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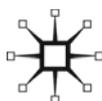
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# Post-War Statebuilding and Constitutional Reform

Beyond Dayton in Bosnia

Sofía Sebastián-Aparicio

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*To my husband Piet for his unconditional support and love,  
and to our beloved daughter  
Tessa, born three days after the delivery of the manuscript*

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# Contents

<i>List of Tables</i>	ix
<i>Foreword</i>	
Brendan O’Leary	x
<i>Acknowledgments</i>	xv
<i>List of Abbreviations</i>	xvii
<b>Introduction</b>	<b>1</b>
Research questions	3
Propositions	4
Why Bosnia?	5
Bosnia as a deeply divided society	5
Bosnia in context	8
Methodology	14
Organization of the book	22
<b>1 Post-war Statebuilding in Divided Societies: A Conceptual Framework</b>	<b>24</b>
Statebuilding after violent conflict: a review	24
Statebuilding in divided societies: the three-tiered framework	33
Conclusions	42
<b>2 Dayton</b>	<b>43</b>
The constitutional debate before Dayton	43
Dayton and the external intervention (1995–2005)	51
Beyond Dayton: the rationale	68
Conclusions	72
<b>3 Beyond Dayton I: Inter-ethnic Divisions</b>	<b>74</b>
Phase I: the engagement of party leaders	74
Analysis of Phase I: inter-ethnic divisions in post-conflict Bosnia	88
Conclusions	102
<b>4 Beyond Dayton II: External Agency</b>	<b>104</b>
Phase II: the United States takes over	104
Analysis of Phase II: the impact of external actors	118
Conclusions	125

<b>5</b>	<b>Beyond Dayton III: Intra-ethnic Divisions and Collapse</b>	<b>127</b>
	Phase III: public discussion in parliament	127
	Analysis of Phase III: the disruptive impact of intra-ethnic dynamics	130
	The 2006 elections	139
	Conclusions	144
<b>6</b>	<b>Elusive Reform and the New International Engagement</b>	<b>146</b>
	After the April Package: international disengagement (2006–07)	146
	International reset: Lajčák and the Prud process (2007–09)	150
	Butmir and Bosnia's logjam (2009–12)	157
	Conclusions: a cycle of crisis and collapse	167
<b>7</b>	<b>Conclusions</b>	<b>173</b>
	The failure of constitutional reform in Bosnia	173
	Contributions to theory	179
	Statebuilding in practice: lessons learned	185
	<i>Notes</i>	192
	<i>Bibliography</i>	223
	<i>Index</i>	239

# List of Tables

3.1	Party positions on constitutional reform (November 2005)	82
3.2	Overview of consensus areas at the meeting in Brussels (November 12–14)	85
3.3	Overview of consensus areas at the meeting in Washington (November 19–20)	87
4.1	Party positions on the presidency (January 2006)	107
4.2	Dayton and the constitutional amendments of March 2006	116
5.1	Results of presidential elections, October 2006	143
5.2	Results of legislative elections, October 2006	144
6.1	Comparison of constitutional proposals (1995–2009)	159

# Foreword

*The Bosnian Book of the Dead* enumerates over 97,000 victims who died in the war waged in and over this small and pretty European polity between 1992 and 1995. The proportion of Bosniak casualties was twice that of Serbs and three times that of Croats. Perhaps more than 2.2 million people left their homes because of organized ethnic expulsions, mostly fleeing to areas controlled by partisans of their own ethnic group. Almost 30,000 people went missing, and one-third of these were still missing a decade later. The geographical distribution of Bosnia's ethnic groups was transformed by the war. Before the war, the local patterns of ethnic residency were a "patchwork quilt." By war's end, most people, by fearful choice or overt coercion, lived in distinct ethnic enclaves. What became the Serb Republic had very few Muslims or Croats.

The war followed Bosnia's contested secession from the former Yugoslavia. Most of its Bosniaks and Croats voted for independence; most of its Serbs rejected the legitimacy of the referendum that passed under legislation that violated Bosnia's existing (communist-era) constitution. The more extreme Bosnian Serbs invested in two projects: violently carving out a Serb Republic through conquest and expulsion; and keeping all, or most, of Bosnia within the rump of Yugoslavia, dominated by Serbs. They had success in the first goal, but not the second. In the three years between Bosnia's secession and the American-led negotiated conclusion, the most violent war since 1945 was fought on European soil – a civil war that was anything but civil, and an international war in which Serbia and Croatia backed their co-ethnics in Bosnia, while a curious alliance of the United States, Turkey, Iran, and Saudi Arabia eventually helped to arm the Bosniak-dominated government in Sarajevo.

European-led mediation efforts to end the war, including an arms embargo, had failed for three years. Europeans were divided over whether to recognize the breakup of Yugoslavia, over whether to permit a partition of Bosnia, and over whether to arm the Bosniaks and fight on their behalf. What had been proclaimed as Europe's hour proved an inglorious three years of indecisions punctuated by numerous bad decisions. An audacious Croatian and Serbian plan to partition Bosnia was blocked, but the Bosniak-led government in Sarajevo could not hold even the territory predominantly settled by Bosniaks. In 1994, the United States, tiring of indifferent European leadership, encouraged

Bosniak and Bosnian Croat leaders to form a federation, terminating the previous Serb and Croat conspiracy. The following year, in November, under the diplomatic leadership of Richard Holbrooke, and after intensive “proximity” negotiations, a comprehensive peace agreement was initialed at Dayton, Ohio. The conflict formally ended on December 14, 1995, when the General Framework Agreement for Peace, signed in Paris, entered into force (Holbrooke 1998).

One of the appendices to the Dayton Peace Agreement (DPA) contained Bosnia’s constitution. It was delivered from on high, the culmination of some 44 months of intermittent negotiations under the auspices of the International Conference on the former Yugoslavia and the Contact Group. The Dayton negotiations had been deliberately limited to a small group of participants. The Western powers sought agreement between the Bosniak leadership and the leaders of Croatia and Serbia; Bosnian Croats played little role in the negotiations; and Bosnian Serbs were ignored. Others were excluded entirely. The composition of the negotiators suggested that the conflict had not been over dominance within the state, but rather over whether the state should exist (Bieber 2013).

The text of the constitution, delivered from on high, detailed a “corporate consociation,” combined with federalizing elements. One was the already established Federation of Bosnia and Herzegovina, and the other, the confederation (or federation) of two entities, the Serb Republic and the Federation of Bosnia and Herzegovina. Whether the relationships between these two entities were confederal or federal was left ambiguous, and some even tried to pretend that Bosnia was a decentralized unitary state. No democratic process of ratification accompanied the Dayton Agreement. A constitution appended to a peace treaty is a curious way to birth a new order. The subsequent efforts of international powers, and of local parties and agents, to make this constitution work – or not, and it has often been not – is at the heart of Dr Sofía Sebastián-Aparicio’s very welcome book.

Here the reader is provided with an insightful, careful, clear, and compelling exploration of the European Raj that followed the Dayton Agreement, demonstrating significant empirical research. She shows how a bewildering plethora of international organizations have tried to support statebuilding in Bosnia, often without doing their homework, and nearly always with their own national and ideological prejudices. It is tempting to call it statebuilding without a state. While highlighting the rigidities of the Dayton Agreement, Dr Sebastián-Aparicio shows how intra-ethnic competition and divisions, and inconsistency and turnover in key international personnel and institutions have created

an irresponsible system of power-sharing. It is irresponsible because the internationals do not allow the power-sharing provisions to be properly tested. Outside arbiters make key decisions regarding Bosnia, where they are “legally entitled” to do so, but, in so doing, inhibit the prospects of successful cross-party negotiation and joint government. The reader will learn of the April package (2006), the Prud proposals (2008), the Butmir package (2009), and other endeavors to amend Bosnia’s constitution without success; about intricate and intriguing court cases that have led to the usurpation of constitutional authority by the European Court of Human Rights (McCrudden and O’Leary 2013), and about political “outbidding” within each ethnic community that has often succeeded because fears about group interests have credible foundations.

Bosnia’s arrangements have had very extensive external involvement, both in their genesis and in their operation, or, as Dr Sebastián-Aparicio emphasizes, non-operation. Expansive roles for external agents in overseeing—and running—consociations and federations were not anticipated by Arend Lijphart and the founding fathers of consociational thought. They focused on the endogenous, rather than the exogenous, sources of power-sharing institutions. In Bosnia, extensive external involvement has occurred not only in the negotiation, drafting, and imposition of Bosnia’s constitution, but also in the mediation of subsequent difficulties among the signatories to the agreement. Non-Bosnians also have a direct role in Bosnia’s institutions. To name but one, the Constitutional Court has three international appointments from countries that are not contiguous to Bosnia; many of them have done a very good job, and their opinions have been models of humanist reasoning.

Yet even this extraordinarily prominent role for foreigners in Bosnia’s court system has been overshadowed by the appointment of a High Representative of the Contact Group after Dayton to ensure that the governmental structures functioned. The role granted to the Office of the High Representative (OHR) under the DPA was subsequently radically expanded under “the Bonn Powers” that temper the consociational and federal features of Bosnia’s constitution, and indeed usurp Bosnia’s sovereignty. Even well-disposed analysts consider that the High Representative’s powers make Bosnia into a protectorate, a ward of the currently dysfunctional European Union.

The activities of the High Representative, after what is known as the *Constituent Peoples* case, illustrates the paradoxes of the “European Raj” in Bosnia. What the reader needs to know is that the relevant decision of the Constitutional Court was not self-executing. Changes were necessary in the entities’ constitutions, for which elected politicians in

the two entities were responsible. After extensive negotiations among the parties, and after an agreement had been secured, the last stage of implementation ended in failure. This deadlock was broken only by the intervention of the High Representative, who imposed the necessary changes. The High Representative has no jurisdiction, however, to impose changes in Bosnia's constitution – only in the constitutions of the entities.

Dr Sebastián-Aparicio's book suggests that ill-considered over-intervention can be as troublesome as non-intervention, in ethics and in the practical coordination of diplomats and politicians with mandates. The availability of external mechanisms to overcome, and, in some cases, to override local stand-offs serves to encourage irresponsibility by these agents. They are able to present an intransigent position to their supporters, knowing, perhaps, that the consequences of such intransigence will be resolved by the external power(s). It may indeed be easier for external officials to make allegedly "necessary changes," but this in turn may stunt rather than help the growth of more responsible and cooperative democratic politics in the longer term. In other words, the overuse of external supervision or arbitration means that the power-sharing "partners" do not bear the costs of stalemates that might otherwise encourage them to work more productively together.

Supporters of power-sharing should read Dr Sebastián-Aparicio's monograph and see whether they conclude, as I have done, that power-sharing works best when it is ratified by the likely constituent peoples, not imposed upon them. Power-sharing arrangements are also best modified by the local parties to such an agreement, according to whatever rules they have previously agreed upon. Outsiders should not encourage insiders to manipulate them, or vice versa, and all should be wary of constitutional coups as ways of breaking stalemates.

Dayton ended a war of blood and dishonor; that is its lasting accomplishment. Today's Bosnia is much better than it was in 1992–95. There is peace, and there has been significant exercise of the right of return. But the cruel game of stalemate punctuated by a high-minded (though often under-informed and incompetent) European governor has to end one day. Readers of this book will not come away confident that international agents, especially within the EU, know how to coordinate the difficult task they have set themselves: to exit from Bosnia while incentivizing it to join the Union. It is reasonable to wonder whether in future Bosnia will have a new body of outsiders to asset-strip its sovereignty, namely "the troika" of the IMF, the European Central Bank, and the European Commission, who would likely soon be in charge of its public

finances. Readers of Dr Sebastián-Aparicio's book will re-learn the merits of modesty in efforts to govern other people's countries, and should conclude that power-sharing is best done by those who are supposed to be sharing power.

Brendan O'Leary

Lauder Professor of Political Science, University of Pennsylvania  
and former Senior Advisor on Power-Sharing in the Standby Team of  
the Mediation Support Unit of the United Nations

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The book (and especially some sections in Chapter 1 and Chapters 3 through 5) develops some ideas first published elsewhere, including: "The Role of the EU in the Reform of Dayton in Bosnia-Herzegovina," *Ethnopolitics*, 8(3), 341–54; "State Building in Divided Societies: Constitution-Making in Bosnia and Herzegovina," *Journal of Intervention and Statebuilding*, 4(3), 323–44; and "Constitutional Engineering in Post-Dayton Bosnia and Herzegovina," *International Peacekeeping*, 19(4), 597–611. Permission to reproduce excerpts from these articles is gratefully acknowledged. Most interviews included in this book were undertaken during my doctoral studies and were carried out under the ethical guidelines of the LSE.

# List of Abbreviations

BiH	Bosnia and Herzegovina
BOSS	Bosanska Stranka (the Bosnian Party)
CEE	Central and Eastern Europe
CEEC	Central and Eastern European Countries
CFSP	Common Foreign Security Policy
CoE	Council of Europe
CLAC	Commission of Legal and Constitutional Affairs in Bosnia
CNRT	Council for National Resistance of Timor
DPHR	Principal Deputy High Representative
EC	European Commission
EEC	European Economic Community. The EEC was transformed into the EU in 1993 under the Maastricht Treaty. The EEC became one of the Pillars of the EU as the European Community.
ECHR	European Court of Human Rights
ESDP	European Security and Defense Policy
EU	European Union
EUFOR	EU Force
EUPM	EU Police Mission
EUSR	European Union Special Representative
FBiH	Federation of Bosnia and Herzegovina
FRY	Federal Republic of Yugoslavia
FTV	Federation's Radio and Television
GFAP	General Framework Agreement for Peace
HDZ-BiH	Hrvatska Demokratska Zajednica (Croatian Democratic Union BiH)
HDZ 1990	Hrvatska Demokratska Zajednica 1990 (Croatian Democratic Union 1990)
HNZ	Hrvatska Narodna Zajednica (Croatian People's Community)
HR	High Representative
ICFY	International Conference on the Former Yugoslavia
ICTY	International Criminal Tribunal for the Former Yugoslavia
IFOR	Implementation Force (NATO force in 1995–96)
IMF	International Monetary Fund

NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organization
NHI	Nova Hrvatska Inicijativa (New Croatian Initiative)
OHR	Office of the High Representative
OSCE	Organization for Security and Cooperation in Europe
PIC	Peace Implementation Council
PILPG	Public International Law and Policy Group
PRC	Police Restructuring Commission
PRD	Police Reform Directorate
RS	Republika Srpska
RSNA	Republika Srpska National Assembly
SAA	Stabilization and Association Agreement
SAP	Stabilization and Association Process
SBB BiH	Savez za bolju budućnost BiH (Union for a Better Future of BiH)
SBiH	Stranka za BiH (Party for Bosnia and Herzegovina)
SDA	Stranka Demokratske Akcije (Party for Democratic Action)
SDP	Socijaldemokratska Partija (Social Democratic Party)
SDS	Srpska Demokratska Stranka (Serb Democratic Party)
SDU	Socijaldemokratska Unija (Social Democratic Union of Bosnia and Herzegovina)
SFOR	Stabilization Force (NATO force in 1996–2004)
SNSD	Savez Nezavisnih Socijaldemokrata (Union of Independent Social Democrats)
SRS-RS	Srpska Radikalna Stranka Republike Srpske (Serb Radical Party, RS)
UK	United Kingdom
UN	United Nations
UNDP	United Nations Development Programme
UNHCR	United Nations High Commissioner for Refugees
UNPROFOR	UN Protection Force
UNTAET	UN Transitional Administration in East Timor
US	United States
USIP	US Institute for Peace
VNI	Vital National Interest (Veto)