

# The Brčko Final Award of 5 March 1999

Christoph Schreuer\*

**Keywords:** arbitration; award; Dayton Accords; the former Yugoslavia.

**Abstract:** The Dayton Accords of 1995 for Peace in Bosnia and Herzegovina provided for arbitration over the boundary line in the Brčko area of Bosnia. Arbitration took place between the Muslim and Croat Federation and the Republika Srpska. The Award of 14 February 1997 did not draw a boundary line but established an international interim supervisory regime. On 15 March 1998 the Arbitral Tribunal handed down a Supplemental Award which extended the interim regime pending further action by the Tribunal. The Final Award of 5 March 1999 establishes a permanent self-governing Brčko District government that is independent of the two entities. The Tribunal reserves the authority to revise its decision in case of a failure of either party to cooperate in the implementation of the new regime.

## 1. INTRODUCTION

The Dayton Accords of 1995 for Peace in Bosnia and Herzegovina provided for arbitration over the boundary line in the Brčko area.<sup>1</sup> The parties to the arbitration were the two sub-state entities of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, representing the Muslim and Croat held parts of the country and the Republika Srpska (RS), representing the Serb held part of the country. An Award of 14 February 1997<sup>2</sup> established an international interim supervisory regime for the area and held out the prospect of a further award. On 15 March 1998 the Arbitral Tribunal handed down another Award entitled Supplemental Award.<sup>3</sup> This more recent Award also did not contain an allocation of the disputed area, but directed that the supervisory regime should continue for the time being. It held out the prospect of a further decision by the Tribunal in early 1999.

---

\* Professor of Law, Department of International Law, University of Salzburg, Salzburg, Austria; and Edward B. Burling Professor of International Law and Organization, The Paul H. Nitze School of Advanced International Studies, Johns Hopkins University, Washington, DC, United States of America.

1. General Framework Agreement for Peace in Bosnia and Herzegovina, 35 ILM 75 (1996).
2. Arbitral Tribunal for Dispute Over Inter-Entity Boundary in Brčko Area (The Republika Srpska v. Federation of Bosnia and Herzegovina), Award of 14 February 1997, 36 ILM 396 (1997). The Award is described in C. Schreuer, *The Brčko Award of 14 February 1997*, 11 LJIL 71-80 (1998).
3. Arbitral Tribunal for Dispute Over Inter-Entity Boundary in Brčko Area (The Federation of Bosnia and Herzegovina v. The Republika Srpska), Supplemental Award of 15 March 1998. The Supplemental Award is described in C. Schreuer, *The Brčko Supplemental Award of 15 March 1998*, 11 LJIL 493-495 (1998).

<sup>12</sup> Leiden Journal of International Law 575-581 (1999)  
© 1999 Kluwer Law International

The Award of 5 March 1999,<sup>4</sup> called by the Tribunal 'Final Award', adopts a regime for the contested area whereby the hitherto divided Brčko Opština will form a self governing 'neutral' district called "The Brčko District of Bosnia and Herzegovina". The newly formed District will be under the exclusive sovereignty of Bosnia and Herzegovina and will form a single administrative unit. Powers will be shared by the common institutions of Bosnia and Herzegovina and by a new District government. The two entities, the Federation of Bosnia and Herzegovina and the Republika Srpska will hold the Brčko Opština simultaneously in 'condominium'. The territory of both entities will encompass the entire Brčko Opština but neither entity will exercise any authority. The powers exercised by the new District government will be subject to "supervised coordination with the two entity governments."<sup>5</sup> Overall co-ordination will be with the Brčko Supervisor, who was appointed by the first Award of 1997,<sup>6</sup> and who may delegate that responsibility to an appropriate Federation of Bosnia and Herzegovina institution. During a period of transition the Inter-Entity Boundary Line (IEBL) will continue to exist and entity law will apply until modified by District law. After the transition is complete, no subdivision of the District on any ethnic basis shall be permitted.<sup>7</sup>

## 2. THE FACTS UNDERLYING THE DECISION

In its Supplemental Award of 1998 the Tribunal had given the following warning to the Republika Srpska:

[g]iven the RS's systematic non-compliance with (indeed, defiance of) the Dayton Accords in the Brčko area for much if not all of 1997, the Tribunal's final IEBL decision in late 1998 or early 1999 will surely diminish the RS's position in the Brčko area *unless* the RS by that time has carried the burden of demonstrating very clearly that it has truly reversed course and committed itself to an apparently permanent program of full Dayton compliance and revitalization of the area. To carry that burden the RS will need to be in a position to show significant new achievements in terms of returns of former Brčko residents, unfettered freedom of movement, strong support for the multi-ethnic governmental institutions including the multi-ethnic police force, and full cooperation with the Supervisor and the authorities responsible for conducting fair and democratic elections in September 1998. Thus, in any subsequent pro-

---

4. Arbitral Tribunal for Dispute Over Inter-Entity Boundary in Brčko Area (The Federation of Bosnia and Herzegovina v. The Republika Srpska), Final Award of 5 March 1999, 38 ILM 534, para. 10 (1999).

5. *Id.*

6. *See* Award, *supra* note 2, para. 104.

7. *See* Final Award, *supra* note 4, paras. 9-11.

ceeding, the Tribunal will expect to receive from the RS evidence displaying a very vigorous and consistent program of correction and compliance throughout 1998.<sup>8</sup>

In its Final Award the Tribunal finds that the Republika Srpska failed to show compliance with these requirements. On the contrary, there was a significant level of obstruction against the objectives contained in the Dayton Accords and the Tribunal's earlier decisions. In particular, the return of displaced persons was impeded through the discouragement of Serb departures from Brčko and the discouragement of Bosniac and Croat returns to Brčko.<sup>9</sup> In addition, there was also a failure to facilitate a democratic local multi-ethnic government and a lack of co-operation with the international supervisory regime.<sup>10</sup>

The grave violations by the Republika Srpska might have persuaded the Tribunal to transfer all of the Brčko Opština to the Federation of Bosnia and Herzegovina. Such a step would have been entirely within the Tribunal's mandate under Art. V of Annex 2 to the Dayton Accords describing the Tribunal's terms of reference.<sup>11</sup> But the Tribunal notes that the performance of the Federation of Bosnia and Herzegovina in ensuring the return of Serb displaced persons to their former homes in the Federation during 1998 was less than satisfactory. Although criticism of the Federation of Bosnia and Herzegovina is much milder than of the Republika Srpska, the Tribunal declines to place Federation officials in exclusive control of ethnic reintegration in Brčko.<sup>12</sup>

The Dayton Accords directed the Tribunal to apply relevant legal and equitable principles.<sup>13</sup> Whereas the first Award of 1997 still looks at principles of law and of equity,<sup>14</sup> the Final Award is focused exclusively on finding an equitable balance between the interests of the two entities as well as of the international community. The interests identified by the Republika Srpska consisted of a 'territorial continuity' between the two parts of Republika Srpska, of its alleged right to 49% of the territory of Bosnia and Herzegovina and of its need to have a strategic corridor between the two parts of Republika Srpska. The Tribunal points out that since under the condominium arrangement all of the Brčko area will belong to both entities, the territory of the Republika Srpska will be continuous. This also means that nominally the Republika Srpska's territory will be increased through the Award. As to the strategic corridor, an application will have to be made to SFOR should the Republika Srpska have a legitimate need to move military forces through the District. Apart from military transit, the Re-

8. See Supplemental Award, *supra* note 3, para. 21. Footnote omitted.

9. See Final Award, *supra* note 4, paras. 6, 7, 18-31.

10. *Id.*, paras. 6 and 32-33.

11. See Dayton Accords, *supra* note 1, at 113.

12. See Final Award, *supra* note 4, paras. 47, 56.

13. See Dayton Accords, *supra* note 1, at 113.

14. See Schreuer, *supra* note 2, at 76 *et seq.*

publika Srpska and its citizens will have complete freedom of movement through the District.<sup>15</sup>

As to the interests of the Federation of Bosnia and Herzegovina, a multi-ethnic democratic government will ensure, in the Tribunal's view, the return of Bosniac and Croat displaced persons who were forced out of Brčko. The regime for the Brčko District will also safeguard the Federation's economic interests in opening the Brčko Opština to traffic to Croatia and Europe.<sup>16</sup> As to the interests of the international community, the most urgent objective of maximizing the freedom of refugees and displaced persons to return to their original homes in Bosnia and Herzegovina, will be most effectively advanced by keeping Brčko returns out of the exclusive control of either of the two entities.<sup>17</sup>

### 3. THE STRUCTURE OF GOVERNMENT FOR THE BRČKO DISTRICT

The Tribunal sets out the new government institutions for the new Brčko District of Bosnia and Herzegovina. The District government will operate on a self-governing basis under the sovereignty of Bosnia and Herzegovina. There will be a single unitary multi-ethnic democratic government throughout the pre-war Brčko Opština. The District government will consist of a democratically elected legislative body, called the District Assembly, of an Executive Board to be selected by the Assembly, of an independent judiciary, and of a unified police force under a single command. The new District police force will be totally independent of the two entities.<sup>18</sup>

The international supervisory regime established by the first Award will continue for the time being. The Supervisor will initiate and oversee the implementation of the plans for the new District government with the help of a joint implementation commission. The laws currently applied in the RS and Federation portions of the Brčko Opština will continue to apply until they are 'reviewed and harmonized' by the Supervisor and the new District Assembly. Existing governmental arrangements will continue in force pending formation of the District government. The Inter-Entity Boundary Line will cease to exist once the Supervisor concludes that it no longer has any legal significance. The Tribunal hopes and expects that the new District government will be operational for the most part by 31 December 1999 or within a few months thereafter.<sup>19</sup>

Neither entity shall allow its military forces to be based in the District. Plans are to be developed for the gradual withdrawal of military forces and facilities.

---

15. See Final Award, *supra* note 4, paras. 51-53.

16. *Id.*, paras. 54 and 55.

17. *Id.*, para. 57.

18. *Id.*, paras. 34-36 and 40.

19. *Id.*, paras. 37-39 and 46.

Military movements by the Republika Srpska through the District will continue to be subject to SFOR permission. Thereafter, any such transits will take place only in accordance with the laws of Bosnia and Herzegovina and the District.<sup>20</sup>

#### 4. ADJUSTMENT AND REVISION

Although the decision of 5 March 1999 carries the title Final Award, the Tribunal reserves the authority to take further action in two distinct ways. The Award is accompanied by an Annex that sets out in some detail certain features of the new Brčko District. The parties are given an opportunity to provide written comments on the Annex within 60 days of the Final Award. Such comments may only be directed to the details contained in the Annex and not to issues resolved in the Final Award itself. The Tribunal reserves the right to make modifications to the Annex in the light of these comments.<sup>21</sup>

More importantly, the Tribunal reserves the right to revisit the case if there should be any failure to cooperate with the implementation of the regime outlined in the Final Award. The Tribunal states that it will remain in existence and will retain jurisdiction over this dispute until the Supervisor, with the approval of the High Representative has notified the Tribunal that the two entities have fully complied with their obligations to facilitate the establishment of the new institutions and that the institutions are functioning effectively and apparently permanently. Until such notification, the Tribunal reserves the authority to modify the Final Award including, in the event of serious non-compliance, the authority to transfer the District entirely out of the territory of the non-complying entity and into the exclusive control of the other.<sup>22</sup>

#### 5. CONCLUDING OBSERVATIONS

It is futile to speculate on the prospects of effective implementation of this Award. In view of the past obstructions by the Republika Srpska and of the Tribunal's threat to revise the Award, including the possibility to transfer the District entirely to the Federation of Bosnia and Herzegovina, we may well not have seen the last act in this dispute.

From the perspective of international arbitration, this dispute has several unusual features. One is the fact of a territorial dispute not between two sovereign states but between two entities within a sovereign state. The consequences of

---

20. *Id.*, paras. 41 and 42.

21. *Id.*, paras. 35 and 63, introduction to Annex.

22. *Id.*, paras. 8, 13 and 65-68.

this feature for the application of international law have already been commented upon.<sup>23</sup>

Another unusual feature is the presence of the signature of only the Presiding Arbitrator, Roberts B. Owen, on all three Awards. A specific authorization by the parties made this possible.<sup>24</sup> Circumstances forced the Presiding Arbitrator to operate essentially like a sole arbitrator and the Awards are evidently his product.

The most interesting feature of the Brčko Arbitration is the public order function that the Tribunal assumed. Traditionally, arbitration is perceived as a mandate that is narrowly circumscribed by the parties' agreement. A tribunal is entrusted with the specific task of answering a legal question defined by the parties. Digression beyond these parameters is often threatened by nullity. Once the tribunal has fulfilled its mandate it ceases to exist.

In the Brčko Arbitration the Tribunal took a much broader view of its function. Despite its seemingly narrow terms of reference, to determine the Inter-Entity Boundary Line, it took the task upon itself to find the optimum solution as determined by the object and purpose of the Dayton Accords.<sup>25</sup> In doing so, it created first an international system of supervision and eventually a special joint regime of government for the disputed area. The Tribunal took its mandate not so much from the disputing parties' agreement. Rather, it saw itself as an agent of the international community. The Tribunal's unusual boldness in shaping an outcome that seemed politically prudent rather than technically orthodox was, no doubt, facilitated by the political support it enjoyed. The UN Security Council and the Brčko Implementation Conference clearly strengthened the Tribunal's hand.

The Tribunal's perception of its public order function as an agent of the international community is apparent in several aspects of the three Awards. One is the liberty it takes with its mandate in creating a system of self-government for the District on the legal basis of condominium rather than drawing a line on the map. Another such aspect is the Tribunal's attempt to prod the parties to the dispute into accepting a carefully balanced solution that requires cooperation and compromise, two qualities that have been conspicuously absent from the area in recent years. This attempt is evident in the succession of three Awards rather than one. The Tribunal tried to persuade the parties to comply with its plans while warning it of the consequences of non-compliance for future decisions. This aspect is present even in the Final Award which holds out a threat of its revision in case of non-compliance. A third unusual aspect is the fact that the Awards address themselves not only to the parties but also to the international community. The Awards appoint international organs such as the Brčko Super-

---

23. See Schreuer, *supra* note 2, at 76-79.

24. For more detailed discussion see *id.*, at 73-74.

25. *Id.*, at 74-76.

visor,<sup>26</sup> weigh the interests of the international community along with those of the parties,<sup>27</sup> and address general recommendations to the High Representative and to the international community.<sup>28</sup>

All of this is a far cry from the limited role of a traditional arbitration. The Brčko Tribunal has not just settled a boundary dispute. It has created a constitution for a permanent territorial regime and has put the disputing parties under its continuing curatorship with regard to that territory.

---

26. See Award, *supra* note 2, para. 104.

27. See Final Award, *supra* note 4, para. 57.

28. *Id.*, paras. 47-49.