Brcko Arbitral Tribunal for Dispute Over the Inter-Entity Boundary in Brcko Area Award

ARBITRAL TRIBUNAL FOR

DISPUTE OVER INTER-ENTITY BOUNDARY IN BRCKO AREA

The Republika Srpska
Arbitration for the Brcko Area

v.

The Federation of Bosnia and Herzegovina

AWARD

Appearances:

For the Republika Srpska:

Mr. Nikola Kostich

Styler Kostich LeBell

Dobroski & McGuire

Dr. Delbert D. Smith

Mr. John M. Adams

Reed Smith Shaw & McClay

For the Federation of Bosnia and Herzegovina:

Mr. Frank McCloskey

Mr. Edward O. Delaney

Barnes & Thornburg

Mr. Jay D. Zeiler

Akin, Gump, Strauss, Hauer & Feld

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I. INTRODUCTION

1. On 14 December 1995, after over three and a half years of war in Bosnia and Herzegovina, the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina (“Federation”) and the Republika Srpska (“RS”), as part of the General Framework Agreement for Peace in Bosnia and Herzegovina (“GFAP” or “Dayton Accords”), signed Annex 2 of the GFAP, which entered into force upon signature of the parties[1], and provided for the establishment of an “Inter-Entity Boundary Line” (“IEBL”) between the Federation and the RS throughout Bosnia and Herzegovina. The parties having failed to reach agreement during negotiations in Dayton on the allocation of Entity-control in the Brcko area, Article V of Annex 2, entitled “Arbitration for the Brcko Area”, provided that the parties “agree to binding arbitration of the disputed portion of the Inter-Entity Boundary Line in the Brcko Area.”

2. Article V provides for the selection of a three-member arbitral tribunal. Under Article V(2), the Federation and the RS agreed that “no later than six months after the entry into force of this Agreement, the Federation shall

appoint one arbitrator, and the Republika Srpska shall appoint one arbitrator". Pursuant to this provision, the Federation appointed professor Cazim Sadikovic and the RS appointed Dr. Vitomir Popovic as arbitrators. Each party selected its arbitrator without objection or challenge from the other party.

3. Article V(2) further provides that

(a) third arbitrator shall be selected by agreement of the Parties' appointees within thirty days thereafter. If they do not agree, the third arbitrator shall be appointed by the President of the International Court of Justice. The third arbitrator shall serve as presiding officer of the arbitral tribunal.

After the party-appointed arbitrators failed to appoint a third arbitrator within the required time, the president of the International Court of Justice, on 15 July 1996, appointed Roberts B. Owen as third arbitrator and presiding officer of this Tribunal.

4. Article V also provides for the substantive and procedural rules under which the arbitration would proceed. Under Paragraph 3, the parties agreed that unless otherwise agreed by the parties, the proceedings shall be conducted in accordance with the UNCITRAL rules. The arbitrators shall apply relevant legal and equitable principles.

5. Although Article 31 of the UNCITRAL Rules contemplates that in normal circumstances "any award or other decision of the arbitral tribunal shall be made by a majority of the arbitrators," the parties can always agree on a different procedure, and in this case they have so agreed. It was understood at Dayton, as subsequently confirmed in writing, that if a majority decision of the Tribunal is not reached, "the decision of the presiding arbitrator will be

final and binding upon both parties."2 It may be observed that such an agreement was in fact a virtual necessity in this particular case: from the outset the positions of the two parties on the merits have been polar opposites and each party has explicitly refused to compromise. These polar positions and accompanying intense animosities, consistently in evidence from the opening of the Dayton conference onward, made clear from the outset that any party-appointed arbitrator would encounter significant difficulties in conducting himself with the usual degree of detachment and independence. The parties therefore decided to change the rule on decision-making in view of the substantial likelihood that an arbitral resolution could be achieved only by the two parties' agreeing that the rulings of the Presiding Arbitrator will be treated as decisive.

6. Article V(5) of Dayton Annex 2 calls for a Tribunal decision "no later than one year from the entry into force" of the agreement – i.e., by 14 December 1996 – but the parties have agreed, with the consent and approval of the Tribunal, to extend the date until 15 February 1997.3

II. PROCEDURAL HISTORY

7. Shortly after his appointment, the Presiding Arbitrator notified the other arbitrators and the parties that a preliminary conference would be held in Sarajevo on 7 August 1996 in order to constitute the Tribunal and decide preliminary procedural issues including scheduling of future proceedings. Thereafter, on 6 August 1996, having been informed of somehesitation on the part of Republika Srpska as to whether it would actually participate in the proceedings,

the Presiding Arbitrator visited Pale, conferred with Dr. Popovic and senior RS officials, and conveyed the message that the RS was bound by its Dayton treaty obligations to participate and that it was in the best interests of RS to do so in order to present its side of the dispute to the Tribunal. On 6 August, however, Dr. Popovic announced his decision not to appear at the conference scheduled for the next day.

8. On 7 August 1996 the Tribunal, represented by the Presiding Arbitrator and Professor Sadikovic, convened and held the preliminary conference in Sarajevo. At the conference, the Federation was represented by counsel. Neither Dr. Popovic nor any representative of the RS attended. During the conference, the Tribunal heard argument from Federation counsel concerning various procedural issues, including the scheduling of written submissions andoral hearings. At the conference, Federation counsel also argued that certain UNCITRAL Rules were inapplicable to the proceedings, and pointed out that the silence of the UNCITRAL Rules on the question of admissibility of evidence suggested the need to adopt a set of guiding evidentiary principles.

9. Immediately after the conclusion of the 7 August conference the Presiding Arbitrator prepared a draft "Pre-Hearing Order." The draft was sent to counsel for the Federation for comment, and on 8 August 1996 the Presiding Arbitrator again visited Pale and delivered to senior RS representatives a copy of the draft "Pre-Hearing Order." The Presiding Arbitrator described to the RS representatives the discussions that had occurred the previous day, explained the suggested provisions of the draft order, invited RS to make any comments it might wish, but received no immediate response.

10. Six days later, on 14 August 1996, after receiving comments from Federation counselbut nothing from RS, the Presiding Arbitrator issued the final version of thePre-

Hearing Order. The Order was served upon counsel for the Federation, upon political officials of the RS, and upon Dr. Popovic. In that order, the Tribunal ruled that

1. Neither party having voiced any objection as to any of the three arbitrators asselected by the parties and by the President of the International Court of Justice, the Tribunal shall be constituted in accordance with such selections.

* * *

4. Procedurally, the Tribunal will be guided by the UNCITRAL Rules (except for Rules 3, 18, 19, and 20, which shall not be applicable). As to the admissibility of evidence, the Tribunal will be guided by the principles set forth in the Appendix to this Order.[4]

11. The Pre-Hearing Order further established deadlines for the submission of, and response to, "First" and "Second" written statements by each party. As to the First Statement, the Order provided that

each party shall submit a First Statement (a) describing all essential facts that the party believes the Tribunal should consider in reaching its decision; (b) stating, and providing supporting authority (if any) for, all principles of law and equity that the party believes applicable; and (c) identifying all witnesses whose testimony the party intends to present and summarizing that testimony.

12. As to the Second Statement, the Order provided thateach party shall submit a Second Statement that describes in detail a proposed plan for the economic and political structure of the Brcko area, consistent with the Dayton General Framework Agreement and its Annexes. The Order further provided that the plan should address a number of specific factors relevant to the dispute.[5]

13. Pursuant to the 14 August Order, the Federation

timely filed its First and Second Statements.[6] Both filings were served upon political officials of the RS and upon Dr. Popovic.

14. On 17 September 1996, having received no pleadings from the RS, the Presiding Arbitrator convened a status conference in Vienna to consider, among other things, the reasons for RS's non-participation in the arbitration. The arbitrators and both parties were notified of and invited to the conference, which was attended by the Presiding Arbitrator and Professor Sadikovic, counsel for the Federation, and a delegation of political officials representing the RS. Dr. Popovic did not attend the meeting. At the conference, the RS argued that the Tribunal was without jurisdiction to proceed because (1) the RS interpreted Annex 2, Article V(l) as authorizing an arbitration only if the "disputed portion" of the IEBL was "indicated on [a] map" included in the Appendix to Annex 2 and (2) there was no map showing the disputed portion of the IEBL in the Brcko area. Without ruling on the issue, as to which neither side had made a written presentation, the Presiding Arbitrator indicated that under the UNCITRAL Rules such jurisdictional rulings could be deferred until the issuance of a final award, and strongly encouraged the RS to designate legal counsel and begin to participate in the formal arbitral proceedings. At the conference the Presiding Arbitrator provided the RS delegation with a Dayton map showing the IEBL in the Brcko area and indicating (by footnote) that the location of the line in the Brcko area was subject to arbitration.

15. On 1 October 1996, at the request of legal counsel retained by the RS, the Presiding Arbitrator held a meeting with such counsel in Washington, D.C., and discussed the status of the proceedings. While RS counsel stressed that they had not yet been authorized by their client to participate in the proceedings, the Presiding Arbitrator provided to RS counsel a memorandum describing the procedural

history of the arbitration to that date.

16. On 16 October 1996, the Presiding Arbitrator, after notifying Professor Sadikovic and the Federation and hearing no objection from either, held an ex parte conference in Washington, D.C. with political officials from the RS in order to continue to seek a solution to RS's continued non-participation in the proceedings. At this meeting, the RS was also represented for the first time by legal counsel, who advised the Presiding Arbitrator that, although Dr. Popovic was in Washington at the time, he had decided not to attend the meeting. After reiterating their earlier jurisdictional arguments, the RS representatives indicated that the RS might decide to file papers with the Tribunal. The RS further indicated that, if it did decide to participate in the proceedings, it would request that the Tribunal defer its decision from the prescribed date (14 December 1996) until 15 February 1997.

17. On 31 October 1996, the Presiding Arbitrator sent a letter to counsel for RS to confirm that any papers the RS wished to submit to the Tribunal must be presented no later than 14 November, with the possible exception of short additions merely supplementing points previously presented in writing. Thereafter, at the request of RS counsel, the deadline for the RS's submission of papers was extended until 22 November.

18. On 22 November 1996, the RS filed: (1) an "Emergency Request for an Expedited Interim Award," and (2) a "Special Appearance and Jurisdictional Statement," including as an Appendix a "Statement of the Republika Srpska." In the "Emergency Request for an Expedited Interim Award," the RS requested, pursuant to Article 32(1) of the UNCITRAL Rules, an Interim Award (i) clarifying the scope of the Tribunal's jurisdiction; (ii) confirming that the Tribunal had not prejudged the merits of the case before it; and (iii) ordering that all activities and communications related to the

proceedings be confidential and limited in distribution to the parties and their counsel.

19. Promptly thereafter, the Tribunal issued a Memorandum to the Parties which denied the RS request for an Interim Award clarifying the scope of the Tribunal's jurisdiction. At that time the Federation had not had an opportunity to respond to the RS's Jurisdictional Statement. The Memorandum further indicated that the Tribunal had not prejudged the case before it and would continue, as before, to observe procedures designed to maintain the confidentiality of the proceedings.

20. On 27 November 1996, acting on the 16 October 1996 request of the RS and with the agreement of the Federation, the Tribunal extended the time for completion of the arbitration to and including 15 February 1997.

21. On 1 December 1996, Gojko Klickovic, President of the Government of Republika Srpska, wrote a letter to the Presiding Arbitrator stating that RS did not intend to participate further in the arbitration proceedings and purporting to revoke the decision of the RS to appoint Dr. Popovic as its chosen member of the arbitral tribunal.[7] The letter claimed the RS actions were justified because "guarantees for a fair and just procedure do not exist, and . . . [the Presiding Arbitrator] intend[s] to use the arbitration process strictly as a smoke screen for the imposition of a pre-ordained, unjust decision, all to the harm of the legitimate and vital interests of Republika Srpska." The letter concluded by stating that the RS would consider any future Tribunal decisions to be invalid.

22. On 11 December 1996, the Presiding Arbitrator responded to President Klickovic's letter of 1 December 1996, stating the view that the RS's proposed actions would clearly violate its treaty obligations under the Dayton Accords and encouraging both the RS and Dr. Popovic to participate in

future proceedings so that the Tribunal, at the time it rendered its Award, would have the benefit of the views of all concerned.

23. On 12 December 1996, the Federation submitted three documents in response to the 1 December 1996 letter from President Klickovic. First, the Federation submitted a formal "Response" that argued that the RS could not, under the UNCITRAL Rules, withdraw the appointment of its arbitrator and stated that the purported withdrawal from the proceedings could not prevent the Tribunal from continuing the arbitration. Second, the Federation submitted a "Request for a Final Ruling and Default Judgment" in light of the withdrawal of the RS. Finally, the Federation offered a "Proposed Final Default Order."

24. In mid-December 1996 theTribunal solicited the parties' views as to the Tribunal's proposal to hold a hearing commencing in the first week of January 1997. When neitherparty made any objection, the Tribunal notified the parties that a hearing would take place in Rome commencing 8 January 1997.

25. On 3 January 1997, the Federation submitted a "Response to the Republika Srpska's Jurisdictional Arguments and Arguments on the Merits."

26. The hearing commenced on 8 January 1997 with all three arbitrators in attendance. Despite the previous "withdrawal," the RS was represented in full: three counsel from two U.S. law firms appeared for the RS; and various RS political figures, including Minister Aleksa Buha, also attended throughout. The Federation was also fully represented by legal counsel and a political delegation headed by Vice President Ejup Ganic. The hearing, which lasted nine days, included opening statements by counsel, testimony by 19 witnesses (eight called by the Federation, nine by the RS, and two by the Tribunal itself), and closingarguments. In

addition, the Tribunal received during the proceedings various written and evidentiary submissions by both parties. Most significantly, the Tribunal received from the RS a written submission entitled "Basic General Principles for the Economic Integration of Republika Srpska and the Free Movement of Goods, Services and People Through the Brcko Area." While not timely filed, the submission – in essence representing the RS's Second Statement – was accepted in order that the RS would have on file a complete set of pleadings in accordance with the Tribunal's 14 August 1996 Order.

27. Following the Rome hearing, the Tribunal conducted its deliberations in Washington, D.C. All three arbitrators were present and fully participated in the deliberations. However, during the last day of deliberations both Professor Sadikovic and Dr. Popovic refused to sign the Award.

III. PRELIMINARY RULINGS

A. Authority of the Tribunal to Act When One Member Refuses to Participate

28. An initial inquiry is whether the Tribunal's authority to render a binding arbitral award is affected by (a) President Klickovic's letter of 1 December 1996, purporting to effect a withdrawal from the arbitral proceedings, or (b) Dr. Popovic's refusal to participate in certain pre-hearing proceedings or to sign the Award, or (c) Professor Sadikovic's refusal to sign the Award.

29. As to item (a), it is deprived of any legal significance by the fact that the RS, subsequent to the Klickovic letter, fully participated in the Rome hearing and, indeed, completed its submission of written pleadings

requested in the 14 August Pre-Hearing Order. The RS has had a full opportunity to present its case to the Tribunal, thereby curing any question raised by the Klickovic letter.

30. As to (b) and (c), the Tribunal notes that Dr. Popovic also has cured any question relating to his early non-participation by fully participating in the Rome hearing and in the Tribunal's subsequent deliberations. As to the refusal by both Dr. Popovic and Professor Sadikovic to sign the Award following full deliberations, the UNCITRAL Rules do not deal expressly with the question of the legal significance of such a refusal, but other tribunals have interpreted those Rules as authorizing the tribunal to proceed to a decision despite the refusal of an arbitrator to sign. See, e.g., Saghi v. Iran. Award No. ITL 66-298-2, 14 Iran- U.S. C.T.R. at 3-8; see also Stephen Schwebel, International Arbitration: Three Salient Problems 279 (1987).8 Moreover, as noted in paragraph 5 above, the parties have agreed to modify the UNCITRAL Rules in order to provide that if a majority decision of the Tribunal is not reached, "the decision of the presiding arbitrator will be final and binding upon both parties."

31. For these reasons, the Tribunal concludes that there exists no impediment to the Tribunal's rendering its Award.

B. Jurisdiction

32. The Federation argues that a basic aspect of the dispute that the parties agreed in Dayton to submit to arbitration is the question whether the town of Brcko ("the Grad") and the surrounding municipality ("the Opstina") should be included in the territory of the RS or in the territory of the Federation. The Federation argues that the Tribunal has jurisdiction and authority to resolve this basic issue and related issues as to the future administration of these areas.

33. The RS advances two basic arguments as to the Tribunal's jurisdiction. It asserts, first, that the Tribunal has authority only to resolve the final placement of the IEBL in the Brcko area. Indeed, the RS has argued that the Tribunal has jurisdiction only to move the IEBL to the south of its present temporary location. Second, the RS asserts that it never understood at Dayton that a possible outcome of the arbitration might be a transfer of Brcko Grad from RS to Federation territory. The RS misunderstood the facts at Dayton, it asserts, with the alleged result that there has been an error or mistake of fact that invalidates the arbitration agreement under Article 48(1) of the Vienna Convention on the Law of Treaties ("Vienna Convention").9

34. In determining whether and to what extent it may properly exercise jurisdiction in the instant case, the Tribunal must of course look to the language of GFAP Annex 2. See Article 31(1), Vienna Convention on the Law of Treaties (a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose").10 If the meaning of the terms are ambiguous or obscure, recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning … or to determine the meaning.

Article 32, Vienna Convention on the Law of Treaties.

35. Annex 2 contains two relevant provisions. First, and most important, Article V – entitled "Arbitration for the Brcko Area" ~ provides that the Parties agree to binding arbitration of the disputed portion of the Inter- Entity Boundary Line in the Brcko area indicated on the map attached at the Appendix.

Second, the Appendix to Annex 2 provides that

the Appendix to Annex 2 consists of (a) a 1:600,000 scale UNPROFOR road Map consisting of one map sheet, attached hereto; and (b) a 1:50,000 scale topographic Line Map, attached hereto.

Such maps are incorporated as an integral part of this Appendix, and the Parties agree to accept such maps as controlling and definitive for all purposes.

36. The ordinary meaning of the language used in Article V(l), read in context and in light of the object and purpose of the Article, shows that a dispute exists between the RS and the Federation as to their respective claims for control in the Brcko area (as that area was indicated on the maps contained in the Appendix to Annex 2), and that the parties agreed to resolve this dispute by creating an international arbitral tribunal and submitting the issue to the tribunal for binding arbitration. The provision, however, contains several ambiguities. The provision does not explain the nature of the dispute and it makes the somewhat vague reference to the "Brcko area." The wording of Article V(l) does not precisely define the area, and the maps attached at the Appendix display, the territory of the Brcko Opstina, including the town of Brcko itself, with the temporary boundary line running through the opstina. Finally, the precise segment of the boundary line that lies within the disputed area is not explicitly identified either in the Annex or the map.

37. Turning to "supplementary means of interpretation" to clarify these ambiguities, it is clear that the reason for the lack of a precise definition of the nature of the dispute was the widely divergent positions of the parties with respect to the situation that should exist in the Brcko area after Dayton. During the Dayton negotiations, the Federation delegation firmly took the position that Brcko Grad must be included within Federation territory (and the IEBL placed accordingly), while the delegation representing the Bosnian

Serbs steadfastly held to the position that the RS must control not only the Grad itself but also a "corridor" connecting the two halves of the RS (and the IEBL placed accordingly). Indeed, each party indicated during the Dayton negotiations that the possession and control of Brcko was so important that, absent agreement, it would be willing to quit Dayton and resume hostilities. Finally, after recognizing that agreement could not be reached at Dayton, the parties agreed to submitthe situation to binding arbitration. The fact that the geographic scope and/or portion of the IEBL in "dispute" was not precisely defined, either in writing or on the map itself, does not negate the existence of the dispute. Rather, it underlines the magnitude and complexity of the dispute – and the reason the parties agreed to submit to binding arbitration as a means to resolve it. Moreover, the lack of a precise definition presents no impediment to the Tribunal's work: as in any arbitral matter, the exact contours of the dispute are defined by the parties' contentions during the arbitral process.

38. As demonstrated in the preceding paragraph, it is clear that the fundamental nature of the dispute concerns the mutually-exclusive demand that each Entity exercise sole control of the Brcko area. It seems clear that the Tribunal's jurisdiction was intended by the parties to be sufficiently broad to resolve the overall dispute that the parties placed before it. This might include, inter alia, granting the Federation exclusive control of Brcko Grad and the surrounding area by moving the IEBL to the Sava River, or, going to the other extreme, to move the IEBL southward to widen the corridor and thus enhance RS territory. It must also mean that the Tribunal has the power to fashion a remedy representing a compromise between the parties' extreme positions. The Tribunal has taken note of the RS's arguments to the contrary – the contention being that no action of the Tribunal can properly affect "the future governance of contiguous areas on either side of the IEBL." Such an interpretation, however,

would render the Tribunal powerless to perform its central arbitral task. And as to the RS suggestion that the Tribunal was intended to have power to widen the corridor but in no circumstances to narrow it11, there is absolutely nothing in either the language of Annex 2 or the negotiating history to suggest that the parties intended such an unequal bias in favor of RS interests.

39. The absence of any precise definition of the scope of the parties' dispute is also atleast partially explained by the fact that the issue of the parties' respective claims to Brckocame to a head only in the closing hours and minutes of the Dayton Conference. An agreement of some kind on the issue had been urgently sought by the mediating governments for 21 days. Negotiations on the point finally broke down, as the Conference was about to end. Under the circumstances the definition of the exact scope of the dispute was left open, to be resolved through the process of arbitration.

40. Pursuant to UNCITRAL Rule 21, the Tribunal decides that Annex 2, Article V(l) gives it jurisdiction to consider and resolve the dispute as defined within the parameters of the parties' disagreement at Dayton and the claims they assert here. At Dayton, and throughout these proceedings, the Federation has consistently argued that the Brcko area, and in particular Brcko Grad, must fall exclusively within its territory and that the IEBL should be located accordingly. At Dayton and subsequently, the RS also argued for exclusive control of a corridor extending from the Sava River to points as far as twenty kilometers south-west of Brcko Grad or, at a minimum, for maintaining the IEBL as shown on the Dayton maps without any political changes of any kind.12 The Tribunal has jurisdiction to resolve these conflicting claims in light of relevant legal and equitable principles.

41. Further aspects of the Tribunal's jurisdiction, including the scope of the Tribunal's remedial authority to fashion an Award in light of relevant legal and equitable

principles, will be discussed later in this decision.

III. FACTUAL BACKGROUND

A. The Brcko Area Before the War

42. A number of factual assertions concerning the history and demographic make-up of the Brcko area before the war have not been disputed by the parties. The Brcko area is situated in a low-lying valley along the Sava River in northern Bosnia and Herzegovina near a nexus of the current boundary lines of Bosnia and Herzegovina, the Republic of Croatiaand the Federal Republic of Yugoslavia. Historically, the area has represented a cross-roads between peoples and empires.13 As a result, the area for centuries has been home to a rich mix of Serb, Croat, Bosnian and other ethnic groups, the Orthodox Christian, Catholic, and
Muslim religions, and European and Eastern cultures.

43. Brcko Grad, located along the Sava River in the northernmost corner of the area, wasfounded in the fifteenth century at a time when the area was part of the Ottoman Empire. Brcko Grad has historically consisted of a multi-ethnic cross-section of the area's population. The area to the south and west of Brcko Grad has historically consisted of smaller, ethnically homogenous villages and towns.

44. Over the centuries, the Brcko area developed as both an agricultural and ~ because of its proximity to the Sava River – a transportation center. In 1894, a railroad bridge over the Sava River was constructed in Brcko Grad. This bridge was later transformed into an automobile bridge when a more modern railway bridge was constructed. In 1964, a port (the "Luka port") was constructed in Brcko Grad.

Prior to the outbreak of hostilities in 1992, the Brcko port was one of only two Bosnian ports along the Sava River and was Bosnia's only multi-modal (rail, road, water) transportation center.

45. As the Brcko area – both the Grad and the surrounding area –developed,the population increased. The most dramatic increase in the population occurred in the years following the Second World War, when the area witnessed significant economic development. According to the last census of the area, taken in 1991, the population of Brcko Grad – which in 1991 covered 5.93 square kilometers – was 41,346, of which 23,089 (56%) were Muslims, 8,254 (20%) were Serbs, 2,869 (7%) were Croats, and 7,134 (17%) designated themselves as belonging to some "other" ethnic group.[14] According to the same census, the total population of the Brcko Opstina was 87,332, of which 38,771 (44%) were Muslims, 18,133 (21%) were Serbs, 22,163 (25%) were Croats, and 8,265 (10%) designated themselves as belonging to some "other" ethnic group.

46. Historically, Brcko Grad has been an important economic center. While there are disputes about certain statistics, data relating to the performance of various economic sectors in the Brcko area are both available and largely undisputed. According to data from the Socialist Federal Republic of Yugoslavia ("SFRY"),[15] Brcko was seventh among Bosnian towns in income generated from traffic and transportation and communications.[16] As arailway center in 1990, it ranked eighth both in terms of freight/cargo traffic and passenger traffic, and ninth in terms of tonnage unloaded at Bosnian rail stations. The Brcko Port – the only Bosnian port listed in the SFRY statistical survey – handled 77,000 tons in 1990. Several large manufacturing enterprises were located in Brcko Grad and the surrounding area. These enterprises included the Bimal cooking oil plant, the Bimeks meat processing

plant, the Tesla battery company, the Interplet textile company, the Izbor shoe factory, and other smaller factories.

47. According to SFRY data, the Brcko Opstina's 1989 gross income of 501 million dinar ranked it seventh among Bosnian opstinas, trailing Sarajevo, Banja Luka, Mostar, Tuzla, Zvornik and Zenica. Industry and mining generated half of this income, placing Brcko eighth in this category among Bosnian towns. Its agriculture and forestry sector accounted for roughly a quarter of its income, placing Brcko a close fourth among Bosnian towns. Its wheat and corn yields – 4.0 and 4.2 tons per hectare, respectively – placed it among the top ten producers in Bosnia.

B. Effects of the War on the Brcko Area

48. In 1991, as the former Socialist Federal Republic of Yugoslavia dissolved and the former constituent republics began to declare themselves independent sovereign states, hostilities erupted between Croatia and Serbia. Brcko Grad, which housed a Yugoslav National Army (JNA) barrack, immediately found itself near the center of the conflict. In late 1991 Serb paramilitary troops arrived in Brcko Grad and began to train local Serb volunteers. At the same time, the JNA confiscated weapons from the Bosnian Territorial Defense Force in Brcko.

49. By early 1992, the conflict had spilled into the territory of Bosnia and Herzegovina. On April 7, following formal recognition of the Republic of Bosnia and Herzegovina by the European Community, Bosnian Serbs proclaimed an independent Serbian Republic of Bosnia and Herzegovina and began to set up administrative structures in parts of the

country. On or about April 30, 1992, Serb forces – composed of regular JNA forces and irregulars – began their assault on Brcko Grad. On the first day of the assault, Serb forces destroyed the road and rail bridges over the Sava River. The Serb forces encountered limited resistance in the Grad, and after six days offighting Serb forces had taken control of the Grad and an area extending several kilometers south and west of the Grad.

50. Over the next several months, Serb forces occupying Brcko Grad forcibly expelledvirtually the entire population of Muslim and Croat residents. During the first two weeks of May, Muslims were arrested and detained in several locations in Brcko Grad.17 The primary detention camp was the Luka Port facility where as many as 5,000 inmates were detained at any given time from May 1992 through July or August 1992. Up to three thousand prisoners may have been killed in the Luka Camp, and all inmates were subjected to inhumane living conditions and brutal treatment. By the end of the Serb campaign, the demographic contours of the area had been radically shifted as local populations of Muslims and Croats were forced to flee to areas held by Muslim and Croat forces, and local Serb populations moved into areas held by Serb forces.

51. After the Serb assault on Brcko Grad in the spring of 1992, the Brcko area witnessed some of the fiercest battles of the continuing war along a battle-line drawn only a few kilometers south and west of Brcko. While Brcko Grad sustained some damage, numerous towns and villages only a few kilometers south and west of the Grad were totally destroyed. Significant civilian casualties were caused both as an incident to the fighting and by inhuman treatment by occupying forces.18

C. Brcko Since the Dayton Accords

52. At the time of the signing of the Dayton Accords, the RS controlled some 48% of the territory of the Brcko Opstina (representing an area of 225 square kilometers), including Brcko Grad and the surrounding area, with the Federation controlling approximately 52% (representing 239 square kilometers).

53. It is estimated that between 32,000 and 37,000 people currently live in Brcko Grad, and that of this number between 31,000 and 36,000 of the town's inhabitants are Serbs. Of the Serb population, approximately 8,000 are pre-war residents who have remained in Brcko Grad; some 8,000 to 10,000 are former residents of towns in the Brcko Opstina who moved into the Grad after the Muslim and Croat population was displaced; and the remainder are displaced persons from the Krajina, Sarajevo, and a number of Bosnian towns. Approximately 15,000 Serbs live outside of Brcko Grad on the RS side of the provisional IEBL. The majority of Muslims displaced from Brcko Grad now live in Rahic Brcko and other towns in the Brcko Opstina under Federation control. The ethnic Croat population of the Opstina, numbering approximately 30,000, is now concentrated in Federation territory to the south-west of Brcko Grad.

54. In Brcko Grad, there has been, at best, only minimal implementation of the Dayton provisions relating to the right of the former residents to return and reclaim their property. Even with UNHCR guidance and coordination, apparently only fifteen Muslim families have thus far returned

to Brcko Grad. Fear is undoubtedly the major impediment. South of the Grad, where Muslims have attempted to reconstruct homes, 27 such homes have been destroyed by bombings. The majority of these bombing cases have not been solved by the local RS police.

55. There is a critical need for repairs to damaged housing in Brcko Grad. According to UNHCR, currently some 12,200 houses are in need of repair. Of this total, 8,500 are homes of Muslims, 2,500 are Croat homes, and 1,200 are Serb homes.

56. Economic activity in the Brcko area was brought to a virtual standstill by the war, and none of the principal enterprises in Brcko Grad has resumed operations. The Port is not operational both because the Sava River is no longer navigable (and will not again be navigable until the river is dredged) and because of the damage sustained by the port's facilities. The rail bridge has not yet been repaired, and rail lines in the Brcko area also need extensive repairs. While IFOR partially reconstructed the road bridge to allow single lane traffic to cross, significant further repairs are needed in order to add a second lane and enable heavy vehicles to use the bridge.

57. Economic activity in the area is, for the most part, now concentrated in the Arizona Market, located on the Federation side of the IEBL on the Donja Mahala-Orasje Road[19] to the southwest of Brcko Grad. Here, under the tacit sponsorship of and with security provided by IFOR (now SFOR), local authorities have allowed Muslim, Croat and Serb traders to set up a market for a variety of foodstuffs and household goods.

V. CONTENTIONS OF THE PARTIES

A. Contentions of the Federation

58. Emphasizing that Annex 2, Article V(3) provides that "the arbitrators shall apply relevant legal and equitable principles," the Federation seeks application of treaties to which Bosnia and Herzegovina and Yugoslavia are parties, as well as principles of customary international law, and specifically argues that the international legal doctrine of non-recognition must be applied in the instant case. According to the Federation, the modern doctrine of non-recognition provides that, when an act alleged to create a new territorial right was done in violation of an existing rule of customary or conventional international law, the act in question is invalid and cannot produce benefits for the wrongdoer in the form of new legal rights or otherwise.

59. As to the application of the doctrine of non-recognition, the Federation argues: (1) the RS conducted a campaign of ethnic cleansing in the Brcko area; (2) this campaign violated peremptory international norms relating to non-aggression, human rights, and the laws of war; and (3) the Tribunal is therefore precluded from legitimizing the results of RS aggression by leaving undisturbed the consequences of the ethnic cleansing campaign, and in fact must reverse the effects of such acts by re-establishing the prior demographic identity of the area and granting the territory to the Federation.

60. In order to establish factually the nature of RS conduct in the area during the war, the Federation first cites various factual findings and determinations by the United Nations that, in the view of the Federation, establish that an ethnic-cleansing campaign occurred in Brcko – and then asserts that this Tribunal should be bound by those factual findings. Second, the Federation has presented both affidavits (from witnesses to the atrocities committed in the area) and, during the hearings, live testimony (from witnesses who had either seen many of the events or had interviewed eye-witnesses and victims while compiling reports on atrocities in the area). Finally, the Federation has drawn the attention of the Tribunal to numerous public documents that catalogue the atrocities committed in the Brcko area. The Federation asserts that such evidence establishes a pattern of RS aggression in the Brcko area designed to expel the Bosniac and Croat populations from Brcko Grad.[20]

61. The Federation argues that the RS aggression in the Brcko area violated a variety of peremptory norms of international law. Noting that the United Nations Security Council and other organs have repeatedly found that the acquisition of territory by the Bosnian and Yugoslav Serbs through ethnic cleansing violated international law, the Federation argues that this Tribunal should be bound by such United Nations findings of law.[21] The Federation further argues that the RS campaign in the Brcko area violated a core set of human rights principles, including prohibitions against genocide and racial discrimination,[22] and a number of additional legal principles applicable to international and domestic conflicts.[23]

62. In addition to the doctrine of non-recognition, the Federation also asserts that historical, demographic, cultural and other factors may give rise to a legal claim to a territory even if these ties were originally to a people or entity which did not constitute an independent state or hold traditional legal title over territory.[24] In effect, the Federation argues that the Federation's people and cities have stronger historical and socio-economic ties to Brcko than does the RS, and that the area should therefore be placed under Federation control.

63. The Federation also asserts that in applying relevant equitable principles, the Tribunal may use equity either (1) as a means to temper the operation of strict legal doctrines with concepts of justice and right dealing or (2) as a general theory by which gaps in applicable law may be filled by applying concepts of reasonableness and fairness.

64. Specifically, the Federation argues that the equities in the case overwhelmingly favor an award of the Brcko area to the Federation with the possibility of assistance from an international presence. Since the RS conduct in the Brcko area allegedly failed to conform to any acceptable ethical and moral standard, the Federation argues that permitting the Serbs to maintain control over Brcko, acquired through brute force and horrific violence, would reward them for their reprehensible conduct and would fly in the face of the most fundamental human values. It would also be inconsistent with Dayton's principles, it is said, to leave Brcko in the hands of a regime which has deprived Brcko of its economic assets, obstructed the right of Bosniacs and Croats to return to their homes in the area, and conducted a campaign to force Serbs to register to vote in the Brcko elections. Finally, the Federation requests this Tribunal to weigh the

importance of the Brcko area to the economic development of the Federation, pointing out, among other factors, that (1) Brcko represents the Federation's only link to important markets and products in Europe; and (2) Brcko has the only multi-modal (rail, road, water) transportation center with the capacity to serve the transportation needs of the Federation's industrial and trade sectors.

65. On this basis, the Federation argues that the Tribunal should move the IEBL north to the Sava River so as to bring Brcko Grad and a large area south of Brcko Grad within Federation territory. In the alternative, the Federation indicates its readiness to accept an interim international presence in the area, acknowledging that international oversight may be the only way to assure citizens of both the Federation and the RS that a multi-ethnic Opstina can exist in peace and prosperity.

66. In its written pleadings and during the Rome hearing, the RS presented several defenses to the Federation's claims. As to the legal principle of non- recognition, the RS asserts that it is inapplicable to the case at hand and, in any event, has been misstated by the Federation.[25] In addition, the RS argues that the principle of non-recognition does not apply to the present case in which the alleged illegal activities that gave rise to the RS's possession of territory were "ratified" by the Dayton Accords.[26]

67. As to equitable principles, the RS argues that the Federation may not rely on equitable considerations when it has, itself, engaged in war crimes and acts of aggression in the area. To prove this charge, the RS produced various United Nations reports and presented several witnesses during

the hearing. In addition, the RS challenges the Federation's characterization of the importance of Brcko to the future economic development of the Federation.[27]

68. Finally, the RS objects to any international regime on several grounds. A special international district in Brcko, it says, would violate the constitution of Bosnia and Herzegovina, which specifically provides that the nation be composed of two Entities and that "all Governmental functions and powers not expressly assigned … to the institutions of Bosnia and Herzegovina shall be those of the Entities." The RS contends that an international regime could be authorized only by amendment of the BH Constitution. In addition, the RS argues that the Federation plan would conflict with Article 68.1, section 1 of the Constitution of Republika Srpska, which states that the RS regulates and secures the "integrity, Constitutional order and territorial integrity of the Republika."

69. The Federation has presented several rebuttal arguments to the above RS defenses. As to the contention that the doctrine of non-recognition applies in claims involving states, the Federation argues that the doctrine has been applied where the illegal acts at issue, such as those taken by the Bosnian Serbs, were taken in a failed attempt to create a new state.[28] As to the RS's contention that the RS may not, as a legal matter, be held responsible for the actions of irregular units and Yugoslav military personnel that took place prior to the RS's own creation and without its control or direction, the Federation asserts that it has provided overwhelming evidence that the RS leadership was directly involved in the ethnic cleansing campaign in Brcko and elsewhere.[29]

70. In response to the RS argument that a constitutional amendment would be needed to authorize an international presence, the Federation emphasizes that Annex 2 and Annex 4 (the Constitution of Bosnia and Herzegovina) are part of the same treaty, signed at the same time by the parties, and are therefore of co-equal authority. According to the Federation, Annex 2(V) should be viewed as the lex specialis of the Dayton Accords dealing with the disposition of Brcko, and represents an agreement by the parties to allow the decision of the Tribunal to become part of the structure of relationships between the Entities and the central government. Further, the Federation relies upon Article III(5) of the Constitution, providing that

Bosnia and Herzegovina shall assume responsibility for such other matters as are … necessary to preserve the sovereignty, territorial integrity, political independence and international personality of Bosnia and Herzegovina, in accordance with the division of responsibilities between the institutions of Bosnia and Herzegovina. Additional institutions may be established as necessary to carry out such responsibilities.

Under this language, the Federation argues, the central government of Bosnia and Herzegovina may take steps appropriate to preserving the peace and preventing the disintegration of the Bosnian state, including arrangements that would remove Brcko from the control of the Entities and place it under the control of a separate institution.

B. Contentions of the RS

71. According to the RS, the Dayton Accords not only ratified RS control over the Brcko area and recognized the concept of continuity of territory, but also recognized the right of the RS to exercise sovereignty over 49 percent of all of Bosnia andHerzegovina. It follows, according to the RS, that the Tribunal must leave the two halves of RS territory connected by a corridor area and, if the IEBL is to be changed, can only move it south to increase the RS's territory.30 The RS further argues that the Brcko area is critically needed by the RS for the relocation of Serb refugees and displaced persons and for the economic health of the RS.31

72. The Federation presents several answers. As to the RS claim to 49% of Bosnian territory, the Federation argues that the Agreed Principles of September 8, 1995 (where the 51-49% formulation appears) were not formally incorporated into the Dayton Accords. The Federation asserts that the preambular reference in the Dayton Accords in which the parties "affirm their commitment to the Agreed Basic Principles" does not create a binding obligation in and of itself, and that there is nothing in the Dayton Accords that relates in any way to the territorial allocation in the Brcko area except Annex 2, which explicitly leaves the status undetermined pending a decision by the Arbitral Tribunal. Further, the Federation argues that the territorial division set out in the Agreed Principles explicitly provides that the proposal is subject to revision by the final agreement of the parties.32

73. In response to the RS assertion that the Dayton Accords recognize the existence of a corridor connecting the eastern and western portions of the RS, the Federation argues that such an interpretation is belied by the explicit language of Annex 2, which specifically places the disputed portion of the IEBL in the Brcko area under international arbitration, thus leaving the issue of the existence of a corridor (or not) open for later resolution by this Tribunal.

VI. REASONS FOR THE AWARD

74. Ever since the commencement of the Dayton negotiations, and indeed before, the Federation and the RS have been locked in an intense rivalry, both seeking to protect what they consider their legitimate interests in the Brcko area. As evidenced by the public statements of the two parties during the pendency of this arbitral proceeding (statements that have included actual threats of war), the rivalry has generated a high level of tension stemming from a host of historical, economic and psychological factors – factors which were so deep-seated at the time of the Dayton conference that no agreement on the subject of Brcko could be reached, despite the intense efforts of the mediators. Among the tension-generating factors are: periods of ethnic and religious hostilities between Bosniacs, Croats, and Serbs over the past several hundred years; evidence of horrifying genocidal atrocities committed, primarily by the JNA and Serb paramilitary forces, in the Brcko area in 1992, and of countermeasures taken by Bosniac and Croat forces against Bosnian Serbs, including harsh treatment in several "concentration camps" in the Brcko area; the five-year old

Serb conviction that a connecting corridor (including Brcko) between the two halves of Republika Srpska is strategically and economically vital to the RS; the apparent Serb commitment to a degree of "ethnic separatism" in the Brcko area (which may or may not be matched by similar separatist attitudes in some parts of the Federation); and the Federation's conviction that, unless the Town, with its port and road bridge and railroad, are readily accessible, allowing Federation businesses to have complete economic freedom of movement through the corridor to Europe, the economic development of the Federation will be severely inhibited.

75. Given the complexities of the factors involved – and having in mind the command of the arbitration agreement that the Tribunal be guided by "equitable" as well as legal considerations – it may not be surprising that, particularly in terms of the "equities" of the situation, this Tribunal is unable (as discussed further below) to say that either side is 100% right in its position or 100% wrong. The Tribunal has concluded that any "simple solution" must be rejected in favor of an approach that is consistent with law and equity and is designed gradually to relieve the underlying tensions and lead to a stable and harmonious solution.

A. Legal Considerations

76. As previously noted, the principal legal argument presented by the Federation in support of its affirmative claim is based upon the international legal doctrine of non-recognition. According to the Federation, (1) the RS conducted a campaign of ethnic cleansing in the Brcko area; (2) this campaign violated peremptory international norms of

non-aggression, human rights protection and the laws of war; and (3) rather than legitimizing the results of RS aggression by leaving the consequences of the ethnic cleansing campaign uncorrected, the Tribunal must reverse the effects of such acts by re-establishing the demographic identity of the area and granting the territory to the Federation.

77. As developed in modern times, the non-recognition doctrine ~ providing that an act in violation of a norm having the character of jus cogens is illegal and therefore null and void33 – is based in part on the principle ex injuria jus non oritur, according to which acts contrary to international law cannot become a source of legal rights for a wrongdoer.34 The international community and international tribunals have applied the non-recognition doctrine in cases where an entity seeks, through aggression in violation of international law, to acquire territory with the aim of effecting a change in sovereignty over that territory.35 In the case of the Republika Srpska, its campaign in the period between 1992 and 1995 had, as its object, the acquisition of territory from the internationally recognized Republic of Bosnia and Herzegovina, and the United Nations Security Council applied the doctrine generally to RS aggression in Bosnia and Herzegovina.36

78. While the Tribunal believes that the doctrine precludes the RS from asserting a legal right, based on their conquest, to control – sovereign, administrative or otherwise – of the disputed area, it does not automatically follow that the Federation is entitled to control the territory. The purpose of the RS campaign in the disputed area, as elsewhere, was to wrest sovereignty from the Republic of Bosnia and Herzegovina, not from the Federation, which did not even come into existence until well after the RS conquest. Indeed, the Federation has neither asserted nor sought to prove any

antecedent right or title to the disputed territory, thus failing to establish a required factual element of its prima facie case. Consequently, the injured party – to whom, under the terms of the Federation's own argument, the doctrinewould require restoration of control – is the Republic of Bosnia and Herzegovina, not the Federation. But the GFAP already has confirmed that the Republic (now renamed) has sovereignty over the entire territory of the country.37 The particular injury for which redress is demanded under the non-recognition doctrine has thus already been remedied.

79. The Federation, in its other principal legal argument, cites the findings of the International Court of Justice in the Western Sahara case,38 and asserts that the Federation should be granted control of the Brcko area because the historical demographic, cultural and political ties of the Federation to the Brcko area give rise to a legal claim to the territory. The Tribunal, however, finds that a strict application of the Western Sahara principles provides no clear answer to the dispute. Most importantly, in light of the unique demographic diversity of the Brcko area before the war, it is not clear that either Entity has shown sufficiently dominant connections with the area to justify an award of exclusive control to one or the other of the parties.39 Indeed, both Entities have established extremely close ties to the area based upon these factors, which suggests not that one party or the other should enjoy exclusive control of the area, but that both should play a role in the future control of the area.

80. Having concluded that the Federation has not established a legal right requiring Federation administrative control over the area, the Tribunal must now consider whether

the RS – which relies entirely upon principles allegedly derived from the GFAP – has asserted a legal basis for RS administrative control.[40]

81. The RS first contends that the GFAP incorporates the principle that the territory of Bosnia and Herzegovina should be divided in a ratio of 51:49 between the Federation and the RS. It then points out that the IEBL as shown on the Dayton map gives the RS less than 49 percent (by a small margin) and concludes that the Tribunal is precluded from making any reduction in the RS's territory. Second, the RS contends that the GFAP created a status quo which has had the effect of ratifying both the territorial "continuity" provided by the corridor shown on the map and RS control of Brcko.

82. The Tribunal disagrees. First, it is true that the preamble to the GFAP reaffirms the parties' commitment to certain Pre-Dayton "Agreed Basic Principles," one of which provides that "the 51:49 parameter of the territorial proposal of the Contact Group is the basis for a settlement" subject to "adjustment by mutual agreement." That preambular language, however, did not itself create a binding obligation; the parties' obligations appear in the text of the GFAP, which modified the 51:49 parameter (by including a slightly different distribution) and left unresolved the territorial allocation in the Brcko corridor area. That lack of resolution is the reason for this arbitration. In short, the GFAP has ratified neither continued RS control of the disputed area nor territorial continuity for the RS.

83. On the other hand, the Tribunal agrees with the RS point that the GFAP provides relevant law, particularly considering that the Tribunal is itself a creature of the

GFAP. As such the Tribunal must be concerned with such GFAP principles as the right of all refugees and displaced persons "freely to return to their homes of origin," their "right to have restored to them property of which they were deprived . . . and to be compensated for any property that cannot be restored to them," the "right to liberty of movement and residence," and the right of safe and voluntary return for refugees and displaced persons. In considering how to fashion a solution to the instant dispute that is consistent with these principles, the Tribunal must review the facts as to whether these principles are now being honored in the disputed area, and as to how such compliance might be assured in the future.[41]

84. At the Rome hearing the RS made several significant statements as to its attitude toward implementation of GFAP principles. First, the RS tacitly conceded (in the face of considerable other evidence) that under RS governance the requirements of Dayton are not now being honored in the Brcko area. Second, the RS presented to the Tribunal a written statement of "Basic General Principles" that it intended to follow in the future, and in that document the RS proposed that if its regime in the Brcko area were to continue, it would not honor Dayton in at least the following two respects:

(1) The RS declared that it "is prepared to permit the free movement of people on the existing Arizona Road, north-to-south through Republika Srpska territory,"thus allowing north-bound "commercial and passenger" traffic to cross the corridor "to Orasje," a border town on the Sava River across from Croatia. The clear implication – as conceded at the hearing – is that commercial and passenger travel on other roads in the area would not be permitted. Moreover, as revealed by other hearing evidence, use of the cross-corridor

"Arizona" route to Croatia and elsewhere in Europe is now less than satisfactory: at Orasje, where the road reaches the Sava River, there is no bridge across the river, and all Arizona Road traffic northward must proceed across by ferry – a process requiring commercial vehicles to wait for as many as two to three days.42 In addition, while the same statement of "Basic General Principles" recognizes that there is a road bridge across the Sava "in centrograd Brcko at the frontier between Croatia and Republika Srpska," the RS plan for the Brcko road bridge is to allow it to be used only for pedestrian traffic. In short, while Dayton requires full and free movement for all kinds of traffic, including commercial, the RS's position in January 1997 was that such commercial traffic would not be permitted on any efficient north-south route across the corridor to the rest of Europe.

(2) As to the Dayton-guaranteed right of former residents of Brcko to return and recover their homes and other property, the RS "Basic General Principles" take the position that such persons, even if they could "establish legitimate title to property in the Brcko municipality now within the territory of Republika Srpska," would be entitled only to compensation (either in money or in other property), but not recovery of their property. As emphasized at the Rome hearing, the fairly obvious purpose – and the result – of this policy would be to keep Brcko an "ethnically pure" Serb community in plain violation of Dayton's peace plan. In economic terms it would also prevent Bosniacs and Croats from helping to revive Brcko's totally defunct economy, including its non-functioning Sava River port – a facility whose revitalization (according to its Serb director) is "essential" to economic development in the area.43

85. The significance of these statements of intention

is highlighted by the testimony of two disinterested witnesses called by the Tribunal during the Rome hearings. Specifically, Mr. Santiago Romero Perez of UNHCR and Lt. Col. Anthony Cucolo of the United States Army (and formerly of IFOR), both with considerable experience in the Brcko area, opined without contradiction from any other witness that real peace cannot be achieved in the Brcko area unless former residents are permitted to exercise their right of return to their former homes. In Mr. Romero's words, "without people returning to their homes, there is little hope for peace." Similarly, Lt. Col. Cucolo, after eleven months of experience in the Brcko area, has become "convinced . . . that there is this primal need to return to homes," and that "unless this need is met somehow, there will be unrest and discontent." Given that testimony it would be difficult for the Tribunal to conclude that it would be either consistent with the legal principles established in the GFAP, or in the general public interest, to enter an award that permits the RS to achieve its stated goals of inhibiting freedom of movement in the area and blocking entirely the right of former residents of Brcko to return to their homes and other property.

86. One way to alleviate the effects of the RS's past violations – and to prevent proposed future violations of the law – would be for the Tribunal to re-locate the IEBL in such a way as to bring into Federation territory (a) all of the major commercial roads through the corridor to the rest of Europe and (b) the Brcko Grad itself, including its river port and its two Sava River bridges (road and rail). Such a remedy, based directly on "relevant legal principles" drawn from the GFAP, would clearly be within the Tribunal's explicit authority to adjust the IEBL in accordance with such principles. On the other hand, as explainedbelow, considerations of "equity" suggest that there are other less

severe remedial steps that would accomplish the desired objectives.[44]

87. Having found that relevant legal principles do not require the award of the area in dispute to one party or the other, we turn to the question of the applicability of relevant equitable principles.

B. Equitable Considerations

88. In considering the parties' command to "apply relevant legal and equitable principles" (emphasis added) in resolving the dispute presented, the Tribunal finds that such a clause must require, at a minimum, that equitable considerations be used to render an award that gives effect to considerations of fairness, justice and reasonableness.[45] In territorialdisputes, international tribunals have identified as relevant such particular "principles" as, inter alia: (1) the consideration of the factual context of the dispute – the unique political, economic, historical and geographical circumstances surrounding the dispute ~ and the balancing of the interests of the disputants in light of these factors;[46] and (2) a set of equitable doctrines associated with fairness, such as the doctrine of "unclean hands," by which the inequitable conduct of one of the parties may be taken into account in thedecision.[47] Whatever the cited principles, however, international tribunals have typically stressed that the importance of equity in the deliberative process lies not in the formal application of specific "equitable principles" but in the ultimate achievement of an "equitable result."[48]

89. Turning to the facts of the case, the Federation has demonstrated that it has compelling equitable interests in the Brcko area. Brcko Grad itself, while multi-ethnic in composition, was predominantly populated by Muslims and Croats before the war, a situation radically changed by a brutal campaign of ethnic cleansing. The Tribunal therefore must agree that the Federation has a fundamental interest in providing for the safe return of theprevious Muslim and Croat population, and that the previous residents have a compelling interest in returning safely and availing themselves of their Dayton guaranteed right to reclaim their property. Further, Brcko has vital economic significance for the Federation, both as it attempts to rebuild its infrastructure and as it seeks to integrate its economy with Europe and the world. For that purpose it needs an open economic gateway to the north. The Tribunal concludes that in the circumstances and in light of its responsibilities under the GFAP any solution must, at minimum, provide that these vital interests are protected.

90. A significant equitable consideration militating against the maximum remedy described above (i.e., granting absolute control of the entire Brcko area to the Federation) is Republika Srpska's assertion of a vital interest in preserving a connecting corridor between its eastern and western parts. The evidence adduced at the Rome hearing suggests that three elements enter into the RS's insistence in this respect. First, there are repeated references to the corridor's "strategic" value. Presumably this is a reference to a desire to have the ability to move armed forces from one part of the RS to the other without interference from Federation authorities, and this would seem to be a legitimate interest provided such movements are not related to prohibited threats or use of force and any applicable legal limitations are observed in the process. Second, there was testimony at the hearing from a

prominent RS economist that the RS feels a need to create within the connecting corridor “certain infrastructure facilities” including an east-west highway parallel to the Sava, a railroad, a pipeline, and telecommunications lines, all in the corridor area south of Brcko Grad. Again, although economic integration between the Federation and the RS would, if possible, render some or all of these facilities superfluous and avoid some investment waste for the country as a whole, it is understandable that the RS is interested in having the freedom to plan and create such facilities on its own. Finally, it is undoubtedly the fact that the preservation of a corridor is of tremendous psychological significance to the RS. Arguably there is an inconsistency between such a separatist attitude and the spirit of Dayton, but the tension-creating psychological factor is not one that can be overlooked by the Tribunal.

91. It can be argued by the Federation with some force that the alleged need for a corridor is significantly less substantial than as presented by the RS. Specifically, if the corridor were interrupted through a shift in the IEBL, the Federation would nonetheless be obliged under the Dayton Accords to provide complete freedom of movement over Federation territory between the RS’s eastern and western portions. This argument is offset, however, first by the fact that the Federation has less than a perfect record in enforcing Dayton’s freedom-of-movement requirements and second by the fact that, even if perfectfreedom of movement were foreseeable under a Federation regime in the area, there is no assurance that the Federation’s planning authorities would allow the construction and operation of the infrastructure facilities upon which the RS places such emphasis.

92. As a matter of equity the Tribunal must also be

mindful of the effect that any award will have on the current population of the Brcko area. Specifically, while the Federation calls for a "mandatory penalty" against the Republika Srpska via an outright transfer of the Brcko area from the RS to the Federation, the Tribunal must take into account the fact that a very large proportion of the total present population of Brcko Town consists of Serb refugees who have recently moved there from the Krajina, Sarajevo, and a number of other Bosnian towns – and the fact that, judging by recent experience in Sarajevo, a transfer of Brcko to Federation control would result in a mass exodus of thousands of Serbs out of Brcko into a state of homelessness for a second time. The result would be a severe penalty on large numbers of persons who were not present in Brcko in the spring of 1992 and who must be presumed innocent of any specific wrongdoing.[49] The international community, in establishing the Hague Tribunal, has provided an authorized mechanism for punishing the war criminals who committed and abetted the crimes alleged in this case, and it is not at all clear that the separate "penalty" being sought from this Tribunal would fall on those who deserve it.

93. The Tribunal cannot forebear from commenting that the welfare of the Brcko community (including both former and present residents) has tended to become obscured by the political rhetoric of the opposing sides. In a sense the Town of Brcko has been allowed to become a symbol of victory in the aftermath of an inconclusive war in which victory was simply not available to either side. Indeed, the parties have talked of Brcko as though it were a trophy: if this Tribunal "awards" it to the Federation or the RS, a climax of the late war will finally have been achieved, with enormous satisfaction to the "winner" – and attendant vengeful thoughts from the "loser". In the Tribunal's view, however, these arc not the terms in which the matter should be analyzed: surely

a far more important principle is that this Tribunal, rather than handing a trophy to one side or the other, should take affirmative steps to provide immediate relief, both in terms of human rights and in terms ofeconomic revitalization, for the thousands of poverty-stricken individuals who live in, and want to make their home in, Brcko. Such steps are important to ease the regional tensions that have given rise to this dispute, and that is a primary objective of the Award.

94. Finally, among the equitable factors to be considered by the Tribunal are the interests of the international community. Although economic burdens pale in comparison with the human sacrifices already suffered in Bosnia, it is nonetheless the fact that the international community has already incurred huge financial costs in seeking to achieve stability in Bosnia, and significant additional costs are necessarily going to be incurred.50 Regional stabilityand the costs being incurred to achieve it are factors that must play a role in the design of the Tribunal's final order.

C. The Tribunal's Authority to Frame the Present Award

95. The Award in this case (see Section VII below), insofar as its immediate terms are concerned, calls upon the international community to establish an interim supervisory regime in the Brcko area designed (primarily through implementation of the Dayton Accords) to allow former Brcko residents to return to their homes, to provide freedom of movement and other human rights throughout the area, to provide proper police protection for all citizens, to

encourage economic revitalization, and to lay the foundation for local representative democratic government.

96. As to whether the Tribunal has authority to include such provisions in its Award the Tribunal finds that the text of Annex 2 does not set limits on the measures the Tribunal may use in its resolution of this dispute. Rather, Annex 2 is framed in broad terms that can reasonably be read to authorize the Tribunal to frame an award that, based upon the facts and the legal and equitable considerations involved, will effectively ease the tensions from which the dispute arises and protect the interests of the people of Brcko.

97. This view is strongly supported by Article V(3)'s specific reference to "equitable principles," which allows the arbitrators to give effect to considerations of fairness, justiceand reasonableness in the award. Not being required to proceed solely on the basis of legal rules, the Tribunal is authorized to render an award that, in its view, best reflects and protects the overall interests of the parties and that has the strongest likelihood of promoting a long-term peaceful solution.

98. The Tribunal is mindful that the RS has contested this broad view of the Tribunal's authority and has argued strenuously that all the Tribunal may do is fix the final position of the IEBL in the Brcko area. In reality, however, as previously noted, that view seriously understates the scope of this dispute. At Dayton the parties argued – and are continuing to argue here – about what laws and political structures are to control the lives of the people of the area, and the Award must be framed in that context. Under Article 31 of the Vienna Convention on the Law of Treaties, the

Tribunal is to construe the terms of Annex 2 in good faith in accordance with their ordinary meaning in their context and in light of the object and purpose of the Dayton Accords. Here, the context includes the Dayton Accords' elaborate structure of obligations aimed at attaining peace in Bosnia and Herzegovina. In the Dayton Accords, the parties to this arbitration accepted many substantial undertakings, including measures designed to control arms, to provide freedom of movement throughout Bosnia and Herzegovina, to provide safety and security for individuals, to promote the return of refugees, and to allow individuals to reclaim property. In addition, the parties created several institutions and structures through which the international community is to play important roles in facilitating and ensuring the observance and implementation of these obligations.

99. This context justifies an interpretation of Annex 2, Article V that permits the Tribunal to frame an Award that calls for international assistance and obligates the parties to cooperate in the prescribed programs. The Dayton Accords are replete with provisions of a similar character, the implementation of which requires involvement by entities not party to the accords. This interpretation also seems most in harmony with the object and purpose of the Dayton Accords, which is ultimately to ease existing tensions, restore security in the region, and thus bring about lasting peace.

100. The Tribunal is further aware that, while the arbitrators' mandate derives from an agreement signed by the parties, the Tribunal's work is of broad international interest and concern. Security Council resolutions and international agreements concluded after the entry into force of the Dayton Accords offer additional support for taking a broad view of the Tribunal's mandate and underscore the

parties' obligation to honor this Award.[51] Such statements by the Security Council are authoritative statements of the will and expectations of the international community regarding implementation of the Dayton Accords. Since they were adopted under Chapter VII, they have binding legal force to the extent provided by their terms. They can appropriately be taken into account by the Tribunal in construing Article V and in assessing the scope of its mandate.

101. One aspect of the Award in this case deserves special comment – namely, the provision reciting the Tribunal's conclusion that at this time it would be inappropriate to make a final choice as to which of the competing political entities should be given control of the town and thus become, in a sense, its guardian after the period of international supervision. The difficulty is that, despite the passage of time since Dayton, the political institutions competing for guardianship (the Federation and the RS), as well as the joint institutions of Bosnia and Herzegovina, are less stable today than was to be expected when the Dayton Accords were signed. Specifically, the organizational arrangements of the Federation are still incomplete; the RS's almost total disregard of its Dayton implementation obligations in the Brcko area has kept the tensions and instability in the region at a much higher level than was expected; and the joint institutions of Bosnia and Herzegovina have not yet developed into an effectively working government. It is the Tribunal's judgment, therefore, that in these unique circumstances it would be unwise and inequitable to make a choice among these competing institutions now.

102. Nonetheless, the Tribunal recognizes that under the Dayton Accords is has an affirmative duty to make the choice when that can be done consistent with relevant legal and

equitable principles. Accordingly, the Award provides, consistent with the Tribunal's powers under Article 15 of the UNCITRAL Rules, that after the interim international supervision has had a chance to operate, either party may approach the Tribunal to requestfurther action with respect to Brcko and that any response by the Tribunal shall form a part of the Award.

103. Finally, the Award puts the parties on notice that, in the event of such a request for further action affecting the Award, the Tribunal may conclude, depending upon the then-current circumstances, that the Town of Brcko must become a special district of Bosnia and Herzegovina so that it will no longer be within the exclusive political control of either Entity. Whether that will appear to be an appropriate step when and if such a further request is presented, the Tribunal cannot now predict, but the possibility of such further action affecting the Award should be noted.

VII. AWARD

104. For the foregoing reasons the Tribunal adopts the following orders and provisions, which shall be final and binding upon all Parties to GFAP Annex 2, and with which all Parties shall comply and cooperate in full.

I. Interim International Supervision of Dayton Implementation in

the Brcko Area

A. Given ongoing failures to comply with the Dayton Accords in the RS area of the Brcko Opstina (particularly in terms of freedom of movement and the return of former Brcko residents to their Brcko homes), and the high levels of tension resulting therefrom, there is a clear need to establish a program for implementation of the Dayton Accords in the area, as hereinafter provided.

B. Since it is essential that the international community undertake a role in devising a detailed implementation strategy, the Office of the High Representative ("OHR") is expected, as soon as feasible, to establish an office and staff in Brcko under the leadership of a Deputy High Representative for Brcko (hereinafter "the Brcko Supervisor" or "Supervisor") whose functions will be: (a) to supervise Dayton implementation throughout the Brcko area for a period of not less than one year, and (b) to strengthen local democratic institutions in the same area. Given the sensitivity of the issue, it is essential that implementation begin only after the Brcko Supervisor, in consultation with the High Representative, the PIC Steering Board, and SFOR, determines that key elements of an integrated implementation strategy are in place. The work of the Supervisor is expected to include the following elements:

(1) The Supervisor will have authority to promulgate binding regulations and orders in aid of the implementation program and local democratization. Such regulations and orders shall prevail as against any conflicting law. All relevant authorities, including courts and police personnel, shall obey

and enforce all Supervisory regulations and orders. The panics shall take all actions required to cooperate fully with the Supervisor in the implementation of this provision and the measures hereinafter described.

(2) The Supervisor should consider assembling an Advisory Council and include within its membership representatives of OSCE, UNHCR, SFOR, IBRD, IMF, the Institutions of Bosnia and Herzegovina, local ethnic groups, and such other official and unofficial groups as the Supervisor may deem appropriate to provide advice and liaison in implementation of this Award.

(3) The Supervisor in close liaison with SFOR should coordinate with IPTF and such other international police mechanisms as may be established in the Brcko area to. Provide services with two principal objectives in mind:

(a) To ensure freedom of movement, through highway patrols and otherwise, for all vehicles and pedestrians on all significant roads, bridges and port facilities in the relevant area from (and including) the Donja Mahala-Orasje Road (the so-called “Arizona Road”) on the west to the eastern boundary of the Brcko Opstina.

(b) To ensure that the relevant authorities will undertake normal democratic policing functions and services for the protection of all citizens of Bosnia and Herzegovina within the relevant area.

(4) The Supervisor should establish, with advice and assistance from UNHCR, the Commission for Displaced Persons and Refugees, and other appropriate agencies, a program (which may incorporate previously established procedures) to govern the phased and orderly return of former residents of the relevant area to their homes of origin and for the restoration, construction, and allocation of housing as necessary to accommodate old and new residents.

(5) The Supervisor should: (a) work with OSCE and other concerned international organizations to ensure that free and fair local elections are conducted under international supervision in the relevant area before the end of the international supervision; and (b) following such elections, issue such regulations and orders as may be appropriate to enhance democratic government and a multi-ethnic administration in the Town of Brcko. The parties will fully implement the results of the municipal elections according to the rules and regulations of the PEC.

(6) Given the significance of economic revitalization (particularly in terms of easing ethnic and other tensions in the area), a concerted effort at economic reconstruction is considered essential to the reduction of such tensions. The Supervisor therefore should assist the various international development agencies to develop and implement a targeted economic revitalization program for the Brcko area.

(7) Since revitalization of the Sava River port in Brcko is of paramount interest to both parties, all land now publicly or socially owned within the port area shall be placed under the exclusive control of the Bosnia and Herzegovina Transportation Corporation (an entity established

under GFAP Annex 9, Article II(1)). Both parties are directed to use their best efforts – and the Supervisor is invited and encouraged to guide such efforts – to, attract public and private investment (e.g., through leasing space) to revive the port through physical reconstruction, river dredging, and other appropriate measures.

(8) The Supervisor should, in the interests of fostering commerce and international economic development, assemble a group of international customs monitors to work with appropriate authorities of the parties (including Bosnia and Herzegovina) toward the establishment of efficient customs procedures and controls in the relevant area.

(9) In the interests of maximizing economic growth in the area, the State of Bosnia and Herzegovina, acting through its Foreign Ministry, is directed as soon as possible to open negotiations with the Republic of Croatia to arrive at mutually agreeable arrangements for customs procedures and border crossings between Bosnia and Herzegovina and Croatia in the Brcko area.

II. Subsequent Proceedings

A. Although the Tribunal anticipates, pursuant to Annex 2, Article V(5), that the parties will implement without delay the foregoing provisions, thereby lowering existing tensions in the area, nevertheless, the Tribunal has concluded that it would be inappropriate to make a judgment at this time as to what final allocation of political responsibilities as among the parties following the period of interim international supervision will best achieve implementation of the Dayton Accords and develop representative democratic local government

in the relevant area. Absent further action by the Tribunal, the IEBL in the region will remain unchanged, and the Tribunal shall continue to monitor the situation in the area during the period of interim international supervision. Pursuant to its powers under Article 15 of the UNCITRAL Rules, the Tribunal will entertain from either party requests for further action affecting the Award with respect to the allocation of political responsibilities in the area, provided that any such requests must be received between 1 December 1997 and 15 January 1998. The Tribunal shall render any further decision by15 March 1998, and any such further decision shall form a part of this Award.

B. The Tribunal hereby gives notice (1) of its concern that matters in the relevant area may be so controlled as to prevent satisfactory compliance with the Dayton Accords and the development of representative democratic local government, and (2) that in the event of a request for modification of this Award, the Tribunal may at that point conclude, in light of the then-current situation, that to correct the situation the Town of Brcko must become a special district of Bosnia and Herzegovina in which district the laws of Bosnia and Herzegovina and those promulgated by local authorities will be exclusively applicable.

C. To assist its inquiry into the foregoing matters the Tribunal requests, and expects to receive, the following:

(1) Regular reports from the Supervisor, submitted through the Office of the High Representative, appraising current conditions in the relevant area as they may bear on the need (or not) for further actions from the Tribunal, through the “special district” approach or otherwise; and

(2) Such written requests and submissions as the

parties may choose to present on the same issues.

VIII. AUTHENTICITY

105. The English language text of this Award shall be the authentic text for all purposes. The Tribunal shall issue at the earliest possible time authorized translations of the authentic text into the Bosnian and Serbian languages.

Roberts B. Owen
Presiding Arbitrator

Cazim Sadikovic Vitomir Popovic

Arbitrator
Arbitrator

Rome, 14 February 1997

Reasons for the Absence of Signatures

Pursuant to Article 32(4) of the UNCITRAL Rules, the Tribunal notes that, for the reasons stated in Paragraph 27 of this Award, the party-appointed arbitrators have failed to sign the Award.

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1 The preamble of the Annex 3 defines “Parties” as the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srpska.

2The Presiding Arbitrator received letters to this effect from the heads of the delegations of both parties to the Dayton talks and has subsequently discussed the matter with counsel without dissent from anyone.

3The extension was proposed by representatives of Republika Srpska on 1 October 1996; thereafter the Federation indicated its acquiescence in the proposed extension; and it was so ordered by the Tribunal on 27 November 1996.

4 The Appendix to the Order provided as follows:

PRINCIPLES APPLICABLE TO ADMISSIBILITY OF EVIDENCE

1. Each party bears the burden of proving its own case.

2. With regard to the proof of individual allegations advanced by the parties in the course of the proceedings, the burden of proof rests on the party alleging the fact.

3. A party having the burden of proof must not only bring evidence in support of its allegations, but must also convince the Tribunal of their truth. Otherwise, they shall be disregarded for insufficiency of evidence.

4. The international responsibility of a state or entity is not to be presumed. The party alleginga violation of international law giving rise to international responsibility has the burden of proving the assertion.

5. The Tribunal is not bound to adhere to strict judicial rules of evidence. The probative force of evidence is for the Tribunal to determine.

6. When a party produces prima facie evidence in support of an allegation, the burden of proof shifts to the other party or parties.

7. In instances where proof of a fact presents extreme difficulty, the Tribunal may be satisfied with less

conclusive, i.e., prima facie, evidence.

8. The Tribunal's decision shall be based on the strength of the evidence produced by both parties.

5Specifically, the Order provided that the Second Statement should address such factors as the location of the IEBL, economic development, transportation, free movement of goods and services. the right of return of refugees, freedom of movement, military security, and the possibility of an international presence in the area.

6The Federation requested and received a one-week extension of time in order to file its Second Statement.

7On the day of receipt of the Klickovic letter, the Presiding Arbitrator received from Dr. Popovic a letter dated 30 November 1996, which commented on a draft order then under consideration by the Tribunal. This letter made no mention of the purported withdrawal by RS of Dr. Popovic's appointment as arbitrator; in fact, the letter, in calling for the convening of a meeting of the arbitrators to discuss the draft order, suggested that Dr. Popovic was preparing to participate more actively in the arbitral process.

8Other international tribunals have concluded that a truncated tribunal may proceed when a member has unilaterally decided not to participate in whole or in part. See Interpretation of Peace Treaties with Bulgaria. Hungary and Romania (Second Phase). 1950 I.C.J. Rep. 221, 229;. see also Mixed Claims Commission, United States and Germany, Opinions and Decisions in Sabotage Cases handed down June 15. 1939 and October 30.

1939. at 20 (cited in Schwebel, International Arbitration at 218, footnote 224).

9The RS's "Jurisdictional Statement" dated 22 November does not articulate, and in effect thus abandons, the "missing map" argument previously advanced orally on 17 September 1996. See paragraph 14 above. Nor did counsel for the RS raise this theory during oral argument at the Rome hearing.

10See also Stephen M. Schwebel, International Arbitration: Three Salient Problems (1987). According to President Schwebel,

> Arbitration treaties clearly are treaties; their interpretation is governed by the rules of treaty interpretation. Where States have undertaken by treaty to arbitrate, their obligation is binding. It is an obligation they are bound to fulfill. Arbitration treaties, like other international contractual instruments, are to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of the treaty's object and purpose.

Id. at 149.

11See RS Jurisdictional Statement at 11.

12At the Rome hearing, the RS explicitly disavowed any claim that the IEBL should be moved in such a way as to increase RS territory, limiting its arguments instead to complete preservation of the status quo.

13In 1699, following the conclusion of the Treaty of Karlowitz, the Sava River became the border between the Ottoman and Hapsburg empires. For the next two centuries, Brcko represented the western-most reach of the Ottoman Empire. In 1878, at the Congress of Berlin, Austria-Hungary was allowed to occupy Bosnia and Herzegovina, which, however, stayed under Ottoman sovereignty until 1908, when this too was assumed by Austria-Hungary.

14Census data from the last hundred years also indicates that, while the population of the Brcko Grad has grown dramatically, the relative percentages of the various ethnic groups in the town have been consistent with the 1991 census data.

15 See Statistcki Godisnjak Jugoslavije (1991).

16 Linked to the Tuzla Basin, Brcko served as a transportation center for wood, coal, anthracite, agriculture/animal products and chemical industries.

17See Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), U.N. Doc. S/1994/674 (1994).

18Evidence submitted to the United Nations indicates that, while atrocities were committed by Serb authorities against Muslim and Croat residents in the Brcko area, local Serb populations were also subjected to inhumane treatment, torture and unlawful killing by Muslim-Croat forces in the Brcko area. See, e.g. Report on Cases of Violation of International War and Humanitarian Law in the Territory of the Former Socialist Republic of Yugoslavia, Seventh Report of the

Government of the Federal Republic of Yugoslavia, U.N. Doc. A/51/397 and S/1996/775 (1996).

19Also known as the “Arizona Road”.

20Specifically, the Federation asserts that the evidence presented proves:

1. In September 1991, Red Berets acting under the control of the Serbian State Security Organizations in Belgrade arrived in Brcko Grad and began to train local Serb volunteers.

2. In late 1991, the JNA confiscated weapons and material of the Bosnian Territorial Defense Force and, in early 1992, began patrolling Brcko Grad.

3. In late April 1992, detention centers were established at the Luka Port facility, the JNA casern and elsewhere in Brcko Grad.

4. From 30 April through 7 May 1992, the JNA and Bosnian Serb paramilitary units attacked Brcko Grad, destroying the road and rail bridges over the Sava River and detaining large numbers of Muslim citizens in detention centers. During this assault, Serb forces committed random killings of and atrocities against civilians during street fighting and in detention centers.

5. On 19 May 1992, the JNA formally withdrew Yugoslav officers from Brcko and the forces were converted into the Vojska (“Army”) of the Republika Srpska (VRS).

6. Between May and August 1992, the remaining civilian

Muslim population was either forced out of Brcko Grad or detained at the Luka Port Camp and smaller detention centers in the area. During this period, a large segment of the detainees, perhaps as many as several thousand, were murdered, raped and beaten by their captors.

7. As a direct result of the RS aggression, the pre-war population of Muslims in Brcko Grad was reduced from some 23,000 at the beginning of the war to approximately 500 at the time of the signing of the Dayton Accords.

21 In particular, the Federation points to Security Council Resolution 819 (1993), in which the Security Council, acting under Chapter VII of the U.N. Charter, "Reaffirms that any taking or acquisition of territory by the threat or use of force, including through the practice of 'ethnic cleansing,' is unlawful and unacceptable . . . [and] Condemns and rejects the deliberate actions of the Bosnian Serb party to force the evacuation of the civilian population from Srebrenica and its surrounding areas as well as from other parts of the Republic of Bosnia and Herzegovina as part of its overall abhorrent campaign of 'ethnic cleansing."

22 Specifically, the Federation argues that the RS committed acts, which violated the Convention on the Prevention and Punishment of the Crime of Genocide and the Universal Declaration of Human Rights.

23 Here, the Federation argues that the law on crimes against humanity prohibits acts of murder, extermination, enslavement, imprisonment, torture and rape which area directed against civilian population in both international and national armed conflicts. The Federation argues that these principles are

accepted as jus cogens and are further found in common Article 3 of and Protocol II to the Geneva Conventions.

24 The Federation argues that this international legal principle has been most recently applied by an international tribunal in Western Sahara (Advisory Opinion). 1975 I.C.J. Rep. 12, in which the International Court of Justice, in determining a dispute between Mauritania and Morocco over controlof the Western Sahara territory in the wake of Spanish withdrawal of colonial control, found that it had to determine each claimants 'legal ties' to the area in the context of the population's social and political organization.

25 The RS acknowledges that the principle of non-recognition holds that title to territory acquired by a state by means of force is not legal and does not merit recognition by other states. The RS argues, however, that the principle has relevance only in circumstances in which a state has unilaterally seized the territory of another state in the course of conflict. That being so, the Federation lacks standing to rely on the concept of non-recognition. Additionally, the RS argues that the RS cannot be held responsible for actions of irregular rmilitia and Yugoslav military personnel which took place prior to the RS's own creation and without its control or direction.

26 The RS reasons that since the Dayton Accords represented a comprehensive settlement and resolution by the Entities, and since the accords provide that the RS should exercise control over Brcko Grad and a portion of the Brcko area that would provide a corridor between the two halves of the RS, the RS's legal jurisdiction over the territory at issue in the arbitration did not result from a unilateral act of aggression

against the interests of a sovereign state, but was part of the international community's creation of a new political structure in the interest of achieving peace and stability.

27 The RS argues that Brcko was a relatively insignificant transportation center prior to the war. According to the RS, the port and rail facilities were used primarily for transportation of relatively small amounts of anthracite, iron and iron ore to local destinations (such as Tuzla and Zenica) and to other destinations within the former Yugoslavia. With the exception of receiving coal shipments from Russia, the port had no international commercial connections. Finally, the RS argues that the roads in the Brcko area are particularly unsuited for north-south commercial traffic and that roads, railways and port facilities outside the Brcko area will provide the most economical means for shipment of goods within Bosnia and internationally.

28 In support of its assertion, the Federation cites the examples of Katanga and Rhodesia, in which recognition was withheld by the international community due to the illegality of the attempted creation of the state, and the attempted creation of the Turkish Republic of Northern Cyprus and South Africa's "homeland states."

29 The Tribunal notes that, during the Rome hearing, the RS itself brought to the attention of the Tribunal the fact that it was celebrating the fifth anniversary of its creation, thus placing its creation prior to the hostile events in question.

30According to the RS, the map attached to Annex 2 depicts the IEBL located immediately to the south of the city of Brcko. The RS concludes that a status quo based upon the existence of

a corridor connecting the eastern and western portions of the RS, with Brcko Gradsubject to RS control, resulted from the Dayton Accords, and asserts that the Tribunal's decision must therefore be limited to deciding to what extent, if at all, the IEBL is to be moved south from the points currently indicated on the map. And yet at the Rome hearing and later the RS affirmatively disavowed any desire to have the Tribunal expand its territory.

31 According to the RS, Brcko is critical to the regional economic development plan of the RS. The RS asserts that the Brcko corridor is vital to the economic integration of the eastern and western halves of the entity. According to the RS, nearly 65 per cent of its manufacturing capability and commercial enterprises are based in the western half of the entity. Further, more than 60 per cent of the population lives in the western half of the Entity. By contrast, the majority of RS raw materials and resources – energy, mining and timber – are located in the eastern portion of the RS. Under this argument, the Brcko area must remain under the control of the RS to guarantee the transportation routes linking the two halves of the RS.

32 In support of its textual argument, the Federation cites Agreed Principles Article 2.1 which states: "the 51:49 parameter of the territorial proposal of the Contact Group is the basis for settlement. This territorial proposal is open for adjustment by mutual consent." According to the Federation, the parties reached just such a mutual agreement at Dayton, where they set the IEBL throughout Bosnia, with the only exception being that the status of the IEBL in Brcko would be determined by arbitration.

33 See John Dugard, Recognition and the United Nations 135 (1987).

34 See 1 Oppenheim's International Law 183-84 (Robert Jennings & Arthur Watts, eds. 1992).

35 See, e.g.. discussion of the examples of the application of the doctrine in the cases of Katanga and Rhodesia, cited in John Dugard, Recognition and the United Nations 86-98 (1987).

36 The United Nations Security Council, in invoking Chapter VII of the United Nations Charter as a basis upon which to call upon the international community to impose of variety of sanctions on parties in the former Yugoslavia, explicitly recognized the applicability of the doctrine to actions in the region. See, e.g., Security Council Resolution 836, U.N. Doc. S/RES/836 (1993), in which the Security Council, acting under Chapter VII of the United Nations Charter, "reaffirms the unacceptability of the acquisition of territory by the use of force and the need to restore the full sovereignty, territorial integrity and political independence of the Republic of Bosnia and Herzegovina. See also Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa). 1971 I.C.J. Rep. 16 ("Namibia Case").

37 The Constitution of Bosnia and Herzegovina specifically provides that the "Republic of Bosnia and Herzegovina . . . shall continue its legal existence under international law as a state, with its internal structure modified as provided herein and with its present internationally recognized

borders." Constitution, Article 1(1). The Tribunal notes that the RS's decision to come to the negotiating table at Dayton, and its ultimate agreement to Article 1(1), is due in no small part to the decision on the part of the international community collectively to refuse to allow Serb aggression to be rewarded with a change in sovereignty in the region.

38 Western Sahara (Advisory Opinion), 1975 I.C.J. Rep. 12.

39 Indeed, this determination is in harmony with that reached by the I.C.J. in the Western Sahara case itself. There, the court, after determining that both Morocco and Mauritania had shown the existence of close ties with the nomadic tribes in the area, found that neither claimant had established an absolute right to sovereign control of the area. See Western Sahara (Advisory Opinion). 1975 I.C.J. Rep. at 68. ("The materials and information presented … do not establish any tie of territorial sovereignty between the territory of Western Sahara and me Kingdom of Morocco or the Mauritanian entity.")

40 While the Tribunal has found that the RS's aggressive acquisition of the area cannot give rise to a legal basis for exercising administrative control over the area, this does not preclude the RS from asserting a separate legal basis for control over the area.

41 The Tribunal in this sense agrees with the assertion in the Statement of the Republika Srpska that, in reaching its result, "it is incumbent on the Tribunal to recall that the underlying linchpin of the Dayton Accords is to secure long term stability in Bosnia and Herzegovina through establishment

of a viable relationship between its two Entities." The Tribunal agrees that it must devise a solution aimed at establishing long-term stability, and believes that only a solution that seeks to achieve full implementation of the GFAP in the Brcko area will do so.

42 The Tribunal is informed that there are international plans to build a river-crossing bridge at Orasje within the next two or three years, but until that time the Arizona route cannot provide an efficient crossing.

43 On 7 February 1997, just as this Award was in the last stages of preparation, the RS submitted an outline of possibly more lenient positions, but with an agreed deadline of 15 February 1997, there has been no opportunity for a true analysis of these last-minute proposals or a response by the Federation.

44 The Tribunal has also considered the application, either directly or by analogy, of other possibly relevant legal principles concerning the acquisition of territorial control. Specifically, the Tribunal has considered the application of such principles as:

1. uti possidetis juris, see, e.g.. Frontier Dispute Case (Burkina Faso v. Republic of Mali. 1986 I.C.J. Rep. 554; see also Conference on Yugoslavia, Arbitration Commission Opinion 3 (Jan. 11, 1992) 31 I.L.M. 1499 (1992);

2. the right to self-determination, see, e.g.. Namibia Case. 1971 I.C.J. Rep. 16; and

3. occupation and prescription, see, e.g., Minquiers and Ecrehos Case (France v. United Kingdom). 1953

I.C.J. Rep. 47.

The Tribunal finds that an application, either directly or by analogy, of these principles to the instant dispute provides no clear basis for a final and binding award.

45 See Cayuga Indians (Great Britain) v. United States. 6 R.I.A.A. 173 (1926). In Cayuga Indians). Great Britain and the United States agreed to binding arbitration of a dispute in accordance "with treaty rights and with principles of international law and equity." The tribunal, after considering this provision, concluded that

an examination of the provisions of the arbitration shows a recognition that something more than the strict law must be used in the grounds of decision of arbitral tribunals in certain cases; that there are cases in which – like the courts of the land -these tribunals must find the grounds of decision, must find the right and the law, in general considerations of justice, equity and right dealing, guided by legal analogies and by the spirit and received principles of international law.

Id. at 180. See also Hersh Lauterpacht, 1 International Law 85 (1970). According to Lauterpacht,

equity, in its wider sense as connoting ideas of fairness, good faith and moral justice, is a source of international law to the not inconsiderable extent to which it may be regarded as forming part of general principles of law recognized by nations . . . while securing moral justice is an essential object of the law, that object cannot always be achieved. It

must yield, in particular cases, to requirements of certainty, stability and fulfillment of legitimate expectations – all of which are directly related to moral justice. It is in that sense that there must be understood the various treaties providing for arbitral settlement of disputes … on the basis of 'law and equity' . . .

46 See North Sea Continental Shelf. 1969 I.C.J. Rep. 3; see also Continental Shelf (Libyan Arab Jamahiriya/Malta). 1985 I.C.J. Rep. 13); Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States). 1984 I.C.J. Rep. 246; Continental Shelf (Tunisia/Libyan Arab Jamahiriya). 1982 I.C.J. Rep. 18. In the Continental Shelf (Tunisia/Libya) case, Judge Arechaga, in a separate opinion, reasoned that

to resort to equity means, in effect, to appreciate and balance the relevant circumstances of the case, so as to render justice, not through the rigid application of general rules and principles and of formal legal concepts, but through the adaption and adjustment of such principles, rules and concepts to the facts, realities and circumstances of each case . . . in other words, the judicial application of equitable principles means that a court should render justice in the concrete case, by means of a decision shaped by and adjusted to the relevant "factual matrix" of that case. Equity is here nothing more than the taking into account of complex historical and geographical circumstances the consideration of which does not diminish justice but, on the contrary, enriches it.

Continental Shelf (Tunisia/Libya). 1982 I.C.J. Rep. 100, 106. (Arechaga, J, Sep. Op.).

47 See, e.g.. Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark/Norway). 1993 I.C.J. Res. 38, 211 (J. Weeramantry, Sep. Op.). In his separate opinion, Judge [Vice President] Weeramantry suggests that the tribunal may appropriately consider equity as encompassing a series of considerations:

· equity as a basis for "individualized" justice tempering the rigors of strict law;

· equity as introducing considerations of fairness, reasonableness and good faith;

· equity as offering certain specific principles of legal reasoning associated with fairness and reasonableness, to wit, estoppel, unjust enrichment and abuse of rights:

· equity as furnishing equitable standards for the allocation and sharing of resources and benefits;

· equity as a broad synonym for distributive justice and to satisfy the demands for economic and social arrangements and redistribution of wealth.

Id. at 613.

48See Continental Shelf (Libyan Arab Jamahiriya/Malta). 1985 I.C.J. Rep. 38-9 ("It is however the goal – the equitable result – and not the means to achieve it, that must be the primary element").See also Continental Shelf (Tunisia/Libyan Arab Jamahiriya). 1982 I.C.J. Rep. 18. In the Tunisia/Libya case, the I.C.J. reasoned that

it is, however, the result which is predominant; the principles are subordinate to the goal. The equitableness of a principle must be assessed in the light of its usefulness for the purpose of arriving at an equitable result. It is not every such principle which is in itself equitable; it may acquire this quality by reference to the equitableness of the solution. The principles to be indicated by the Court have to be selected according to their appropriateness for reaching an equitable result. From this consideration it follows that the term "equitable principles" cannot be interpreted in the abstract; it refers back to the principles and rules which may be appropriate in order to achieve an equitable result.

Id. at 59.

49The Tribunal recognizes that there is evidence tending to show that certain RS authorities may have deliberately herded Serb refugees from Sarajevo and the Krajina toward Brcko, encouraging them to settle there precisely in order to dissuade this Tribunal from transferring Brcko from the RS to the Federation. Whether such reprehensible behavior occurred or not, the plight of innocent Serb refugees and displaced persons in Brcko is an equitable factor that cannot simply be ignored.

50Without attempting a complete listing, some of the costs incurred to date are those of the UNPROFOR operation, the provision of food and humanitarian supplies, the EU administration in Mostar, the 60,000-person IFOR program, and the numerous other post-Dayton implementation efforts including those of the Office of the High Representative, the OSCE voting project, the IPTF, the UNHCR, and the many additional official and unofficial agencies.

51Specifically, acting under Chapter VII of the Charter of the United Nations, the Security Council has adopted post-Dayton

resolutions stressing the need for a peaceful settlement of the conflict in Bosnia and Herzegovina and calling for full implementation of all commitments undertaken at Dayton. Security Council Resolution 1031 (1995), which created IFOR, reaffirms the Security Council's commitment to a negotiated political settlement, calls upon the parties to fulfill their commitments in good faith, and affirms the need for implementation of the Dayton Accords in their entirety. Resolution 1088 (1996), which authorized SFOR and renewed IPTF, used even stronger terms. It reaffirmed support for the Dayton Accords and called upon the parties "to comply strictly" with their Dayton obligations. It also reminded the parties to cooperate fully with all entities involved in the implementation of the peace settlement, presumably including this Tribunal.