

Arbitration Award for Dobrinja I and IV

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17 April, 2001

I Diarmuid P Sheridan having been appointed Independent Arbitrator by Decision of the High Representative made on 5th February 2001, wish to state that I am greatly honoured at the appointment both for myself and my country.

I have come here with a completely open mind and no preconceived ideas except to do my best to achieve a fair and just Award which is mine alone, having held a hearing and having studied such documents (including maps appropriate to my task).

In selecting an Irish judge to come to Bosnia and to embark on my solution of a very difficult matter, namely to draw the Inter Entity Boundary Line between the Federation as one party and Republika Srpska (hereinafter referred to as the RS) as the other, I do not consider that is a question of a Plaintiff and a Defendant. Rather, both parties are equal before me and both enjoy my total esteem.

I wish to make clear, as I have on many occasions in this arbitration, that no one has sought by word or deed to influence me in my approach to my task. The document of the HR states that I am an independent arbitrator.

This means what it says and at this present moment commencing to put on paper my findings and award, I know of no source which is attempting or has attempted to fracture this independence. Both parties and the people of Dobrinja who have appeared before me in the last week of the hearing have of course strenuously developed their points of view and arguments as to the outcome and their desires in respect of same. It has struck me during the hearing that courtesy has played a major part, even while as the parties have tenaciously adhered to their stated positions.

I am conscious that I am not skilled in the language or languages of the country and I am dictating this document in English. Because of this and, because I wish my own words to be fully effective, I must now state, that the interpretation of this document shall be from the English text, notwithstanding that this text will be translated as required. Let no one think that this decision on my part is in any way condescending but is born of practical realities, as far as I am concerned.

Dayton Agreement

I have spent a lot of time reading and re-reading the Dayton Agreement and, the more I do so, the more I admire it, as I think it was a splendid achievement in Bosnia and Herzegovina, with the consequent demarcation of the boundaries of the respective Entities, being the parties to this Arbitration. I have read a good deal about the circumstances of the Agreement and it is quite obvious that, by no stretch of the imagination, could it be said that it was easily achieved. Breakdown was the constant companion of the negotiators up to the time of signature. It is also, at least, withstood the test of time as five years have now passed since its inauguration and the terrible violence of the war, to which I will not allude, has ceased. While I am sanguine with the Agreement and the various Annexes appended thereto, I am far from satisfied with the maps.

The parties in Washington and Dayton were under great strain and the map chosen in the first instance, I am informed, was a map to a scale of 1:600,000. Why this particular scale was chosen is not clear to me.

Because while it would be perfectly adequate to delineate the boundaries of the Entities over the whole spectrum, the fact would have to remain that the City of Sarajevo would merely appear as a dot. In my opinion, the translation to a 1:50,000 scale, whilst an improvement, would not be of great assistance for the purposes of pinpointing an area such as Dobrinja I and IV with any type of accuracy in relation to the buildings. The RS have stoutly maintained that there is a map in Washington in the Pentagon which shows the confrontation line

coinciding with the IEBL line. This is alleged to be on a scale of 1:600,000 and although I have not seen it, it would suffer from the infirmity as being of too large a scale. Some support for this is to be found in an article given by Carl Bildt, the first High Representative, where he states that there is a map in the Pentagon which corroborates the merging of the lines and that a map going through the centre of buildings is absurd. This article was handed in by a witness for the RS and I investigated the matter as far as I could. This alleged statement was never repeated in his book "Peace Journey" first published in 1998 three years after the Dayton Agreement. I have not received any confirmation in relation to this article even though I asked for it but another map was produced from the United States known as The Proximity Peace Talks Representative Map, third edition. This map was received from the National Imagery and Mapping Agency in Reston, Virginia, USA and is to a scale of 1:600,000. It has the advantage that it was signed not only by the parties but by the President of Bosnia and Herzegovina and endorsed by Croatia and the then Yugoslav Republic. Whilst the scale has been the subject of criticism by me, as a proper scale for a detailed map, the writing on it states that it contains the agreed cease-fire map, the IEBL line and zones of separation. It is quite clear, certainly to the practised eye of a cartographer in, this case Major Batchelor of the Canadian Army, who is the chief geographic officer in SFOR HQ and an officer, to my mind, of total integrity, that the cease-fire line at Dobrinja I and IV does not coincide with the IEBL line. I think it is true to say that the parties, whilst under great strain produced map after map, and while a connection between the IEBL line and the cease-fire line is alleged I am far from satisfied that this is in fact the case.

At the end of his very able address to me in summing up the case for the RS, I put this very matter specifically to Mr. Lukic and pointed out to him the matters of which I have just referred, namely the signatures. His response was that in this regard the RS remains on its claim that it was a mistake in the dispute area and protested against this on 11 December. Since he claimed that it was a mistake the RS, in his submission, permanently remain of the same position. For my part I find it impossible to be satisfied that a map of such a scale or even map of 1:50,000 would allow sufficient detail so as to allow a cartographer to plot anything more than the whole of the boundary line between the two entities and I feel that even if I were in possession of the map stated to be in the Pentagon, being a map of 1:600,000 I could not use that map so as to allow to hold that at Dobrinja I and IV the confrontation line and the IEBL line coincided pinpointing areas such as Dobrinja I and IV. I have examined such maps, 1:50,000, and I cannot see how any cartographer or map drawer could accurately draw a line with Dobrinja I and IV in mind on a map of such a scale. It is only when one gets to a much lower scale that the outlines of the buildings, comprised in the particular area, become manifest. I am firmly of the view that no cartographer would draw lines deliberately to go right through the middle of existing buildings. I am not satisfied that when the parties executed the agreements in Paris that they realised the full import of the line as drawn. I am not satisfied and have not been from a very early stage, that the particular line and its course can be upheld. I think that in both cases, in relation to the confrontation line and the line as drawn, the doctrine of mistake is of particular significance. If I might quote from a letter received from a citizen of Dobrinja he says, "I ask you, Mr. Sheridan, not to divide any kind of lines that divide buildings in two going through our apartments, bedrooms, living-rooms hallways and bathrooms which would be a most primitive form of behaviour indeed." I find myself in total agreement with those sentiments. I think that this was recognised by the drafters of Annex 2 which allowed the parties to adjust the IEBL by mutual consent subject to notification to the IFOR commander.

Article 4 of Annex 2, inter alia, provides that the line on the 1:50,000 scale map would be provided for the Appendix delineating the Inter Entity Boundary Line, which is accepted by the parties as controlling and definitive and is accurate to within 50 metres. This provision of 50 metres, while of little consequence in relation to unbuilt on territory might well be crucial in respect of buildings. Be that as it may, it was quite clear that the two Entities, in so far as Dobrinja I and IV were concerned, failed to agree at all at the sub-commission for the adjustment of boundaries under Annex 2 Article 4. 1. Despite many discussions under the chairmanship of General Wilcox with both parties present the RS maintained, and carry this claim up the present time that the true line was the confrontation line whereas the Federation have adhered to the IEBL line, although such line goes through the buildings aforementioned.

As will be seen what I have stated I am not convinced as the accuracy of the IEBL line and that any cartographer would draw a line deliberately through blocks of flats, so that my conclusion in regard to mapping, is that I cannot rely on the confrontation line urged upon me with great force by the RS neither can I rely on the IEBL line which has been central to the case put forward by the Federation at this arbitration.

I have mentioned the word mistake in relation to the maps but I think that I should refer to the matter as mistake and rectification. I have studied closely the legal position under the Common Law and Equitable principles so as to find a principle that would apply to this case. This principle is to be found in the judgement of Simonds J. in the

case of *Crane -v- Hageman-Harris Co Inc* [1971] 1 WLR at 1391 where the judge states as follows:

“It is sufficient to find a common continuing intention in regard to a particular provision or aspect of the agreement. If one finds that in regard to a particular point, the parties were in agreement up to the moment when they executed their formal instrument, and the formal instrument does not conform with the common agreement then the Court has jurisdiction to rectify, although it may be that there was, until the formal instrument was executed, no concluded and binding agreement between the parties.”

This passage is of course a passage dealing with the law of contract but it is useful, in my view, to show the legal position that the parties at Paris, in particular, found themselves namely that a map was signed which of course gave effect to the Dayton Agreement, but which has a line which I do not accept as a true line. I venture to say that the parties were quite surprised when on closer examination and under circumstance of a much lower scale the line was found to go through buildings in a conurbation. I do not criticise the parties in any way for failing to reach agreement in relation to Dobrinja I and IV, notwithstanding many meetings. They succeeded in agreeing everything else to all intents and purposes, which was a great achievement. I am therefore, under the jurisdiction conferred on me by the High Representative, while having regard to the confrontation line and the IEBL line, to come to my own conclusion as to where the line should be. Whilst this function is independent of the lines, and is a matter within my jurisdiction, I would, of course, not, unless I had good cause to do so, refuse to recognise the importance of the two lines. I certainly have not done so.

I think it is now appropriate to consider the testimony of the respective parties in the Arbitration. It was the case, made by the Federation that the pre war residents of Dobrinja I and IV who were non Serbs were forced to abandon their holdings and to become refugees. Whilst they adhered to the IEBL line, the thrust of the Federation case was that they wished those people to be put into their homes and, in doing so, this would in my view clearly refer to some property to the right of the IEBL line, and if unchanged, would be in the RS. I will deal with this dilemma when I come to the evidence given by the citizens of Dobrinja I and IV in the last week of the hearing. But it is sufficient to say, at this moment, that the RS position is quite clear, bearing in mind their contention that the boundary was the confrontation line which of course meant that the apartments concerned were within their jurisdiction and undivided. Mr Lukic in his closing submissions stated that Dobrinja I and IV were completely vacated of all their residents, irrespective of their age, sex, ethnic, religious, linguistic or other affiliations. These areas had been emptied because the Dobrinja I and IV had been located at the line of fire. And considering that one's head was more important than one's property and because only the head can use the property the residents of Dobrinja I and IV abandoned it. I heard the evidence of the Prime Minister of the RS, who pledged that all persons deprived of their homes in Dobrinja I and IV would be speedily re-housed. I have no doubt that, this is the intention and I accept the bona fides of His Excellency the Prime Minister.

During the hearing a great deal of contention arose as to the 51/49% divide of territory. The RS contended that they did not receive their percentage (49%) and claimed the disputed area of Dobrinja I and IV to make it up. I cannot step outside my jurisdiction to consider elsewhere in relation to the territory, but I am certainly not entitled to visit any such shortfall on one area namely Dobrinja I and IV.

Before going on to deal with the evidence of the Dobrinja residents, I think, that it is appropriate that I refer to the school. Since the signing at Paris of the Dayton Agreement, the land between the confrontation line and the IEBL has, to all intents and purposes, been fallow. In it one finds the remains of a very large school. This school, apparently, from evidence that I received during the course of the Arbitration was a very important school; so much so that it was necessary to hold classes in shifts. It is quite clear that it catered for the area now the subject matter of the Arbitration, many other areas in other parts of Dobrinja, areas that are now without question within the RS and many other villages and areas of population over a wide compass. In respect of the outcome of this Arbitration it seems absolutely essential that the school should be refurbished as quickly as possible. I am quite sure that its re-opening would be the subject of great joy in the surrounding area.

Apart from cost there not appear to be any great difficulty as the lines as they are at present constitute no barrier to the day to day activities of the inhabitants who are free to cross the line at will. I would envisage that whatever line I draw will be the same, so that schoolchildren would not be inhibited in any way from attending the school once it is refurbished. This school should be devoid of any element of ethnic discrimination and be open to all irrespective of their ethnic origin, creed, colour, or any other inhibiting factor. This would be a great joy to me. There was mention of “Berlin Walls” during the course of the hearing but I envisage that when the line is drawn it will be a line on a map, of course, showing the boundary between the two entities, but, under no circumstances

preventing persons on both sides from enjoying full movement or from carrying on business on the other side of the line. It would be heartening, if I were to be able to expect that in the future the line would disappear for all practical everyday purposes and that the communities generally, whilst of different ethnic origin, would come together as neighbours and would be welded by time, into a community enjoying the fruits of a re-built Dobrinja I and IV.

I think it would be appropriate for me to make a comment or two on the question of Sarajevo generally. The pre-war population of Sarajevo consisted of Bosniaks, Serbs, Croats and other nationalities. It was an international city and a very beautiful one at that. I find it very difficult to come to terms with the phrases "Serb Sarajevo", "Bosniak Sarajevo", "Croat Sarajevo" or any other appellation such as those. In my view, the city of Sarajevo is a single unit comprising the ethnic groups that I have mentioned. Many have fled and it is my earnest desire that all persons should return to this great city as residents and that Sarajevo like the Phoenix will fully rise (as it is now rising) from the ashes of war, as it now is the capital of Bosnia and Herzegovina. With regard to the apartments at Dobrinja I and IV, irrespective of what line is drawn, it is essential that all persons whether Serb, Bosniak, Croat or any others who are or were legitimate residents of the area and those who have been dispossessed should be, without delay, hold or be restored to their residences, properly refurbished with ordinary utilities that people are entitled to expect. It is only then that the community will revive and the legacy of strife will tend to disappear.

I have made it quite clear at the outset of this Arbitration that I have been concerned much more with people rather than with institutions and I could not fail to be affected by some of the descriptions of the hardship endured during this unfortunate conflict. I also had to make it quite clear that I have no jurisdiction whatsoever to put any person into possession of an apartment or residence or to dispossess any person from same.

This is a matter for the Civil Law. But I would urge that, if any person or persons illegally hold property and are dispossessed, provision should be made at the earliest possible moment, either by the Federation or the RS, as appropriate, to re-house these people. At the end of the day to find people enduring more hardship on top of the hardship already endured would be very distressful.

Let me pay tribute to the Club of Mayors, a representative of which body gave evidence before me. They were a mixed group including a fair proportion of Serbs. They remained in Sarajevo throughout the war and their bravery excites a feeling of admiration. The Mayors stood firm notwithstanding the terrible hardship of a long siege. They must have been a great example to the ordinary people of Sarajevo trying to do the best they could in very difficult circumstances. I heard evidence in rotation from persons from the Federation and persons from the RS.

Many persons from the RS were kind and generous and acknowledged the great suffering of the people and one witness stated that the ordinary citizens were not responsible for what happened. I am bound to say that most of the witnesses from the RS were either in apartments at Dobrinja I and IV or came from different places outside the scope of this Arbitration. Before commencing the Arbitration I received hundreds of letters, mostly, I am bound to say from persons, who have, if I may call it a Federation viewpoint, but I did receive a large number of letters from schoolchildren in the RS. I have read every one of them and have taken them into consideration as well as the testimony actually given in the last week of the Arbitration.

The vast preponderance of evidence and the letters are from persons who have stated that they were put out of their houses and that they dearly wished to return. Having heard all the evidence and read all the letters I am convinced that a vast bulk of people, normally non-Serbs were driven from their houses and became refugees. Many of the witnesses who gave evidence for the RS have acknowledged the hardship of these people and as I already stated Mr. Lukic described it as a deserted area. Although I am certain that he holds this view I am not convinced that Dobrinja I and IV ever became actually deserted but certainly the Bosniak people had to go.

I am not for one moment, going to dwell on anything like imprisonment or hardship, I am merely concerned with the people themselves and my duty towards them. I would like everybody housed straightaway but at present this is not possible. The different regulations between the Federation who run a voucher system and the RS where cash is involved makes for great difficulty for people to gain possession of really what is their own. I have to recognise realities and do my best, according to my conscience, to try and right a wrong which was done to these people. I have to make it clear that no member of the Serb community legitimately in any apartment be it Federation or the RS should be disturbed in the slightest and should be entitled to such facilities that will come on board in relation to refurbishment. I am convinced that the vast majority of refugees longing to return are Bosniaks and that according to the places pointed out to me on the large photograph have apartments on both sides of the IEBL line. Many of the witnesses were concerned with Sarajevo itself describing it as a living organism but I cannot be

concerned with anything except Dobrinja I and IV and such matters as will flow from my award.

The resolution of this matter has been as difficult as I have encountered in my long period in dealing with cases and I can only go where my conscience leads. Even though that it will be painful for persons whose allegiance, and this I admire, lies elsewhere. I have become convinced that the persons almost exclusively from the Federation side were dispossessed of their homes and the only matter that my conscience allows me to do is to restore them accordingly. To do this, it is necessary for me to declare and award that the blocks of flats and the school should be contained in the IEBL line that I propose to have drawn and to this end I wish to refer to the map prepared by Major Batchelor giving effect to the view I have formed. I have never felt so human as I do at this moment. I have never felt as humble as I do at this moment but I would ask everybody to believe me that if my conscience had dictated another course then that course would have been adopted.

Sarajevo, 17 April 2001

Diarmuid P. Sheridan
Arbitrator for Dobrinja IEBL

Statement, 17 April, 2001