The Brčko Award of 14 February 1997

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Abstract: The Dayton Accords of 1995 provided for arbitration over the boundary line in the Brčko area of Bosnia. Arbitration took place between the Muslim and Croat Federation and the Republica Srpska. Both party-appointed arbitrators refused to sign the Award. The Award does not draw a boundary line but establishes an international interim supervisory regime. The Tribunal decided on the basis of international law and equity. But it refused to apply the principle of non-recognition of territorial gains obtained in violation of international law. A further decision of the Tribunal is planned by 15 March 1998.

1. INTRODUCTION

The General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Accords) of 14 December 1995[1] establishes an Inter-Entity Boundary Line (IEBL) between the Federation of Bosnia and Herzegovina, representing the Muslim and Croat held part of the country, and the Republica Srpska, representing the Serb held part of the country. In one particularly sensitive region of the country, the Brčko area, the parties were unable to reach agreement. The Brčko area had been the scene of particularly bitter fighting and brutal ethnic cleansing. It forms a pivotal strategic corridor between the two geographical parts of the Republica Srpska. Disagreement over the allocation of the Brčko area nearly led to a breakdown of the Dayton Conference in its last hours. Finally, agreement was reached to refer this issue to arbitration. Article V(1) of Annex 2 to the Dayton Accords provides: "[t]he Parties agree to binding arbitration of the disputed portion of the Inter-Entity Boundary Line in the Brčko area indicated on the map attached at the Appendix".[2]

The Federation of Bosnia and Herzegovina and the Republica Srpska were to appoint one arbitrator each, with a presiding arbitrator to be ap-

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1. 35 ILM 75 (1996).
2. *Id.*, at 113.

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pointed by agreement of the parties' appointees or, failing such agreement, by the President of the International Court of Justice. On the law to be applied by the tribunal, Annex 2, Article V(3) said: "[u]nless otherwise agreed by the Parties, the proceedings shall be conducted in accordance with the UNCITRAL Arbitration Rules. The arbitrators shall apply relevant legal and equitable principles".[3]

The Tribunal was constituted in July 1996. It produced an Award signed only by the Presiding Arbitrator on 14 February 1997.[4] The Award does not purport to establish the IEBL in the Brčko area. Rather, it calls upon the international community to establish an interim supervisory regime. This supervisory regime is set out in considerable detail in the Award. At the same time, the Tribunal invites requests for further action from the parties and holds out the prospect of a further decision by 15 March 1998, which shall form part of its Award.

This Award raises a number of interesting procedural and substantive questions. The following remarks will address the question of the parties' and the Arbitrators' participation in the proceedings (*see* Section 2, *infra*); the presence of only one signature on the Award (*see* Section 3, *infra*); the Tribunal's power to order the establishment of an international supervisory regime rather than the drawing of a boundary line (*see* Section 4, *infra*); the principles of law and of equity applied by the Tribunal (*see* Section 5, *infra*); and the outcome of the proceedings (*see* Section 6, *infra*).

2. PARTICIPATION BY THE PARTIES AND ARBITRATORS

The parties to the arbitration were not states, but the two entities within Bosnia and Herzegovina, namely the Federation of Bosnia and Herzegovina and the Republica Srpska. Both parties selected their arbitrators without objection or challenge from the other party. The Presiding Arbitrator, Roberts B. Owen, was appointed by the President of the International Court of Justice, following failure by the party-appointed arbitrators to agree on a nominee.

During the early stages of the proceedings, there was much reluctance on the part of the Republica Srpska and the arbitrator appointed by it, Dr. Popovic, to participate. The Republica Srpska failed to file pleadings on the merits and merely submitted arguments disputing the Tribunal's jurisdiction. Dr. Popovic declined to attend the Tribunal's meetings in August, Septem-

3. *See* Dayton Accords, *supra* note 1. The UN Commission on International Trade Law Arbitration Rules are reproduced *in* 15 ILM 701 (1976).
4. Arbitral Tribunal for Dispute over Inter-Entity Boundary in Brčko Area: Award in The Republica Srpska *v.* The Federation of Bosnia and Herzegovina (Control over the Brčko Corridor), UN Doc. S/1997/126, 36 ILM 396 (1997).

ber, and October of 1996. After the Tribunal had denied the Republica Srpska's request for an interim award clarifying the scope of the Tribunal's jurisdiction, the Republica Srpska on 1 December 1996 notified the Presiding Arbitrator that it did not intend to participate further in the arbitration, and that it purported to withdraw its appointee to the Tribunal. The Presiding Arbitrator reacted by informing the Republica Srpska that this course of action would violate its treaty obligations under the Dayton Accords and the Federation of Bosnia and Herzegovina submitted a request for a 'default judgment'.[5] Thereupon, hearings commenced on 8 January 1997 with all three arbitrators in attendance and both parties represented and fully cooperating. The Republica Srpska was represented by three counsel from two US law firms and various political figures. The Federation of Bosnia and Herzegovina was similarly represented. Both parties submitted detailed oral arguments and various written submissions. In addition, witness testimony was heard. All three arbitrators fully participated in the Tribunal's subsequent deliberations. On the last day of the deliberations, both party-appointed arbitrators refused to sign the Award.

3. THE PRESENCE OF ONE SIGNATURE ONLY ON THE AWARD

The refusal by both party-appointed arbitrators to sign the Award came as no surprise. The position of both parties on the merits of the dispute had been entirely irreconcilable already at Dayton. Both parties had explicitly refused to compromise on the issue at all times. Under these circumstances, it seemed highly unlikely that either party-appointed arbitrator would align himself with an outcome that was not fully in accord with the position of the party appointing him. This situation carried the danger of either a stalemate in the Tribunal, or, even more dangerous from the parties' perspective, the prospect of the Presiding Arbitrator siding with one of the party-appointed arbitrators.

The UNCITRAL Rules provide in Article 31(1) that where there are three arbitrators, an award or other decision of the tribunal shall be made by a majority of the arbitrators. Article 32(4) provides that the Award shall be signed by the arbitrators. Where there are three arbitrators and one fails to sign, the award shall state the reason for the absence of the signature. The Rules do not provide for the contingency of two out of three arbitrators re-

5. Under the UNCITRAL Arbitration Rules, *supra* note 3, if one of the parties fails to appear or fails to produce documentary evidence, Art. 28 states that "[t]he arbitral tribunal may make the award on the evidence before it". The UNCITRAL Arbitration Rules in Art. 13(2) provide for the replacement of an arbitrator who fails to act but are otherwise silent on the consequence of such failure. On the authority of truncated international tribunals, *see* S.M. Schwebel, International Arbitration: Three Salient Problems 144 *et seq.* and 278 (1987).

fusing to sign the Award.[6]

The parties had anticipated this problem and had agreed on a modification of the UNCITRAL Rules to the effect that if a majority decision of the Tribunal was not reached, "[t]he decision of the presiding arbitrator will be final and binding upon the parties".[7] This was understood already at Dayton and subsequently confirmed in letters to this effect from the heads of the delegations of both parties to the Dayton talks.

In the present dispute, this solution was a practical necessity. But it is a step that commends itself also to arbitration in a less politically charged environment. Strengthening the hand of the presiding arbitrator in this manner is likely to change the decision dynamics of a three-person tribunal[8] in a positive way. It is likely to increase the readiness of party-appointed arbitrators to reach compromise and will increase the coherence and quality of reasoning of awards.

4. THE TRIBUNAL'S TERMS OF REFERENCE: BOUNDARY LINE OR INTERNATIONAL REGIME

The most interesting aspect of the case is the Tribunal's approach to its own terms of reference. The agreement to arbitrate contained in Article V of Annex 2 provided for "arbitration of the disputed portion of the Inter-Entity Boundary Line in the Brčko area".[9] One might have concluded that the Tribunal's powers were restricted to just drawing a line on a map. This map might have left the *de facto* armistice line in the area unchanged. Or, it might have moved it either in favor of the Federation of Bosnia and Herzegovina, or of the Republica Srpska. The Tribunal chose an entirely different course of action. It imposed a detailed interim regime of international supervision and put the parties on notice that "[t]he Tribunal shall continue to monitor the situation in the area".[10] In addition, it holds out the prospect of a further decision hinting at the possibility of the town of Brčko Grad becoming a special district of Bosnia and Herzegovina belonging to neither of the

6. Art. 31(1) of the UNCITRAL Arbitration Rules, *supra* note 3, provides that in the case of questions of procedure, when there is no majority, the presiding arbitrator may decide on his own, subject to revision, if any, by the tribunal. The Arbitration Rules of the International Chamber of Commerce, 36 ILM 1604, at 1613 (1997), Art. 25, provide for majority awards of a tribunal of three arbitrators, adding that "[i]f there be no majority, the Award shall be made by the chairman of the Arbitral Tribunal alone".
7. *See* Award, *supra* note 4, para. 5.
8. For an incisive analysis on this point, *see* W.M. Reisman, *The Supervisory Jurisdiction of the International Court of Justice: International Arbitration and International Adjudication*, 258 RCADI 291-296 (1996).
9. *See* Dayton Accords, *supra* note 1, at 113.
10. *See* Award, *supra* note 4, at 436 (1997).

two entities.

There are several historical examples suggesting that arbitral tribunals must be careful to stay within their terms of reference, especially in boundary disputes. For instance, in the *El Chamizal* arbitration, the Tribunal had been asked to allocate the disputed tract of land either to Mexico or the United States. After the Award had partitioned the land between the parties, the United States claimed that the Award was a nullity since it had gone beyond what the Tribunal had been asked.[11]

In the *Taba* arbitration,[12] the Tribunal had been asked to choose the correct location of pillars marking the boundary from the submissions made by either Egypt or Israel. Despite the dissent of one arbitrator, the Tribunal was careful not to choose a third location.

In the case concerning the *Arbitral Award of 31 July 1989 (Guinea Bissau* v. *Senegal)* before the International Court of Justice,[13] the parties had submitted to an arbitral tribunal the question of whether an agreement of 1960 relating to their maritime boundary had the force of law between them. In the case of a negative reply to that question, the Tribunal was to undertake the delimitation including the drawing of a line on a map. The Tribunal found that the 1960 agreement had the force of law with regard to the territorial sea, the contiguous zone, and the continental shelf, but not with regard to the exclusive economic zone (EEZ) which did not exist in 1960. The Tribunal did not proceed to delimit the EEZ, nor did it draw a line on a map. Guinea Bissau argued the nullity of the Award for *excès de pouvoir* because of the Tribunal's failure to discharge its duty under the terms of the arbitration agreement. The ICJ rejected the claim of nullity, although it admitted that the Award was open to criticism. Several dissenting judges came to the conclusion that the Award should have been declared void for failure to comply with the terms of the agreement to arbitrate.[14]

The Brčko Tribunal was clearly aware of the problematical nature of its course of action. It was at pains to explain and justify its departure from its apparent task to draw a boundary line. The idea to come up with a plan for the administration of the area rather than to draw a line seems to have arisen early on in the proceedings, since it is already hinted at in a *Pre-Hearing Order* of 14 August 1996.[15] The Parties pleaded primarily in terms of a change of the boundary line in their favour. The Republica Srpska claimed that the Tribunal only had the authority to shift the IEBL south so as to en-

11. As reproduced *in* 1 Hackworth Digest 411 (1940).
12. 27 ILM 1421, at 1470, 1496, and 1529 (1988). *See also* J.G. Merrils, International Dispute Settlement 88 (1991).
13. Arbitral Award of 31 July 1989 (Guinea Bissau v. Senegal), Judgment of 12 November 1991, 1991 ICJ Rep. 52.
14. See, for Dissenting Opinions, *id.*, at 120 *et seq.*
15. As referred to in the Award, *supra* note 4, at 403, para. 12.

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large their territory.[16] The Federation of Bosnia and Herzegovina pleaded in favour of shifting the IEBL in the opposite direction, but it did indicate its readiness to accept an interim international presence in the area.[17]

The Tribunal acknowledged that it had jurisdiction to accede to either party's territorial demands, but argued that it must also have the power to fashion a compromise between the parties' extreme positions.[18] The Tribunal derived its power to devise an international interim supervisory regime from the context of the arbitration agreement as part of the Dayton Accords in the light of the latter's object and purpose. This object and purpose includes the restoration of security in the region, freedom of movement throughout Bosnia and Herzegovina, and the return of refugees.[19]

The Tribunal finds further support for taking a broad view of its mandate in Security Council resolutions and international agreements subsequent to Dayton.[20] The Tribunal does not explain how these resolutions referring to other parts of the Dayton Accords lead to an extensive interpretation of its powers.

The Tribunal also argues that Annex 2, containing the arbitration agreement, is framed in broad terms and that the specific reference to 'equitable principles' allows the Tribunal to render an award that, in its view, best reflects and protects the overall interests of the parties.[21]

This last point appears less than convincing. It seems to be based on a confusion between the Tribunal's terms of reference, which define its task and the rules and principles to be applied in discharging this task. If the Tribunal's power was indeed restricted to determining a boundary line, the authorization to use equitable principles in addition to rules of law in doing so can hardly serve as a justification for undertaking a different task.

5. THE APPLICABLE PRINCIPLES OF LAW AND OF EQUITY

While the procedure before the Tribunal is fairly precisely defined through a reference to the UNCITRAL Arbitration Rules,[22] the substantive rules to be applied are extremely broad. The arbitration agreement merely refers to "relevant legal and equitable principles".[23]

The parties to the arbitration agreement are the Republic of Bosnia and

16. *Id.*, at 408 and 409-410, paras. 33 and 38.
17. *Id.*, at 407 and 417, paras. 32 and 65.
18. *Id.*, at 409-410 and 426, paras. 38, 40, and 86.
19. *Id.*, at 431 and 432, paras. 98 and 99.
20. *Id.*, at 432, para. 100.
21. *Id.*, at 431, paras. 96 and 97.
22. *See* note 3, *supra*.
23. *See* Dayton Accords, *supra* note 1.

Herzegovina, a sovereign state, and the two entities within Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republica Srpska. In addition, the agreement is 'endorsed' by the Republic of Croatia and the Federal Republic of Yugoslavia. The parties to the arbitration proceedings were only the two entities within Bosnia and Herzegovina.

The Tribunal does not hesitate to apply international law to the dispute. Not surprisingly, the Tribunal applies the Dayton Accords.[24] The Vienna Convention on the Law of Treaties[25] is applied to the arbitration agreement.[26] Other elements of international law, such as customary international law and treaty law are also applied. This is particularly prominent in the debate on the application of the doctrine of non-recognition of territorial gains obtained in violation of international law. The Federation of Bosnia and Herzegovina argued that the campaign of ethnic cleansing in the Brčko area had violated a number of peremptory international norms relating to non-aggression, human rights, notably genocide and racial discrimination, and the laws of war, and that the Tribunal was precluded from legitimizing the results of this aggression[27] and must reverse the effects by granting the territory to the Federation of Bosnia and Herzegovina.[28] The Republica Srpska opposed the applicability of the principle of non-recognition, *inter alia*, by contending that its relevance extended only to situations where one state had seized territory from another state and that hence the Federation of Bosnia and Herzegovina lacked standing to rely on it.[29] The Tribunal accepted the factual veracity of the Federation of Bosnia and Herzegovina's argument detailing forcible expulsion and mass killings.[30]

However, it refused to apply the doctrine of non-recognition in favour of the Federation of Bosnia and Herzegovina. It came to this result by stating that the doctrine applied only to situations where an entity seeks to effect a change in sovereignty over territory. In the case of the Republica Srpska, its campaign had the object of acquiring territory from the internationally recognized Republic of Bosnia and Herzegovina. While it followed that the Republica Srpska was precluded from asserting rights based on conquest, it did not follow that the Federation of Bosnia and Herzegovina was entitled to control the territory in question. The injured party was the Republic of Bosnia and Herzegovina and not the Federation of Bosnia and Herzegovina. Since the Dayton Accords had already confirmed the sovereignty of the Re-

24. *See* Award, *supra* note 4, at 419, 424, and 431, paras. 70, 83, and 98.
25. 8 ILM 679 (1969).
26. *See* Award, *supra* note 4, at 408 and 431, paras. 34 and 98.
27. This argument is supported by Security Council Resolutions UN Doc. S/RES/819 (1993) and UN Doc. S/RES/836 (1993).
28. *See* Award, *supra* note 4, at 415-416, 419, and 421, paras. 59-61, 69, and 76.
29. *Id.*, at 418, para. 66.
30. *Id.*, at 413, paras. 49-51.

public of Bosnia and Herzegovina over the entire territory of the country, the particular injury for which redress was demanded under the non-recognition doctrine had already been remedied.[31]

This reasoning gives a certain semblance of formal logic, but it is less than satisfactory in policy terms. If the doctrine of non-recognition can work against sub-state entities, it is difficult to see why only sovereign states may benefit from it. The Tribunal admits that the doctrine has been extended from purely inter-state situations to situations where a sub-state entity seeks to wrest territory from a sovereign state. By the same logic, the principle should apply where one sub-state entity commits aggression against another sub-state entity. If the policy behind the doctrine of non-recognition is the discouragement of aggression, genocide, and other human rights violations in the course of acquisition of territory, it is difficult to see why the principle should only apply if a sovereign state stands to lose territory. The true injured party is likely to be the population of the area concerned. Moreover, for all other purposes, the Brčko arbitration follows the pattern of a classical territorial dispute under international law. It is curious that on this point the Federation of Bosnia and Herzegovina should lack standing to rely on an accepted principle of international law.

The interplay of legal rules and equitable principles, as applied by the Tribunal, is well illustrated by the way it deals with the demographic consequences of the conflict. The Tribunal cites statistics according to which the town of Brčko Grad before the outbreak of the hostilities was 56% Muslim, 20% Serb, 7% Croat, and 17% 'other'. The population of the entire Brčko Opstina region was 44% Muslim, 21% Serb, 25% Croat, and 10% 'other' at that time. By the time hostilities were suspended, the area controlled by the Republica Srpska was almost entirely Serb populated. It now consists of pre-war residents as well as refugees from other parts of Bosnia and the Krajina.[32]

The Federation of Bosnia and Herzegovina asserted that historic, demographic, cultural, and other factors may give rise to a claim to territory, even if these ties were originally to a people or entity which did not constitute a state. Since the Federation of Bosnia and Herzegovina had stronger historical and socio-economic ties to Brčko than the Republica Srpska, the area should be placed under Federation control.[33]

The Tribunal finds that in light of the unique demographic diversity of the Brčko area it is not clear that either entity can show sufficiently dominant connections with the area to justify exclusive control. Turning to equi-

31. *See* Award, *supra* note 4, at 421-422, paras. 76-78.
32. *Id.*, at 411 and 413-414, paras. 45, 50, and 53.
33. *Id.*, at 417, para. 62. In support of its contention, the Federation cited Western Sahara, Advisory Opinion of 16 October 1975, 1975 ICJ Rep. 12.

table principles, it recognizes that the Federation of Bosnia and Herzegovina has demonstrated compelling interests in the Brčko area, in particular in providing for the safe return of the previous Muslim and Croat populations.[34] The Tribunal finds that one way to alleviate the results of the Republica Srpska's past violations would be to relocate the IEBL in such a way as to bring into Federation territory all the major roads and the town of Brčko Grad itself,[35] or even to grant control of the entire Brčko area to the Federation of Bosnia and Herzegovina. This solution is rejected essentially for two reasons: firstly, the Republica Srpska has a vital interest in preserving a connecting corridor between its eastern and western parts. The desire to have the ability to move armed forces from one part of the Republica Srpska to another seems a legitimate interest to the Tribunal, provided such movements are not related to prohibited threats or use of force.[36] Secondly, the Tribunal is mindful of the effect that such an award would have on the current population of the Brčko area, many of whom are Serb refugees from other parts of Bosnia and the Krajina. Transfer of the Brčko area to the Federation of Bosnia and Herzegovina would result in a mass exodus of Serbs from Brčko. The task of punishing war criminals lies with the Hague Tribunal and any 'penalty' imposed by the present Tribunal is liable to fall on a population that must be presumed innocent.[37]

6. OUTCOME

The Award's operative part foresees a detailed program of action involving the appointment of a Deputy High Representative for Brčko (Brčko Supervisor), whose task is to supervise the Dayton implementation in the area for at least a year and to strengthen local democratic institutions. The Supervisor is to have legislative powers. In cooperation with SFOR and the UN International Police Task Force (IPTF), he is to ensure freedom of movement and the protection of all citizens of Bosnia and Herzegovina within the area. He is to establish a programme for the return of former residents. He is to ensure free and fair local elections in the area under international supervision, as well as the establishment of a democratic government and a multi-ethnic administration for Brčko Grad. In addition, he is to take a number of specific steps toward economic vitalization of the area.[38]

The Tribunal concludes that at this time it would be inappropriate to make a final allocation of responsibilities among the parties. It will entertain

34. *See* Award, *supra* note 4, at 428, para. 89.
35. *Id.*, at 426, para. 86.
36. *Id.*, at 429, para. 90.
37. *Id.*, at 430, para. 92.
38. *Id.*, at 433, para. 104.

requests for further action to this effect from the parties to be received between 1 December 1997 and 15 January 1998. The Tribunal announces its intention to render a further decision by 15 March 1998 which shall form part of this Award.[39]

While the Award may be open to criticism on a number of technical points and in terms of its somewhat inconclusive outcome, it is difficult to offer attractive alternatives. Any attempt to change the *de facto* armistice line, especially at the cost of the Republica Srpska, would almost certainly have encountered determined armed resistance. The Award, unorthodox as it is, constitutes an attempt to implement the Dayton principles without changing the *de facto* boundary.

In a Presidential Statement of the Security Council,[40] issued on the same day as the Award, the Security Council notes the decision and reminds the parties to Annex 2 of their obligation to be bound by the Arbitral Tribunal's decision and to implement it without delay.

The Brčko Implementation Conference convened in Vienna on 6 and 7 March 1997 and endorsed a number of proposals for the Award's implementation.[41] Specifically, it took account of the need to place additional police monitors in the area. Security Council Resolution 1103[42] notes the Tribunal's decision and the holding of the Brčko Implementation Conference. In it, the Security Council decides to authorize the increase of the UN Mission in Bosnia as requested by the Brčko Implementation Conference by an additional 186 IPTF monitors together with 11 civilian personnel.[43] A Brčko Supervisor was appointed in the person of Robert William Farrand, a US national. Elections took place in September 1997.

It is still too early to make an assessment of the Award's implementation. Reports of violence against UN personnel and property in Brčko, such as the incidents of 28 August 1997,[44] indicate that success is far from assured. There has been no notable progress towards the return of former residents. A number of measures for the economic revitalization of the area have been taken.

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39. The Tribunal invokes Art. 15 of the UNCITRAL Arbitration Rules, *supra* note 3, as forming the basis for this procedure. Art. 15 authorizes the tribunal in general terms to conduct the arbitration in such a manner as it considers appropriate. It deals with such matters as the taking of evidence from witnesses and the submission of documents. Curiously, the Award does not cite Art. 26 of the UNCITRAL Arbitration Rules, which provides for interim measures and the rendering of an interim award for that purpose.
40. UN Doc. S/PRST/1997/7.
41. *See* Press Release SC/6350 of 31 March 1997.
42. UN Doc. S/RES/1103 (31 March 1997).
43. The cost of this increase is budgeted at $12.9 million. *See* Press Release GA/AB/3152 of 30 May 1997.
44. *See* Press Release SG/SM/6307 of 29 August 1997.