity of their tradition and its role in their everyday life in Croatia, most of the Roma, in regards to earning their income, work in the trade area of secondary raw-materials, crafts and trade, and begging in the streets. In regards to the statistical data on the unemployment of the Roma population, the number is high. For example, in December 2011, it was estimated that the number of unemployed Roma was 4,500 and a survey showed that 65% of the unemployed Roma were between the ages of 16 and 64.¹⁴⁹ According to a 2011 report, the percentage of the Roma that have access to medical insurance is 82%, while the non-Roma population has 97%. Moreover, 91%

¹⁴⁴ The Croatian Bureau of Statistics. *Population by ethnicity, 1971-2011 Censuses*. http://www.dzs.hr/Eng/censuses/census2011/results/htm/usp_03_EN.htm.

¹⁴⁵ Posavec, Koraljka, and Neven Hrvatic. “Intercultural education and Roma in Croatia.” *Intercultural Education* 11, No. 1 (2000): 96.

¹⁴⁶ Roma Education Fund. *Needs Assessment Study for the Roma Education Fund Background Paper – Croatia*. Paris, 3 December 2004. 6.

¹⁴⁷ Ibid.

¹⁴⁸ Personal interview with Tin Gazivoda, Open Society Foundations Advisor for Croatia. 18 July 2013.

¹⁴⁹ OSCE Office for Democratic Institutions and Human Rights. *Best Practices for Roma Integration Regional Report on Anti-discrimination and Participation of Roma in Local Decision-Making*. May 2013. 15. <http://www.osce.org/odihr/102083>.

of the Roma population has access to health services and 98% of the non-Roma population has that access, while 44% of Roma lack access to indispensable drugs.¹⁵⁰ As it can be seen, these numbers are quite high and many of them still cannot retain drugs that they might need on a daily basis.

The Roma population face hardships in their everyday life and have witnessed a sequence of poverty. Even though Croatia has been part of the Decade throughout the whole period, 92.31% of the Roma have income less than 60% of the median, while for the non-Roma this number is 41.96%.¹⁵¹ Another problem that is still present is that one quarter of the Roma live in slums or dilapidated dwellings, which is six times more than the number of non-Roma.¹⁵² Moreover, they continue to face problems with indoor bathrooms, direct access to portable water, indoor facilities, heating, etc. To be precise, 45% of the Roma households do not contain indoor facilities, while only 5% of the non-Roma population have this problem. Only 4% of the non-Roma households lack direct access to portable water, while the percentage reaches 35% when it come to the Roma households. These types of problems make it hard for anyone to live a healthy and productive life. Likewise, 10% of all children in Croatia under the age of 14 live in poor households, while the majority are the Roma children. Though several years have passed by since Croatia joined the Decade of Roma Inclusion, the Roma population is still the most vulnerable group, thus meaning that Croatia still needs to work on its policies that will help to reinforce the integration of the Roma and social recovery in the country.¹⁵³

Until the present time, many efforts have been undertaken to prevent discrimination and to integrate the Roma into the society, but the development of “friendly” relations between the Roma and

¹⁵⁰ Ibid, 15.

¹⁵¹ Decade of Roma Inclusion 2005-2015. *Progress Report 2012 – Croatia*. 1. http://www.romadecade.org/cms/upload/file/9276_file2_decade-progress-report-hr.pdf.

¹⁵² OSCE Office for Democratic Institutions and Human Rights. *Best Practices for Roma Integration Regional Report on Anti-discrimination and Participation of Roma in Local Decision-Making*. May 2013. 15. <http://www.osce.org/odihr/102083>.

¹⁵³ UNICEF. *Croatia-Country programme document 2012-2016*. 2011. 2. http://www.unicef.org/about/execboard/files/Croatia_final_approved_2012-2016_18_Oct_2011.pdf.

the rest of the society has not fully progressed. The Roma have been looked at with cynicism and disgust and this is mainly due to the stereotypes and offensive judgement of the non-Roma population. It is actually not true that such a situation is due to the Roma resistance, their tradition, nor their mentality.¹⁵⁴ As Sležak mentioned, the key to overcoming discrimination and harassment is to improve the social standing of the Roma population. Due to the fact that they are highly unskilled in a country in which globalization is expanding, they will continue to be at a high hazard of poverty. Additionally, “disabling stigmatization towards the Roma group will not be attained unless there are major changes in their socio-economic and educational status”.¹⁵⁵ One way in which the integration of the Roma population could go faster and much easier is through the development and improvement of their socio-economic position. It cannot be stressed enough that one way in which this could be done is through the educational system.

3.2 Primary education of Roma children

Enjoying the right to education, a human being can achieve various goals and due to this, discrimination should be prevented in the area of education. Education should not be used as a way to assimilate the Roma children into the society, and to make them forget about their own culture, traditions and language, but rather should become a means of their successful voluntary and equal integration. Education should be seen as an effective tool to be used during the “integration phase” of the Roma into the society. Unfortunately, the consistency of the low level of education and high-dropout rates among the Roma are evident. One of the explanations for this can be their poor command of the Croatian language and the feeling of being treated as the ‘outsiders’. Without the knowledge of the official language of a country, a person cannot

¹⁵⁴ Posavec, Koraljka, and Neven Hrvatic. “Intercultural education and Roma in Croatia.” *Intercultural Education* 11, No. 1 (2000): 94.

¹⁵⁵ Sležak, Hrvoje, and Laura Šakaja. “Prostorni aspekti socijalne distance prema Romima.” [Translated by the author: Spatial aspects of social distance towards the Roma] *Hrvatski Geografski Glasnik* 74, 1 (2012): 109.

learn the skills needed to take full advantage of their rights as citizens. In a 2012 report it was noted that a total of 6% of the Roma population speaks the Croatian language. On the other hand, a positive illustration within a 2011 Roma survey report indicated that the literacy rate for the Roma population older than 16 years is 84%.¹⁵⁶ Another fact that is of interest is that when comparing urban and rural Roma children, 92.2% from the urban area attend primary school, while 85.7% from the rural area attend.¹⁵⁷ Only 40% of the Roma children in Croatia complete primary education. This is a low figure when comparing it to the number of the Roma children present in Croatia each year at the age of the attendance of primary schooling.

Primary education in Croatia is compulsory, yet a breakthrough for the attendance of the Roma children and lower dropout rates in primary schools is on hold. In order to get a clearer picture of the situation, some statistics will be presented compiled by MoSES.¹⁵⁸ During the 2006/2007 school year, there were only 3,010 Roma pupils present and in the 2007/2008 school year there were 3,786 enrolled. At the beginning of the 2008 school year, there was a total of 3,940 pupils and at the end of that school year, in 2009, there was a decrease in the Roma pupils present, with a number of 3,936. Nevertheless, a positive result of the Action Plan on the Decade of Roma Inclusion implemented since 2005 was that, the number of the Roma children enrolled in primary schools had tripled in the 2009/2010 school year, with 4,186 pupils enrolled.¹⁵⁹ Ill-advisedly, it was reported that at the

¹⁵⁶ UNDP/World Bank/European Commission. *Regional Roma Survey 2011-Croatia*. <http://europeandcis.undp.org/ourwork/roma/show/D69F01FE-F203-1EE9-B45121B12A557E1B#ROMAexplore>.

¹⁵⁷ Potočnik, Dunja. "Access to Education and Educational Achievements of Roma Children and Youth in Croatia." PDF Lecture given at an international conference in Zagreb, 22-23, 2013. Slide 4. http://tromadecade.org/cms/upload/file/9469_file5_dpococnik_22042013_en-%255Bcompatibility-mode%255D.pdf.

¹⁵⁸ The Ministry started to collect statistics on this data only since 2005.

¹⁵⁹ Ministarstvo znanosti, obrazovanja i sporta Republike Hrvatske. Akcijski plan Desetljeća za uključivanje Roma 2005.-2015. - izvješće za 2009. i 2010. Izvješće za osnovnoškolsko obrazovanje za 2009 i 2010. [Translated by the author: Action Plan for the Decade of Roma Inclusion 2005-2015 - Report for the period of 2009 until 2010. Report for primary education for 2009 and 2010]. 1. <http://public.mzos.hr/Default.aspx?art=9684&sec=3156>.

end of that particular school year, there were only 4, 172 Roma children remaining. These statistics show that there was a total of 14 dropouts at the end of 2010. In relation to the number of the Roma only classrooms, the systematic monitoring of this issue only began in 2008 with the help of the state administration offices. Accordingly, in 2008/2009 there were 52 and in 2009/2010 there were 44 Roma only classrooms.¹⁶⁰ In regards to the dropout statistics, in 2008/2009 there was a total of 136 pupils that dropped out and in 2009/2010, there was 144 pupils who dropped out.¹⁶¹

In 2010 some minor changes can also be seen. In the 2010/2011 school year, there were 4,435 Roma children enrolled.¹⁶² The Decade of Roma Inclusion 2012 Progress Report mentioned that the number of pupils attending primary school in Croatia has increased over the years. To be precise, in 2011 at the beginning of the school year, the number of pupils enrolled was 4,915 and in the 2012 school year there were 5,173 pupils enrolled. In the past three years in connection with the enrolment, as it can be seen from the given statistics, there have been positive developments regarding the number that is increasing each school year, but the number of enrollees remains quite low when looking at the number of Roma children at the age of primary schooling. When it comes to the drop-out rates, there was a total of 4,435 Roma children in 2010 at the beginning of the school year, but at the end of the school year in 2011 there were 4,723 pupils. This is a positive example of more pupils actually enrolling during the school year.

Regarding the repeating of grades, in the school year 2011/2012

¹⁶⁰ Ibid, 10.

¹⁶¹ Vlada Republike Hrvatske. *Izvešće o provođenju Ustavnog zakona o pravima nacionalnih manjina i utrošku sredstava osiguranih u Državnom proračunu Republike Hrvatske za 2012. godinu*. [Translated by the author: Report by the Government of the Republic of Croatia on the implementation of the Constitutional Law on Minority Rights and on the expenditure of funds provided in the state budget of Croatia for the year 2012 for national minorities], Zagreb, July 2013. 19. <http://www.uljppnm.vlada.hr/images/26072013/izvjescje%20o%20provedbi%20uzpnm-a%20-%20za%202012.pdf>.

¹⁶² European Commission against Racism and Intolerance. *ECRI Report on Croatia – fourth monitoring cycle*. 25 September 2012. 18. <http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Croatia/HRV-CbC-IV-2012-045-ENG.pdf>.

there were 604 repeaters, while 2012/2013 consisted of 431 repeaters.¹⁶³ In addition, the number of the Roma only classrooms has decreased, but remains high. While there were 53 classrooms in the 2010/2011 year, there were 52 classrooms in the 2011/2012 year, which decreased to 50 in 2012/2013. Out of a total of 2,028 classrooms with the Roma pupils in the 2012/2013 school year, only 50 were Roma only classrooms and the rest were mixed classrooms.¹⁶⁴ Unfortunately, the number of pupils that finish primary school remains low and many leave during the school year and never come back to finish it.¹⁶⁵ According to the dropout statistics, in 2010/2011, there were 173 dropouts and in 2011/2012 there were 189 dropouts. As it is evident from the statistical data, regardless of all policies and measures the number of dropouts still continues to increase each school year.¹⁶⁶

Hence, although, there have been some improvements, there still have to be specific and further efforts made in order to try and reduce the dropout rates. One interesting fact that was found was that the education aspirations of the Roma children were not 'in agreement' with the actual education attained, meaning that the Roma children

¹⁶³ Vlada Republike Hrvatske. *Izvešće o provođenju Ustavnog zakona o pravima nacionalnih manjina i utrošku sredstava osiguranih u Državnom proračunu Republike Hrvatske za 2012. godinu*. [Translated by the author: Report by the Government of the Republic of Croatia on the implementation of the Constitutional Law on Minority Rights and on the expenditure of funds provided in the state budget of Croatia for the year 2012 for national minorities]. Zagreb, July 2013. 19-20. <http://www.uljppnm.vlada.hr/images/26072013/izvjsce%20o%20provedbi%20uzpnm-a%20-%20za%202012.pdf>.

¹⁶⁴ Decade of Roma Inclusion 2005-2015. *Progress Report 2012 – Croatia*. 7. http://www.romadecade.org/cms/upload/file/9276_file2_decade-progress-report-hr.pdf.

¹⁶⁵ Ibid, 7.

¹⁶⁶ Vlada Republike Hrvatske. *Izvešće o provođenju Ustavnog zakona o pravima nacionalnih manjina i utrošku sredstava osiguranih u Državnom proračunu Republike Hrvatske za 2012. godinu*. [Translated by the author: Report by the Government of the Republic of Croatia on the implementation of the Constitutional Law on Minority Rights and on the expenditure of funds provided in the state budget of Croatia for the year 2012 for national minorities]. Zagreb, July 2013. 19. <http://www.uljppnm.vlada.hr/images/26072013/izvjsce%20o%20provedbi%20uzpnm-a%20-%20za%202012.pdf>.

precisely would like to earn a higher education.¹⁶⁷ Thus, as to why such a low number of the Roma children attains education is puzzling, but one of the reasons is most likely due to the constant discrimination and segregation of this group.

3.2.1 Classroom segregation and discrimination

Segregation and discrimination have been forbidden by several international and regional documents, standards and organisations as well as at the national level by the adoption and implementation of legal documents, strategies and action plans. Conversely, the Roma population still faces discrimination on a daily basis, particularly by being excluded from the mainstream society in Croatia.¹⁶⁸ In addition to discrimination and segregation, the Roma children face various problems in Croatia in regards to their motivation and maintenance of their education due to reasons such as poverty, language barriers, etc. A 2012 report prepared by the Croatian Ombudsman emphasized that primary education is to be equal and adequate for all children in Croatia, yet the Roma children still face various problems such as discrimination in the schools and also a low level of support from their parents.¹⁶⁹ It is my belief that discrimination and segregation have no place in society and the existence of such practices can only harm and prolong the full integration of the Roma and Roma children into the society. One of the main reasons for the existence of the negative stereotypes and attitudes

¹⁶⁷ Potočnik, Dunja. "Access to Education and Educational Achievements of Roma Children and Youth in Croatia." PDF Lecture given at an international conference in Zagreb, 22-23, 2013. Slide 9. http://romadecade.org/cms/upload/file/9469_file5_dpocnik_22042013_en-%25Bcompatibility-mode%25D.pdf.

¹⁶⁸ European Commission against Racism and Intolerance. *ECRI Report on Croatia – fourth monitoring cycle*. 25 September 2012. 33. <http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Croatia/HRV-CbC-IV-2012-045-ENG.pdf>.

¹⁶⁹ Pučki pravobranitelj. *Izvešće o pojavama diskriminacije za 2012. godinu*. [Translated by the author: *Report on the presence of discrimination in 2012 by the Ombudsman in the Republic of Croatia.*] Zagreb, June 2013. 44. <http://www.ombudsman.hr/dodaci/Izve%C5%A1%C4%87e%20o%20pojavama%20diskriminacije.pdf>.

toward the Roma is the lack of will to learn about the Roma culture and lifestyle, which in the long-run contributes to the failure in improving the educational standards for the Roma children.¹⁷⁰

In order to show the presence of segregation, the examples of Roma only classrooms in Međimurje County are presented. Thus, in 2001, in the “Primary School Kuršanec”, 88% of the Roma children went to the Roma only classes and in a primary school in Macinec, 83% of the pupils went to those type of classes. One of the Roma pupils from Međimurje County named Dejan said that he was in the segregated classes during all his school years and that his language skills were never tested in order to see if can be integrated into the non-Roma classrooms.¹⁷¹ Even after the verdict had been given of the ECtHR, Croatia has registered the practices of exclusion of the Roma pupils such as the previously mentioned case in September 2012 in Gornji Hraščan. Some of the comments made by the non-Roma parents were that “there was no more room in the school; that they had built that school and they did not want ‘others’ to go into it and that they were going to burn down the school together with the Roma children inside”.¹⁷² In answering the question does segregation and/or discrimination against the Roma children still exist today in primary schools of Croatia?, Tomljenović answered, “yes, segregation is linked to residential segregation and due to white flight, schools near large Roma communities usually in time become Roma-only.”¹⁷³

Another problem that has been evident is the fact that the Roma pupils are at times put into special needs schools due to their low knowledge of the Croatian language. When this occurs, they follow an adapted programme which is only a certain percentage of the overall requirements in mainstream schools, which additionally diminishes their chances in pursuing further education and to gain the same knowledge

¹⁷⁰ Roma Education Fund. *Needs Assessment Study for the Roma Education Fund Background Paper – Croatia*. Paris, 3 December 2004. VI.

¹⁷¹ Matejčić, Barbara. “Unatoč presudi Europskog suda za ljudska prava, razredi u Međimurju su još uvijek segregirani.” [Despite the judgment of the European Court of Human Rights, classes in Međimurje are still segregated] *Jutarnji List*, 16.04.2013. <http://h-alter.org/vijesti/ljudska-prava/njegovanje-segragacije>.

¹⁷² Ibid.

¹⁷³ E-mail correspondence with Biserka Tomljenović, REF Country Facilitator. 18 September 2013.

as the other children.¹⁷⁴ Unfortunately, this is still evident in some cities in Croatia. As it can be seen in a report by MoSES, there were two Roma only classes in the 2011/2012 school year and in the 2012/2013 school year in the Municipality of Čakovec (within Međimurje County) in a school that is designed for children with special needs.¹⁷⁵ As it can be seen, Roma only classes are present even in special needs schools and the number has not decreased. It has been said that when the criteria is lowered for children, it makes them feel unmotivated and they reduce their expectation of teachers, peers and of their parents and this practice in the long-run contributes to children dropping out of the school system and/or not continuing their further education.¹⁷⁶

In order to demonstrate a recent clear cut discrimination case in Croatia, one specific case is presented to validate that discrimination is still clearly present. This case within the educational system is about a child, named T.M. who attended the regular (custom planned) classes at the 'Primary School Hodošan' in the Međimurje County. The discrimination was in the fact that the child was ignored and isolated from the rest of the class during her time spent at the school. Other children expressed derogatory and discriminatory statements such as "Gypsy; that she was stupid and that she smelled, etc". The children did not want to touch anything after she had used it and no one wanted to sleep in the same room with her during a school outing due to the fact that they were calling her dirty. Another important aspect is the fact that on several occasions, T.M.'s father warned the school principal,

¹⁷⁴ UNDP. Monitoring Framework for the Decade of Roma Inclusion in Croatia. 2008. 25. http://www.undp.hr/upload/file/211/105998/FILENAME/monitoring_framework_-_complete_document.pdf.

¹⁷⁵ Ministarstvo znanosti, obrazovanja i sporta Republike Hrvatske. Akcijski plan Desetljeća za uključivanje Roma 2005.-2015. - izvješće za 2011. i 2012. Izvješće za osnovnoškolsko obrazovanje za 2011 i 2012. [Translated by the author: Action Plan for the Decade of Roma Inclusion 2005-2015 - Report for the period of 2011 until 2012. Report for primary education for 2011 and 2012]. 15. <http://public.mzos.hr/Default.aspx?art=12159&sec=3156>.

¹⁷⁶ Vlada Republike Hrvatske. *Nacionalna Strategija za uključivanje Roma, za razdoblje od 2013. do 2020.godine*. [Translated by the author: The National Strategy for Roma Inclusion for the period of 2013 until 2020]. Zagreb, studeni 2012. godine. 42. <http://www.uljppnm.vlada.hr/images/nacionalna%20strategija%20za%20ukljucivanje%20roma%20za%20razdoblje%20od%202013-2020.pdf>.

the class teacher and the school guidance counsellor of such behaviour, however the school continued to do nothing in order to try and resolve the problem. During one of the father's visits, the principal said that "he could not run after the children with a stick or have any impact on the parenting skills of the children's parents". Due to such discriminatory behaviour, the child ended up in a psychiatric ward in Zagreb.¹⁷⁷

Hence, the school was required to take a series of measures, but failed to react in time and to take measures in accordance with the Rules of Procedures in Cases of Violence among children. One of the main immediate requirements that the school should have taken was to stop the violent treatment of the child. Some of the other measures that the school was supposed to implement on behalf of the victim were: conduct an interview with the child who is a victim of violence in the presence of some of the professional staff of an educational institution, refer professional help that can be obtained in a school or outside of it to the child's parents, etc. In regards to the child that had committed such an act of discrimination, the school was supposed to undertake some of the following measures: the school should have indicated the harmful results of such behaviour to the child that was involved, conduct an interview with the child who has committed the discrimination in the presence of school experts, etc.¹⁷⁸ It is appalling to say that none of the competent authorities that handled this case, presented any actual violations. The school, only after the child was admitted to the hospital for treatment initiated the proceedings under the Rules of Procedures in Cases of Violence among children. It is noteworthy to highlight that another problematic issue is the fact that neither the Ombudsman for children, nor MoSES contacted the child or her family during their oversight of the case. The protection measures are supposed to be implemented at all levels of the government, but in this case they chose to look the other way. Nonetheless, discrimination and ignorance were detected by all stakeholders that are supposed to fully protect the right to education of all children.

¹⁷⁷ Center for Peace Studies. *Protocol of the discrimination cases for the civil society organizations for the annual report on discrimination for the 2012 year*. Zagreb.

¹⁷⁸ Center for Peace Studies. *Protocol of the discrimination cases for the civil society organizations for the annual report on discrimination for the 2012 year*. Zagreb.

3.2.2 Quality education

“Everyone has the right to education”. This is the first line of Article 26 of the Universal Declaration of Human Rights. But what does the right to education mean, particularly if we consider acceptability, the quality of education and accessibility to it. The right to education should be implemented for all human beings according to the highest standards. Quality education should consist of all the required technical and general elements, including the right to quality teachers and resources. The facilitation of quality education for the Roma pupils in Croatia is examined in this sub-chapter. In a position paper, UNICEF defined ‘quality education’ as a broad concept that “incorporates the opportunity for both effective cognitive learning, together with opportunities for creative and emotional development”.¹⁷⁹ Some main components are the following: desegregation projects, particularly for the Roma children; a broad, relevant and inclusive curriculum; rights-based learning and assessment and a child-friendly, safe and healthy environment. Education, in order for it to be successful and to have an impact, must be implemented in an open, inclusive, equal and multicultural environment so that every child feels welcomed. The UNICEF report stated that “quality education can only be achieved through the development of child-friendly learning environments that have a holistic approach to children’s development”.¹⁸⁰

In 2008 and 2009, in accordance with the Action Plan for the Decade of Roma Inclusion, free textbooks and transportation were provided for primary and secondary school pupils.¹⁸¹ The introduction of the extended day in schools was planned already in 2005 with the Decade of Roma inclusion 2005-2015 Action Plan, but it has been

¹⁷⁹ UNICEF. *The right of Roma Children to Education, Position Paper*. Geneva: Atar Roto Presse Sa, 2011. 26. http://www.unicef.org/ceecis/UNICEF_ROE_Roma_Position_Paper_Web.pdf.

¹⁸⁰ UNICEF. *The right of Roma Children to Education, Position Paper*. Geneva: Atar Roto Presse Sa, 2011. 54. http://www.unicef.org/ceecis/UNICEF_ROE_Roma_Position_Paper_Web.pdf.

¹⁸¹ Jašarevic, Aida. “Rodna dimenzija uzroka odustajanja romske djece od obveznog školovanja u Hrvatskoj.” [Translated by the author: The gender dimension of the causes of abandonment of compulsory education in Croatia by Roma children]. Croatia, September 2011. 9.

available free of charge for the Roma only since 2009. The extended stay can be seen as one of the indicators for quality education and for the integration of the Roma pupils. Its purpose is to provide a space and other requirements needed for homework and studying for the Roma children who do not have favourable conditions in their own homes. Also, it used to provide assistance for their progress in primary education, such as help with learning the Croatian language and for learning the lesson plans of the curriculum.¹⁸²

In the 2006 school year, there were 349 Roma pupils involved in the extended stay programme and in the 2007/2008 school year, there were 183 pupils. The high decrease of participation in the programme was due to the fact that the programme which was financed by MoSES and the Roma Education Fund (REF) was suspended, thus resulting in no financial support from REF in 2008.¹⁸³ On the other hand, in 2008/2009, the number of participants in the programme increased to 229. According to a report by MoSES in 2009/2010, there were 229 participants and at the end of the year there were 563 pupils. The next school year in 2010/2011, the programme was attended by 340 pupils, with only 246 pupils remaining at the end of the year. Then in 2011/2012, there were 256 pupils and 362 at the end of the year. In the previous school year (2012/2013), there were 367 pupils attending the extended stay programme.¹⁸⁴

If the separate classes for the Roma children continue, they will be provided with the same resources (i.e. educational equipment and facilities), but they will not have the opportunity to participate in an inclusive and multicultural environment. The 2012 ECRI report highlighted that the issue of separate classes has been improved, but the situation was different a couple of years ago with 80% of the Roma

¹⁸² Vlada Republike Hrvatske. *Izvešće o provođenju Nacionalnog Programa za Rome za 2007., 2008. i 2009. godinu.* [Translated by the author: Report on the implementation of the National Programme for the Roma in 2007, 2008 and 2009]. Zagreb, 2010. 74.

¹⁸³ Ibid, 74-75.

¹⁸⁴ Ministarstvo znanosti, obrazovanja i sporta Republike Hrvatske. *Akcijski plan Desetljeća za uključivanje Roma 2005.-2015. - izvješće za 2011. i 2012.* *Izvešće za osnovnoškolsko obrazovanje za 2011 i 2012.* [Translated by the author: Action Plan for the Decade of Roma Inclusion 2005-2015 - Report for the period of 2011 until 2012. Report for primary education for 2011 and 2012]. 11. <http://public.mzos.hr/Default.aspx?art=12159&sec=3156>.

pupils being put into separate classes, in which the curriculum was reduced by 30% in comparison to the full and standard curriculum that other children were following.¹⁸⁵ The result was that the Roma pupils could not receive the adequate and quality education that the rest of the children were being taught. Participation in primary education has been identified as critical, especially when it comes to the skills in the Croatian language and social skills and further efforts have to be incorporated in order to help the Roma children with these skills.

Based on a 2012 progress report, 23 teaching assistants were provided in primary schools in Croatia in order to help the Roma pupils with their school work.¹⁸⁶ Some of the main requirements that are supposed to be executed by these teaching assistants are that they are supposed to help the Roma children adjust to the school environment, overcome language difficulties and also create a link between the child, the family, the school and the community in order to encourage the attendance of the Roma children in primary schools.¹⁸⁷ Out of these 23 assistants, two of them are financed by the by the local government in Sisak and Omišalj.¹⁸⁸ Unfortunately, the number of teaching assistants has not increased over the years which is unusual due to the fact that the number of the Roma pupils is increasing in primary schools. As mentioned previously there were 4,915 pupils enrolled in 2011, thus it can be calculated that for that school year there was one Roma teaching assistant for 213 students each in Croatia.

The ECRI has also emphasized that, due to the large amount of the Roma children, the number of the Roma teaching assistants that are provided is not sufficient because they cannot give them time, nor the attention that each Roma pupil needs and deserves. Although no

¹⁸⁵ European Commission against Racism and Intolerance. *ECRI Report on Croatia – fourth monitoring cycle*. 25 September 2012. 18. <http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Croatia/HRV-CbC-IV-2012-045-ENG.pdf>.

¹⁸⁶ Decade of Roma Inclusion 2005-2015. *Progress Report 2012 – Croatia.7*. http://www.romadecade.org/cms/upload/file/9276_file2_decade-progress-report-hr.pdf.

¹⁸⁷ European Commission against Racism and Intolerance. *ECRI Report on Croatia – fourth monitoring cycle*. 25 September 2012. 20. <http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Croatia/HRV-CbC-IV-2012-045-ENG.pdf>.

¹⁸⁸ Vlada Republike Hrvatske. *Izvešće o provođenju Nacionalnog Programa za Rome za 2007., 2008. i 2009. godinu*. [Translated by the author: Report on the implementation of the National Programme for the Roma in 2007, 2008 and 2009]. Zagreb, 2010. 75.

monitoring mechanism exists, additional classes, consisting of one hour per week in some schools were organised, but MoSES proposed amendments to the National Programme for Roma, which consisted of three additional hours during the week for learning the Croatian language.¹⁸⁹ During the 2010/2011 and 2011/2012 school years, special assistance was provided in regards to learning the Croatian language in accordance with Article 43 of the Primary and Secondary Education Act due to the changes made in 2010.¹⁹⁰ Therefore, the law now requires both primary and secondary schools for children to be provided with assistance if they have insufficient knowledge of the Croatian language. To be exact, in 2010/2011¹⁹¹, 555 were provided with special assistance and during the 2011/2012 year, 700 Roma pupils were provided with assistance.¹⁹²

Furthermore, REF Country Facilitator, Tomljenović has said that “in primary education, the quality of education of Roma children is impaired and may be different in Roma only classes”. The reason for this impairment in Roma only classes is due to the fact that the Roma pupils “often change teachers, are taught by unexperienced teachers, or in some cases teachers who work in Roma only classes for years lower their expectations of the Roma pupils. Some children are lucky and have teachers who are great professionals and experts.” She also added that there is no difference between Roma and non-Roma children in terms of facilities, conditions of school buildings, educational equipment, etc. Another interesting fact that she mentioned was that the

¹⁸⁹ Vlada Republike Hrvatske. *Izvjeshće o provođenju Nacionalnog Programa za Rome za 2007., 2008. i 2009. godinu*. [Translated by the author: Report on the implementation of the National Programme for the Roma in 2007, 2008 and 2009]. Zagreb, 2010. 75.

¹⁹⁰ Decade of Roma Inclusion 2005-2015. *Progress Report 2012 – Croatia.7*. http://www.romadecade.org/cms/upload/file/9276_file2_decade-progress-report-hr.pdf.

¹⁹¹ Vlada Republike Hrvatske. *Izvjeshće o provođenju Ustavnog zakona o pravima nacionalnih manjina i utrošku sredstava osiguranih u Državnom proračunu Republike Hrvatske za 2012. godinu*. [Translated by the author: Report by the Government of the Republic of Croatia on the implementation of the Constitutional Law on Minority Rights and on the expenditure of funds provided in the state budget of Croatia for the year 2012 for national minorities]. Zagreb, July 2013. 20.

¹⁹² Decade of Roma Inclusion 2005-2015. *Progress Report 2012 – Croatia.7*. http://www.romadecade.org/cms/upload/file/9276_file2_decade-progress-report-hr.pdf.

teacher's interests and capacities for professional development impact the education of the Roma children.¹⁹³ Meaning that if the teachers themselves are not prepared to fulfil their end of the bargain, the Roma children will get the short end of the stick.

3.2.3 General-wide strategies

This section addresses general-wide strategies and measures that aim at providing adequate education and better educational standards for the Roma children in primary schools by financial investments and other measures. Regrettably, money matters. By investing in and funding education rights and opportunities of the Roma children, such strategies and measures give Roma children a chance for adequate education, training, materials, assistants while raising awareness of the importance of education. The government should continue to promote awareness and tolerance in regards to the adequate education and non-discrimination of Roma children.

As previously mentioned, some of the documents of significance for the Roma population are the National Programme for Roma, the Action Plan for the Decade of Roma Inclusion 2005-2015 and the National Strategy for Roma Inclusion for the period of 2013 until 2020. These first two documents have somewhat helped to integrate the Roma into the wider society. On the other hand, it is ironic that while these three documents are supposed to protect the Roma population, the National Programme for Roma states that “for Roma children who were not included in preschool programs and/or do not know sufficient Croatian, separate classes or separate groups will be organised for them in the first grade of elementary school”.¹⁹⁴ It is ironic that such a programme promotes separate classes. Croatia has set up various laws and provisions, yet problem of dropout rates still remains. According to the legislation, MoSES in accordance with the provisions of Articles 135, 136, and 152 of the Law on Education and Primary and Secondary

¹⁹³ E-mail correspondence with Biserka Tomljenović, REF Country Facilitator. 18 September 2013.

¹⁹⁴ Government of the Republic of Croatia. *The National Program for the Roma*. Zagreb, 2003. 37.

School has set up mechanisms in order to be able to react if there is neglect of the parental roles manifested in no reaction from the parents after several attempts to establish contact with them. Thus, schools have a duty to inform the County Office and the Center for Social Welfare, but rarely are there any actual effective outcomes.¹⁹⁵

In regards to the facilitation of strategies, MoSES has had a somewhat of an active role. It has taken several steps in order to address segregation and discrimination against Roma pupils. For instance, they have supported their access to pre-school education programmes, provided scholarships, employed the Roma assistants in order to improve cooperation between the parents, pupils and schools, funded informal education methods, etc.¹⁹⁶ In 2006 and 2007, the Ministry co-financed programmes for improving the education of the Roma minority which included pre-school programmes, pre-school education and extended staying in primary schools. All of these programmes also paid for the transportation and meals for the Roma pupils. It was evidenced that these programmes, along with the learning material, helped to create the conditions for the inclusion of the Roma pupils in primary education.¹⁹⁷ Although, it does not specifically mention the Roma pupils nor minority rights, the Ministry also prepared and adopted the National Framework Curriculum in 2010 in order to address the problems arising from the basic curriculum taught in the Roma only classes and to integrate the Roma pupils into mixed classes immediately. Another goal is to create a specific curriculum for children with inadequate command of the Croatian language who should be provided with supplementary

¹⁹⁵ Vlada Republike Hrvatske. *Nacionalna Strategija za uključivanje Roma, za razdoblje od 2013. do 2020.godine*. [Translated by the author: The National Strategy for Roma Inclusion for the period of 2013 until 2020]. Zagreb, studeni 2012. godine. 41. <http://www.uljppnm.vlada.hr/images/nacionalna%20strategija%20za%20ukljucivanje%20roma%20za%20razdoblje%20od%202013-2020.pdf>.

¹⁹⁶ Bieber, Florian. *Guide to Minorities and Education*. A joint publication of Civic Initiatives and the King Baudouin Foundation, October 2007. 48.

¹⁹⁷ Ministarstvo znanosti, obrazovanja i sporta Republike Hrvatske. *Akcijski plan Desetljeća za uključivanje Roma 2005.-2015. - izvješće za 2007. i 2008. Izvješće za osnovnoškolsko obrazovanje za 2007 i 2008*. [Translated by the author: Action Plan for the Decade of Roma Inclusion 2005-2015 - Report for the period of 2007 until 2008. Report for primary education for 2007 and 2008]. 10. <http://public.mzos.hr/Default.aspx?art=9688&sec=3156>.

language and other classes, including individual monitoring.¹⁹⁸

In 2007, the amount that was spent from the State budget on the Roma teaching assistants was 1,256,574.24 Kuna; 90,237.00 Kuna was spent for the trips and school trips for the Roma pupils and 280,000.00 Kuna was spent on summer school. In 2008, 1,368,540.84 Kuna was spent on the teaching assistants; 116,172.17 Kuna on the trips and 108,000.00 Kuna on the summer school for the Roma children. In 2009, 1,401,388.53 was spent on the Roma assistants from the State budget. In 2009, REF gave 295,000.00 Kuna for the extended stay; 288,455.90 Kuna for the school in nature, school trips, children's Olympic games, purchasing Roma-Croatian dictionaries; and 288,455.90 Kuna for the patronage Day of the Roma language and for the language summer school.¹⁹⁹

There have been various other programmes, such as the founding of the dance school in Rijeka in which the Roma pupils were integrated into; a programme by the Croatian government named "Literacy for Croatia: The Way to a Better Future" which was intended for the Roma children to motivate them and return them to primary school if they had left it for some reason; schools in the nature; and events such as "the ball against discrimination (a soccer tournament), swimming lessons, school trips, etc. Besides the financial assistance from the state and REF, there has also been assistance from the PHARE²⁰⁰ programme for the integration of the Roma into the educational system. Some of the assistance from this programme goes to supporting the training of

¹⁹⁸ Vlada Republike Hrvatske. *Očitovanje na treće mišljenje savjetodavnog odbora vijeca europske o provedbi okvirne konvencije za zaštitu nacionalnih manjina od strane republike hrvatske*. [Translated by the author: Polling of the third opinion of the Advisory Committee of the Council of Europe on the implementation of the Framework Convention for the Protection of National Minorities by the Republic of Croatia]. Zagreb, 2010. 23. http://www.uljppnm.vlada.hr/images/pdf/3rd_com_croatia_hr.pdf.

¹⁹⁹ Vlada Republike Hrvatske. *Izvjješće o provođenju Nacionalnog Programa za Rome za 2007., 2008. i 2009. godinu*. [Translated by the author: Report on the implementation of the National Programme for the Roma in 2007, 2008 and 2009]. Zagreb, 2010. 75. http://www.vlada.hr/hr/aktualne teme i projekti/aktualne teme/nacionalni program za rome/novosti/izvjescje o provođenju nacionalnog programa za rome za 2007_2008 i 2009 godinu.

²⁰⁰ The Phare Programme is a pre-accession financial instrument of the European Union (EU) for cooperation with Central and Eastern European countries to support their transition to market oriented economy and their accession to EU.

the Roma assistants, seminars for the associates that will work with the Roma parents and to the creation of a positive image of the Roma population that can contribute to their successful integration into the society.²⁰¹ According to a progress report, the amount of money that was spent in 2012 from the state budget on educational programmes, graduation trips, education held in nature, extra-curricular and other activities was 35,438 EUR.²⁰² The state also spent around 195,092 EUR for the Roma teaching assistants that are supposed to assist the Roma children (as well as teachers) in their everyday activities within the school.²⁰³ It was estimated that the total amount that was spent on primary education was 230,530 EUR, which showed an increase in the amount of funding of primary education in comparison with previous years.²⁰⁴ However, Tomljenović stressed that more support should be given to the teachers who are working in a multicultural setting in regards to providing them with quality trainings because currently some of them are lacking it.²⁰⁵

While there has been an increase in the amount of money provided for the various programmes and strategies, Kuharić emphasized that, “although there have been programmes implemented, unfortunately, none of them are enough for the long-term solutions, such as the longer pre-schooling, after-schooling with language programmes, educators working on employment contracts for an indefinite period, etc”.²⁰⁶ On the other hand, the 2012 ECRI report states that there have been affirmative results such as that “significant resources have

²⁰¹ Ministarstvo znanosti, obrazovanja i sporta Republike Hrvatske. Akcijski plan Desetljeća za uključivanje Roma 2005.-2015. - izvješće za 2009. i 2010. Izvješće za osnovnoškolsko obrazovanje za 2009 i 2010. [Translated by the author: Action Plan for the Decade of Roma Inclusion 2005-2015 - Report for the period of 2009 until 2010. Report for primary education for 2009 and 2010]. 9-14. <http://public.mzos.hr/Default.aspx?art=9684&sec=3156>.

²⁰² Decade of Roma Inclusion 2005-2015. *Progress Report 2012 – Croatia*. 7. http://www.romadecade.org/cms/upload/file/9276_file2_decade-progress-report-hr.pdf.

²⁰³ Ibid, 7.

²⁰⁴ Ibid, 7.

²⁰⁵ E-mail correspondence with Biserka Tomljenović, REF Country Facilitator. 18 September 2013.

²⁰⁶ Personal interview with Lucija Kuharić, lawyer at the Center for Peace Studies in Zagreb. 16 July 2013.

been devoted to dealing with inequalities faced by Roma; availability of pre-schools for all Roma and the enrolment of Roma children in primary schools has increased and positive measures are being taken to put an end to separate Roma-only classes”.²⁰⁷ There have been various programmes, but more focus should be put on programmes that involve the Roma and non-Roma children in order for them to adjust to each other and pave the way for a future consisting of a multicultural environment without discrimination.

4. MEĐIMURJE: AN EXAMPLE FOR THE REST OF CROATIA?

This chapter gives an overview of the situation of the Roma children in Međimurje in connection with the case *Oršuš and Others v. Croatia* in order to grasp the measures being taken by Croatia to ensure the implementation of this 2010 judgment. The implementation of the right to education seems to be a handful task when it comes to the Roma children, but I consider it to be a rather simple one. For the purpose of giving a clearer picture of the right to education and the presence of segregation and discrimination, Međimurje County has been used as the case study. It is relevant due to the fact that, recently, in Međimurje, the ECtHR confirmed that the segregation of the Roma children into separate classes based on language is unlawful discrimination. This section provides an overview of the Roma children in Međimurje in order to examine the effectiveness of the concrete steps taken by Croatia that have improved the situation in regards to the education of Roma children. The last part of this chapter is devoted to the analysis and recommendations for Croatia.

²⁰⁷ European Commission against Racism and Intolerance. *ECRI Report on Croatia – fourth monitoring cycle*. 25 September 2012. 7. <http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Croatia/HRV-CbC-IV-2012-045-ENG.pdf>.

4.1 Oršuš and Others v. Croatia

In order to understand the case of Oršuš and Others v. Croatia, we first have to look at the reasoning behind the lawsuit. It can be said that the actual issue started in 1996 in two primary schools in the Međimurje County, when Roma pupils were placed in the Roma only classes. Thus, in 2000, 15 children of the Roma origin began the proceedings against their primary schools in the Croatian villages in Macinec and Podturen.²⁰⁸ The Roma pupils claimed that their right to education had been denied and that they were discriminated against on a daily basis due to their ethnic background. To be exact, in the 2001/2002 school year in Međimurje, there was a total of 865 Roma pupils in primary schools and 511 of them were segregated into the Roma only classes.²⁰⁹

The government of Croatia and the schools insisted that the Roma children did not have the satisfactory command of the Croatian language to be included in regular classes, but there were no mechanisms in place to monitor the children's command of the language and their progress that would enable their transfer to the mixed classes with other non-Roma children.²¹⁰ The schools did not provide adequate tests to examine the linguistic skills of pupils or provide sufficient language instruction in the separate classes for the Roma pupils.²¹¹ Furthermore, the Roma children took a psychological test which proved that being segregated from the rest of the pupils led to "psychological harm", which lowered their self-esteem and hampered the development of

²⁰⁸ Council of Europe: European Court of Human Rights. *Oršuš and Others v. Croatia*, Application no.15766/03, 16 March 2010. 3. <http://www.refworld.org/docid/4ba208fc2.html>.

²⁰⁹ Vlada Republike Hrvatske. *Nacionalna Strategija za uključivanje Roma, za razdoblje od 2013. do 2020.godine*. [Translated by the author: The National Strategy for Roma Inclusion for the period of 2013 until 2020]. Zagreb, studeni 2012. godine. 41. <http://www.uljppnm.vlada.hr/images/nacionalna%20strategija%20za%20ukljucivanje%20roma%20za%20razdoblje%20od%202013-2020.pdf>.

²¹⁰ Amnesty International. "Croatia Submission to the Committee of Ministers of the Council of Europe on Oršuš and Others v. Croatia (application no. 15766/03)." 5. http://www2.ohchr.org/english/bodies/hrc/docs/ngos/AI-3_Croatia_HRC105.pdf.

²¹¹ Ibid, 6-7.

their identity. By such practices the educational system failed to realize its social functions that are to increase the pupils' self-confidence and promote the identity of the individuals.²¹² In 2010, the Grand Chamber of the ECtHR came to the conclusion that the reasoning behind the separation of these pupils was not justified, therefore they found that the Croatian government was violating Article 14 and Article 2 of the Protocol No. 1 of the European Convention on Human Rights and Fundamental Freedoms.²¹³ The ECtHR judgment states:

In the circumstances of the present case and while recognising the efforts made by the Croatian authorities to ensure that Roma children receive schooling, the Court considers that there were at the relevant time no adequate safeguards in place capable of ensuring that a reasonable relationship of proportionality between the means used and the legitimate aim said to be pursued was achieved and maintained. It follows that the placement of the applicants in Roma-only classes at times during their primary education had no objective and reasonable justification. The Court considers that the applicants must have sustained non-pecuniary damage – in particular as a result of the frustration caused by the indirect discrimination of which they were victims – for which the finding of a violation of the Convention does not afford sufficient redress. However, the Court considers the amounts claimed by the applicants to be excessive. Ruling on an equitable basis, it assesses the non-pecuniary damage sustained by each of the applicants at EUR 4,500.²¹⁴

According to the ECtHR verdict, the Croatian government has to implement several provisions, such as enacting legislation in order to protect

²¹² Council of Europe: European Court of Human Rights. *Oršuš and Others v. Croatia*, Application no.15766/03, 16 March 2010. 11. <http://www.refworld.org/docid/4ba208fc2.html>.

²¹³ Amnesty International. "Croatia Submission to the Committee of Ministers of the Council of Europe on *Oršuš and Others v. Croatia* (application no. 15766/03)." 5. http://www2.ohchr.org/english/bodies/hrc/docs/ngos/AI-3_Croatia_HRC105.pdf.

²¹⁴ Council of Europe: European Court of Human Rights. *Oršuš and Others v. Croatia*, Application no.15766/03, 16 March 2010. 61-62. <http://www.refworld.org/docid/4ba208fc2.html>.

the Roma pupils, putting regulations in place regulating the placement and testing of the linguistic skills, the curriculum and monitoring mechanisms, as well as introducing measures that could reduce high dropout rates among the Roma pupils.²¹⁵ Many have said that although there have been improvements regarding the implementation of the verdict, according to a progress report from 2012, there is still an inadequate response from the government and more efforts have to be executed.²¹⁶

On the other hand, Ćuk said that “even though the matter of segregation of the Roma children in Međimurje no longer exists at the institutional level, the concept of white-flight has been in effect”. She continued to say that, “it was no longer a one-sided situation and that while clear-cut segregation is vaguely present; the community problems between the Roma and non-Roma continue to exist”.²¹⁷ No measures and activities can be truly successful within the educational system if the Roma and non-Roma society are still divided in the communities. Without trust and intercultural dialogue, there cannot be a positive outcome. The state is trying to work on these issues, but according to a 2012 report, the dropout rate of the Roma pupils in primary schools in the Međimurje County continues to be high (84%).²¹⁸ Although, there are still problems present in the County, Lucija Kuharić, said that “the lawsuit and the verdict were a ‘slap’ in the face for the schools and the outcome has been effective. Meaning that now it is not easy for the schools to segregate because they are scared of the consequences, however we cannot claim with certainty that the schools no longer segregate”.²¹⁹

²¹⁵ European Commission against Racism and Intolerance. *ECRI Report on Croatia – fourth monitoring cycle*. 25 September 2012. 19. <http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Croatia/HRV-CbC-IV-2012-045-ENG.pdf>.

²¹⁶ Pučki pravobranitelj. *Izvešće o pojavama diskriminacije za 2012. godinu*. [Translated by the author: *Report on the presence of discrimination in 2012 by the Ombudsman in the Republic of Croatia*.] Zagreb, June 2013. 44. <http://www.ombudsman.hr/dodaci/Izvjecje%20o%20pojavama%20diskriminacije.pdf>.

²¹⁷ Personal interview with Renata Ćuk, program coordinator at Open Society Foundations. 4 July 2013.

²¹⁸ European Commission against Racism and Intolerance. *ECRI Report on Croatia – fourth monitoring cycle*. 25 September 2012. 18. <http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Croatia/HRV-CbC-IV-2012-045-ENG.pdf>.

²¹⁹ Personal interview with Lucija Kuharić, lawyer at the Center for Peace Studies in Zagreb. 16 July 2013.

4.1.1 Out with the old, in with the new?

This sub-chapter analyses the after-effect of the ECtHR verdict. It has focused on what has been done in accordance with the verdict and how it has changed or not reformed the situation in Međimurje. It is important to provide some statistical data in order to get a vivid picture of the ‘changes’ that have occurred in regards to the Roma only classes due to the fact that they were the primary illustration of the segregation and discrimination that was occurring in Međimurje. Thus, in 2009/2010 there were 34 Roma only classes and in 2010/2011 there were 32 Roma only classes. On the other hand, 2011/2012 saw an increase with 42 Roma only classes and in 2012/2013 there were 39 Roma only classes.²²⁰ Thus, the overall picture shows unfortunate results. As it can be seen the number of the Roma only classes has been on the rise throughout the years and it has actually increased since the verdict was passed.²²¹ As the OSCE report stated that since the judgment, “evidence of change that has been passed is sparse”.²²² Despite this, in a 2012 progress report on Croatia, the ECRI conveyed that there have been positive developments in Croatia regarding the judgment and that the enrolment of the Roma pupils has increased over

²²⁰ Ministarstvo znanosti, obrazovanja i sporta Republike Hrvatske. Akcijski plan Desetljeća za uključivanje Roma 2005.-2015. - izvješće za 2009. i 2010. Izvješće za osnovnoškolsko obrazovanje za 2009 i 2010. [Translated by the author: Action Plan for the Decade of Roma Inclusion 2005-2015 - Report for the period of 2009 until 2010. Report for primary education for 2009 and 2010]. 10. <http://public.mzos.hr/Default.aspx?art=9684&sec=3156>.

²²¹ Ministarstvo znanosti, obrazovanja i sporta Republike Hrvatske. Akcijski plan Desetljeća za uključivanje Roma 2005.-2015. - izvješće za 2011. i 2012. Izvješće za osnovnoškolsko obrazovanje za 2011 i 2012. [Translated by the author: Action Plan for the Decade of Roma Inclusion 2005-2015 - Report for the period of 2011 until 2012. Report for primary education for 2011 and 2012]. 14. <http://public.mzos.hr/Default.aspx?art=12159&sec=3156>.

²²² OSCE Office for Democratic Institutions and Human Rights. *Best Practices for Roma Integration Regional Report on Anti-discrimination and Participation of Roma in Local Decision-Making*. May 2013. 15. <http://www.osce.org/odihr/102083>.

the years particularly in the Međimurje region.²²³ The ECRI stated that the authorities still have a lot of work to do, such as providing more assistants (especially of the Roma background), training and aid for both teachers and assistants while making sure that the teachers have the required skills to be able to teach Croatian as a second language for some children.²²⁴

The CoE²²⁵ and the ECRI²²⁶ welcomed the steps taken up until now by Croatia to remedy the shortcomings contained in the Oršuš judgment, such as organising various seminars for teachers in order to be able to teach specifically the Roma children. It is definite that the Croatian authorities have taken some of the proper measures in order to improve the situation. Additionally, Gazivoda stressed that “the verdict was a confirmation that it was a step in the right direction, but that this issue needs to be dealt with in terms of acquiring permanent solutions”.²²⁷ He continued to say that there are currently new challenges that have to be dealt with in depth and that while there are still problems present in terms of the people themselves, but there have been some positive tendencies from the MoSES and municipalities.

An additional after-effect has been the white-flight phenomenon. As previously mentioned, white-flight is a phenomenon that occurs when there is a high concentration of the Roma in an area. Due to this high concentration of the Roma children attending a particular school, the parents of the non-Roma children, start removing their children from those specific schools. This results in the Roma only schools and classes. Although this cannot be looked at as a typical case

²²³ European Commission against Racism and Intolerance. *ECRI Report on Croatia – fourth monitoring cycle*. 25 September 2012. 18. <http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Croatia/HRV-CbC-IV-2012-045-ENG.pdf>.

²²⁴ Ibid, 20.

²²⁵ Council of Europe – Committee of Ministers. *Supervision of the execution of the judgment in the case of Oršuš and others against Croatia*. CM/Inf/DH(2011)46. 2 November 2011. <https://wcd.coe.int/ViewDoc.jsp?id=1862497&Site=CM>.

²²⁶ European Commission against Racism and Intolerance. *ECRI Report on Croatia – fourth monitoring cycle*. 25 September 2012. 20. <http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Croatia/HRV-CbC-IV-2012-045-ENG.pdf>.

²²⁷ Personal interview with Tin Gazivoda, Open Society Foundations Advisor for Croatia. 18 July 2013.

of segregation, the outcome is the same. White flight leads to ethnic segregation due to the fact that this results in the Roma only children and classes, which prevents or at least diminishes any possibility of integration and social promotion of the Roma. Also, this can sometimes lead to actual classroom segregation due to the fact that many schools try to avoid such outcomes by putting the Roma children in separate classrooms in order to 'please' the non-Roma parents.

The phenomenon of white-flight has only recently been observed in Croatia, specifically in the Međimurje County. Renata Ćuk stated that, "since the verdict, many of the non-Roma parents are taking their children out of the Roma majority schools in Međimurje due to the fact that the parents are worried that there will be a decrease in the provision of adequate education due to the attendance of the Roma children".²²⁸ One example of this is in the Primary School "Dr. Ivana Novaka" in Macinec. In the last school year they had 465 children and out of that number 110 were non-Roma children. In the seventh grade, there were four non-Roma children and 25 Roma children. There used to be more children in that grade, but unfortunately their parents moved them to another school after the verdict in Strasbourg, because they were afraid that their children would have to be accommodated into the Roma majority classrooms. In the Međimurje County this has become a frequent event in which many of the Croat parents are enrolling their children into the schools where the majority of the children are the non-Roma.²²⁹ Although, this is not a blatant type of segregation, it is definitely a 'hidden' type of discrimination and segregation. UNICEF proposed some solutions to this issue such as: making action plans for the integration of Roma in the municipalities and regions; giving development assistance to the integration activities of the Roma such as school transport, monitoring and capacity-building of municipal/regional authorities; the financial support to the pure education work in schools should be provided by the education stakeholders; awareness raising activities that deal with the Roma culture within the

²²⁸ Personal interview with Renata Ćuk, programme coordinator at Open Society Foundations. 4 July 2013.

²²⁹ Matejčić, Barbara. "Unatoč presudi Europskog suda za ljudska prava, razredi u Međimurju su još uvijek segregirani." [Despite the judgment of the European Court of Human Rights, classes in Međimurje are still segregated] *Jutarnji List*, 16.04.2013. <http://h-alter.org/vijesti/ljudska-prava/njegovanje-segragacije>.

local communities; preparing and making long-standing strategies for working with the communities, such as building tolerance between the schools, parents and children; and creating collaboration between neighbourhoods in order to promote desegregation in all areas of life.²³⁰

In the end, although you cannot force the parents of the non-Roma children to not take their children out of the schools that are attended by the considerable share of the Roma children, all stakeholders at both the state and local level can and should work together to find solutions in order to prevent the negative influences of white flight. There certainly needs to be more communication and involvement from both sides of the community (the Roma and non-Roma parents) in order to try to eradicate the problem. One positive development has been noticed in Međimurje in a primary school in Orehovica. It was said that the school seemed like a “common ground” for the non-Roma and the Roma community and that the children were integrated fully with their Croat peers. The fascinating part was that it was emphasized that the “Roma and Croatian families are learning how to live, learn and play together”.²³¹

In terms of changing strategies, in 2010, the MoSES created an Action Plan which contains several measures to deal accordingly with the ruling of the ECtHR. On the other hand, the Action Plan does not provide innovative ideas or plans that are not already found in the existing national documents.²³² Additionally, the Upbringing and Education Agency Act of 2006 has been set up to be in charge of monitoring the advancement of children who are in the Croatian learning classes. This type of regular monitoring will help to ease the integration of the pupils with inadequate command of the language into the regular mainstream classes. One measure that has been taken by

²³⁰ UNICEF. *The right of Roma Children to Education, Position Paper*. Geneva: Atar Roto Presse Sa, 2011. 50. http://www.unicef.org/ceecis/UNICEF_ROE_Roma_Position_Paper_Web.pdf.

²³¹ Bowers, Jake. “Roma Inclusion: What We Can Learn from Croatia.” 17 July 2013. <http://www.opensocietyfoundations.org/voices/roma-inclusion-what-we-can-learn-croatia>.

²³² Ministarstvo znanosti, obrazovanja i športa. Mjere za izvršenje presude Europskog suda za ljudska prava u predmetu *Oršuš i dr. protiv Hrvatske*. [Translated by the author: Measures for the execution of the judgment of the European Court of Human Rights in the case *Oršuš and Others v. Croatia*. 2010]. 2010. <http://public.mzos.hr/Default.aspx?art=10635&sec=3156>.

the Ministry is that they adopted a new bylaw named Regulations on the procedure for determining the physical and mental condition of the child, student, and composition of the expert committee²³³ in May 2011. This by-law “sets up the procedure for initial placement in a class and the setting up of a panel of experts who are in charge of the preliminary assessment of the aptitude of each child prior to his or her enrolment in school”.²³⁴ The Committee of Ministers emphasized that there have to be further efforts executed in order to deal with the low attendance and high dropout rates among the Roma children.²³⁵

Another new result in accordance with the verdict has been the task force that was set up by the MoSES in 2011 whose main task is to monitor the implementation of the programme for learning Croatian for the Roma pupils. The task force has also provided guidance to several of the schools in Međimurje in formulating their curriculum which is to be aimed specifically at the integration of the children into the mainstream schooling system.²³⁶ In 2011, it was noted that the external evaluation of education of Roma children in primary schools was introduced in Međimurje County and relevant bylaws were amended to reduce the maximum number of Roma pupils per class, which were part of the requirements in the Oršuš judgment.²³⁷

Tomljenović wrote that “the verdict did not contribute to the ending of segregation in a way that is very visible in the areas where the problem is most visible, but it did contribute in the area of national policy awareness”.²³⁸ There are various programmes present and the verdict has been sentenced which confirmed that Croatia violated the European Convention on Human Rights, but Dvornik believes that discrimination is still strongly present within the country.²³⁹ Another

²³³ Translated by the author. The original title is: “Pravilnik o postupku utvrđivanja psihofizičkog stanja djeteta, učenika te sastavu stručnoga povjerenstva.”

²³⁴ Council of Europe – Committee of Ministers. *Supervision of the execution of the judgment in the case of Oršuš and others against Croatia*. CM/Inf/DH(2011)46. 2 November 2011. <https://wcd.coe.int/ViewDoc.jsp?id=1862497&Site=CM>.

²³⁵ Ibid.

²³⁶ Ibid.

²³⁷ Ibid.

²³⁸ E-mail correspondence with Biserka Tomljenović, REF Country Facilitator. 18 September 2013.

²³⁹ Dvornik, Srđan. “Margina bez ROMantike.” *IDENTITET*, No. 18. May 2013. 26-27. <http://www.identitet.info/arhiva/KB178.pdf>.

interesting detail that Dvornik mentioned is the fact that while Croatia has blamed the lack of language knowledge for almost ten years as the reason for the integration hardship of the Roma population, it has still not acknowledged the fact that a possible solution could be a regulated educational system in the language of the Roma minority.²⁴⁰ Whereas many of the other minorities have this possibility, the Roma are once again excluded from an opportunity such as this one, which could essentially be both the solution to Croatia's problems and the answer to an equal educational system for the Roma community.

4.1.2 Programmes and funding

Since the ECtHR verdict, there have been some activities undertaken by the state and local authorities, local and international NGO's. There have been certain programmes and funding allocated in order to try to implement the verdict and improve the situation in Međimurje. For example, the REF as a financial perspective of the Decade of the Roma inclusion 2005-2015 should provide funding for improved performance and status of the Roma community in education. One example of the type of assistance that REF provides is the endowment of projects such as the project "Through pre-school to full integration" in Međimurje County that has been implemented the past two school years, which focuses on awareness raising in the local communities and the obligation to provide adequate and quality education for children, including the Roma.²⁴¹ Another sponsor of this project is the MoSES that covers some of the teachers' fees, didactics fees, etc. and has since 2010 allocated EUR 289,550 from the state's budget. One of the primary reasons as to why this project was created and implemented was to address and deal with the implementation of the verdict in the Oršuš case.²⁴²

For the implementation of the National Programme for Roma and the Action Plan for the Decade of Roma Inclusion 2005-2015, a total of 15,349,719.94 Kuna were spent from the State budget in

²⁴⁰ Ibid, 27.

²⁴¹ Roma Education Fund. *Annual Report 2012*. 37. http://www.romaeducationfund.hu/sites/default/files/publications/ref_annual_report_2012.pdf

²⁴² Ibid, 38.

2012.²⁴³ One more project that has been recently implemented in the Međimurje County is the “Comprehensive Inclusion Programme for Roma in the Međimurje County in Croatia” by the United Nations Development Programme in Croatia. One of the primary goals of this project is to “improve the educational outcomes of Roma pupils so that their integration into Croatian schools is better facilitated and to improve the capacities of teachers for inclusive teaching and options for additional extra-curricular classes for the Roma”.²⁴⁴ This will be a good way for all stakeholders to be involved and to work together on the elements that are needed for the integration of the Roma children into the school system and society.

As previously declared, another programme since 2010/2011 is the inclusion of the Roma pupils into the pre-school programme and also their extended stay (after school support). This pre-school programme is available free of charge in order to prepare the Roma pupils for their further schooling. There has been an increase in the funding of this pre-school programme compared to 2010 due to the ECtHR verdict in order to help enforce the judgment. The MoSES, in cooperation with the Međimurje County has strived to ensure that the pre-school programme is held five hours a day, with two meals and transportation. In regards to this programme, there have been positive results as it has already prepared a large number of Roma children for the inclusion into the educational system.

Unfortunately, this programme is dependent on the funding from the state budget and its sustainability is uncertain due to the changing priorities at the state and local level. Some parts of Croatia fund this programme and in other places it is not a priority that needs to be

²⁴³ Vlada Republike Hrvatske. *Izvjeshće o provođenju Ustavnog zakona o pravima nacionalnih manjina i utrošku sredstava osiguranih u Državnom proračunu Republike Hrvatske za 2012. godinu*. [Translated by the author: Report by the Government of the Republic of Croatia on the implementation of the Constitutional Law on Minority Rights and on the expenditure of funds provided in the state budget of Croatia for the year 2012 for national minorities], Zagreb, July 2013. 61. <http://www.uljppnm.vlada.hr/images/26072013/izvjsce%20o%20provedbi%20uzpnm-a%20-%20za%202012.pdf>.

²⁴⁴ UNDP in Croatia. *Platform for Roma Inclusion in Međimurje*. http://www.hr.undp.org/content/croatia/en/home/operations/projects/poverty_reduction/roma.html.

implemented.²⁴⁵ A report by MoSES claims that this problem has been fixed through the implementation of the EU project titled “Integration of Disadvantaged Groups in Regular Education System”. This project and money will help finance the pre-school education programme, the teaching assistants, providing quality education for the national minorities, including the Roma community, etc.²⁴⁶

It should be specified that many of the programmes are directly accorded for the Međimurje County and the money is coming directly from the EU. Some of the projects²⁴⁷ that are directed towards Međimurje are the following: “Try to Do It”, “Earlier inclusion of Roma children into the educational system - a pilot project - Let’s go to kindergarten!, Quality Education for the Roma children”, etc.²⁴⁸ The new National Strategy on Roma Integration, as one of its objectives on its until 2020 list, includes “Abolishing of all Roma – only classes in Croatia”, however the Action plan accompanying the Strategy does not contain concrete measures related to that objective.²⁴⁹ On the one hand while it is important that the strategy includes this goal, 2020 is seven years away and hopefully the government will not wait until the last minute to execute this goal.

²⁴⁵ Ministarstvo znanosti, obrazovanja, i sporta Republike Hrvatske. *Izvešće o provođenju Ustavnog zakona o pravima nacionalnih manjina i utrošku sredstava osiguranih u Državnom proračunu Republike Hrvatske za 2011. godinu.* [Translated by the author: Report Government of the Republic of Croatia on the implementation of the Constitutional Law on Minority Rights and on the expenditure of funds provided in the state budget of Croatia for the year 2011 for national minorities]. Zagreb, 2012.14. <http://public.mzos.hr/Default.aspx?art=11976&sec=3154>.

²⁴⁶ Ministarstvo znanosti, obrazovanja i sporta. “Dodijeljeno 6.6 milijuna eura za integraciju skupina u nepovoljnome položaju u redoviti obrazovni sustav.” [Translated by the author: 6.6 million euros was granted for the integration of disadvantaged groups into the regular education system.] <http://public.mzos.hr/Default.aspx?art=12661&sec=1933>.

²⁴⁷ The names of the projects have been translated into english by the author.

²⁴⁸ Ministarstvo znanosti, obrazovanja i sporta. “Dodijeljeno 6.6 milijuna eura za integraciju skupina u nepovoljnome položaju u redoviti obrazovni sustav.” [Translated by the author: 6.6 million euros was granted for the integration of disadvantaged groups into the regular education system.] <http://public.mzos.hr/Default.aspx?art=12661&sec=1933>.

²⁴⁹ E-mail correspondence with Biserka Tomljenović, REF Country Facilitator. 18 September 2013.

One non-governmental organisation that has also been involved is the civil society organisation Open Academy Step by Step. One of their projects is the “Empowerment of Roma parents”, which is implemented in four communities and four schools, three of which were involved in the Oršuš case. The overall goal of the project is the well-being, successful development and learning of the Roma children.²⁵⁰ By supporting and developing the relationship between the Roma and non-Roma parents and schools, who have the most impact on children, the organisation is looking at the whole picture and trying to remedy the situation while thinking in terms of a long-standing outcome. One review emphasized that this type of project “powerfully proves that the best antidote to racism is simply meaningful contact between individuals of different backgrounds”.²⁵¹

4.2 Analysis

At the end of the day, the real question remains, can the implementation and protection of education rights of minorities sustain in a country such as Croatia? Croatia, though it is seen a democratic country, is still a country in transition. This chapter is devoted to the final reflections and some of the recommendations from relevant sources for what is needed to be done in order to provide education without discrimination and segregation for the Roma children. While Croatia has the main tools at its disposal, why do cases of discrimination still occur in the educational system? Stereotypes result in anti-sentiment and exclusion of the Roma community in Croatia. Croatia can have all of the appropriate legislation in place, but unless the communities themselves start to accept and be tolerant of each other, there will be lack of cohesion.

The trickle-down effect has to be implemented. Besides the implementation of legislation, it is quite evident that the whole society plays a role in providing quality education without discrimination to the Roma children in Croatia, either indirectly or directly. The simple fact

²⁵⁰ Open Academy Step by Step. “Empowering Roma parents.” Project presentation received on 25 July 2013 by the organisation.

²⁵¹ Bowers, Jake. “Roma Inclusion: What We Can Learn from Croatia.” 17 July 2013. <http://www.opensocietyfoundations.org/voices/roma-inclusion-what-we-can-learn-croatia>.

that primary education is compulsory and free under the Constitution, requires not only the participation of the parents, but also of the decision-makers accountable, primary schools, teachers, social institutions, etc. Thus, the government has to lay down the law and filter the actual promotion of mutual understanding between the different inhabitants. The outcomes of ‘white-flight’ do not have to be a direct consequence of the government’s failures to implement the appropriate legislation, but it can be the result of social circumstances. A solution needs to be found in order to prevent the continuation of this phenomenon. Due to white-flight, many of the Roma pupils will spend the entire course of their education without being in a multicultural environment, which is precisely one of the elements of quality education.

Croatia used the ‘language excuse’ for the separation of the Roma and non-Roma pupils, however there is a vast difference between the formation of classes that are in the interest of the Roma children and the interest of the country not to deal with the issue. As the Advisory Committee stated, “some of these structures are legitimate, while others are unacceptable, especially if they impose segregated education and have discriminatory effects, as is often the case for the Roma”.²⁵² While some of the legal provisions and actions might be aimed at the protection of minorities, they can, at times, lead to counterproductive results. Even though Croatia has been trying to execute all of the requirements asked of them in accordance with the verdict, there have been some flaws. For example, the Action Plan that was created in compliance with the implementation of the ECtHR verdict mentions discrimination only once and in an obvious way suggests that the Roma pupils are the ones at fault due to their low command of the Croatian language.²⁵³

It was expected that the Oršuš case would raise awareness and

²⁵² Advisory Committee on the Framework Convention for the Protection of National Minorities. *Commentary on Education under the Framework Convention for the Protection of National Minorities of the Advisory Committee*. ACFC/25DOC(2006)002. Strasbourg, 2 March 2006. 17. http://www.coe.int/t/dghl/monitoring/minorities/3_fcnmdocs/pdf_commentaryeducation_en.pdf.

²⁵³ Ministarstvo znanosti, obrazovanja i športa. Mjere za izvršenje presude Europskog suda za ljudska prava u predmetu *Oršuš i dr. protiv Hrvatske*. [Translated by the author: Measures for the execution of the judgment of the European Court of Human Rights in the case *Oršuš and Others v. Croatia*. 2010]. 2010. <http://public.mzos.hr/Default.aspx?art=10635&sec=3156>.

public discussions on the matter, but different examples of segregation and discrimination continue to be a problem. As it can be seen from the statistical data that has been provided, there have been minor changes in regards to the increasing number in the participation in the extended stay programmes and in the number of pupils that have been provided special assistance. The number of Roma assistants that are available for the pupils remains rather insufficient. There needs to be more financial support in order to employ and train the Roma assistants so that each Roma child has an equal chance to receive the best education that can be provided in Croatia.

One of the most beneficial outcomes of the judgment has been the pre-school programme. A positive illustration is the fact that in the Međimurje County, all Roma children have been included in the pre-school programme. The Roma parents are extremely satisfied with the pre-school programme due to the fact that their children are learning how to read and how to speak Croatian since the majority of the parents never completed primary school.²⁵⁴ As the principal in the “Dr. Ivan Novak” Primary School in Macinec emphasized that there was only one Roma pupil that was held back last year in the school compared to an average of five pupils being held back every year before the intensification of the pre-school programme.²⁵⁵ In fact one of the recommendations should certainly be in regards to making the pre-school programme last three years rather than the current nine month programme in order to further prepare the children for the educational system.

There have been improvements regarding the increased attendance rate of Roma pupils, but there has to be more involvement among the relevant social services because this obligation lies within their job description. As previously revealed, after all of these years, dropping out of primary school has been the typical trend of the Roma pupils, but they are not the only ones at fault. A report by the Croatian government stated that this type of information clearly indicates that the system has not sufficiently accommodated the Roma pupils with

²⁵⁴ Bass, Tom. “Desegregating Roma and Croat schoolchildren: what has been done?” 21 May 2013. <http://www.opendemocracy.net/tom-bass/desegregating-roma-and-croat-schoolchildren-what-has-been-done>.

²⁵⁵ Matejčić, Barbara. “Fits and Starts.” *Transitions Online*. 27 March 2013. <http://www.tol.org/client/article/23685-croatia-education-roma-language.html>.

adequate preparation to enter into the educational system.²⁵⁶ Croatia has implemented all of the adequate policies, but the realistic state of affairs shows that even after three years of the Oršuš verdict by the ECtHR, the Roma children still face various types of difficulties within the educational system. As Matejčić emphasized in her article, during an interview with one of the plaintiffs involved in the Oršuš lawsuit, the young man could barely express himself in the Croatian language.²⁵⁷ This is one example of the poor education received by Roma children and the ‘outcome’ of the momentous case in Croatia.

So what is the result of Croatia becoming a member of the Decade of Roma Inclusion and an EU Member state? Yes, it fulfilled the EU requirements and continues to implement all of the needed obligations, yet cases such the one in Gornji Hrašćan still occur. It is a state party to the ICESCR, yet it has obviously not prohibited discrimination fully. As one of the Roma parents said, it was a problem when the Roma did not send their children to school, nonetheless it has become an even greater problem when they started to send them.²⁵⁸ Međimurje is currently an example of indirect segregation and direct discrimination being present within the educational system. One of the main reasons as to why the national strategies are not adequately addressing the existing challenges that are in favour of the right to education of the Roma children are the lack of will to execute them and the apparent lack of finances. Thus, the short-term effect is questionable, measures have been taken due to the Action Plan and this is precisely the effect, that Croatia has “taken measures”.

Thus, while some of the resources have been made available for the provision of pre-school education, language training and school assistant training, there should be more assistance provided in order to ensure the further success of desegregation efforts. The teaching

²⁵⁶ Vlada Republike Hrvatske. *Nacionalna Strategija za uključivanje Roma, za razdoblje od 2013. do 2020.godine*. [Translated by the author: The National Strategy for Roma Inclusion for the period of 2013 until 2020]. Zagreb, studeni 2012. godine. 39. <http://www.uljppnm.vlada.hr/images/nacionalna%20strategija%20za%20ukljucivanje%20roma%20za%20razdoblje%20od%202013-2020.pdf>.

²⁵⁷ Matejčić, Barbara. “Fits and Starts.” *Transitions Online*. 27 March 2013. <http://www.tol.org/client/article/23685-croatia-education-roma-lanuage.html>.

²⁵⁸ Beti, Ivica. “Loše je kad djecu ne šaljemo u školu, loše je i kad ih šaljemo.” *Večernji list*. 20.09.2012. 9.

assistants act as the role models for the Roma children, but when comparing the number of Roma assistants provided and the number of Roma pupils, it shows that the equation simply does not add up. It is of paramount importance for the state and other stakeholders to invest and provide more for the teaching assistants. The parents are also important in this case in order to ensure the sound learning of the language and to ensure their children's regular attendance for the entire school course.

On the basis of the CoE recommendations, some of the other requirements that still have to be addressed are the following: abolishing the Roma only classes, addressing the problems of poor school attendance and the high drop-out rate of the Roma children, need to clarify which measures have been taken to combat high drop-out rates among the Roma children in primary schools, active and structured involvement of the relevant social services, providing what measures have been taken in order to prevent excessive length of proceedings before the Constitutional Court, etc.²⁵⁹ By implementing all of the further required obligations asked of Croatia, the country is investing not only in the Roma children, but also into the future of the country. Posavec and Hrvatic have suggested the following recommendations for the proper realization of an all-inclusive method specifically for the Roma pupils: "the right to education in one's own language, the establishment of special, educational institutions or departments, the creation of classes with special programs in which the history, culture and science of the Roma are emphasized and the intercultural educational practice".²⁶⁰

Croatia, as a whole, cannot give up on the Roma children due to the fact that many of the non-Roma people believe that education is not of great importance for the Roma due to their way of life. But, what if the majority of them actually wants to educate themselves? As the old saying goes, "never judge a book by its cover". Therefore the Roma should not be solely judged on the basis of stereotypes regarding their community and traditional ways. The ECtHR verdict can be seen as a political aspect of the wider spectrum of resolving the issue of inclusion and integration of the Roma population, but it cannot be successful on

²⁵⁹ Council of Europe – Committee of Ministers. *Supervision of the execution of the judgment in the case of Oršuš and others against Croatia*. CM/Inf/DH(2011)46. 2 November 2011. <https://wcd.coe.int/ViewDoc.jsp?id=1862497&Site=CM>.

²⁶⁰ Posavec, Koraljka, and Neven Hrvatic. "Intercultural education and Roma in Croatia." *Intercultural Education* 11, No. 1 (2000): 100.

its own. There have to be continuous efforts made in order for the Roma and non-Roma communities to cooperate and find a common ground. The educational system is precisely this common ground that can be the road towards the inclusion of the Roma community. As Panagiotis Liargovas emphasized “if states allow discriminatory actions within the state, they are allowing for future problems to occur, but by allowing diversity it can be used for the development of a country”.²⁶¹ As a result, Croatia still has a long way to go and should start taking into consideration the actual specific needs of Roma pupils. Although there have been improvements in regards to legislation, the situation on the ground needs to be improved and further efforts have to be invested in order to completely eradicate segregation and discrimination.

CONCLUSION

This paper analysed the situation of the Roma community, specifically focusing on the Roma pupils’ right to education in primary schools in Croatia. Special attention has been given to the Roma pupils in the Međimurje County due to the recent ECtHR verdict that identified that the segregation of the Roma children into separate classes based on language was unlawful discrimination. The arguments of the critics and the supporters of minorities’ rights and the utilisation of the right to education have been presented. I have elaborated the arguments showing how and why minorities, such as the Roma and in this case the Roma pupils should have their right to education respected, protected, and guaranteed without segregation and discrimination like every other human being. The question is, does Croatia enable quality and adequate education for the Roma children? As we have seen that while the Roma children do have access to the resources due to the implementation of the international, regional and national legislation, particularly due to the implementation of the recent verdict by the ECtHR, one crucial element remains to be further worked on and eradicated, which is discrimination. Without the abolition of this element, the Roma pupils will not be able

²⁶¹ Liargovas, Panagiotis. “Diversity as a Source for Economic Development and Prosperity” Paper presented at the 19th CEI International Summer School. Bertinoro, Forlì, 12th-13th September 2013.

to receive the full version of adequate and quality education.

Throughout the thesis the idea was presented that even though Croatia has implemented and executed some of the proper steps in accordance with the ECtHR verdict, further progress is still needed in the Croatian educational system, particularly due to the fact that there is still discrimination and ignorance present towards the Roma pupils. This demonstrates that Croatia cannot be seen as an entirely successful story when it comes to discrimination and segregation of Roma children within the educational system.

The situation sometime differs when looking at the issues in practice and what is essentially taking place on the ground. The Roma and non-Roma community need to accept each other and work together to serve as an example of promoting tolerance for the youth in their communities. Despite the fact that all of the legislation concerning minority rights and the right to education is prepared and is in accordance with the international norms, the implementation on the ground has to be further enriched and promoted in order to ensure the full integration and equal functionality of the Roma into the society.

It has been three years since the verdict and a new problem has arisen. This new challenge regarding the educational system can be described as a non-direct type of segregation, the phenomenon of white-flight. If the trends of white-flight continues to strengthen, in time there will be no multicultural classrooms consisting both of Roma and non-Roma pupils which will lead to further segregation between the pupils as well as minority and majority communities in general and non-acceptance of each other. All things considered, it still cannot be said with certainty that segregation no longer exists. As statistics show the number of Roma only classrooms has fluctuated over the years, but recently it has been on the rise. It was pointed out there are also various other issues to be dealt with. One of the main challenges in addressing segregation and discrimination in Croatia continues to be the community problem. The promotion of tolerance, acceptance and understanding between the Roma and non-Roma community could be the answer to all issues regarding the right to education. Parents influence their children the most and if the Roma and non-Roma parents internalize and promote the core values for mutual understanding, in the long-run, this could lead to the non-presence of discrimination in

the educational system. Another way this could be done is through the introduction of education in the Roma minority language. However, this idea has not been thoroughly considered in Croatia.

There are national strategies that deal with the right to education of minorities, nonetheless the Roma children continue to be the 'outsiders' within the educational system. As it can be concluded, the strategies need to be revised in order to include both innovative and in-depth measures in order to genuinely deal with the presented issue. The solution lies somewhere in the middle between the cooperation amongst the Roma, non-Roma community and all of the significant stakeholders at the state and local levels.

The number of the Roma and their communities increases each year and if discrimination continues to be present, the educational system will create even deeper gaps which will cause the two communities to never be side by side on equal terms. It is of crucial importance for Croatia to continue to intensify their efforts at providing quality education for the Roma children because as I see it, it is their only way eliminate discrimination and ensure full voluntary integration of the Roma. In this context various dimensions of their lives should be considered that should provide them with a chance to acquire a socio-economic position which will give them an opportunity to be on an equal level with everyone else.

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**EUROPEAN REGIONAL MASTER'S DEGREE IN
DEMOCRACY
AND HUMAN RIGHTS IN SOUTH EAST EUROPE**

University of Sarajevo – University of Bologna

**PROTECTION OF HUMAN RIGHTS OF ARMED
FORCES PERSONNEL: CASE STUDY OF THE
EXISTING NATIONAL MECHANISMS IN BOSNIA
AND HERZEGOVINA AND MONTENEGRO**

MASTER THESIS SUBMITTED IN PARTIAL FULFILMENT OF
THE EUROPEAN REGIONAL MASTER'S DEGREE IN DEMOCRACY
AND HUMAN RIGHTS IN SOUTH-EAST EUROPE

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Table of Content

LIST OF ABBREVIATIONS	191
INTRODUCTION.....	193
Chapter one: EVOLVING DEFENCE AND SECURITY	
CONCEPTS AND ACTORS.....	197
1.1. Changing Security Environment, Changing Perspectives	197
1.2. International Framework.....	202
1.3. The Role of States and Existing National Mechanisms.....	206
Chapter Two: HUMAN RIGHTS IN MILITARY OF BIH AND	
MONTENEGRO.....	213
2.1. Bosnia and Herzegovina and Montenegro – background information.....	213
2.2. Bosnia and Herzegovina and the Institution of BiH Parliamentary Military Commissioner.....	218
2.2. Montenegro – Union representation of soldiers.....	224
Chapter Three: ANALYSIS	232
Comparison and Critical Analysis of the HR Protection of	
Military Personnel System in BiH and Montenegro.....	232
CONCLUSION	238
Literature.....	242
ANNEXES	249

LIST OF ABBREVIATIONS

AF BiH	Armed Forces of Bosnia and Herzegovina
BiH	Bosnia and Herzegovina
BiH PA	Parliamentary Assembly of Bosnia and Herzegovina
CSO	Civil society organization
ECHR	European Convention on the Protection of Human Rights and Fundamental Freedoms
GA	Gradjanska alijansa (Civil Alliance)
HoP	House of Peoples
HoR	House of Representatives
HR	Human rights
JNA National Army)	Jugoslovenska narodna armija (Yugoslav National Army)
Lt	Lieutenant
Lt Col	Lieutenant Colonel
MoD	Ministry of Defence
NGO	Nongovernmental organization
PMC	Parliamentary Military Commissioner
WB	Western Balkans
SOVCG	Sindikalna organizacija vojske Crne Gore (Syndical Organization of the Army of Montenegro)

INTRODUCTION

Armed forces are an integral part of a democratic state and society, representing and, to some extent, reflecting the state structures. By fulfilling their defence and national-security functions, the armed forces play a crucial role in enabling a secure environment that allows other citizens to enjoy the inalienable rights and freedoms to which they are all entitled as human beings. There is, it might be argued, little room to consider the human rights of those within the armed forces. Armed forces personnel are in principle (and usually by the law as well) bound to respect human rights and international humanitarian law while exercising their professional duties. But only when their rights are fully guaranteed within their own institution, will armed forces personnel be likely to uphold these in the discharge of their tasks— both when in the barracks and during operations.¹

Bearing in mind the nature of the defence and security sector, one might be forgiven for thinking that the very essence of human right is not a primary consideration for the armed forces of a state which has established them for at least one purpose, to fight a war on its behalf.² This work considers those aspects of human rights law which may become relevant to the activities of armed forces whether they remain in barracks, undertake training or are deployed in military operations within their own state or outside it. An overreaching purpose of this work is to show that human rights promotion in military can serve as a positive influence in armed forces, particularly in the developing democracies that suffered conflict past. Furthermore, the research will look into the existing national trends and institutional mechanisms for protection of human rights of armed forces personnel. The two researched countries, Bosnia and Herzegovina and Montenegro, still search for a balance between transitional challenges and democratic growth in its broader military engagement strategies. An evaluation of BiH and Montenegrin military human rights promotion efforts is long overdue. The centrality of human rights promotion in developing

¹ OSCE/DCAF, *Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel*, OSCE ODIHR, Warsaw, 2008., p 13

² Rowe P., *The Impact of Human Rights Law on Armed Forces*, Cambridge University Press, Cambridge, 2005., p 2

democracies, the lack of literature and knowledge about efforts in this area, and the possible positive implications of finding some common ground between militaries and human rights all contribute to the need for such an assessment.

Chapter one is dedicated to the analysis of the changing security environments and how it reflected the international legislation with regard to the human rights protection of military personnel. At the same time, it reflects upon the changing perception of the service in general. The Chapter will give an overview of existing international regulations that are in direct relation with the army profession. Furthermore, and in the light of those changes, many new democratic states have had to adapt their military structures in order to respond to quickly changing security environments, but also to properly respond to the emerging democratic demands (usually as a result of obligations inherited from the international HR treaties that the countries have signed). This also includes democratic control over their military forces and reform of their military structures with the aim of making them consistent with international HR obligations. Chapter two demonstrates the findings of the empirical research conducted in the two analyzed countries of Western Balkans, Bosnia and Herzegovina and Montenegro. The research on BiH reflects upon the role and mandate of the regionally unique institution of BiH Parliamentary Military Commissioner in the overall human rights institutional framework. It compares the mandate of the Commissioner with those of the Inspector General of the BiH Ministry of Defense and the Institution of the Ombudsman of Bosnia and Herzegovina. By clearly demonstrating the role, mandate and the results of the work of Military Commissioner, this research analyzes the impact of this institution on Bosnia and Herzegovina's endeavors to implement international human rights standards not only in the civilian but also in the military environment.

Montenegro has a somewhat unique approach to protection of the HR of military personnel, having established two Unions for Soldiers that are, as research proves, clashing in jurisdiction and competencies and are in conflicting relations due to different political agendas. The research will provide the overview of the current situation and HR protection mechanisms offered to the Montenegrin military (including the Inspectorate, civilian Ombudsman and several others) and tackle

the perspectives of both Union representatives.

The changes these countries need to face reflect a recognition that, as “citizens in uniform”,³ armed forces personnel are entitled to the same human rights and fundamental freedoms as all other citizens. Indeed, the cornerstone of all international human rights treaties to which both states are bound is that all human beings, regardless of their professional situation or position in society, are entitled to their inalienable rights and freedoms. Bearing in mind that the concept of the citizens in uniforms is relatively new for both countries, some issues in implementation of the HR obligations can be easily spotted. Nevertheless, this is a very important topic for both countries, still striving toward NATO integrations and struggling with the ghosts of the past conflict. Chapter three resonates some of the HR challenges that military personnel face in these two countries, followed by a series of endorsements for the future.

In an effort to thoroughly analyze existing national mechanisms in BiH and Montenegro, I have employed three working assumptions, all derived from relevant literature and field research. The first assumption is that protection of human rights of armed forces personnel is a relevant democratic obligation and it is necessary in the context of future conflict prevention and democratic prosperity. Furthermore, the second assumption is asserting that this matter deserves a special institutional and practical approach arguing that specialized independent institutions such as the Military Commissioner have a positive impact on the developments in defence and security structures. In that regard, success of human right promotion and protection depends greatly on consistency of the state policies. Looking for inconsistencies in countries efforts and the impact of those shifts should help to measure the effectiveness of military human rights promotion in Bosnia and Herzegovina and Montenegro. Finally, measuring performance against consistency will also help to answer the key question of whether state human rights protection efforts are still underdeveloped, an argument that this work's thesis contests.

This research deals with peacetime situations only, and in the period from 2006 onward (the independence of Montenegro and unification of armed forces of BiH both took place in 2006.). The

³ The concept will be explain in detail in Chapter I.

selected countries for analysis are BiH and Montenegro, for their unique approach to human rights protection of military personnel in all the Western Balkans. The research methods include legal analysis and study of the existing documentation: the obligations and recommendations set by international treaties, national legislations, reports by relevant state institutions and relevant bibliography (publications, journals, books) on contemporary human rights protection. The second phase of the fieldwork research included preparation and execution of over 20 interviews with all relevant institutions (ministries, PMC, NGOs, IOs, Ombudsman, soldiers, media) and attendance in two conferences.⁴ The interviews were of a semi-structured nature while the analysis of the documents was thorough and based on the desk review method. Field work proved to be most fruitful in terms of obtaining information, but some significant structural challenges have been encountered while researching human rights of armed forces personnel in the two countries.

There is a clear lack of comprehensive studies of comparative data and analysis of national practices in the region. Communication with the institutions (the Ministry of Defence in both countries) was oftentimes challenging, and access to substantive information from their side was clearly missing. Furthermore, communication with the soldiers had to have been informal and anonymous, due to lack of official permission from the Joint Staff. Another challenge is the gap between legal provisions and reality. Norms and standards enshrined in a country's constitution and laws are not always respected in reality. For these reasons, the research strategy involved analysis of NGO and media perspective as well.

Notwithstanding the mentioned challenges, this paper aims to explain the importance and relevance of the respective subject in the context of newly developed democracies and post-conflict rehabilitation. Furthermore, the research itself presents a significant academic contribution to the area of defence reform in correlation with human rights obligations of the state.

⁴ Regional Conference, *Positive practice in protection of human rights of armed forces personnel*, 21.-22.03.2013., BiH Parliamentary Assembly, Sarajevo, BiH
Regional Euro-Atlantic Camp, 26.-31.08.2013., Alfa Center Niksic, Plav, Montenegro

Chapter One

Evolving Defence and Security Concepts and Actors

In the aftermath of challenging historical developments that shook the core principles of both security and human rights in the world, it is not surprising that discourse about the importance and correlation between defence structures and preservation and protection of rights for individuals belonging to this system came into being. The relevance of such debate is even stronger for those new democracies that emerged from the conflict past. This chapter will elaborate on the historical context and background of the concept of military personnel as citizens in uniform, and give an overview of existing international and national mechanisms for protection of human rights of soldiers.

1.1 Changing Security Environment, Changing Perspectives

For most of the modern history, standard reference of security in international relations referred solely to national and state structures, defined primarily in military and economic terms, thus not necessarily having a clear or obvious connection to human rights. In fact, it was often viewed that (national) security and human rights are competing views, and such standpoint is broadly reflected in the national military structures.⁵

However, in the new waves of events, with the democratization of the Eastern Block and the ever-changing security agendas, the approach toward both issues has significantly changed.⁶ Following the changes in perception of security (from collective to individual) and its connection to human rights, the newly developed democratic institutions put effort in recognizing the importance of preservation

⁵ Donnelly J., *Universal Human Rights in Theory and Practice*, Cornell University Press, London 2003, 249

⁶ For example, the 1975 Helsinki Final Act of the Conference on Security and Cooperation in Europe (CSCE) was one of the earliest concrete expressions of an international political vision of security related directly to human rights. In this act, human rights were treated as a security issue and without threatening the sovereignty of states, put in emphasis the importance of individual rather than collective security.

of human rights principles within the military personnel. As an illustration of those efforts, the first Parliamentary Commissioner for the Armed Forces took up office in 1952 in Norway (followed by the German Bundestag in 1959), as the world's first parliamentary military ombudsman.⁷ Its purpose was and still is to "safeguard the rights of all members of the Armed Forces"⁸, allowing individuals to bring their cases, complaints and concerns forward directly. At the same time, the role and tasks of the military was also widely changing, with many states getting involved in international peace-keeping and humanitarian missions outside their national countries. Notwithstanding that the trend was introduced significantly (understandably) later in the ex communist countries and countries of the Western Balkans, the overall result was a broader transformation of military profession in today's modern society.

The detailed treatment of human rights is generally a post-World War II development. Although the term was little used in the context of the armed forces before then the soldier was not wholly at the mercy of his military superiors acting to enforce military discipline. He would, most probably, have had certain rights to make complaint about his treatment.⁹ This right to make a complaint was, however, unlikely to have been effective means of challenging what we would now think as a breach of individual human rights. There was no objective standard of treatment, which a human rights treaty could provide, to which a soldier (in particular) was entitled. Although all armies would have operated under a system of military discipline, different armies treated and still treat their servicemen differently.

The change in perception was dully channeled in the international arena with the concept of soldiers (conscripts) being considered as *citizens in uniforms*. The concept was introduced in the Council of Europe Resolution 1966 from 1998, where it states:

1. In most Council of Europe member states defence is based on national military service and the people's obligation to serve their country for a period limited by law. These conscripts, like all soldiers, must be regarded as citizens in

⁷ Official website: <http://www.ombudsmann.no/node/57>, accessed 10.09.2013.

⁸ IBID

⁹ More in: Nolte G., *European Military Law Systems*, De Gruyter Recht, Berlin, 2003, p 76

uniform.

2. As a result, conscripts should enjoy the same rights and fundamental freedoms, in particular those conferred by the European Convention on Human Rights, and enjoy the same legal protection as ordinary citizens. This does not preclude the possibility of states providing for restrictions on the exercise of these freedoms, if these are justified according to the specific circumstances or for maintaining military discipline, but they must be in strict respect of the Convention.¹⁰

The fact that human rights of soldiers are this way covered by several treaties, none of which are specific for military but for citizens in general, meant that there was an additional need to cover separately those areas specific for military job. It was later summed up in Council of Europe Parliamentary Assembly Recommendation 1380 from 1998 entitled Human Rights of Conscripts,¹¹ followed by series of other over-encompassing documents in the upcoming years.¹² There it states again that members of the armed forces, as citizens in uniforms, are entitled to the same fundamental freedoms, including those set forth by the European Convention on Human Rights and the European Social Charter, and the same protection of their rights and dignity as any other citizen – within the limitations imposed by specific exigencies of military duties.

The “citizens in uniform” approach is of relevance not only to armed forces with large numbers of conscripts. Moreover, the concept of citizens in uniform cannot refer solely to conscripted soldiers. While the conscripted soldier is under arms as part of compulsory military service, the professional soldier agrees to join the armed forces on a voluntary basis. The mere fact of joining the armed forces voluntarily does not and cannot result in a waiver of human rights. It enforces an important more general point about the position of the armed forces in a democracy under the rule of law. The respect for democratic institutions is enhanced through encouragement of members of the armed forces to regard themselves as citizens to the fullest extent possible.

¹⁰ <http://www.assembly.coe.int//Main.asp?link=http://www.assembly.coe.int/Documents/AdoptedText/ta98/eres1166.htm#2>

¹¹ <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta98/EREC1380.htm>

¹² To be discussed in Chapter 1.2., International Framework

Although this notion clearly points out the fact that servicemen and women should be equally treated in access to their rights as other citizens, the final remark on the specificity of the vocation gives room for specific interpretation of the notion '*citizens in uniforms*' in different ways, in different countries. Furthermore, there is no single model for protecting the human rights of armed forces personnel.¹³

But why is human rights of military personnel such a sensitive and complex topic? To answer this question, one must take into consideration that for these people, human rights may be legally adapted or limited under specific conditions and situations. Several factors may be taken into account: the nature of military discipline, the hierarchical organization of military ranks, the need to obey orders, and the protection of morale.¹⁴ Military is a very unique profession. Among a couple of other job profiles that are legally bound to carry weapons, this is again the most complex and carries the biggest weight in responsibilities, obligations and rights. Unlike any other group of citizens, members of the armed forces can, in the course of their official duties, be called upon to kill other people and to sacrifice their own lives. Military life may involve serving under harsh or extreme conditions. Even in normal circumstances, there may be relatively little separation between private life and official duties, e.g. limitations in family life, limitations in movements etc.

The first line of defence, however, has to come from within the armed forces themselves. In particular, protection of the human rights of their subordinates features among the key responsibilities of superior officers. Human rights education is crucial in raising awareness and creating a professional culture within the military that includes respect for human rights as part of a commitment to democratic values. Furthermore, in the conditions of war (and they will not be examined here thoroughly), military personnel is often those who commit the most heinous crimes. But there is an understanding that, and this is put bluntly, if these people are fully aware of their rights and obligations, are unlikely to commit severe human right breaches in the field. The case in point can be war rapes and other atrocities committed toward

¹³ OSCE, DCAF, Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel, OSCE ODIHR, Warsaw 2008., p 22

¹⁴ OSCE, DCAF, Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel, OSCE ODIHR, Warsaw 2008., p 24

civilians. If there is a just and transparent system of protection (and education in HR matters) of military personnel, they are at least obliged to report such crimes, also prevent them at best. This might sound rather simplistic and very common sense, but the only way to ensure the highest level of protection from such atrocities, is to state their severity through legal norms. This way, they are not only a moral, but a legal obligation and that is very relevant for the period of the aftermath of any kind of conflict or military intervention.

Human rights of members of armed forces have additional importance in the contemporary context for two reasons. The first is the changing nature of military operations. Armed forces are now more likely to be deployed in peace-keeping operations than in conventional warfare. Servicemen and -women in peace-keeping operations are frequently called upon to assist political institutions within societies fractured by conflict to re-establish a culture of respect for human rights in their area of operations. They will be in a better position to do this if they themselves have knowledge of, and are accustomed to, such a culture within their own armed forces. Also, where armed forces are not engaged in conventional combat but in roles analogous to policing, the case for restrictions on their rights for reasons of military discipline is substantially weakened.

Second, the increasing use of multinational military task forces in these and other operations draws attention to differences in the working conditions and rights enjoyed by members of the armed forces in different states. Unless there are good reasons to justify such variations, the differences will inevitably impact the morale and effectiveness of those units enjoying fewer rights.

These special factors, distinctive to life in the armed forces, confirm also the need for placing limitations on the human rights of armed forces personnel. While individuals do not lose their human rights when they enter the armed forces, states can limit their enjoyment of human rights due to requirements related to the particular characteristics of military life. For instance, CoE Committee of Ministers/Rec (2010) 4 on the human rights of members of the armed forces, states:

According to Article 15 of the Convention and Article 30 of the European Social Charter, in time of war or other public emergency threatening the life of the nation, states

may derogate from certain of their obligations under the Convention and the Charter to the extent strictly required by the exigencies of the situation and provided that such measures are not inconsistent with their other obligations under international law.¹⁵

The particularities of military life that are used to justify restrictions on the exercise of human rights in the barracks are often related to preserving order and discipline in the military; establishing the political neutrality of the armed forces; maintaining operational effectiveness; protecting classified information; obeying orders; and maintaining the hierarchical structure of the military organization. How and to what extent — if at all — these characteristics constitute a justification for restricting the enjoyment of human rights is yet to be discussed.

1.2. International Framework

In order to provide some amelioration of the condition of the victims of the war, to control the methods of war and to limit its consequences, particularly as they affect civilians or civilian objects, states have, over a period of time, agreed by treaty to wide dobby of international humanitarian law. International humanitarian law has been drawn up for implication in time of war (or armed conflict). It is not entirely clear whether international humanitarian law gives the soldier any rights under it. The general structure of this body of law is to impose obligations upon states, although individuals may take their benefit and those who infringe them may be personally liable. An important provision in the Geneva Conventions 1949, however, is that a (soldier) “may in no circumstances renounce in part or in entirely the rights secured to by the present Convention”.¹⁶ These rights within the Geneva Conventions 1949 are not of the same nature as those within

¹⁵ Recommendation CM/Rec (2010)4 of the Committee of Ministers and explanatory memorandum, Human Rights of Members of the Armed Forces, CoE, Strasbourg 2010., p 7

¹⁶ <http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/index.jsp>

human rights treaties. The practical reality of the situation is that there are very limited means provided by these Conventions to a protected person to enforce the treatment of him which these Conventions require of the detaining state.¹⁷

The main treaties of international humanitarian law that complement human rights law during times of armed conflict are the Geneva Conventions of 1949, with the 1977 Protocols to those Conventions. A number of other treaties also protect human rights by dealing with the criminal liability of individuals, rather than state liability. These include 13 general treaties on terrorism, treaties on genocide and slavery, and the Rome Statute on the International Criminal Court. A number of these provisions can potentially apply to armed forces personnel. The treatment of individuals on a basis of equality is, however, a fundamental principle of most, if not all national legal systems. It certainly is in international law. International humanitarian law requires protected persons under the Geneva Conventions of 1949 to be treated without, for example, ‘any adverse distinction based, in particular, on race, religion or political opinion’.¹⁸ It is not surprising to see human rights treaties containing a similar message, although such rights to equal treatment may not amount to a free-standing right. The right to equal treatment may also be given in other international instruments, an example being under the law of the European Union. Human rights law, however, has been developed largely for application in time of peace, although it was envisaged that it would also have some relevance during wartime. But, human rights law played a significant part in the development of international humanitarian law.

The most valuable source of guidance in international framework of protection of human rights of military personnel is the jurisprudence under the European Convention for the Protection of Human Rights and Fundamental Freedoms and the interpretations made by the European Court of Human Rights.¹⁹ The “citizens in uniform” approach mentioned above can be seen in relation to several of the most important civil and

¹⁷ Rowe P., *The Impact of Human Rights Law on Armed Forces*, Cambridge University Press, 2006., p 13

¹⁸ <http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/index.jsp>

¹⁹ OSCE, DCAF, Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel, OSCE ODIHR, Warsaw 2008., p 26

political rights under the ECHR: freedom of expression; the right to respect for private life, home and correspondence; freedom of thought, belief and conscience; and freedom of association.²⁰ These are all qualified rights within the convention system, i.e., they are rights that states may restrict provided certain conditions are met. Limitations must be “in accordance with law” or “authorized by law” and “necessary in a democratic society” for one of a number of specified interests.²¹ The limitations most relevant to the armed forces are “in the interests of national security”, although on occasion “the prevention of disorder” and the protection of the “rights and freedoms of others” have also been cited.²²

In April 2006, the Parliamentary Assembly of the Council of Europe in their Rec 1742 entitled Human Rights of the Members of the Armed Forces reaffirmed the importance of ensuring that member states respect their human rights:

At a time when armies in many member states are seeing action in the same theatres of operation, the Assembly resolutely promotes shared principles to be used to guide army action and govern the conditions under which they discharge their duties. Members of the armed forces cannot be expected to respect humanitarian law and human rights in their operations unless respect for human rights is guaranteed within the army ranks. It is therefore essential that the Council of Europe’s efforts to lay down guidelines on human rights protection within the armed forces be accompanied by a policy in the member states of heightening human rights awareness among their own military personnel.²³

This Recommendation is accompanied by several similar recommendations, all directed to support greater liberties for the armed forces personnel.

²⁰ IBID

²¹ http://www.echr.coe.int/Documents/Convention_ENG.pdf

²² More in: http://www.echr.coe.int/Documents/Convention_ENG.pdf

²³ Council of Europe, Parliamentary Assembly Recommendation 1742 (2006). Available on: <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta06/EREC1742.htm>

The second important piece of international legislation is the OSCE Code of Conduct on Politico-Military Aspects of Security that was adopted by the Forum for Security Co-operation in 1994.²⁴ The Code of Conduct was the first multilateral instrument to regulate the armed forces at both domestic and international levels. “OSCE Code of Conduct on Politico-Military Aspects of Security commits participating States to ensure that military, paramilitary, and security-service personnel are able to enjoy and exercise their human rights and fundamental freedoms in conformity with the relevant constitutional and legal provisions and with the requirements of service.”²⁵ Its rationale is that the democratic control of armed forces is “an indispensable element of stability and security and an important expression of democracy”²⁶. It adopts an innovative approach that bridges both the human and military dimensions of security. Moreover, the Code applies to military and defence policies both in peacetime and in times of conflict.

The Code of Conduct embodies four key principles: the primacy of constitutional civilian power over military power; the subjection of armed forces to international humanitarian law; respect for the human rights of members of the armed forces; and limits over the domestic use of force to what is commensurate to their legal mission and restricting interference with the peaceful and lawful exercise of human rights.²⁷

Modern law of international human rights is without a doubt based on the UN Charter (in particular its Preamble and Arts. 1.3, 55, and 56), supplemented by the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights.²⁸ In addition, there are UN treaties dealing with discrimination with respect to race and women; the Convention on the Rights of the Child; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment; and conventions concerned with refugees and citizenship.

²⁴ Available on: http://www.osce.org/documents/fsc/1994/12/4270_en.pdf%3E;

²⁵ OSCE, DCAF, Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel, OSCE ODIHR, Warsaw 2008., p 30

²⁶ http://www.osce.org/documents/fsc/1994/12/4270_en.pdf%3E; para 20

²⁷ OSCE, DCAF, Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel, OSCE ODIHR, Warsaw 2008., p 34

²⁸ OSCE, DCAF, Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel, OSCE ODIHR, Warsaw 2008., p 34

All of these treaties are relevant for the military personnel as well.

UN treaty obligations are further complemented by regional human rights systems. In practice, the main system of relevance to the analyzed states is the European Convention for the Protection of Human Rights and Fundamental Freedoms²⁹ of 1950, which has been ratified by both of them. Art. 1 of the Convention obliges the contracting states to secure to “*everyone* within their jurisdiction” the rights and freedoms under the Convention.³⁰ It therefore applies to members of the armed forces as well as to civilians.

It should not be thought that the mere enactment into law (whether in an international or national form) of a “human right” is sufficient, by itself, to guarantee the enjoyment of that right. Even if it is clear that the armed forces have denied an individual his or her rights, there may (in some context) be many procedural or other impediments lying in the national mechanisms of a state involved.

1.3 The Role of States and Existing National Mechanisms

In many different countries, the mechanisms for protecting the rights of armed forces personnel still remain inadequate. States have chosen different approaches to human rights in military, depending on several political factors, but mostly related to the perception of the wider role and position of the armed forces in society. National legislation is mostly utilized to set out in positive terms the civil, political, and social rights of members of the armed forces. Laws are especially important if the human rights of armed forces personnel are to be limited for reasons of national security. The OSCE Handbook on Protection of Human Rights of the Armed Forces clearly states that “human rights are not merely a matter of high-sounding aspirations on paper: they must also be fully implemented in daily practice in the armed forces(...). Although laws and regulations prohibiting such practices often exist, it is their practical implementation that proves

²⁹ http://www.echr.coe.int/Documents/Convention_ENG.pdf

³⁰ IBID

most difficult”.³¹ Because human rights are essential for every member of a society, including the military, it is important that limitations on the human rights of armed forces personnel be backed up with safeguards in order to avoid abuse or otherwise unjustified limitations.

There are two requirements for the limitation of soldiers’ rights which apply to all the countries: prescription by law and proportionality.³² There, states differ both in selection of rights they will limit, and the amount of limitation. Although the term “human rights” of the soldiers was not spoken of the armed forces would normally wish to treat its soldiers “fairly” or with “common humanity” if only to ensure recruitment of a sufficient number of soldiers or to retain those whom it had trained. Whilst these considerations might have been less pressing in ex Yugoslavia states where they conscripted those who would form its junior ranks, a certain degree of fair treatment of soldiers by those in authority over them was essential to ensure that the army acted with some measure of efficiency.

Some states perceive military as a unique institution entirely different from civilian institutions. For example, within a military structure difference in rank brings with it different roles and responsibilities. The requirement to obey orders without discussion, in an appropriate case, is considered vital to most (if not all) military systems. A failure to obey an order from a soldier higher in rank will usually amount to a serious military offence. In addition, national laws may impose obligations of equal treatment in different ways. Differences in rank or seniority in the armed forces may lead to different treatment by military superiors of soldiers. This is usually more marked in armed forces than in comparable civilian occupations. The reason for this lies in the different nature of each type of military service.³³ This uniqueness is imperative for militaries of all times and all countries, as it is the only way of preserving operational effectiveness. The armed forces possess another characteristic different in degree from all other forms of employment. This is its

³¹ OSCE, DCAF, *Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel*, OSCE ODIHR, Warsaw 2008., p 67

³² Nolte G., *European Military Law Systems*, De Gruyter Recht, Berlin, 2003, p 75

³³ Rowe P., *The Impact of Human Rights Law on Armed Forces*, Cambridge University Press, 2006., p 13

hierarchical structure based on rank and the obligation to obey orders given by a person more senior in rank or seniority to the recipient of the order. This requirement to obey orders has been described as “the essence of efficiency in military unit”³⁴ and it cannot be ignored when the acts of an individual soldier are being considered.

However, according to this view, a member of the armed forces is not an ordinary public servant but is someone who answers a calling, is dedicated to duty, country, and honour.³⁵ Contrary to this position, other commentators take the view that the distinctiveness of the military is only of relative importance because the military was subject to “civilianizing” trends in the 20th century as a result of political, legal, cultural, technological, and economic pressures from society.³⁶

The effect of these transformations is illustrated by the Institution/Occupation model presented in the work of Charles Moskos.³⁷ The underlying thesis of this model is that the military profession is shifting away from an institutional format to one that is similar to the occupational format of other professions in society. Increasingly, the military profession is becoming “just another job” driven by financial incentives, job security, and attractive working conditions, instead of a unique institution based on country, duty, and honour.³⁸ According to the institution model, soldiers’ human rights will be greatly restricted because the military profession cannot be compared with any other profession in society. According to the occupation model, however, soldiers will generally have the same rights as other citizens because of the commonalities between the military profession and other professions in society.

It is imperative, however, that throughout the process of democratization of the defence system, the rule of law stays

³⁴ IBID

³⁵ Cf. Boene B., *How Unique Should the Military Be? A Review of Representative Literature and Outline of a Synthetic Formulation*, European Journal of Sociology, Vol. 31, No. 1, 1990., p 45

³⁶ Cf. Boene B., *How Unique Should the Military Be? A Review of Representative Literature and Outline of a Synthetic Formulation*, European Journal of Sociology, Vol. 31, No. 1, 1990., p 45

³⁷ Charles Moskos, *From Institution to Occupation: Trends in Military Organization*, *Armed Forces & Society*, Vol. 4, No. 1, Fall 1977, p 232

³⁸ IBID

fundamental and indispensable element in every phase. This refers mostly to the restrictions that are introduced to the personnel of the armies. They must be rationally related to military needs and not merely the result of arbitrary practice or tradition. They should be firmly based upon law, preferably legislation that has been subject to considered democratic debate and lawful procedure. They should be proportionate, i.e., adapted in a nuanced way, to the interests of the military, which would be compromised by the full exercise of human rights. Any restrictions on the rights of armed forces personnel that operate in a discriminatory fashion on the basis of race, ethnicity, religion, sex, or sexual orientation must be carefully scrutinized given their suspect nature and the requirement for clear justification. The weight to show that it is necessary to restrict the rights of armed forces personnel should firmly lie with the military itself.³⁹

National security should not be used as a pretext to abandon the commitment to the rule of law that characterizes democratic states, even in extreme situations, such as domestic disturbances or international armed conflict. Another important step in that direction is the involvement of parliamentary oversight of the armed forces. The need for legislation and parliamentary accountability to govern the armed forces is also recognized by a range of international organizations. Parliamentary involvement gives legitimacy and direct democratic accountability. It can help to ensure that the armed forces are serving the state as a whole and protecting the constitution, rather than narrower political or sectional interests. Proper control ensures a stable, politically bi-partisan approach to defence that is to the benefit of the state and of the armed forces themselves. The involvement of parliamentarians can help to ensure that the use of public money on defence is properly authorized and accounted for.⁴⁰

There is a widespread belief that security policy is a ‘natural’ task for the executive as they have the necessary knowledge and can act quickly. Parliament tends to be regarded as a less suitable institution for dealing with security issues, especially given its often time-consuming procedures and lack of full access to the necessary

³⁹ Nolte G., *European Military Law Systems*, De Gruyter Recht, Berlin, 2003, p 138

⁴⁰ Born H., Fluri P., Johnson A., *Parliamentary Oversight of the Security Sector: Principles, Mechanisms and Practices*, DCAF, IPU, Genève, 2003., p 32

expertise and information. However, as with any other policy area, parliament is entrusted with reviewing and monitoring the executive. There are at least four reasons why such oversight in security matters is crucial: it is a cornerstone of democracy to prevent autocratic rule, control of the budget is crucial, it helps create legal parameters for security issues and a bridge with the public.⁴¹ In a democracy, the representatives of the people hold the supreme power and no sector of the state should be excluded from their control. A state without parliamentary control of its security sector, especially the military, should, at best, be deemed an unfinished democracy or a democracy in the making. According to the eminent American scholar Robert A Dahl, “the most fundamental and persistent problem in politics is to avoid autocratic rule”.⁴² As the security sector deals with one of the state’s core tasks, a system of checks and balances is needed to counterbalance the executive’s power. Parliamentary oversight of the security sector is thus an essential element of power-sharing at state level and, if effective, sets limits on the power of the executive or president. Furthermore, to this day, one of parliament’s most important mechanisms for controlling the executive is the budget. From the early days of the first assemblies in Western Europe, parliaments demanded a say in policy matters, their claim being: “No taxation without representation”.⁴³ As security sector organisations use a substantial share of the state’s budget, it remains essential that parliament monitor the use of the state’s scarce resources both effectively and efficiently.

In practice, it is the executive that drafts laws on security issues. Nevertheless, members of parliament play an important role in reviewing these drafts. They can, if need be, suggest amendments so as to ensure that the proposed legal provisions adequately reflect the new thinking about security. Moreover, it falls to parliament to see to it that the laws do not remain a dead letter, but are fully implemented. Also, the executive may not necessarily be fully aware of the security issues which are priorities for citizens. Parliamentarians are in regular contact with the population and are

⁴¹ IBID

⁴² IBID

⁴³ IBID

well-placed to ascertain their views. They can subsequently raise citizens' concerns in parliament and see to it that they are reflected in security laws and policies.

Another important institution in this chain of democratic bodies relevant for protection of human rights in the military is the office of the Ombudsman. Although this is an institution that deals with civilian matters and that has limited executive authority, their role can be expanded in the cases where countries do not have a specific institution that could treat military matters of similar nature.⁴⁴ Ombudsman for Human Rights is an independent institution dealing with protection of rights of natural and legal persons that have been violated in accordance with national legislation and international obligations.⁴⁵ It determines violations of rights, issues recommendations to competent organs to undertake measures to restore human right violation or poor functioning of administration.⁴⁶

Protection of human rights of military personnel just through the office of the civilian Ombudsman is also known as the Scandinavian model. In total, there are four models for safeguarding the rights of soldiers.⁴⁷ Aside from the Ombudsman's office, the military model offers such services strictly through the capacities of the Ministry of Defence (General Inspectorates, Commissars, etc.). The German model introduces the institution of the Parliamentary Military Commissioner as an independent, constitutionally binding institution that has a role of being an advocate and a legal representative for the rights of servicemen and women.⁴⁸ The combined model, present in i.e. Belgium, offers multiple channels for realization of rights for military personnel (aside from Ombudsman, they have military Appeal Committees, Inspectors, etc.).⁴⁹

Although quite a rare institution in democracies across the

⁴⁴ Buckland B., McDermott W., *Ombuds Institutions for the Armed Forces*, DCAF, Genève, 2012., p 13

⁴⁵ <http://www.ombudsmen.gov.ba/Default.aspx?id=10&lang=EN>

⁴⁶ IBID

⁴⁷ From the interview with Mr Bosko Siljegovic, BiH Parliamentary Military Commissioner, dated ...

⁴⁸ Krueger - Sprengel F., *The German Military Legal System*, Military Law Review, Vol 57, Washington DC, 1972., p 64

⁴⁹ Nolte G., *European Military Law Systems*, De Gruyter Recht, Berlin, 2003, p 269

world, the military ombudsman is considered a very relevant (if not the key) part of the national mechanism for protection of human rights in the military. The main task of the military ombudsman is to investigate alleged arbitrary decisions or misdemeanours committed on behalf of the responsible minister(s) of the security services, notably the military.⁵⁰ The institutional embedding of the military ombudsman in the political system varies from country to country. Defence ombudsmen can be appointed by parliament and report to the parliament (Germany, Sweden), or can be appointed by the minister of defence (Israel, Canada). Some ombudsmen have their office within the parliamentary precincts (as is the case of the German Parliamentary Commissioner for the Armed Forces) or it can be institutionally located outside the parliament (Sweden).⁵¹

Citizens or servicemen who were mistreated by the military can ask the ombudsman to start an inquiry. In addition, parliamentarians can ask the ombudsman to investigate alleged abuses and complaints. Often the cases investigated by the ombudsmen deal with exemption from, and postponement of, obligatory military service, transfer and re-posting during military service, diet, demobilisation, leave of absence, disciplinary and punishable offences. If the ombudsman finds that a complaint was justified, he/she can make recommendations, including demanding the institution in question change or reconsider its decision.

Bearing in mind the nature of the security sector, some information cannot be disclosed to the public for reasons of national security. Many countries have established specific provisions in law as to how the ombudsman should operate in matters of national security. Generally speaking, even where rules of top confidentiality apply, the ombudsman is allowed to carry out whatever investigations are necessary, and to have access to military bases and all relevant documents for any specific case. The ombudsman, however, cannot disclose the findings of the investigation to the general public.⁵²

⁵⁰ Buckland B., McDermott W., *Ombuds Institutions for the Armed Forces*, DCAF, Genève, 2012. , p 56

⁵¹ IBID

⁵² IBID

Chapter Two

Human Rights in Military of BiH and Montenegro

The following chapter will reflect on the situation of human rights in the military of the analysed countries in detail. In particular, the focus will be on the institutional models that are present in Montenegro and Bosnia and Herzegovina.

2.1. Bosnia and Herzegovina and Montenegro – background information

The challenging political landscape of the Western Balkans has been analyzed in various ways and perspectives, but a very few have tackled the perspective of human right protection systems of military women and men in the countries of the region.⁵³ The focus in this research will be on two countries, Bosnia and Herzegovina and Montenegro.

These two states of Western Balkans, after having experienced gruesome wars while simultaneously underwent through a transformation of the societal system (mirrored in the military as well), have now moved to the institutional model. Due to the economic crisis that is affecting both Bosnia and Herzegovina and Montenegro, the military jobs are portrayed as a stable income (i.e. the amount of people that apply for peace-keeping missions in Montenegro is ten times bigger than the requested number, just because of the financial benefit⁵⁴).

Both Parliaments of Bosnia and Herzegovina and Montenegro have a Joint Committee on Defence and Security with the main role to oversee, consider and monitor the implementation of the security and defence policies in the two countries. The bodies monitored are not only the Military and Ministry of Defence, but institutions with broader security mandate, such as Committees on Military Matters, Commissions

⁵³ Aside from the OSCE Handbook that covers all the Participating States, including Montenegro and Bosnia and Herzegovina, and several publications made by the Office of the BiH Parliamentary Military Commissioner, no local institution has tackled this particular HR issue

⁵⁴ Interview with Mr Radovan Bogojevic, Montenegro Ministry of Defence, dated 28.08.2013.

for Regulation of Small Arms and Light Weapons Disposal, Ministries of Security and other executive bodies.⁵⁵ With respect to the military, their role is in particular focused on long-term and short – term planning pertinent to the structure of the military, personnel policy and recruiting, salaries and allowances, education and training, professional conduct and ethical standards of civilian and military staff, army equipment, procurement and export/import etc.⁵⁶ The Committee also considers the cooperation of the countries with relevant international institutions such as the UN, OSCE, NATO and the Stability Pact of South-East Europe. They are also in charge of considering ratifications and implementations of international treaties in the domain of security and defence. In the structure of the command, however, both armies respond directly to the heads of the country (in the case of BiH, it is the three members of the Presidency, and in the case of Montenegro, the countries' President) as a firm link between the government and the defence structure. On the other hand, the parliamentary oversight component presents a linkage between the defence structures and the people of the country (through their elected representatives).

Both of the countries have taken over the same international obligations in the human rights and security sphere. In addition to the general human rights commitments, the states have made pledged to give legal protection to human rights for members of the armed forces.⁵⁷ According to OSCE Handbook on Human Right Protection of Military Personnel, there are several human rights that are exceptionally important in military and its changing security environment: Right to life, Torture, Inhuman and Degrading Punishment or Treatment, Freedom of Association, Freedom of Expression, Freedom of Thought, Conscience, Belief and Religion, National, Cultural, and Linguistic Identities, Equality on Grounds of Sex, Freedom from Arbitrary Arrest and Trial and Right to a Fair Trial.⁵⁸

As noted earlier, in principle soldiers, as citizens in uniform, enjoy the same fundamental rights as every citizen. Many countries'

⁵⁵ https://www.parlament.ba/sadrzaj/komisije/zajednicke_komisije/odbrana/default.aspx?id=28478&mid=1&langTag=bs-BA&pril=b

⁵⁶ IBID

⁵⁷ OSCE, DCAF, Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel, OSCE ODIHR, Warsaw 2008., p 137

⁵⁸ IBID

armed forces consider, however, that political activities are detrimental to the need for discipline and are incompatible with the military profession, and BiH and Montenegro are not an exception. According to the Law on Service of both countries⁵⁹, members of the military are prohibited to be politically engaged. For this reason, the political neutrality of soldiers is a controversial issue for all military systems.

There are several justifications for restrictions of this kind. First, the armed forces, as defenders of territorial integrity and the constitutional order, need to be seen to be independent and above political controversy. Neutrality helps to ensure that voters alone determine who is to govern the state. In many transitional democracies, the armed forces have had a tainted and repressive history of association with the dominant political party, and neutrality requirements are a means of breaking with the past. Second, restrictions are aimed at preventing political controversy within the armed forces that could detract from their effectiveness and morale, particularly in the case of criticism of the country's political leadership or of the tasks assigned to the military by elected leaders.

Third, effective civilian control and accountability for the armed forces require a separation of the political and military spheres. If members of the armed forces are significant actors within the political sphere, it will undermine democratic accountability and create conflicts of interest. Consequently, restrictions may be necessary to prevent the active involvement of members of the armed forces in politics.

In a democracy it is well understood that the government must exercise control of the armed forces. Individual states will do this in different ways. The main rights at stake in the militaries of BiH and Montenegro are the freedoms of expression (e.g., to express and communicate political views) and of association (e.g., to join a political party, or to form Unions, and the right to strike). The freedom of peaceful assembly is guaranteed by article 21 of the ICCPR and article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁶⁰ It is clear that, in general, the imposition of punishment (including a professional disciplinary penalty) for participating in a demonstration will be regarded as a breach of human

⁵⁹ MNE Law on Service, article 33, Official Gazzete no 88/09 from 31.12.2009., Law on Service BiH, article 26, Official Gazzete no 42/12 from 31.05.2012.

⁶⁰ http://www.echr.coe.int/Documents/Convention_ENG.pdf

rights law. However, article 11.2 of the ECHR states: “This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the state.”⁶¹ The Law on Service of BiH, for example, in its article 26, limits not only political engagement but also formation of Unions, syndicates. The Law does not allow military personnel to go on strike either. Unlike the BiH system, Montenegro Law on service allows formation of Unions, with limited jurisdiction and somewhat supervised acting.⁶²

Indeed, in some other states like Montenegro, unions of soldiers are permitted. There may be separate unions for different groupings of soldiers, for example, officers and conscripts. This is quite a different situation than state permitting members of its armed forces to join a civilian union. In those states permitting military-specific unions there will invariably be lawful restrictions on a union calling out its members on strike. There may also be restrictions on political activity taking place on the military base, soldiers taking part in demonstrations off the base while in military uniform and on ‘industrial action’ taking place while on duty. This is not the case either in BiH or Montenegro.

Other interesting rights for military life include religious freedoms and gender equality. Religious freedoms are not tackled separately in the military of Montenegro for example. Yes, they are generally guaranteed but no special emphasis is put on this matter within the Montenegrin system, although cooperation with the church is constant. In the BiH system, religious leaders have the ranks of officers and are employed as military priests to be the constant link between the life in service and their particular religious needs of servicemen and women.⁶³ The results of a research regarding the institutional regulations of religious liberties within the military of the states of ex-Yugoslavia conducted by Mr Omerovic Hasan for Islamic Community in BiH shows that these liberties are legally regulated in all states, but, on the ground, the relations between different ethnic groups are not defined, that is, the religious needs of minority groups in the military

⁶¹ IBID

⁶² MNE Law on Service, Official Gazzete no 88/09 from 31.12.2009

⁶³ There are 12 serving officers priests of Muslim religion (mufti’s), 9 Orthodox priest officers, and 7 Catholic priest officers

are not adequately regulated.⁶⁴

The matters concerned are, in the first place, elementary rights of soldiers to religiously approved food (separate cooking dishes), a proper space for performing religious duties and prayers, and access to the literature with a religious contents. The noticeable progress in this regard has been made by Bosnia and Herzegovina (together with Croatia and Slovenia) who already has chaplaincies in their armed services, while Montenegro (together with Macedonia and Serbia) are still looking for a solution to install this kind of service within their systems of defense. Having been aware of the fact that the transitional period, that is, the reform of the military in all states of ex-Yugoslavia is, still, in progress, it is to be expected that, in foreseeable future, the matter of religious freedom of the servicemen will be fully and institutionally regulated.⁶⁵ In that regard, in the Montenegrin system, several changes are to be made in the law in line with the recommendations set forward by the Union, and that is to introduce amendments to the Law on Service in order to regulate dietary needs of soldiers with different religious backgrounds and in certain periods of year (i.e. during fasting periods). Although this is usually the practice, it is always good to note in order not to discriminate anyone when it is already too late.

With regard to gender equality, there are no specific regulations for women in the military with regard to some specific fieldwork conditions, and there is no different or preferential treatment in that regard as well in neither of the militaries analyzed. However, in order to empower women to join the army, and for the Montenegro and BiH to reach the NATO standard (of at least 10 percent of women in uniforms⁶⁶), several positive steps have been made, among which the most significant one is the establishment of the position of Gender Advisor in the Ministry of Defence of Montenegro, a position led by a person already in charge of other work within the MoD. True is that there is very few females in non-commission officers and officers ranks

⁶⁴ Omerovic, H. *Religijske slobode pripadnika oruzanih snaga u drzavama Ex Jugoslavije*, Rijaset Glasnik, Vol 3-4, 2008., p 37

⁶⁵ IBID

⁶⁶ The current Montenegro Military has around 8 % of women, as stated by Mr Radovan Bogojevic in the interview conducted on 28.08.2013

in both armies⁶⁷, but it is also true that much more women are interested to serve in both countries. For example, for the latest advertisement for soldiers in BiH Armed Forces, 290 female candidates applied.⁶⁸

In the following chapters, the systems for protection of human rights in the military of Bosnia and Herzegovina and Montenegro will be discussed separately and in detail.

2.2. Bosnia and Herzegovina and the Institution of BiH Parliamentary Military Commissioner

The institution of the Parliamentary Military Commissioner is a rather new, but as the reports witness, a rather successful institution. The Parliamentary Assembly Committee for Defense and Security was familiarized with the model of Parliamentary Military Commissioner in German Bundestag in 2009, during the study trip.⁶⁹ In order to enhance the protection of human rights of military personnel, Bosnia and Herzegovina decided to test this system through establishment of the Parliamentary Military Commissioner for a temporary 3-year mandate. The Law on Parliamentary Military Commissioner was subsequently adopted in 2009,⁷⁰ by which the PMC is an independent institution of the parliament, established with the sole purpose to protect the human rights and freedoms of the military personnel and cadets of the Ministry of Defense and Armed Forces of BiH and to strengthen the rule of law.⁷¹ The Commissioner investigates alleged human rights violations of the military personnel and has the authority to decide on the subject matters.⁷² The recommendations issued by the Commissioner are obligatory to all units of the Ministry of Defense and Armed Forces. It significantly contributes to the increased confidence in the military sector by creating

⁶⁷ Only one lieutenant in MNE army and only one Colonel in BiH Army is a woman

⁶⁸ <http://crime-zone.com/index.php/studenti/rubrike/konkursi/1521-preko-3200-lica-apliciralo-na-konkurs-za-prijem-vojnika-u-os-bih>

⁶⁹ Interview with Mr Bosko Siljegovic, Parliamentary Military Commissioner, conducted on 20.08.2013.

⁷⁰ Law on Parliamentary Military Commissioner, BiH Official Gazette no 51/09, dated on 29.06.2009.

⁷¹ IBID

⁷² IBID

greater transparency in human rights protection without prejudice to the military hierarchy. The institute of the Military Commissioner was established to eliminate the risk that the misuse or harassment of the Armed Forces members or employees would go unpunished due to the lack of trust when it comes to disciplinary proceedings and due to fear of retribution by military commanders, which could jeopardize the protection of human rights of the armed forces members.⁷³ It ensures better access to justice for the military personnel, provides free legal aid aimed at improving their human rights protection and contributes to the development of modern armed forces in BiH.⁷⁴ Those reasons confirmed the importance of the institution of the Parliamentary Military Commissioner and the mandate of the institution has been extended after the three year trial period.

As mentioned before, military life is very unique in a sense that it is both provided with very specific rights (i.e. use of force) but also several limitations (i.e. right to strike or political grouping). In the practice of all professional military personnel, following the chain of command is taken seriously and is a part of the job practice. In the context of human right breaches, this could easily mean that commanding officers, if not bound by the moral ethics of their profession, could maltreat their supervisees without having to justify their behaviors in many instances. Those of lower ranks could have difficulties reporting such incidents, due to the fact that they should first report to the direct supervisor and then to other instances, and this has proven to be the case in several other countries.⁷⁵ In BiH, thanks to the institution of the Parliamentary Military Commissioner, any military person or cadet in the Armed Forces has a right to directly contact the Military Commissioner, without the mediation of official bodies, and to file a complaint. A complainant cannot be a subject to disciplinary procedure or discrimination.

The Parliamentary Military Commissioner provides effective and efficient human rights cases adjudication and investigation of the

⁷³ Interview with Mr Bosko Siljegovic, the BiH Parliamentary Military Commissioner, dated on 20.08.2013.

⁷⁴ Interview with Mr Bosko Siljegovic, BiH Parliamentary Military Commissioner, dated on 15.04.2013.

⁷⁵ As noted in the OSCE/DCAF Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel, OSCE ODIHR, Warsaw 2008.

military personnel in Bosnia and Herzegovina. The cases are solved in line with the highest standards for protection of human rights as stipulated in the Law on Military Parliamentary Ombudsman through transparent decision making process. His actions ensure there is no backlog of unsolved cases and that the justice is timely achieved for all applicants. The PMC works within the legal framework consisting of the European Convention for the Protection of Human Rights and Fundamental Freedoms⁷⁶, the Law on the Parliamentary Military Commissioner of BiH⁷⁷ and additional rulebooks regulating particular relations of the Commissioner with other relevant institutions such as Ombudsman's office and General Inspectorate in the Ministry of Defense.⁷⁸

The Commissioner visits military barracks to ensure the work and living conditions are at the acceptable level and issues obligatory recommendations in case those are not.⁷⁹ Military Commissioner has permanent access to all armed forces installations and all files and may initiate investigations, notably when complaints from the people (professional military personnel) in the services (of any rank) are received. Any soldier is entitled to take his case directly to the Commissioner and is not obliged to go through official channels.⁸⁰ In performing his duties, the PMC may conduct hearings with full freedom of communication, request report from the Minister of Defense or conduct any other investigative work.⁸¹ The Commissioner may also attend disciplinary hearings, or attend sessions of the Defense and Security Parliamentary Committee.⁸² The recommendations that are issued on behalf of this institution are obligatory to the parties in its

⁷⁶ The ECHR has supra-constitutional power in BiH

⁷⁷ Law on Parliamentary Military Commissioner, BiH Official Gazette no 51/09, dated on 29.06.2009.

⁷⁸ The Rulebook of the PMC, the Rulebook on Cooperation of PMC and the Ministry of Defense of BiH, Inspectorate General of the MoD BiH and the AF BiH, Code of Conduct on Military and Political Aspect of Security, the OSCE legal framework for cooperation of PMC with HR Ombudsman office in BiH

⁷⁹ Interview with Mr Bosko Siljegovic, BiH Parliamentary Military Commissioner, dated on 20.08.2013.

⁸⁰ Interview with Mr Bosko Siljegovic, BiH Parliamentary Military Commissioner, dated on 15.04.2013.

⁸¹ More in the BiH Law on Parliamentary Military Commissioner, annex 4

⁸² IBID

nature. In case the human rights violations are obvious and to avoid investigative work, the Commissioner may initiate mediation process between the two parties.

These strict regulations make the Commissioner highly instrumental in establishing a balanced relationship between civilians and armed forces. According to the Law on Parliamentary Military Commissioner, in performing duties under his/her competencies, the Commissioner has the authorities to request information and access to the records from the Minister of Defence and personnel subordinated to the Minister.⁸³ If a complaint of a civilian employee from the MoD reaches the office of the PMC, however, it is being forwarded to the civilian Ombudsman in BiH. This right may be denied only in case of important reasons for protecting the confidentiality that must be explained before the Parliamentary Defense and Security Committee. Furthermore, the Military Commissioner also extends its support to the military units participating in the peace support operations. His activities in these regards ensure equal treatment and human dignity for all military personnel in Bosnia and Herzegovina.⁸⁴ The access to justice and free legal aid is of the paramount importance for effective protection of human rights. The Commissioner therefore ensures that every person in uniform can address his human rights related concerns and can receive equal treatment before the law.

The institution of the Military Parliamentary Commissioner complements the work of the Office of the Inspector General in the MoD and the Institution of the civilian Ombudsman in BiH. There are distinct mandates of all three institutions that do not overlap and that improve opportunities for human rights protection of military personnel. The Military Commissioner increases confidence in the military sector by creating greater transparency without prejudice to the military hierarchy and eliminates the risk that the misuse and abuse of members of the Armed Forces will go unpunished due to fear of retribution by military commanders. Whilst the Military Commissioner is an independent institution, the Inspector General is an organizational

⁸³ For more details on competencies, see Annex 4, Law on Parliamentary Military Commissioner in BiH

⁸⁴ Regional Conference Publication, *Protection of Human Rights and Freedoms of Armed Forces Personnel*, BiH Parliamentary Assembly, INDOC, Sarajevo, 2011., p 14

unit of the Ministry of Defense. Inspector General conducts trainings and provides advice to the Minister of Defense regarding the elimination of conditions that affect morale, efficiency and human rights in general. As important for this paper, the General Inspectorate initiates, conducts investigations related to the allegations of misconduct and violations of human rights in the Armed Forces. Inspector General has the authority to ensure the protection of human rights without any prejudice and is authorized to propose to the Minister of Defense the adoption of systemic solutions which establish procedures to protect these rights. It may seem that the role of the Inspectorate is somewhat overlapping that of a Parliamentary Military Commissioner, but there is an important distinction: “The Inspectorate General is an organizational unit within the executive power institution –a part of the Ministry of Defense. It also has a great deal of independence. The Inspectorate General, however, submits its report to the Minister of Defense and thus, the report may remain vulnerable to misuse.”⁸⁵

The cooperation between the Institution of the Ombudsmen for Human Rights of Bosnia and Herzegovina and the Military Parliamentary Commissioner is defined in the Guidelines for Cooperation between the two institutions, dated from December 2009. Two institutions exchange information and cooperate in the matters of human rights violations. The Ombudsmen may, with prior consent of the military claimant, make the case available to the Military Commissioner for further action. In these cases, the Military Commissioner informs the Ombudsmen for Human Rights on implementation and outcome of the proceeding. While the Commissioner protects human rights of the military personnel, he also transfers the cases to the Ombudsman that are related to the civilian contractor employed by the Ministry of Defense. This *modus operandi* ensures there is no overlapping between institutions and that both institutions through mutual cooperation contribute to the better protection of human rights and freedoms of citizens of Bosnia and Herzegovina no matter if they are civilians or military.

The number of reported human rights violation cases has

⁸⁵ Protecting Human Rights and Freedoms of AF Personnel, Regional Conference Publication, BiH PA INDOK, 2011, p. 20 (speech by BiH Parliamentary Military Commissioner)

significantly increased ⁸⁶and the rate of resolved cases is close to 90%. The Commissioner creates an environment that improves access to justice, free legal aid and human rights protection to the military personnel. This approach has proven to be highly productive and effective over the past three years. In the period of its existence, this institution has published three yearly reports on the status of human rights and freedoms of armed forces personnel.⁸⁷ The complaints usually refer to the violations of rights and obligations of AF members, management mode of conduct, application of disciplinary regulations, regulations referring to working hours, salaries and reimbursements, complaints with regard to living conditions and issues related to advancement in service and performance assessment etc. Whilst in some cases most of such complaints are not necessarily violations of human rights (but rather of labor law), there can easily be or escalate into cases of discrimination, deprivation to access to different rights, violations of human dignity through harassment and maltreatment etc.

In the year 2010, there were 132 complaints submitted to the Commissioner institution. The year 2011 was followed by 58 complaints, and 2012 with 57 complaints.⁸⁸ The overall success ratio in resolving these issues throughout the years is little under 90 percent. Many of individual complaints in these reports show some systematic problems (i.e. poor living conditions in some barracks) but, as stated by the Parliamentary Military Commissioner in all of his reports, there is no systematic violation of human rights in the Armed Forces of BiH.⁸⁹

Acting upon individual complaints, the Military Commissioner of BiH issues recommendations for the cases in relation to which the investigation established that violations of human rights and fundamental freedoms of members of the Armed Forces of BiH did occur. However, the situation regarding human rights and freedoms

⁸⁶ Before the establishment of PMC, the level of HR reports to the Inspectorate General was very low, up to 3 cases per year. In the past three years, as long as the institution exists, the average of reported cases climbs up to a 100 per year.

⁸⁷ Not including the one from 2009, covering the period of mid – September – end of December 2009

⁸⁸ As the institution already started working in 2009., the report from that year covers the period mid September – end of December, receiving 25 complaints in that period

⁸⁹ https://www.parlament.ba/sadrzaj/komisije/ostalo/vojni_povjerenik/izvjestaji_o_radu/Default.aspx?id=40276

of members of the BiH Armed Forces is fairly assessed as being good.⁹⁰ Violations were reported in individual cases, however, the willingness of the management of the BiH Ministry of Defence and the BiH Armed Forces to eliminate all procedural failures and observed irregularities in favour of members of the BiH Armed Forces was also encouraging and confirmed that there was no systematic violation of human rights.⁹¹

2.2. Montenegro – Union representation of soldiers

Montenegro is also a young democracy with even younger institutions of the Ministry of Defence. Although having existed for only six years now, the institution has managed to adopt many of the principles of democratic work, state the MoD officials.⁹² The period of transition for Montenegro military brought up several challenges characteristic for previously closed systems: weak cooperation with civil society, lack of readiness to open to media and public, lack of general transparency, etc. In 2010, as a reaction to these problems, Montenegro adopted the Law on Parliamentary Oversight in the field of security and defense. The Law contains all the standards of respect for human rights of all citizens of Montenegro and especially of all employees in the defense and security system⁹³. The protection of human rights of all citizens is naturally guaranteed by the Constitution of Montenegro, as well as through application of the European Convention of Human Rights and Fundamental Freedoms and different UN conventions and international instruments.⁹⁴ But Montenegro failed to form any particular institution that would tackle protection of HR of military personnel issues in particular.

⁹⁰ As stated in PMC Report from 2010, 2011 and 2012, available on www.parlament.ba

⁹¹ Protecting Human Rights and Freedoms of AF Personnel, Regional Conference Publication, BiH PA INDOK, 2011, p. 20 (speech by BiH Parliamentary Military Commissioner)

⁹² Interview with Mr Bosko Siljegovic, BiH PMC, dated on 15.04.2013.

⁹³ Article 17 and 18 of the Law clearly regulates the role of each individual in the defense and security system that allows them to point to any possible violations.

⁹⁴ The BiH Constitution in that regard is rather unique, as it is the only Constitution in the world where ECHR has more power than the document itself

The military structure does however recognize the institution of Defense Inspectorate and their employees, whose work is bound, among other things, by the Constitutional provisions stipulating that ‘no one can be held responsible or suffer other adverse consequences due to attitudes raised in their submission’.⁹⁵ The Defence Inspectorate is a body within the Ministry of Defence, employing 9 inspectors that are in charge of different areas of responsibility, from audits, inspection of administrative acts to training control. The role of the inspectorate is somewhat strong in areas such as inspection of the working conditions of the barracks etc, but again lacks the authority to have binding decisions that will make the institution respect their findings. Also, as stated by the BiH Parliamentary Military Commissioner, the Inspectorate is not an independent institution, but rather a core institution of the Ministry of Defence and therefore, cannot be the only open channel for complains for the soldiers.⁹⁶ This does not mean that the Inspectorate works only ‘in favour’ of the Ministry, but that it is bound by a certain dependency in that respect, and that it is always good to have additional bodies outside the MoD open for communication with the military personnel.⁹⁷ The most important one, in relation to preservation of the highest level of HR within the military, is the Inspector in charge of the issues of protection at workplace. His role and mandate are also regulated by the civilian Law on Inspectoral Oversight.⁹⁸ For now, no cases of human right breaches have been reported to the Inspectorate for Defence.⁹⁹ The other open option for soldiers with HR concerns is to speak directly to the Minister or the civilian Ombudsman.

The civilian Ombudsman for Human Rights, or as the official title in Montenegro calls it, the Office of the Protector of Human Rights and Freedoms, is defined as the independent institution and its duty is to protect and improve human rights and freedoms when violated by act,

⁹⁵ Constitution of MNE, available on <http://www.gov.me/biblioteka/1055251939.pdf>

⁹⁶ From the speech of Mr Bosko Siljegovic, BiH PMC at the Conference *Positive practice in protection of human rights of armed forces personnel*, dated on 21.-22.03.2013., BiH Parliamentary Assembly, Sarajevo, BiH

⁹⁷ From the interview with Cpt Nusret Hanjalic, MNE MoD, dated from 30.08.2013.

⁹⁸ IBID

⁹⁹ Interview with Mr Radovan Bogojevic, MNE MoD, dated 20.06.2013.

activity or inaction of bodies of public authority.¹⁰⁰ Additionally, human rights and freedoms imply not only rights guaranteed by Montenegrin Constitution and laws, but rights guaranteed by international ratified treaties, and generally adopted rules of international law. Citizens whose rights are violated by action or inaction of public authority may address Ombudsman directly. Institution of Ombudsman in Montenegro has been established on 10 July 2003, by Law on Protector of Human Rights and Freedoms.¹⁰¹ The Parliament of Montenegro adopted on 29 July 2011, a new Law on Ombudsman.¹⁰² According to the adopted Law, Ombudsman has been designated to monitor and implement the Law on Prohibition of Discrimination, and the Institution has been chosen as the National mechanism for the Prevention of Torture. Significant improvement in fight against human rights has been achieved in 2010, when the level of cooperation has been improved between the institution and civil society. According to the new Law, Ombudsman has direct competence on issues of protection from all forms of discrimination, committed by all legal and physical persons.

Also, Ombudsman has the possibility to lodge an appeal in the name of discriminated person. All these tools, even if they fall very much within the scope that might be useful for the military, have never been used to tackle any of the breaches of HR of soldiers. Furthermore, the Ombudsman has not received a single complaint from the military personnel about allegations of human rights crimes. As stated by the Ombudsman himself, capacities of the office for implementation of Law on protection from discrimination in the monitored period were not at satisfying level.¹⁰³

For example, they lacked a team of professionals and the institution stated that the budget approved by the Government to Ombudsman, was insufficient for successful implementation of all competences (due to lack of finances, staff capacities were only 50% fulfilled).¹⁰⁴ The Ombudsman does not find common grounds with the institutions such as Unions of Soldiers, mentioned below. Although the power of Ombudsman is fairly weak in implementation sense, it also to

¹⁰⁰ Interview with Mr Sucko Bakovic, MNE Ombudsman, dated from 20.06.2013.

¹⁰¹ www.sluzbenilist.me/2002

¹⁰² www.sluzbenilist.me/2011

¹⁰³ Interview with Mr Sucko Bakovic, MNE Ombudsman, dated 20.06.2013.

¹⁰⁴ IBID

a certain extent depends on the approach of the Ombudsman himself. For example, if a severe complaint was submitted to the Ombudsman by military personnel, he could address it to the Defence and Security Committee of the Montenegrin Parliament. The Ombudsman can also ask to review some of the documents and reports of the relevant institutions, to speed up the process in judiciary, etc. Until nowadays, Ombudsman published eight reports on the work of the institution with overall number of complaints reaching over 4.000, none of which was connected to the service. In average, citizens mostly complain about long court proceedings, torture and violation, discrimination, violation of right to free access to information, right to fair trial, rights from labor relations, right to property, right to health care protection, rights of children etc.¹⁰⁵

There are no civil society organizations dealing with this particular issue. The closest thing to an NGO that monitors, among other things, this particular concern, is Gradjanska alijansa (Citizens alliance) based in Podgorica, with a broader humanitarian mandate that includes monitoring of quality of implementation of laws, and monitoring, researching and documenting of human rights violations, their processing, and representation of victims before competent courts and public bodies.¹⁰⁶ Human rights program is focused on facing the past, problems of torture and discrimination, politically motivated violence, freedom of expression, freedom of gathering, protection of personal data, religious freedoms, minority rights, status of displaced persons, economic and social rights. Their engagement was crucial in speaking to the public when certain problems in the military arose, but that will be elaborated later on.

In the overall HR/defence system, the protection of human rights in the Montenegro military carries little weight in comparison to labour rights, regulated through several channels. This is due to the fact that Montenegro military passed different system of transition that the one in BiH, and to some extent, with lesser influence from the international community.¹⁰⁷ After breaking apart from the Yugoslav National Army (JNA) back in 2006, already small army suffered additional cuts in

¹⁰⁵ IBID

¹⁰⁶ <http://www.gamn.org/onama.html>

¹⁰⁷ Interview with Lt Col Cobeljic, dated 18.06.2013.

manpower accompanied by a non-transparent system of early and obligatory retirement. There was a clear need, even then, to establish some kind of a coordination body that would liaise between the needs of the soldiers and that of the Ministry. For that reason, in October 2010, the first Syndical Organization of Montenegro Army (Sindikalna organizacija vojske Crne Gore, SOVCG) was established, led by Lt Col Nenad Cobeljic (this Union is also a member of CSO Union of Free Syndicates of Montenegro). However, briefly afterwards, only a couple of months later, the Montenegrin MoD decided to form another Union entitled Montenegro Army Syndicate. The two Unions do not have good relations and do not seem to cooperate, but rather clash in their interest, as the first one claim to be independent, and that the other is a political instrument of the Ministry.¹⁰⁸ The unions are authorized to visit the barracks and military compounds, although this is not necessarily explicitly their jurisdiction and they hold no executive power in that regard. Although the Montenegrin law recognizes the right to form unions, strikes however, are not allowed to the military systems. The primary role of Union is, again, dealing with concerns of labour law, which can extent to issues of concern for human right protection (i.e. sexual violence, abuse of power etc). In terms of numbers of members, the SOVCG was very popular once it was formed, and it had over 400 members, but according to the Head representative of the Union, Lt Col Cobeljic, the soldiers and officers who belonged to the Union were threatened to leave it and that is why the number decreased extremely after the second Union was formed. The Ombudsman did not react to these allegations, although the process was followed both on media and lobbied by GA to the European Commission.

The case of Montenegro syndicates is a peculiar one: there are two official syndicates with the same mandate and role. Whilst the law does not limit the number of such organizations (therefore technically, there could be even specialized syndicates for every particular issue), there are certain budgetary limitation and of course, the question of usefulness and productivity of such approach. The general practice in all organizations with unions is to have one in order for the workers to easily address their concerns through one organized channel.

The yearly report on Human Rights in Montenegro from 2012

¹⁰⁸ IBID

reports on the discrimination of representatives of the Trade Union Organization of the Army of Montenegro (SOVCG) reported to the Civil Alliance on 10 March 2011.¹⁰⁹ SOVCG complained of having sustained pressures and for being discriminated due to trade union organizing. As they said, pressures started after the establishing of SOVCG, since 5 October 2010. Nenad Cobeljić, President of SOVCG, two members were expelled from the Headquarter due to trade union organizing. Representatives of SOVCG told CA researchers that soldiers under the contract were dismissed due to membership in SOVCG and that some soldiers, who were members of SOVCG, were replaced at lower positions and other garrisons more than 20 officers and non-commissioned officers.¹¹⁰ They were openly threatening and prohibiting membership of employees in SOVCG with threats on termination of employment in Army of Montenegro (VCG).¹¹¹ Members were sent to forced annual vacations, there were also pressures, threats and blackmails to give up the membership in SOVCG which resulted in resigning of more than 200 members. Some evidence was published such as the audio of the meeting of the Navy Commander with the military staff.¹¹² Also, disciplinary proceeding against the President of SOVCG was initiated, followed by suspension with the aim to separate employees from the membership and put pressures on them. In decisions on disciplinary sanction of the Chief of Headquarter and Ministry of Defense, it was clearly noted that “offences” had no damaging consequences.¹¹³ It was stated that united disciplinary proceeding was initiated for ten “offences” and at the end was pronounced guilty for two.¹¹⁴ According to SOVCG opinion, disciplinary proceeding was very problematic because all witnessed were not heard nor were taken into consideration many facts and evidences. Also, Chief of the Headquarter of the Army of Montenegro did not consider a lot of reports of SOVCG due to

¹⁰⁹ YIHR, Balkan Trust for Democracy, *Human Rights in Montenegro 2011* (Program: Monitoring of Human Rights in Montenegro), YIHR, Civil Alliance, Podgorica, January 2012, p 112

¹¹⁰ IBID

¹¹¹ Interview with Mr Cobeljic, dated 18.06.2013.

¹¹² YIHR, Balkan Trust for Democracy, *Human Rights in Montenegro 2011* (Program: Monitoring of Human Rights in Montenegro), YIHR, Civil Alliance, Podgorica, January 2012, p 113

¹¹³ IBID

¹¹⁴ IBID

anti-trade union activities and discrimination, which the Prosecutor's office was introduced with. Also, disciplinary proceedings were not initiated against responsible persons for discrimination and intensive mobbing towards their member, who was replaced from the logistic base when she asked for help several times.¹¹⁵ It was also stated that none of the members of SOVCG went to the ISAF mission unless previously resigned from this trade union. Moreover, participation in ISAF mission was conditioned with resigning from SOVCG. This organization faced with prohibition of use of trade union premises and organizing meetings with its members at the working time. Competent institutions (primarily Ombudsman) did not react on these problems although SOVCG regularly addressed them for help. SOVCG filed three criminal charges against several officers in the Army of Montenegro on 3 September 2012, due to violation of official duty, because even after nine months since the termination of investigation and 20 months after committed criminal offenses, Prosecutor's office did not make decision. In response to this criminal charge was stated on 13 January 2012, that Deputy of Basic Public Prosecutor in Podgorica made decision on rejecting criminal charge with explanation that actions of the people involved did not have elements of criminal offense or preventing political, trade union, and other organizing, violation of official duties, and other criminal offense for which is being prosecuted *ex officio*. On 20 December 2012, SOVCG filed new criminal charge because Deputy of Basic Public Prosecutor did not submit decision to SOVCG on rejecting criminal charge against officer of Ministry of Defense even after 11 months.¹¹⁶ The charge was submitted against three Prosecutors due to suspicion they had committed criminal offenses as follows: violation of right to submitting legal means, providing assistance to committers after committed criminal offense, violation of official duty and unconscientious work in service.

Trade union organization familiarized President of Montenegro, President of the Government, Parliamentary Committee for Human Rights and Freedoms and Parliamentary Committee for Defence and Security with the situation. However, competent bodies did not react during 2011.

¹¹⁵ Interview with Lt Col Cobeljic, dated 18.06.2013.

¹¹⁶ YIHR, Balkan Trust for Democracy, *Human Rights in Montenegro 2011* (Program: Monitoring of Human Rights in Montenegro), YIHR, Civil Alliance, Podgorica, January 2012, p 113

The issue of two Unions, therefore, portrays a picture of a systematic set of problems that countries in transition are faced with. However, not everything is with negative connotations in the current system. Montenegro has adopted the largest amount of European and international standards in many areas, including human rights and security.¹¹⁷ The country currently faces the problem of harmonizing some key norms, and this fact gives space for several forms of discrimination and injustice.¹¹⁸ A perfect example of such mistreatment is the fact that civilian personnel working for the Montenegrin military also have to do certain assignments pointed out by the Book of Rules for all internal personnel, which should not be the case in professional militaries. Additional problem is the fact that military personnel have too many obligations, not necessarily relevant for their line of work, and especially for advancement, and that fact is not properly financially compensated (or financially compensated at all). Another human right/labour law violation in Montenegro Army is the short term contracting practice, giving room for corruption, blackmail, and manipulation. 7th battalion complained to the Union SOVCG that all of them work on short term contracts until the age of 32, and the army and MoD don't offer additional training and education, which does not enable the personnel to advance. One year contracts are given until they reach 32 years, and if they don't advance they are kicked out under the excuse of not having achieved the necessary level of advancement. The salaries are very low; there are many concerns and faults in distribution of allowances for separated life. There is also no guarantee of severance pay in the military. The military does not provide adequate education opportunities for career advancement. Such, and several other problems, usually set forward by the internal document called the Rulebook of Service, are still not in line with the recommendations set by the Council of Europe body EUROMIL from 2010.¹¹⁹ Also, according to the Recommendations, the countries are obliged to send yearly progress reports to the CoE about the situation of Human Rights for military personnel, and Montenegro has failed to send such report for the past two years. On the other hand,

¹¹⁷ According to Mr Milan Radovic, the Coordinator of Civil Alliance of Montenegro, Podgorica, dated 19.06.2013.

¹¹⁸ i.e. Book of Rules on Military Service with Law on Prohibition of Discrimination etc.

¹¹⁹ More on EUROMIL document in previous chapters

advancements could be seen in the amendments to the Law on Military that are ongoing, and for what the Unions have been asked to send their comments and recommendations.¹²⁰

The following chapter will be dedicated to the critical analysis of the two systems of protection of human rights in militaries of Bosnia and Herzegovina and Montenegro.

Chapter Three

Comparison and Critical Analysis of the HR Protection of Military Personnel System in BiH and Montenegro

The paper mostly reflected upon the existing national mechanisms for protection of HR in militaries of BiH and Montenegro, but it is also important to not some of the politico – military characteristics of the two analysed countries in order to get a more comprehensive picture. When it comes to differences between the analyzed countries, the biggest one refers to the size of the Military Personnel. Together with the civilian staff from the MoD, Montenegro Military has around 2000 members, whilst Bosnia counts up to 12000 people (the numbers also reflect the size of the population).¹²¹ However, there are several similarities between the two defence systems, which help draw a comparative line between these two states. First of all, both armies (in their current capacity) are rather young: the Bosnian Armed Forces united from the previous three ethnic armies, and has gone through a most successful defence reform process that concluded in 2006.¹²² The process envisaged establishment of the state level Ministry of Defence (abolishment of entity ministries), establishment of unified army and Joint Staff, as well as significant decreasing (since the end of the war onwards) and retirement of military men and women that served during the war times. Montenegro had a more simple transition process, having pronounced the independence from the former unity of Serbia and Montenegro in 2006. The state Ministry and the Military of Montenegro were formed, with minor

¹²⁰ Interview with Lt Col Cobeljic, Director of SOVCG, dated 18.06.2013

¹²¹ The statistics obtained from the MoD PR department

¹²² BiH MoD PR Department, contacted on 17.04.2013.

mandatory decrease in the number of servicemen and women.¹²³

In Bosnia and Herzegovina Law on Service¹²⁴, the right to assembly (and political participation) is forbidden for servicemen and women, whereas in Montenegro, soldiers can form unions. If not tackled (and monitored) properly, this restriction on the right of assembly can be used to conceal poor physical treatment of soldiers, particularly, conscripts, unpopular activities required of soldiers, poor leadership displaying, for instance, discriminatory treatment of certain soldiers or the giving of irrational orders and poor management of the armed forces by the government of the state (such as a failure to pay the soldiers on time or at all).¹²⁵ Whilst soldiers may be permitted by the military law of their state to make an individual complaint about their treatment in the hands of superior officers, as is the case in Montenegro, it may not permit collective complaints, which are not allowed in neither of the two examined countries.

When it comes to more political elements, Bosnia and Herzegovina and Montenegro are countries most eager to join the alliance and are making headway with their membership preparations, but fall short with of some political – defence reform standards.¹²⁶ Both have formally pledged that the goal of their external policies is Euro-Atlantic integration.¹²⁷ Different efforts are made by the two states to advance in the negotiations for the accession (Montenegro has a Membership Action Plan, BiH a conditional MAP – not before resolving the issue of military property), and emphasis is put on the professionalization of the armies and reform processes. This supports an even greater emphasis on meeting the international standards in the human rights arena as well. For example, NATO required standard of female soldiers is about 12 % and both states are supporting the accession of women into the army through lobbying, establishing

¹²³ Interview with Mr Nusret Hanjalic, dated 30.08.2013.

¹²⁴ Law on Service BiH, article 26 , Official Gazzete no 42/12 from 31.05.2012.

¹²⁵ Rowe P., *The Impact of Human Rights Law on Armed Forces*, Cambridge University Press, Cambridge, 2005., p 64

¹²⁶ More on BiH and Montenegro aspirations toward Euro-Atlantic integration in: Brooks T., *Great Expectations*, IHS Jane's Defence Weekly, vol 60, issue 24, August 2013, p 22

¹²⁷ Speech of Mr Kaludjerovic in Plav, 27.08.2013. at the opening of the Regional Euro-Atlantic Camp

focal points (Montenegro has a Gender Focal Point in the MoD, Ms Djakonovic Radmila), etc. They both deployed their troops to peace-keeping missions and continue to expand their contingents in hope of proving dedication to the same values of the broader politico - military structures such as NATO. Unfortunately, the countries face strong political challenges in accession, and although of different nature, these problems are symptomatic of the same transitional process that carries great difficulties in meeting certain requirements for future prosperity.

For the purpose of this research, the interviews conducted included several sources, among them the statements taken from soldiers of different ranks (2nd Lt, Col, corporal) from both militaries, 10 in total, that were ready to give statements on their perception of the situation of human rights in their respective armies. All replies evolve around nepotism, lack of merit-based work, corruption and discrimination on several grounds (mostly political background). Needless to say, the interviews also included relevant institutions, not only the Ministries of Defence of BiH and Montenegro, Parliamentary Military Commissioner, but also the Ombudsman office, civil society and media representatives. The result of such research produced a credible picture on the human rights situation in both surroundings, but also gave room for critical perspective on ways to go forward with this issue.

As yet another consequence of the transition period for both states was the difficulty to move from the old perspective and mindset where military was highly politicized, to the conditions of professional military structures. Depolitization of armies was also one of the main preconditions for successful democratization of defence and security structures in the Western Balkans. There are several challenges connected to this fact: corruption accusations, no leadership potential in the officers, no transparency in advancement, accountability in the institutions etc. For example, according to some interviewees, the biggest problem in Montenegro military services is the right to receive a reply once you have submitted any kind of request.¹²⁸ The system is slow and inefficient and there are no provisions such as those in the Laws of Administration, where if not receiving an official answer by a certain date, the reply can be considered positive. Another important point that came up during interviews is the difficulty in changing mindsets; as

¹²⁸ Interview with Mr Hanjalic, MNE MoD, dated 28.08.2013.

many of the interviewees mention, the biggest challenge in these newly developed democracies might not be the institutional framework, but rather the change of mindset, especially in the old generations. This challenge is again reflected in the under-usage of existing mechanisms to fight nepotism, corruption and other crooked phenomenon in a certain system. The military is in that mindset understood as an institution created to blindly follow the orders of the political or structural top. The chain of command should be respected, but not to an extent that rules are broken.

If not addressed, poor morale in the armed forces may well lead to a breakdown, to some extent, of discipline, caused by a number of factors, including the unwillingness of the government to provide the necessary standard of equipment for the armed forces to carry out the functions allocated by that government to them. This may range from unsafe equipment, to lack of training time on, for instance, flying tasks because of lack of sufficient fuel, to inadequate military equipment or accommodation and rations of soldiers.

There are several characteristic strengths and weaknesses for both systems. Starting from the one existing in Bosnia and Herzegovina, it is important to mention that the institution of PMC was very highly appreciated in both Parliamentarian, Ministerial, military and public circles. The existing PMC, Mr Bosko Siljegovic, was reelected for the second mandate, not just by proving that the institution itself is highly useful (through the number of complaints it has received so far), but he himself has previously established good relations with both Ministry and soldiers in the field. He is known to travel a lot, and talk to military personnel in person, being proactive and very efficient in resolving disputes. However, this type of institution, in a system which is highly unstable (and where the efficiency of an institution is highly dependent on the people within), there is a great chance that in the next mandate, if somebody else were to be elected, the institution might not function as efficiently as it has been so far. The system and the practice of the institution cannot guarantee the continuity of good progress if any other person were to be elected for that position.

Furthermore, political neutrality of the position was questioned during some of the interviews. Although the PMC has the full right to lobby for the support in parliamentary caucuses (as he did, before

getting reelected), Mr Siljegovic is an ex MP within the Parliament, a representative of a strong political party, of which he stopped being a member only a couple of months before getting the position of PMC. And again, if the following person, politically neutral as it should be, were to apply for the PMC mandate, a certain political support is required, which can become a sensitive and a less transparent issue in the BiH political circles, as shown many times before.¹²⁹ Another potential issue is the profile of the person that would be able to carry out the work of PMC: very few people in Bosnia and Herzegovina can claim to have good experience in HR protection and sound knowledge of military affairs at the same time, not to mention political support for being selected. This is by no means a legal criteria for becoming a PMC, nonetheless, there is no doubt that experience in both areas should be a criteria for selection for future Commissioners.

When it comes to Montenegrin system of protection of human rights, even bigger challenges arise. The Union affair has taken a wrong toll on the position of military personnel and is discouraging to see that accusations of intimidation for even an existence of one such institution could be freely happening. Whilst there are several channels mentioned within the system of HR protection, none of them carry a stable weight as a representative institution for the rights of military women and men. The Ombudsman office, for example, has very weak power, financial restraints and no experience in dealing with military affairs. There are mechanisms such as collective suits to the Ombudsman, but they are rarely used and never by the military personnel.

Other challenges, such as weak judiciary, are characteristic for both systems. Independent judiciary is very important for human rights protection, and the fact that, even when the complaints are put forward, there is a general feeling that the judicial system is not independent and is highly influenced by different political elites, is never a good sign. The case of Montenegro proves this point even stronger, having in mind that they have just recently introduced legislation for the independence of Judiciary¹³⁰. This gave open space for misuse of chain of command, command responsibility, etc within the structures, but that were very hard to prove, even more so knowing that the judicial system is slow,

¹²⁹ Interview with Mr Bosko Siljegovic, BiH PMC, dated 15.04.2013.

¹³⁰ www.sluzbenilist.me/2013

inefficient and not independent. The judiciary seems to punish only for the petty crimes, and the big ones stay untouched, thus encouraging the perpetrators to continue breaking the law and/or misusing their position and status.¹³¹ Serious complaints over the work of judiciary have been pointed out even to the press by the current director of the SOMA Union, Lt Col Cobeljic. He for example, stated that during his trials, the process was purposely dragged on, that there was no transparent distribution of evidence and that many times, the judiciary failed to reply to their requests. Although he made sure that the process was public and often in the media for several months, it did not help speed the process. On the other hand, the situation in Bosnia and Herzegovina seems to be rather efficient when dealt through the institution of PMC,¹³² but if the case were to be transferred to judiciary, the length of the process would be, no doubt, an issue in BiH as well. Other issues of relevance include for example Law on Prohibition of Discrimination: although both states have adopted this important piece of legislation, it is rarely used especially in the context of military affairs. Speaking of legislation, it is also important to mention human right issues as an explicit point in the Laws on service: although they are touched upon in several points of the law, major human right concerns are not tackled in neither of the Laws on Service of the countries. This should be explicitly stated thus making it a stronger legal obligation to respect and protect.

Finally, perhaps the biggest challenge for both systems is the link between the crises in the politics with the military: although this fact is also a good indicator of unfinished process of professionalization of the Armed Forces, the crises in the governments often reflects the situation in the MoD and military to an overwhelming extent. As stated by the Lt Col Cobeljic, the fact that Government has not changed for 20 years in Montenegro speaks ill of Montenegro democratic climate.¹³³ Also, as mentioned before, the current Parliamentary Military Commissioner is an ex MP in the BiH Parliamentary Assembly.¹³⁴ All these facts play a somewhat discouraging role in the overall process of democratization and preservation of HR standards in defence structures, but notwithstanding the challenges, the two countries made a significant progress in the right

¹³¹ Interview with Lt Col Cobeljic, dated 20.06.2013.

¹³² The percentage of resolved cases in one year is between 90 – 95%

¹³³ Interview with Lt Col Cobeljic, dated 20.06.2013.

¹³⁴ SDS party MP in the BiH PA House of Representatives

direction.

Again we can ask ourselves the question, why are these processes so relevant for both BiH and Montenegro? The official transformation to democratic systems has long gone occurred, the institutions for human rights have been created, and on the surface, everything seems to be working to the satisfactory level. However, defense related issues have a more important role to play in the bigger picture for prosperity of both countries, and that is why it is crucial for such systems to function flawlessly. It is because defence structures have maybe even the biggest impact on state building in both countries. These structures reflect the new perspectives of these countries, saying that they are ready to build stability and security not just for themselves, but for the international arena as well, they are multiethnic and multicultural, and need to be structured purely on the basis of merit.

Conclusion

This paper has sketched the most important correlations of human rights and security through analysis of key characteristics of some of the existing mechanisms for protection of HR for military personnel. The topic itself became popular among the broader international players such as the Council of Europe and the OSCE only a couple of years back, with minor exceptions in already in the 70-ties. As a matter of fact, as the perception of the security changed throughout history from a national to a more individual perspective, so did the attitude toward military service.¹³⁵ The new concept envisaged soldiers as ‘citizens in uniforms’, therefore possessing the same rights as any other civilian (with some limitations posed by the service). The concept was broadly accepted, but with nuances in national legislations and approaches, explained in detail in chapter one. The restrictions are naturally left for the states to decide, but again international standards and recommendations were set in order to ensure that military job becomes as any other, professional service with enjoyment of key rights and freedoms. Also, what was left to the states, was how any of them will tackle the protection of those rights within the service.

¹³⁵ in most countries, for example, the compulsory service was abolished

As it was mentioned already in chapter one and two, the enjoyment of human rights by members of the armed forces can be restricted by the constitution or by law, regarding the principle of proportionality. In the two selected countries for analysis, Bosnia and Herzegovina and Montenegro for instance, armed forces personnel are not allowed to fully exercise their rights to freedom of speech and freedom of assembly, and this is not uncommon in many other countries as well.¹³⁶ As a consequence, armed forces personnel can be hindered from speaking for themselves or voicing concern about cases of human rights violations. As this situation can escalate due to the closed nature of military institutions, it is important for governments to ensure that human rights are protected within their armies' barracks.

It is due to such closed and disciplined nature of the profession, that it is still important to bear in mind that armed forces personnel possess weapons, equipment and training normally unequalled by any other organ of the state. Without some form of effective control over their activities, and especially in the newly developed democracies (that have furthermore, emerged from the conflict past), the armed forces could achieve anything within their physical power and skills. Furthermore, it is, perhaps, not too great an exaggeration to conclude that as the fundamental purpose of an army is to fight during an armed conflict, a individual's needs are treated as subservient to this purpose. This is why the crucial point of the paper is, first and foremost, that adequate systems of protection and oversight in the military need to be established in all new democracies in order to change mindsets of both military personnel and broader public and therefore ensure democratic prosperity and prevent future conflict.

The two chosen countries for analysis are Bosnia and Herzegovina and Montenegro because they share some crucial similarities, mostly with respect to the turbulent past, somewhat successful defence reform process and politico – military ambitions (i.e. NATO integrations). However, their approach toward human rights protection greatly differs, as it is clearly shown in chapter two. The research proved that institutional framework is necessary in order to preserve transparency and effective

¹³⁶ Freedom of assembly is prohibited in BiH Armed Forces, and in both Montenegro and BiH, freedom of speech of soldiers to public is clearly limited by formal authorisation of the chain of command, in both cases, the Joint Staff

democratization of military structures. Bosnia and Herzegovina, as a successful case in that respect, introduced the Parliamentary Military Commissioner, which proved to be a highly effective institution dealing with all human right concerns of the military women and men, and enjoying certain authorized powers to act accordingly with respect to HR matters. The record of military ombudsmen, for example also in the case of the Swedish Military Ombudsman (created in 1915), shows that this institution has become a powerful tool in enhancing public confidence in the defence sector. In addition, the ombudsman provides essential protection to individual servicemen and women against abusive treatment within the military.¹³⁷ This function is enhanced through the creation of independent civilian human rights commissions charged with investigating and reporting conditions within the armed forces. Such a link between the armed forces and civilian governments serves not only to enhance human rights protections for military personnel, but also to strengthen dialogue and interaction between the armed forces and civilian governments.¹³⁸ It may in general be stated that the major achievement of the ombudsman with regard to the security sector is to contribute to increased trust in the military sector by creating greater transparency in the entire administrative process, without challenging the military hierarchy or decreasing military readiness. The paper argues that Military Ombuds institutions strive for both independence and impartiality: their effectiveness depends on the maintenance of trust and respect vis-à-vis both the state and the people, including members of the armed forces. Indeed, one thing that makes such institutions unique is that they seek to improve the quality of the relationship between the people and the administration by avoiding unnecessary conflicts. Military Ombuds institutions are able to leverage their high levels of trust to promote and achieve equitable and flexible solutions

¹³⁷ Born H., Fluri P., Johnson A., *Parliamentary Oversight of the Security Sector: Principles, Mechanisms and Practices*, DCAF, IPU, 2003., p 92

¹³⁸ See U.S. DEPT. OF STATE, COUNTRY REPORTS ON HUMAN PRACTICES FOR 1997 (last modified Jan. 30, 1998) <<http://www.state.gov/www/glogat/humanrights/1997-hrp-report/russia.html>> (recommending the creation of civilian ombudsmen to serve as government supervisors). This report also mirrored one such recommendation of the November 1997 conference on military service and human rights in Moscow, hosted in part by the Russian Federation Presidential Commission on Human Rights. See id.

for all parties. Their independence and impartiality make them a crucial element in an overall framework aimed at ensuring the accountability of public authorities, outside of the adversarial environment of the courts. Indeed, ombuds institutions can be preferable to the courts in many situations. In particular, their low barriers to entry (i.e., they are accessible, available without cost to individuals, and informal) make them an attractive alternative in a large number of cases. More broadly, ombuds institutions for the armed forces are essential to democratic governance as a whole. Drawing upon developments in the area of human rights protection of the military personnel in Bosnia and Herzegovina, the paper concludes that the Military Commissioner plays an important role in furthering human rights protection in the Ministry of Defense and Armed Forces in Bosnia and Herzegovina. It complements the work of the Inspectorate General of the Ministry of Defense and the Institution of the Ombudsman of Bosnia and Herzegovina. The Commissioner plays an important role as an independent human rights institution that fosters access to justice and free legal aid mechanisms for military personnel in protecting their basic rights. This institution has also proved to be the most efficient and approachable mechanism for human rights protection of armed forces. It promotes the international human rights standards and enables all military individuals to feel empowered to tackle sensitive issues of broader concern such as discrimination and other forms of violations to human dignity. The high rate of efficiency in resolving different complaints is further telling of the institution's capabilities to address human rights in the military environment. With the Military Parliamentary Commissioner, the human rights system in Bosnia and Herzegovina does recognize sufficiently the specificities of the military context and ensures protection of those rights and freedoms for its citizens in uniforms. Furthermore, this puts Bosnia and Herzegovina as a good example to the region of successful efforts in preservation of the highest human right standards in ever-changing security settings at the national and international level. A Parliamentary Military Commissioner is independent of the armed forces, and with the power to receive unhindered, twenty-four hour access to military personnel, training, and housing facilities. Frequent and regular meetings with base commanders also ensure that channels of communication remain open and that the ongoing work of the commissions is understood and appreciated.

Montenegro system, on the other hand, still lacks a particular institution that would deal specifically with the matters of HR protection for armed forces personnel. There are several institutions analyzed in the paper, in order to determine the ways soldiers can come with their HR concerns. In that respect, the analysis covered the work of the civilian Ombudsman, Protector of Human Rights and Fundamental Freedoms, and the work of Military Unions, as well as Ministries' Inspectorates. The paper shows that these instruments are insufficient in addressing relevant concerns for military profession, especially having in mind the problems that establishment of Union has brought primarily to soldiers, and the lack of transparency in these affairs.

However, whilst comparing the two systems, one can learn that institutions are still not influence-free in these countries. Many problems arise, especially if political crises occur in the already instable democracies such as these two. More effort is needed to ensure sustainability of the success story of the Bosnian Military Ombudsman. Also, capacity building of defence structures is very relevant for future prosperity of both countries, because it reflects on the stability, state building and security of the transitional and young democracies of Bosnia and Herzegovina and Montenegro.

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Annexes

Annex 1: Key Human Right Features in the OSCE Code of Conduct

The OSCE Code of Conduct: Key Human Rights Features
Rights of Armed Forces
Recruitment and call-up practices are to be consistent with human rights commitments (paragraph 27)
Domestic legislation shall reflect the human rights of members of the armed forces (para. 28)
Participating States will ensure the enjoyment and exercise of human rights by members of the armed forces, including appropriate legal and administrative procedures to protect their rights (paras. 32 and 33).
Duties of Armed Forces to Respect Rights
The armed forces shall be politically neutral (para. 23)
States are required to disseminate and train members of the armed forces in international humanitarian law of war (paras. 29 and 30)
Armed forces personnel can be held individually accountable for violations of international humanitarian law (para. 31)
Armed forces are, in peace and in war, commanded, manned, trained, and equipped in accordance with the provisions of international law (para. 34)
Recourse to force in performing internal security missions must be commensurate with the needs for enforcement. The armed forces will take due care to avoid injury to civilians or their property (para. 36)
The use of the armed forces cannot limit the peaceful and lawful exercise of citizens' human and civil rights or deprive them of their national, religious, cultural, linguistic, or ethnic identity (para. 37)

Annex 2: The main HR obligations and their relevance in the military

Main Human Right Treaty Obligations and Their Relevance		
Right	Legal Source	Examples of Relevance
Right to Life	Art. 2 ECHR Art. 6 ICCPR Art. 3 UDHR (life, liberty, security)	Extreme bullying of conscripts, inquests into unexplained deaths on military premises or during military service
Right to Liberty	Art. 5 ECHR (lists circumstances where scope of the right may be curtailed in cases prescribed by law) Art. 9 ICCPR Art. 5 ICERD Art. 10 ICCPR Art. 1 UDHR (liberty and equality) Art. 3 UDHR (life, liberty and security)	Detention under military justice system
Right to Equality	Art. 14 ECHR Art. 3 ICCPR (does not list grounds on which discrimination may be based) Art. 14 ICCPR (equal before courts and tribunals) Art. 2 CEDAW Art. 15 CEDAW Art. 2 ICERD Art. 3 ICESCR Art. 2 CRC Art. 1 UDHR (liberty and equality) Art. 2 UDHR Art. 6 UDHR (right to recognition before the law) Art. 7 UDHR Preamble UN Charter	Differences in treatment of women, religious and ethnic minorities, gay and lesbian service personnel (i.e. discharge following pregnancy, or upon discovery of sexual orientation, sexual harassment, limits on deployment of women to combat zones)

Annex 3: Freedom of Expression and Association, rights limited in Armed Forces of BiH and Montenegro, key articles in international legislation

Freedom of Expression and Association – relevant articles	
Art 19 UDHR	Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.
Art 19 ICCPR	<p>1. Everyone shall have the right to hold opinions without interference.</p> <p>2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.</p> <p>3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:</p> <p>(a) For respect of the rights or reputations of others;</p> <p>(b) For the protection of national security or of public order, or of public health or morals.</p>
Art 21 ICCPR	The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (<i>ordre public</i>), the protection of public health or morals or the protection of the rights and freedoms of others.

Art 10 ECHR	<p>1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority. ...</p> <p>2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.</p>
Art 20 UDHR	<p>(1) Everyone has the right to freedom of peaceful assembly and association.</p> <p>(2) No one may be compelled to belong to an association.</p>
Art 11 ECHR	<p>Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.</p>

Art 8 ICESCR

1. The States Parties to the present Covenant undertake to ensure:

(a) The right of everyone **to form trade unions and join the trade union of his choice**, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;

(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(d) The **right to strike**, provided that it is exercised in conformity with the laws of the particular country.

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

Art 5 ESC

With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations, the Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom. The extent to which the guarantees provided for in this article shall apply to the police shall be determined by national laws or regulations. The principle governing the application to the members of the armed forces of these guarantees and the extent to which they shall apply to persons in this category shall equally be determined by national laws or regulations.

Art 6 ESC

With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake:

- 1 to promote joint consultation between workers and employers;
- 2 to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements;
- 3 to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes;

and recognise:

- 4 the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.

Annex 4: Law on Parliamentary Military Commissioner in BiH, relevant articles

LAW
ON THE PARLIAMENTARY MILITARY COMMISSIONER OF
BOSNIA AND HERZEGOVINA

SECTION I, CHAPTER I. GENERAL PROVISIONS

Article 1

(Subject)

(1) This Law shall regulate the procedure of selection, appointment and dismissal of the parliamentary military commissioner of Bosnia and Herzegovina (hereinafter: Military Commissioner), competencies and methodology of work, and other issues relevant for his/her work and administrative support.

(2) The position of Military Commissioner is established in order to strengthen the rule of law, protection of human rights and freedoms of military personnel and cadets in the Armed Forces of Bosnia and Herzegovina (hereinafter: BiH) and the BiH Ministry of Defence, as stipulated in the BiH Constitution and attached international agreements.

(3) /

CHAPTER II. MILITARY COMMISSIONER

Article 2

(Definition)

(1) The Military Commissioner shall be an independent commissioner of the BiH Parliamentary Assembly with competencies stipulated in Article 3 of this Law.

(2) / (3) / (4) / (5) /

CHAPTER III. COMPETENCIES AND AUTHORITIES

Article 3

(Competencies)

In performing parliamentary oversight of the work and other issues in the area of the protection of human rights and freedoms related to military personnel and cadets in the Armed Forces of BiH and the BiH Ministry of Defence, the Military Commissioner shall have the following competencies:

- a) Investigation of specific issues under the directions of the BiH Parliamentary Assembly and BiH Joint Committee on Defence and Security (hereinafter: the Joint Committee). The directions may be issued only in case that the issue is not already considered by the Joint Committee, and the Military Commissioner may request the Joint Committee to issue the directions for investigation of specific issues;
- b) Activities performed based on his/her personal assessment, following information received by the members of the BiH Parliamentary Assembly, or consideration of complaints by military personnel and cadets, or in any other circumstances indicating a violation of human rights and freedoms of military personnel and cadets.

Article 4

(Authorities)

In performing duties under his/her competencies, the Military Commissioner shall have the following authorities:

- a) To request information and access to the records from the BiH Minister of Defence and personnel subordinated to the Minister. This right may be denied only in case of important reasons for protecting the confidentiality. In such cases, denial shall be made by the Minister of Defence and reasons for denial shall be explained to the Joint Committee by the Minister;
- b) Based on directions issued in accordance with Article 3, paragraph (1), sub-paragraph a) of this Law and in case of the appeal of a complainant, he/she will have the authority to conduct a hearing of the complainant, as well as witnesses and experts;

- c) To give an opportunity to the relevant institution to resolve the issue;
- d) To forward the issue to the bodies responsible for criminal or disciplinary proceedings;
- e) To visit units and commands of the Armed Forces of BiH and organisational units of the BiH Ministry of Defence at any time and without prior notice. This right is related only to the Military Commissioner;
- f) To attend sessions of the BiH Parliamentary Assembly or the Joint Committee;
- g) To request, within his/her scope of competency, reports from the BiH Minister of Defence;
- h) To attend disciplinary proceeding events and to access records related to the case.

CHAPTER IV. DUTIES AND RESPONSIBILITIES

Article 5

(Duties and responsibilities)

- (1) The Military Commissioner shall submit written reports to the BiH Parliamentary Assembly for each calendar year (annual report).
- (2) Military Commissioner may submit a separate report at any time to the BiH Parliamentary Assembly or to the Joint Committee.
- (3) When acting based on the directions issued in accordance with Article 3, sub-paragraph a) of this Law, the Military Commissioner shall submit a separate report on results of investigation upon request.
- (4) The BiH Parliamentary Assembly and the Joint Committee may request the presence of Military Commissioner at any time

Article 6

(Obligation to keep the confidentiality)

- (1) The Military Commissioner shall have the obligation to keep the confidentiality of data, made available to him/her on official basis, even after the end of his/her mandate, in accordance with the Law on the Protection of Secret Data. This shall not apply to the official correspondence or issues generally known to the public or those that

due to their significance clearly do not require to be classified as confidential.

(2) Even if not on duty any more, Military Commissioner may not make statements, without approval, on official issues related to his/her duties before the court or outside the court. This approval shall be given by the Joint Collegium of both houses of the BiH Parliamentary Assembly, in consultation with the Joint Committee.

SECTION II

CHAPTER I. RELATIONS WITH OTHER INSTITUTIONS AND BODIES

Article 7

(Co-operation with other institutions)

(1) In performing duties under his/her competencies, the Military Commissioner shall co-operate with the following institutions:

- a) BiH Ministry of Defence,
- b) Office of the Inspector General of the BiH Ministry of Defence,
- c) Armed Forces of BiH,
- d) Institution of the BiH Ombudsmen for Human Rights.

(2) Institutions and bodies referred to in paragraph (1) of this Article shall be obligated to inform the Military Commissioner on the proceedings initiated in accordance with his/her request or request made by other bodies, as well as on the outcome of the proceedings.

(3) Judicial bodies and administration bodies shall be obligated to inform the Military Commissioner on commencement of the proceeding, indictment and outcome of the proceeding initiated by his/her proposal.

(4) The institution of the BiH Ombudsmen for Human Rights may, with prior consent of the complainant, make the case available to the Military Commissioner for further action. The Military Commissioner shall be obligated to inform the Institution of the BiH Ombudsmen for Human Rights on implementation and outcome of the proceeding.

CHAPTER II. RIGHT TO FILE COMPLAINT

Article 8

(Right to file complaint)

- (1) Any military person or cadet in the Armed Forces of BiH shall have the right to directly contact the Military Commissioner, without the mediation of official bodies, and to file a complaint. A complainant shall not be subject to disciplinary procedure or discrimination because of a filed complaint.
- (2) Anonymous complaints shall not be considered.
- (3) When acting on the filed complaint, Military Commissioner shall not reveal this information publically, if so requested by the complainant and if his/her request is not in conflict with the legal provisions.
- (4) The Ministry of Defence and Armed Forces of BiH are obligated to ensure access to information on competencies of the Military Commissioner to all military personnel and cadets. This obligation shall include the information on procedure to file a complaint as well as on the protection of the complainant from any disciplinary measures or discrimination.

CHAPTER III. SELECTION, APPOINTMENT, MANDATE AND OTHER STATUS ISSUES

Article 9

(Selection)

- (1) The Military Commissioner shall be selected by the BiH Parliamentary Assembly upon proposal made by the Joint Committee.
- (2) Candidates for the Military Commissioner shall be proposed by the members of the Joint Committee, caucuses in the House of Representatives and caucuses in the House of Peoples of the BiH Parliamentary Assembly.

Article 10

(Selection requirements)

(1) In addition to general requirements, a candidate for the Military Commissioner may not:

- a) Be a member of a steering and other boards of a political party and may not follow the instructions of political parties;
- b) Be convicted for a criminal offence;
- c) Obtain another activity that would provide him/her additional remuneration.

(2) The Military Commissioner is required to be a person with extensive parliamentary experience, high moral reputation and good knowledge of defence related matters.

Article 11

(Appointment and mandate)

(1) The BiH Parliamentary Assembly shall appoint the Military Commissioner.

(2) The mandate of the Military Commissioner shall last for five years with the possibility of one reappointment.

(3) The mandate of the Military Commissioner shall begin with taking an oath before the House of Representatives of the BiH Parliamentary Assembly.

(4) Except in a case referred to in a paragraph (2) of this Article, or in a case of death, the mandate of the Military Commissioner shall end in a case of:

- a) Dismissal;
- b) Resignation.

(5) In a case of request made by the Joint Committee for dismissal of the Military Commissioner, the final decision shall be made by the BiH Parliamentary Assembly.

(6) The Military Commissioner may resign at any moment. In such case, a decision on the dismissal shall be made by the Joint Collegium of both houses of the BiH Parliamentary Assembly.

Article 12
(Status and allowances)

/

SECTION III

CHAPTER I. TRANSITIONAL AND FINAL PROVISIONS

**EUROPEAN REGIONAL MASTER'S DEGREE IN
DEMOCRACY
AND HUMAN RIGHTS IN SOUTH EAST EUROPE**

University of Bologna – University of Sarajevo

**THE REVOLVING DOOR OF REFORM:
ADDRESSING THE DILEMMA OF
CONSTITUTIONAL CHANGE IN BOSNIA AND
HERZEGOVINA**

MASTER THESIS SUBMITTED IN PARTIAL FULFILMENT OF THE
EUROPEAN REGIONAL MASTER'S DEGREE IN DEMOCRACY
AND HUMAN RIGHTS IN SOUTH EAST EUROPE

BY:

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SARAJEVO, BOSNIA AND HERZEGOVINA

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Table of contents

ACKNOWLEDGEMENTS	265
INTRODUCTION.....	266
1. “Look a shoot is sprouting”: measuring apathy	276
1.1. Overview of political culture and apathy.....	276
1.2. Clarifying the conceptual framework	281
1.3. Putting apathy into context	284
1.4. Identifying political apathy.....	287
2. “Mirror of clear redeeming grace”: measuring culture	290
2.1. A-systemic orientations	290
2.2. Anti-systemic orientations	292
2.3. Absence of interpersonal trust	296
2.4. Institutions as an explanation.....	302
3. “We’ve still not found a cure”: constitutional rules	308
3.1. Constitutional choice and change	308
3.2. Status quo and policy stability	313
3.3. Previous proposals for reform.....	320
3.4. Reform dilemmas and deadlock.....	327
4. “We need to uncover the lost paths”: modelling change	338
4.1. Modelling intransigence.....	338
4.2. Modelling the failure of reform	352
4.3. Modelling ways out.....	362
4.4. A revolving constitution.....	381
CONCLUSION	388
ANNEX A – GLOSSARY	391
ANNEX B – APPENDICES	393
BIBLIOGRAPHY	396

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appearing in the text and for any flaws, errors or omissions that remain.



*“Once upon a time a worthy questioner asked:
Forgive me who is and what sir
Where is
Whence and
Whither sir
Prithee sir
Is this
Bosnia”*

Mak Dizdar ⁴

INTRODUCTION

The State Constitution of Bosnia and Herzegovina⁵ is not conventional in any sense drawn up as it was as Annex IV to the Dayton Peace Agreement.⁶ With the signatures of the main protagonists, the Dayton Peace Agreement successfully ended the war that ravaged Bosnia following its declaration of independence. Critically, however, the Dayton Peace Agreement and the State Constitution, in particular, did not create the successful democratic, functioning state envisaged by its chief proponents.⁷ It set out, instead, complex procedures

⁴ The reply of the questioned appears in the Conclusion. Dizdar, Mak. ‘Inscription about a land’ in *The Stone Sleeper*.

⁵ Bosnia and Herzegovina is hereafter referred to as Bosnia.

⁶ The State Constitution was agreed as Annex IV of *the General Framework Agreement for Peace in Bosnia and Herzegovina*, initialled at Dayton on 21 November 1995 and signed in Paris on 14 December 1995.

⁷ Richard Holbrooke, the principal negotiator of the agreement, maintains that “on paper, Dayton was a good agreement; it ended the war and established a single, multiethnic country.” The caveat is that the “the results of the international effort to implement Dayton would determine its true place in history.” Failure of the agreement, therefore, lies with the parties’ failure to abide by its terms, not the agreement itself. Bose (2002). Chief negotiator on the Bosniak side, former President Haris Silajdzic echoes those sentiments. *Al Jazeera Interview*. 17 March 2010.

for governance⁸ that has institutionalised ethnic division and led to governmental paralysis.⁹ The State Constitution had no civic mandate and lacks features allowing any future democratic legitimacy. There are critical aspects of the State Constitution, therefore, which require reform including, *inter alia*, introducing measures which would ensure Bosnia's compliance with obligations under international treaties to which it is a State Party.¹⁰

Constitutional reform, however, has been impeded by intransigent and narrow-nationalist positions taken by political representatives of the three 'constituent peoples' (Bosniaks, Croats and Serbs) in the Parliamentary Assembly, State Presidency and Entities¹¹ of Bosnia. The State Constitution is not based on individual political rights but instead on the collective equality of the constituent peoples as ethnic groups. Vetoes, ethnic quotas¹² and decentralised government accorded to the ethnic groups, by the State Constitution, has institutionalised the intransigence of ethno-nationalist political elites.¹³ Policy change is significantly inhibited and non-cooperation with the ethnic 'other' has become rewarding. There are few incentives for elites to compromise their positions: any attempt at reform is seen as an attempt to undermine

⁸ Bosnia comprises two Entities, three 'constituent peoples,' five layers of governance with fourteen prime ministers and governments, and five presidents. It has the highest number of presidents, prime ministers, and ministers per capita in the world. Belloni, Roberto. "Bosnia: Dayton Is Dead! Long Live Dayton!" in Oakley (2010). 359.

⁹ Notwithstanding that it has cast a heavy burden on the small economy and State. Estimates suggest that 50% to 65% of the State Budget is spent on government administration; almost 1% of GDP. Peace Implementation Council Steering Board. *The Communiqué of the Steering Board of the PIC*, 3 February 2005.

¹⁰ See, for instance, European Court of Human Rights. *Sejdic and Finci v. Bosnia and Herzegovina*, (27996/06 and 34836/06), Council of Europe: 22 December 2009; or Art. 70(1) obligations under the *Stabilisation and Accession Agreement between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part*. Luxembourg, 16 June 2008.

¹¹ The two component Entities of Bosnia, the Federation of Bosnia and Herzegovina and Republika Srpska are hereafter referred to as 'Federation' and 'RS' respectively.

¹² In the executive and legislature

¹³ Political elites are referred throughout simply as elites.

the other ethnic group¹⁴ - a classical beggar thy neighbour problem.

This study considers whether constitutional change should be the focus of reforms when the underlying political culture of the masses (or the electorate) may be indifferent to active involvement in politics (on an ethnically neutral biased) and where segments of the population may be actively hostile to the State itself (whether Bosniak, Croat or Serb). If that is the case then elites are merely faithfully representing the preferences of their electorates. Ultimately, lack of constitutional change is a consequence of a lack of citizen initiative and will.

My core research questions are as follows: (a) is the underlying ‘political culture’ (as a non-participant culture) the primary causal variable explaining political apathy and the persistence of ethnic division leading to a lack of constitutional change at a State level?¹⁵ or (b) are the constitutional structures and institutions themselves (in which political elites operate) the most significant causal factor deepening political apathy and ethnic division?; (c) If constitutional structures are a significant cause of political apathy and division within State institutions then reform could help to address division and break the deadlock. Therefore, the supplemental questions would be how the State Constitution can be reformed so that it: (i) is acceptable to all ethnic-groups and, in particular, elites; (ii) can help manage conflicts between elites within State institutions; and (iii) has a civic mandate and is democratically legitimate (*if* ‘political culture’ is conducive to reform).

The aim of these questions is to identify whether the explanation for political apathy and ethnic division is connected to political culture of the electorate; and, if so, in what way. This issue is addressed at the outset as much of the civil society impetus for constitutional reform takes for granted that political culture is conducive to democratic politics on an ethnically neutral basis. The claim is that political culture, in so far as it is a product of historical circumstances, cannot be the main causal variable explaining political apathy and behaviour of elites in Bosnia. If historical circumstances explained the development of

¹⁴ At least that is how ethnic leaders have present attempted reforms to their respective ethnic constituencies.

¹⁵ The corollary to that question is that if political culture is not an adequate explanation, then what causal variables could explain political apathy and the endurance of ethnic division in Bosnia?

a non-participant culture then surely those same circumstances must manifest themselves in neighbouring countries¹⁶ with similar cultures (unless we adopt the idea of Bosnian exceptionalism). The reason that political culture is regarded as the cause of all of Bosnia's ills is because it is convenient to blame something as nebulous as culture.¹⁷

A far more nuanced narrative is required. To the extent that a non-participant political culture *is* to blame is because of the political institutions (most importantly embedded and institutionalised by the State Constitution) and economic markets created/maintained largely by the international community after the war. Those institutions perpetuate elite intransigence and division which in turn help create and fuel political attitudes that inhibit participation particularly on an ethnically-neutral basis.¹⁸ The critical element is that there is a discrepancy between elite preferences (which tend towards isolation and exclusive ethno-nationalism) and mass preferences which are increasingly more moderate, accommodating and inclined towards political participation. Academics, politicians and commentators that blame culture alone have misidentified the variable that causes political apathy and entrenched ethnic division. The root causes of political apathy are the same root causes engendering an indifferent and non-participant culture – they are manifestations of one another. And the cycle is, of course, vicious; precisely because there is a belief that nothing can be done, nothing is done.

Objectives of the study

The primary claim is that should the State Constitution (and by extension its institutions) be the most significant impediment to bridging societal divides (and it is argued that it is) then its reform must

¹⁶ Such as Croatia or other former Yugoslav countries. The study uses Croatia as a comparative case study. Given the different paths Croatia and Bosnia have taken following the war and the relative political 'success' of Croatia the comparison is immensely useful in analysing variations, if any, in culture.

¹⁷ First blame communism, then ethnic hatreds and if that fails to fall back on Orientalist ideas of 'backward,' Eastern modes of behaviour which had dominated the region for five hundred years.

¹⁸ I do not consider the issue of economic markets any further as time and scope do not permit me to do so.

be the priority and such reform must be linked to the population at large. While the failure to have a constitution (as to how best to govern the country) without a civic mandate is problematic for any democratic state it is far more problematic for states in transition;¹⁹ the project of democratisation itself can be fundamentally undermined. But how might a constitution embodying the principles of individual rights and equality for all ever be adopted when the current political incentives and structures (created by the State Constitution) constrain elites from accommodating behaviour and reinforce ethnic divisions in society?

A modified model of constitutional design and adoption is proposed using adaptations from game theory (mechanism design and implementation theory²⁰) and behavioural economics (prospect theory). Constitutional changes can be presented to people in a way that ‘nudges’ them and elites into accepting proposed reforms without undermining the existence of the State. The model is premised²¹ on the underlying desire by the people of Bosnia for accommodation and change in contrast with elites who remain intransigent and status quo oriented. The concept of a ‘revolving constitution’ is developed whereby parts of the constitution are subject to civic involvement (referendums and initiatives) on a fixed and regular basis.²² It is demonstrated that fixed and repeated referendums on the constitution properly institutionalised, and with procedural safeguards, will make people no worse off than

¹⁹ I take ‘democratic transition’ to mean “a political regime in which democracy as a complex system of institutions, rules and patterned incentives and disincentives has become ‘the only game in town’” (Linz (1996)). In other words, the democratic process prevails as the forum in which the objectives of governance are achieved in contrast to non-democratic processes. Linz, Juan J. and Stepan, Alfred. *Problems of Democratic Transition and Consolidation*. Baltimore: The John Hopkins University Press, 1996.

²⁰ ‘Implementation theory’ is concerned with designing mechanisms, or game forms, that implement desired social choices in *every* equilibrium of the mechanism (i.e. where actors interact repeatedly). The literature on ‘dynamic mechanism design’ is usually concerned only with establishing a *single* equilibrium of some mechanism with socially desired properties. Lee, Jihong and Sabourian, Hamid. “Efficient Repeated Implementation.” *Econometrica*, Vol. 79, No. 6 (November, 2011), 1967–1994; and K.J Arrow, A.K. Sen and K. Suzumura. *Handbook of Social Choice and Welfare, Volume 1*. Amsterdam: Elsevier Science B. V, 2002.

²¹ Though does not entirely depend (as the model will demonstrate)

²² For instance, every four electoral cycles or 16 years

the status quo. If anything just the mere possibility of a constitutional referendum would guarantee that the outcomes of reform would accord with the median voter (whether accommodating or intransigent). Elites in the constitutional reform space, currently interacting only with each other in the parliamentary arena would be incentivised to consider the preferences of the masses in the electoral arena. Given that masses are far more accommodating than elites, interaction between elites and the population at large can lead to far greater constitutional change than currently possible and far greater likelihood of accommodating behaviour amongst elites sooner. The proposal attempts to lessen the impact of ‘winner takes all’ approach to constitutional change. It could help break the constitutional reform impasse; regulate ethnic conflicts between elites in the State institutions; and provide a new constitution with a democratic mandate.

Whilst the adoption of a revolving constitution would seem like a polemical revolutionary moment in fact its actual operation would tend to constitutional evolution: the possibility of amending the constitution with civic involvement would lead to moderate proposals for reform which could incrementally change the shape of Bosnian politics.²³

Significance of the study

The research challenges the idea of ‘un-amendable’ or ‘very difficult to amend’ legalistic constitutional models which have gained increasing acceptance in transitioning countries following

²³ Lerner (2011) writes about the value of incremental constitutional change in divided societies so that difficult issues are deferred for resolution in a more settled political climate in the future. The shortcoming of her work is that such a future may never arrive and conflict may merely be deferred into the future. Additionally, temporary constitutional measures (like not adopting a constitution in Israel) may become permanent features leading to entrenchment of divides both within institutions and without. For Bosnia this is not an option as deferral has lasted long enough especially given the imperative for reforms to protect the rights of those discriminated against and to ensure a viable, self-sustaining state. There is also the further complication in Bosnia that the State Constitution has never had a civic mandate. See Lerner, Hanna. *Making Constitutions in Deeply Divided Societies*. Cambridge: Cambridge University Press, 2011. See also, *Review on Lerner (2011)* by Doyle, Oran. Trinity College Dublin. 2011.

consociational models prescribing certain institutional arrangements that ensure autonomy and power sharing for key groups. Introducing the capacity to change the constitution (with limitation periods) can introduce flexibility in political life in Bosnia that is present in long evolved democratic polities like the UK, Switzerland, and Iceland (but perhaps which Bosnia cannot afford to wait for). The objective is to reintroduce context and an ear for justice into fixed and rigid legalistic documents.²⁴ The concern is not so much with the content of any constitutional reform (i.e. specific provisions) as much research exists already in that area but exactly how constitutional change can occur that can resolve conflicts within State institutions; be acceptable to all ethnic elites; and have a powerful civic mandate. If the evidence-based assumption that the people of Bosnia continue to move towards reconciliation is correct constitutional referendums would allow an outlet for policy change currently being completely overlooked by policy actors.

The precipitant danger of failure to reform is that should a set of circumstances present themselves that galvanise all the discontents, troubles and grievances of variegated groups of people into a single push against an incumbent government then it could fundamentally call into question the legitimacy of the entire democratic project set up under the Dayton Peace Agreement, especially if we identify a groundswell of opinion that may suggest the population harbours latent political potential.²⁵

Organisation of the study

This study is organised as follows. As there are two distinct areas of investigation there are two chapters (Chapters 1 and 3) that outline the relevant literature and set out my research frameworks.

Chapter 1 is the literature review and introduces theoretical ideas explaining falls in political participation and variables that can

²⁴ See the very cogently argued Honig, Bonnie. "Dead Rights, Live Futures: A Reply to Habermas's "Constitutional Democracy."” *Political Theory*, Vol. 29, No. 6 (Dec 2001), pp. 792-805. 801.

²⁵ See, for instance, Kuntz, Philipp and Thompson, Mark R. "More than Just the Final Straw: Stolen Elections as Revolutionary Triggers.” *Comparative Politics*, Vol. 41, No. 3, April 2009. pp. 253-272.

help explain why people are (or become) apathetic. The sub-chapters elaborate on concepts such as ‘political culture’, ‘political apathy’, and ‘political participation’ and propose a model for analysis. The chapter also presents the findings of quantitative research in respect of poor political participation (political apathy) in Bosnia and Croatia. Chapter 2 presents the findings of quantitative research in respect of political culture. In particular, the chapter considers whether a non-participant political culture (defined in Chapter 1) is the main variable explaining political apathy in Bosnia or whether there are more persuasive explanations such as institutional failure (stemming from constitutional structures). It outlines the salience of institutional and, therefore, constitutional failure as a causal variable explaining political apathy. Chapter 3 sets out the literature and theoretical principles of constitutional design and amendment. The sub-chapters, as a case study, set out the proposals that have been made to date to reform the State Constitution and the reasons for their failure. Chapter 4 suggests some theoretical ideas for breaking the impasse drawing upon literature in the fields of game theory and behavioural economics. The Conclusion identifies the main findings, touches upon the limitations of my study and suggests avenues for further research.

Methodology

This study makes use of two research methods to answer the primary research questions: (a) quantitative research to understand political culture,²⁶ political apathy and political division in Bosnia; and (b) the use of rational choice models (game theory and veto player theory) and behavioural economics (prospect theory) to analyse the behaviour of political elites and masses (together ‘players’) in the current constitutional framework.

The quantitative analysis uses value based surveys produced by the *World Values Survey (WVS)* and *European Values Study (EVS)* to operationalise the terms ‘political culture’ and ‘political apathy’ (see

²⁶ In so far as a quantitative analysis of culture at a point in time provides meaningful results (see sub-chapters 1.1 and 1.2).

sub-chapter 1.2). Croatia is used as a comparative case study.²⁷ The dataset produced by WVS/EVS conducted five waves of studies with three in each of Bosnia (1998 (N=800), 2001 (N=1200), 2008 (N=1512)) and Croatia (1996 (N=1196), 1999 (N=1003), 2008 (N=1525)).²⁸ WVS/EVS is used as it is the only dataset available for the region that collated time-series data cross-nationally on issues concerning political participation over a significant period of time. Given the lack of any other serious time-series data, and gaps in the datasets which exist, my analysis is supplemented by data obtained from other local studies where available and relevant (principally by Gallup Balkans Monitor).

The quantitative analysis forms the basis for the rest of the study. The quantitative data together with the case study on Bosnia's institutional failure (Chapter 3) is necessary to form some of the *assumptions* about players' substantive preferences and institutional structures in the rational choice analysis that follows (Chapter 4). These assumptions give empirical content to the theory and hence make it testable (Ganghof (2009)).²⁹ Rational choice models have explanatory power and predictive potential: in Bosnia they could serve to elucidate why substantive proposals for constitutional reform are failing and suggest possible ways to break the reform impasse. The game theory approach helps to systematically explain complicated political behaviour; why the behaviour of political actors is an

²⁷ Given the different paths Croatia and Bosnia have taken following the war and the relative political 'success' of Croatia the comparison is immensely useful in analysing variations, if any, in 'culture' and levels of apathy.

²⁸ "The *World Values Survey* is a global database for social scientists studying changing values and their impact on social and political life. The WVS has been carried out in close collaboration with the *European Values Study* and encompasses data of representative national surveys from ninety-seven societies around the globe, containing almost 90 percent of the world's population. These surveys show pervasive changes in what people want out of life and in what they believe. In order to monitor these changes, the EVS/WVS has executed five waves of surveys, from 1981 to 2007." World Values Survey 1981-2008 Official Aggregate v.20090901, 2009. *World Values Survey Association*. Aggregate File Producer: ASEP/JDS, Madrid. EVS (2010): European Values Study 2008, 4th wave, Bosnia-Herzegovina. *GESIS Data Archive*, Cologne, Germany, ZA4786 Data File Version 1.1.0 (2010-11-30) doi:10.4232/1.10179.

²⁹ Ganghof, Steffen. Veto Player. University of Potsdam, 2009. Forthcoming in: Badie, Bertrand/ Dirk Berg-Schlosser/ Leonardo Morlino (Hg.): *International Encyclopaedia of Political Science*, Los Angeles, CA: Sage.

optimal response to conditions of their environment (political context and political institutions) and the behaviour of others. Changing the context or institutions (the rules of the game) leads to change in preferences and, therefore, outcomes. The models, therefore: provide theoretical clarity and strong explanatory power by eliminating chance/ad-hoc explanations whilst acknowledging that the model is only an approximation of reality (although a relatively good approximation).³⁰ They also explain why certain conditions and behaviour prevail in a state such as Bosnia (so status quo equilibriums). The veto player approach in particular can integrate a number of approaches to institutional analyses by focusing on actors within institutions that actually matter – those that can set, alter and veto legislation (Tsebelis (1999, 2002); Ganghof (2009); Hallerberg (2010)³¹). The traditional analysis of institutional structures conducive to cooperation in divided societies ([Chapter 3](#)) is, therefore, absorbed neatly into the veto player framework modelling elite behaviour ([Chapter 4](#)) with consequent implications for policy stability and institutional stability (not least, choice of institutions).

The game theory and veto player approaches are used to model the game played by elites in the parliamentary arena which is the principal arena. The preferences of elites, however are influenced in another important arena; the electoral arena where interaction with masses (or followers) can alter preferences and therefore outcomes. The objective of the study is not to discuss the shortcomings and benefits of various institutional structures generally for Bosnia but compare all of these structures consistently with respect to one particular variable³²: the capacity for meaningful constitutional change. Given that the use of such models has been neglected in the study of Bosnia's political paralysis this study will improve on existing work by identifying precise

³⁰ Tsebelis, George. *Nested Games: Rational Choice in Comparative Politics*. Berkeley: University of California Press, 1990. 40-47.

³¹ Hallerberg, Mark. "Empirical Applications of Veto Player Analysis and Institutional Effectiveness" in König, Thomas, Tsebelis, George and Debus, Marc. *Reform Processes and Policy Change: Veto Players and Decision-Making in Modern Democracies*. New York: Springer Science +Business Media, 2010. 21.

³² Tsebelis, George. "Decision Making in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism and Multipartyism." *British Journal of Political Science*, Vol. 25, No. 3 (Jul., 1995), pp. 289-325. 290-293.

causes of failure in the institutional structures in Bosnia inhibiting meaningful constitutional reform and civic participation in politics.³³ In particular, the study may serve to be a relevant contribution to the literature by proposing ways to move towards a State that has greater civic participation and greater democratic legitimacy. That would go some way to creating a Bosnia premised on individual rights and equality rather than the collective equality of ethnic groups. ☞

*“Look a shoot is sprouting from
the white stone
Sprouting from an ancient hand a
dark face
From it a white flower has painfully
budded and grown
And from its hidden nest a bird
has already flown
Into the lonely ring of someone’s
gleaming dream”*

Mak Dizdar³⁴

1. “Look a shoot is sprouting”: measuring apathy

1.1. Overview of political culture and apathy

The literature on political culture is rich and varied and the typology for analysing culture (participatory or non-participatory) in a country dauntingly disparate. The term political culture is often used as a ‘catch all’ explanation when it is used to describe political outcomes. That this is so aids in validating the main hypothesis of this study; because a variable which itself cannot be adequately conceptualised to refer to very specific aspects of culture cannot plausibly be a sufficient

³³ Some work using the concept of veto players has been used at a high level by Bahtić-Kunrath (2011) but otherwise there are no other works I am aware of. Bahtić-Kunrath, Birgit. 2011. “Of veto players and entity-voting: institutional gridlock in the Bosnian reform process.” *Nationalities Papers*. 39 (6): 899-923.

³⁴ Dizdar, Mak. Partial extract from “Krajina: Ending” in *“The Stone Sleeper:”* Buturović, Amila, and Francis R. Jones. *Stone Speaker Medieval Tombs, Landscape, and Bosnian Identity in the Poetry of Mak Dizdar*. New York: Palgrave, 2002.

cause of another dependent variable, namely political participation and apathy.

As a working definition the term ‘political culture’ could be used to denote ‘the distinctive, variable set of ways in which societies normatively regulate social behaviour.’³⁵ That definition may be supplemented by the idea that political culture can be the product of complex historical experiences that create norms of behaviour in society. Culture cannot be a fixed variable given that it is highly dynamic and constantly in flux. Political culture is and will be; political culture influences political outcomes but the political context is constantly reshaping and influencing the supposed culture of which the context is supposedly a product.

This idea of political culture will serve as the basis for my research looking at civic attitudes and behaviour towards democratic institutions within Bosnia and how institutions themselves autonomously impact political culture. As a critique of existing work explaining political participation in Bosnia, this study, attempts to challenge the commonly held assumption that non-participant political culture is the bane of Bosnia’s political life.

A myriad of contemporary literature and scholarship focuses on the importance of political culture for democratic practice (including among them Almond and Verba (1963); Dahl (1972); Inglehart (1997); Norris (2002); Welzel and Inglehart (2008)).³⁶ This study draws upon the breadth of this scholarship to develop a theoretical basis in support of answering the main research questions. One may rudimentarily divide the approaches taken by scholars into the following categories: (a) value based models (which primarily use self-expression values across time) that focus on the essential value preconditions for liberal democracy (Almond and Verba (1963); Hakansson and Sjöholm (2007); Welzel and Inglehart (2008); Kuntz (2011)); (b) social capital models

³⁵ Werlin, H. and Eckstein, Harry. “Political Culture and Political Change.” *American Political Science Review*, 84/1, 1990, 4.

³⁶ Indeed, the very idea of liberal democracy quite aside from a simple electoral democracy is “based on mass voice in self-governance [and] therefore depends on social preconditions such as the wide distribution of participatory resources and a trusting, tolerant public that prizes free choice” Welzel, Christian & Ronald Inglehart. “The Role of Ordinary People in Democratization.” *Journal of Democracy* (19) 1, 2008, 126-140. 126.

focusing on how social interaction leads to greater trust, reciprocity and participatory habits (foremost advocated by Putnam (1993), (2000)). Others have argue that social interaction can both increase or decrease trust depending on the conditions under which association takes place (Pettigrew (1971); Knack and Keefer (1997)³⁷); (c) modernisation and post-modernisation hypothesis where the absence of material need propels people into the democratic arena (endogenous version) countered by theories that suggest democracy ‘happens’ and is subsequently sustained by development (exogenous versions) (Lipset (1959); Inglehart (1997), (1999); Acemoglu and Robinson (2001), (2005) cf. Przeworski (2000))³⁸ and (d) alternative or ‘new politics’ hypotheses where people conceive of the political differently than in the past: associational activity, as such, being channelled into less formal political behaviour in place of conventional political practice (Ekman and Amna (2009); Ekman (2009)).

Value-based models (Almond and Verba (1963)) maintain that democratic politics requires more than just democratic institutions; they dispense with the idea that electoral participation is the sole measure of political participation. The effectiveness of democratic government (which is by default participatory) depends essentially on an allegiant political culture (the “civic culture”) or a participant culture.³⁹ Crucially, however, ‘parochial’ and ‘subject’ orientations in society – such as a limited interest in politics and little appetite for dissent – are important for a balanced political culture. Where the parochial or subject culture is predominant then democratic institutions will find it difficult to be legitimate; conversely, if there is no parochial or subject culture then populations will become completely unruly and will never accept any decision by authorities legitimate. In Bosnia, therefore, if the culture is largely one of deference and disinterest then it should have an impact

³⁷ See further, Håkansson, Peter and Sjöholm, Fredrik. “Who Do You Trust? Ethnicity and Trust in Bosnia and Herzegovina.” *Europe-Asia Studies*, Vol. 59, No. 6 (Sep., 2007), pp. 961-976.

³⁸ This approach is not considered any further as it falls out of the scope of my research. See further, Wucherpfennig, Julian and Deutsch, Franziska. “Modernization and Democracy: Theories and Evidence Revisited.” *Living Reviews in Democracy, Volume 1*, 2009.

³⁹ “The structural norms that have been introduced [in a democracy] are usually participant; for congruence they require a participant culture.” Verba, Sidney and Almond, Gabriel. *The Civic Culture*. London: Sage, 1989, 26.

on democratic institutions (following Almond and Verba (1963)).

Social capital models (Putnam (1993), (2000)) also focus extensively on why ‘civic culture’ is a key explanatory variable to good political government and political participation. Putnam (1993) explains why the North of Italy has a far better regional government than the South. The key variable is not wealth but the ‘civic community’ of the North characterized importantly by horizontal, rather than hierarchical, networks embodying values of solidarity, civic-engagement, cooperation and honesty – ‘social capital’ in short.⁴⁰ Acknowledging the usual dilemmas of collective action (tragedy of the commons, credible threats, prisoner’s dilemma etc) Putnam outlines that institutions can reduce the transactions costs of co-operative behaviour. But why do collaborative institutions work in some places and completely fail to work in others? Putnam links this difference to a ‘civic community’; conducive political culture existing in the North but not in the South.⁴¹ ‘Happiness’ concludes Putnam ‘is living in a civic community.’⁴²

Carlo Trigilia (1994), (1995), however, has pointed to the growth in associational activity in the South of Italy ‘in part political, but above all cultural, which is shaping new possibilities on the level of democratic growth and the positive use of civic resources.’⁴³ A particularly salient

⁴⁰ Success in overcoming collective action game lies in the broader social context within which such games are played. Voluntary cooperation is easier in a society with an inherited stock of social capital, in the form of networks of reciprocity and networks of civic engagement. Social capital refers to “features of social organization, such as trust, norms and networks that can improve the efficiency of society by facilitating coordinated actions”. in Putnam, Robert D. with Leonardi, Robert and Nanetti, Raffaella Y. *Making democracy work: Civic traditions in modern Italy*. Princeton: Princeton University Press, 1993, 167.

⁴¹ Cross sectional data showed that the North put new institutions to better use due to the political culture in four ways; a) civic engagement, b) political equality, c) solidarity, trust and tolerance, d) social structures of cooperation. His statistical inferences show that all the regions with high institutional performance and high scores on the civic community index are from the centre-North.

⁴² Putnam, Robert D. with Leonardi, Robert and Nanetti, Raffaella Y. *Making democracy work: Civic traditions in modern Italy*. Princeton: Princeton University Press, 1993, 113.

⁴³ In fact 6400 cultural associations were found in the South, two thirds of which were created after 1980. See further, Tarrow, Sidney, “Making social science work across space and time: a critical reflection on Robert Putnam’s Making democracy work.” *American Political Science Review*, 1996, 90(2), 392.

criticism of Putnam is that his concept of civic engagement includes all manners of behaviour which may be far removed from influencing political behaviour – not all civic engagement has consequences for politics (North (1991)). Ekman (2009) rightly notes that to explain declining levels of civic engagement we need to be clear about what exactly is declining otherwise we ‘stretch’ the concept to be completely meaningless.⁴⁴

Putnam (1993) also conveniently leaves out the successive ‘explosions’ (as Tarrow (1996) calls them) in Northern associational activity which are far removed from developing ‘social capital’.⁴⁵ Not all associational activity is ‘good’ activity. Associations themselves can have conflicting objectives to those of other associations which can promote rivalry and possibly conflict.⁴⁶ The democratising and anti-democratising impact of associational behaviour is important when analysing political participation in Bosnia – it presents an opportunity for participation but that participation can be disastrously anti-system (particularly when associations receive the patronage of narrow-minded, self-interested governing elites.).

No doubt, horizontal ties and the forming of associations can help counteract the effects of individualism⁴⁷ and build trust in other people through mutual assistance: all very useful for democratising and

⁴⁴ Ekman, “Political Participation and Civic Engagement,” 4.

⁴⁵ Corruption scandals on top of separatism; mafia infestations on top of years of political kidnappings and terrorism; the collapse of Marxist and Catholic subcultures with their panoply of mass organisations giving way to a party system whose capillary structures have all but disappeared. Ibid.

⁴⁶ In defence of de Tocqueville, though, Michael Walzer notes that ‘this is probably as close as we can come to that ‘friendship’ which Aristotle thought should characterise relations among members of the same political community’’. Walzer, Michael. *What it means to be American*. New York: Marsilio Publishers, 1996, 89. See also Walzer, Michael. “Civility and Civic Virtue in Contemporary America,” in *Radical Principles*. New York: Basic Books, 1980.

⁴⁷ Alexis de Tocqueville, described by Putnam as the ‘most relevant social theorist’ on this issue, believes the role played by civil associations is crucial in a democracy as ‘democracy... confines him [man] entirely within the solitudes of his own heart.’ The reason why de Tocqueville believes democracy is dangerous is that it breeds individualism, where people are only concerned with themselves and leave society at large to itself, causing public life to be stifled and excluding large parts of society e.g. the poor. De Tocqueville, Alexis. *Democracy in America*. Cambridge: Sever and Francis, 1863, 121.

developing participant political orientations. But such developments must not leave out the influence of governing elites and the systems and structures in which they operate (an issue considered further in [Chapter 4](#)). The objection would be that the governing elites can pursue their self-interest in the community and exploit trust given the nature of hierarchical relationship: but that is precisely the point. For Putnam, the state suffers as a result of poor political culture but he does not accept that the state itself may be the cause of poor political culture. Tarrow's (1996) critique (very cogently elaborated by Theda Skocpol (1996)⁴⁸) is that states via institutions can carry out autonomous actions with political and civil consequences. That institutions and political elites can have such autonomous effect (both good and bad) is no clearer than in Bosnia (an issue further elaborated on in [Chapter 2](#)).

1.2. Clarifying the conceptual framework

In order to clarify the scope of the analysis the term 'non-participant' must be unpacked from 'political culture.' 'Non-participant' culture refers to norms, values, orientations tending towards disengagement from politics (either systemic or non-systemic) and low levels of trust towards (or participation with) others. Non-participation is defined as such by building on Inglehart and Welzel's (2008) studies showing that self-expression values (of tolerance, interpersonal trust, participatory habits) demonstrate a commitment by people towards democracy because they value freedom and autonomy in and of itself⁴⁹ rather than pledging a practical commitment to democracy.⁵⁰ But some expression of commitment to democracy is important too and,

⁴⁸ Theda Skocpol, "Unravelling From Above." *The American Prospect* no. 25 (March-April 1996): 20-25.

⁴⁹ Welzel, Christian & Ronald Inglehart. The Role of Ordinary People in Democratization. *Journal of Democracy*, (19) 1, 2008, 126-140, 132.

⁵⁰ His thesis is that survival values (driven by economic need) are replaced by self-expression values (giving priority to the environment, tolerance of diversity and demands for participation in decision making in politics) which challenge elites and therefore leads to participation. Inglehart finds that societies which rank high on self-expression values also tend to rank high on interpersonal trust – this in turn leads high value for freedom and autonomy which leads to political activism – all very crucial to the endurance of democratic practice.

therefore, elements of Verba's (1989) concept of the 'civic culture' is incorporated into the definition, which considers it essential that a participant culture is allegiant to the political structure to which it is oriented,⁵¹ namely to the idea that democracy is 'the only game in town'. Systemic disengagement from the State, therefore, is an extremely non-participant orientation.

Non-participant political culture is modelled, therefore, by two values: absence of interpersonal trust (generalised trust towards others and in particular other ethnic groups) and *negative orientation towards political behaviour* (*a-systemic*: no interest at all in politics, no importance of politics in life, no confidence in government / *systemic* (or more accurately *anti-systemic*): having a democratic system is bad, the economy in a democracy runs badly, political system as it was before was very good,). The very idea of a divided Bosnia would fall within this category as attitudes towards others would be characterised by mistrust and attitudes towards political institutions would be acutely anti-systemic.

The dependent variable being analysed is political apathy which is the inverse of political participation. 'Political participation' denotes "action by ordinary citizens directed toward influencing some political outcomes."⁵² The latter is wider in scope than Verba's (1978) popular definition⁵³ so as to give prominence to: (a) the idea that participation is manifest and observable; (b) ordinary people are the participants and not elites or civil servants; and (c) those being influenced are people in power – meaning powerful actors, groups or businesses capable of influencing government and not just political elites alone.⁵⁴ Political participation is not limited to action directed toward influencing political outcomes. Ekman (2009) rightly notes that we must account for *latent*

⁵¹ Verba, Sidney and Almond, Gabriel. *The Civic Culture*. London: Sage, 1989, 30.

⁵² Ekman, Joakim and Amna, Erik citing Brady (1999) 737 in "Political Participation and Civic Engagement: Towards A New Typology." *Youth and Society (YeS)*, Working Paper 2009: 2, 7.

⁵³ He defines political participation as referring "to those legal acts by private citizens that are more or less directly aimed at influencing the selection of governmental personnel and/or the actions that they take." in Verba, Sidney, Nie, Norman H. and Kim, Jae-on. *Participation and Political Equality: A Seven-Nation Comparison*. New York and London: Cambridge University Press, 1978, 1.

⁵⁴ Ekman, Joakim and Amna, Erik. "Political Participation and Civic Engagement: Towards A New Typology." *Youth and Society (YeS)*, Working Paper 2009: 2, 7.

forms of political participation; observable civil actions⁵⁵ which may have important future consequences in relation to political outcomes – what could be termed ‘capacity action’ or ‘capacity building.’

Political apathy is the antithesis of political participation. Political apathy, therefore, may be defined as ordinary citizens’ disinterest and indifference to political outcomes manifest by measureable inaction (i.e. there being no attempt to have their voice heard) or action (i.e. the attempt to make their anti-political stance vocal and public).⁵⁶

Political apathy is modelled by inverting and adapting the five dimension typology used by Teorell *et al* (who draw on Verba and Nie’s research) to analyse political participation, namely the lack of: *electoral participation* (voting), *consumer participation* (donating money to charity, boycotting, signing petitions), *party activity* (being a member, donating money or volunteering time), *protest activity* (taking part in demonstrations), and *contact activity* (contacting politicians, civil society organisations or civil servants).⁵⁷ The typology is developed further by modelling latent political participation using two variables: interest in and awareness of political and societal issues (following politics in the news, discussing politics with friends), and *self-reported activities within the civil society*⁵⁸ sphere (membership of groups).⁵⁹

⁵⁵ That is social involvement (i.e. attention to and interest in political and societal issues) or civic engagement which combines attentiveness and action. In Ekman. “Political Participation and Civic Engagement.” 19.

⁵⁶ Ekman also provides a typology on non-participation but he appears to conflate a person’s subjective orientations and opinions (i.e. culture – which for me is an independent variable) with the act of non-participation which is the dependent variable I am attempting to analyse. See Ekman. “Political Participation and Civic Engagement,” 21.

⁵⁷ Ekman. “Political Participation and Civic Engagement.” 7.

⁵⁸ Michael Walzer’s concept of ‘civil society’ is used to name the space of uncoerced human association and also the set of relational networks – formed for the sake of family, faith, interest and ideology – that fill this space. The space filled by civil society is not agreed upon nor are the sources from which civil society emanates. Kaviraj and Khilnani believe that the sources of civil society ought to ‘restrain and moderate the state’. It should be noted that historically the term civil society referred to the state but contemporary usage tends to contrast civil society and the state.

⁵⁹ Martin, Irene and Jan W. van Deth. *Citizenship and Involvement in European Democracies: A Comparative Analysis*. Chapter on Political Involvement. London and New York: Routledge, 2007, 312.

1.3. Putting apathy into context

There is an increasing level of political apathy in Bosnia. All the conventional measures of democratic participation in the last 20 years show low electoral turnout, low levels of political protest/activism, decreasing social participation (i.e. membership in civil society organisations) and low/declining party membership. Data from the *International Institute for Democracy and Electoral Assistance (International IDEA)*⁶⁰ (see [Appendix 1](#)) shows falling voter turnout over the last 20 years; which has been consistently under 60%.⁶¹ Data from the *European Values Survey* and *World Values Survey* (see [Appendix 2](#)) demonstrates that active political participation is generally low in Bosnia – except for signing petitions no more than 10% of people have joined in boycotts, lawful demonstrations, unofficial strikes, or are active members⁶² of political parties. What could explain the apparent political apathy and, in particular, the seemingly apathetic Bosnian population? Do the figures actually show a crippling politically apathetic populous?

Following almost £5.1 billion in pledged aid for post war reconstruction⁶³, deep international involvement in the political process through the use of the Bonn Powers by the Office of the High Representative, and thousands of internationally funded civil society projects the explanation for Bosnia's failure to have democratised sufficiently quickly (and have accountable political elites) has been put squarely on political culture.

⁶⁰ *International Institute for Democracy and Electoral Assistance (IDEA)*, Stockholm, Sweden. Database on voter turnout, Bosnia and Herzegovina: IDEA. <http://www.idea.int/vt/index.cfm> [Accessed 3 July 2013].

⁶¹ There seems to be widely varying figures for turnout in Bosnia for the 1996 presidential election. The International Crisis Group put the figure at 103.9%. IDEA places the figure at 60.32% (56.35% if considering voter age population). I wish to highlight the discrepancy without going into detail behind it. See International Crisis Group Report. *Elections in Bosnia & Herzegovina*. No 16, 22 September 1996. See also Belloni, Roberto. *State Building and International Intervention in Bosnia*. Oxford: Routledge, 2007, 91.

⁶² Party membership has declined from a high of 11% in 1998 in Bosnia to 4.4% in 2008 although the figure in Croatia has increased from 2.8% in 1996 to 6.9% in 2008.

⁶³ International Crisis Group Report. *Why Will No One Invest In Bosnia and Herzegovina? Europe Report No 64*, 21 April 1999.

On 15 November 2011, the High Representative for Bosnia told the UN Security Council that his Office had to remain in place because of the “continued negative trends and political instability” and challenges to the Dayton Peace Agreement. He remarked that “one of the basic reasons for those challenges *lay at the core of the nation’s political culture*, in which politicians showed little willingness to compromise [emphasis mine].⁶⁴” Some international stakeholders have called the political culture in Bosnia a ‘kafana culture’ – i.e. indifferent and uninterested. In a damning report by the European Stability Initiative the blame was squarely put on the lack of engagement by citizens.⁶⁵

At its extreme, the explanation is a kind of historical determinism whereby Ottoman influence split the region between the European Habsburgian states (Croatia and Slovenia) from the Balkan Ottoman states – the latter being characterised by political fragmentation, bitter ‘tribal’ feuding, archaic social structures and corrupt habits.⁶⁶ It was in a sense that very clash between Huntington’s enlightened West and the backward East and is a legacy which apparently persists in Bosnia.⁶⁷ Some have sensibly dismissed certain such views outright: “Indeed, we cannot identify with the ethnocentric view of the Balkans as a territory

⁶⁴ United Nations Security Council. *Comments made by High Representative Valentin Inzko at a meeting with the UN Security Council* (6659th Meeting (AM)), 11 November 2011.

⁶⁵ “At the heart of the Bosnian governance problem – from social policy to natural resource management, from rural development policy to debates over the most appropriate way to spend scarce education resources – lies the lack of engagement by Bosnian citizens and interest groups in the practice of government. Just as a company without the interest of an owner will not use its assets wisely, public institutions which are not subject to constant pressure from citizens exerted through the democratic process will not respond to the needs of the public effectively.” See European Stability Initiative. *Governance and Democracy in Bosnia And Herzegovina Post-Industrial Society and the Authoritarian Temptation*. Berlin & Sarajevo, 2004.

⁶⁶ This can be dismissed outright for the Habsburgian legacy primarily responsible for the kind of ethnic tribal nationalism that has become a feature of Balkan politics. In addition Greece and other former Ottoman states (Romania and Bulgaria) have acceded to the European Union as functioning democracies. See Butt, Judy and Mazower, 2002.

⁶⁷ Batt, Judy. “The Western Balkans.” in White, Steven, Batt, Judy and Lewis Paul G. *Developments in Central and East European Politics*. New York: Palgrave and MacMillan, 2007, 74.

where “Turkish dominance caused permanent retardation” (Hösch (1998))⁶⁸ The persistence of the view, however, endures. Kasapovic (2005) confidently surmises that “In more than five centuries of shared history, the members of the three major religious and ethnic communities never permanently, unitedly [sic] and massively stood behind one state. Only one community would do so, while the members of the other two would be adversaries or enemies of the incumbent ruling power. This centuries-old division was also manifested in the 1990s in the different attitude of the three communities to the idea of an independent Bosnian state.”⁶⁹ (See [Chapter 2](#) for further elaboration).

The enduring legacy of socialism is a more salient factor for other academics; noting the particular hardship in developing a rich civil society due to an apparent inherited civic passivity from the socialist regime.⁷⁰ Jasiewicz (2007)⁷¹ more coherently argues that communists replaced ‘natural’ horizontal ties of civil society with vertical ones whereby the state had a controlling influence in both public and private social relations. The mass upheavals in Eastern Europe in the 1990’s and in Yugoslavia could only partially restore long-lasting grass roots level bonds and permanently destroyed formal organisations creating vertical ties. The result, he argues, is that East-Europeans are apt at getting organised in times of crisis but ‘seem indifferent, if not helpless, when it comes to managing their day-to-day affairs. Social atomization and anomie, induced along with the introduction of communist regimes decades ago, remain in place.’⁷² The absence of strong formal organisations he believes helps the proliferation of cronyism and corruption as only informal, personal ties can help get things done. Mudde (2007) has gone deeper into the associational aspect noting that trust is the crucial cultural component that has been

⁶⁸ Cabada, Ladislav. Hösch (1998), 611 in “Political culture and its types in the post-Yugoslav Area.” *Politics in Central Europe* 5. December 2009, 80.

⁶⁹ Kasapović, Mirjana. “Bosnia and Herzegovina: Consociational or Liberal Democracy?” *Politička misao*, Vol. XLII, (2005.), No. 5, pp. 3–30.

⁷⁰ Vozab, Dina. “Communication models of civil society organizations in Croatia.” *Observatorio (OBS*) Journal*, Special issue “Networked belonging and networks of belonging,” 079-099, 2.

⁷¹ Jasiewicz, Krzysztof. “Citizens and Politics.” In White, Steven, Batt, Judy and Lewis Paul G. *Developments in Central and East European Politics*. New York: Palgrave and MacMillan, 2007, 208.

⁷² Ibid, 208.

impacted by communism. He argues that ‘generalised trust’ (trust in people generally both known and strangers⁷³) has been undermined at the expense of small scale experience based trust for instance by the ‘economy of favours and ‘particularised trust’ (trust of ones own kind). Eastern European states show apparently high levels of particularised trust (far more than Western states) especially when it comes to ethnic bonds which would suggest that ‘civic engagement may create a less civil and less trusting society.’⁷⁴

1.4. Identifying political apathy

Path dependent explanations about democratic participation are highly suspect especially where a concept as nebulous as culture is apparently the main causal variable. They raise many unanswered questions – how far do inherited political cultural legacies last? What does it take for inherited legacies to be dislodged? How quickly can new political culture emerge? The analysis below uses Croatia as a comparative case study. Given the different paths Croatia and Bosnia have taken following the war and the relative political ‘success’ of Croatia the comparison is immensely useful in analysing variations, if any, in culture.

The statistical data on Bosnia demonstrates that: (a) people are not as apathetic as they seem although they are slightly more apathetic (on conventional measures) in Bosnia than in Croatia (see [Appendices 1, 2 and 3](#)); (b) measures of non-participant culture are very similar in both Bosnia and Croatia therefore the higher apathy in Bosnia cannot be explained merely by referring to ‘culture’; if anything the cultural measures are more promising in Bosnia than in Croatia (see [Appendix 4](#)); (c) non-participant culture is split by attitudes towards political structure or systemic measures and a-systemic measures. A-systemic measures concerning current politics and the government have become

⁷³ ‘Partial trust,’ by contrast, is trusting people who are perceived to be in ‘one’s own’ sphere. Håkansson, Peter and Sjöholm, Fredrik. “Who Do You Trust? Ethnicity and Trust in Bosnia and Herzegovina.” *Europe-Asia Studies*, Vol. 59, No. 6 (Sep., 2007), pp. 961-976. 962.

⁷⁴ Mudde, Cas. “Civil Society”. “Citizens and Politics.” In White, Steven, Batt, Judy and Lewis Paul G. *Developments in Central and East European Politics*. New York: Palgrave and MacMillan, 2007, 223

increasingly anti-government since 1996 (see [Appendices 4 and 5](#) and [Chapter 2](#)). Systemic measures have remained constant since 1996 in terms of general attitudes towards democracy but in terms of attitudes towards BiH as a unified state views remain complex and disparate (see [Chapter 2](#)).

[Appendix 1](#) demonstrates that voter turnout is generally higher in Croatia than in Bosnia yet there is no clear downward trend in participation in Bosnia. Croatia almost had 80% turnout in 2000 the highest since independence partly due to the death of Tudjman in December 1999, increasing media plurality and the growth of civil society organisations encouraging voter participation.⁷⁵ Bosnia in 2010 had higher turnout figures in both Presidential and Parliamentary elections than the first post-war elections. [Appendix 2](#) shows that over the last 15 years active political participation (in lawful demonstrations, boycotts, party membership) have all increased in Croatia. After sharp falls in participation in signing petitions and unofficial strikes during the Tudjman years (probably explained by intimidation and reprisals) the trend in Croatia has been increasing since. Crucially, [Appendix 2](#) shows that Bosnia having had an equal or greater participation rate than Croatia (in all categories: lawful demonstrations, boycotts, party membership, signing petitions, unofficial strikes) in the early 1990's has since seen falling participation such that it now lags Croatia on every measure. Belloni (2007) identifies that in the October 2004 local elections, turnout fell to 46.8 per cent, with less than 15 per cent of Bosnians under thirty deciding to go to the polls (HCHR (2005)).⁷⁶ At the October 2006 general elections turnout was just 42.76 per cent, despite the introduction of 'passive registration' that increased the electoral base by more than 400,000 people.

That is not the full picture, however. Measures of latent participation (i.e. building capacity for political in the future) would suggest that Bosnia has lower latent non-participation rates than Croatia (which is seeing rapidly increasing levels of latent non-participation): this means that it is far more likely that for a Croatian to not discuss politics with his friends, be a member of a voluntary group, or follow


⁷⁵ Fisher, Sharon. *Political change in post-Communist Slovakia and Croatia: from Nationalist to Europeanist*. New York: Palgrave MacMillan, 2006.

⁷⁶ *Ibid*, 95.

politics in the news than a Bosnian (see [Appendix 3](#)). Remarkably, people who stated that they are not a member of a voluntary organisation were only 17.6% in Bosnia whereas the figure in Croatia was 58.5%.

In Croatia following the demise of Tudjman politics has focussed on bread and butter issues; as [Appendix 3](#) shows people are increasingly less inclined to join voluntary groups, follow politics in the news, or discuss politics with friends. Under Tudjman with little prospect of change the “public granted increased approval to whatever means necessary to bring about change.”⁷⁷ They are not as Kuntz (2011) suggests “engaging increasingly with society, but not with the political sphere.” In fact the data shows that Croatians are actually taking an increasingly active part in the mainstream political processes – party membership, signing protests, joining boycotts are all on the increase. But the propensity to engage (i.e. the desire and will to engage) is on the wane – it is a case of a developing indifferent culture maybe because ‘things aren’t so bad’.

In Bosnia, the inclination to participate (though not in mainstream political action *per se*) actually seems to be increasing in the past 10 years but trust in government is falling. As Kuntz (2011) notes “In Croatia, participatory habits surged in a nationalist regime lacking democratic institutions, yet declined under more democratic institutions. Institutions alone, it appears, cannot prevent nor sustain participatory habits.”⁷⁸ But institutions *do* impact conventional forms of participation and attitudes towards participating.

The fact that the measure for latent non-participation is not increasing sharply for Bosnians would suggest that Bosnians have very promising potential for political action if we are to consider awareness of political issues and membership of voluntary organisations as indicators of possible future mobilisation. But could, perhaps, the relatively higher levels of political apathy of Bosnians (in mainstream political participation) be because of culture? 

⁷⁷ Kuntz, Jessica. “(Re) Entering Europe.” 2011, 233.

⁷⁸ Kuntz, Jessica. “(Re) Entering Europe.” 2011, 238.

*“The fifth with clenched fists/
and trembling fingers tries to hold
This mirror of clear redeeming grace
But it slips
To the
Floor
For in it that instant he recognises
His own
Ancient
Forgotten
Face”*

Mak Dizdar ⁷⁹

2. “Mirror of clear redeeming grace”: measuring culture

2.1. A-systemic orientations

The key a-systemic measures of non-participant culture are very interesting and demonstrate that Croatia has a far more non-participant culture (and growing) than Bosnia and this is despite the measures taken in respect of EU accession. People expressing ‘no interest in politics at all’ has increased in Croatia from 23.1% in 1996 to 33.3% in 2008 (despite the demise of Tudjman’s anti-democratic legacy). In Bosnia it has increased from 16.6% in 1998 to 26.4% in 2008. People expressing no confidence in the government at all has been rapidly increasing in both countries though the figure was twice as higher in Croatia in the mid 90’s and is still marginally higher in Croatia. Fascinatingly, the number of people saying that politics is not at all important in life was rapidly declining in Croatia during the Tudjman years declining from 33.3% (1996) to 20.2% (1999) and since has been slowly rising again. In Bosnia in 1998 the figure rose from 21% to 28.6% in 2001 but has fallen since to 20.6%. Tentatively, we might say there would appear to be a positive correlation between importance of politics and poor governance.

Appendix 4 shows that culture is constantly changing and is shaped by the political environment. It is evident that Bosnia enjoys

⁷⁹ Dizdar, Mak. Partial extract from “A Text about a Text” in “The Stone Sleeper.” Buturović, Amila, and Francis R. Jones. *Stone Speaker Medieval Tombs, Landscape, and Bosnian Identity in the Poetry of Mak Dizdar*. New York: Palgrave, 2002.

a slightly more favourable participant culture (when considering a-systemic issues) than Croatia but that the difference between them is not huge. If that is the case then it is difficult to argue that there is a relatively more apathetic culture in Bosnia than Croatia because Bosnia has a non-participant culture – that is simply not the case. Batt astutely recognises that “political weaknesses conventionally attributed to the ‘Balkans’ as a region are by no means immutable; nor are such defects unique to the region.”⁸⁰

In fact, if we are to look at political culture historically, any supposed apathy induced by communism would be hard to substantiate in the case of former Yugoslav countries. Distinguishing Yugoslavia from the USSR was the economic system of self-management. Kuntz (2011) notes that self-management was designed to produce a highly decentralized economy, in contrast to the central planning Soviet Gosplan, which placed decision-making in the hands of the workers.⁸¹ Elements of civic and economic responsibility were introduced as long term commitments; 20% of people had served in workers’ councils, 7% in local community councils, 6% in apartment/house councils, and 4% in municipal councils.⁸² People from Yugoslavia freely travelled to Europe and Europeans frequently travelled to Yugoslavia which led to cultural exchange and exchange of political ideas. Civic society, however, of the type latterly described was restricted largely to those of higher socio-economic status and membership of Communist bodies like the League of Communists was restricted by criteria such as being Atheist. Any legacy which was inherited in Croatia and Bosnia was, therefore, mixed but we can say that it was not the usual ‘communist’ basket case.⁸³

⁸⁰ Batt, Judy. “The Western Balkans.” in White, Steven, Batt, Judy and Lewis Paul G. *Developments in Central and East European Politics*. New York: Palgrave and MacMillan, 2007, 74.

⁸¹ Kuntz, Jessica. “(Re) Entering Europe: The Post-communist Transition of Croatian Political Culture.” *Politička misao*, Vol. 48, No. 5, 2011, pp. 215-246, 223.

⁸² *Ibid*, 224.

⁸³ That Yugoslavia was indeed an exception as demonstrated by pre-war data collected by Hodson, Sekulic and Massey (cited by Kuntz (2011)) showing a direct correlation between levels of diversity and levels of tolerance on a republic basis; measures which on paper are very conducive to democratic practice (see further sub-chapter 2.3). *Ibid*, 226.

Krajnc *et al* (2012) in a recent study corroborate my findings (in sub-chapter 1.4 above) by identifying that post-Yugoslav population is almost as protest oriented (i.e. inclined to signing a petition, joining in boycotts, attending lawful/peaceful demonstrations) as citizens in western countries, and more so than today's EU member states.⁸⁴ Kranjc (2012) also observes that within post-Yugoslav states protest participation is positively associated with pro-democratic orientations – again confirming my findings above. Building on the research of others, Krajnc (2012) verifies that in the post-Yugoslav context levels of political participation has a weak association with levels of socioeconomic development⁸⁵ so political apathy in the post Yugoslav states must be explained by something other than economics and culture.

While the inclination to protest declined in the first decade following the collapse of communism, it is on the rise in almost all the post-Yugoslav states other than in Bosnia. So why is Bosnia an exception? It is safe to say that the usual aspects of political culture cannot be the prime reason for relatively higher apathy in Bosnia. What then can persuasively explain the democratic deficit in Bosnia? Is it that Bosnia as a multi-ethnic state is the problem?

2.2. Anti-systemic orientations

Appendix 5 demonstrates that non-participant attitudes towards the democratic system have remained fairly constant and are not very anti-systemic in both countries. Respondents who said that having a democratic system was very bad is below 4.1% in Bosnia (though numbers have doubled in the last 15 years) and below 2.5% in Croatia (with numbers quadrupling in 15 years). Figures

⁸⁴ Krajnc, Marina Tavčar, Flere, Sergej and Kirbiš, Andrej. "Is Protest Participation in Post-Yugoslav Countries Motivated by Pro-democratic Political Culture? A Cross-National Study." *The Western Balkans Policy Review*, Volume 2, Issue 2, Summer/Autumn 2012

⁸⁵ See Mihailović (1986); Miljević and Poplašen (1991) in Krajnc, Marina, Andrej. "Is Protest Participation in Post-Yugoslav Countries Motivated by Pro-democratic Political Culture?" 13. Krajnc's results corroborate the findings of more recent studies of post-Yugoslav states (Kirbiš, (2011); Kirbiš and Flere (2010), (2011)).

for whether the economy runs badly in a democracy are below 7% in both countries with marginal difference; although in 2008 the figure was higher in Croatia than Bosnia. The socialist legacy would presumably have expected much higher figures given the very poor economic situation in Bosnia but views are not extreme at all. The key structural figure of whether people thought ‘the system as it was before [under Yugoslavia] was very good’ shows that in Croatia the figure increased from 1.3% (1996) to 2% (1999) and in Bosnia from 5.2% (1998) to 19.5% (2001). This massive increase indicates that people in the first decade following independence in Bosnia hardened their views about the democratic system relative to the system under Yugoslavia as a result of their experience of democracy in the intervening years; although their views about democracy *per se* are not anti democratic as noted earlier. That the relative difference was not a product of inheritance is clear.

The logic of the civil war of 1992-96 which pitted Croat against Serb against Bosniak and the consequences of the ethnic cleansing has meant that the three constituent peoples have been segmented geographically – if they were not, as some argue, already segmented by historical processes. Kasapović (2005) argues that this segmentation is the corollary to a longer historical division; although that is dubious and can be debated at length.⁸⁶

There is no doubt that it is possible to gauge (or more precisely poll) secessionist sentiments amongst citizens of the three communal groups but the ‘authenticity’ and ‘endurance’ of such sentiment is highly suspect; dependent as such sentiments are on a myriad of factors: elite manipulation, group preferences, or recent societal or communal group conflict. The Dayton Peace Agreement could be seen as a series of concessions (ongoing it would seem) that aimed

⁸⁶ She argues that Bosnia has been a state in which the three constituent peoples, Croats, Bosniaks and Serbs have rarely coexisted as a united, peaceable state and that the relations between the three people has been characterised by political competition in some imposed form of consociational agreement (either the millet system under Ottoman rule, or proportional systems under the Hapsburgs or Yugoslavs). Kasapović, Mirjana. “Bosnia and Herzegovina: Consociational or Liberal Democracy?” *Politička misao*, Vol. XLII, (2005.), No. 5, pp. 3–30, 5.

to protect the territorial integrity of Bosnia at the expense of having a state consensually legitimised by all the people. In fact, if the people were to have had a referendum after the war it would have been likely (and very likely still) that at least the Serbs and Croats would want separate independent mono-ethnic states.⁸⁷ The outcome, therefore, is political impasse, inefficiency and intractability as foundational division is replicated at a political level.

Gallup polls indicate that 87% of Serb respondents would support the creation of an independent state if a majority of its citizens voted that way.⁸⁸ Aside from the fact knowledge how the majority might vote can very significantly skew individual choice in any situation (an issue elaborated on in Chapter 4) it is clear that support for secession is readily available particularly so when others (especially if others are ethnically similar) are perceived to support that choice. Incidentally, majorities of both Croats and Bosniaks (63% and 80%, respectively) did not agree with a potential secession of the RS in the event of a referendum. In general, a majority of Bosnian Croats (56%) and Bosniaks (86%) do not agree with the idea of dividing up Bosnia any further, although 61% of Serbs state that they would be in favour.⁸⁹

The conclusion that some academics would reach is that there never was and never will be the will to create a single unified State of Bosnia and it is fruitless to try and do so.⁹⁰ Parish, coming

⁸⁷ Kasapović (2005) speculates that “This might explain why the international community has not dared to introduce some more radical changes into the existing state structure or to call a new constitutional referendum in which the political will of the people and the peoples would be probed. The risks are incalculable, and its results might delegitimize everything that has been done so far for the reconstruction of the state. While implicitly surviving as a “non-consensual” state union, the country must remain under the international military and political protectorate.”

⁸⁸ Gallup Balkans Monitor. *Focus On Bosnia and Herzegovina*. GBM Focus On #04. November 2010. 4.

⁸⁹ Ibid.

⁹⁰ T.J. “Bosnia’s gridlock: Two visions for Bosnia. *The Economist*, 13 April 2011. Eastern Approaches Blog. http://www.economist.com/blogs/easternapproaches/2011/04/bosnias_gridlock

dangerously close to endorsing the outcome of ethnic cleansing,⁹¹ remarks that “the future of Bosnia without heavy international oversight is inevitable disintegration. The international community should now be focused upon managing the side-effects of this ugly process rather than striving to keep alive a discredited vision.”⁹² This view is, however, morally and politically indefensible.⁹³

What might separation mean, for instance, for the 30% of the Sabor that did not vote for independence in 2000 or the remaining Serbs/Bosniaks in a future ‘Croat entity’? Should they also be entitled to ‘independence’? What had Croatian independence meant for Croats living in the Republic of Serbian Krajina many of whom were expelled when that Republic was proclaimed or for Serbs living in that same ‘Republic’ (240,000 of whom who had fled or were expelled following Operation Storm towards the end of the war)? Might the Muslims of Sandzak in Serbia also obtain independence, and what of the Muslim populations of Macedonia and Montenegro? Without ethnic cleansing, assimilation, forced or voluntary population transfer, mono-ethnic States (at least at face value) are not possible to create (Arendt (1948); Mann (1998);

⁹¹ Refugee return would appear ‘problematic’ for instance: “Brcko also remains problematic because under US tutelage Bosniak refugees returned to the town in significant numbers; yet that town centre must now form the land bridge between the two parts of Republika Srpska, if Dodik is to achieve his goal.” See further: Parish, Matthew. “Comment: Croat Crisis Pushes Bosnia Towards Endgame.” *Balkan Insight*, 21 March 2011.

<http://www.balkaninsight.com/en/article/comment-croat-crisis-pushes-bosnia-towards-endgame>

⁹² Parish, Matthew. “Comment: Croat Crisis Pushes Bosnia Towards Endgame.” *Balkan Insight*. 21 March 2011. <http://www.balkaninsight.com/en/article/comment-croat-crisis-pushes-bosnia-towards-endgame>

⁹³ See further remarks in this respect by Bassuener, Kurt: “...Parish’s prescription – the internationally managed dissolution of the state – would be a disastrous failure, as well as demanding far deeper and more risky international engagement than would be required to prevent state dissolution. There is no way that the country could be divided in a consensual, nonviolent fashion. A deceptively simplistic solution, it would create more problems than it would solve, further destabilize the region, and fuel nationalist politics in neighbouring Serbia and Croatia.”

Derrida (2002); Taylor (2002)).⁹⁴ A single homogenous State, one could concede, would not be feasible in Bosnia without separation; but the very idea of homogenous (or ‘pure’) States is always mythological and their foundation upon violence always reprehensible.⁹⁵

The appropriate prescription is that same one elaborated by the Badinter Commission on 11 January 1992 substituted by the name of the relevant ethnic group, namely that: “that the Serbian population in Bosnia and Herzegovina and Croatia is entitled to all the rights concerned to minorities and ethnic groups [...]” and “that the Republics must afford the members of those minorities and ethnic groups all the human rights and fundamental freedoms recognized in international law, including, where appropriate, the right to choose their nationality.”⁹⁶ Indeed, that prescription was built into the State Constitution (as noted in [Chapter 3](#)); namely that fundamental human rights and freedoms cannot be amended by any future constitutional change (Art. X.2, State Constitution). But following the war achieving such a state based on the consent of all ethnic groups was and remains the ultimate challenge.

2.3. Absence of interpersonal trust

Hayden (2007) has gone further than most and says that the war if anything was an extension of a deeper tradition in Bosnia of segregation, intolerance and division: “*The international imagining of a single Bosnian community despite the efforts of large, non-random segments of the population to reject it actually delegitimizes the beliefs of, many of “the natives” themselves ... Indeed the whole enterprise*

⁹⁴ Derrida, Jacques, “Force of Law: The ‘Mystical Foundation of Authority,’” in Gil Anidjar (ed.), *Acts of Religion*. New York: Routledge, 2002. 234; Arendt, Hannah. *Origins of Totalitarianism*. Orlando: Harcourt Brace & Company, 1948. 291; Taylor, Charles. “Democratic exclusion (and its remedies?).” *Eurozine Magazine*, February 2002; Mann, Michael. “The Dark Side of Democracy: The Modern Tradition of Ethnic and Political Cleansing.” *The Social Science Research Council Workshop “Democracy, the Use of Force and Global Social Change”*, University of Minnesota, May 1-3, 1998. 41.

⁹⁵ Abraham, Aarif. “Enemy of the State: The creation of enemies and their exclusion from democracy.” Sarajevo: University of Sarajevo. *Unpublished*. December 2012.

⁹⁶ Pellet, Alain. “The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples”. 3 *EJIL* (1992), 178.

of the international community in postwar Bosnia may be seen as an attempt to create a single society in a setting in which a large portion of the natives successfully fought a war to prevent just that result."⁹⁷ Aside from the suspect historical revisionism - for instance, that all 'the Bosnian Serbs and Herzegovinian Croats' rejected the idea of a Bosnian State at its inception⁹⁸ or that a groundswell of popular feeling propelled ordinary people into war rather than the planned and deliberate use of horrific violence by the war's instigators⁹⁹ - Hayden's arguments are not persuasive. Firstly, Bosnia was a highly intermingled society (even if one is to accept the debateable position that society was not 'imagined' as a nation by its constituents at the time).¹⁰⁰ Bosnia demonstrated a tradition of tolerance and co-existence against which a war was waged (for complex reasons) in an attempt to create mono-ethnic nation-states

⁹⁷ Hayden, Robert M. "Moral Vision and Impaired Insight: The Imagining of Other Peoples' Communities in Bosnia." *Current Anthropology*, Vol. 48, No. 1 (February 2007), pp. 105-131.

⁹⁸ The independence referendum (held on 29 February and 1 March 1992) required by the Badinter Commission voted in favour of an independent Bosnia (confirmed by the Assembly on 4 March 1992). 63.37% of people both tuned up and voted yes to independence. Even assuming each and every Bosniak entitled to vote turned up and said yes would only amount to 43.47% which must have indicated support amongst others. In fact at a political level both the HDZ and SDA the two major parties supported independence. The majority of Serbs in Bosnia and in particular in the then non-segregated 'Serb areas' were led and encouraged by elites of the SDS to boycott the independence referendum. Note that Serb autonomous areas were already being formed by September 1991 as well as Croat autonomous areas. Also, in May 1992 Croat and Serb political leaders engaged in discussions over the partition of Bosnia. In fact, it is now known that as early as 25 March 1991 had the Presidents of Yugoslav Federal States SR Croatia and SR Serbia Franjo Tuđman and Slobodan Milošević agreed to partition Bosnia (the Karađorđevo Agreement). By 27 March 1992, the Serb Republic of Bosnia and Herzegovina was formally declared. Following the international recognition of Bosnia on 6 April 1992, the war began. See further: Bieber, Florian. *Post-war Bosnia: ethnicity, inequality and public sector governance*. New York: Palgrave MacMillan, 2006. 42; Imamovic, Mustafa. *Bosnia and Herzegovina: Evolution of its Political and Legal Institutions*. Sarajevo: Magistrat, 2006. 389; Mahmutćehajić, Rusmir. "No Final Curtain: The Neverending Drama of Bosnia and Herzegovina". *Forum Bosnae*. Volume 6 No. 1, January 2011.

⁹⁹ See further, Duijzings, Ger. *Reply to Hayden (2007)*. *Current Anthropology*, Vol. 48, No. 1 (February 2007), pp. 105-131.

¹⁰⁰ "With very few exceptions (notably Drvar), the municipalities were not mono-national, but had at least two of the three communities living in close proximity." Bieber, 2006. 31.

((Malcolm (1996); Buturović and Jones (2002); Mahmutćehajić (2003), (2005); Bieber (2006)).¹⁰¹ That in itself was a reason for intervention and challenge the behaviour of those ‘natives’ willing to support the use of ethnic cleansing (directly or indirectly) to create mono-ethnic states. Secondly, it is not surprising that large sections of the population rejected co-existence during the war and continue to do so not least because genocide and cultural destruction on a massive scale might not have made pluralism particularly appealing.¹⁰² Borneman (2007) rightly notes that “we might lessen the incidence of such behaviour not by replicating but only by changing the understandings of the people involved”.¹⁰³ People’s preferences are not stable and are constantly shifting shaped as they are by time, space and circumstance. Whilst people may have been inclined to reject cultural pluralism at particular points in time they need not do so for time immemorial.¹⁰⁴

That division and segregation is far from engrained in Bosnian political culture is amply demonstrated by statistics today on trust, tolerance and reciprocity. The commonplace view is that the lack of

¹⁰¹ It was not until the late 1980s that nationalist exclusive perspectives took root in Bosnia. Note that even as late as 1990 the electoral law banned political parties organized along ethnic lines; a decision that was widely supported in opinion polls at the time: “it would be misleading to consider the system of government in Bosnia under Communism as being a group-based power-sharing system, as officials represented the same interests, rather than negotiating the interests of the three largest nations in Bosnia (Andjelic 2003: 39–40) [...] Instead, the party and the republic were very much governed on the understanding that while national identity continued to matter, it was not the primary organizing principle of political life.” Bieber (2006), 16, 19. See also, Mahmutćehajić, Rusmir. *Learning from Bosnia: Approaching Tradition*. New York. Fordham University Press, 2005; Buturović, Amila, and Francis R. Jones. *Stone Speaker Medieval Tombs, Landscape, and Bosnian Identity in the Poetry of Mak Dizdar*. New York: Palgrave, 2002; and Mahmutćehajić, Rusmir. *Sarajevo essays: politics, ideology, and tradition*. New York: State University of New York Press, 2003.

¹⁰² See further the study by Håkansson, Peter and Hargreaves, Sarah. *Trust in Transition - Generalised Trust in Bosnia and Herzegovina*. Balkans Analysis Group. Sarajevo, 2004.

¹⁰³ See further, Borneman, John. Reply to Hayden (2007). *Current Anthropology*, Vol. 48, No. 1 (February 2007), pp. 105-131.

¹⁰⁴ Studies suggest that trust is fragile in that it often requires time to build and sustain but is easily broken (McGregor 1967). See further Hakansson and Sjöholm (2007).

interpersonal trust (particularly generalised trust) in Bosnia is the key hindrance to future reform and accommodation amongst people; the view is widespread even amongst international CSOs: “There is no agreement on the future, and elite mistrust reflects a genuine absence of social trust.”¹⁰⁵ Many such views rely on surveys showing that generalised trust is very low in Bosnia; in one report only 7.2% said they could trust other people. As [Appendix 6](#) shows, this figure is little different from the figure in neighbouring Croatia and, in fact, in 2008 the figure in Croatia was a full 7 per cent higher than in Bosnia. In addition, in Bosnia figures on generalised mistrust towards others have gone down by 10% from a high of 84.2% in 2001.

The relevant measures of trust, however, are not so much generalised trust but partial trust: trust between different ethnic groups. It is the failure of inter-ethnic accommodation which is the problem because if generalised trust was the only salient variable then there should be political paralysis in Croatia too. But here too the studies are instructive and counter-intuitive.

Håkansson and Sjöholm (2004), (2007) convincingly demonstrate that people in Bosnia, aside from regional differences, tend to show low levels of trust in all other people irrespective of their ethnic belongings.¹⁰⁶ In addition, there is a strong correlation between trust for one’s own ethnic group and corresponding trust for people from other ethnic groups. People, therefore, unlikely to trust their own are unlikely to trust others whichever their ethnic group. Håkansson and Sjöholm (2007) posit that previously found positive effects of ethnicity on trust is likely to be explained by the fact that those regions that were ethnically heterogeneous were also the worst hit by the war e.g. Una-Sana, Gorazde and Brcko.¹⁰⁷ Those regions, therefore, would suffer from low trust both partial and generalised.

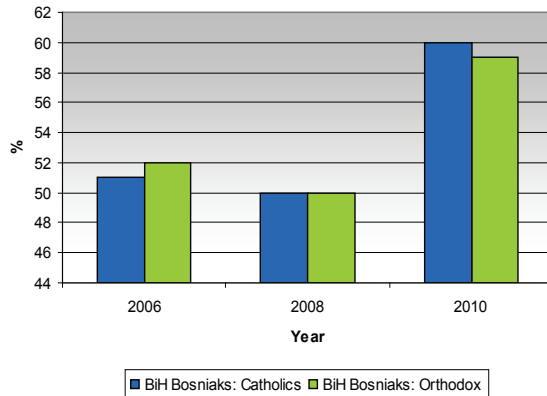
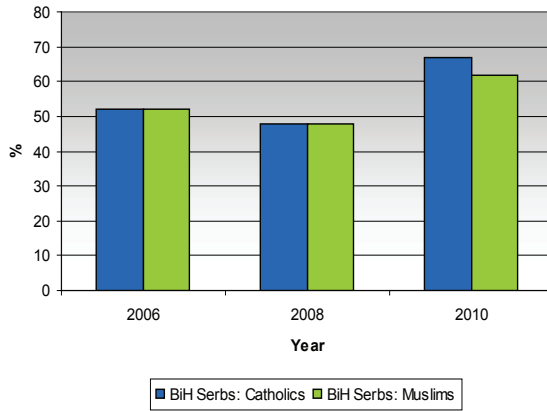
What the available figures would show is that the underlying population is not averse to cross-ethnic political compromise because their mistrust of other ethnic groups is paralleled by mistrust of their

¹⁰⁵ International Crisis Group. *Bosnia’s Incomplete Transition: Between Dayton and Europe*, Europe Report N°198, 9 Mar 2009. 2.

¹⁰⁶ Håkansson, Peter and Sjöholm, Fredrik. “Who Do You Trust? Ethnicity and Trust in Bosnia and Herzegovina”. *Europe-Asia Studies*, Vol. 59, No. 6 (Sep., 2007), pp. 961-976.

¹⁰⁷ *Ibid*, 972.

own. In any case, figures for ethnic accommodation and trust between groups have been increasingly promising – as demonstrated at [Appendix 6](#) and below. Mirroring the fact that people are more inclined to live next to people of a different race today than 12 years ago (see [Appendix 6](#)), people in Bosnia are far more likely to trust those of different religions than prior years (and generally more so than in Croatia). Gallup polls represented in [Figure 2.3](#) confirm respondents showed more trust in members of the other religious groups than they had in 2006; each ethnic group was inclined to trust another either ‘a lot’ or ‘somewhat’ between 60-70% - around 10% more than five years prior.¹⁰⁸



¹⁰⁸ International Crisis Group. *Bosnia’s Incomplete Transition: Between Dayton and Europe*, Europe Report N°198, 9 Mar 2009. 2.

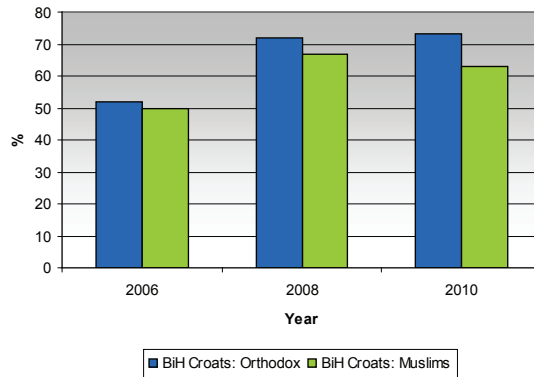


Figure 2.3: Trust between major ethnic groups

Yet such figures should not come as a surprise unless there is a fixation with anecdotal evidence and/or an exclusive focus on *post-war* Bosnia. Studies by Hodson, Sekulic and Massey (1994) confirm a direct correlation between levels of diversity and levels of tolerance on a Republic basis; measures which on paper are very conducive to democratic practice on a non-ethnic basis. They found that Bosnia – the most diverse of the Republics – had the highest average tolerance score of 3.88, while the province of Kosovo – the least diverse part of Yugoslavia – had the lowest score of 1.71.¹⁰⁹ Croatia came second after Bosnia.

The results demonstrate that despite increasing tolerance or willingness to accommodate ‘the other’, paradoxically, there are sentiments existing within society (for a myriad of reasons) that can reinforce division and separation. Arguably, growing political apathy (persistence of secessionist sentiment) in Bosnia is primarily explained by the behaviour of political elites performing in the institutional framework¹¹⁰ created by the international ‘protectors’ of Bosnia’s

¹⁰⁹ Kuntz, Jessica. “(Re) Entering Europe: The Post-communist Transition of Croatian Political Culture.” *Politička misao*, Vol. 48, No. 5, 2011, pp. 215-246, 223. 226.

¹¹⁰ By ‘institution’ I take Robert Elgie’s definition of the term; political institutionalism refers to ‘such political features of the institutional context as the rules of electoral competition, the structure of party systems, the relations among various branches of government, and the structure and organisation of economic actors like trade unions.’

fledgling democracy. What the statistics would indicate is that, poor political institutions which are responsible for the cause of the growth in non-participant culture may also be the principal cause of political apathy (when looking at conventional measures). Culture, unexplained, cannot be the primary reason for relatively higher apathy in Bosnia. What follows is an analysis which suggests that, the ethno-nationalist territorial divisions occurring as a result of the war are certainly problematic but far more so are the ethno-nationalist divisions within State institutions.

2.4. Institutions as an explanation

Recognising that there is no wide acceptance or consensus on the institutional structure created following the Dayton Peace Agreement, elites endorse extreme anti-systemic positions. As [Chapter 4](#) demonstrates using rational choice models, politics in Bosnia is characterised by elites making maximalist claims that favour one's own group at the expense of the legitimacy of the State. Whilst the underlying populous is not anti-democratic they can be easily mobilised against the framework created post-Dayton. For instance, in June 2011, the RS threatened a referendum to secede as a way of extracting concessions on reforms to the judiciary¹¹¹ – international actors duly obliged. The precedent was set much earlier, however. The HDZ convened in 2000 the Croatian National Assembly (Sabor) of all Croatian parties to pass a referendum on independence of the 'Croat cantons' unless the reform of electoral laws (implemented by the OHR) which would reduce Croatian influence in the House of Peoples was revoked. The referendum went ahead with high turnout and 70% of the voters were in favour of the establishment of a Croatian entity in the Federation. The impasse ended when the international community caved in on the electoral law reform and the HDZ rescinded the Croatian self-rule referendum.¹¹²

One must caution, though, that the potential for secessionist sentiment is far from a wholesale endorsement of secession or secessionist

¹¹¹ International Crisis Group. *Bosnia: What Does Republika Srpska Want?* Europe Report No 214, Oct 2011.

¹¹² Kasapović, M. "Bosnia and Herzegovina: Consociational or Liberal Democracy?" 18.

government, (notwithstanding the highly unfavourable economic, political and social circumstances for making secession viable). For instance, elected leaders in the RS openly talk of secession or greater autonomy (despite increasing disavowal from Serbia, NATO and the EU).¹¹³ Yet the electorates in both Entities are largely highly dissatisfied and disillusioned by elites representing them. People who stated they have no confidence in the government at all have rapidly increased from 12.3% in 1996 to 34.6% in 2008 (see [Appendix 4](#)). In terms of government performance at a State level the assessment of respondents in both entities has remained negative – 92% of respondents in the Federation and 82% in the RS said they thought that the government’s work was poor or only fair: a level that, in aggregate, has been rather stable since 2008.¹¹⁴ Around two-thirds of Serb respondents (64%) were convinced that the RS government was doing a poor or only a fair job (although there was an increase of 13 percentage points saying it was doing a good job).¹¹⁵ In the Federation, respondents had a much more negative assessment of their entity leaders with 91% (roughly stable since 2008) saying that their performance was poor or only fair.¹¹⁶

As noted in [Chapter 4](#), the political agenda is largely focused on maintaining the status quo. Until the 2010 elections, Bosnia was governed by Bosniak, Croat and Serb parties with exclusionary nationalist agendas, with one exception between 2000 and 2002.¹¹⁷ Demonstrating that cross-ethnic political compromise is possible, the October 2010 elections saw the election of a compromise oriented

¹¹³ Statements made by the current President of Republika Srpska and leader of SNSD, Milord Dodik, are noted in [sub-chapter 3.4](#).

¹¹⁴ Although, there is some cause for optimism as this dissatisfaction has softened significantly in past years: while in the Federation, in 2008, 70% of interviewees stated that the government’s performance was poor, that figure has decreased to 57% in 2010. In Republika Srpska, this same figure dropped from 56% to 26% in the 2008-2010 timeframe. Gallup Balkans Monitor. *Focus On Bosnia and Herzegovina*. GBM Focus On #04. November 2010. 2.

¹¹⁵ Gallup Balkans Monitor. *Focus On Bosnia and Herzegovina*. GBM Focus On #04. November 2010. 5.

¹¹⁶ Ibid, 10.

¹¹⁷ This coalition between multi-ethnic parties was called “Democratic Alliance for Change.”

Bosniak President,¹¹⁸ the re-election of a non-nationalist Croat President¹¹⁹ (again with very high numbers of Bosniak votes who voted in the Croat List instead of their ‘own’ Bosniak List). SDP which campaigns on a non-nationalist ticket (although its political base is largely Bosniak) also won the largest number of seats. At the same time, however, a senior member of the SNSD,¹²⁰ campaigning on grounds to secede from Bosnia, was re-elected as the Serb representative of the State Presidency. Importantly, none were the leaders of the strongest parties in their communities (SDA, HDZ and SNSD, respectively), which weakened their policymaking ability and link with the Entities.¹²¹ Just as critically, it took almost fourteen months to form a state government after the elections; then the fledgling coalition broke down less than six months later, on 31 May 2012. Belloni has remarked that “Since the early twentieth century Bosnians have often voted along ethno-nationalist lines when given the opportunity, and it is not startling that they continue to do so in the aftermath of the 1992–95 war, particularly given that constitutional and electoral norms favour ethnic voting.” The elections in 2010, however, show just the opposite in the Federation; Bosnians (at least in the Federation where there is greater plurality) are happy to vote on non-ethnic lines. The constitutional and electoral norms, however, encourage anything but especially when moderates in the Federation are met by intransigent elites in the RS and reciprocally intransigent opponents in the Federation. There is much, therefore, to be said how far ethnic elites actually represent the will of ‘their people’ especially when there is a strong insistence by elites that only those of shared ethnicity can represent people politically.

In the face of this crippling paralysis it is hardly surprising that

¹¹⁸ Bakir Izetbegovic, member of SDA against the relatively hard-line Haris Silajdžić.

¹¹⁹ Zeljko Comsic, previously a member of SDP but left in July 2012 due to irreconcilable differences with the party to found his own, the Democratic Front.

¹²⁰ Nebojša Radmanović

¹²¹ The International Crisis Group suggests that the Presidency is now overshadowed by the leaders of the six ruling parties who since September 2011 have been meeting behind closed doors to agree on policy. International Crisis Group. *Bosnia's Gordian Knot: Constitutional Reform*. Europe Briefing N°68 Sarajevo/Istanbul/Brussels, 12 July 2012. 15.

party membership is rapidly declining, and trust in government is at an all time low. Distrust in political parties is immensely high – almost 50% of people do not trust them at all (see [Appendix 4](#)). Gallup polls confirm that a majority in each of the three ethnic groups do not feel that somebody was speaking for them at a political level.¹²² Significant majorities are willing to accept changes to the State Constitution, for instance, to support EU accession yet elites are unable to agree on such reforms.¹²³ People stating that politics is not at all important in life has gone down from 28.6% in 2001 to 20.7% in 2008 – the only time this figure was declining in Croatia was during the Tudjman years which seems to suggest discontent with the status quo given politics has an increasing negative impact on their lives (see [Appendix 4](#)).

Aside from the paralysis that ethno-nationalist politicians induce, other institutional explanations for political apathy can include inter alia: (a) the frequency of elections – there have been nineteen electoral races between 1996 and 2006 and frequent changes to the electoral rules¹²⁴ – for instance, the changes to the parliamentary electoral rules in 2000 were proposed by the OSCE just a month before elections¹²⁵; (b) a complex electoral system that encourages centrifugal outcomes – it encourages ethnic competition and extreme party fragmentation at the expense of accommodation and compromise; and (c) and the widespread perception that the role played by international organisations has made political participation and the election of local politicians redundant.¹²⁶ We may in some ways have come full circle: as Denitch (1993) writing about the death of Yugoslavia remarked: “The fragmentation in the 1980s of a relatively successful state and economy (compared to the rest of

¹²² Gallup Balkans Monitor. *Focus On Bosnia and Herzegovina*. GBM Focus On #04. November 2010.

¹²³ Toal, Gerard (Gearóid Ó Tuathail) and Maksić, Adis, “Is Bosnia-Herzegovina unsustainable? Implications for the Balkans and the European Union”, *Eurasian Geography and Economics*, vol. 52, no. 2 (2011). 70.

¹²⁴ *Ibid*, 93.

¹²⁵ In fact, since its introduction in 2001, the Electoral Law of Bosnia was amended 18 times, often within a few months or even days before the election (OSCE). See also, Kasapović, M. “Bosnia and Herzegovina: Consociational or Liberal Democracy?” 17.

¹²⁶ Belloni, Roberto. *State Building and International Intervention in Bosnia*. Oxford: Routledge, 2007, 92.

Eastern Europe) exacerbated an already excessive dependence on international and transnational institutions remote from the citizens and unaffected by democratic control.”¹²⁷

Today international intervention is the one of the main reasons used by elites to excuse their policy and personal failings – a case of missing opportunities and attributing blame elsewhere; elites have no incentive to be accountable to their populations. International conceptions of participation (and certainly those espoused by the European Union), Greenberg (2010) observes, have some ideological assumptions at work; they elide heterogeneity ‘in terms of class, education, region, but most significantly ethnicity’¹²⁸ which does not take into account local circumstances and preferences. International organisations now require cross-ethnic participation amongst citizens in Bosnia to be considered successful yet the institutional structure imposed on Bosnians belies that goal.¹²⁹ We must return ultimately to the socio-psychological underpinnings of many theories of participation; peoples deep seated desires, fears and needs. Withdrawal and apathy from political institutions and structures particularly in Bosnia are a way of distancing oneself from what is seen as failure, corruption and compromised political processes.¹³⁰

Bosnia is experiencing an increase in political apathy as a result of poor governance primarily caused by the institutional

¹²⁷ Denitch, Bogdan. “Learning from the Death of Yugoslavia: Nationalism and Democracy.” *Social Text*, No. 34 (1993), pp. 3-16, 5.

¹²⁸ Ibid, 52.

¹²⁹ Even the European Stability Initiative (aforementioned) which blamed an indifferent Bosnian culture for the impasse (and, therefore, institutional reform would be useless) said one of the main reasons for disengagement was institutional: “not only are most of the Bosnian government institutions a recent creation – every ministry in the country above the level of municipal government is a war-time or post-war creation, but the continuous changes of the institutional landscape and the lack of clarity over responsibilities and division of labour between different levels of government all render attempts by citizens or interest groups to influence the policy process extremely difficult.” Considering the analysis above it is difficult to disagree. See further, European Stability Initiative. *Governance and Democracy in Bosnia And Herzegovina: Post-Industrial Society and the Authoritarian Temptation*. Berlin & Sarajevo: 2004, 51.

¹³⁰ Ibid, 61.

framework – the kind of poor governance that galvanised people into action upon the death of Tudjman in Croatia. What this might mean is that latent political participation that is on the rise in Bosnia can be channelled into the political domain or risk that such capacity becomes dangerously anti-systemic.

What is required is not a moral lesson to Bosnian citizens on the power of democratic political practice for such practice (in the current institutional set-up) may ultimately reinforce non-participant modes of behaviour. Also, political participation itself, as I have demonstrated can be disastrously anti-systemic especially when structures are imposed from without. Rather people and their representatives must be left (and their neighbours too) to face the hardships, dilemmas and difficulties of political life on their own terms – for the successes, failures and compromises attempting to address those hardships will help build on what is already in a non-conventionalist sense an environment conducive for vibrant democratic life: tolerance of difference, reciprocity and trust. The international community may now help but they must not lead. For future constitutional reform, locally led and agreed initiatives will be critical if a sustainable, democratic, unified Bosnian polity based on citizen rights is to be achieved.

What are then the options for Bosnia in breaking the political impasse? Constitutional reform (and linking such reform to the willingness amongst the population for ethnic accommodation and tolerance) is the obvious answer yet elite intransigence and the logic of the institutional structure provides no incentive for such reform; playing the ethnic card in elections pays dividends (sometimes quite literally). ☉

*“Past time’s thorns and switches
past wizards and witches
Our hands are still here but we still
haven’t clasped each other’s hands
We’re still not free of their sorcery*

*For we’ve still not found a cure
Except this ancient lore
Except this curse this prayer
Except from river to river
From Drina to Ukrina and Sava
from Una and Sana to Rama
and Neretva”*

Mak Dizdar ¹³¹

3. “We’ve still not found a cure”: constitutional rules

3.1. Constitutional choice and change

Disagreements about constitutional design or choice go back to the very beginning of political thought whether such choices are considered as imposed foundational laws or ‘social contracts’ upon which societies agree to govern their affairs (Aristotle (335-323_{BC}); Locke (1690); Hobbes (1651); Hamilton, Jay and Madison (1787); Rawls (1971); Habermas (1998), (2001); Derrida (2002)).¹³² In contemporary thought, institutional analysis

¹³¹ Dizdar, Mak. Partial extract from ‘Madderfield’ in ‘*The Stone Sleeper*’. Buturović, Amila, and Francis R. Jones. *Stone Speaker Medieval Tombs, Landscape, and Bosnian Identity in the Poetry of Mak Dizdar*. New York: Palgrave, 2002.

¹³² Aristotle. *Politics: A Treatise on Government*. London: J M Dent & Sons Ltd, 1912; Locke, John. *Two Treatises of Government*, 1690; Hobbes, Thomas, and John Charles Addison) Gaskin. *Leviathan*. Oxford: Oxford University Press, 1998; Rawls, John. *A theory of justice*. Harvard: Harvard University Press, 1971; Habermas, Jürgen, Ciaran Cronin, and Pablo De Greiff. *The Inclusion of the Other Studies in Political Theory*. Cambridge, Mass: MIT Press, 1998. Habermas, Jürgen. and Rehg, William. “Constitutional Democracy: A Paradoxical Union of Contradictory Principles?” *Political Theory*, Vol. 29, No. 6 (Dec., 2001), pp. 766-781; Derrida, Jacques, “Force of Law: The ‘Mystical Foundation of Authority,’” in Gil Anidjar (ed.), *Acts of Religion*. New York: Routledge, 2002.

and the impact of rules on behaviour of elites has come to the fore. Political ‘agents’ are seen as embedded in broader institutional structures or constitutional rules which help determine outcomes ((March and Olsen (1989), (2011); Buchanan and Tullock (1962); North (1991)).¹³³ Most importantly, the ‘outcomes’ of institutional designs could be critical in mitigating or regulating ethnic conflict in divided societies (Horowitz (1991), (1993); McGarry and O’Leary (1993)).¹³⁴ Institutional rules need not be formally written in a Constitution; informal rules and conventions of association can be equally important and institutionalised in a society (North (1990); Foley (1989))¹³⁵. Indeed, much of the analysis in Chapter 1 and 2 was essentially concerned at gauging how receptive informal norms in Bosnia were to exogenous (imposed) foundational laws/democracy. Successful political systems as North (1993) puts it “have evolved flexible institutional structures that can survive the shocks and changes that are a part of successful evolution. But these systems have been a product of long gestation. We do not know how to create adaptive efficiency in the short run.”¹³⁶ The initial Dayton design was formal and geared towards creating consociational institutions to incentivise local political actors to cooperate; stability was the operative aim. But the institutions created have not been adaptive to change and are far from cooperative; they are unresponsive to changes in society which is all the more critical given that culture and identity is rarely fixed. Changing the formal rules when societies’ underlying beliefs remain rigidly opposed will result in failed institutions; a failure to change the

¹³³ Ginsburg, Tom. *Comparative Constitutional Design*. New York: Cambridge University Press, 2012. 4.

¹³⁴ Alternative are completely changing political actors (assuming that they would be incentivised somewhat differently though that is debateable) or a complete change of the political actors, or some exogenous shock that would make cooperation imperative (March and Olsen (2011)). See also McGarry, John, and Brendan O’Leary. *The Politics of Ethnic Conflict Regulation: Case Studies of Protracted Ethnic Conflicts*. London: Routledge, 1993.

¹³⁵ North, Douglass C. “Institutions.” *The Journal of Economic Perspectives*, Vol. 5, No. 1. Winter, 1991, 97-112.

¹³⁶ Fogel, Robert W. and North, Douglass C. “Economic Performance through Time.” *Prize Lecture. Lecture to the memory of Alfred Nobel*, December 9, 1993.

formal institutions when belief systems are conducive to change perils formal institutions. In sum, successful constitutional design is endogenous (Voigt (2011); Dougherty and Julian (2011)). The choices made when the status quo was abhorrent (whilst Bosnia was at war) would be very different to the choices made when the status quo is reasonable (Bosnia before the war and long after) (McGann (2006))¹³⁷: Bosnian people arguably should have the possibility of that choice in the near future.

The literature on consociationalism is predicated on the idea that elites co-operate and work together despite a lack of a political consensus and often ‘sharp plural divisions’ within society (Lijphart, (1977), (2004), (2008)).¹³⁸ Constitutions, accordingly, are imposed on the electorate with provisions for institutions inclined towards accommodation between elites. Civic involvement in constitutional choice or locating constituent power in the people would be seen as a grave mistake given historical divisions within society, propensity towards despotism or entrenched conflict (Arangio-Ruiz (1895); Elster (2012)).¹³⁹ Bosnia is a case in point. As deep political cleavages are inimical to democratic governance generally; power sharing and group autonomy may moderate cleavages and allow democratisation (Lijphart (1977); (2008)).¹⁴⁰ Both consociationalists and non-consociationalists agree that constitutional choices creating rules and institutions (for power sharing and autonomy) are critical (Lijphart (2008); Horowitz

¹³⁷ McGann (2006) in Dougherty, Keith L. and Edward, Julian. *The Calculus of Consent and Constitutional Design*. New York: Springer Science+Business Media, LLC, 2011.

¹³⁸ Lijphart, Arend. *Democracy in Plural Societies: A Comparative Exploration*. New Haven: Yale University Press, 1977. 2; Lijphart, Arend. “Constitutional Design For Divided Societies.” *Journal of Democracy. Platinum Periodicals*. Apr 2004; 15, 2.

¹³⁹ Ginsburg, Tom. *Comparative Constitutional Design*. New York: Cambridge University Press, 2012. 33.

¹⁴⁰ ‘Power sharing’ denotes the participation of all significant communal groups in political decision-making, especially at the executive level; ‘group autonomy’ means that these groups have authority to run their own internal affairs, especially in areas of education and culture. The latter two are primary characteristics of consociational democracy. See further, Lijphart, Arend. “Constitutional Design For Divided Societies.” *Journal of Democracy. Platinum Periodicals*. Apr 2004; 15, 2. 97.

(1993)).¹⁴¹ The fierce disagreements, however, focus on which choices are optimal to help manage conflict.

Lijphart (2008) prescribes the following institutional choices in a constitution for divided societies (regardless of their circumstances): parliamentary over presidential regimes, proportional representation (closed list) electoral systems (over majority rule); collegial coalitional executives; multi-party federal systems with bicameral legislatures; and high thresholds for amending the constitution. Constitutional rules and institutions allow elites to accommodate one another despite the intransigence of their divided people. Elites co-operate for a number of reasons including external threats or international pressure (Cameron, (1978)), long term concern for the political system if divisive politics are pursued¹⁴² (Lijphart, (1977)) or self-interested behaviour to extract rents from the system (Lijphart in McRae (1974)).¹⁴³

When successful, consociational States should demonstrate¹⁴⁴: high degrees of institutional trust amongst citizens; multiple and complementary identities; a high degree of identification with the state; and measures at reconciliation and reciprocity amongst different communal groups. Bosnia, however, demonstrates anything but.

The failure of consociational model (particularly of the Lijphartian variety) is often attributed to shallow constitutional prescriptions having either insufficient grounding in the ongoing interests of politicians or in careful diagnosis of what was likely to go wrong (Horowitz (1993)).¹⁴⁵ For instance, sometimes consociational

¹⁴¹ "...political institutions and decision rules can make a major difference in ethnic outcomes. In abstract many institutions compatible with democracy but not all of them are conducive to multi-ethnic inclusiveness. In fact most usual democratic rules either do nothing about ethnic exclusion or actually foster it." Horowitz, Donald, L. "The Challenge of Ethnic Conflict: Democracy in Divided Societies." *Journal of Democracy* 4, 4 October 1993: 18-37.

¹⁴² Ibid, 182. "The more extreme the condition of cleavage and mutual isolation, the clearer the danger signals are likely to be perceived. Once the peril is recognised, remedies may be applied."

¹⁴³ Tsebelis, George. *Nested Games: Rational Choice in Comparative Politics*. Berkeley: University of California Press, 1990. 162

¹⁴⁴ Kavish, Donovan. "Constitutional Reform in Bosnia and Herzegovina: State-Nation Theory and the Spirit of the Dayton Accords." *INTL 494-01*: Fall 2012. 7.

¹⁴⁵ Horowitz, Donald. "Democracy in Divided Societies," *Journal of Democracy*, October 1993. 18-38. 35-38.

designs develop a preoccupation with numerical balance rather than workability.¹⁴⁶ Power sharing may also provide a convenient short-term mechanism for ending hostilities but it may become a source of long-term tension – institutionalising the conflict that gave rise to the arrangements (Rothschild (2008); Murshed (2010)). The reasons for this could include, inter alia: asymmetric information about the peace agreement signed and interpretations; perceived group strengths may differ and therefore may encourage opportunism; spoiler groups may hijack institutions; and external guarantors of peace may not be sufficiently credible (Murshed (2010)).¹⁴⁷ Roeder (2005); Rothschild (2008); and Murshed (2008) propose ‘power dividing’ institutions as an alternative to power sharing in the long term: in summary they prescribe fewer veto powers, more decentralised governance structures (that act as checks and balances on executive powers). Many such prescriptions are either applied in Bosnia or are proposed as reforms. The challenge, though, is how to successfully implement such structures in a particular state and how power dividing structures could now receive the ascent of political actors in post-conflict, deeply divided societies.

Other critics of consociationalism have argued that many accounts leave out the role of the electorate/masses. First, the electorate may not be as polarised as the literature would make out (Keech (1972); Barry (1975))¹⁴⁸ and this is critically important in the case of Bosnia as my analysis in Chapter 2 sets out. Second, elites are ultimately accountable to the electorate and therefore their behaviour should be influenced to certain extents by popular will and opinion (Barry (1975)).¹⁴⁹ Third, elites may initiate conflict themselves or help to perpetuate it (Tsebelis (1995), (1999), (2002); De Ridder, Peterson, and Wirth (1978)). Indeed, cleavages may be

¹⁴⁶ See further Bahtić-Kunrath, Birgit. 2011. “Of veto players and entity-voting: institutional gridlock in the Bosnian reform process.” *Nationalities Papers*. 39 (6): 899-923.

¹⁴⁷ Murshed, Mansoob. *Explaining Civil War: A Rational Choice Approach*. Cheltenham: Edward Elgar Publishing, 2010. 154.

¹⁴⁸ See further, Keech (1972) and Barry (1975a and b) in Tsebelis. *Nested Games*, 1990. 163.

¹⁴⁹ Brian, Barry. “The Consociational Model and Its Dangers.” *European Journal of Political Research* 3 (December 1975). 406.

mobilised to generate support for an issue arising from other sources of political competition.¹⁵⁰

The behavioural aspect of elite decision making is critical to understanding the success or failure of consociational models with their emphasis on institutions (Konig, Tsebelis and Debus (2010)). The literature considers elites which are interested in maximising their chances to win office by presenting their proposals in the electoral arena (Downs (1957); Strom (1999)) which they must fulfil to remain faithful to the median voter (and get re-elected).¹⁵¹ Preferences of voters, however, may not be faithfully represented or translated by the parliamentary elites (due to, inter alia, the electoral system, legislative structure, and executive powers). In fact, preferences of voters may not exist or voters may not be rational utility maximising agents at all (Thaler and Sunstein (2009); Tversky and Kahneman (1974)). Tsebelis' approach ((1995), (1999), (2000)) takes the behavioural aspects of decision making into account by modelling explicitly the voting behaviour of actors who are decisive for changing the policy status quo.¹⁵²

The literature on elite behaviour and decision making is instructive for modelling the failure of the current institutional arrangements in Bosnia and lack of constitutional reform. How exactly does Bosnia fit into the consociational mould?

3.2. Status quo and policy stability

The State Constitution (Annex IV, Dayton Peace Agreement) was primarily drafted with a view to ending the conflict falling as it did within the wider peace agreement. Tudjman and Milosevic (who had denied many times having control or being the minds behind the

¹⁵⁰ Tsebelis, George. *Nested Games: Rational Choice in Comparative Politics*. Berkeley: University of California Press, 1990. 163.

¹⁵¹ Konig, Thomas, Tsebelis, George and Debus, Marc. *Reform Processes and Policy Change: Veto Players and Decision-Making in Modern Democracies*. New York: Springer Science +Business Media, 2010. 272.

¹⁵² Ibid.

conflict¹⁵³) were both key negotiators and signatories of the Dayton Peace Agreement¹⁵⁴; this indicates the kind of compromise achieved at Dayton. It was a compromise predicated on the outcome of military territorial gains and ethnic cleansing,¹⁵⁵ which handicapped, at its infancy, much hope of a unified multi-ethnic State.

Secondary to the cessation of hostilities was the idea of ensuring a fully functioning and viable State which would regulate ethnic conflict and overcome the hostility (exponentially multiplied by the war) to the very idea of a multi-ethnic Bosnian State. As signatories of the Dayton Peace Agreement, Tudjman and Milosevic together on behalf of their respective States agreed to act as guarantors of the agreement *vis-à-vis* Bosnia (but not *vis-à-vis* the RS and the Federation). Tudjman and Milosevic had no specific obligation to ensure compliance between RS and the Federation except in respect of two Annexes¹⁵⁶ critical for peace. The fact that they were not signatories to the State Constitution (Annex IV) perhaps indicates the importance that was given to the future of

¹⁵³ In June 1992 Milosevic remarked to a reporter: “We are not supporting any military action in Bosnia Herzegovina. We are only supporting our people to survive there with the humanitarian and civilian help.” See also Gaeta, Paul. “Symposium: The Dayton Peace Agreements: A Breakthrough for Peace and Justice? The Dayton Agreements and International Law.” 7 *EJIL* (1996) 147-163. 156.

¹⁵⁴ Milosevic headed a unified delegation (comprising representative of the Bosnian Serbs and the FRY) on behalf of the Bosnian Serbs (or more properly on behalf of the SDS/VRS (Vojska Republike Srpske) forces). Tudjman and Milosevic together on behalf of their respective States agreed to act as guarantors of the Dayton Peace Agreement *vis-à-vis* Bosnia and Herzegovina (but not between the RS and the Federation). Tudjman and Milosevic had no specific obligation to ensure compliance between RS and the Federation save in two respects: The Agreements on Military Aspects and The Agreement on the Inter-Entity Boundary Line. Both Milosevic and Tudjman were specific signatories to only those two Annexes which were seen as critical for peace and for which they assumed enhanced obligations to ensure compliance *within* Bosnia.

¹⁵⁵ (For which both Franjo Tudjman and Slobodan Milosevic bore responsibility). See further Bose, Sumantra. *Bosnia After Dayton: Nationalist Partition and International Intervention*. New York: Oxford University Press, 2002. 53-55; and Toal, Gerard, and Carl Dahlman. *Bosnia Remade: Ethnic Cleansing and Its Reversal*. New York: Oxford University Press, 2011. 4.

¹⁵⁶ The Agreements on Military Aspects and The Agreement on the Inter-Entity Boundary Line.

Bosnia as a sovereign and viable State.¹⁵⁷ Whilst the violent conflict had ceased the ‘non-violent’ conflict had resumed.

In tandem with the cessation of hostilities, a specific objective was the return of displaced persons and refugees¹⁵⁸ to reverse the ethnic cleansing and territorial separation of ethnic groups that occurred during the war (Article II.5, State Constitution¹⁵⁹ and Annex 7, Dayton Peace Agreement). The wording of Annex 7, however, precludes complete unreserved return to pre-war homes (an inevitable outcome of negotiations with the perpetrators). Toal and Dahlman (2011) are correct in saying that “Annex 7 could be an instrument for the consolidation of ethnic cleansing because it permitted the displaced the right to stay in the newly legitimated homelands.”¹⁶⁰ Displaced persons and refugees have not (more could not) return to their pre-war homes but remained in parts of the country where they feel ‘the people [to which] they belong’ are the majority’ (Kasapovic (2005), Papic (2001)).¹⁶¹ The viability and reconstruction of an independent democratic state has, accordingly, been severely compromised with almost one million out of the two million displaced not returning to their pre-war homes. Bosnia’s legacy of ethnic cleansing has not been ‘reversed’ to return it to pre-war ethnically mixed municipalities but neither has Bosnia been completely ‘unmixed’ into unchanging ethno-territories.¹⁶² Enough damage, however, has been done to challenge the legal, political and social continuity of a unified Bosnian State under the constitutional structure negotiated at Dayton.

¹⁵⁷ Gaeta, Paul. “Symposium: The Dayton Peace Agreements: A Breakthrough for Peace and Justice? The Dayton Agreements and International Law.” *7 EJIL (1996)* 147-163. 156.

¹⁵⁸ Annex 7 (Agreement on Refugees and Displaced Persons), Dayton Peace Agreement.

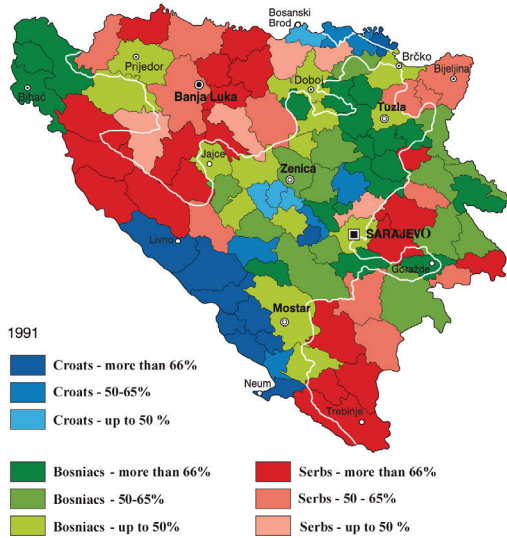
¹⁵⁹ Article II.5 of the State Constitution reads: “All refugees and displaced persons have the right freely to return to their homes of origin. They have the right, in accordance with Annex 7 to the General Framework Agreement, to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any such property that cannot be restored to them. Any commitments or statements relating to such property made under duress are null and void.”

¹⁶⁰ Annex 7 allowed the right to relocate and seek compensation. Toal and Dahlman. *Bosnia Remade*. 2011. 7.

¹⁶¹ Kasapović. “Bosnia and Herzegovina: Consociational or Liberal Democracy?” *2005*. 7.

¹⁶² Toal and Dahlman. *Bosnia Remade*. 2011. 9.

Ethnic composition before the war in BiH (1991)



Ethnic composition in 1998

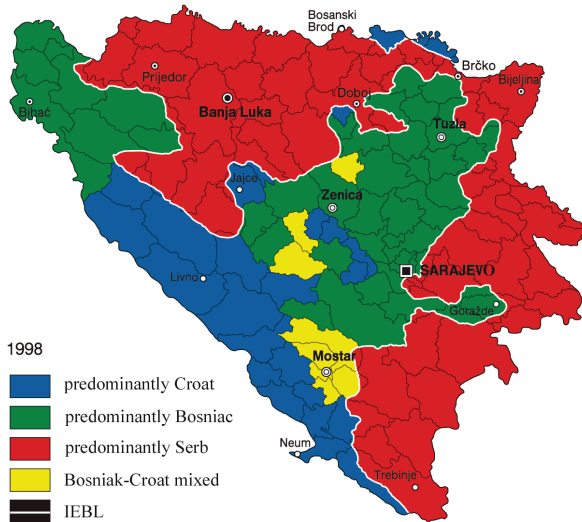


Figure 3.2A

Source: OHR

Despite the new demographic realities with the distinct ethno-territorial borders, the principles of autonomy, power sharing and, therefore, consociation¹⁶³ were avowedly worked into the State Constitution. The State Constitution sets out the main State institutions comprising the Presidency, the Council of Ministers, the Parliamentary Assembly (House of Representatives and House of Peoples: together a bicameral legislature), and the Constitutional Court. Consociational characteristics establishing equality and proportional representation of Bosniaks, Croats and Serbs are found within all the structures and institutions of the State including:

3.2.1. *Decentralised asymmetric federalism*¹⁶⁴ to give wide autonomy to two territorial entities (Art I.3, State Constitution). The Federation is highly decentralised and is divided into 10 cantons, layered on top of the pre-war municipalities with key features designed to ensure equality and power sharing between Croats and Bosniaks within the executive and legislature.¹⁶⁵ The institutions were designed to ensure the numerically lesser Croats (and decreasing ever since the war¹⁶⁶) are not outvoted by the majority Bosniaks. By contrast, the RS is highly

¹⁶³ By 'power sharing' Lijphart denotes the participation of all significant communal groups in political decision-making, especially at the executive level; 'group autonomy' means that these groups have authority to run their own internal affairs, especially in areas of education and culture. The two foregoing are primary characteristics of consociational democracy.

¹⁶⁴ By federalism I refer to Robert Dahl's definition: "a system in which some matters are exclusively within the competence of certain local units – cantons, states, provinces – and are constitutionally beyond the scope of the authority of the national government; and where certain other matters are constitutionally outside the scope of the authority of the smaller units" (italics in original). See further Stepan, Alfred, Linz, Juan J. and Yadav, Yogendra. *Crafting State-Nations: India and Other Multinational Democracies*. Baltimore: Johns Hopkins, 2011. 5.

¹⁶⁵ Five Cantons have a primarily Bosniak, three Cantons have a primarily Croat and two Cantons have a mixed Bosniak/Croat character but none of which are neatly contiguous. See further, Bose, Sumantra. *Bosnia After Dayton: Nationalist Partition and International Intervention*. New York: Oxford University Press, 2002. 241.

¹⁶⁶ Estimates suggest the figures are far below the 17 percent recorded in 1991 and could be as little as 10%. International Crisis Group. *Bosnia's Incomplete Transition: Between Dayton and Europe*. Europe Report N°198, 9 Mar 2009. 10.

autonomous and centralised. It has no cantons and no intermediate layer between the Entity government and municipal governments and few consociational prescriptions given the homogeneity engineered during the war.¹⁶⁷ Federal territorial autonomy in Bosnia necessarily entailed political autonomy to ethnically pure areas: institutionalising and making permanent the segregated demographic reality created, by the war (including the horrific use of war crimes to pursue territorially ‘pure’ regions) (see Figure 3.2A). The competencies of common State institutions are fairly limited (even excluding defence) and are specifically set out in the State Constitution (Art. III.1). Anything not specifically falling within the competency of the State is within the competency of the Entities (Art. III.3.a, State Constitution). The discrepancy between the two Entities and the relatively weak powers accorded to State institutions makes unified, central government highly dysfunctional (particular when minority vetoes are considered – see 3.2.4 below). Furthermore the stability of Bosnia is constantly threatened by Entities failure to cooperate with one another in joint institutions. Croats and Bosniaks elites challenge the legitimacy of the RS and elites in RS challenge required moves towards integration of Bosnia or expanding of critical State competencies (under Art III.4, State Constitution).

3.2.2. *Proportionality of representation within the executive, legislature and judiciary.* Seats in the Parliamentary Arena are allocated on the basis of ethnic group membership. Strict parity rules applies to allocation of seats in the House of Peoples. Similarly, there is a collective, rotating, three-member Presidency consisting of: a Bosniak and Croat directly elected from the Federation and a Serb directly elected from the RS (Art. V, State Constitution).¹⁶⁸ The Council of Ministers must also have at least one member of each constituent people and one minority (Art. V.4.b, State Constitution). Quotas and parity rules in general apply to all State level institutions (Article IX.3, State Constitution).¹⁶⁹

3.2.3. *Grand coalitions for government representing all major*

¹⁶⁷ See further, Bose, Sumantra. *Bosnia After Dayton: Nationalist Partition and International Intervention*. New York: Oxford University Press, 2002. 68-75.

¹⁶⁸ See for further, *Ibid*, 64-65.

¹⁶⁹ See for further, International Crisis Group. *Bosnia's Gordian Knot: Constitutional Reform*. Europe Briefing N°68 Sarajevo/Istanbul/Brussels, 12 July 2012. 11.

ethnic groups. Both branches of the government (the Presidency and the Council of Ministers) must be ethnically proportional and represent both Entities. The Council of Ministers¹⁷⁰ is comprised of ministers drawn from both Entities (2/3 Federation and 1/3 RS). The chair and ministers within the CoM each must be of different nationalities. Generally, the functioning of the CoM is a reflection of the disunited governance between the Entities as demonstrated by its inability to propose jointly agreed upon policy to the Parliamentary Assembly (as outlined in sub-chapters 3.4 and 4.2).

3.2.4. *Minority vetoes*. Decisions are largely made by consensus or by qualified majorities in the Parliamentary Assembly subject to veto rights accorded to the three ethnic caucuses (See further Table 3.4A below). The Presidency decides by consensus although “if all efforts to reach consensus fail”, decisions may be made by two Members subject again to an ethnic veto (See further Table 3.4A below).¹⁷¹ In essence mutual veto mechanisms are extended to all significant political groups (which are the three constituent peoples) in the executive and legislature. Majoritarian voting is, thereby, checked by essentially a requirement for consensus of all ethnic groups on ‘important’ issues. As will be elaborated on in sub-chapter 3.4, what precisely is ‘important’ is of great contention.

Although consociational institutions and rules were prescribed at many levels there has been an acute failure to create the kind of accommodation that elites are meant to be interested in. The failure of consociation as noted in sub-chapter 3.1 is attributed sometimes to an ‘insufficient grounding in the ongoing interests of politicians or in careful diagnosis of what was likely to go wrong’ (Horowitz (1993)). In Bosnia, however, the constitutional prescriptions of Annex IV would seem to have identified the ‘ongoing interests of politicians’ very well; precisely encouraging and incentivising the advantage of pursuing nationalist conflict by non-violent means now that the war had ended. What was likely to go wrong was ignored.

Criticisms at the time and ever since (particularly by those who felt the full brunt of war crimes) have focused on the idea that the division and segregation sought by certain wartime leaders was institutionalised

¹⁷⁰ Functions of the Council of Ministers are set out at Art V.4, State Constitution.

¹⁷¹ Article V.2c and 2d, State Constitution.

and deplorable crimes rewarded.¹⁷² That outcome betrayed, in essence, a tradition of unity in diversity at a critical juncture; when Bosnia's multi-ethnic milieu happened to be severely punctured by that 'countercurrent of persecution and slaughter' attempting to destroy it (Malcolm (1996); Agee (2002); Mahmutćehajić (2005), (2011)).¹⁷³

What has been done to try and remedy the institutional failures? Can elites, at least, agree to create better accommodating institutions for the future? If not why are elites unable to agree?

3.3. Previous proposals for reform

Bearing in mind the failure of the State Constitution to produce sustainable and working central institutions without international intervention, there have been a number of proposals (largely driven by international actors¹⁷⁴) to reform the State Constitution.¹⁷⁵ The

¹⁷² In fact Milosevic as negotiator on behalf of the Bosnian Serbs confirmed as much.

¹⁷³ Agee, Chris. "Stone And Poppy: Mak Dizdar's Kameni Spavač / Stone Sleeper." *Forum Bosnae* (15/2002); Mahmutćehajić, Rusmir. *Learning from Bosnia: Approaching Tradition*. New York. Fordham University Press, 2005, 9; Mahmutćehajić, Rusmir. "No Final Curtain: The Neverending Drama of Bosnia and Herzegovina". *Forum Bosnae*. Volume 6 No. 1, January 2011.

¹⁷⁴ Not least because of pressure from Europe: the Council of Europe (See Resolution 1725 [2010] and the European Commission of the European Union (See SEC [2009] 1338 of 14 October 2009) have made it clear that the Constitution must undergo reform. Note also the decision on 22 December 2009, of the Grand Chamber of the ECtHR adopted the final and binding Judgment in the case of Sejdić and Finci versus Bosnia and Herzegovina, whereby it is established that certain aspects of the provisions of the Constitution of Bosnia and Herzegovina, relating to the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina and the Presidency of Bosnia and Herzegovina are in contravention of the European Convention of Human Rights and Fundamental Freedoms. The Judgment has not yet been implemented (situation on 03 August 2013).

¹⁷⁵ I do not consider actions by the High Representative (imposed actions as they are) any further as my concern is with attempts to revise the constitution with involvement of local actors in a way that is enduring and sustainable. Kavish (2012) rightly points out that 'vast majority of successful reform to date has come through direct intervention by the Office of the High Representative, who has final say on all legislative matters in the country.' See Kavish, Donovan. "Constitutional Reform in Bosnia and Herzegovina: State-Nation Theory and the Spirit of the Dayton Accords." *INTL* 494-01: Fall 2012. 8.

Venice Commission is right in saying that “constitutional reform is indispensable since present arrangements are neither efficient nor rational and lack democratic content.”¹⁷⁶

Annex IV, it should not be forgotten, was seen by its international progenitors as an interim State Constitution with a view that substantial aspects of the constitution would be negotiated and agreed by elites at a later date.¹⁷⁷ The substantial expanding of State competencies, given the general and somewhat limited competencies prescribed in Art. III.1 of the State Constitution, are clear examples. The general provisions allowed, *inter alia*: (a) setting up of a court at BiH level; (b) transfer responsibilities in the fields of defence, intelligence, the judiciary, indirect taxation, immigration and asylum; (c) competence in electoral matters¹⁷⁸ The key caveat though is that the transfers or assumptions of the new competencies would have been highly unlikely without direct leadership or intervention by the High Representative; very few were local initiatives which Art. III.5.a envisaged would be the case.¹⁷⁹ This international involvement (often dependence) in the face of elite intransigence perhaps explains the sustainability of reforms within the current system; nationalist groups least inclined to reform can try and rollback reforms or remove State competencies. The threatened actions of the leader of the SNSD are a case in point; the Indirect Taxation

¹⁷⁶ Constitutional reform tending towards individual rights and greater democratic content, however, has suffered significant setbacks and it is clear the international community now considers such reforms unrealistic. See, however, Venice Commission. *Opinion on the Constitutional Situation in Bosnia And Herzegovina and the Powers of the High Representative*. Adopted by the Venice Commission at its 62nd plenary session, Venice, 11-12 March 2005. 25.

¹⁷⁷ Just the fact that it is still definitive in only its English form due to an inability of elites to agree on its publication in the official languages of Bosnia is cause for amazement and despondency in equal measure.

¹⁷⁸ Venice Commission. *Opinion on the Constitutional Situation in Bosnia And Herzegovina and the Powers of the High Representative*. Adopted at 62nd plenary session, Venice, 11-12 March 2005. 4, 7.

¹⁷⁹ The Dayton Peace Agreement established the Office of the High Representative (OHR) (Annex 10) and granted it considerable powers. The Peace Implementation Council (PIC) is a group of 55 countries and international organizations ‘that sponsor and direct the peace implementation process’. The 1997 PIC Conference in Bonn provided executive powers to the High Representative enabling him/her to impose legislation, and remove any official obstructing the Dayton Peace Agreement.

Authority, the State Court, State control over extradition policy and even the powers of the High Representative have all come under attack recently.¹⁸⁰

For amending the actual terms of the State Constitution, agreement of the respective elites of the constituent peoples within the Parliamentary Assembly would be required with at least a two-thirds majority in the House of Representatives (Article X.1, State Constitution). Critically, however, any such amendment is subject to the ultimate safeguard for all of Bosnia's peoples that no amendment could be made such that any of the guarantees of individual civil and political rights extensively detailed and incorporated by Annex IV could be diminished (Article X.2, State Constitution).

There have been at least five major reform proposals each of which have failed either to garner sufficient support (at inception) or when put to vote in State institutions: The Venice Commission proposals in 2005; the April Package of 2006; the Prud Agreement of 2008, and the Butmir Process of 2009; and numerous attempts at implementation of the decision of the ECtHR in December 2009 in the *Sejdic-Finci* case. A summary of the reform proposals and reasons for failure are set out in Table 3.3A below.¹⁸¹

¹⁸⁰ Parish, Matthew. "Comment: Croat Crisis Pushes Bosnia Towards Endgame." *Balkan Insight*, 21 March 11. <http://www.balkaninsight.com/en/article/comment-croat-crisis-pushes-bosnia-towards-endgame>

¹⁸¹ A detailed comparison of constitutional reform provisions proposed by various institutions can be obtained from the Public International Law and Policy Group (PILPG). PILPG is implementing a project funded by the United States Agency for International Development (USAID) aimed at supporting Bosnian civil society organizations (CSOs), activists and civic leaders to play a stronger and more integral role in identifying and proposing constitutional reforms needed to strengthen Bosnia's Euro-Atlantic integration processes, stability, security and prosperity. PILPG is a non-profit organization that operates as a global pro bono law firm providing free assistance to developing states and governments.

TABLE 3.3A: SUMMARY OF REFORM PROPOSALS FOR THE STATE CONSTITUTION

PROPOSAL NAME	DATE - DURATION	INITIATOR	MAJOR FOCUS OF REFORM	CIVIC INVOLVEMENT – PROCEDURAL OR SUBSTANTIVE	STAGE OF FAILURE	NOMINAL ACCEPTANCE AT TIME BY	REASON FOR FAILURE
Venice Commission ¹⁸²	March 2005	International: Council of Europe Parliamentary Assembly	Articles II, III, IV, and V - Defined 'vital interest' with narrow scope - Transfer presidency responsibilities to PM. - Single indirectly elected weak president - Abolish House of Peoples	No civic involvement at procedural level or substantive level – during reform process or as a focus of reform (although considered desirable deemed unworkable)	No wholesale adoption but many elements incorporated in April Package	SDA, SNSD Rejected by: SBiH, HDZ 1990	Only recommendations (elements of which incorporated in April Package)
April Package	Autumn 2005 – April 2006	International: USA ¹⁸³	Articles II, III, IV, and V - Transfer presidency responsibilities to PM - Indirectly elected weak president - Limited powers for House of Peoples - State full competency over EU integration	No civic involvement at procedural level – during reform process No civic involvement at substantive level – as a focus of reform effort	Parliamentary Assembly: House of Representatives	SDA, SNSD Rejected by: SBiH, HDZ 1990	2/3 majority for constitutional amendment lacking by two votes. Package's perceived failure to address Croat concerns (2 HDZ 1990 and 1 SDA MP defected). Bosniak hardliners wished for more centralisation (SBiH). Smaller parties also refused to give consent ¹⁸⁴
Prud Agreement	November 2008 – 21 February 2009	Domestic: Three major political parties – SDA, HDZ, SNSD	Entire restructuring of state into four units between the central state and the municipal level	No civic involvement at procedural level – during reform process	At discussion stage	SDA Rejected by: SBiH, ultimately all parties.	Each group wished to create or maintain own entity unit based on ethnicity. Croats wished to create exclusive entity (despite non-contiguous dispersion of population) and RS wished to maintain the RS as an undivided Canton.

¹⁸²

Also known as the 'European Commission for Democracy through Law'. It is the Council of Europe's expert body on constitutional affairs. It delivered an "Opinion on the Constitutional Situation In Bosnia And Herzegovina and The Powers of the High Representative". Adopted at its 62nd plenary session, Venice, 11-12 March 2005.

¹⁸³

In March 2006, under US pressure, three major ethnic parties (SDA, HDZ, SDS) and four smaller parties (SDP, SNSD, HNZ and PDP) signed the plan for constitutional reform and ushered it into the parliamentary procedure.

¹⁸⁴

See International Crisis Group. *Bosnia's Gordian Knot: Constitutional Reform*. Europe Briefing N°68, 12 July 2012; *Bosnia: State Institutions under Attack*, Europe Briefing N°62, 6 May 2011; and *Bosnia's Incomplete Transition: Between Dayton and Europe*, Europe Report N°198, 9 Mar 2009.

Butmir Process	October 2009 – December 2009	International: Joint US / EU	<ul style="list-style-type: none"> - Presidency powers to PM with strong CoM - Indirectly elected weak president. - HoP converted into a committee of HoR. - Expand members of HoR - More State powers¹⁸⁵ - Full State competency over EU integration 	No civic involvement at procedural level – during reform process No civic involvement at substantive level – as a focus of reform effort	At discussion stage.	SDA Rejected by: All major parties by 2009	Widespread rejection amongst most major parties across a number of issues (seen as being far too radical)
Sejdic-Finci¹⁸⁶ Implementation	December 2009 (Judgment of the ECtHR) – Present Failed. Major Proposals Timeline: ¹⁸⁷ - Fall 2010. Council of Ministers working group: met seven times in the - Oct, Nov 2011. Parliamentary Joint Committee: several meetings, ¹⁸⁸ - Sep - May 2012. 7 summit meetings between six party leaders. Some basic principles agreed. - May 2012. HDZ and SDP proposal. - June - Oct 2012. EU roadmap. - Oct 2013. HDZ, SDA, SNSD proposal.	International: Judgment of the Grand Chamber. ECtHR in a case brought before the court	<p>Article IV and V. Election to the HoP and for the State Presidency should be open to all and not limited to certain ethnic groups¹⁸⁹</p> <p>Proposal A: Open run for Presidency but 2/3 allocation for Federation, 1/3 for RS.</p> <p>Proposal B: Direct elections but no member of same ethnicity nor from 'others' – Ensured by split districts</p>	Limited civic involvement at procedural level – during reform process (CSO proposals invited on occasion) No civic involvement at substantive level – as a focus of reform effort	At discussion stage.	All parties accept implementation but not on specifics. Proposal A: SDA, SNSD Rejected by: HDZ BiH and HDZ 1990 Proposal B: SDA, HDZ, SNSD Rejected by: SBB, SBiH, SDP	Proposal A: All Croat parties rejected as insistence on Croat president elected by 'Croat electorate', which has not been case since 2006 ¹⁹⁰ Proposal B: Being considered at time of study (Oct 2013)

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Including inter alia defence, intelligence, and external security and the establishment of a single indirect system of taxation.

European Court of Human Rights. *Sejdic and Finci v. Bosnia and Herzegovina* (application nos. 27996/06 and 34836/06)

Detailed analysis: International Crisis Group. *Bosnia's Gordian Knot: Constitutional Reform*. Europe Briefing N°68 Sarajevo/Istanbul/Brussels, 12 July 2012. 9-11.

Consisted of delegates from 13 political parties, representing only Bosniaks, Serbs, and Croats. Lacked minority representation though they had a vote in the discussions. See further <http://www.hrw.org/news/2011/11/02/bosnia-move-end-discrimination>

Abolishing the Presidency and House of Peoples would automatically make Bosnia compliant with the ECtHR. All candidates would become equally ineligible for positions. Electing Presidents indirectly and House of Peoples members via the entity governments without reference to ethnic quotas could also work.

Crisis Group interviews, Bakir Izetbegović, member of presidency of Bosnia (SDA), Sarajevo, 2 March 2012. All Croat parties reject it. Crisis Group interviews, leading Croat politicians, Mostar and Sarajevo, March-May 2012. See Bosnia's Gordian Knot: Constitutional Reform, 12 July 2012. 5.

A remarkable feature of each of the reform proposals are the lack of civic involvement in the reform process and the proposals themselves present few, if any, institutional structures providing for greater civic involvement in the political process let alone civic involvement not based on narrow ethnic interest. The reason for this is predicated on the received wisdom that there are deep engrained ‘ethnic hatreds’ in society that must be regulated by elites (as set out in sub-chapter 2.3 above) and that society is not democratically mature; elites, therefore, can best ensure cooperation and compromise and ensure stability.¹⁹¹ Reform processes are led by elites, determined (or more accurately vetoed) by nationalist elites and would seem largely beneficial to elites – although they would contend that it was in the interests of protecting their ethnic group). The elites, however, are those primarily responsible for fomenting and exploiting narrow-nationalist goals.

The April Package, for instance, attempted to introduce stronger parliamentary processes (a strong prime minister, a strong single-cameral legislature, and a weak indirectly elected State Presidency) for all the consociational benefits for power sharing such an arrangement should entail. The Presidency, however, is the only State level institution directly elected and accountable to the electorate and has worked relatively well in Bosnia without the deadlock seen in the other State institutions.¹⁹² Parliamentary systems have been proposed for divided societies as they reduce the harshness of the ‘winner takes all’ presidential system (Linz (1990); Mainwaring and Shugart (1993))¹⁹³: reduce executive-legislative deadlock by having

¹⁹¹ See also Caspersen (2004) who argues given the deep division in society, the maximalist positions of elites and the numerical balance between groups (all of which are exogenous) it would be premature to sacrifice the ‘stability’ induced by consociational institutions in Bosnia. Caspersen, Nina. “Good Fences Make Good Neighbours? A Comparison of Conflict-Regulation Strategies in Postwar Bosnia.” *Journal of Peace Research*, Vol. 41, No. 5 (Sep., 2004), pp. 569-588.

¹⁹² International Crisis Group. *Bosnia’s Gordian Knot: Constitutional Reform*, 4. See also Kavish, Donovan. “Constitutional Reform in Bosnia and Herzegovina: State-Nation Theory and the Spirit of the Dayton Accords.” *INTL 494-01*: Fall 2012. 13.

¹⁹³ Linz, Juan J. “The Perils of Presidentialism,” *Journal of Democracy*, Vol. 1 No. 1 (Winter 1990): 51-69; Mainwaring, Scott and Shugart, Matthew. Linz, Juan. “Presidentialism, And Democracy: A Critical Appraisal” *Working Paper #200*. July 1993.

grand coalitions for government; remove majoritarian elections for personality oriented presidents who may overshadow party political decisions. Yet an indirectly elected executive, with possible closed list elections for the legislature (as a number of major parties have vowed to reintroduce)¹⁹⁴ would further reduce citizen identification with the State and accountability for political decisions.¹⁹⁵ Replacing such a system is required but not at the expense of accountability and representation of the electorate. Indeed, the idea of further removing direct citizen involvement and segmenting the population by ethnicity would work in favour of nationalist oriented elites who can create narrow compliant electorates for re-election and remain un-accountable. This dilemma is addressed in the game theory model introduced in [Chapter 4](#).

Similarly, every serious proposal for implementation of *Sejdic-Finci* at the time of writing focused on indirect elections to the House of Peoples or Presidency¹⁹⁶ which demonstrates that addressing very high political apathy/alienation (set out at [Chapter 1](#) above), making leaders accountable or increasing representation of the electorate to include minorities is a not a significant objective of elites. Such proposals are far removed from the spirit of the ECtHR judgment (as are requirements that representatives of a constituent people must be of the same ethnicity) although technically the letter of the law will be met. Elites primarily wish to preserve narrow ethnic interests whatever the cost: Bosniaks reject the three electoral districts for fear of dividing Bosnia further;

¹⁹⁴ Including but not limited to the SNSD, SDP, HDZ and HDZ 1990. (See [sub-chapter 4.1](#) below).

¹⁹⁵ In any case, as the International Crisis Group has noted, the 2006 proposal to transform the presidency into a weak, indirectly elected president (mentioned above) has been dropped largely due to Croat and Serb objections. ("RS leaders reject transferring powers to a new prime minister, and argue the presidency needs the legitimacy that comes with direct election to exercise its powers. Crisis Group interviews, Banja Luka and Sarajevo, 2011-2012. Croats want to retain a secure seat).

¹⁹⁶ Opposition RS politicians (SDS, PDP) actually prefer direct election though the SNSD is reportedly prepared to accept indirect election (so long as the RS National Assembly selects). Opposition parties (SDS, PDP) insist on direct election partly because it gives them a greater chance at winning. Nebojša Radmanović, the SNSD candidate, won by fewer than 10,000 votes out of 604,370 cast against Mladen Ivanić, the joint opposition candidate. See Crisis Group interview, Mladen Bosić, SDS president, Sarajevo, 18 April 2012. International Crisis Group. *Bosnia's Gordian Knot: Constitutional Reform*, 12.

Croats fear a single electoral district (despite the public clamour for a ‘third entity’) as this will mean they do not get represented in the Presidency due to lack of numbers and ethnic cross-over votes; RS elites are slightly more inclined to direct elections as the demographic will make little difference to ethnic representation although it matters for which elites have a chance of getting elected.¹⁹⁷ The primary reason for indirect elections is that it would preserve the ability of party leaders to direct and influence executive and legislative processes (although a proposal by the Crisis Group for the introduction of electoral colleges could help to reduce some of that influence).¹⁹⁸

What explains the intransigence of elites to constitutional reform? What explains the inclination to maintain the status quo and why is exclusive-nationalist politics rewarding in the context of constitutional reform?

3.4. Reform dilemmas and deadlock

The general deadlock and lack of consensus can be attributed to the exclusive-nationalist attitudes of elites to policy even when such policy is important for the political and economic welfare of the State. A significant problem is that positions of the majority of the elites of the three constituent peoples are almost all anti-systemic and envisage competing nationalist visions for Bosnia.¹⁹⁹

(a) Bosniak elites advocate a unitary civil state. Proposals for centralisation differ: detractors say attempts at centralisation are attempts at forced assimilation of others because if people vote along

¹⁹⁷ See further, International Crisis Group. *Bosnia's Gordian Knot: Constitutional Reform*. Europe Briefing N°68 Sarajevo/Istanbul/Brussels, 12 July 2012. 12.

¹⁹⁸ “An ad hoc body of electors pledged to the candidates chosen by voters of their entity, canton or other electoral unit can meet the needs of all three constituent peoples, citizens and others. Crisis Group plans to explore options for this proposal in a later report.” Ibid, 13.

¹⁹⁹ See further: Bosnia's International Crisis Group. *Gordian Knot: Constitutional Reform*. Europe Briefing N°68 Sarajevo/Istanbul/Brussels, 12 July 2012. 12; International Crisis Group. *Bosnia's Incomplete Transition: Between Dayton and Europe*. Europe Report N°198, 9 March 2009. 4-12. Kasapović, M. “Bosnia and Herzegovina: Consociational or Liberal Democracy?” 19. Bahtić-Kunrath, Birgit. 2011. “Of veto players and entity-voting: institutional gridlock in the Bosnian reform process.” *Nationalities Papers*. 39 (6): 899-923. 903.

ethnic lines then the state would become dominated by the majority Bosniaks.²⁰⁰ Liberal academics, however, note that a state based on plurality protected by individual human rights can only be conceived of as a state unified and de-entitled.²⁰¹ Indeed, moderate Bosniac elites are avowedly for greater centralisation with appropriate safeguards for the other constituent peoples (again detractors would say that this is their public position only);

(b) Serb elites advocate the exclusive status of the RS as a nation-state of the Bosnian Serbs and propose its separation from the rest of the State.²⁰² Indeed, comments by the current RS President and leader of the SNSD²⁰³ are instructive on this point.²⁰⁴ Recognising that secession cannot be achieved without cost, elites in the RS prefers to maintain the status quo under the State Constitution and nominally ‘accept’ as a necessary evil the federal arrangements under the Dayton Peace Agreement granting the RS wide autonomy (whilst taking steps

²⁰⁰ Belloni, *State Building*, 2008. 55.

²⁰¹ Manfred Novak (former Austrian member of the Bosnian Human Rights Chamber) and Zoran Pajic (Bosnian constitutional lawyer) among them. *Ibid*, 56.

²⁰² “For observers of Bosnian politics, this should come as no surprise: During the legislation period 2006–2010, then RS Prime Minister Milorad Dodik pointed out on several occasions that the RS would never give up any of its achievements (meaning the greatest possible degree of autonomy), even if this meant a setback in the European integration process” Dzihic’ 365; International Crisis Group. *Bosnia’s Incomplete Transition*, 19. *Ibid*.

²⁰³ With majorities in both the Parliamentary Assembly and the RS National Assembly at the time of writing.

²⁰⁴ Milorad Dodik has separately and repeatedly said of Bosnia as: “a nightmare” (Oslobodenje, 23 July 2010); “makes him sick” (Večernji List, 17 September 2012); “has a future only in case a third, Croat entity is set up, so there is the Serb Republic, Herzeg-Bosnia, and Bosnia, so that only foreign policy, foreign security and foreign trade decisions are made on the state-level” (Večernji List, 17 September 2012). If there was any doubt as to his position it was clarified in 2013. “I am not interested in building Bosnia/Herzegovina. My reply would be, if that would ever happen, it would only mean that I had understood that there is nothing of Bosnia/Herzegovina and that I shall go there only for a final act.” Breberina, N. / Kozomara, A. “Milorad Dodik: My going to Sarajevo would mean end of Bosnia/Herzegovina.” *BLIC*, 10 July 2013; Jukic, Elvira M. “Republika Srpska has all the criteria of a state: the government, the territory and the people.” *BIRN*, 16 May 2013. See also: Traynor, Ian. “Bosnia in worst crisis since war as Serb leader calls referendum.” *The Guardian*, 28 April 2011.

to build institutions for independence);²⁰⁵

(c) Croat elites advocate the elimination of entities to be replaced by a number of cantons²⁰⁶ or see the state as a union of three national entities. In the absence of a large demographic, cultural or economic base the Croat elites work towards cementing their territorial and political resources with a view to push for further autonomy in the future. Croat parties insist that seats guaranteed for them are being used by other ethnic groups to field candidates that do not genuinely represent them and rather represent party interests (for instance Bosniaks voting for Croat seats).²⁰⁷ This of course hinders the functioning of the Federation. Croats are also unhappy about not having the possibility to employ significant vetoes (including an entity-voting in the parliament without Bosniak support). The Croat veto grievance is elaborated on further in section 4.2 below.

Bahtić-Kunrath (2011) (following Tsebelis (1995), (1999), (2002)) accounts for the failure to change primarily by looking at the use of veto mechanisms built for power sharing and stability within Bosnia. The approach although a refreshing addition to the literature on Bosnian constitutional reform analyses the significant points of veto that lead to deadlock at a high level.²⁰⁸ She outlines that legislation which was planned by the government (particularly the Council of Ministers) but then not adopted by the legislature was because policy change was inhibited by elites with veto powers adopting exclusivist-nationalist positions. The State institutions are created along ethnic cleavages so that no one group can unilaterally take decisions (due to consociationalist ideas of power sharing and autonomy). Vetoes are

²⁰⁵ International Crisis Group. *Bosnia's Incomplete Transition: Between Dayton and Europe*. Europe Report N°198, 9 Mar 2009. 7.

²⁰⁶ Ibid, 56.

²⁰⁷ Furthermore, the International Crisis Group notes that: "Three of the four "others" and four of the eight Croats in the RS Council of Peoples belong to the predominantly Serb SNSD; yet the party has not visibly started to pay more attention to the rights of Croats or other minorities in the RS. Furthermore, none of the seven current representatives of the "others" in the Federation parliament belongs to a minority; all identify as "Bosnian", "Muslim", "Bosnian-Herzegovinian" or simply as undifferentiated "other." See International Crisis Group. *Bosnia's Gordian Knot: Constitutional Reform*. Europe Briefing N°68 Sarajevo/Istanbul/Brussels, 12 July 2012. 5.

²⁰⁸ Although her statistical analysis between 2006 and 2010 is very useful.

the essential safeguard for consensual decision making but exclusive maximalist positions inevitably lead to deadlock and prevent reform.

In terms of mechanisms to address deadlock, Bahtić-Kunrath proposals for reform are merely prescriptive and look more to extra-institutional means to resolve the conflict. Primarily reform she concludes must come from pressure from the outside: the EU, Bosnia's neighbours; and/or a change in political leaders.²⁰⁹ The veto player approach can be developed much further and in particular extensively developed to attempt to reach some meaningful conclusions as to how to reform Bosnia from within so that change is enduring.

²⁰⁹ Bahtić-Kunrath, Birgit. 2011. "Of veto players and entity-voting: institutional gridlock in the Bosnian reform process." *Nationalities Papers*. 39 (6): 899-923. 914, 918.

TABLE 3.4A: SUMMARY OF VETO MECHANISMS UNDER THE STATE CONSTITUTION					
VETO NAME	STATE INSTITUTION WHERE EXERCISED	RELEVANT PROVISION OF STATE CONSTITUTION	VETO PLAYERS	INVOCATION	ETHNIC USE
Vital national interest presidency veto (VNIP)	State Presidency	Article V (Presidency) 2.c and 2.d ²¹⁰	Each of the three members of the Presidency	Only for issues of 'vital interest' <u>Note:</u> no prescribed definition of 'vital interest'	Any member (solely Bosniak, Croat or Serb) may invoke VNI subject to ratification by relevant caucus in Entity parliament
Vital national interest house veto (VNIH)	House of Peoples	Article IV (Parliamentary Assembly) 3.e and 3.f ²¹¹	A majority of a national caucus present and voting; ²¹² (so any three members or two if quorum of caucus is three)	Only for issues of 'vital interest' which is ultimately and definitively decided by the Constitutional Court. <u>Note:</u> no prescribed definition of 'vital interest'. ²¹³	Any caucus (Bosniak, Croat or Serb) may invoke VNI if a quorum of three member of the HoP is met

²¹⁰

Art. V (Presidency) 2.d provides "A dissenting Member of the Presidency may declare a Presidency Decision to be destructive of a vital interest of the Entity from the territory from which he was elected, provided that he does so within three days of its adoption. Such a Decision shall be referred immediately to the National Assembly of the Republika Srpska, if the declaration was made by the Member from that territory; to the Bosniac Delegates of the House of Peoples of the Federation, if the declaration was made by the Bosniac Member; or to the Croat Delegates of that body, if the declaration was made by the Croat Member. If the declaration is confirmed by a two-thirds vote of those persons within ten days of the referral, the challenged Presidency Decision shall not take effect."

²¹¹

Art. IV (Parliamentary Assembly) 3.e provides that "A proposed decision of the Parliamentary Assembly may be declared to be destructive of a vital interest of the Bosniac, Croat, or Serb people by a majority of, as appropriate, the Bosniac, Croat, or Serb Delegates selected in accordance with paragraph 1(a) above. Such a proposed decision shall require for approval in the House of Peoples a majority of the Bosniac, of the Croat, and of the Serb Delegates present and voting."

²¹²

"Whenever vital interest is invoked, the House of Peoples has to set up a commission to decide on its justified invocation; if there is no agreement in that commission, the Constitutional Court will rule if the vital interest of the complaining ethnicity was indeed threatened" (Bosnia and Herzegovina, "Rules of Procedure House of Peoples" Art. 161, Art. 162). Trnka, Kasim (et. al.), Procес odlučivanja u Parlamentarnoj skupštini Bosne i Hercegovine: stanje, komparativna rješenja, prijedlozi, *Fondacija Konrad Adenauer*, Sarajevo, 2009. 13.

²¹³

There is no prescribed definition of 'vital interest' in the State Constitution although the Entity Constitutions provide a broad definition

²¹⁴

In the absence of such support, the item can be 'rescued' within three days by a harmonization procedure in the three-headed commission of the respective house. If those efforts fail, decisions shall be taken by a majority (present and voting) provided that the dissenting votes do not include two-thirds or more of the Delegates or Members elected from either Entity. If the bill is harmonised and makes it past the House of Representatives then it may still fail in the House of Peoples if it does not receive the requisite amount of votes

Entity-voting veto (EVV)	House of Peoples and House of Representatives	Article IV (Parliamentary Assembly) 3.d	Support for decision of at least one-third of the delegates (present and voting) elected from each of the RS and the Federation in both houses. ²¹⁵ If decision harmonised then 2/3 majority from either Entity can still veto.	No rules governing use. Can be used to veto any decision (including draft laws, conclusions, requests, initiatives, and proposals)	Federation. A single caucus can pass a bill. Majority Bosniak support will pass a bill in either House. Majority Croat support will pass a bill in the HoP but not at the initial stage in HoR – they could be outvoted by Bosniaks (i.e. by abstaining). So to ensure the veto works, both Croats and Bosniaks must neither support a bill in the HoP to trigger the veto. RS. Delegates can deploy entity-voting in all stages of law making uninhibited given that the majority are Serbs. RS in best position. ²¹⁵
Constitutional amendment veto	House of Representatives	Article X (Amendment)	Two thirds majority in House of Representatives	No rules governing use. Can be used to veto any amendment	Any caucus may decline to give support thereby vetoing the amendment. Note: other vetoes could still be deployed
Inter-entity coordination veto (IECV)	State Presidency	Article III (Responsibilities of and relations between the institutions of Bosnia and Herzegovina and the Entities) 4 and 5.b ²¹⁶	Simple objection or absence of consent for a decision by either Entity	No rules governing use. Can be used to veto any decision of the Presidency. Note: there is an Entity veto in this respect vis-à-vis the State but only so far as such an area actually falls outside of State competencies	Either entity (via members of the Presidency) may decline to give support thereby vetoing a decision
Simple majority-voting ²¹⁷	House of Representative or House of Peoples	Article IV (Parliamentary Assembly) 3.d	Not technically a veto: Insufficient support by the delegates from either Entity in the HoR, or rejected by more than one caucus in the HoP	No rules governing use. Can be used to veto any legislation	Any caucus may decline to give support thereby vetoing legislation

Source: derived from the provisions of the State Constitution unless otherwise stated

²¹⁵ Essentially, 10 of the 14 delegates elected to the House of Representatives from RS territory must agree for the entity veto to operate (i.e. to block legislation).

²¹⁶ Art III.4 provides “The Presidency may decide to facilitate inter-Entity coordination on matters not within the responsibilities of Bosnia and Herzegovina as provided in this Constitution, unless an Entity objects in any particular case.”

²¹⁷ Although this is not technically a veto mechanism it is included within this table though for completeness. See Bahtić-Kunrath (2011, 7) who includes it within her analysis to compare how often vetoes are responsible for failure of planned legislation to get support compared to general lack of support in the Parliamentary Assembly.

Veto mechanisms

Table 3.4A above sets out the five primary ways the three constituent peoples are able to cripple legislation using vetoes under the State Constitution (either as caucuses in the Parliamentary Assembly or members of the Presidency).

The most talked about is the vital national interest vetoes (VNI) which can be exercised either by the members of the Presidency (which must be Bosniak, Croat or Serb) or a caucus of the House of Peoples (which again must be Bosniak, Croat or Serb). The procedure has been used relatively infrequently partly because any declaration of VNI is either definitively determined for procedural regularity by the Constitutional Court (for VNIH) or by a substantial majority of the upper house in Entity Parliaments (for VNIP). In fact, the VNIP has been invoked only four times in 11 years (only once between 2006 and 2010).²¹⁸ The Constitutional Court has also begun to interpret objectively the notion of ‘vital interest’ although there is no constitutional definition at the State level.²¹⁹ The other major reason for its infrequent use is that opponents in the political process will anticipate its use (in an objective sense) and become more intransigent – the veto emboldens intransigent actors and dissipates moves towards cooperation although potential for abuse is not great. Although its day to day use may be minimal it is relevant for constitutional amendments as many aspects could, given the absence of a definition, fall within a caucuses’ ‘vital national interest’.²²⁰

Of the veto mechanisms, the most powerful mechanism is ‘entity voting’ which is often abused to protect exclusionary ethnic interests without any objective way to determine whether it is really deployed to protect vital interests (unlike a decision

²¹⁸ Bahtić-Kunrath, Birgit. 2011. “Of veto players and entity-voting: institutional gridlock in the Bosnian reform process.” *Nationalities Papers*. 39 (6): 899-923. 22.

²¹⁹ Venice Commission. *Opinion on the Constitutional Situation In Bosnia And Herzegovina and The Powers of the High Representative*. Venice Commission, 11-12 March 2005. 9.

²²⁰ The Venice Commission believes in a curtailment and narrowing of the vital national interest to essential issues concerning language, education and culture but no broader scope. *Ibid*, 9.

of the Constitutional Court). Contrary to the view of the Venice Commission which considers it ‘redundant’²²¹, it would be correct to say that it “threatens the consociational system of checks and balances, and inhibits the adoption of reforms, which makes Bosnian politics highly status quo-oriented.”²²² Looking at planned legislation during the period between 2006-2010 (proposed largely by Council of Ministers which represents all ethnic groups in coalition government) studies confirm that only 30% of that legislation was actually adopted.²²³ The entity-voting veto in the House of Representatives was responsible for most failures, in particular vetoes emanating from RS delegates: “RS entity-voting was the major reason for bills failing in the HoR, rejecting 50 draft laws, followed by majority-voting with 39 failed bills, while Federation entity-voting was applied eight times.”²²⁴ Contrary to popular opinion, the House of Representatives, in effect, has become an ethnically divided institution primarily due to electoral rules: there have been no Serbs among the 28 federation representatives since 2006, and no Bosniaks or Croats in the RS delegation since 2010.²²⁵ Entity voting was less frequently used in the House of Peoples but where it was again RS delegates tended to use it most frequently: “Of 31 failed bills, RS delegates rejected 19, while Federation delegates deployed entity-voting only once, on the census law”²²⁶ This belies a particular failure of the institutional set up – in an attempt to get broad consensus there is no real government and opposition. The same parties which are meant to be governing and propose legislation (via the Council of Ministers) are the ones that veto the legislation in the

²²¹ Ibid, 10.

²²² Bahtić-Kunrath, Birgit. 2011. “Of veto players and entity-voting: institutional gridlock in the Bosnian reform process.” *Nationalities Papers*. 39 (6): 899-923. 3.

²²³ See Centri Civilnih Inicijativa. *Izvjestaj o monitoringu rada Skupštine Parlamentarne skupštine BiH*. 30. Oct. 2010. and Bahtić-Kunrath, Birgit. 2011. “Of veto players and entity-voting: institutional gridlock in the Bosnian reform process.” *Nationalities Papers*. 39 (6): 899-923. 2.

²²⁴ Ibid, 8.

²²⁵ International Crisis Group. *Bosnia’s Gordian Knot: Constitutional Reform*. Europe Briefing N°68 Sarajevo/Istanbul/Brussels, 12 July 2012. 5.

²²⁶ Ibid, 12.

Parliamentary Assembly: there is no consequence as in an ordinary parliamentary system for the failure of the government to pass legislation.²²⁷ In usual parliamentary systems, a failure to pass major legislation should lead to the fall of the government but in Bosnia the government itself cannot agree on proposed legislation. Division in the executive is merely amplified by the legislature.

Studies confirm that RS delegates tend to prefer the status quo when it comes to policy changes (that is, preserve RS autonomy and interest whatever the policy benefit for the wider State including the RS itself) (International Crisis Group (2009), (2011), (2012)), Venice Commission (2005), Bahtić-Kunrath (2011)). But the ability to force such a position on the State depends critically on the RS's ability to deploy vetoes without hindrance – and it is able to do so without regard to other ethnic groups (especially the entity-voting veto) because the majority of the population in the RS is Serb and the opposition parties are disparate and divided.²²⁸ Without mass return of refugees or stronger centripetal forces amongst parties²²⁹ that is unlikely to change; unless vetoes and vital interests are defined in the constitution very narrowly or abolished.

What does this mean for constitutional reform? Any proposal, therefore, for constitutional reform in the Parliament

²²⁷ Although there is a mechanism for a vote of no-confidence in the Council of Ministers in the Parliamentary Assembly (Art. V.4.c, State Constitutions) it would appear unworkable.

²²⁸ “In the RS, the Serb majority sharply increased from 54.3 per cent in 1991 to 96.8 per cent in 1997. Simultaneously, the Bosniak population decreased from 28.8 per cent to 2.2 per cent, while the Croats dropped from 9.39 per cent to 1.02 per cent (ibid.: para. 86). As for the Federation, the court noted that the proportion of Bosniaks in the territory of the Federation increased from 52.1 per cent to 72.6 per cent between 1991 and 1997, while the Serb population dropped from 17.6 per cent to 2.3 per cent (ibid.: para. 130).” Constitutional Court of Bosnia and Herzegovina. *Request for evaluation of certain provisions of the Constitution of Republika Srpska and the Constitution of the Federation of Bosnia and Herzegovina*, Case No. U 5/98-III, Third Partial Decision, 1 July 2000, Paragraph 61. See also Belloni, 2008. 71.

²²⁹ See Table 4.2A which demonstrates that a stronger oppositional coalition could reduce the power of the EVV significantly if the SDS/SNSD seats in the House of Representatives are reduced to 10: blocking legislation in the House of Representatives would be much more difficult.

Assembly which challenged Serb autonomy would come up against very strong and significant vetoes. In fact, the requirement for two thirds majority support for constitutional amendments would mean vetoes could be deployed by any caucus (see [Table 3.4A](#) above) – as we saw lack of support amongst the smaller parties and minor defections amongst Croat and Bosniak delegates scuppered the April Package by just two votes.


Adopting the language of game theory academics²³⁰ have prescribed that “... the elites must *a priori* renounce the intention to achieve in negotiations their exclusivist or maximalist political goals at the expense of the other parties.”²³¹ The prescriptions have been many: re-cantonisation and consociational government with limited, defined vetoes for cantons (Kasupovic (2005) Bahtić-Kunrath (2011)); “de-ethnization” of entity-voting (Belloni (2008)); maintaining Dayton institutions but changing political actors and imposing external incentives (Bieber (2011));²³² or a “centripetalist” system, or one single constituency throughout the whole country, providing incentives for politicians to cross ethnic boundaries (Bahtić-Kunrath (2011)).

Yet how can this be achieved and what could persuade elites to give up their maximalist national interests in favour of co-operation? Elites, under the current system, must not only adopt the language of accommodation but must ensure the support of her ‘ethnic base.’ Any elite which attempts to use the language of accommodation risks being undercut by extreme nationalists who would question their loyalty to ‘their people’ and cite the short-term self interest of pursuing maximalist nationalist positions; ‘the existential threat to ‘us’ as a people’. Consequently, the clamour for exclusivist and narrow policies grow louder. This has been, for

²³⁰ Only one academic to date has considered the issue from a rational choice theory perspective: Bahtić-Kunrath, Birgit. 2011. Kasupovic has employed some of game theory language on this issue although she has not analysed the matter using rational choice based models.

²³¹ Kasapović, M. “Bosnia and Herzegovina: Consociational or Liberal Democracy?” 18.

²³² Bieber, Florian. “Constitutional Reform in Bosnia and Herzegovina: Preparing for EU Accession.” *European Policy Centre. Policy Brief*, April 2010. Web. 6 June 2011.

instance, a recurring problem for the directly elected Presidents at State level whose conciliatory positions are undermined by stronger nationalist positions taken by indirectly elected party leaders.²³³ To circumvent the problem of deadlock and intransigence it is first necessary to elaborate on the so called ‘zero-sum game’ that is ‘played’ by elites.²³⁴ 

²³³ An International Crisis Group report outlines one such case: “... in 2006 [when] Bosniak Haris Silajdžić, Croat Željko Komšić and Serb Nebojša Radmanović won. None were the leaders of the strongest parties in their communities (which were then the SDA, HDZ and SNSD, respectively), and this weakened their policymaking ability and link with the entities.¹⁴ They were unable to represent unified presidency policies and were often considered to be advocating personal positions.” International Crisis Group. *Bosnia’s Gordian Knot: Constitutional Reform*. Europe Briefing N°68 Sarajevo/Istanbul/Brussels, 12 July 2012. 15.

²³⁴ Note: it is commonly assumed that the game being played by elites is zero-sum (Kasapović (2005) considers it such) although only if certain conditions are met is a game zero-sum. A zero sum game is one where it is impossible to make one person better off without making at least one other worse off (i.e. a situation which is Pareto optimal). For instance, distributing some sweets to one group of people will mean that there are fewer sweets available to distribute to everyone else (as long as each group values the sweets equally). Chapter 4 will show that the ‘deadlock’ game being played by elites is ‘zero-sum’ but the ‘prisoner’s dilemma’ game is not.

*“We need to learn again
to listen to the rain the rain
We need to unstone ourselves
and eyes straight to walk
unwavering through the city gate*

*We need to uncover the lost paths
that pass through the blond grass . . .
We need to wash ourselves anew
and dream in clean drops of dawn dew . . .
We need to meet our own hearts
again
that fled so long ago
We need to unstone ourselves ...”*

Mak Dizdar ²³⁵

4. “We need to uncover the lost paths”: modelling change

4.1. Modelling intransigence

To propose ways to circumvent the lack of constitutional reform in Bosnia (and explain the intransigence of elites) it is first necessary to model the ‘game’ that is being ‘played’. At least two arenas for the game need to be considered: the **parliamentary arena** where **elites**²³⁶ play with each other and the **electoral arena** whereby **followers**²³⁷ can interact with elites. Followers voting in the electoral arena can affect the choices elites make (and the resulting payoffs of their choices) in the parliamentary arena. That of course depends on whether the electorate remain passive observers of the parliamentary arena or are active agents. Passivity and activity of followers can be a function of institutional design (as demonstrated in [Chapters 1 and 2](#)). The game amongst elites, therefore, is nested within the wider game between

²³⁵ Dizdar, Mak. Partial extract from “Rain,” in ‘*The Stone Sleeper*’. Buturović, Amila, and Francis R. Jones. *Stone Speaker Medieval Tombs, Landscape, and Bosnian Identity in the Poetry of Mak Dizdar*. New York: Palgrave, 2002.

²³⁶ (or leaders or representatives)

²³⁷ (or the electorate)

elites and the electorate.²³⁸ The literature on sub-games games is drawn upon to model the situation in Bosnia (adapting models elaborated on by Flood (1952); Tucker (1950); Downs (1957); Tsebelis (1990)) (see sub-chapter 4.1).

Following the sub-game model, it is necessary to model how elites of the three constituent peoples (Bosniak, Croats and Serbs) would behave in the game when one introduces a game-changing policy question such as constitutional reform whereby the fundamental rules of the game are up for renegotiation. The literature on veto players is used in a modified form to model elite behaviour in the parliamentary arena (adapting models deployed by Tsebelis (1990), (1995), (2002)) (see sub-chapter 4.2).

The final aspect is modelling whether the adoption of particular types of rules or institutions in a new constitution could help break the deadlock in the constitutional reform game by modifying the underlying assumptions, incentives and disincentives of the games in the parliamentary and electoral arenas (see sub-chapter 4.3). A wide spread of literature is drawn upon when considering the modification of the ‘rules of the game’ and how that could be achieved in Bosnia (Rapoport (1974); Myerson (1987); Fudenberg’s and Maskin’s (1986), Tsebelis (1990); Auer (2008)) (see sub-chapters 4.3 and 4.4).

The nested game

The literature on consociationalism is predicated on the idea that elites co-operate and accommodate others despite ‘sharp plural divisions’ within society (or the electorate) segmenting and polarising followers (Lijphart (1977), (2004), (2008)).²³⁹ As set out in Chapter 3, three major criticisms may be made of consociation. First, the electorate may not be as divided as made out; second, the electorate may be more inclined to accommodation than presumed; third, elites may not be as accommodating as they should be in institutions designed for such accommodation. To consider these factors the following model

²³⁸ Given that elite decision making occurs in the context within which the electorate can impose significant constraints on representatives. See further Tsebelis. *Nested Games*, 1990. 161.

²³⁹ Lijphart, 1977. 2.

is deployed.

There are two sets of players/parties: followers who are segments or divisions of the population (representing Bosniaks, Croats and Serbs) and elites (representing the followers for each segment). Players have two different strategies: either accommodate or cooperate with other players (**A**) or be intransigent (**I**) (as set out in Matrix 4.1A below). The outcome of choosing a strategy given the choice by the other player is situated in the highlighted area (these are known as the **payoffs**). As rational actors, players attempt to maximise their payoffs in any given situation. The choice of strategy available to each player is the same but the preference orderings for a particular payoff can differ for each. The preference orderings determine the difference in behavioural outcomes between elites in the parliamentary arena and between followers in the electoral arena. Remember though that elite payoffs can be influenced by what happens in the electoral arena and vice versa. The preference orderings set out in Matrix 4.1A below determine the type of game being played: prisoner's dilemma, deadlock, assurance or chicken.

For the sake of simplicity, only two of the three players are considered here. The subscript i refers to the player participating in the game (either 1 or 2). In the case of mutual cooperation, each player receives a reward R_i and in mutual defection each player receives penalty P_i . If one player cooperates while the other defects, the cooperative player receives the sucker's payoffs S_i , and the defecting player receives the temptation payoff T_i .

Players (P_i):	- 1 or 2
Strategies:	- Accommodation/cooperation (A) or
	Intransigence/non-cooperation (I)
Payoffs:	- Mutual cooperation, R_i
	- Mutual defection, P_i
	- Sucker, S_i
	- Defector, T_i

It is assumed the reader has some familiarity with basic algebra and game theory. In any case, the four types of game are immediately summarised below.

In the prisoner's dilemma game²⁴⁰ (Flood (1952); Tucker (1950)) the dominant strategy for each player is defection. Dominant means a strategy which leaves each player better off no matter what the opponent does. But the dilemma is that by choosing the dominant strategy (defecting) the players reach a suboptimal outcome (P_1, P_2): they are worse off than if they had chosen the cooperative strategy (R_1, R_2). The ordering of the different payoffs for the prisoner's dilemma is $T_i > R_i > P_i > S_i$. In the absence of communication and playing the game a single time (single shot) the dominant strategy is the one that leaves both worse off.

Reversing the ordering of the P_i and R_i so that $T_i > P_i > R_i > S_i$ generates a different game: deadlock. In this game defection is also the dominant strategy but the outcome here is actually optimal: both players are better off with mutual defection than mutual cooperation.

Ordering the payoffs so that $T_i > R_i > S_i > P_i$ produces the game of chicken. There is no dominant strategy but mutual defection is the worst possible outcome. The fear of such an outcome (P_1, P_2) leads both players to cooperate. Ordering the payoffs so that $R_i > T_i > P_i > S_i$ makes mutual cooperation the most preferred outcome.

As the players maximise their payoffs they adopt mutually optimal *strategies* which in turn become the Nash equilibriums. Nash equilibriums are stable outcomes which no player has an incentive to deviate from as long as the opponent does not change strategy (see [Matrix 4.1A](#)). So unilateral improvement is impossible. Multiple Nash equilibriums (as in the game of chicken) can be source of instability of outcomes because it is not clear which strategy one should take. Instability may also result if *outcomes* are not Pareto optimal for both players. An outcome is Pareto optimal if it is impossible to improve one player's payoff without reducing the others. So collective improvement is impossible. When outcomes are not Pareto optimal players know if they get together they can improve the payoffs for some or all the players but this does not happen due to lack of communication. For instance, in

²⁴⁰ The story is told often as follows: two prisoners suspected of a serious crime are incarcerated in two different cells and each is offered the following deal: "If you confess and the other prisoner does not confess, you will be free; if the other prisoner confesses, too, you will receive a moderate sentence. If neither of you confess, you will receive a smaller sentence than if you both confess; if the other confesses but you do not, you will receive the maximum sentence."

the prisoner’s dilemma P_1, P_2 is not a Pareto optimal outcome although it is Nash equilibrium.

Matrix 4.1A: Payoffs of possible games in parliamentary arena and electoral arena		
	<i>Accommodation (A)</i>	<i>Intransigence (I)</i>
<i>Accommodation (A)</i>	R_1R_2	S_1T_2
<i>Intransigence (I)</i>	T_1S_2	P_1P_2
$T_i > P_i > R_i > S_i$ Deadlock	Nash equilibrium: (P_1, P_2)	
$T_i > R_i > P_i > S_i$ Prisoner’s Dilemma	Nash equilibrium: (P_1, P_2)	
$T_i > R_i > S_i > P_i$ Chicken	Nash equilibrium: (T_1, S_2) and (S_1, T_2)	

Nested games in Bosnia

The *Nested Games* approach (Tsebelis (1990)) can now be applied to Bosnia. Let us assume for now something that many take for granted: that society is irrevocably polarised.

In the electoral arena, followers have a dominant strategy: be intransigent when others accommodate – this would result in outcome T_1S_2 with payoff T_1 . The worst outcome for a follower is to accommodate while others are intransigent (S_1T_2) with a very low payoff S_1 . The other two outcomes are equally amenable to followers – mutual accommodation (R_1R_2) or mutual intransigence (P_1P_2). If mutual accommodation is preferred to mutual intransigence then the game is prisoner’s dilemma. If mutual intransigence is preferred the game is deadlock. Regardless of whether the game is deadlock or prisoner’s dilemma the dominant strategy for followers is intransigence whatever strategy their opponent pursues (as outlined by the ordering of preferences in Matrix 4.1A). In both games the stable Nash equilibrium is mutual intransigence and in the prisoner’s dilemma the Nash equilibrium is also Pareto non-optimal.

Following the consociation model, in the parliamentary arena, if elites are doing their job of accommodation then their dominant strategy is to be intransigent when their opponent compromises with equilibrium

outcome (T_1S_2). Yielding, however, to an intransigent opponent and avoiding conflict (S_1T_2) is preferred to mutual intransigence (P_iP_i). So fearing mutual intransigence elites prefer mutual compromise or yielding to intransigence (so cooperation) to mutual intransigence.

Following the *Nested Games* approach, the inequalities below show the order of preferences for elites in the three possible games:²⁴¹

Electoral arena $T_{ei} > P_{ei} > R_{ei} > S_{ei}$ (deadlock)
(Inequality 4.1a)

$T_{ei} > R_{ei} > P_{ei} > S_{ei}$ (prisoners dilemma)
(Inequality 4.1b)

Parliamentary arena $T_{pi} > R_{pi} > S_{pi} > P_{pi}$ (chicken)
(Inequality 4.1c)

So what explains the disparity between elites and followers? Considering the literature on consociationalism, Tsebelis (1990) may explain this discrepancy by identifying two extremes.²⁴² On the one hand, elites play the game in the parliamentary arena largely isolated from the masses; so they play chicken because they fear the consequences of mutual intransigence (Inequality 4.1c above). On the other hand, elites represent their followers' preferences faithfully and play their followers' game also in the parliamentary arena – and so play deadlock (Inequality 4.1a above). In reality, of course elites must pay attention to both arenas and so their actual payoffs would be a convex combination of the payoffs in the two arenas²⁴³ demonstrated by the linear Formula 4.1d immediately below:

$$PO_i = kPO_{ei} + (1-k)PO_{pi}$$

(Formula 4.1d)

²⁴¹ The subscripts p and e stand for the parliamentary and electoral arenas respectively

²⁴² Tsebelis (1990) considers the case of Belgium and the disparity in behaviour between elites and followers. See Tsebelis. *Nested Games*, 1990. Chapter 6.

²⁴³ Tsebelis. *Nested Games*, 1990. 166.

Where PO_i stands for the payoffs (T,R, S, or P) of player i . k lies between interval $[0,1]$ indicating the weight of the electoral arena (or the weight of the followers in the decisions of the elites). $1-k$ indicates the weight of the parliamentary arena. k is influenced by two primary factors: (a) information followers have on elite decision making and if they have such information the *reasons* for elite behaviour (so costs of information); and (b) monopoly of representation (or electoral competition).²⁴⁴

First, high information costs would reduce visibility of political decisions thereby reducing follower influence and would give elites greater independence. Greater information would act as a constraint on elite behaviour (k will increase) only, of course, to the extent followers have different preferences from elites (i.e. they disagree with what elites are doing). Follower preferences, however, can change and elites may well be able to induce that change if visibility of decisions is high. With high visibility there would be exchange of information and mutually ‘bargained’ positions. In Bosnia, there is little to no visibility of decisions as demonstrated by my analysis of voter preferences and political apathy in [Chapter 1](#).

Second, intuitively, one could assert that greater electoral choice should increase follower representation. Elites, however, may have monopoly control on electoral choice as followers do not have a varied pool of representatives to choose from. Followers, therefore, may not be able to reward or punish elites. In consociational models, the assumption is that society is segmented, communication between segments is minimal and barriers to exit from each segment is high (Tsebelis (1990)).²⁴⁵ As [Figure 4.1A](#) below demonstrates, across a one-dimensional policy space (for simplicity), two elites (A and B) competing for election would converge to the position of the median voter (Downs (1957)).²⁴⁶

²⁴⁴ Ibid. 168

²⁴⁵ Ibid. 169.

²⁴⁶ Assuming, the usual Downsian principles, including, fixed electoral preferences and elites conducting to take policy positions that would maximise their appeal for votes.

Reduce the choice of leader to a single elite (say A) with an ideal position SQ' , and followers can be blackmailed into accepting any position between the current status quo (SQ) and the elites ideal position SQ' . Followers must accept a possibly very wide range of policies favoured by the elite.²⁴⁷

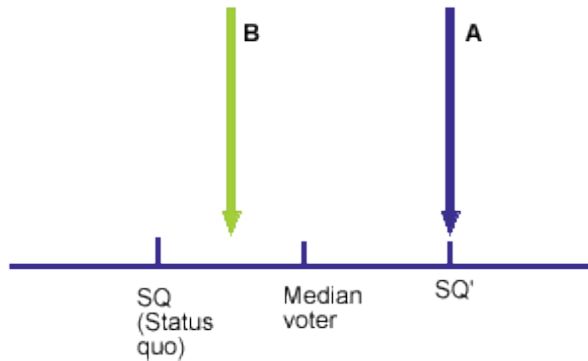


Figure 4.1A

There are a range of factors that can influence the availability of elite choice including salience of issues, costs of entering an election (set out usually in electoral laws or party structures), and resources that the elite has at her disposal (strong organisations and endorsements by other monopolistic institutions such as organised churches/mosques).²⁴⁸ In some cases there may be no direct choice of a representative at all and consociational policies have tended to reduce electoral choice to a minimum (with closed lists, PR) so intransigence of the masses does not spill over into the parliamentary arena resulting in intransigent elites.²⁴⁹ In Bosnia, monopoly control of electoral choice is very clearly visible in

²⁴⁷ See further Tsebelis. *Nested Games*, 1990. 170.

²⁴⁸ Ibid, 170.

²⁴⁹ (Questions of representation and barriers to entry in and deterrence strategies used by elites in Bosnia are not within the scope of this study although understanding how much electoral competition there is within segments of the Bosnian population is useful to the analysis.) See further spatial voting literature in Shepsle and Cohen (1998) and an introductory discussion in Tsebelis. *Nested Games*, 1990. 170.

at least one Entity, the RS (Sahadžić (2009)).²⁵⁰ All the major parties in the RS are nationalist vying for the most extreme policy positions which, in essence, revolves around challenging the future existence of a Bosnian state.²⁵¹ The SDS, SNSD and even the more moderate PDP²⁵² are largely unable to distinguish between themselves. Whilst the SDS opposes the SNSD at the Entity level it coordinates policy jointly at the State level which removes its ability to oppose the RS government; it can only gain ground by positioning itself to the right of the incumbent. This is especially so where a supposed existential threat to the RS is the RS government's most pressing concern – bolstered by nationalist rhetoric emanating from parties in the Federation. Coupled with little

²⁵⁰ But not just the RS. “Bosnia’s peculiar constitutional structure has the effect of segmenting the electoral marketplace along ethnic lines. At the same time, it creates a patchwork quilt of political arenas, each with varying degrees of ethnic integration and each with different rules for promoting ethnic integration. In all of Bosnia’s elections, however, parties tend to compete for the votes of a single ethnic community. No politician needs the support of anyone from another ethnic group in order to get elected. There are certain offices for which the system is structured to ensure that members of a given ethnic group vote only for their own representatives (Manning, 2004: 71)”; “[...] it seems that there are no available instruments and mechanisms that would give citizens the opportunity to influence elections. Citizens are not able to decide and determine the lists of candidates. This is done through political parties. Also, citizens vote for candidates that are elected by a political party and placed on list of candidates which means that citizens do not have the opportunity to elect candidates outside of the list of candidates presented by political party. In this way, citizens do not have power to decide to elect the most competent persons. Elected candidates are not responsible to citizens because citizens do not have power to revoke them. Elected candidates are responsible to the political party they belong to and to other elected candidates.” Sahadžić, Maja. “The Electoral System of Bosnia and Herzegovina: A Short Review of Political Matter and/or Technical Perplexion.” *Contemporary Issues*, (2009) Vol. 2, No. 1.

²⁵¹ The SDS President, Milorad Dodik stated in November 2010 that “It [Bosnia] lives only on foreign infusion, [for] as long as there is this infusion.” International Crisis Group. *Bosnia: What Does Republika Srpska Want?* Europe Report N°214, 6 October 2011. 3.

²⁵² For instance PDP leader Milen Ivanić has talked about the talked about organising an independence referendum or linking RS’s status to Kosovo’s. It also opposed the transfer of more competences from the entity to the state without full RS consent. International Crisis Group. *Bosnia: What Does Republika Srpska Want?* Europe Report N°214, 6 October 2011. 4.

policy differentiation opposition moderates complain of limited media coverage of their campaigns, weak civil society (due to tight government control) and a highly centralised entity government restricting the development in municipalities controlled by the opposition.²⁵³ The Entity separation and lack of a multi-ethnic electoral base (given lack of large-scale refugee returns) only reinforces the monopoly of nationalist representation. Representatives can use then critical issues to provoke conflict between the constituent groups in order to maintain political office and stifle rival opponents.

Popular involvement in politics

In summary, greater interest and involvement of followers on a particular issue would increase the value of k reducing the scope of elites to manoeuvre away from follower preferences.

In the case of Bosnia, then, if k is very large (i.e. the masses are very influential in the decision making process) it would mean the elites are highly constrained. They would faithfully fulfil popular aspirations (i.e. greater polarisation) because followers have lots of information about decision making and actively punish and reward elites (Sartori (1976)). Elites then would play the prisoner's dilemma or deadlock game where the dominant strategy is intransigence. This would explain elite behaviour very nicely and would accord with the discourse that underlying ethnic hatreds and division within society is to blame. There would be little further analysis needed and in essence the institutional arrangements would merely be prolonging the inevitable conflict between followers into the future.

There is a problem, however, applying the model with the assumptions above because it is evident that: (a) followers do not actually have much information on or involvement in the decision

²⁵³ “Local government is disempowered financially, administratively and politically, which is especially evident in municipalities run by opposition parties (Doboj, Bijeljina, Bratunac, Gacko, Nevesinje, East Sarajevo and its municipalities) or Federation-based parties (Srebrenica).” International Crisis Group. *Bosnia: What Does Republika Srpska Want?* Europe Report N°214, 6 October 2011. 4, 7.

making process.²⁵⁴ In fact, minimal involvement was built into the State Constitution so the value of k should be very small. If k is very small then elites should play the pragmatic game of chicken according to consociational models but, in fact, they do not. Followers' involvement (or really lack of) cannot then explain persistent intransigence by elites; and (b) if anything, followers inclination to be accommodating seems to be increasing in Bosnia whilst elite intransigence seems to be intensifying so elites are not faithfully fulfilling follower aspirations by being more accommodating. These conjectures are bolstered by my analysis in Chapters 1 and 2 on political apathy and culture.

In essence, the assumptions relating to the preference ordering of elites and followers is reversed: elites play deadlock or prisoner's dilemma but followers would prefer they play chicken. As the value of k is low elites can play in the parliamentary arena alone (unconstrained by follower preferences). But elites still choose to play prisoner's dilemma or deadlock. Why is this? Why is mutual cooperation not appealing to elites? The answer depends on the payoffs orderings for cooperation for a particular issue being fought over.

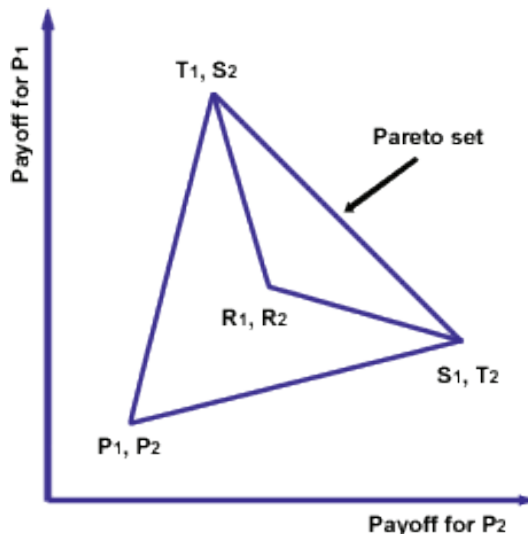


Figure 4.1B

²⁵⁴ (High political apathy and dissatisfaction as demonstrated in Chapter 1 would be evidence of such a situation)

Figure 4.1B represents the position graphically, showing that as payoffs T_i (defect when other accommodates) or P_i (penalty for mutual defection) increase cooperation decreases.²⁵⁵ The likelihood, therefore, of mutual accommodation (R_1, R_2) not being in the Pareto set increases. As the payoffs R_i or S_i increase so does the likelihood of cooperation. So, R_i is more likely to be in the Pareto set. If R_i increases significantly then it would be above the line connecting the temptation to be intransigent ($T_1 S_2$ and $S_1 T_2$). Figure 4.1B confirms that where an issue is very important for both parties (such as for instance constitutional reform) the value attached to T_i will be very high and the value attached to S_i will be low: any accommodation is highly unlikely and R_1, R_2 is not Pareto optimal. The 2000 and 2006 general elections provide an excellent example: elites of SBiH²⁵⁶ (an exclusively Bosniak party) campaigned on the platform of a ‘Bosnia without Entities’. In response, Serb nationalists sparked alarm of a Bosnia dominated by Bosniaks and rallied support for a national cause to defeat the SNSD leader²⁵⁷ (at the time the international community’s favoured and well funded moderate candidate (Belloni (2007), Peric 2000)). The irony was that in 2006 SNSD deployed electoral tactics that outdid the most radical Serb nationalists. Championing RS autonomy and re-threatening to hold an independence referendum to see off the existential threat to the RS, led the SNSD to a landslide.²⁵⁸ For ‘high importance’ issues a high value attached to payoff T_i may be reasonable but even very trivial matters seem to fall victim to nationalist bickering at the expense of cooperation. In 2008, a law regulating genetically modified food was supported by all the parties but failed due to an inability to agree on the ethnic composition of an advisory committee (which happened to be powerless).²⁵⁹

Note again that on issues of high salience the game is not iterated and there is only a single shot in which the players have to

²⁵⁵ See further Tsebelis. *Nested Games*, 1990.

²⁵⁶ Haris Silajdžić, Bosnia’s wartime prime minister in particular

²⁵⁷ Milorad Dodik

²⁵⁸ See further, Belloni, Roberto. *State Building and International Intervention in Bosnia*. Oxford: Routledge, 2007, 54-60.

²⁵⁹ International Crisis Group. *Bosnia’s Incomplete Transition: Between Dayton and Europe*. Europe Report N°198, 9 Mar 2009. 2.

make a decision. Players cannot offer compromises in subsequent rounds or punish defectors to an agreement which is as fundamental as changing the rules of the game. Changes to the constitution fall within this category. In such one-shot games, the ordering of the payoffs (T_i , S_i , R_i and P_i) is all critical. The dominant strategy, therefore, here will be intransigence and the equilibrium would be mutual intransigence (P_1, P_2). Congleton (2010) is right that where mutual intransigence is inevitable parties may agree to increase the payoff for mutual intransigence (P_1, P_2) to ensure it is not so painful and to postpone any irreparably damaging conflict.²⁶⁰ Players will tend to focus on the lowest common denominator and agree on minimal or retrogressive measures. This is exactly the situation in Bosnia whereby parties agree to embed and postpone the conflict.

The value of P_i is high in Bosnia due to a number of factors: there is no collapse of the incumbent government following a failure to pass policy; basic human rights are respected and un-amendable; elites continue to be paid as elected representatives even in the absence of a government²⁶¹; entities can continue the provision of essential services in the manner they wish free of State intervention due to the asymmetric federation; international actors cannot and will not allow collapse of the state; and funding, compromises/concessions can be obtained from the international community or other parties for being intransigent (such as calling for independence

²⁶⁰ Arranging a game to increase payoffs for a non-Pareto optimal outcome is common in numerous political bargains as Congleton comments: "Insofar as conflict within political institutions tends to be less costly than on the battlefield (or within an organization's production teams), adopting such procedures tends to be advantageous for both parties." Congleton, Roger D. *Perfecting Parliament: Liberalism, Constitutional Reform and the Rise of Western Democracy*. Fairfax: Center for Study of Public Choice. George Mason University. (Forthcoming Cambridge University Press.) 2010. 98.

²⁶¹ In fact, very large sums of party funding comes directly from the state – over 80 per cent of funding for parties can be derived from various government budgets. In 2009 spending on the party financing accounted for a whole percent of Bosnia's GDP. See Transparency International BiH. *An overview of budget appropriations for political parties in BiH*. Bosnia and Herzegovina: Transparency International, June 2011.

referendums).²⁶² Intransigent political practice in Bosnia is endemic. A particular clear example is the agreement of cooperation in 2012 between two almost diametrically opposed political parties (the SNSD and the SDP)²⁶³ where a number of measures agreed would deepen and entrench division by Entity. Measures agreed included: amending the Electoral Law of Bosnia to close electoral lists and abolishing the Central Vote Counting facility. HDZ and HDZ 1990 offered support to the agreement in exchange for an indirectly elected State Presidency only if the Croat Member of the Presidency is elected by Croat votes.²⁶⁴ The SNSD leader also appears to support the creation of a third Croat entity.²⁶⁵

When it comes to the issue of constitutional reform the idea is to make accommodation in the future Pareto optimal and to decrease the payoffs of mutual intransigence (P_1, P_2). By pushing outcomes towards the Pareto frontier in [Figure 4.1B](#) above the situation is improved for most to all players. Adopting a new constitution (thereby changing the rules of the game) is fundamentally different from questions concerning everyday

²⁶² For instance, between 2003 and 2011 the leader of the SNSD, Milorad Dodik, called for an independence referendum on at least eight different policy areas: On defence reform (November 2003); preserving the RS name (March 2004); police reform (November 2006); defence against attempts to abolish RS (March 2008); NATO membership (October 2009); and OHR's decisions to extend the mandate of foreign judges and prosecutors (December 2009); to support the Dayton Peace Agreement (January 2010); to challenge OHR intervention in formation of Federation government (April 2011). International Crisis Group. *Bosnia: What Does Republika Srpska Want?* Europe Report N°214, 6 October 2011. 14; and Toal, Gerard (Gearóid Ó Tuathail) and Maksić, Adis, "Is Bosnia-Herzegovina unsustainable? Implications for the Balkans and the European Union." *Eurasian Geography and Economics*, vol. 52, no. 2 (2011). 284.

²⁶³ The agreement was between Alliance of Independent Social Democrats (SNSD) leader Milorad Dodik and Social Democratic Party (SDP) leader Zlatko Lagumdžija. See "Bosnian party leaders agree on cooperation." *Tanjug*. 1 November 2012.

²⁶⁴ Jukic, Elvira M. "Bosnian Croat Parties Back Dodik-Lagumdžija Deal". *BIRN*. 12 November 2012.

²⁶⁵ HDZ leader Dragan Covic following a meeting with Milorad Dodik on 18 December 2010 in Banja Luka told the press after meeting that "HDZ-BiH and SNSD have a clear desire to protect the interests of both peoples in BiH. Only by our doing so can BiH survive and function." Diplomatic Cable. "Bosnia: Covic And Dodik - Strange Bedfellows. ID:10SARAJEVO148_a, 2010 February 12.

policy issues whose outcomes one may discern relatively easily. Given the lack of information, uncertainty about the outcomes of constitutional change is the critical factor. On the one hand, if there was absolute ignorance about the outcome the position is not dissimilar as to the question facing a person under Rawls 'veil of ignorance' – the best possible result for all could be secured. On the other hand, Tsebelis is right, that with complete information a player would pick the institutional arrangement most favourable to her (given her particular set of preferences). Constitution making in the real world sits in between these two extremes.²⁶⁶

Given the uncertainty and having discounted the role of the masses in the process the focus must be on modelling elite behaviour alone; so that as a result of analysing the positions of elites towards reform, institutions can be created which make accommodation the dominant strategy. A veto player approach would be the best way to analyse elite intransigence and lack of reform.

4.2. Modelling the failure of reform

Elites representing segments of the population in the parliamentary arena are essentially veto players. A veto player is an individual or collective actor with specific preferences and intentions whose agreement is necessary to change policy. An adapted version of Tsebelis (2002) model is used here.²⁶⁷ A summary of the model and its assumptions is provided immediately below.

The veto player model is particularly useful as it succinctly demonstrates that policy change (or its opposite policy stability) is a function of three variables: (a) the number of veto players, (b) the distances between these players' policy ideal points (policy congruence)

²⁶⁶ See further Tsebelis. *Nested Games*, 1990. 118.

²⁶⁷ Primary literature used for the model includes but is not limited to: Konig, Thomas, Tsebelis, George and Debus, Marc. *Reform Processes and Policy Change: Veto Players and Decision-Making in Modern Democracies*. New York: Springer Science+Business Media, 2010; Tsebelis, George. *Veto Players: How Political Institutions Work*. Princeton: Princeton University Press, 2002; Tsebelis, George. "Decision Making in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism and Multipartyism." *British Journal of Political Science*, Vol. 25, No. 3 (Jul., 1995), pp. 289-325.

and (c) veto players' internal cohesion.²⁶⁸ These characteristics affect the set of policies/outcomes that can replace the status quo (SQ) and is called the winset of the status quo (W(SQ)). When W(SQ) is small significant departures from it are very unlikely and, therefore, policy stability will reign. The decision making rule for veto players could be qualified or unqualified. If unqualified, absolute unanimity is required amongst players. The 'unanimity core' is the set of points with an empty winset. That is, the points in the core cannot be defeated by any other point if we apply a decision making rule such as unanimity (hereafter unanimity core or Pareto set).²⁶⁹ To clarify the Pareto set is the set of outcomes that makes no actor worse off than the status quo.

In [Figure 4.2A](#) below the unanimity core is represented by triangle BCS. W(SQ) is indicated by the darkly shaded intersection of circles. [Figure 4.2A](#) confirms that when the status quo (SQ) is far away from all the veto players (B, C, S), its winset is large (policy stability is low). As SQ approaches one of the veto players policy stability increases (since the winset of the status quo includes only the points that this veto player prefers over the status quo). Moving the status quo and locating it among the veto players may completely eliminate the winset of the status quo²⁷⁰ (SQ' in [Figure 4.2A](#) indicates this).

Veto players may be institutions (such as parliaments, presidents etc) but the rules governing that institution may determine the partisan veto players (such as parties in a coalition) who in essence hold the ability to veto. Therefore, institutional actors may be ignored and reduced to particular groups within a stable institutional framework.²⁷¹ In the case of Bosnia the veto players would be the major parties representing the segmented populations of Bosniaks, Croats and Serbs. Veto players are the independent variable one considers when analysing policy stability (which is the dependent variable). Like in game theory models above, veto player

²⁶⁸ Tsebelis, George. *Veto Players*. 2002. 13; and Ganghof, Steffen. "Promises and Pitfalls of Veto Player Analysis." State of the Art Article. Max-Planck-Institut für Gesellschaftsforschung Köln. *Swiss Political Science Review* 9(2):1-25. 2003. 8.

²⁶⁹ See further Tsebelis, George. *Veto Players*. 2002. 39.

²⁷⁰ Ibid, 40.

²⁷¹ Tsebelis, George. *Veto Players*. 2002. 33; Tsebelis, George. "Decision Making in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism and Multipartyism." *British Journal of Political Science*, Vol. 25, No. 3 (Jul., 1995), pp. 289-325. 302.

behaviour is at least minimally and at least temporarily fixed²⁷² (these assumptions are necessary otherwise any analysis would be completely meaningless if actors constantly changed their minds). As the policy space (constitutional reform) has two or more dimensions each dimension is weighted equally (“Euclidian preferences”) and the assumption is that there are no side payments or log rolling. Without such an assumption nothing meaningful could be said about the importance of veto players, because even many veto players could easily agree on policy change if they cared about different policy dimensions (Tsebelis (2002); Ganghof (2003)).

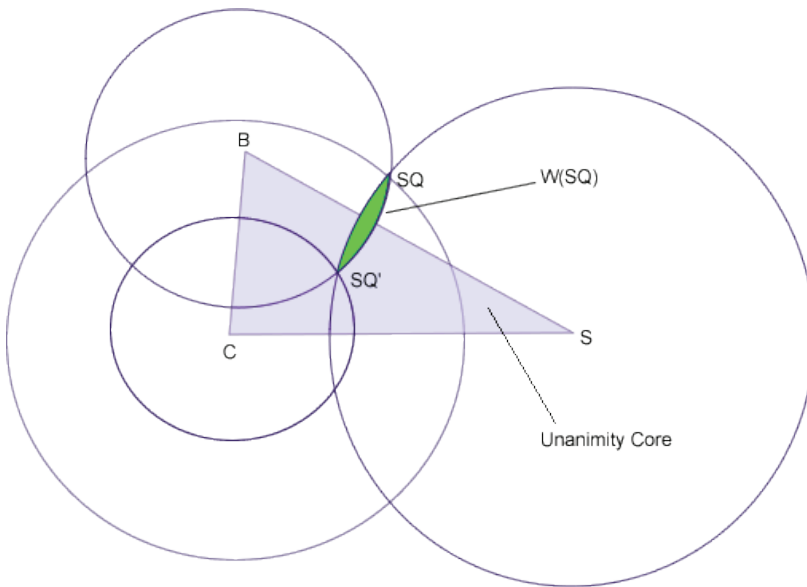


Figure 4.2A

*Veto players in the constitutional
change policy space*

Figure 4.2A represents the policy space of constitutional change in Bosnia. The parliamentary arena is the main veto gate through which constitutional change can occur but critically agreement depends on the

²⁷² Steffen Ganghof. “Promises and Pitfalls of Veto Player Analysis.” State of the Art Article. Max-Planck-Institut für Gesellschaftsforschung Köln. *Swiss Political Science Review* 9(2):1-25. 2003. 3.

three caucuses that make up the Parliamentary Assembly: Bosniaks, Croats and Serbs.²⁷³ Each of these caucuses as highlighted in [Table 4.2A](#) can exercise a veto regardless of party affiliation to scupper constitutional change. The constitutional amendment veto (CAV) and entity-voting veto (EVV) are the most important but not each of the veto players can deploy them effectively. The VNIH veto is slightly less important as the question of ‘vital interest’ when a proposal is vetoed can be assessed for validity by the Constitutional Court thereby changing the game dynamics.²⁷⁴ Essentially, when the vetoes are considered together near unanimity is required for unimpeded constitutional change.

To clarify, the veto players here are the majority exclusionary ethno-nationalist parties that comprise a majority in the Parliamentary Assembly (in both Houses) and who are represented by the indifference curves B, C and S in [Figure 4.2A](#). The location of the relevant veto players in the constitutional change policy space is common knowledge and is specifically catalogued in [Chapter 3](#) above and a summary is provided immediately in [Table 4.2A](#) below. What [Table 4.2A](#) very interestingly suggests is that the constitutional change policy space in Bosnia has changed remarkably since the 2002 elections: (a) party positions are far more extreme and single track than they were a decade ago; (b) there are more anti-systemic party positions (greater vetoes or autonomy) than before; and (c) veto use is far more feasible than a decade ago. The greater polarisation amongst parties can be compared with the data in [Chapter 3](#) which suggests greater accommodation and tolerance amongst the population at large. In some ways, the increasing despondency and hostility towards elites and the government amongst the population may be a consequence of this discrepancy as suggested in [Chapter 3](#) (although future studies must be undertaken to establish a firm causal link).

²⁷³ The institution of the Presidency can be ignored as the ability for Presidents to veto policy is via the ‘vital national interest mechanism’ and their ability to veto is essentially constrained by the preferences of the parties to which they belong. The veto capacity of the Presidency therefore is subsumed under the veto ability of parties represented in the Parliamentary Assembly as an ultimate veto of any decision exercised by the Presidency is exercised by the parties in the Parliamentary Assembly.

²⁷⁴ The role of the Constitutional Court is not considered any further given that is beyond the scope of this study.

TABLE 4.2A: VETO PLAYERS IN THE CONSTITUTIONAL CHANGE POLICY SPACE				
DATE OF PARLIAMENTARY ELECTION	HoR: MAJOR PARTIES BY ETHNICITY ALLOWING COALITION VETO (SEATS) NOTE: TOTAL SEATS = 42	SIMPLE VETO IN HOUSE OF REPRESENTATIVES	HoP: MAJOR PARTIES BY ETHNICITY ALLOWING COALITION VETO (SEATS) NOTE: TOTAL SEATS = 15	SIMPLE VETO IN HOUSE OF PEOPLES
2010	SDP (8 - F)		SDP (1)	
	SDA (7 - F)		SDA (3)	VNIH
	SBB BiH (4 - F)		SBiH (1)	
	SBiH (2 - F)		HDZ BiH (3)	VNIH
	HDZ BiH (3 - F)		HDZ 1990 (2)	
	HDZ 1990 (2 - F)		SNSD (3 - RS)	VNIH, EVV
	SNSD (8 - RS)		PDP (1 - RS)	
	SDS (4 - RS)		SDS (1 - RS)	
	SDA (8 - F / 1 - RS)		SDA (3)	VNIH
	SBiH (7 - F / 1 - RS)		SBiH (1)	
2006	SDP (5 - F)		SDP (1)	
	HDZ BiH (3 - F)		HDZ BiH (3)	VNIH
	HDZ 1990 (2 - F)		HDZ 1990 (2)	
	SNSD (7 - RS)		SNSD (3 - RS)	VNIH, EVV
	SDS (3 - RS)		SDS (1 - RS)	
			EVV	

2002	SDA (9 - F / 1 - RS)	EVV only if: ≥ 19 F SEAT COALITION	SDA (4)	VNIH
	SBIH (5 - F / 1 - RS)		SBIH (1)	
	SDP (4 - F)		SDP (1)	
	DNZ - NP - BOSS (3 - F)		HDZ - Christian Democrats (4)	VNIH
	NP - NHI - SPU (3 - F)		SDS (3 - RS)	VNIH, EVV
	HDZ - Christ. Dems. (5 - F)		PDP (2 - RS)	
	SDS (5 - RS)			
	SNSD (3 - RS)			
	CAV: $28 \leq \text{SEATS} / \text{EVV}: 10 \geq \text{RS SEATS} 19 \geq \text{F SEATS}$		CAV: $10 \leq \text{SEATS} / \text{EVV}: 3 \geq \text{RS SEATS} 7 \geq \text{F SEATS}$	
	Preferred position of party elites to reform		<u>Status-quo orientation</u> <u>Unitary civil state or greater centralisation</u> <u>Greater autonomy or increased veto powers</u>	

Source: Figures obtained from OSCE and the Parliamentary Assembly BiH

B, C and S it is assumed exercise their veto only on the basis of their policy preferences. As noted earlier, k is small so electoral goals and appeals to their constituency are not immediately relevant for constitutional change. Many of the parties in the Parliamentary Assembly are located within the Pareto set (the set of outcomes that makes no actor worse off than the status quo) of the three veto players (the triangle in [Figure 4.2a](#)). The positions, therefore, of these parties are absorbed by the most extreme preferences of those that are able to exercise a veto (which in the case of a VNIH veto would only require the support of two or three MPs at most). The locations of the veto players in between the extremes B, S and C are not relevant. The reason for this is provided by a trivial example. If there are two veto players with identical preferences, they will act as though they were a single veto player, because they will always agree on any policy change (Tsebelis (2002)). The only instance where they would have a veto power is if they act on the basis of motives other than policy preferences (i.e. if they are directly accountable in the electoral arena – an issue returned to later) and if they are not located in the triangle in [Figure 4.2A](#) because they are more extreme than B, C and S. Indeed, for constitutional change this matters as the policies which the veto players are proposing may completely alter the game dynamics if those policies are further ideologically than that represented by the unanimity core, BCS, in [Figure 4.2A](#). This issue is again addressed later.

The unanimity core in [Figure 4.2A](#) is large indicating that the positions of B, C and S on constitutional change are far apart and, therefore, there is a large unanimity core (i.e. points where agreement cannot be reached due to the potential for veto). $W(SQ)$ is very small indicating the potential to reach agreement for change is rather small and that any change will actually be incremental (no major policy change can be expected). Any change will tend towards SQ' which is still far apart from each of B, C and S ideal policy preferences. Any arrangement reached will be far from ideal. SQ is located outside the unanimity core but not far away; in particular SQ is closer to B and S policy preferences than C. C has far greater in common with B than S reflecting the proximity of both in the Federation (indicated by the substantial overlap of the B and C indifference curves). C though had less influence in drafting the current State Constitution which is reflected

in the fact it is unable to deploy the entity-veto alone, and it does not have sufficient number in the HoR to block legislation. Its ultimate safeguard is in utilising the VNIH veto or using extra-constitutional means of pressure.²⁷⁵ That is precisely why Croat delegates would not accept proposals to abolish the House of Peoples without preserving an undefined VNI veto in a unicameral legislature together with additional safeguards such as a stronger hand in utilising the entity-veto (which was one of many perceived grievances of the April Package).²⁷⁶ By doing so any ability to seriously veto policy would be lost – the future unanimity core would shrink and the winset would expand allowing greater scope for policy change. The irony is that Croat vetoes (partly because they are not significant) are not the problem but the abuse of Serb vetoes are (the entity-veto in particular). But if greater Croat vetoes are awarded then policy change would become even harder.

Current proposals for constitutional change

Figure 4.2A would affirm the position reached in the parliamentary arena game outlined in sub-chapter 4.1 above. Given the extreme policy positions of B, C and S, their ability to veto significantly reduces the scope for radical constitutional change. In fact, some of the negotiation positions taken by them confirm that they are tending toward further intransigence rather than accommodation. Agreement on such positions should be outright ruled out in the constitutional reform agenda. For instance, providing further autonomy or vetoes to any caucus would not help with greater accommodation. As demonstrated in Figure 4.2B below any reform under the current arrangements would be small and incremental. If, for instance, stronger vetoes were granted to C which S possesses (and nothing else) the effect would be like introducing a new veto player. The dark-shaded area in Figure 4.2B shows that the

²⁷⁵ Although its votes are needed for meeting the two thirds requirement for constitutional amendments.

²⁷⁶ Council of Europe. *Draft Resolution on “Constitutional reform in Bosnia and Herzegovina*. Report Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee) Co-rapporteurs: Mr Mevlüt Çavuşoğlu, Turkey, European Democrat Group and Mr Kimmo Sasi, Finland, Group of the European People’s Party. Doc. 10982, 27 June 2006.

unanimity core would significantly increase – C would be further away from the position of B and S and the number of issues which could not be changed regarding the constitution would significantly increase. Any further change towards even minimal change (SQ') would be impeded. A number of commentators have thought further 'entitisation' may be a solution thereby ensuring that each Caucasus has a "stake in the political process" (Parish (2011); Hayden (2007, 2006)²⁷⁷ cf. Belloni (2008)).²⁷⁸ But with a set of structures predicated on the Dayton arrangements, further entitisation is a recipe for deadlock, division, and ultimately separation.

Other popular proposals in the constitutional reform debate concentrate on abolishing or weakening the Presidency (Venice Commission, April Package, Sejdic-Finci Proposals).²⁷⁹ Yet such a measure will do little to break the deadlock, for a number of reasons: (a) the VNIP is rarely invoked because the Presidency makes few decisions that are of critical consequence; (b) competencies of the Presidency are relatively narrow in scope already and the Presidency rarely submits draft laws to the Parliamentary Assembly even though it is able to do

²⁷⁷ Hayden, Robert M. "Moral Vision and Impaired Insight: The Imagining of Other Peoples' Communities in Bosnia." *Current Anthropology*, Vol. 48, No. 1 (February 2007), pp. 105-131; Hayden, Robert. "Constitution Drafting in Bosnia and Herzegovina". *Meeting Report (323) of a seminar held at Tufts University*, May 10, 2006.

²⁷⁸ Belloni (2008) remarks "If both the Entities and the state are meant to provide a similar degree of protection to all constituent peoples, then they are redundant institutions, which perhaps justifies the proposal to abolish the Entities, as advocated by some liberal observers and part of the Bosniak leadership." 84. Belloni is right that at the point at which there are no ethnic quotas or discriminatory provisions against other groups or individuals then there is little justification for exclusivist Entities preserving privileges for certain groups.

²⁷⁹ Gavrić, for instance, building on the work of others fully endorses the position: "Abolishment of the BiH Presidency and transferring executive powers and competences to the BiH Council of Ministers. The BiH Council of Ministers would be the central executive body, with the representation of constituent peoples and "Others". The executive body would become more functional and simpler. This would prepare the ground for a more intensive engagement in the Euro-Atlantic integration." Gavrić, Saša. "Constitutional Reform in Bosnia and Herzegovina. A Unicameral Parliamentary Political System as a Solution for the Implementation of the Ruling in the Case "Sejdić and Finci vs. Bosnia and Herzegovina"?" Centre for Political Studies, Sarajevo. *South East European Journal of Political Science*. Volume I, No. 2. June 2013.

so²⁸⁰; (c) the majority of proposals for draft laws (in fact, over 75% in both Houses) emanate from the Council of Ministers which has no effective veto mechanisms;²⁸¹ (d) given that the Council of Ministers propose the majority of legislation - as a grand coalition representing all party interests - one would expect almost all legislation gets passed. That is, however, not the case because it does not protect ethnic interests (i.e. there are no effective vetoes). The entity-veto, VNIH or majority vetoes are deployed in the Parliamentary Assembly (especially by RS delegates who can hold back any legislation they wish using vetoes). Empowering the Council of Ministers further and abolishing the Presidency may meet the technical requirements of the judgment in Sejdic-Finci but little policy change will occur on the ground (especially given that members of the Presidency are already sidelined by more influential party leaders). Figure 4.2A will remain unchanged.

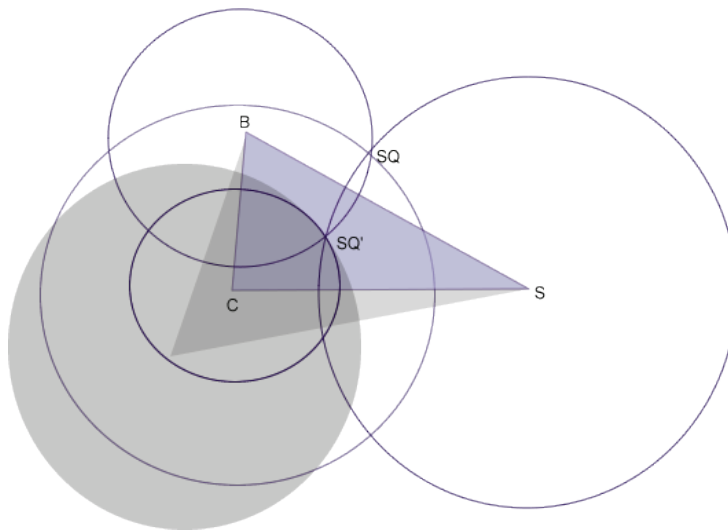


Figure 4.2B

²⁸⁰ Proponents who are authorised to submit draft laws to the Parliamentary Assembly can be any member of one of the Houses, a parliamentary committee and the joint committees of the houses, the Presidency, and the Council of Ministers (Bosnia and Herzegovina, “Rules of Procedure House of Peoples” Art. 92, “Rules of Procedure House of Representatives” Arts. 101, 102). See . Bahtić-Kunrath, Birgit. 2011. “Of veto players and entity-voting: institutional gridlock in the Bosnian reform process.” *Nationalities Papers*. 39 (6): 899-923. 920.

²⁸¹ Ibid, 907.

Is there a way out of the current predicament? Can the unanimity core be reduced and the winset ($W(SQ)$) be increased? Can the exclusionary ethno-nationalist parties be moderated?

4.3. Modelling ways out

Constitutional reform is often seen as extraordinary and given a constitution's importance in providing stability they are purposefully designed to be difficult to change (as noted in [Chapter 3](#)).²⁸² The assumption, therefore, made in the models above was that any game modelling constitutional reform would be a single-shot game unlike models concerned with ordinary 'day-to-day' political decisions. The other assumption based on the design of Dayton institutions is that there is very limited civic involvement (so k in the [Formula 4.1d](#) (restated below) is very low).

In the models below it is demonstrated that proposing a new constitution for Bosnia relaxing these two assumptions will have two significant effects. First, allowing greater communication and repeated games will facilitate greater inter-ethnic cooperation. Second, involving the masses will bring the position of the elites closer to the median-voter position. If the statistics (in [Chapter 2](#)) are to be believed the preferences of the median voter in Bosnia are moderate, accommodating and far more inclined to political participation than consociational models would presume them to be. Civic involvement, therefore, should moderate elite behaviour significantly (increasing k) and alter the veto player scenario displayed in [Figures 4.2A](#) and [4.2B](#) above.

Greater communication and repeated interaction

Relaxing these assumptions will mean that a future constitution of Bosnia could be far more flexible than normal constitutions. Repeated games would mean the opportunity to change the constitution on a regular and fixed basis (i.e. a revolving constitution). But, of course, such change must not destabilise the State. Mechanisms which could

²⁸² See further, Dougherty, Keith L. and Edward, Julian. *The Calculus of Consent and Constitutional Design*. New York: Springer Science+Business Media, LLC, 2011.

be used to ensure State stability are outlined in sub-chapter 4.4 below. Similarly, civic involvement and legitimacy can be a blessing and a curse: the issue of constitutional reform cannot be allowed to be used for narrow elite goals or politicised to replicate the current situation amongst elites at the level of the masses. Referendums in their simple and unrefined form can indeed be ‘blunt instruments’ but that they can never be usefully deployed in divided societies is wrong: “It is doubtful that a form of plebiscite can be devised, leave alone implemented, in divided societies that would avoid all these dangerous pitfalls [of inflaming and polarising conflicts].”²⁸³ Mechanisms can be built into the revolving constitution to ensure that co-operation rather than intransigence is the preferred choice as outlined in sub-chapter 4.4 below.

Figure 4.1B above outlined that where an issue is very important for both parties (such as for instance constitutional reform) the value attached by elites to T_i in the parliamentary arena will be very high and the value attached to S_i will be low. Any accommodation is highly unlikely and mutual cooperation (R_1, R_2) is not Pareto optimal. The assumption that was made was that games were single-shot and that general actors were self-interested, rational and independent. If we relax some of those assumptions²⁸⁴ and assume that games are repeated and actors have the ability to communicate and coordinate strategies then the game changes in a fundamental way. These strategies are called **contingent**.

Whatever game is being played (deadlock, chicken or prisoner’s dilemma), when player 1 chooses to cooperate player 2 chooses to cooperate with probability p (probability of inclination)²⁸⁵. Similarly, if player 1 is intransigent player 2 will be so too with probability q (probability of retaliation). Essentially, player 2’s decision is contingent on player 1’s decision before: each player would choose the strategy

²⁸³ Bose, Sumantra. *Bosnia After Dayton: Nationalist Partition and International Intervention*. New York: Oxford University Press, 2002. 51.

²⁸⁴ Tsebelis (1990) outlines the impact of correlated or contingent strategies on games in multiple arenas and demonstrates how the likelihood of the choice of each particular strategy varies with the payoffs of the game rather than preference orderings (as in single shot game without communication or iterations). See further Tsebelis. *Nested Games*, 1990. 68.

²⁸⁵ This term is used because it is assumed that player 1 by setting an example inclines player 2 to follow.

that would maximise her expected utility. p and q allows us to consider the expected utilities of each strategy as follows:

$$EU(I) = T(1 - q) + Pq$$

Equation 4.3a ²⁸⁶

$$EU(C) = Rp + S(1 - p)$$

Equation 4.3b ²⁸⁷

Cooperation would be the preferred strategy if:

$$EU(C) - EU(I) > 0$$

Inequality 4.3c

Rearranging the three equations above results in the following inequality:

$$(R - P)p + (T - P)q > (T - S)$$

Inequality 4.3d

Although it sounds intuitive, Inequality 4.3d shows that as the probabilities p and q increase the choice of cooperation is more likely. If one was to work through the inequality two propositions can be made: the likelihood of cooperation increases when the payoffs for cooperation increase (R_i and S_i) and decreases when the payoffs for intransigence increase (T_i and P_i). Those propositions apply whatever the nature of the game (prisoner's dilemma, chicken or deadlock). Critically, however, Inequality 4.3d shows that for the variation in payoffs (T_i, S_i, R_i and P_i) to make a difference, inclination to follow cooperation (p) or retaliation (q) in future rounds must be credible. Indeed, the players' perspective on the future is all important; a factor influenced by history, recent interaction and so forth. There are two extremes and an intermediate position: either (a) there is no consideration of payoffs in future rounds as players (largely elites) are concerned with immediate payoffs and are impatient (Addison &

²⁸⁶ So the expected utility of intransigence is the payoff for T (temptation to be intransigence) multiplied by the probability that retaliation will not occur ($1 - q$) plus the payoff for P (penalty for mutual intransigence) multiplied by the probability of retaliation q .

²⁸⁷ So the expected utility of cooperation is the payoff for S (being a sucker and accepting intransigence) multiplied by the probability that the other will not follow ($1 - p$) plus the payoff for R (reward for mutual cooperation) multiplied by the probability of the other following (p).

Murshed (2002)).²⁸⁸ The costs or consequences of today's action in the future is heavily discounted; both in terms of reputation of players (e.g. for being non-cooperative) and their inability in future rounds to create surprises (e.g. strategically resorting to conflict when the opponent least expects it)²⁸⁹ – often situations of war; or (b) elites are highly concerned about the future (especially constitutional 'game rules') and, therefore, unconstrained by any outside forces choose high level conflict to finally determine the future; or (c) elites are highly concerned about the future (especially constitutional 'game rules') and, therefore, choose low levels of conflict with their opponents to ensure an outcome favourable to them in the future - given that they are unable to erase their opponents they will exist in the future and they must accommodate them somehow (Garfinkel & Skaperdas (2000)). In the latter case, both reputation and surprises matter and it is the situation most relevant to this study.

As demonstrated in Chapter 3, in the parliamentary arena legislation was constantly vetoed and parties preferred intransigence precisely because there were very low payoffs for cooperation (R_i and S_i). The likelihood of retaliation (q) or inclination to follow cooperation (p) was very low. Remember, in a single-shot game with no communication the size of the payoffs could not be varied and, therefore, preference orderings were all important. What makes the game of constitutional reform different is that the rules themselves are being changed – future interaction is being determined. Introducing contingent strategies can make threats of retaliation (q) or promise of cooperation (p) very believable and real (because the new rules may either reward or punish). Now the immediate objection to this might be why would elites commit to making any changes given that

²⁸⁸ Of course, this might apply for ordinary political decisions as much as it does to constitutional decisions.

²⁸⁹ The discount factor, $d=1/(1+r)$, is a figure between 0 and 1. r is the indicator of time preference. d , determines the relative weight attached by a player to the future, where 0 demonstrates no concern for the future, only immediate payoffs in the current stage game and 1 a sole concern with future payoffs (demonstrating supreme patience and concern for long-term well being). See further, Leyton-Brown, Kevin and Shoham, Yoav. *Essentials of Game Theory: A Concise, Multidisciplinary Introduction*. Oregon: Morgan & Claypool. 2008. 51 and Addison, Tony and S. Mansoob Murshed (2002). 'Credibility and Reputation in Peacemaking', *Journal of Peace Research* 39(4): 495.

consent of all significant elites, more or less, needs to be obtained? Why not be intransigent in all periods? These issues will be addressed below and it will be demonstrated that allowing repeated interaction and, in particular, involving the masses can have a special positive effect.

Repeated interaction

Repeated interaction, in fact, is in many ways critical because players become interested in maximising their payoffs during the entire period of interaction.²⁹⁰ As a result it becomes rational to choose sub-optimal outcomes in the single-shot game if such strategies increase their payoffs over repeated interaction (Luce and Raiffa (1957); Axelrod (1984); Tsebelis (1990). Carroll (1985) has suggested that if in a repeated game the number of rounds of interaction are finite then contingent strategies are impossible. By backward induction a player would rightly expect defection in the final round and, therefore, defect earlier in anticipation of future defection.²⁹¹ Indeed, in repeated games only the penultimate and final rounds are important subject only to a discount factor to weight the relative importance of the final (second) round; whereby a relatively low importance attached to the future or impatience will lead to short-term decisions. Under Carroll's (1985) model, however, agreements between opponents could never occur (because they expect defection in the final round) which is not realistic. Fudenberg and Maskin (1986) present the folk theorem which confirms that any individually rational outcome can arise as a Nash equilibrium

²⁹⁰ Tsebelis. *Nested Games*, 1990. 75.

²⁹¹ Carroll (1985) amongst others has speculated that repeated interaction make little difference if the number of rounds are finite and players know this. By backwards induction they would work out that in the final round they have an incentive to defect. Because both players know that defection is likely in the final round they defect in the penultimate round. Such a decision process continues until the first round where they also defect. Contingent strategies, are therefore impossible because the opponent's unconditional strategy of defection in the final round will push them to defect in the first. Tsebelis. *Nested Games*, 1990. 74.

in infinitely repeated games even with sufficiently little discounting.²⁹² In addition, any outcome that gives each player at least as much as she could obtain on her own can be a stable Nash equilibrium in any number of finite rounds whenever there is incomplete information or uncertainty about the opponents payoff (as would be the case in constitutional reform).²⁹³ Credibility and the reputation of players and their ability to generate surprises in future rounds become important. As there is not perfect information there is a probability (however small) that her opponent's payoff make mutual cooperation rational for her.²⁹⁴ Moreover, with the number of repeated games threats of punishment become more credible. For a set of payoffs $T_i > R_i > P_i > S_i$ across a number of iterations when the rewards for cooperation (R_i, S_i) increase or rewards for defection (T_i, P_i) decrease cooperation could occur under much shorter time horizons. For instance, if an opponents payoffs are ($T_i=6, R_i=4, P_i=2, S_i=1$) then if she defects, she gains 2 units ($6 - 4$) in that round but thereafter will only receive 2 (a net loss of 2) in each further round – so more than two iterations are required for punishment. If the payoffs for mutual defection decrease so $P_i=1$; following defection the net loss is 3 units so she is punished immediately in the next round.

Constitutional revolutions

Greater communication and repeated interaction are, therefore, in principle, important for the game in the parliamentary arena. For constitutional reform in Bosnia, because the rules of the game are being

²⁹² A player in essence cooperates until the other player fails to cooperate, which results in non-cooperation forever more. The only caveat is that the discount factor for the future needs to be sufficiently high (so that the players attach a sufficiently high weight to the future (such that the punishment can be painful). If, therefore, players are sufficiently patient cooperation can be sustained. Zikos, Vasileios. *Lecture Notes on Game Theory*, 29 September 2013; and Fudenberg, Drew and Maskin, Eric. "The Folk Theorem in Repeated Games with Discounting or with Incomplete Information." *Econometrica*, Vol. 54, No. 3 (May, 1986), pp. 533-554. 533.

²⁹³ In the [Figure 4.1B](#) above for any type of game, each player can guarantee themselves P_i and therefore any outcome that is at least P_i is equilibrium. Players can arrive at any point Pareto superior to (P_i, P_i) and be at equilibrium: essentially repeated games helps players reach the Pareto surface.

²⁹⁴ Tsebelis. *Nested Games*, 1990. 76.

decided, punishments would be much more painful and incentives much rewarding. For repeated interaction to work however there must be a fixed and regular possibility to amend the constitution (with civic involvement of course). A failure to amend or unilateral deviation amongst participants must lead to the threat of credible punishment and preferably a monotonic reward scheme that links choices made by players to rewards. Higher levels of accommodation should be rewarded²⁹⁵ with higher payoffs so that different players have an incentive to align themselves in a way that they can be identified by their equilibrium choices (incentive compatibility). Such credible punishment in the parliamentary arena would be an inability to form a government, dissolving of parliament and requirement to re-elect of elites (see further sub-chapter 4.4). Indeed, in Bosnia, under the current State Constitution a failure to pass policy has no consequences for the coalition government. Kavish (2012) rightly notes that in the current system with no risk of government collapse, ‘there is little incentive for the ethnically based parties to compromise resulting in renewed emphasis on each group’s “preferred solutions” and nationalist rhetoric.’²⁹⁶ In the proposed model, the rewards for cooperation (R_i and S_j) would increase significantly and the threat of retaliation (with probability q) would be very credible which would encourage elites to bargain more than they are currently willing in a single-shot game. Far more important, however, than the possibility of government collapse would be the threat posed by one critical aspect of this model: the masses. Civic involvement will help to ensure greater responsiveness of the Parliamentary Assembly to the will of an accommodating majority and ensure the stability of the State (if not the government).

Two objections to the ‘outcome’ provided by repeated interaction may be made by considering the work of elite spoilers who can play on

²⁹⁵ Such features already exist in institutions in other spheres: “For instance, many constitutions involve explicit provisions for amendment, [via voting rules] while a designer of repeated auctions or other repeated allocation mechanisms often commits to excluding collusive bidders or free-riders from future participation.” Lee, Jihong and Sabourian, Hamid. “Efficient Repeated Implementation.” *Econometrica*, Vol. 79, No. 6 (November, 2011), 1967–1994.

²⁹⁶ Kavish, Donovan. “Constitutional Reform in Bosnia and Herzegovina: State-Nation Theory and the Spirit of the Dayton Accords.” *INTL* 494-01: Fall 2012. 15.

secessionist sentiment: (a) why would players (elites) willing to take any spoiling action in the short term (e.g. pursue conflict, secession, or even terrorism) be conciliatory and loose their reputation for being tough on the opponent (especially if one makes the assumption that the future is not discounted heavily by elites)?²⁹⁷ and (b) why would such spoilers reveal their dominant position (i.e. to compromise) in the repeated interaction game when that could mean losing the ability to generate surprises in the future? Considering objection (a): Spoilers, in terms of their recourse to violent conflict, are still kept in check by the guarantee provided by the signatories to the Dayton Peace Agreement which precludes any imminent violent conflict in the medium term.²⁹⁸ Unilateral secession of either group, we could also conclude, is also not a viable option given the guarantee provided by the parties to the Dayton Peace Agreement. Unilateral secession would also have no basis under international law and would not in the case of RS gain wide acceptance.²⁹⁹ Spoilers would be incentivised to compromise as given uncertain information they would still retain the ability to generate surprises in later stages of the game. Extremist follower's of spoilers, with participation and incentive compatibility constraints may mean they would defect from any conciliatory behaviour of the elites but again the international guarantee will contain such defection (which

²⁹⁷ See for instance, the work of Murshed (2002, 2010). Murshed, Mansoob. *Explaining Civil War: A Rational Choice Approach*. Cheltenham: Edward Elgar Publishing, 2010.

²⁹⁸ Especially given the proximity of Bosnia to the EU, the history of the violent conflict in Bosnia, and the geo-strategic considerations at play in the region with various minorities in each of the South East European states.

²⁹⁹ A region's desire for independence from a State is not sufficient. The RS has not been subject "subject to alien subjugation, domination or exploitation", nor has its people been "denied any meaningful exercise of its right to self-determination within the state of which it forms a part." If anything the RS has had quite the opposite experience with wide autonomy and the ability to exercise their rights to self determination internally within Bosnia (See further Canada. In the Supreme Court of Canada in the Matter of Section 53 of the Supreme Court Act, R.S.C. 1985, Chap. S-26 and in the Matter of a Reference by the Governor in Council Concerning Certain Questions Relating to Secession of Quebec from Canada, As Set Out in Order in Council P.C. 1996-1497, Dated the 30th Day of September, 1996. Ottawa: Supreme Court of Canada, 1997; International Crisis Group. *Bosnia: What Does Republika Srpska Want?* Europe Report N°214 – 6 October 2011. 24.

elites will recognise). In addition, under the mechanisms developed in sub-chapter 4.4 the body that would consider constitutional amendments would have electoral rules favouring centripetal positions thereby restricting the ability of extremists to get elected. Considering objection (b): Indeed, if the current institutional arrangement for constitutional change were kept intact, spoilers would have little reason to reveal their dominant position in the initial rounds given their reputation for intransigence. The current actors in the Parliamentary Arena are already those taking the most extreme positions and therefore there is little further scope for more extreme intransigence, short of violent conflict. In the proposal for a revolving constitution the non-nationalist types in repeated interaction will be encouraged to reveal their dominant strategy of compromise (which they are unable to currently do). The extreme nationalist elites will have a check on their ability to spoil the game due to new institutional restraints and rewards for higher accommodation. Also, given the smaller pool of people extreme nationalists can now call followers³⁰⁰ there will be little loss to them to be conciliatory (other than losing extremist minority support). In any case, the least bad outcome would remain the status quo, which is characterised by deadlock, and elite intransigence.

Civic mass involvement

The problem identified in the games above demonstrated that insulation of the parliamentary arena from the electoral arena was a major stumbling block to reform. How might direct civic involvement (a referendum of a sort) affect the game being played in the parliamentary arena? The outcomes selected by elites in parliament will of course be preferred by them over the status quo, while the outcomes selected by a referendum will be preferred by a majority of voters. As we saw earlier, on a single-dimensional issue the outcome would be determined by the median voter. In multiple dimensions (where there is more than one issue as in constitutional reform) a medium voter does not really exist. The preferences, however, of a large population may be very well approximated by a small circle (the ‘yolk’) which is the shaded circle

³⁰⁰ Assuming, of course, there is appropriate non-nationalist civic involvement in the new institutions.

in [Figure 4.3A](#) below. The yolk represents the centre of the intersection all the ‘median’ lines (at which point each voter is indifferent between two alternatives equal distance from their ideal point). The winset of the status quo (i.e. the points at which the median voters would like to reach) is located at the centre of the circle, y .³⁰¹

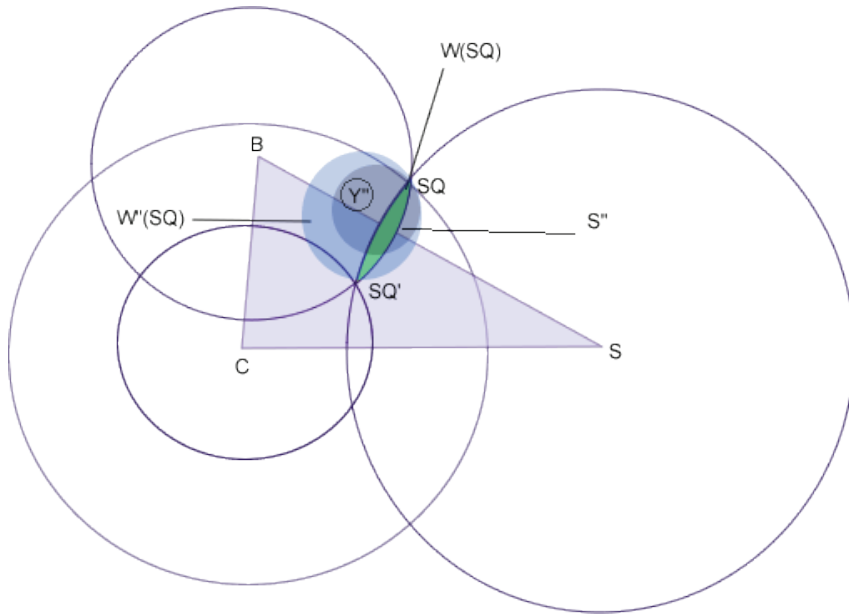


Figure 4.3A

³⁰¹ The details of this proof are not set out here as it has already extensively been set out by others. Needless to say I take it for granted that the median voter is represented by the circle and the winset of the status quo (i.e. the points that allow departure from the status quo are located within that circle). A more precise description is provided by Hug and Tsebelis (2002): “*What the previous two paragraphs indicate is that for a large population, the median voter may not exist but all median lines pass through a very small area (of radius r), so an ‘as if’ median can be very well approximated by the centre Y of the yolk of the population. In addition, the winset of the status quo for such a large population is also very well approximated by a circle with radius d .*” Hug, Simon and Tsebelis, George. “Veto players and referendums around the world.” *Journal of Theoretical Politics* 14(4): 465-515. 2002. 473 and 476; and Tsebelis. *Veto Players*. 2002. 176.

Figure 4.3A above shows how a referendum on the State Constitution may interact with the parliamentary arena. Elite preferences are represented by the circles B, C and S. The ideal preference of the median voter is represented by the centre of the yolk Y'' which is the shaded circle. One scenario (based on the analysis in Chapter 2) is that the outcome of a referendum on the State Constitution would be located in the shaded area called W''(SQ) while the winset of the elites remains at W(SQ) (the green shaded ellipse). This demonstrates that whilst the possible outcomes of a referendum or parliamentary decision can have a common outcome ($W(SQ)=W''(SQ)$) the preferences of the political elites and voters may not coincide. In fact, the outcome of a referendum could fall anywhere in the shaded area, W''(SQ). That would suggest that referendums should decrease policy stability as the number of outcomes that can defeat the status quo are significantly increased. Greater civic involvement would increase the possibility of change in Bosnia (especially if my evidence-based assumption that the electorate is more accommodating than the elites is correct).

There is, however, one important aspect that could mean that referendums induce greater policy stability than currently the case. The institutions that regulate referendums are critical. In particular who is able to trigger a referendum and who can ask the questions are crucial.

Bare referendums

If a referendum is merely the ability to ratify a constitutional amendment of the parliamentary arena (as is usual in many countries³⁰²) then the outcome has to be located within the intersection of the parliamentary and popular winsets ($W(SQ)=Y''$). So referendums (which are merely required to ratify) create an

³⁰² Suski (1993: 138, 142) confirms that out of 160 constitutions analysed 56 make reference to referendum on constitutional amendments. Of those, only 36 make explicit reference to required referendums for ratification. 47 countries allow for non-required referendums but only a minority allow civic initiatives. See further Hug and Tsebelis. 2002. 487.

additional veto player in the game: the people.³⁰³ One could conclude that even if allowing referendums merely creates an additional veto player, the majority of the voters will not be any worse off (they are guaranteed at least minimal reform $W(SQ)$ should $W''(SQ)$ overlap $W(SQ)$). Even better, any decision taken would be closer to the voters median position should $W''(SQ)$ intersect $W(SQ)$) (for instance if $W''(SQ)$ was the darkly shaded circle in [Figure 4.3A](#)). But mere ratification will not really increase the winset of the status quo overall although it would ensure the position of the median voter is taken into account. In the minority of cases where the civic veto can strike down parts of legislation as opposed to the entire legislative decision then the potential for policy change can increase.³⁰⁴ Policy stability in most cases then would reign as a result of a required bare referendum.

Partisan triggers out of the question

Furthermore, any proposal for constitutional referendums in Bosnia cannot be partisan – that is the ability to trigger referendums or set agenda questions cannot be partisan. If B, C or S were all given equal ability to call referendums then if one player gets an outcome in the parliamentary arena outside of the winset of the voters ($W''(SQ)$) and the elites own ideal position then it has an incentive to call a referendum to get an outcome closer to its own ideal points – the centre of the circles B, C or S. The positive aspect from this is that the median voter position would be better represented; the downside

³⁰³ It is assumed that simple majorities in a referendum can pass a policy proposal purely for simplifying the model. The model can easily accommodate differences in majority requirements. See further on required referendums in Hug, Simon and Tsebelis, George. “Veto players and referendums around the world.” *Journal of Theoretical Politics* 14(4): 465-515. 2002. 478; and Tsebelis. *Veto Players*. 2002. 176.

³⁰⁴ Referendums on this basis are allowed in Italy. See further Hug and Tsebelis. 2002. 491.

is that instability and short-termism would reign (Cronin (1989)).³⁰⁵

More serious is if B, C or S is also able to set the agenda question on constitutional reform then assuming complete information the referendum agenda setter would be guaranteed to get the outcome it most prefers from the popular winset of the status quo $W'(SQ)$. Let us assume that the actual popular winset of the status quo is the darkly shaded circle in [Figure 4.3A](#). If S had a referendum veto and agenda setting power independent of the parliamentary arena it would anticipate that SQ' is likely to be the outcome of parliamentary agreement. Alternatively, SQ' may be the result of a decision in the parliamentary arena. To obtain, however, a better position for itself, S may trigger a referendum, set an agenda question designed to influence an outcome closer to its most preferred position. It obtains outcome S'' or even retreats to the old status quo SQ : therefore, a possibility of reaching SQ' is vetoed. Indeed, the referendums used by the RS and the Croatian Sabor (discussed in [Chapter 2](#) above) were exactly designed to have such an impact: referendums are called, leading questions are posed (“would you agree to secession if a majority agreed?”) and the inevitable success of the referendum is used as leverage to veto policy proposals that are disliked. Giving partisan players the ability to set the agenda in a referendum would risk cancelling out other partisan veto players leading to governmental or even State instability. Just as important, using referendums as partisan vetoes will lead to greater policy stability (i.e. moving away from the status quo will become very difficult). The will of the people may be merely the will of one segment.³⁰⁶

³⁰⁵ Cronin, Thomas E. *Direct Democracy: The Politics of Initiative, Referendum, and Recall*. Cambridge, MA: Harvard University Press, 1989. See also Reviews by Zimmerman, Joseph F. *Annals of the American Academy of Political and Social Science*, Vol. 507, Privatizing and Marketizing Socialism (Jan., 1990), pp. 159-160; Engstrom, Richard L. *Presidential Studies Quarterly*, Vol. 22, No. 4, America's Bill of Rights, Market Economies And Republican Governments (Fall, 1992), pp. 786-788; and Benedict, Robert. *The American Political Science Review*, Vol. 85, No. 1 (Mar., 1991), pp. 281-282.

³⁰⁶ Hug and Tsebelis. 2002. 483.

Civic initiatives

Where the ability to trigger referendums and critically set the agenda is by civic initiative (i.e. citizens trigger and ask questions) then the outcomes can significantly shake up the status quo especially if elite preferences in the parliamentary arena are not close to the median voter preferences. Indeed, if the process of referendums is completely detached from the parliamentary arena then the winset of the elite (as veto players) can be completely eliminated and replaced by the winset of the masses: the lightly shaded circle in [Figure 4.3A](#). Elite veto players can be completely disregarded so it is unsurprising that very few constitutions provide for unrestrained civic initiatives.³⁰⁷ Civic initiatives could lead (in theory) to a much wider popular winset ($W^*(SQ)$) and far greater scope for change. The optimal position (in order to maintain governmental stability and ensure a check on unconstrained voter preferences) is a balanced link between the parliamentary arena and electoral arena.

What empirical evidence supports the theoretical position on civic initiatives? Tsebelis's (2002) caveat can only be echoed: so few civic initiatives are built into constitutions that there are few, if any, studies showing the effect of such referendums on policy outcomes cross-comparatively. Although Gerber (1996) shows that at a sub-national level in the USA and Switzerland that provision for civic initiatives lead to policies significantly closer to the voters' median position.³⁰⁸ Where civic initiatives are introduced, agenda setting powers (both triggering and setting questions) should ideally be competitive and inclusive. Hug and Tsebelis (2002) rightly note that that if all the potential players (both veto and non-veto) are included in the selection process then the status quo would only be defeated if proposals are made so that they are supported by a majority; "which means that the process will converge towards the preferences of the 'median voter'."³⁰⁹ Much of the literature focuses on civic initiatives launched by broad based citizen groups or specialist interest groups to

³⁰⁷ Only 11 constitutions provide civic initiatives but these provisions other than in Switzerland are hardly used. The countries allowing for such initiatives include: Belarus, Latvia, Liechtenstein, Lithuania, Moldova, Philippines, Slovakia, Switzerland and Ukraine. See further *Ibid*, 489.

³⁰⁸ *Ibid*, 492.

³⁰⁹ *Ibid*, 486.

trigger and set questions (Gerber (1999); Hug and Tsebelis (2002)). Broad based groups would collect signatures meeting a high threshold, which would indicate wide majority support, leading to moderate proposals close to the median voter. Such a system, however, relies on a homogenous and relatively harmonious population without significant cleavages. In a conventional way, signature selection could not work in Bosnia. Thresholds would either not be met as a result of elites mobilising support against any initiative they disliked that attempted to collect signatures for reform. Lowering the threshold to encourage use would risk that elite veto players may try and initiate referendums in their own isolated segments to trigger a referendum and set questions pursuing narrow nationalist goals – far away from the preferences of the median voter.

Harnessing the power of referendums

It is possible, however, to harness the power of referendums for meaningful constitutional reform in Bosnia. Thaler and Sunstein (2009) (following in the footsteps of Tversky and Kahneman (1974)) use prospect theory (or behavioural psychology) to demonstrate that decision making and preference formation under risk is not simply a function of utility maximisation (as they are under rational choice models).³¹⁰ Violations of the assumptions of rational choice models³¹¹

³¹⁰ From observed behaviour prospect theory says that: People systematically make decisions which assess probabilities poorly. People tend weigh losses greater than gains (i.e. they are loss averse). People tend to be more interested in their relative gains and losses as opposed to their final income and wealth – they therefore encode choices in terms of deviations from a reference point rather than net assets. People tend to under-react to low-probability events and over-weight high-probability events (certainty effect). Because people are loss averse and they are interested in relative gains and losses the identification of the reference point, or framing of a choice problem, becomes absolutely critical. Tversky, A. and Kahneman, D. ‘Judgment Under Uncertainty: Heuristics and Biases’ (1974) 185 *Science* 1124-1130; Thaler, Richard H., and Cass R. Sunstein. *Nudge: Improving Decisions About Health, Wealth, and Happiness*. New York: Penguin Books, 2009; Yeung, Karen. “Nudge as Fudge. Review Article on Nudge (2012)” 75(1) *Modern Law Review* 122-148

³¹¹ Or more accurately, violation of several of the basic assumptions of expected-utility theory in uncertain choice situations including transitivity, dominance, invariance, and cancellation (or the independence of irrelevant alternatives transitivity, dominance, invariance, and cancellation (or the independence of irrelevant alternatives).

generate, in particular, two biases that could affect constitutional referendums (a status quo bias and framing effects).³¹² The status quo bias refers to the tendency not to change established behaviour,³¹³ thereby remaining passive, unless compelling incentives are provided to do so.³¹⁴ It can also mean that actors encode choices in terms of deviations (loss or gain) from a reference point rather than simply think in terms of gains and losses³¹⁵ – choices made during or immediately after a war are different from choices made in times of relative peace. ‘Framing effects’ occur when two “logically equivalent (but not transparently equivalent) statements of a problem lead decision makers to choose

³¹² “Transitivity requires that if A is preferred to B and B to C, then A is preferred to C. Dominance means that if one option is better than another in one state of the world and at least as good in all other states, the dominant option should be chosen. Cancellation- which is equivalent to the substitution axiom (von Neumann and Morgenstern, 1944), the extended sure thing principle (Savage, 1954), and the independence of irrelevant alternatives-refers to the elimination of any state of the world that yields the same outcome regardless of one’s choice. Invariance, or “extensionality” (Arrow, 1982), requires that different representations of the same (i.e., mathematically equivalent) choice problem should yield the same preferences (Tversky & Kahneman, 1986, pp. S253-S254). On the axiomatic foundations of utility theory, see Luce and Raiffa (1957, Ch. 2). For a discussion of behavioural violations of these axioms, see Kahneman and Tversky (1979), Arrow (1982), Tversky and Kahneman (1986, pp. S252-S254), and Tversky, Slovic, and Kahneman (1990)”. Levy, Jack S. “An Introduction to Prospect Theory.” *Political Psychology*, Vol. 13, No. 2, Special Issue: Prospect Theory and Political Psychology, (Jun., 1992), pp. 171-186.

³¹³ Given people’s limited time, intellectual capacity and resources.

³¹⁴ Kahneman and Tversky (1979) also talk about an ‘endowment effect’ as an instance of status quo bias. When people value objects/services already in their possession more than items that they do not have. Preventing loss of something already owned, therefore, is far more important than gaining something extra. Studies also point to psychological discounting (Frederick (2002)). People would tend to place more weight on the short term than on the long term effects decisions. Thaler and Sunstein. *Nudge*. 2009; Stoker, Gerry. “The Politics of Nudge: dilemmas in implementing policies for sustainable consumption”. *University of Southampton*. August 2012. 3; Yeung, Karen. “Nudge as Fudge”. Review article on Nudge (2012) 75(1) *Modern Law Review* 122-148. 6.

³¹⁵ Levy, Jack S. “An Introduction to Prospect Theory.” *Political Psychology*, Vol. 13, No. 2, Special Issue: Prospect Theory and Political Psychology, (Jun., 1992), pp. 171-186.

different options.”³¹⁶ If the status quo bias and framing effects hold, then, Thaler and Sunstein’s work could contain some very useful suggestions for overcoming biases in the political arena. In particular, designing policies with defaults that are closer to voters’ ‘real preferences’³¹⁷ or desires (i.e. nudging³¹⁸ them) without removing voter’s ability to choose could have very useful social, political and economic consequences in Bosnia.³¹⁹

Framing effects in particular have enormous implications for referenda agenda setting, in particular, for followers. Indeed, at a normative level at its extreme it suggests that voter preferences are nothing more than arbitrary whims and completely irrelevant when policy makers are considering decisions which impact voters.³²⁰ At a positive level, framing effects would break the connection between the normative theory of rational actors (in particular, the axiom of invariance) and the expectation that actual human behaviour accords to rational choice assumptions about maximising utility. Framed the right way, therefore, and you can get voters to agree to pretty much anything.

The assumptions, however, of prospect theory (of the non-utility maximising rational actor) challenge the assumptions of the

³¹⁶ The example frequently used is that people support an economic program when it is said to result in 90% employment, but then oppose the same program when it is said to result in 10% unemployment. Druckman, James N. “Using Credible Advice to Overcome Framing Effects.” *Journal of Law, Economics, & Organization*, Vol. 17, No. 1 (Apr., 2001), pp. 62-82. 62.

³¹⁷ Which of course begs the question what real preferences are? For to ‘nudge’ people towards their real preferences would presumably mean to nudge them in the direction of the normative rational actor. Nudge’s libertarian paternalism presumes that policy makers understand what ordinary people want better than the people themselves leaving open the possibility of policy makers’ susceptibility to make mistakes. See further Leonard, Thomas C. Review article on Nudge (2009). *Department of Economics, Princeton University. Springer Science+Business Media, LLC* 2008; and Farrell, Henry and Shalizi, Cosma. “‘Nudge’ policies are another name for coercion”. *New Scientist Magazine*. Issue 2837. 09 November 2011.

³¹⁸ By which he means ‘any aspect of the choice architecture that alters people’s behaviour in a predictable way without forbidding any options or significantly changing their economic incentives.’ Thaler and Sunstein. *Nudge*. 6.

³¹⁹ Some examples Thaler and Sunstein consider is enrolling employees on a pension scheme or people onto an organ donation scheme automatically unless they actively opt out.

³²⁰ *Ibid*, 63.

rational choice model used above which hold such an actor (albeit a relatively weak one) as the basis for analysis. There is some way to reconcile the work of Thaler and Sunstein to the models above. The two biases can be accounted for in the rational choice framework. Druckman (2001) demonstrates that individuals can overcome framing effects by relying on credible advice. In fact, much of the literature on framing effects (including Kahneman and Tversky's work) has ignored this possibility by forcing experimental participants to make decisions in isolation from social contact and context.³²¹ Variance of preferences as a result of framing can be addressed to a large extent by greater information and interaction amongst individuals.³²² At the very least, simultaneous presentation of choices would render framing effects more transparent and reduce the chance that decision makers are influenced by them without knowledge or desire.³²³ For elites this would already be the case and, as demonstrated in the models above, they are driven largely by narrow self-interest. For followers, however, framing effects matter but only to the extent that they make choices with relatively little information and relatively little credible advice. The veto player approach analysing referendums confirmed as much in that the partisan veto player who was entitled to set questions which would achieve a result closer to her ideal point than the other veto players.

Regardless, of the strength of rational choice assumptions in individual decision making some insight on constitutional referendums can be gained from the effects of framing and status quo bias: in

³²¹ Druckman, James N. "Using Credible Advice to Overcome Framing Effects." *Journal of Law, Economics, & Organization*, Vol. 17, No. 1 (Apr., 2001), pp. 62-82. 64.

³²² Although, the advice giver themselves must be credible and believed to be so. In any case, "... preference formation is consistent with a conventional rational choice model where people base their preferences on their prior beliefs as well a credible signal (e.g., Lupia and McCubbins, 1998)-preference invariance is not violated because preferences are not based on arbitrary features of the problem description (see Arrow, 1982:7; Bartels, 1998:7). Moreover, from a normative perspective, preferences based on the systematic integration of credible information are much more meaningful as a public policy instrument." Ibid, 66.

³²³ McDermott, Rose. *Risk-Taking in International Politics: Prospect Theory in American Foreign Policy*. Ann Arbor: University of Michigan Press, 1998. 27.

particular, ‘nudging’ outcomes amongst the population at large in Bosnia towards accommodation rather than intransigence.

One such device would be to make constitutional referendums a default, fixed and regular feature of Bosnian politics (what I would term a **‘revolving constitution’**). The procedural rules of such a constitutional regime would be set out in a Constitutional Covenant widely agreed and adopted.³²⁴ Based on the models above, a revolving constitution would have four principle accommodating effects: (a) it would introduce into political life the possibility of iterated games with the consequent effect that cooperation and accommodation becomes much more likely; (b) The process of agenda setting (triggering and asking questions) would be made possible but critically removing status quo bias or the possibility of the process being hijacked by narrow ethno-nationalist goals. Also, mechanisms for referendum by civic initiative would become a possibility without partisan framing effects (see sub-chapter 4.4 below); (c) elites would be forced to consider median voter preferences which are more accommodating when making decisions in the parliamentary arena (as Chapter 2 demonstrated). Follower incentive incompatibility and participation constraints are removed by virtue of active participation. In fact, elite vetoes can be completely eliminated should agenda setting (asking questions) be determined solely by the electorate; and (d) a Constitutional Convention could be created as a regularly convened body, with representatives of popular parties being elected to the Convention (at regular intervals) for the specific purpose of settling the terms of a new constitution (see sub-chapter 4.4 below) – therefore elite and follower preferences could be reconciled. The popular vetoes in the

³²⁴ The Constitutional Covenant would form the legal basis (both procedural and substantive) for the process of revolving the constitution and ensure the rules for setting the ‘rules of the game’ are clear, transparent and themselves ratified by the public at large. Auer (2008) considers such a Charter as a way to initiate a democratic process of autonomous constitution making in Cyprus. He does not consider anything similar to a revolving constitution but his work on trying to increase civic participation as a way to break the deadlock and give legitimacy to any future constitution in Cyprus is both useful and innovative. See further, Auer, Andreas. “On the Way to a Constitutional Convention for Cyprus.” C2D – Centre for Research on Direct Democracy. *C2D Working Paper Series 29/2008*.

parliamentary arena, of course, would be eliminated but replaced by elites being elected (as party representatives) for the specific purpose of constitutional reform; ensuring that such elites are far more closer to the position of the median voter. Countries like Cyprus, Iceland, South Africa, Germany, Poland which have considered/used such constitutional conventions can be a practical guide to implementing such a model (outlined in framework in sub-chapter 4.4 below).

4.4. A revolving constitution

In summary, there are two major insights we can obtain from this study. First, constitutional referendums properly institutionalised and with procedural safeguards³²⁵ will make people no worse off than the status quo. If anything just the mere possibility of a referendum guarantees that any outcome in terms of constitutional reform would accord with the median voter (whether accommodating or intransigent). In Bosnia that is progress in itself notwithstanding the significant benefits that participation would bring: increase in popular legitimacy of reform, increase in public trust in institutions and empowering citizens with a sense of ownership in the State constitution.³²⁶ Policy choices in the parliamentary arena would be located in the set of preferences of the electorate as whole, in particular, choices about fundamental game rules. Whilst the adoption of a revolving constitution would seem like a polemical revolutionary moment in fact its actual operation would tend to constitutional evolution: the possibility of amending the constitution with civic involvement (under the mechanisms set out below) would lead to a whole raft of moderate proposals which could incrementally

³²⁵ Cronin (1989) suggests a number ranging from: “details of petition requirements (number of signatures, geographical distribution, certification) through campaign regulations (fairness doctrines, mandatory financial disclosures, public financing), to scheduling (general elections only).” Engstrom, Richard L. *Presidential Studies Quarterly*, Vol. 22, No. 4, America’s Bill of Rights, Market Economies And Republican Governments (Fall, 1992), pp. 786-788.

³²⁶ PILPG. Participatory Constitutional Reform. Legal Memorandum. April 2012.

change the shape of Bosnian politics.³²⁷ A Constitutional Covenant in Bosnia – far from imposing any normative prescription of the majority on the various groups – would open up the potential for civic debate and changing the constitutional institutions that have embedded ethnic division and discriminatory/exclusivist politics (Stojanović (2011) cf. Bochsler (2011)).³²⁸ Critically, State stability would be maintained (Behnke (2008); Lerner (2011) cf. Doyle (2011)).

Second, if the evidence-based assumption (as demonstrated in [Chapter 2](#)) that the people of Bosnia continue to move towards reconciliation is correct constitutional referendums would allow an outlet for policy change currently being completely overlooked by policy actors. Empowering people as non-veto players to set the referendum agenda competitively could fundamentally change the rules of the game in the parliamentary arena. The major limitation of course is positioning

³²⁷ Lerner (2011) writes about the value of incremental constitutional change in divided societies so that difficult issues are deferred for resolution in a more settled political climate in the future. The shortcoming of her work is that such a future may never arrive and conflict may merely be deferred into the future. Additionally, temporary constitutional measures (like not adopting a constitution in Israel) may become permanent features leading to entrenching of divides both within institutions and without. For Bosnia this is not an option as deferral has lasted long enough especially given the imperative for reforms to protect the rights of those discriminated against and to ensure a viable, self-sustaining state. There is also the further complication in Bosnia that the State Constitution has never had a civic mandate. See Lerner, Hanna. *Making Constitutions in Deeply Divided Societies*. Cambridge: Cambridge University Press, 2011. See also, Review on Lerner (2011) by Doyle, Oran. *Trinity College Dublin*. 2011.

³²⁸ It could allow the implementation of Stojanovic’s call for ‘direct democracy’ in Bosnia but avoiding the pitfalls that his approach would entail: such as (a) the risk that referenda outcomes permanently exclude certain minorities leading to instability (revolving constitutions (removing questions of agenda setting) and a Constitutional Convention deliberating on issues would avoid this pitfall); (b) erosion of human rights (a bar on amending human rights would address this); and (c) risk of further divide communities (joint-entity-civic-initiatives would ensure greater accommodation as would electoral district and accommodating voting mechanisms). Stojanović, Nenad. “Limits of Consociationalism and Possible Alternatives Centripetal Effects of Direct Democracy in a Multiethnic Society.” *Transitions vol. 51 1&2 (special issue, ed. Sylvie Ramel and Francis Cheneval)*, 2011. cf. Bochsler, Daniel. “Let the people decide? Learning from Swiss direct democracy in a comparative perspective.” *Transitions vol. 51 1&2 (special issue, ed. Sylvie Ramel and Francis Cheneval)*, 2011.

where exactly the people of Bosnia are heading: towards separation and division or toward union and cooperation. In any case, fixed and repeated civic interaction can lead to far greater constitutional change than currently possible and far greater likelihood of accommodating behaviour amongst elites sooner.

Implementing revolving constitutions

Implementing the idea of a revolving constitution can be achieved via a plethora of institutional mechanisms. Some tentative and speculative proposals are outlined below as a supplementation to my analysis above and to open a process rather than determine an outcome. Such a project would require further investigation, extensive peer review, and most importantly careful implementation.

An objection might be how to get elites to agree to a revolving constitution given their current intransigence? There are three potential ‘first movers’: (a) international actors could coordinating with the PIC, EU, USA, UNSC and other stakeholders agreeing to force elites to agree to a Constitutional Covenant, setting out the procedural rules, for a revolving constitution prior to any proposal for a new constitution – to ‘start the ball rolling’ to speak. International involvement is, however, the least best option given that forced adoption of such a rule would defeat the purpose of incentivising elites and may lead to a rejection of the concept at its inception; (b) local groups and civil society could take up the concept and raise awareness about the need to reform the State Constitution and the necessity for it to have democratic legitimacy and civic involvement. Pressure for a Constitutional Covenant (allowing a revolving constitution) could a prime focus for building ‘broad church’ coalitions that could pressure the elites in both Entities; (c) elites themselves could push for idea. If elites are playing the rational game in an institutional structure encouraging intransigence (but they would actually prefer to cooperate should the rules allow) then they themselves would acknowledge the advantage of introducing some flexibility and civic involvement for constitutional amendments. It would open the possibility for changing the rules of the game for their own benefit and for the benefit of society as a whole – the logic of the revolving constitution would be

self-fulfilling. Those inclined to accommodation and non-nationalist politics could be the concept's first champions. In reality, co-opting each of the actors above would be the most realistic way to encourage the idea of a revolving constitution.

In terms of the actual mechanics of having a fixed and regular constitutional referendums some insight may be gained from the literature on initiatives and referendums applicable to constitution making in countries like Iceland, Cyprus, Switzerland, Nepal, South Africa (Cronin (1989); Foley (1989); Trechsel (1996); Arato (2009); Auer (2008); Behnke (2008); Lerner (2011); PILPG (2012)).

First, the electorate would have an opportunity to answer a simple 'yes' or 'no' as to whether they would like to amend the constitution at fixed and regular intervals, say, for instance, every 16 years (four electoral cycles). The referendum would precede the elections but both could either be state wide with a high threshold (say 75%) or more realistically take place simultaneously in both Entities with a simple majority for reaching decisions (or a requirement for consent in a majority of municipalities).³²⁹

³²⁹ Buchanan and Tullock (1962) have talked about the necessity to have unanimity rule when making constitutional decisions despite the large costs involved in a decision with such a high threshold. They argue that making decisions about the rules of the game implies potentially large external costs (i.e. costs that other people will decide on their behalf or coerce them) — so great are the external costs, in fact that the relative importance of decision costs is very small (pp 93-96). They are right that unanimity rules would include everyone in the bargain and guarantees Pareto improvements from the status quo. Such rules are important to prevent a tyranny of the majority. But note that unanimity may preserve abhorrent or unjust situations in the status quo: a tyranny of the minority: "For example, if some actors own slaves and emancipating slaves is a core part of a proposed constitution, then requiring all constitutional decisions to be Pareto improvements from the status quo may ultimately result in the preservation of slavery." Unanimity rules in large referendums, therefore, would not be preferable in Bosnia (nor even perhaps super-majority) aside from the fact that unanimity rules would be completely unworkable. A higher threshold for the decision in the Constitutional Convention would be the compromise noting that majority rules can also be Pareto optimal (although not always improvements). Achieving Pareto optimal institutions is important: it that means that there is not another set of institutions that everyone prefers to the one just agreed. See further, Dougherty, Keith L. and Edward, Julian. *The Calculus of Consent and Constitutional Design*. New York: Springer Science+Business Media, LLC, 2011. 14, 53.

Second, should the voters choose ‘yes’ at that interval, a Constitutional Convention would be specially re-convened³³⁰ with delegates elected so as to reflect the preferences of the voters. The elections for delegates could be a state-wide alternative vote system to encourage accommodation with high thresholds or take place simultaneously in both Entities with simple majorities for candidates from municipalities. Delegates would be elected for the specific purpose of drafting the new constitution (of course, likely comprising representatives from parties in the Parliamentary Arena³³¹ and Entities) and key non-partisan experts: each being empowered to vote and decide. Preventing serving politicians from constituting delegates of the Constitutional Convention should seriously be considered to prevent reproducing cleavages and divisions in the parliamentary arena in the Convention – especially considering the different voting mechanisms used to elect delegates to the Convention (Behnke (2008)).³³²

Third, the Constitutional Convention would then deliberate on an agreed, revised Constitution – with agreement conditional on, say, 75% support of the representatives. Submissions from civil society and individuals on provisions to reform can be invited for consideration by the Convention; with a requirement that they should be considered ‘of necessity’ should certain procedural requirements be met.³³³ Various mechanisms for allowing such submissions can be adopted as examples from Iceland, South Africa, Albania demonstrate.³³⁴ An additional

³³⁰ In accordance with the rules of the Constitutional Covenant

³³¹ Though they should not hold political office whilst the Constitutional Convention is convened.

³³² Behnke, Nathalie. “Towards a new organization of federal States? – Lessons from the processes of constitutional reform in Germany, Austria, and Switzerland.” FernUniversität. *ECPR Joint Sessions of Workshops, Workshop No. 20 “The politics of constitutional change.”* Rennes, France, April 11-16 2008.

³³³ Note that aspects relating to human rights and fundamental freedoms would not be up for negotiation as under the current State Constitution but additional stronger protections could be added.

³³⁴ PILPG. Participatory Constitutional Reform. Legal Memorandum. *Bosnia and Herzegovina: PILPG*. April 2012; and Arato, Andrew. “Redeeming the Still Redeemable: Post Sovereign Constitution Making”. *International Journal of Politics, Culture, and Society*, Vol. 22, No. 4, 1989 and *Beyond: The Future of Democratic Politics* (II) (Dec., 2009), pp. 427-443.

accommodating feature would be the introduction of ‘joint-entity civic initiatives’³³⁵ whereby citizen groups accumulating a fixed number of signatories in each entity (say 100,000 with specific support (say 5,000-10,000)³³⁶) in a majority of municipalities) would be entitled to submit recommended provisions (either precisely or generally formulated) which the Constitutional Convention must consider and put to a vote. Any provision would then be included as a separate line item for popular vote together with a vote, if any, on the revision of the existing constitution. Such a mechanism would increase cross-ethnic cooperation amongst citizens (Epple-Gass (1988); Trechsel (1996)) and any abuse of process would still be checked by the requirement of support by the delegates of the Constitutional Convention. It should be noted that a failure by the Convention to draft an agreed constitution (following a vote calling for one) would lead to a crisis. Consequences could result in a fall in the government and fresh elections in the Parliamentary Arena (if parliamentary representatives are co-opted in the process) which would encourage politically partisan delegates not to hijack the process and/or fresh elections for the Convention.

Fourth, agreement on a revised Constitution would be put to a second civic referendum requiring wide majority support in the Entities. Failure to receive the required support will end the process and the current State Constitution would remain in place.

Numerous stakeholders, both domestic and international have insisted on greater civic involvement in Bosnia’s democratic process but few have suggested how involvement could occur. The Venice Commission came as close to being candid about the necessity for civic involvement as is possible for a diplomatic international institution noting all the while that the current arrangements are “largely based

³³⁵ The idea emanates from the ‘Initiative for partial revision of the constitution’ (precisely or generally formulated) in Switzerland which allows 100,000 electors to propose revisions to the current constitution. See further Trechsel, Alexander and Kriesi, Hanspeter. Switzerland: the referendum and initiative as a centrepiece of the political system. in Gallagher, Michael. and Uleri, Pier Vincenzo. *The Referendum Experience in Europe*. London: Macmillan Press Ltd, 1996. 187-190; 203.

³³⁶ With sufficient procedural safeguards such as a limitation period for signatures (e.g. 90 days), evidence of signature collections and so forth.

on the ethnic principle and maintaining it risks reproducing and reinforcing the ethnic divisions”³³⁷: “*It is desirable for the citizens at some stage to decide to have an entirely new constitution based on their own wishes and drafted during a period without ethnic strife ... The ultimate goal should be to have democratically legitimate constitutions prepared with the participation of all political forces and civil society in a public and transparent process.*”³³⁸ That ultimate goal will not be achieved if the road to reform is the most trodden. Desiring and achieving a State premised on individual rights and equality rather than collective equality of ethnic groups is to take the road least travelled or even the path unknown. ☒

³³⁷ “It seems questionable whether any of the three Constitutions provides a sound basis for the future. It is desirable for the citizens at some stage to decide to have an entirely new constitution based on their own wishes and drafted during a period without ethnic strife ... The ultimate goal should be to have democratically legitimate constitutions prepared with the participation of all political forces and civil society in a public and transparent process.” Venice Commission. *Opinion on the Constitutional Situation in Bosnia*. Adopted at its 62nd plenary session, Venice, 11-12 March 2005. 12.

³³⁸ Ibid,16.

*“The questioned swiftly replied in this wise:
Forgive me there once was a land
Sir called Bosnia
A fasting a frosty a
Footsore a drossy a
Land forgive me
That wakes from sleep sir
With a
Defiant Sneer”*

Mak Dizdar ³³⁹

CONCLUSION

Bosnia was devastated by violent conflict in the last decade of the millennium. In the new millennium, whilst the threat of violent conflict has abated a conflict of another kind has flourished and is now endemic: low latent conflict amongst the political elites of the constituent peoples.³⁴⁰

Political elites explain this conflict and their intransigence as premised avowedly on political culture; they behave as they do in the name of ‘their people’. Indeed, it has been taken for granted (by actors and academics alike) that conflict between elites in the constitutional institutions of Bosnia is a mirror reflection of the latent conflict amongst the population at large. The people in Bosnia are characterised as poor democratic participants: anti-democratic and pro-ethno-nationalist sentiment is all pervasive. Political elites, the narrative goes, merely represent faithfully the political preferences of their respective, and segmented, Bosniak, Croat and Serb electorates. Political apathy and deadlock within State institutions, therefore, is a result of a lack of citizen initiative and will (a non-participant culture).

Such a narrative, however, is not supported by Bosnia’s variegated, multi-ethnic history predicated on accommodation and tolerance.³⁴¹ In so far that an anti-democratic or intolerant culture could

³³⁹ The query of the worthy questioner appears in the Introduction. Dizdar, Mak. ‘Inscription about a land’, in *‘The Stone Sleeper’*.

³⁴⁰ Bosniaks, Croats and Serbs

³⁴¹ Although much of that history has come under the strong influence of foreign powers.

be to blame it is as a result of the political culture *emanating* from the consequences of war. This study compels us to consider that the root causes of political apathy and division are the same causes engendering an indifferent and non-participant culture – they are manifestations of one another. The institutional structures created by the State Constitution at Dayton are the primary causal variable resulting in these twin phenomenon.

Given, therefore that culture and identity ‘emanates’, it must be the case that it is rarely ever fixed or unchanging: there is always the possibility of change. This study demonstrates that the masses are increasingly moderate, accommodating and far more inclined to political participation than many have given them credit. In fact, the masses are much more accommodating than the rigid elites representing them on an exclusively ethno-national basis.³⁴²


There is, therefore, a discrepancy between elite preferences and mass or follower preferences; constitutional structures when combined with the legacy of the war tend to favour the election of ethno-nationalist elites (not least because of separate electoral districts and infrequent national elections). As the State Constitution (and by extension its institutions) is the most significant impediment to bridging societal divides its reform must be the priority and such reform must have a civic mandate. But elites, isolated from the masses,³⁴³ are unable and/or unwilling to undertake reform that is conciliatory, moderate and accommodating; they are seemingly locked in revolving doors without exit.

Given their predicament, a revolving constitution may provide a possible way out. A ‘revolving constitution’ would subject parts of the constitution to greater civic involvement and input (referendums and initiatives) on a fixed and regular basis. The study

³⁴² This assumption is based on the case study of elite behaviour in the State institutions (Chapter 3) together with the quantitative analysis in Chapter 2 demonstrating the scope for accommodation amongst the population at large. A limitation of the study is the gaps in the quantitative times series data preventing a comprehensive analysis but significant and sufficient data is available to make the claims in this study. At the very least the data confirms that culture is not fixed or unchanging and that the direction of change is positive in respect of accommodation amongst citizens.

³⁴³ On the issue of constitutional reform, at least, and arguably on almost all policy issues given the way the electoral laws and districts operate.

demonstrates that fixed and repeated referendums on the constitution properly institutionalised, and with procedural safeguards set out in a Constitutional Covenant, will make people no worse off than the status quo. If anything just the mere possibility of a constitutional referendum would guarantee that the outcomes of reform would accord with the median voter even if masses are less accommodating than evidenced in this study. Elites in the constitutional reform space, currently interacting only with each other in the parliamentary arena would be incentivised to consider the preferences of the masses in the electoral arena.³⁴⁴ As masses are more accommodating than elites, regular interaction between elites and the population at large can lead to far greater constitutional change than currently possible and far greater likelihood of accommodating behaviour amongst elites sooner.

In essence a revolving constitution would have three principle accommodating effects, namely: (a) reconcile intransigent elite and moderate mass preferences; (b) allow elites to be more conciliatory with one another in the constitutional reform policy space; (c) make cross-ethnic agreement sustainable and viable in a stable political environment. The revolving constitution far from being a revolutionary construct, immediately empowering or disempowering one group or another in the ‘political game’, would tend towards constitutional evolution although boldly in defiance of exclusive ethno-nationalism. The possibility of regularly amending the constitution with civic involvement would set in motion a process rather than determine an outcome. A process whereby actors are incentivised to pursue moderate, accommodating reform could, incrementally, alter the shape of Bosnian politics. A standard may even be set for other plural, multi-ethnic polities to follow. 

³⁴⁴ The idea that elite decision making is in the name of ‘the people’ would no longer ring hollow and masses assigning blame solely at elites for intransigence would be more difficult to sustain given that all the people will now have an opportunity to participate.

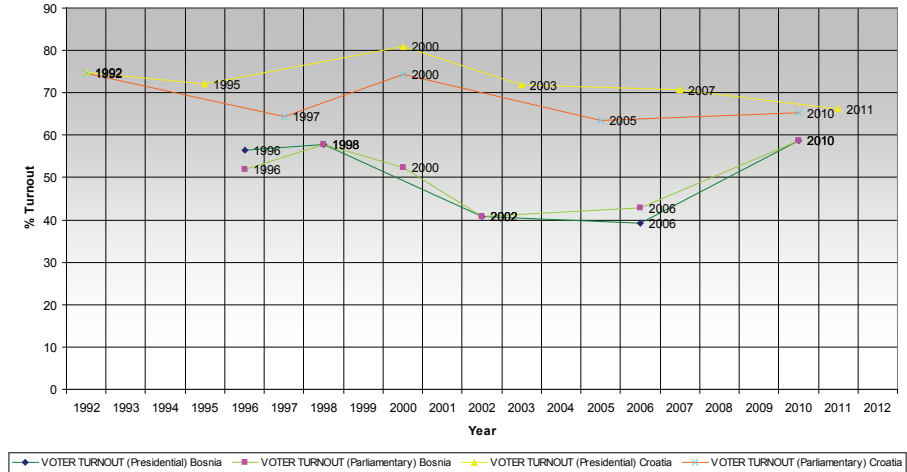
ANNEX A – GLOSSARY

Bosnia	Bosnia and Herzegovina
Bosnian	Includes but is not limited to ‘Bosniak, Bosnian Serb or Bosnian Croat,’ Bosnians, Others
CoM	Council of Ministers
Croat	Bosnian Croat unless otherwise stated
Dayton Peace Agreement	General Framework Agreement for Peace in Bosnia and Herzegovina and Annexes
EC	European Commission
ECtHR	European Court of Human Rights
EU	European Union
EUSR	European Union Special Representative
Federation	Federation of Bosnia and Herzegovina
HoP	House of Peoples
HoR	House of Representatives
HDZ	Hrvatska demokratska zajednica (Croatian Democratic Union), or HDZ BiH, largest predominantly Croat party in Bosnia
OHR	Office of the High Representative. The High Representative is the international official charged with interpreting and enforcing the Dayton Peace Agreement
PIC	Peace Implementation Council. It is a group of 55 countries and international organizations ‘that sponsor and direct the peace implementation process’
PDP	Partija demokratskog progresa (Party of Democratic Progress), the third-strongest Serb party in RS currently in opposition
RS	Republika Srpska
RSNA	Republika Srpska National Assembly
SBB	Savez za Bolju Budućnost (Union for a Better Future).

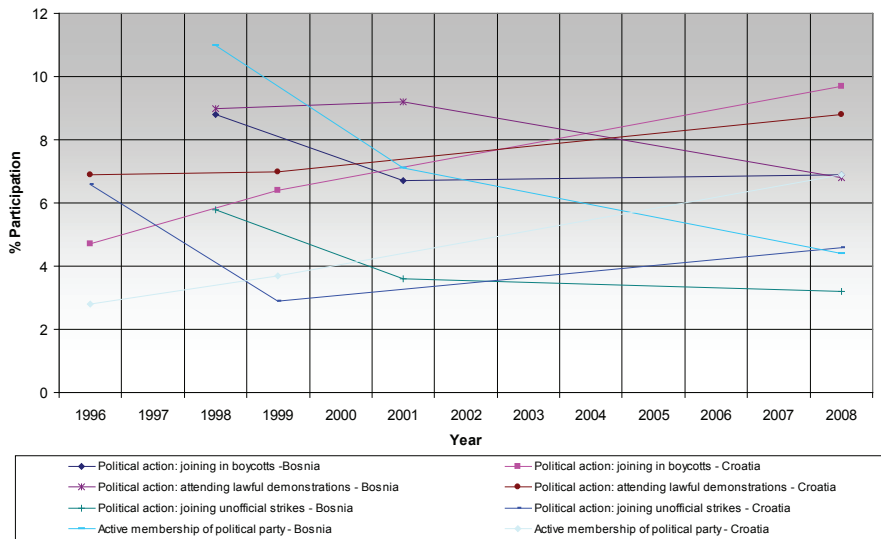
SBiH	Stranka za Bosnia (Party for Bosnia), predominantly nationalist Bosniak party.
SDA	Stranka demokratske akcije (Party for Democratic Action), largest and oldest predominantly Bosniak party.
SDP	Socijaldemokratska partija (Social Democratic Party), large multi-ethnic party. Predominantly Bosniak base. Successor to League of Communists of Bosnia.
SDS	Srpska demokratska stranka (Serb Democratic Party), Serb nationalist party that governed RS during the 1992-1995 war and for many years thereafter.
Serb SNSD	Bosnian Serb unless otherwise stated Savez nezavisnih socijaldemokratska (League of Independent Social Democrats), largest predominantly Serb party, currently the ruling party in RS.
UNSC	United Nations Security Council

ANNEX B – APPENDICES

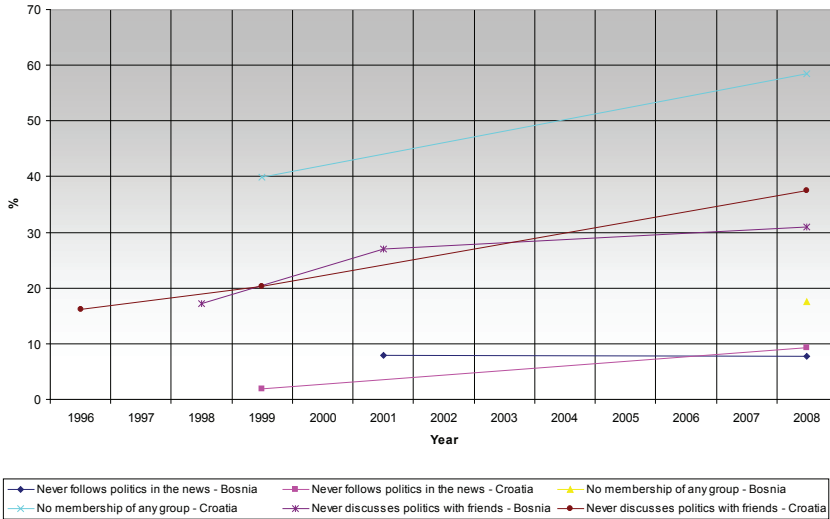
Appendix 1 - Voter Turnout



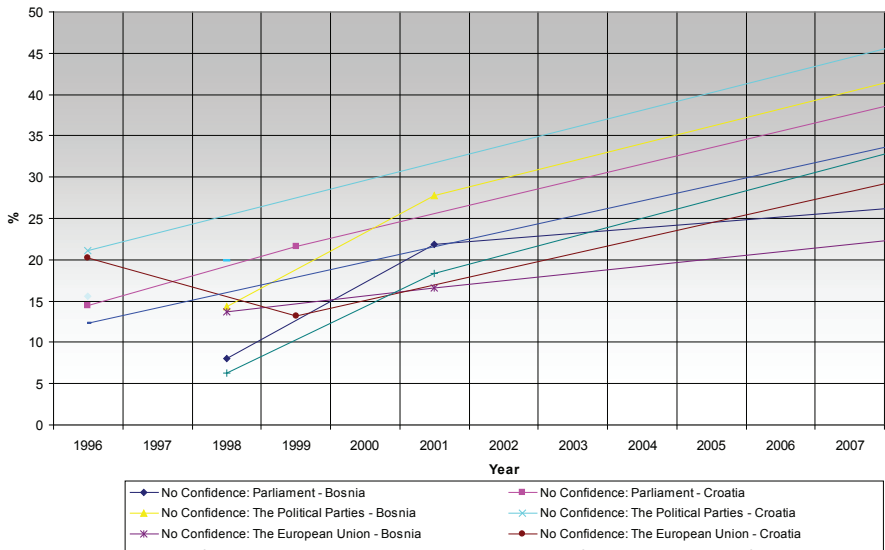
Appendix 2 - Political Apathy



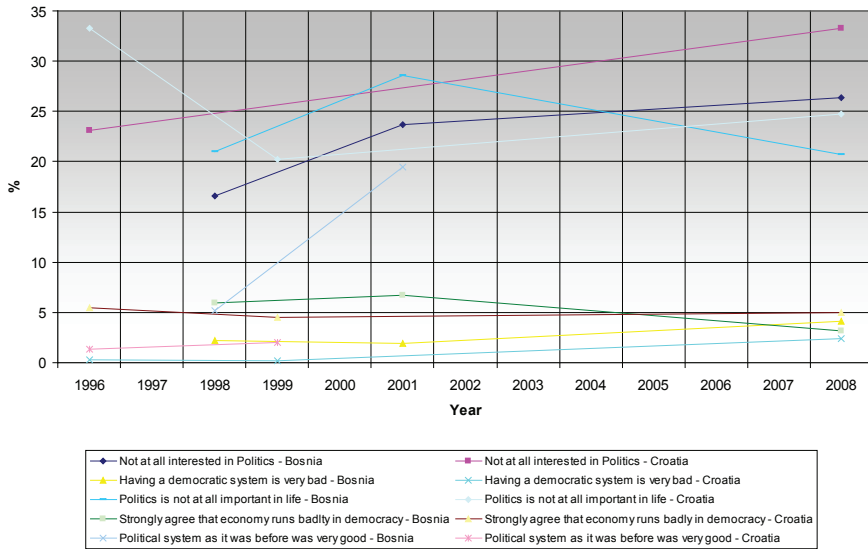
Appendix 3 - Latent Political Participation (Capacity Action)



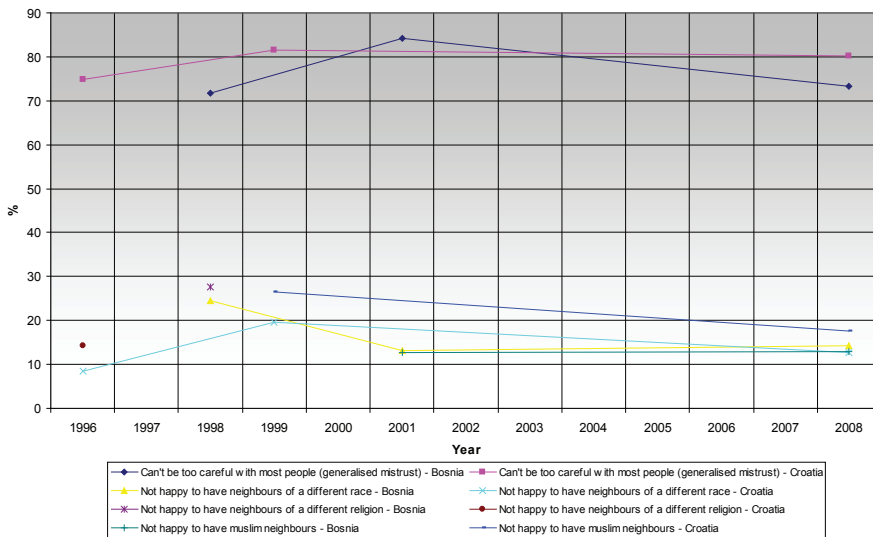
Appendix 4 - Political Culture - A-Systemic Measures (Confidence in Government)



Appendix 5 - Political Culture - Systemic Measures (Democracy and Politics)



Appendix 6 - Measures of Trust



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