

Human Rights Brief

Volume 4 | Issue 1

Article 2

1996

Mediation in the Federation of Bosnia-Herzegovina

Peter H. Backes

Follow this and additional works at: <https://digitalcommons.wcl.american.edu/hrbrief>



Part of the [International Law Commons](#)

Recommended Citation

Backes, Peter H. "Mediation in the Federation of Bosnia-Herzegovina." Human Rights Brief 4, no. 1 (1996): 1, 8-9, 17.

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in Human Rights Brief by an authorized editor of Digital Commons @ American University Washington College of Law. For more information, please contact kcley@wcl.american.edu.



HUMAN RIGHTS

Center for Human Rights and Humanitarian Law

BRIEF

Washington College of Law • American University

Volume 4, Number 1 • Fall 1996

Plight of France's *Sans-Papiers* Gives a Face to Struggle Over Immigration Reform

by Christian E. O'Connell

Three years after the passage of severe anti-immigration statutes, the French government is considering reforms to the controversial legislation known as the Pasqua laws. At stake is the fate of thousands of undocumented aliens, called *sans-papiers* (the paperless), who originate primarily from poor African nations.

The Pasqua laws were enacted in 1993 at the instigation of then-Interior Minister Charles Pasqua, whose vigorous endorsement of "zero immigration" set the tone for recent French policy in refugee and asylum matters. Touted by supporters as an effective and necessary tool to combat clandestine immigration, the legislation encompassed a broad panoply of severe measures. These measures included a toughening of visa requirements, a reduction in the number of visas issued, an expansion of police enforcement powers, an extension of the permitted detention period, and a narrowing of the administrative review scheme. These and other provisions caused a significant number of legitimate aliens to become illegal.

A few provisions contemplated in the original law were struck down in 1993 by the French Constitutional

Court. Since that time, however, legislators have proposed unsuccessfully such additional measures as fingerprinting visa applicants from those countries deemed to pose a high risk of clandestine immigration, restricting access to medical and social services, and extending the maximum permissible period of pre-deportation confinement from 10 to 45 days. Successful subsequent modifications have made it a felony to provide assistance to illegal aliens.

The Pasqua laws also contain one notorious gap that has trapped thousands of immigrant families in a legal conundrum: undocumented parents of children who are French citizens cannot legally be expelled, but are prevented by the Pasqua laws from receiving residence papers.

In the last year, France has significantly stepped up its enforcement activities, thereby intensifying public controversy over the Pasqua laws. French authorities staunchly advocate strict application of the laws. President Jacques Chirac asserts that "[a] strong political signal has to be sent so that those persons likely to immigrate illegally will know that they will have no luck in France." A recent poll in the French daily *Le Monde* suggests that a majority of voters agree — 67% of those polled opposed relaxing the immigration laws.

Humanitarian opposition to aspects of the Pasqua laws has been led by the

Mediation in the Federation of Bosnia-Herzegovina

by Peter H. Backes*

The General Framework Agreement for Peace in Bosnia and Herzegovina (the Dayton Agreement) of December 14, 1995, ended the war in Bosnia-Herzegovina, but the implementation of the Agreement has been successful only in its military aspect. The Implementation Force (IFOR), no longer under a weak UN-structure but a determined NATO command, was the decisive element in ending the fighting and has prevented the return of war ever since. The civil implementation of the Dayton Agreement, however, has created severe difficulties, particularly with regard to issues of freedom of movement and the right of

continued on page 8

See page 12 for
Point/Counterpoint on
Trials in Absentia
in the Former Yugoslavia

INSIDE:

Changes in US Immigration Law Threaten Refugees	Page 3
NEW FEATURE — News from the International War Crimes Tribunals	Page 4
MDRI Releases Report on Hungary	Page 16
News from the Center for Human Rights & Humanitarian Law	Page 18

continued on page 11

Mediation, continued from page 1

refugees to return to their homes, as guaranteed by Annex VII of the Agreement. In addition, expulsion of families and burning of houses continues despite the presence of the International Police Task Force (IPTF) and other international organizations.

While international attention has generally focused on the Serb-Bosniac



Photo courtesy of Peter Hachey

Evidence of the war between Bosnian Croats and Bosniacs is still visible in Mostar, Bosnia-Herzegovina.

dispute and the prosecution of war criminals, an important struggle is taking place in the Croat-Bosniac Federation of Bosnia-Herzegovina (the Federation). Many regard the Federation and its functioning as the key to the whole Dayton peace process. The transition to peaceful power sharing within the Federation has not been easy, but with the help and support of the international community, efforts are being made to mediate and arbitrate disagreements in order to establish functioning and democratic institutions.

Background and History

The people of Bosnia-Herzegovina include three groups: the Bosnian Serbs, the Bosnian Croats, and the Bosniacs, a term which refers to Bosnian Muslims and all others who are neither Serbs nor Croats. Under the Dayton Agreement, the Federation of Bosnia-Herzegovina and Republika Srpska are two separate entities within the state of

Bosnia-Herzegovina, with the Federation comprising 51%, and Republika Srpska holding 49%.

The Federation was founded during the war in 1994 by the Washington Agreement between the governments of Bosnia-Herzegovina and Croatia. This Agreement contains a constitution based on a three-level federal structure providing for municipal, cantonal and federal authorities. The majority of authority lies with the ten cantons. The most difficult task is the effort to keep the balance between the interests of the Croats and the Bosniacs. The Federation Constitution defines both groups as equal constituent people, and to that end, it requires all legislation to be approved by a majority of Croat and Bosniac members of the Federation Assembly. Both groups, however, have repeatedly used the requirement to delay unfavorable legislation. This requirement was intended to preserve the rights of both Bosnians and Croats, but has been used instead to promote nationalist interests.

The Federation has yet to get off the ground. Key institutions are not yet functioning, and the Croats have not fully dissolved the Croat Republic of Herceg-Bosna, a parastate that was established during the war but was legally terminated by the Dayton Agreement. Despite criticism from the international community, the Bosnian Croats have resisted all attempts to dissolve Herceg-Bosna. Its institutions and administrations continue to exist, making it a major obstacle to establishing functioning Federation institutions.

The Mediation and Arbitration System

Shortly after the Federation was founded, the governments of Bosnia-Herzegovina and Croatia recognized the need for a dispute settlement mechanism to resolve disputes that the two parties could not settle themselves. In 1995, Bosnian President Izetbegović and Croat President Tudjman, in accordance with the German and U.S. governments, agreed to a two-step dispute mechanism. The parties appointed Christian Schwarz-Schilling, a member of the German Parliament, as Mediator for the Federation, and Washing-

Expulsion of families and burning of houses continues despite the presence of the International Police Task Force and other international organizations.

ton-based attorney Roberts Owen as the Federation Arbitrator.

The role of the Federation Mediator is to negotiate with the parties to settle all disputes, taking into account the parties' views on particular issues, and to evaluate possibilities of compromise. If the parties reach a compromise, an agreement is immediately documented and signed by the authorized representatives.

If the parties cannot compromise, or if one side is not complying with a signed agreement, either party may request binding arbitration. In contrast to mediation, the arbitration process resolves disputes entirely through legal mechanisms, with no room for bargaining. The parties each present their case and legal arguments, usually in writing, and the Arbitrator then makes an unappealable decision solely on legal grounds.

In the past, arbitration decisions often have been challenged by the losing party, who has asked the Mediator to interpret the decision or renegotiate

Key institutions of the Federation are not yet functioning, and the Croats have not fully dissolved the Croat Republic of Herceg-Bosna.

ate the issue. The Mediator, however, has refused to do so, emphasizing the binding nature of the arbitration. Arbitration, therefore, involves considerable risk because the parties cannot influence the outcome. The losing party in arbitration, in retrospect, often regrets its prior refusal to adopt a compromise proposed by the Mediator. The first mediation round took place in June 1995, and since then only 15 municipalities have applied for binding and final arbitration.

continued on next page

Mediation, continued from previous page

Mediation Issues

The main issues for mediation have concerned the verification of mandates for Municipal Assemblies, the election of assembly chairmen, appointments of delegates to the Cantonal Legislature, the return of refugees, freedom of movement, and, following the elections of September 1996, the establishment of institutions in the Federation, particularly at the cantonal level.

The verification of mandates has proved to be a very complicated problem. The members of the municipal assemblies were elected in 1990 by party lists. Although the municipal assemblies were formed prior to the foundation of the Federation, both Federation partners accepted these assemblies as

The role of the Federation Mediator is to negotiate with the parties to settle all disputes, taking into account the parties' views on particular issues, and to evaluate possibilities of compromise.

the legal interim municipal assemblies until regular municipal elections replace them. The municipal elections, scheduled for September 1996, were recently postponed by the Organization for Security and Cooperation in Europe until 1997. In the meantime, the municipal assemblies created before the war continue to operate.

During the war some of the former assembly members died, disappeared or fled, and must now be replaced. In the Mostar Agreement of May 1995, Croats and Bosniacs agreed that in these cases, the next person on the party list would enter the assembly. Before the war, this procedure would have been accomplished without any problems. The current reality, however, is that the delegates are no longer aligned by party membership but by ethnic background, and whether a delegate is a Croat or a Bosniac now determines whether he is acceptable as a replacement. If a delegate is unacceptable, the party will typically argue that the delegate either has been expelled from the party, has

resigned, or lives abroad and is thus no longer available.

The Mediator and Arbitrator, in a final decision in June 1996, ruled that all members who already held seats as a result of the 1990 elections would maintain their seats even if they resigned from or were expelled by their party. This is the standard procedure in any democracy under the principle of freedom of mandate, which states that any member of a legislative body is independent from party orders or party membership once he enters the body to which he has been freely elected. On the contrary, if a replacement is no longer a member of his party before he replaces a resigning assembly member, he loses his right to replace that resigning member.

The acceptance of this ruling has been dubious at best. The parties accept the ruling as fair and just if favorable to them, and dispute it vehemently if unfavorable. As a result, the assembly members in some heavily contested municipalities have not been verified for a long time, and the assemblies, therefore, have been unable to convene and start working on the extensive post-war problems.

A second mediation difficulty concerns mayoral (municipal executive) elections by municipal assemblies. In one heavily disputed municipality, the Croat nationalist party HDZ had received one seat more than the Bosniac nationalist party SDA, but did not have an absolute majority. The Croats claimed to have the right to determine the mayor based on their interpretation of the Mostar Agreement which stated that the strongest party may "name" the mayor. The same Bosnian word can mean either "nomination" or "determination," and thus it is unclear whether the Croats now have the right to appoint a new mayor or just to nominate one. Reasoning that basic rules of democracy must not be deteriorated, the Mediator and Arbitrator decided that naming the mayor means "nominating" a candidate, thereby allowing the assembly to elect another candidate should it choose to do so.

Another crucial mediation issue has been the number of delegates a municipality may send to the cantonal assembly if part of the territory lies not in the Federation but in Republika Srpska. As a result of the fighting during the war

and the final border drawing at Dayton, some Federation municipalities were divided, with parts in both the Federation and the Republika Srpska. In the Mostar Agreement, the Federation

Another crucial mediation issue has been the number of delegates a municipality may send to the cantonal assembly if part of the territory lies not in the Federation but in Republika Srpska.

parties had agreed that the number of delegates for each municipality would decrease according to what percentage of the territory lay outside the Federation. A municipality with its entire territory within the Federation would get five delegates, while one with only 80% of its territory inside the Federation would get four delegates, and so on. The Mediator and Arbitrator ruled this agreement unconstitutional because a municipality should not be punished with limited representation if its territory diminished as a result of war or the Dayton Agreement. The resolution is that all municipalities shall have five representatives regardless of the size of their territory within the Federation.

Enforcement

In some municipalities, mediation agreements and arbitration rulings have not been implemented because the parties have not been willing to comply. In other cases, however, well-negotiated compromises have been struck by party-functionaries at a higher level.

To tackle this obstruction, the Mediator proposed a Federation Implementation Council to remove individuals who are impeding progress. The Council, to be composed of three members of the international community along with one Croat and one Bosniac, would have the right to investigate cases involving public officials who do not comply with their obligations under domestic law or international treaties such as the Dayton Agreement, or who obstruct progress in their constituency. If the Council finds that an official has committed such a violation, it would have the power to remove this person from office. In the case of an elected official, the Council

Mediation, continued from page 9

would make a strong recommendation to the appropriate legislative body to remove that official. Initial reaction to the Mediator's proposal was favorable, and the proposal was sent on to the Federation Assembly in Sarajevo. Although it was on the agenda in June 1996, the parliament has yet to pass the law.

A successful strategy to overcome obstacles does not always require in-depth knowledge of the applicable law, but simply common sense. During a mediation session to convene a municipal assembly in Central Bosnia, the Croats complained that only the Bosniac flag was raised in the room. When the Croats presented a flag of Herceg-Bosna, the Bosniacs resisted.

Because the Herceg-Bosna flag is very similar to the flag of Croatia, which the Bosniacs were willing to accept, the Mediator's interpreter used her sewing kit to cut out the part that identified the flag as Herceg-Bosna, and with a few stitches turned it into a Croat-like flag. Under great media attention, the flag was then presented to the public and accepted by all sides.

Future Outlook

Despite the set-backs in implementing the Federation institutions and achieving progress in the civil implementation of the Dayton Agreement, progress can be seen in some areas. One cannot expect to quickly solve all the problems that have arisen as a result of the first war in Europe since World War II. Instead, Bosnia-Herzegovina is

in a slow democratization process. The success of this process and of the Dayton Agreement will depend not only on the ability of people to overcome hatred and start living together again, for which there are promising indications, but it will also depend on the willingness of the international community to assist in the reconstruction process and use all means, including military if necessary, to prevent any return to belligerent activity. If the future mandates of Post-IFOR and the IPTF do not close all security gaps existing under the current mandate, it is likely that war will afflict the region again. ☹

** Peter H. Backes (LL.M. 1995) is the Legal Advisor to the International Mediator for the Federation of Bosnia-Herzegovina.*

ALUMNUS PROFILE

Alumnus Advises the International Mediator for Bosnia-Herzegovina

by Gillian Brady

Since February of 1996, Peter Backes (LL.M. '95) has had the opportunity to take part in reshaping the former Yugoslavia. As Legal Advisor to the Mediator for the Federation of Bosnia-Herzegovina, Backes assists in the peaceful resolution of complex legal and political conflicts between competing political parties and national groups. *(For more information about the mediation process in the Federation of Bosnia-Herzegovina, please see Backes' article on page 1.)*

Prior to his study at WCL, Backes received his law degree in Germany and completed his required apprenticeship in various fields of the law. Before he began his LL.M., he worked for six months at a German law firm in corporate and labor law. While at WCL, he focused on international trade, environmental law and worked on dispute settlement issues with the World Trade Organization. The work he did for the WTO in particular has been extremely useful in his current work with the International Mediator.

The opportunity to work in the Mediator's office came accidentally, through a

friend who had heard about the job. The mediation and arbitration process is operated primarily by Americans and Germans, so they specifically wanted someone who had legal training both in Germany and the United States. Backes chose to pursue an LL.M. in the United States because this training makes a lawyer much

human rights are a key part of the Dayton Accords being implemented by the mediation team. Backes believes the experience of working for the Mediator has given him insight into politics and diplomacy and has helped him to understand how difficult and deep-rooted the conflict is. He says it requires patience to deal

with the intense hatred that sometimes surfaces. Many meetings are friendly but some can get very tense.

The work of the Mediator is expected to continue through 1997, or as long as there is a need. Although Backes did not anticipate doing this type of work, he has found that he really enjoys it and finds the political aspects of his job to be very interesting. Working for the Mediator has also provided him with interesting experiences such as serving as an election observer for the Organization for Security and

Cooperation in Bosnia-Herzegovina. When he has finished his work for the mediator he would like to take the mediation talents he has developed into the realm of business, possibly working in dispute resolution. ☹



Peter Backes (left) and WCL's Rochus Pronk serving as election observers at the September 1996 elections in Bosnia-Herzegovina.

more marketable in Germany. The decision was obviously fortuitous, as he believes that he would not have his current position if not for his study in the United States.

The mediation in Bosnia-Herzegovina is mainly political and electoral, although

Photo courtesy of Rochus Pronk