Vision and Reality: Democracy and Citizenship of Women in the Dayton Peace Accords†

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I. INTRODUCTION

This Article examines the gendered meanings of the concepts of democracy, citizenship, and human rights in the context of the General Framework Agreement for Peace in Bosnia and Herzegovina (GFA), negotiated in Dayton, Ohio, in 1995.† The Article is predicated upon the idea

† This Article arises from a research project on Women, Law, and Democracy undertaken at
that a feminist theory and politics of citizenship and democracy "must embrace an internationalist agenda" and that in turn, for effectiveness and legitimacy, the internationalist agenda must embrace feminist thinking. This Article further argues that the GFA provided an opportunity for the renegotiation of a contested space where democratic concepts of access and participation and citizenship issues of entitlement could be reimagined rather than merely being restated in their familiar, gendered guises. Negotiation of the GFA presented the West with an opportunity to look critically at the position of women within its own societies and to reconfigure societal structures to enhance women's empowerment within post-conflict Bosnia and Herzegovina. This reconfiguration would also have benefited women elsewhere, including those within Western states and institutions.

The Article first outlines the significance of the GFA, both in ending the war in Bosnia and Herzegovina and more broadly in the context of Europe after the collapse of Eastern European socialism. It then considers two aspects of the complex backdrop to the GFA upon which Western visions of democracy, citizenship, and human rights were grafted. First, Parts III and IV examine traditional understandings of democracy and citizenship to show how in the West the reality of these concepts has greatly differed for women and others marginalized by their central tenets from the vision of the good life they purport to offer. Parts V and VI also look briefly at some attempts to address these exclusions. Second, the alternative vision of communism and the reality it presented for women in Eastern Europe is examined in Part VII. The context of the reconstruction of Bosnia and Herzegovina is both post-conflict and post-transition from communism. It is therefore appropriate to consider whether the GFA offers a better possibility for women than the situation that existed before the political changes in Eastern Europe.

Part VIII then examines in more detail the treatment of democracy, citizenship, and human rights within the GFA. The Agreement was concluded just weeks after the Fourth World Conference on Women articulated a blueprint for women's empowerment in the Beijing Platform for Action, and

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3. This Article does not give an account of the disintegration of the former Yugoslavia or the war in Bosnia and Herzegovina. For these, see SABRINA PETRA RAMET, BALKAN BABEL: THE DISINTEGRATION OF YUGOSLAVIA FROM THE DEATH OF TITO TO ETHNIC WAR (2d ed. 1996); LAURA SILBER & ALLAN LITTLE, YUGOSLAVIA: DEATH OF A NATION (rev. ed. 1997); SUSAN L. WOODWARD, BALKAN TRAGEDY: CHAOS AND DISSOLUTION AFTER THE COLD WAR (1995).

while the Council of Europe itself was making democracy and equality its priority themes. Gender mainstreaming had also been urged as an objective of both the United Nations and European institutions. This combination of timing, political circumstances, and the nature of the war might have encouraged boldness and vision in the negotiation of the GFA. This in turn could have ensured that the models of democracy, citizenship, and human rights presented therein would offer all citizens, including women, the space and security for the fulfillment of their personal self-determination that had been denied by the traditional, liberal understandings of these concepts. However, the Article argues that such a step was not taken and that, instead, the focus upon ethnic identity and security at Dayton obscured issues of gender in the process of reconstruction.

The Article concludes with Part X, which looks at developments in Bosnia and Herzegovina since 1995 to see how gender issues have been brought onto the agenda despite their omission from the framework provided by the GFA. It considers the role of various actors—international agencies, international non-governmental organizations (NGOs), and local NGOs—in this process and considers the possible disadvantages and advantages of effectively rewriting the GFA to ensure the inclusion of women in light of these subsequent developments.

II. THE GENERAL FRAMEWORK AGREEMENT FOR PEACE IN BOSNIA AND HERZEGOVINA

The General Framework Agreement and its twelve Annexes, known collectively as the Dayton Peace Accords, brought an end to the war in Bosnia and Herzegovina that had erupted as the former Yugoslavia disintegrated. The Agreement was brokered by the United States at the Wright-Patterson Air Force Base, Ohio, and was agreed to by three parties: President Alija Izetbegovic of Bosnia and Herzegovina, President Slobodan Milosevic of the Federal Republic of Yugoslavia, and President Franjo Tudjman of Croatia. Witnesses on behalf of the United States, the European Union, the Russian Federation and other Contact Group members, France, Germany, and the United Kingdom endorsed the Agreement.

The primary objective of the Dayton Peace Accords was to end the conflict in Bosnia and Herzegovina. In this sense, the GFA confirms the earlier cease-fire agreement, but the Dayton process went further by seeking to create regional stability and to provide a constitutional framework for a democratic state that would be workable within the restraints of its ethnic

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7. The European Community promoted gender mainstreaming in Beijing and had begun to incorporate the concept into planning and policy documents. See generally Christopher McCrudden, Mainstreaming Equality in the Governance of Northern Ireland, 22 FORDHAM INT’L L.J. 1696 (1999).
8. For a description of the process by the U.S. chief facilitator, see RICHARD HOLBROOKE, TO END A WAR (1999).
composition. A more long-term objective was political and economic integration within post-Cold War Europe as evidenced by the role given to European institutions such as the Organization for Security and Cooperation in Europe (OSCE) and the paramount position of the Convention for the Protection of Human Rights and Fundamental Freedoms, commonly known as the European Convention on Human Rights. These objectives were pursued in a state that has been subject to almost constant political change and realignment over the past century. There has been no stable basis in Bosnia and Herzegovina for the evolution of a shared philosophy about the proper relationship between the state and individuals, for the fostering of a human rights culture, or for the negotiation of the meaning of citizenship or of gender relations. Rather, the history of the state has been one of constant reordering of political priorities and forging of diverse identities: loyalty to the Kingdom of the Serbs, Croats, and Slovenes; loyalty to the national identities forged by World War II or to the partisans; loyalty to the Titoist second Yugoslavia; loyalty to one of the warring sides; and finally, loyalty to the GFA’s political construct of two separate entities and three nations.

The reconstruction envisaged by the GFA required attention to the “most difficult problems of a modern society.” The Chairman on the International Commission on the Balkans, Leo Tindemans, claimed that these problems consisted of the following:

The relationship between nation and state; the conflicting expectations of ethnic and religious minorities; the development of nationalism, regionalism, confederalism and federalism; the viability of a multi-ethnic state; the acceptance of cultural autonomy; the requirements of modern democracy and civil society; the role of political parties; employment; the transition to market economies; the activities and role of the media; and constitutional problems.

The GFA attempts to address these problems through three strategies: provision for democratic elections; international controls to ensure compliance with its vision; and human rights guarantees. Any reference to women’s empowerment—as either a distinct objective or strategy, or as cutting across all the objectives and strategies—is conspicuously absent.

The details of the Dayton Peace Accords have been widely analyzed and will be only briefly summarized here. The GFA affirms the continuation of the independent state of Bosnia and Herzegovina. It is a democratic state comprising two Entities: the Federation of Bosnia and Herzegovina (the Federation) and the Republika Srpska. All competent national authorities (of

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10. Id. at ix.
11. Id.
13. GFA, supra note 1, Annex 2, 35 I.L.M. at 112-14; Id. Annex 4, art. I(3), 35 I.L.M. at 118. The name Republika Srpska was the chosen name of the Bosnian Serbs. Richard Holbrooke expressed
the Entities and of the state) are required to cooperate with international monitoring bodies, including those established explicitly within Bosnia and Herzegovina, those operating under the various treaty mandates, and the International Criminal Tribunal for Former Yugoslavia (ICTY).14

The GFA affirms the centrality of human rights to post-war Bosnia and Herzegovina. Article II of the Constitution of Bosnia and Herzegovina, established in Annex 4 of the GFA, makes the European Convention on Human Rights and its Protocols directly applicable and gives it priority over all other law.15 Thus, the Constitution incorporates certain specific international human rights enumerated in the Convention,16 in addition to requiring Bosnia and Herzegovina to become (or to remain) a party to listed U.N. and regional human rights instruments,17 including treaties that are not yet in force and treaties that have attracted significant reservations from other state parties. These requirements affirm essential human rights, but they compromise the sovereignty consonant with independent statehood, since sovereign states are free not to ratify international treaties, and, indeed, the United States itself is not a party to many of the treaties required in the GFA. The GFA also establishes specific bodies for the implementation of human rights: the Constitutional Court and the Commission on Human Rights, comprising the Office of the Ombudsman and the Human Rights Chamber.18 Notably, the GFA makes no explicit reference to the human rights of women, but there is a general requirement of non-discrimination in the implementation of the Constitution on a number of grounds, including that of sex but not that of marital status or sexuality.

regret that negotiators had conceded its continuation. HOLBROOKE, supra note 8, at 130-31, 135.


15. GFA, supra note 1, Annex 4, art. II(2), 35 I.L.M. at 119.

16. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, sec. I, 213 U.N.T.S. 221, 224-31 (enumerating the right to life; the right not to be subjected to torture or to inhuman or degrading treatment or punishment; the right not to be held in slavery or servitude or to perform forced or compulsory labor; the right to liberty and security of person; rights relating to criminal proceedings, including to a fair trial; rights to respect for private and family life; freedom of thought, conscience, and religion; freedom of expression, freedom of peaceful assembly, and freedom of association with others; and the right to marry and to found a family).


Although the United States rather than the United Nations or the European Union played the leading role in crafting the Agreement,19 various European institutions are accorded responsibility for its implementation alongside U.N. bodies. Military responsibility is accorded to the Implementation Force (IFOR)20 led by the North Atlantic Treaty Organization (NATO),21 while the U.N. Mission has responsibility for the establishment and training of the civilian International Police Task Force (IPTF).22 The only other U.N. body given a specific role under the GFA is the Office of the High Commissioner for Refugees (OHCHR),23 though the Office of the High Commissioner for Human Rights has established a field presence in Bosnia and Herzegovina.24 The major institutional player with respect to elections is the OSCE;25 this choice emphasizes the perceived importance of elections to the achievement of cooperation and security.

All these bodies work alongside the Office of the High Representative in Bosnia and Herzegovina (OHR). The OHR mandate does not sound overly broad: to facilitate the Parties’ own efforts, and to mobilize and to co-ordinate the activities of the organizations and agencies involved in the civilian aspects of the peace settlement.26 In practice, however, the OHR has been affirmed as the “final authority”27 in the implementation and interpretation of Annex 10 and granted broad subjective discretion, for example, to “facilitate as the High Representative judges necessary, the resolution of any difficulties arising in connection with civilian implementation.” The mandate has been strengthened by the successive Peace Implementation Conferences (PIC),28 notably in Bonn in December, 1997, and in Madrid in 1998. The OHR reported in 1999 that “[t]he High Representative’s powers are still indispensable. They should continue to be used without hesitation whenever local institutions and authorities fail to support Dayton or to impede our work to put Bosnia and Herzegovina back on its feet and enable its progress towards European integration.”29

20. This became the Stabilization Force (SFOR) in late 1996.
25. GFA, supra note 1, Annex 3, art. II, 35 I.L.M. at 115.
27. S.C. Res. 1031, supra note 19.
28. The PIC comprises the states, international organizations, and agencies that attended the London Peace Implementation Conference constituted after the signing of the GFA in 1995.
The GFA has been described as the “most ambitious agreement of its sort in modern history, and perhaps in all of history.”\(^{30}\) It confirms the link between internal state governance and international peace and security by incorporating a state constitution in an international agreement.\(^{31}\) This is a constitution for a new Eastern European state,\(^{32}\) designed and implemented by Western agencies, the United States, and European institutions, and endorsed by the wider international community “to build a state out of the ruins of a conflict of extraordinary barbarity and brutality.”\(^{33}\) This internationally brokered constitution represents an attempt to construct a democratic constitution for a conflict-torn former communist regime’s transition to the vision of a Western, liberal polity. It brings together the internal dimensions of democracy and citizenship of the state of Bosnia and Herzegovina with external guarantees of international human rights under a range of international treaties. It subjects Bosnia and Herzegovina to an extraordinary level of intervention rendering its sovereignty contingent and flexible. By creating what might be seen as a new form of protectorate or trusteeship-type arrangement, the GFA permits the international community to run the internal affairs of a state to an extent never before seen with any member of the United Nations.

The GFA was negotiated as Europe and European institutions were having to rethink their position in the wake of the collapse of socialism in Eastern Europe. The concepts of citizenship, democracy, and human rights have been foundational to this process. They interlock, and, taken together, define the internal relationship between the state and the individual, and determine the individual’s freedom from state intervention. Before 1989, these concepts formed the ideological dividing line between the liberal democracies of Western Europe and the socialist states of Eastern Europe, as the 1975 Helsinki Final Act of the Conference for Security and Co-operation in Europe (CSCE) to some extent demonstrated.\(^{34}\) This document was a Cold War instrument that aimed at establishing a basis for co-existence between the two models of social ordering that then separated East and West Europe. Mantra-like, the principles were reaffirmed throughout the 1990s as the basis for the social and political framework for the economic restructuring of Eastern Europe, for example in the Charter of Paris,\(^ {35}\) the Prague Document on Further Development of CSCE Institutions and Structures,\(^ {36}\) the Copenhagen Document,\(^ {37}\) and at all Summit meetings of the OSCE.\(^ {38}\)

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32. Bosnia and Herzegovina was admitted to the United Nations on May 22, 1992 when the state was already disrupted by conflict.
These same concepts also form the interface between domestic law and international law through the concept of human rights. The vision of human dignity presented in the framework of contemporary human rights law through international instruments—such as the Universal Declaration of Human Rights,\textsuperscript{39} the International Covenant on Civil and Political Rights,\textsuperscript{40} and the International Covenant on Economic, Social and Cultural Rights\textsuperscript{41}—requires individual security through freedom from arbitrary state interference and provision of an adequate standard of living. These goals assume an international, as well as domestic, rule of law. Within Western Europe the relationship between the state and the individual was regulated in the same terms by the European Convention on Human Rights.\textsuperscript{42} Since 1989, the Council of Europe has become a major political focus for promoting cooperation with the countries of Central and Eastern Europe as they have moved towards a democratic form of governance, and adherence to the Convention has become an essential attribute of such commitment.

In the 1990s, as nationalist demands became more urgent in the wake of the collapse of Eastern European communism, the protection of the human rights of collectivities—for instance of minority groups within states—required greater emphasis. The individualist stance of human rights law rendered it ill-equipped to engage with claims to group identity.\textsuperscript{43} This concern became ever more pressing as nationalist challenges to the Yugoslav and other former Soviet bloc states threatened their very existence and made urgent the need to reconcile collective interests with democratic entitlement. The legal response within Europe was the inclusion of minority rights within the mandates and programs of the OSCE and the promulgation of the Framework Convention for the Protection of National Minorities.\textsuperscript{44}

\begin{itemize}
\item and the rule of law through peaceful means, that appropriate action may be taken by the Council or the Committee of Senior Officials, if necessary in the absence of the consent of the state concerned, in cases of clear, gross and uncorrected violations of relevant CSCE commitments.
\item \textit{Id.} at para. 16.
\item The only reference to group rights in the International Covenant on Civil and Political Rights, \textit{supra} note 40, art. 1, 999 U.N.T.S. at 173, and the International Covenant on Economic, Social and Cultural Rights, \textit{supra} note 41, art. 1, 993 U.N.T.S. at 5, is the right to self-determination. The International Covenant on Civil and Political Rights, \textit{supra} note 40, art. 27, 999 U.N.T.S. at 179, provides that persons belonging to minorities shall not be denied the right to enjoy their own culture, to profess and practice their own religion, or to use their own language. Although these rights belong to members of minority groups, they are nonetheless individual rights.
\end{itemize}
Convention notes that “the protection of national minorities is essential to
stability, democratic security and peace” in Europe.45

Feminist scholars and activists have, however, challenged the ideals of
democracy, citizenship, and human rights as providing a gendered vision of
the good life that assumes a male subject and excludes women from its
ambit.46 The rule of law has been shown to be based upon male premises
about law and governance;47 the ideal or universal citizen is male, and
democracy fails to deliver its promise to women. International human rights
law has also been presented as predicated upon protecting men from state
intervention in areas of concern to them rather than upon guaranteeing human
dignity and optimum choice to all individuals.48 While apparently gender
neutral in that the human rights provisions apply equally to women when they
are in these same situations, the provisions offer no protection against the
harms that are particular to women’s life experiences. Provisions for the
protection of minorities do not differentiate between men and women or
provide special protections to persons who claim diversity on other grounds
such as sexuality, disability, or age.49

The debates within Western Europe over the meaning of European
integration and the roles of European institutions have heightened the
disjunction between the purported universalistic visions of democracy,
citizenship and human rights and the reality for women that feminism
exposes. The collapse of the Soviet Union has cast into doubt the future of
institutions founded upon the premise of the Cold War, notably NATO and
the OSCE. The conflict in Bosnia and Herzegovina provided an arena for
working out the future roles of these institutions. During the political,
economic, and social reconstruction of Eastern Europe, the states of the
European Community were moving further toward the goal of a united Europe
through the formation of the European Union.50 The Treaty on European
Union, also known as the Maastricht Treaty, provides for a common foreign
and security policy51 and for European citizenship.52 One of the objectives of
the former is “to develop and consolidate democracy and the rule of law, and
respect for human rights and fundamental freedoms,”53 an objective that was
immediately put to the test by the war in Bosnia and Herzegovina. The

45. Id. pmbl., para. 5, 34 I.L.M. at 353.
46. See, e.g., infra notes 75-98 & 143-150 and accompanying text.
47. REGINA GRAYCAR & JENNY MORGAN, THE HIDDEN GENDER OF LAW 2 (1990) (arguing
that scrutiny of legal knowledge reveals that apparently neutral, value-free doctrines conceal a male
perspective).
48. HILARY CHARLESWORTH & CHRISTINE CHINKIN, THE BOUNDARIES OF INTERNATIONAL
FEMINIST REV. 58, 64 (1991) (“Women of majority and minority groups are affected differently by
sexist limitations to their citizenship rights.”). For a fuller discussion, see WILL KYMLICKA,
51. Id. tit. V, art. J, at 143.
52. Id. art. 8, at 17. The concept of European citizenship was expanded further by the
Amsterdam Treaty—in force as of May 1, 1999—adding paragraphs a through e to article 8 of the
Maastricht Treaty. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties
concept of European citizenship raises questions about the meanings of belonging within Europe. What does being European add to being British or French—or Welsh or Breton? In particular, what can it offer women? The projected membership of Eastern European states in the European Community will extend European citizenship beyond its current borders; while such membership is pending, the concept of European citizenship denotes exclusion as well as inclusion.

The fact that the GFA fails to reimagine gender relations and to provide a contemporary model of citizenship and democracy for women is important because it represents a lost opportunity to move beyond traditional structures and to find ways of addressing cross-cutting discriminations. While it is true that the war in Bosnia and Herzegovina was fought along ethnic lines, gender-based violence was also targeted at women. By securing ethnic identity but ignoring gender the GFA further legitimates this exclusion. It might be thought that the situation in Bosnia is exceptional and that there are no wider lessons to be learned from a case study. We think, however, that the issues are of wider significance, especially for women within Europe. First, women throughout Europe are seeking to open up political spaces for the assertion of their own identities at local, regional, and international levels. An agreement involving players from all three levels and providing diverse arenas for the working out of these ideas might have been expected to indicate where such spaces could be found.

Second, women’s subordination was common to states within Eastern and Western Europe despite the states’ polarized political ideology and divergent manifestations of inequality. Accordingly, women from across Europe can share strategies and ideas for achieving equality and full status as citizens. The Dayton Peace Accords presented the West with an opportunity to structure a model for women’s empowerment that could benefit women elsewhere, including within Western Europe. Refiguring democracy and gender relations should not be seen as an agenda only for failed states but as having currency for existing polities. The Dayton Peace Accords could have made an enormous contribution to the transition from a Cold War to a post-Cold War Europe by rejecting both conventional capitalist and socialist models of citizenship and democracy that fail to satisfy the aspirations of women in political, economic, and social spheres, and by articulating a model that takes account of these aspirations.

Third, the human rights regime that forms a central part of the Accords is very much Europe-based. Indeed, the European Convention on Human Rights is made directly applicable in Bosnia and Herzegovina, although the state has not been admitted to the Council of Europe. This privileging of human rights is not particular to Bosnia and Herzegovina:

54. "The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately." General Recommendations, U.N. Committee on the Elimination of Discrimination Against Women, 11th Sess., General Recommendation No. 19, at para. 6, at http://www.un.org/womenwatch/daw/cedaw/recomm.htm (1992). Thus, gendered violence is understood as particular harms inflicted on a person because of gender. Bombing, which may hit women and men randomly, may also be gendered if a target is selected knowing that there are only, or predominantly, people of one gender in the area.

55. GFA, supra note 1, Annex 4, art. II(2), 35 I.L.M. at 119.
Respect for fundamental human rights is now accepted as a central element in the construction of a democratic and united Europe, and as a critical component of the EU’s self-image as a space of civility and modernity, it is also the fault line on which Europe’s internal and external borders are being inscribed.\textsuperscript{56}

Bosnia provides a testing-ground for this proposition: Will the state make a commitment to human rights commensurate to becoming European, or will it remain outside the European mainstream? Furthermore, how will the bodies for the implementation of the human rights provisions of the GFA construct the European Convention on Human Rights with respect to the human rights of women, an issue of relevance to all European women?

Fourth, the reality of what European citizenship might mean is linked to the European Convention on Human Rights, an inclusive instrument in that it is open to ratification or accession by any European state that accepts its values. The Convention has a unique potential for defining Europe; it is an actual or aspired-to common feature of all European states that their political ordering conform with the Convention and that a supranational body, the European Court of Human Rights, can test this conformity. European citizenship as designated by the Treaty on European Union is much more exclusive in that it applies only to citizens of member states of the Union.\textsuperscript{57} Membership in the Union is to be extended to more states, and the Convention will play a key role in this expansion. The Convention forms part of the “general principles” of European Community law, and although the Community has not itself become a party to the Convention, it must conform to the Convention’s standards.\textsuperscript{58} What being a citizen within Europe means for a Muslim woman from Bosnia, a Welsh woman from the United Kingdom, or a Lapp woman from Norway\textsuperscript{59} is in part defined by the Convention’s guarantees of human rights.

Fifth, Europe regarded itself as a significant player in the crises around the dissolution of the former Yugoslavia. The European Community, precisely as it was reinventing itself, presented itself as a mediator in the disputes between the Yugoslav Republics. It determined a common recognition policy and criteria for recognition of statehood—including a commitment to democracy, human rights and protection for minorities—to be applied by a European arbitration tribunal, the Badinter Commission.\textsuperscript{60} The Community’s subsequent failure to give effect to its own criteria and the decisions of the Badinter Commission led to what many have regarded as premature recognition of states, in particular Croatia, thereby internationalizing the conflict in Bosnia and making war inevitable.\textsuperscript{61} During the war, internal dissention and divided policies between member states of the European

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\textsuperscript{57.} Treaty on European Union, supra note 50, tit. II, art. 8(1), 1757 U.N.T.S. at 17.

\textsuperscript{58.} \textit{Id.}, tit. I, art. F(2), 1757 U.N.T.S. at 12.


Community affected the outcome of attempted peace negotiations.\(^6\) In these circumstances, Europe bears responsibility for the post-conflict consequences, including those with respect to women. By signing the Accords, the European Community and members of the Contact Group appeared to recognize this responsibility.

Finally, in October 2000 the U.N. Security Council held an open meeting on women, peace, and security. On October 31, the Security Council adopted Resolution 1325 in which it urged member states to ensure “increased representation of women at all decision-making levels in national, regional and international institutions and mechanisms for the prevention, management, and resolution of conflict,”\(^6\) and to adopt a gender perspective throughout implementation,\(^6\) including measures for the protection of women’s human rights, “particularly as they relate to the constitution, the electoral system, the police and the judiciary.”\(^6\) These are precisely the elements of democracy and citizenship discussed throughout this Article. The analysis of the GFA from these perspectives thus serves as a case study of the problem of exclusion identified by the Security Council and as an argument in support of the Security Council’s call for redress.

III. WOMEN AND DEMOCRACY

A. Introduction

When they rejected their communist past in 1989-1990, the Eastern European states embraced the concepts of democracy and the rule of law in their contemporary Western guise by seeking membership in the Council of Europe.\(^6\) The active parts played by Eastern European women in their societies’ transformation have been well documented.\(^6\) The allure of democracy was not just the ideology of political freedom but also that of “the good life” achieved through free markets, the availability of consumer goods, and open borders.\(^6\)

While the transition took on different characteristics according to local conditions across Eastern Europe, the dream for many women rapidly gave way to the realities of corporate downsizing, unemployment, and negotiations

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62. Silber & Little, supra note 3, at 199.
64. Id. at para. 8.
65. Id. at para. 8(c).
66. By 2000, there were forty-one member states of the Council of Europe, including Croatia (since November 6, 1996), Slovenia (since May 14, 1993), and the former Yugoslav Republic of Macedonia (since November 9, 1995).
67. Barbara Einhorn, Where Have All the Women Gone?: Women and the Women’s Movement in East Central Europe, 39 Feminist Rev. 16, 16-17 (1991). Jaquette and Wolchik add that such participation was “rarely as women or as feminists.” Jane S. Jaquette & Sharon L. Wolchik, Women and Democratization in Latin America and Central and Eastern Europe: A Comparative Introduction, in Women and Democracy: Latin America and Central and Eastern Europe 1, 7 (Jane S. Jaquette & Sharon L. Wolchik eds., 1998).
over women’s bodies as exemplified by the abortion debates. But it was in the former Yugoslavia that the “ugliest side of the underbelly of post-communism” exploded with nationalist-inspired conflicts that were accompanied by atrocities, war crimes, and genocide. Throughout this war thousands of women in Bosnia were subjected to mass rape, enslavement, and death. Ethnic cleansing forced many to leave their homes and seek refuge in other states or in supposedly safe areas within Bosnia. Women’s wartime experiences were diverse. Some fought; others lived under siege, as in Sarajevo, and maintained families and homes as best they could; still others lost family members. Gendered violence also affected men—for example, in the separation and massacre of men and boys at Srebrenica. These killings, in turn, created further gendered harms for women survivors through their grief for the loss of male family members and through the practicalities of having to recommence their lives without traditional male support.

It is against this backdrop in Eastern Europe that the reconstruction of Bosnia and Herzegovina has taken place and the concepts of democracy and citizenship within the rule of law introduced. The Western vision of these concepts remains the starting point for this reconstruction. Just as Eastern European states all found their individual routes to communism, so too the concept of democracy in the West has been contested and Western states have developed their own principles and practice, making generalizations difficult.

Nevertheless, the different versions of democracy found in Western European states today all share the same theoretical underpinnings. However, these underpinnings are increasingly contested, and even as Western forms of democracy have been exported to Eastern Europe, they have been subjected to considerable criticism at home. This Part examines the feminist critique of the historical account of democracy that has exposed exclusions from the political process—particularly of women—but also of other marginalized groups. The following Part provides a similar evaluation of citizenship. The separate consideration of democracy and citizenship risks distorting their interlocking and interdependence in philosophical and legal accounts. But brief separate considerations show specifically how in each case the reality has historically evolved to embody truths very different than those presented by the vision. These issues are not just of theoretical importance, but have had a major


71. Woodward warns against pathologizing the conflicts in nationalist terms in her analysis of the interplay of economic and constitutional reasons for the disintegration of Yugoslavia. Woodward, supra note 3, at 15-17.


impact on participatory politics—through requirements for consultation, the composition of regulatory bodies and of administrative structures, and the decentralization of power. These benchmarks provide yardsticks against which the Dayton Accords may be measured.

B. A Survey of Western Liberal Democracy

There are many accounts of the evolution of contemporary Western understandings of democracy from its foundations in the theory and practice of the popular democracy of antiquity to its reformulation through the emergence of forms of representative democracy from the seventeenth century onwards. Carol Pateman provides an especially compelling reinterpretation of this story, showing that from its conception liberal democracy was never intended to include all people. In *The Sexual Contract* she identifies two classic interpretations of the social contract, the political fiction that forms the theoretical foundation of liberal democracy. According to one version, when civil society came into being, the first citizens exchanged, through a notional contract, their natural freedom for the civil freedom guaranteed by the protection of the state. The second interpretation is that sons, casting off their natural subjection to their fathers, replaced paternal rule by civil government, thus creating the original “social contract” amongst and for themselves. In both versions of the story, the new civil order replaced the hierarchy of feudalism. But, Pateman argues, half of the story of the contract theorists is never acknowledged, because while the “social contract” is the story of freedom, the other contract—the “sexual contract”—is the story of subjection and women’s exclusion from the process of modern democracy. The following brief survey of leading liberal theorists demonstrates a range of bases for this exclusion, including natural law, biological determinism, and women’s free choice to preserve their exclusion from political life. What the theorists share is their assumption of the propriety of women’s exclusion.

The first and most primitive explanation for women’s birthright of subordination is that of natural law, which is based on the biblically-rooted reasoning of the traditional patriarchalists. Social contract theory rejects absolutely the argument of traditional patriarchalists that there existed such a truth as the natural preordained authority of kings. Yet, patriarchalists and contract theorists agreed about women’s subjection, as traditional patriarchyism was replaced with “modern patriarchy.”

Seventeenth century theorists, such as Hobbes and Locke, replaced the idea of men’s natural authority over women with that of rational authority,

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75. For a historical overview that focuses upon the perspectives of the major Western thinkers, see David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* 3-27 (1995); Douglas B. Klusmeyer, *Between Consent and Descent: Conceptions of Democratic Citizenship* (1996). For a critique of democracy as evolving “within a context of misogyny, incorporating fear, distrust and dislike of biological women and a culturally constructed femininity,” see Diana H. Coole, *Women in Political Theory: From Ancient Misogyny to Contemporary Feminism* 34 (2d ed. 1993).
77. *Id.* at 38-41.
78. *Id.* at 39.
79. *Id.* at 25.
asserting in common that equal individuals could not exist in an order of natural subordination, but that they could consent to the establishment of artificial authority in their own interests. Hobbes’s and Locke’s common stance divided with respect to women, although their end points were identical. Thomas Hobbes believed that there was no natural status of subordination, even including that of men over women, nevertheless, women’s inequality was biologically predetermined. In his view “men, [sic] are naturally fitter than women, for . . . labour and danger,” which Diana Coole understands as ensuring that men have a natural advantage. Accordingly, a woman must contract with her husband to be subordinate in return for the protection she needs for herself and her young. Thus “[o]nce women submit in the family due to the natural unfitness they frequently evince, then by implication they renounce the opportunity to register political consent.” Biology compels women to submit to men in the “sexual contract” while men are left to agree to the terms of the “social contract.”

John Locke omitted Hobbes’s notion of a consensual contract and relied on biology to exclude women. To Locke, the wife is subordinate since the husband is naturally more able and stronger. However, in an early delimitation of the public and private spheres, Locke characterized the male sex, conjugal rights, and women’s subordination as private and non-political, allowing men to proceed to seal the social contract in the public, political world of liberal democracy. Thus the seventeenth century saw the firm establishment of the dual concepts of the sexual and social contracts within the foundations of democracy.

In the eighteenth century, Jean-Jacques Rousseau took up Hobbes’s and Locke’s mantle with respect to the subordination of women. In The Social Contract, he considered slavery and other contracts of subordination to be invalid, but he had no similar qualms about the position of women, for whose position biology and intellect were determinative. For Rousseau, the “disorder of women” existed as a permanently subversive force within the political order, with women’s natures holding the potential to bring the state to ruin. Rousseau and later Freud argued that “women are incapable of transcending their sexual passions and particular attachments and directing their reason to the demands of universal order and public advantage.” Thus, civil order is wholly dependant on the right of husbands over wives that arises

81. Id.
82. COOLE, supra note 75, at 62.
83. HOBBS, supra note 80, at 139-40; see also PATEMAN, supra note 76, at 48-49.
84. COOLE, supra note 75, at 63 (interpreting Hobbes).
85. LOCKE, supra note 80, at Book I, § 47, Book II, §§ 74-76.
88. Id.
89. ID.
from the very different natures of the sexes. Women’s “natural” inadequacies render them forever excluded from public and political life.

Theoretical justifications for women’s political exclusion and private subordination have not remained reliant upon nature and biology. In the nineteenth century, John Stuart Mill launched one of the first and most significant challenges to these entrenched assumptions. In *The Subjection of Women*, Mill argued that women should be afforded the same life opportunities as men, and that education and treatment equal to men would enable them to acquire the rational skills necessary for participation in public life. Despite these assertions, the ultimate position of women for Mill was not very different from those expressed by Locke, Hobbes, and Rousseau, for he assumed that even when women had achieved equality most would still choose marriage and to remain in their home, protected by a husband. Mill equated the choice of a woman to marry with a man’s choice of a career and he assumed that by entering the marriage contract, women agreed to render domestic service.

There are still other explanations for this deeply entrenched exclusion of women within Western democratic social order. Ursula Vogel concludes that women’s subordination came to be justified in the nineteenth century for entirely new reasons. Vogel argues that the inegalitarian position of women in civil law (French, German, Scandinavian) was legitimized in the eighteenth century by the Hobbesian theory of a voluntary pact of submission. However, she suggests that in the early nineteenth century the family was placed outside and above the law and political life as a reaction against individualistic tendencies. Women and their “private” lives were made subject to the command and protection of the head of the family to the detriment of their legal rights and emancipation. Vogel concludes that this separate, “private” domain was essential to ensure the stability and certainty of the state, in particular property rights. If women and the sphere of home and family were immune from the freedom and individualism of public life, then the position of the latter would remain stable. There would, therefore, always be a status quo upon which men could rely—a consistent certainty in an ever-changing world.

Socialist explanations for women’s subordination have further developed Ursula Vogel’s interpretation of German theory. From the theories of Karl Marx, Frederick Engels, and Clara Zetkin, Lise Vogel concludes that the subordination of women in liberal, capitalist societies is about efficiency. She identifies women’s exploitation with their role in the reproduction of labor power and in the generational replacement of the ruling class. Vogel

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91. MILL, supra note 90, at 31-32; PATEMAN, supra note 76, at 163.
93. Id. at 76.
94. Id. at 74.
95. LISE VOGEL, MARXISM AND THE OPPRESSION OF WOMEN: TOWARDS A UNITARY THEORY
also argues that the capitalist drive to appropriate surplus labor relies on the assumption that the domestic component of the labor necessary for the worker’s own survival will be carried out by someone other than the worker himself.\textsuperscript{96} In Ursula Vogel’s analysis, liberal society requires the stability of women’s subordination within the family,\textsuperscript{97} while Lise Vogel sees the oppression of women as essential to the economic survival of the capitalist state.\textsuperscript{98} Thus, feminists from both liberal and socialist perspectives have traced the continuation of women’s subordination in liberal democratic theory. Nevertheless, the force of the story of the social contract has persisted.

C. \textit{Women and Liberal Democracy}

What are the implications for women of basing the modern democratic process on the liberal notion of the social contract? At base, the ideology of liberalism is a world perspective that sees individuals as acting in their rational self-interest but assumes that the net consequence of those combined acts will be to the common good. The theory is based on individualism, making society an artificial construct constituted of many individuals. Central to the liberal’s “individual” is the mechanism of abstraction that creates the notion of a universal, abstract being removed from the context of life and experience that ensures uniqueness. Applying the principle of the abstract individual universally, all are supposedly rendered equal. Intrinsic to the notion of the abstract, universal individual is the concept of freedom from both the state and from other individuals.

The liberal understanding of individualism and freedom relies upon the hotly contested liberal boundary between private and public: the belief that some parts of our lives are constrained within the “private” domain of relations between individuals, while other “public” aspects are open to the interference of the state. The state is regarded as necessary to control action and mediate conflicts, thus giving individuals the freedom to pursue their private goals. The notion of fraternity relies upon the smooth relations between abstract individuals, freedom, and the division of “private” from “public” life. It is only when these notions are in harmony that all individuals can stand equally in the fraternity that makes up the “public” sphere. The theory developed to encompass the belief that the aspirations of society and the realization of human capacities were only possible in civil and public life and that this realization had to be based on the dual concepts of autonomy and harm. Two constituent elements of liberal thought—individualism and the public/private dichotomy—will be briefly examined.

1. \textit{Individualism}

The classic liberal vision of a society made up of individuals is an essentially optimistic one, for it anticipates that all individuals or citizens

\textsuperscript{96} \textit{Id.} at 154-55.
\textsuperscript{97} See supra notes 92-94 and accompanying text.
\textsuperscript{98} VOGEL, \textit{supra} note 95, at 153.
acting or voting in their own best interests will be acting for the common good of all individuals. This society, in German theory, is based on the impersonal, limited, and temporary relations of Gesellschaft or association, rather than the intimate, universal, and permanent relations of Gemeinschaft or community.\textsuperscript{99} For Hobbes and Locke, individualism was essential to explain both the theoretical fiction of the social contract and the legitimization of state power through the voting process.\textsuperscript{100} However, after an election, voters are unable to control their elected representatives. They can only withdraw consent by leaving the dominion of the elected rulers, not a viable option for most people. Admittedly, elections have a prolonged effect through the anticipated voter reaction to political decisions and through political activity beyond elections.\textsuperscript{101} This effect is evidenced by campaigns and protests. Yet, the potential of elections for effecting change is limited within the framework of majority rule.

Criticism of liberal individualism goes beyond the belief that individuals have no power or influence in a process based on pure individualism. Anne Phillips sees the concept itself as fundamentally flawed:

When the individual stepped on to the stage as the source of all knowledge and fount of all meaning he walked into a scenario calculated to produce maximum despair. No truth beyond what we can work out with our own endowment of reason; no shared experience beyond an equal fear of each other; no common interest save those our reason may reveal.\textsuperscript{102}

Phillips' criticism is that, in expressing his or her own best interests, the individual is relied upon to act, coincidentally, with all others to create the conditions that are best for the good of all, in a process that makes no allowance for the identification, examination, and discussion of collective needs.

A further flaw is that the abstract individual is coded male.\textsuperscript{103} If men were the original contractors to the social contract, then the enfranchisement of women in the twentieth century makes it difficult to argue that women are still unable to enter into our modern "contract" by consenting to state power at parliamentary general elections. In The Sexual Contract, Pateman argues that the concept of the liberal individual is itself fundamentally male.\textsuperscript{104} Certainly, men remain more likely to taste the reality of the power and freedom of the liberal individual in political life and in the so-called "private" world of work and home.

The construction of the abstract and universal individual does not have negative implications just for women. The process of liberal democracy was never concerned with all men despite its vision, since the concern was always

\textsuperscript{99} Ferdinando Tönnies, Community and Society: Gemeinschaft und Gesellschaft 37-39, 64-67 (Charles P. Loomis ed. & trans., Harper Torchbooks 1957). The political divisions in central and Eastern Europe have been described as going from Gemeinschaft to Gesellschaft. Jaquette & Wolchik, supra note 67, at 3.

\textsuperscript{100} Hobbes, supra note 80, at 114-15; Locke, supra note 80, at Book II, § 132.

\textsuperscript{101} David Beetham, Liberal Democracy and the Limits of Democratization, in PROSPECTS FOR DEMOCRACY: NORTH, SOUTH, EAST, WEST 55, 63 (David Held ed., 1993).


\textsuperscript{103} Zillah Eisenstein, The Female Body and the Law 77 (1989).

\textsuperscript{104} Pateman, supra note 76, at 221.
for a certain kind of man whose characteristics the abstract liberal individual embodied. Western liberal democracy was essentially about the defense of private property rights\textsuperscript{105} and there was no wish to spread power beyond the propertied\textsuperscript{106}. The abstract individual was a man of means, probably highly educated, acting in pursuit of his own rational self-interest and contracting freely to be ruled by those like him.

Although the formal process of consent is no longer restricted by sex or property ownership, the concept of the abstract individual still works to exclude those who fall short of the “ideal” envisaged. The individuals who supposedly first entered into the social contract and their descendants who repeat that contract when voting for those who will represent them share the same abstract characteristics as the individual on which the liberal vision of democracy relies. The vision makes no allowance for social context, for any sense of connectedness with other human beings, or for awareness of any personal facts or characteristics, including one’s sex\textsuperscript{107}. It denies the differences between people and the multiple identities all people have. It rests upon the universally held qualities embodied in the abstract individual. In short, each of us is an individual capable of expressing political will in the abstract state of social contract theory, and yet none of us can ever actually be that individual. This is the core of the democratic deficit today. For although abstract and universal individualism can include no actual living person, the concept still favors the exclusion of some individuals to the advantage of others, as some are closer to the “ideal” liberal individual than others can ever be.

European political systems are full of barriers to full participation incorporated within the process and the ideology of their democratic traditions. In practical terms, political participation rarely makes allowance for the personal commitments and responsibilities of real people, including those with caring responsibilities and the double burden of private and public work. Equally exclusionary are the other concepts with which individualism co-exists, such as the emphasis on raw competition and inflexible debate that relies on dichotomies and the taking of sides. The creation of a democracy that surmounts such exclusions requires dismantling these barriers. In the Bosnia and Herzegovina constructed by Dayton, grafting democratic processes onto communities defined by nationalism and created by war has left little space for such dismantling and for exploring options.

2. The Public and Private Divide

The natural conclusion to the liberal vision of an abstract, self-interested, logical, rational, and objective ideal man of law and politics existing as equal to other “ideal” men is a division between the private and public aspects of that individual’s life. The liberal individual only agrees to subject himself to the limitations of the rule of law in a self-interested act of self-preservation. He agrees to be bound by the law and the power of the state on the

\textsuperscript{106.} Id. at 169.
\textsuperscript{107.} JOHN RAWLS, A THEORY OF JUSTICE 137-38 (1971).
understanding that he will be protected from harm. This threat of harm lies, in liberal theory, in the hands of other individuals and in the excessive use of power by the state.

The traditional story of the social contract means that the boundary at first seems clearly defined. The public domain is the civil world of political decisions where the operation of and protection by the state are ensured by the wisdom and rational decision-making capacities of the representatives elected by individual citizens. The private sphere encompasses family life and business life. The vision is that in the microcosms of the free market and the family, the individual’s life should be based on a presumption of autonomy so that each individual is permitted freely to define the terms upon which his or her life in these private spheres will be lived. However, in reality, just as the individual cannot be complete without a social context, the civil public sphere cannot exist in isolation from the private sphere on which it depends. The vision, of course, was never capable of translation into reality, and the private and the public have always been intimately intertwined. Despite its evident fictitious base, the division forms the foundation of social contract theory. Locke could only justify women’s subordination by separating the private, conjugal power of men from the public, political power legitimized by the “social contract,” and all contract theorists except Hobbes have argued that the conjugal right is not, or at least not fully, political. Lise Vogel’s analysis of German political theory reveals a similar method of elevating women’s traditional domestic role and position in the family to a higher plane.

In liberal theory, the role of law in the public sphere is to provide protection from harm, while its role in the private domain is about preserving autonomy. In her analysis of the relationship between the market and the family, Fran Olsen found that “[t]he classic laissez-faire arguments against state regulation of the free market find a striking parallel in the argument against state interference with the private family.” However, there is one fundamental difference between the freedom in these two spheres: While the “morality of altruism” characterizes the family, the “morality of individualism” pervades the marketplace. Free market theory is based on the idea that equal individuals will always act in their own competitive self-interest to create an economy of the ultimate efficiency. The liberal view of the family, on the other hand, assumes a private existence that relies on some family members being more equal than others. Thus, while liberal theory relegates both the family and the market to the “private” sphere, it does not do so on the same terms. Although actors in the market are assumed to be the free and equal individuals of classic liberal theory, family relations assume fundamental inequality and a hierarchy of power, an imbalance that is upheld by the state and the law.

108. PATEMAN, supra note 76, at 56-60; see also LOCKE, supra note 80, at Book I, § 48; THOMAS HOBBES, DE CIVI OR THE CITIZEN 107-08 (Sterling P. Lamprecht ed., Appleton-Century-Crofts 1949) (1647).
109. VOGEL, supra, note 95.
111. Id. at 1505.
This analysis reveals some important truths about the liberal conception of autonomy in the private domain. Traditionally, this autonomy has been associated with a free market of equal individuals where each individual is able to pursue his or her economic goals and with an assumption that the value of paid work is exchangeable for the enjoyment of autonomy. The corollary is that unpaid work—traditionally that undertaken by women in the family—has no meaning or value in the world of liberal autonomy. Unpaid work such as housekeeping and child care, traditionally performed by women, relies upon the male breadwinner of a household or the welfare state’s benevolence. The legal underpinning of autonomy seems to be confined wholly to the market, and “[t]he conceptions of autonomy and independence are, in government policy, defined in terms of separation, detachment and not needing others.”

However, this separation is not so straightforward, for it has been argued that the liberal vision of market freedom and political emancipation depends upon the traditional family for stability against the potential disruption of a liberated society. Similarly, the relationship between capitalism and the family has been described as symbiotic:

[Women’s] unwaged labour in the home is a subsidy to capitalism because it reduces the cost of reproducing the next generation of workers and servicing male breadwinners. Women’s assumed dependence in the family and on a male breadwinner depresses their own earning capacity because employers do not need to pay them the full costs of reproducing their own labour power. Their low pay reinforces women’s dependency within marriage and on marriage—they need a share of a man’s earnings.

The relationship between the two pillars of the private domain is therefore a complex one. The private sphere is supposedly the source of freedom and autonomy. The family relies on equality and autonomy in the market so that a breadwinner can fight on equal terms in the interest of himself and his dependants. Simultaneously, the operation of the market and those that fight on equal terms in the marketplace rely on inequality and the dependence of one family member who will be compelled to devote her life to maintaining the stability and very existence of domestic life.

The effects on women of a legal world premised on a division between public and private have been well documented. Traditionally, the law has only been concerned with the public domain, and although liberal theory asserts the fiction that the law applies neutrally to all individuals, in reality women and the private sphere are excluded.

The vision of the law fit perfectly with the nineteenth-century paradigm of the world when women

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113. Vogel, supra note 92, at 76.
116. O’Donovan expresses similar ideas, associating masculinity with “control: autonomy, mastery of oneself and one’s environment,” and constructing femininity as “tenderness and warmth with children, as economic dependence upon men, [and] as physical need of protection against male violence.” KATHERINE O’DONOVAN, FAMILY LAW MATTERS 69, 75 (1993).
possessed few civil or political rights. The twentieth century has seen women enter the public domain in large numbers, but the grip of the distinction remains firm, most notably though the continued sexual division of labor that has taken on new dimensions through globalized markets.

In reality, of course, neither the family nor the marketplace are free from state intervention. The division between private and public is little more than a myth of liberal theory, for areas traditionally considered to exist at the heart of private life are very much in the public domain of legal regulation, while the supposedly “public” sphere continually overlaps with the private one. Nevertheless, understandings of public and private—and the (fictitious and fluid) demarcation between the two—are a matter of deep-rooted ideology about the proper role of government and the protected sphere. This notion has been highlighted in an era in the West in which government policies have undergone widespread privatization and the role of government has become increasingly managerial. Across much of Europe, functions previously seen as governmental have gradually been transferred to private ownership, and many others have been transformed by the culture of contract and regulation against a backdrop of language emphasizing increased efficiency and effectiveness as a result of more competition.117

Cutting across the dichotomy of public/private is the further dichotomy of autonomy/harm. It has been suggested that the traditional liberal interpretation of “harm” in public and “autonomy” in private is based on a distinctly male view of the world which incorporates masculine values that have inevitably formulated a legal system more suited to the man; the rule of law itself offers more to men than to women.118 An examination of autonomy and harm and their embodiment in the democratic system shows that while men have contracted to be protected from harm by the state, women, due to nature, biology, choice, or economics, are to be protected from harm by men. Social contract theory assumes women’s autonomy and protection from harm to exist in the private arena of the family.119 While men surrender a degree of autonomy in the social contract, their total freedom continues to exist in the marriage contract, an autonomy supported by the state.120

The reality of this division has been a harsh one for women, since it has resulted in a reality of private autonomy for men and powerlessness,

118. E.g., Graycar & Morgan, supra note 47 (exposing the gendered nature of legal education and substantive law across a number of categories, including criminal law); CATHERINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987) (showing that the reality of male dominance entails the law treating women as men perceive women); cf. Catharine A. MacKinnon, Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence, 8 SIGNS 635, 644 (1983) (“The liberal state coercively and authoritatively constitutes the social order in the interest of men as a gender, through its legitimizing norms, relation to society, and substantive policies.”).
119. Carole Pateman expresses the view that “[i]ndividually, each man receives a major part of his patriarchal inheritance through the marriage contract.” PATEMAN, supra note 76, at 115.
120. The English Married Women’s Property Act, 1882, 45 & 46 Vict., was a landmark in ending the institution of couverture, which compelled a wife to live where her husband demanded, transferred her earnings to her husband, and deemed their children to be the husband’s property. A wife was essentially her husband’s slave, and murder of a husband by his wife remained classed as the crime of petit treason until 1828 when it was deemed to be murder. 3 SIR JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 34-35 (Routledge/Thoemmes Press, 1993) (1968).
subordination, and dependence for women. The state’s traditional attitude to violence in the home—sexual, physical and emotional—is probably the most striking illustration of the way in which protection from harm in the private sphere has been denied to women.\textsuperscript{121}

This supposedly “private” sphere is not limited to the family. The law’s treatment of sexual issues reveals flawed ideas about protection from harm and about autonomy that appear to be at the expense of women. In effect, the law constructs a “private sphere” around women even when they are in public places; twenty years after the adoption by the U.N. General Assembly of the Convention on the Elimination of All Forms of Discrimination Against Women,\textsuperscript{122} women still suffer direct and indirect discrimination and sexual harassment, which is often deemed “private” or personal attraction on the part of the harasser or irrational sensitivity on the part of the harassed.\textsuperscript{123} Rape, even when committed outside the home in a public act of violence, has been predicated on physical violence rather than sexual violence and degradation. In the context of armed conflict, it is seen as a crime against honor—a woman’s or her family’s public reputation—rather than as a crime of violence or as an instrument of war.\textsuperscript{124} Rape remains under-reported and convictions are hard to establish because of the requirement in domestic law that the prosecution prove lack of consent and because in many instances of prejudices about women’s sexual availability and unreliability.\textsuperscript{125} Similarly, Pateman describes the perception of prostitution as “a problem about women” not one about men.\textsuperscript{126} Certainly, the attitude of many states concerning prostitution is based on the need to protect the public, and the protection of women is surrendered to the maintenance of the autonomy of men.\textsuperscript{127}

However, the autonomy and harm aspects of social contract theory do not tell the simple story of the protection and autonomy of men, neglecting the protection and autonomy for women. Rather, the theory recasts the loss of autonomy for women as a protection from harm. This attitude continues to deny women free choice; in the employment context, for example, certain occupations are deemed too dangerous for women and protective legislation replaces equality obligations.

What is apparent is that despite blurred or collapsed dividing lines between public and private spheres, any separation of private from public life has adverse implications for women who have to negotiate their

121. In Eastern Europe as well, “[o]ther issues which were considered too individualistic [private] to feature in public discourse committed to social progress were sexuality, individual autonomy and violence against women.” Einhorn, supra note 67, at 20.


124. E.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 27, 75 U.N.T.S. 287 (requiring states parties to protect women “against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.”).


126. PATEMAN, supra note 76, at 193.

empowerment against the theoretical grip and practical uncertainties of this separation. As discussed below, the divide of public from private life has been carried into international human rights discourse with the effect of excluding private harms against women from the discourse's accepted ambit, thus weakening the effectiveness of human rights guarantees for women, as in the GFA.

The problem in attempting to redraw the public/private divide so that it reflects reality is the lack of consensus about how this might be achieved. According to one analysis:

1. The aim of a critical feminist theory is not to make the political dimension of life disappear, but to make it part of everyday life, and to change the power relations in the private and public world in a way that makes possible women's participation in political life as social and political agents.

Another model moves away from public/private demarcation, and instead identifies different locations of power within the state and the linkages between them that allow for mutual interaction rather than opposition. As a result, civil society and political society are differentiated and “develop[] and maintain a rule of law ‘embedded in a spirit of constitutionalism’ and supported by a state that is capable and ‘usable’ by the democratically organized nation-state.” Each of these arenas interacts with the structures of economic powers, termed economic society. This model encompasses the “rich background of beliefs, norms and social sanctions” that characterize each of these “societies” while assuming their dynamism. Its glaring omission is, of course, the family as a construct of political power that cuts across all others. Margaret Thornton has addressed this omission by suggesting a schema that more comprehensively takes account of the complexities of social, political, and economic life: the government, economic/social concerns (i.e., the market), civil society, and the family.

Nevertheless, such refinements, while avoiding the distortions of the public/private divide, cannot provide the basis for value judgments about the relationship between the state and individuals or groups of individuals organized around work, politics, business, or sexual matters. The distinctions between the public and private spheres of activity must not be gender-blind, as this would conceal the subordination of women. At the same time, the distinctions should not be drawn along gender lines. Rather, the formulation of emancipatory political theory should be one of citizens' rights that are formulated without reference to gendered roles. The attribution of social roles and their location within public or private spheres would have to be removed from law, social practices, and educational materials. “What constitutes the ‘political’ in political theory could no longer be demarcated by its difference from, and opposition to, a private sphere of naturally female activities: ‘A just

128. See infra notes 322-323 and accompanying text.
future would be one without gender.” It would go beyond the gender blindness that conceals continual gender differentiation and subordination to a future where there would genuinely be no such gender distinction.

These critiques of liberal democracy regarding individualism, the public/private divide, harm, and the sexual division of labor become even more relevant as women from Eastern Europe encounter liberal democracy and face its implications. As will be seen, issues of political participation and representation, the sexual division of labor, violence against women, prostitution, and trafficking are of importance to women in Bosnia and Herzegovina today but were not addressed by the GFA. This silence ensures that long-entrenched assumptions will continue.

IV. WOMEN AND CITIZENSHIP

A. Introduction

A number of the interrelated strands of democracy—including the public/private and autonomy/harm dichotomies—come together in the notion of citizenship. The vision of citizenship is the physical embodiment of our relationship with the legal and democratic processes of the state and our ideas of the private and public aspects of life. It assumes a common public discourse. Citizenship is the tangible status of dignity, legitimacy, participation, accountability, and equality. It is the “right to have rights.”

Citizenship stands simultaneously for individualism and community; it is about the relationship between individuals and between the citizen and the state. Status as a citizen is ongoing; it is the permanent truth of liberal democracy. While serving as a vision of powerful individual value, citizenship overcomes individualism by emphasizing the reality of connection to each other as fellow citizens. Citizenship implies inclusion, identity, and belonging, but it also denotes exclusion and being an outsider. Just as concepts of democracy are contested, contingent, and fluid, so too are understandings of citizenship, and they are equally problematic for women.

The idea of citizenship came to the forefront of popular and academic debate in the 1990s. It has been appropriated as a concept by both the left and the right and by sub-state nationalist movements in their demands for unthinking loyalty. One of the challenges of the contemporary debate is to seek ways to free the concept from these appropriations and to realize its potential for personal identity and self-determination. The European Union, a supra-state entity, has attempted to do this by establishing a new form of identity supplementary to state citizenship.


133. “Citizenship entails being able to participate in society, to enjoy its fruits and to fulfill one’s own potential....” Anna Coote, Introduction to THE WELFARE OF CITIZENS: DEVELOPING NEW SOCIAL RIGHTS 1, 4 (Anna Coote ed., 1992).

134. “Citizenship is man’s [sic] basic right for it is nothing less than the right to have rights.” Perez v. Brownell, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting).

This Part will examine critiques of the concept of citizenship. First, we will look at how the traditional notion of citizenship is gendered. Just as the liberal vision of the ideal man of law and politics is very much at the mercy of an abstract white, middle-class, heterosexual, and able-bodied male, so too is the liberal vision of the ideal citizen. Second, we will look at the way in which the notion of citizenship is changing to embrace a much more personal concept of identity and status. Finally, we will consider the changing notion of citizenship as something based on community—not on the relationship between one individual and another or between one individual and the state but on the relationship of individuals in the plural with other groups of individuals within and beyond the state. This last notion has particular significance in Bosnia, where the state is founded upon the separateness of three constituent peoples. Relations among Bosniacs, Serbs, and Croats are carefully constructed throughout the Dayton Peace Accords, but the gender-neutral language of these constructions conceals the different ways women from these entities may experience their ethnicity and national identity.

A word about terminology is required here. The expression nation-state is frequently used to denote a sovereign state in international law, assuming a state comprised of the peoples of a single nation. The establishment of a nation-state was precisely the object of the policies of ethnic cleansing in Bosnia and Herzegovina and of the genocide in Rwanda. This Part uses the unqualified word “state” in the sense given above and “nation” to denote a sub- or trans-state unit of peoples claiming a common national identity, for example the Serbs or the Croats.

B. Citizenship and Liberal Theory

The citizen of liberal democratic theory has been considered to exist in the public domain, with the status of citizen defining rights and responsibilities vis-à-vis the state and other individuals in “public” life. According to liberal theory, the only way for those who are citizens to extricate themselves from this web of rights and responsibilities has been to abandon citizenship, perhaps by choosing a new state of which to become a citizen. In many instances, such a choice denoted loss of citizenship in a person’s state of origin. The loyalty required of a citizen excluded the possibility of dual or multiple citizenships. The factors that influence a decision to renounce citizenship are rarely civil or political but usually economic, social, financial, and sometimes a matter of life or death. Citizens may be forced out of their homeland by war, ethnic cleansing, persecution, or by the disappearance of the entity to which they belonged. In this last case,

136. Michael Walzer, an American citizen, points out that this was the assumption in Europe but very much the opposite in the United States, a nation based in immigration. MICHAEL WALZER, WHAT IT MEANS TO BE AMERICAN (1992).
137. This terminology is further confused by the common meaning of nationality in international law denoting the legal affiliation between a state and its citizens. See also ALEXIS DE TOCQUEVILLE, THE OLD RÉGIME AND THE FRENCH REVOLUTION (Stuart Gilbert trans., Doubleday Anchorbooks 1955).
people are forced to identify themselves in a way that they might not previously have thought applicable—as Serb or Croat—rather than as Yugoslav.\textsuperscript{140}

An alternative interpretation of citizenship is found in the concept of civic republicanism, which presents the moral citizen as leading an active life in the service of the state through military or civil service.\textsuperscript{141} The civic republican tradition thus emphasizes the importance of active citizenship in community with others as opposed to the individualist stance of liberalism. Yet both the liberal “package” of citizenship rights and duties and the concept of civic virtue play out in the public arena, which, as we have seen, is problematic for women.\textsuperscript{142}

Theorists from both camps have drawn upon a range of gender constructs to justify women’s deliberate exclusion from citizenship: Women “lack the dispassionate rationality and independence required of good citizens”\textsuperscript{143} and apparently cannot be appropriately educated to assume such roles; the family should be protected from the state;\textsuperscript{144} men need a protective private domain to enable them to sustain their public life;\textsuperscript{145} and “essentially private constructs of love and kinship do not sit easily within the public construct of citizenship.”\textsuperscript{146} These constructs depend upon the twin concepts of exclusion and protection, which as seen above re-occur in writings about citizenship.\textsuperscript{147} These insights show the citizen to be constructed as an “abstract, public self,” but the notion of citizenship is “delimited conceptually by falsely universalizing one particular group’s practice of it.”\textsuperscript{148}

Earlier descriptions of the liberal or republican man concentrated upon static and essentialized manifestations of citizenship—military defenders of the realm,\textsuperscript{149} taxpayers, and voters—and excluded women as women. Indeed,
for many years of the twentieth century, most states required a woman who married a foreign husband to assume his citizenship and to give up her own.\footnote{150} This requirement, a graphic illustration of the second-class quality of women’s citizenship, still applies in some states. Women have had to challenge established legal regimes in all these areas (exclusions from voting and the military, tax regimes that fail to treat women as independent wage-earners) through political campaigns and direct legal action in state and suprastate tribunals. Direct legal challenge in courts and tribunals through individual actions can result in legal changes that benefit more than the individual claimant. Indirect, extra-legal methods such as networking, organizing, and lobbying for change address the nature of these restrictions themselves without depending on individualized cases.

The dramatic reconceptualization of the role of the state in much of post-war Western Europe, which accompanied the introduction of the welfare state, also resulted in a rethinking of citizenship. T.H. Marshall offered the most influential definition by arguing for a fuller concept of community citizenship based upon enjoyment of social as well as civil and political rights.\footnote{151} Marshall also considered the obligations of citizenship to include, importantly, the duties to work and to pay taxes on paid work. Radical as Marshall’s analysis was, he too excluded women from his vision of citizenship. For example, he did not consider women’s location in the public or private spheres or their unpaid household labor.\footnote{152} Like Marshall, reformulation of the republican ideal of citizenship has stressed the importance of people paying their dues to the state and rejection of the selfish “free-riders,”\footnote{153} an identification too easily equated with women when the value of unpaid work is not given credence.

Emphasis upon active participation through work, payment of taxes, and public service excludes those who are unemployed, whether due to disability, single parenthood, child-rearing, or unavailability of work. The social exclusions of long-term unemployment, dependency, and poverty replicate the insider/outsider status that is created by immigration restrictions—residency rights being dependent in many cases upon citizenship. These restrictions and exclusions have formed a citizen underclass in which women are over-represented and thus devalued as citizens.

\begin{footnotes}


4. One of the assumptions of the U.K. Beveridge Report on the concept of the welfare state was that women’s service to the state was to be performed in the family through child bearing and rearing. “The attitude of the housewife to gainful employment is not and should not be the same as that of the single woman. She has other duties.” Sir William Beveridge, *Social Insurance and Allied Services: Report*, at para. 114 (1942). The Beveridge Report referred to the idea of an economic value being placed upon this service, *id.* at para. 115, but this has never eventuated.

\end{footnotes}
V. REIMAGINING DEMOCRACY

Despite the critiques of liberal democracy, since 1989 it has been accepted as the prevailing political ideology and continues to be exported by the West. However, the Western model of democracy has faced scrutiny from feminist writers. The very forces liberated by the fall of communism—globalization of the economy, free movement of capital and goods, open borders, and the communications revolution—have combined to weaken the autonomy of the state, the structure upon which liberal democracy is premised. Other factors—deterioration of the environment, growing unemployment and associated economic deprivation, and nationalist claims—have also undermined liberal democracy’s authoritative position in the West.

Alternative models of democracy that are responsive to these changes and to the limitations of liberal democracy have been sought in academic writing and within institutional frameworks. Consideration of the evolving relationship between the state and the citizen, between citizens \textit{inter se}, and between citizens and supra-state institutions has led to the reimagining of the concept of citizenship. One approach has been to rethink the possibilities of participation, while other approaches have focused upon decentering the state as the locus of democratic representation by devolution of decision-making to local communities, by providing for democratic rights at the supra-state level, and by developing horizontal networks for empowerment. All of these approaches are applicable to the reconstruction of Bosnia and Herzegovina.

Proposals have looked to encompass the values of heterogeneity, diversity, and difference, and to move away from the false unities imposed on those who share some of the characteristics of a particular group but have significant differences. The limitations of the liberal focus on the individual have resulted in the formulation of alternatives to its constraints. Collectivism, as the vision of wholly state-owned means of production, was the classic socialist alternative to the unregulated free-market individualism of capitalism. Although the collapse of collectivist experiments worldwide in the 1980s signaled what is widely perceived as the death of socialism, challenges to individualism continue. Thus, thinking that presents democracy as a continuing interactive process between civil society and an elected government has become influential. “Modern democracy, in other words, offers a variety of competitive processes and channels for the expression of interests and values—associational as well as partisan, functional as well as territorial, collective as well as individual. All are integral to its practice.” Indeed, Paul Hirst describes “associational democracy” as a theory of social reorganization that seeks to devolve as many of the affairs of society as possible to voluntary and self-governing associations, with the government

\begin{itemize}
\item 154. For a history of democracy export, especially by the United States, see THOMAS CAROTHERS, AIDING DEMOCRACY ABROAD: THE LEARNING CURVE (1999).
\end{itemize}
acting as guardian over these associations.\textsuperscript{157} Associational activities can be developed through citizens' initiatives across a range of activities.\textsuperscript{158}

However, any vision of more meaningful participation leads inevitably to the "equality or difference" debate that has dominated much feminist, nationalist, and other political writing in recent years.\textsuperscript{159} If the reality is that the imagined equality of liberal theory cannot be achieved, how can differences among peoples be accommodated fairly? The acceptance of plurality of difference and the development of a system that gives all groups a voice is a challenge facing all those who recognize the inadequacies of our present system. Iris Marion Young recognizes the need to develop participatory democratic theory, keeping at the forefront the notion of group differences.\textsuperscript{160} She suggests allowing for the actual representation of oppressed groups within the democratic process and granting them a right to be consulted on the political decisions that affect them. Zillah Eisenstein argues for the need to "pluralise the meaning of difference and reinvent the concept of equality"\textsuperscript{161} so that the multiple differences common to all individuals are accepted as leading to a new understanding of equality. To be treated fairly and to have the same opportunities to participate in political life, no one should be expected to conform to a norm that includes some individuals more easily than others.

From another perspective, Michael Walzer stresses the need for pluralist democracies allowing liberalism to reflect life’s realities by incorporating the sense of connectedness, the pattern of social relations, and the networks of power that create a human society. To him, "[l]iberal society . . . is fragmentation in practice; and community is the exact opposite, the home of coherence, connection, and narrative capacity."\textsuperscript{162} For critics of liberal individualism, democracy must incorporate the means to understand ourselves not only as free individuals but also as interconnected social beings.

Furthermore, individuals themselves have multiple and overlapping identities that are not easily accommodated by a simple notion of participatory politics and problematize the representation of a group. Identification of certain interests as appertaining to a particular group essentializes both the interest and the group. Individuals define themselves according to a range of personal choices.\textsuperscript{163} States in turn are increasingly accepting these choices.\textsuperscript{164} Even if these differences could be accounted for, there is no guarantee that a

\begin{thebibliography}{99}
\item Held, \textit{supra} note 75, at 197.
\item Young, \textit{supra} note 143, at 261.
\item Eisenstein, \textit{supra} note 103, at 4.
\item Thomas Franck, \textit{The Empowered Self: Law and Society in the Age of Individualism} 255 (1999).
\end{thebibliography}
member of a certain group will always speak for every person who happens periodically to identify with that group. Anne Phillips recognizes that women, for instance, do not share "identical oppression" and that female politicians are "wary of speaking for women."165 This raises the problem of adequate representation of diverse interests within a democracy—a problem that is not resolved simply by enhanced participation. Furthermore, Phillips identifies the problem of relying on trust rather than accountability to ensure the representation of certain interests.166

Another difficulty intrinsic to the notion of representation of oppressed groups in society is the risk of counterproductive effects strengthening the divisions between groups.167 Robert Dahl acknowledges these difficulties and cites the reinforcement of inequalities, the strengthening of particularistic over general concerns, the exclusion of organized groups from the democratic process, as well as the increased power of small extremist groups.168 Such focus upon plurality does not necessarily recognize the importance of gender within the understanding of democracy.

The notion of representation of oppressed groups in society has also been addressed at the political level. One of the priorities of the Council of Europe, for instance, has been to examine equality and democracy. The Council has developed what it has termed "parity democracy," which explicitly moves away from the "abstract individual" by recognizing that there can be "no real democracy unless it takes human beings into account as they really are, namely real women and men."169 Parity democracy has been described as a means of integrating "not only half of humanity but humanity as a whole, and thus, every member of the community."170 It offers "a radical alternative to the inequality faced by women" by "offering women and men a unique opportunity to face up to the question of identity as a key aspect of the organization of society."171 The abstract male citizen must be replaced by active subjects, who combine an awareness of their identity based on experience, culture, and relationships with an ability to reason. Such subjects forcefully intervene in society to ensure "the coherent application of the equity principle, non-discrimination and the positive acceptance of our differences."172

This process has been described as the inclusion of the sexual contract in the social contract, in that it attempts to reconcile family and professional life.173 Parity democracy is not limited to political life but applies the balanced

165. PHILLIPS, supra note 102, at 70-72.
166. Id. at 76.
168. DAHL, DILEMMAS OF PLURALIST DEMOCRACY, supra note 155, at 96-107.
170. Id. at 21.
172. Id. at 34.
173. Id.
participation of women and men in decision-making bodies across economic life—in companies, banks, employers' organizations, and trade unions. The aim of parity democracy is said to be:

(a) the enrichment of democracy through the equal contribution of women and men;
(b) the fuller realisation of justice and equity within society;
(c) the opportunity of a new contribution to the political sphere.\textsuperscript{174}

Strategies for its achievement are general—for example, reviewing obstacles to women's enjoyment of democracy in education and professional and political activities,\textsuperscript{175} eliminating sexual bias in language, and looking at the role of the media. Targeting specific areas of women's exclusion is also embraced, through both direct and indirect measures with respect to the functioning of the political system. Direct measures include creating parity thresholds, considering proportional representation electoral systems, creating quotas, and the intentional appointment of women to posts of responsibility. Indirect measures include such policies as increasing the number of women in the senior civil service, reducing the number of offices that can be held by a single person, and changing the work conditions of elected representatives. Parity democracy could be criticized for essentializing women—for presenting sexual difference as more important and prior to other forms of differences. In response, it may be argued that parity democracy seeks to enrich the concept of citizenship by the inclusion of women's experiences and thus of women.

Another vision of democracy found throughout the Beijing Platform for Action presents women's equality as essential to the development of a stable, just, and sustainable state.\textsuperscript{176} This vision goes beyond political agency to encompass all aspects of women's lives, including reproductive choice, steps to end the feminization of poverty and illiteracy, adequate attention to women's health, and enhanced access to education for women and girls.\textsuperscript{177} This vision challenges globalization trends by seeking an end to the "privatization of public responsibility"\textsuperscript{178} that blocks democratic freedom and is perceived as benefiting all of society: "Meet her needs, and you move toward democracy."\textsuperscript{179}

These issues are all central to rethinking democracy in the member states of the Council Europe and to redressing the marginalizations of representative democracy. What is important in this context is that such ideas have become current in European academic and political thought. They were available for consideration at Dayton. But before considering whether such ideas were

\textsuperscript{174} COUNCIL OF EUROPE, supra note 169, at 22.
\textsuperscript{175} There is a good deal of academic and practical writing on the barriers to political participation for women. E.g., id. at 15-18. In addition to the sexual division of labor, they encompass, \textit{inter alia}, electoral systems, candidate selection processes, access to resources, gendered assumptions about who will be successful in the polls, and the working conditions of political life and its lack of consideration for child care. For further details, see case studies of the United Kingdom, Sweden, and France in id. at 68, 91, 105.
\textsuperscript{176} \textit{The Beijing Declaration and the Platform for Action}, supra note 4, at paras. 1, 41.
\textsuperscript{177} Eisenstein, supra note 68, at 92-93.
\textsuperscript{178} Id. at 61.
\textsuperscript{179} Id. at 93.
given any credence at Dayton, it is also necessary to consider the reconfiguration of citizenship.

VI. REIMAGINING CITIZENSHIP

It has been remarked that “[t]he implications of the liberal understanding of citizenship was that, if women were to become full citizens, then women would have to become like men.”180 Women and non-heterosexuals who have been excluded from or prevented from fulfilling the vision of the liberal citizen have not in fact realized their citizenship by becoming like the liberal vision of the ideal man. Instead, they have been active in seeking to renegotiate the concept of the citizen to take account of the realization that citizenship rights are crucial in the most personal aspects of life, identity, and the sense of belonging in and across different communities. In a redrawing of the politics of personal identity, the language of human rights has been brought together with that of citizenship.181

Recently, political emphasis has been given to the concept of citizenship.182 One focus has been on bringing the individualistic contract culture together with the notion of community belonging—for example, by giving individual citizens rights in the form of citizens’ charters. This notion of citizen-as-consumer/entrepreneur depoliticizes citizenship by informing the individual of what is to be expected from often privatized services. It gives the individual a different stake in society that carries with it other obligations. “Democracy requires that citizens of welfare corporate society awake from their privatised consumerist slumbers, challenge the experts who claim sole right to rule, and collectively take control of their lives and institutions through processes of active discussion that aim at reaching collective decisions.”183

The concept of citizen empowerment has centered very much on the individual and thus on rethinking liberal citizenship. It is based on the free market theory that the market is led by the consumer as sovereign, determining what he or she buys, when, and from whom. Another focus has been to reconsider republicanism by seeking new ways of ensuring active and participatory citizenship, even for those who do not or cannot access traditional political arenas or workplaces. Such ideas reject the passive, second-rate form of citizenship that was all that was left for all but the few citizens politically active in the traditional public arena. They aim at strengthening citizenship by developing a form of democratic citizenship out of social citizenship in a reflexive, controlled welfare state184—in a

180. Jones, supra note 142, at 792.
181. LISTER, supra note 2, at 59.
183. Young, supra note 143, at 252.
manifestation of the so-called Third Way. This form of citizenship encompasses obligations as well as rights—in an echo of the original conception of civic duty—that can be better understood through citizenship education. Popular participation, as through consultations with people likely to be effected by particular policies, is another approach to active citizenship. Participatory citizenship reaches down to include in decision- and policy-making the socially excluded, such as the homeless, who are traditionally denied many of the rights of citizenship that depend upon confirmed residence, the poor, and the unemployed, thereby giving them a sense of ownership of policies that impact them. Proponents of citizenship understood in this broad way see potential sites for participation outside of the traditionally defined political sphere, arguing that individuals should share in decision-making in a range of institutions and areas of social and cultural life, such as welfare institutions, voluntary associations, the family, child-raising, and living arrangements. By entering into negotiations with welfare state institutions such as housing authorities or social services, individuals and groups have been able to transform individual action into participatory political action.

A. European Citizenship

A vision of a citizenship that is not bounded by the state emerges from this discussion in two interrelated ways. The first is the understanding of how a person's relationship with the state is mediated through a range of interactions with sub-state entities—including the family, the community, the workplace, and professional organizations—to build multiple layers of loyalties, obligations, and claims. Such an understanding exposes the fluidity of any public/private divide. The second posits a supra-national citizenship that supplements state citizenship through, for example, recourse to international bodies for dialogue, information flow, and the presentation of claims. It has been suggested that “[i]ndividual citizens might be encouraged to develop a differentiated set of loyalties to those various levels of government which are necessarily emerging in response to the difficulties of effective administration in an increasingly complex and interrelated international environment.”

EU citizenship offers one model of citizenship that overlaps with and supplements that offered by the individual member states. However, the status of the EU citizen lacks the classic attributes of citizenship in a liberal state. Admittedly, the EU citizen can vote in elections for the European Parliament.


186. LISTER, supra note 2, at 25.

187. Lister describes this process well. “[T]he sum of individual complaints about a particular issue... can translate into a local political issue.” Id. at 26.


but the weakness of that institution limits the importance of political rights to the EU citizen. The status of citizen soldier has no meaning in European terms since there is no unified European force and NATO is still redefining its identity. The rights and duties of the European citizen are essentially economic, consisting of the enjoyment of the four freedoms—goods, services, persons, and capital—and the payment of taxes.  

Nevertheless, there has been one facet of European citizenship that has allowed for the opening of spaces for women to challenge situational, racist, and gendered nationalist policies. Citizens have used European institutions to bring claims against member states based on European freedoms and standards. Women within the European Union have benefited from Community policy regarding sex discrimination, which is more enlightened than that of some member states, by bringing cases before the European Court of Justice. The institutions of the European Convention on Human Rights have also been used in this way. Recourse to European laws and standards have enhanced national laws against discrimination, and European human rights safeguards have proved a source of powerful judgments condemning some domestic provisions that treat certain citizens with less respect than others. Even where such claims are unsuccessful or have unanticipated consequences, the process of challenging state action can be empowering because of the links it forges between the claimants and women fighting the same issues elsewhere in Europe. Individuals have asserted very personal rights—such as the right not to be discriminated against or the right to privacy—to challenge very public state policies. They have done this in their capacity as citizens of particular states in the courts of those states, and as European citizens.

European Community law has also proved valuable to individuals in the management of their personal lives by promulgating the principles of the free movement of persons and services. Louise Ackers has documented extensive research into the EU migration experiences of 400 women. These women were found to be relying upon economically centered European rights to make personal decisions affecting their careers, personal autonomy, and family lives. The research revealed that women, albeit unconsciously, interpreted and negotiated their status as European citizens. For example, in Ireland, extensive restrictions on access to abortion, contraception, separation, and divorce forced women to seek ways of maximizing their choices, for example by traveling outside Southern Ireland and through recourse to the European Court

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191. The Treaty on European Union, supra note 50, provides three pillars to the European Union: the three European communities (the European Community, the European Coal and Steel Community, and the European Atomic Energy Community), id. at tits. II, III, IV; the Common Foreign and Security Policy, id. at tit. V, art. J; and the Cooperation in Justice and Home Affairs, id., tit. VI, art. K). European Community law derives from the first of these pillars and is subject to the jurisdiction of the European Court of Justice. For a fuller explanation of the relationship, see Stephen Weatherill, The Case for Abandoning the Three Pillars of the European Union, in ASPECTS OF STATEHOOD AND INSTITUTIONALISM IN CONTEMPORARY EUROPE, supra note 61, at 83, 83-87.

of Human Rights. However, this so-called abortion tourism does not only affect Irish women. German and Dutch women who had exercised their rights of free movement to move to Ireland were found to have returned to their countries of origin for abortions, thus retaining “partial citizenship.” European migrant women are therefore in a better position with regard to their personal autonomy than native Irish women, as they can return to their states of origin for access to contraception, pregnancy, testing, and abortion. Ackers illustrates that women may negotiate their European citizenship by retaining dual nationality, thereby enhancing their options, as when migrant woman marry in their country of origin to retain their right to divorce. In these ways, women in Europe have sought to reduce the European public/private divide.

The free movement of persons and the principle of non-discrimination between Community citizens has impacted family relations in other ways. In EC law, a European citizen worker can travel to any member state along with his or her spouse. As a result, an EC national wishing to enter Britain with a non-EC national spouse may be in a more favorable position than a British citizen wishing to enter Britain from outside Europe with a non-European spouse.

Nevertheless, European citizenship has not entirely extended the vision of belonging to a wider entity. Two limitations might be mentioned. First, EU citizenship reflects bias toward the worker in the arena of the so-called free market. This overwhelmingly privileged market citizen envisaged by EC law is “archetypically ‘male.’” The apparent opening of political space, in fact, does nothing to counteract the sexual division of labor in domestic markets. The notion of the European citizen as a free market actor is supported by the formulation of laws and the refusal of the European institutions to intervene in marital and family affairs, such as parental divisions of responsibility. This refusal thus constitutes a new public/private split. The fact remains that many women are not able to move freely by virtue of an autonomous right but only


194. Irish women have challenged the state’s intrusion into their personal lives on the basis of denial of freedom of expression. The Irish Supreme Court has prohibited the dissemination of information about the availability of abortions elsewhere, particularly in Britain. Attorney General v. Open Door Counselling, [1988] I.R. 593. In Open Door and Dublin Well Woman v. Ireland, 14 E.H.R.R. 131 (1992), the European Court of Human Rights found the Supreme Court’s ruling in violation of article 10 (freedom of expression) of the Convention for the Protection of Human Rights and Fundamental Freedoms, supra note 16, 213 U.N.T.S. at 221. However, case law is not always so categorical in its condemnation of denial of personal autonomy. In SPUC v. Grogan, [1989] I.R. 753, an injunction was granted to restrain various student unions in Ireland from providing information about obtaining abortions in the United Kingdom. The student unions were not distributing information “on behalf of an economic operator established in another member State.” SPUC v. Grogan, 1991 E.C.R. I-4685, para. 26.

195. Shaw asserts that this is the case both for “the active market citizen who takes advantage of free movement (as a trader, as a professional, as a worker) and [for] the passive market citizen who reaps the benefit of the enlarged choice which results from freedom of movement . . . .” Jo Shaw, Law, Gender and the Internal Market, in SEX EQUALITY LAW IN THE EUROPEAN UNION, supra note 189, 283, 297.

196. See, e.g., Hofman v. Barmer Ersatzkasse, [1984] E.C.R. 3047, [1986] 1 C.M.L.R. 242, (European Court of Justice refusing a father’s claim for payment to him of the state maternity allowance for taking unpaid leave to care for his new baby when the baby’s mother returned to work after taking statutory maternity leave).
through their relationship with a male “worker.” The extension of social rights for families and dependants attached to the free movement provisions turns out to be “founded upon an ideologically-loaded conceptualization of the family, and of migration behavior which both presumes and reinforces high levels of dependency within families and ignores the barriers to labour mobility facing women migrants.”

These studies suggest that European legal institutions regard matters such as childcare as either outside or on the insignificant edges of their remit, thereby ignoring the restrictions these responsibilities impose upon women’s freedom of movement. The rights of a woman who chooses to care for her children but also goes with her partner from one member state to another are dependent in the new state upon those of her partner. The rights of European citizens remain market-oriented and directed to those rights that are seen as having economic significance. European citizenship does not offer the range of civil, political, and social entitlements that are associated with full citizenship. Women in Bosnia and Herzegovina may look to their European sisters for guidance in extending their concept of citizenship, but the picture they would receive would be incomplete.

The second limitation of European citizenship is that the benefits of free movement have a downside for those excluded by this vision of Europe and for those whose movement is constrained by borders. The “increasing salience of citizenship as a relationship linking the individual and the collectivity” has put a premium upon the criteria for membership and exclusion. One of the main sites for struggle around citizenship is the right to enter and reside in a territory, a right that does not appear in the traditional configurations which assume a static society. Within Europe, the legal bestowal of nationality (the main criterion for unqualified entry) remains a matter of state law with no common inclusive basis for European belonging. The Treaty of Amsterdam ensures that internal domestic law is not trumped by claims of European citizenship; “Fortress Europe” has created inclusion for those within the territorial base but exclusion for those denied this status. The multiple layers of entitlements accorded by member states to people with different immigration status living throughout Europe militates against a genuine European identity. “Far from gaining rights and freedoms, they [immigrants] are becoming the objects of growing internal controls, restrictive rules for family reunion, limited travel rights, all manifestations of ever-increasing official hostility and repression.” Inferior status upon entry and evidence of racism and xenophobia that is both condoned and condemned by official agencies accompanies policies of exclusion from Europe. It must also be remembered that for many women, movement across borders is not voluntary. In addition to those seeking refugee status in the wake of conflicts in the

197. ACKERS, supra note 192, at 126.
198. Id.
former Yugoslavia, trafficking from Eastern Europe has increased since the fall of communism. Such women are subject to the immigration and criminal laws of the state where they find themselves and may be subject to detention and deportation. In these circumstances, the claim to create a democratic Bosnia and Herzegovina founded upon European values seems inflated.

B. Transnational Citizenship

These three strands—democracy, the public/private debate, and citizenship—have been further confused by the globalization trends of the 1990s, the environment in which the Dayton Accords were negotiated. Richard Falk has described these trends as what he terms “globalisation from below” and “globalisation from above.”

The forces of globalization from above—the global movements of capital and free trade dictated by transnational corporate interests rather than those of governments or of peoples—do not purport to be democratic. The traditional understanding of the market as private protects these movements from regulation, as does the traditional international legal doctrine that denies corporations international legal personality. “With governments shrinking and transnational corporations growing, the relationship between public and private space collides.” These movements, which have undermined workers’ rights across the globe, operate on racialized and gendered lines. The sexual division of labor has been accentuated by women supplying the flexible, passive workforce that global capital needs. Consumers the world over seek lower priced clothes and goods, but often the workers are denied the protection and security at the heart of citizenship. “Global capital displaces the economic nation, while relying on women in the family to nurture the globe. Women birth and rear children, and they labor in the sexual ghettos of the global market. ... In first world countries, women disproportionately provide the low-paid service sector labor.”

The sexual ghettos are often located outside the workers’ state of citizenship. In “astonishingly large numbers,” women are migrating across borders to seek work, which is often poorly remunerated and which fails to provide job security or physical safety. Women migrant workers are

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204. Eisenstein, supra note 68, at 65.

205. FEMINIST GENEALOGIES, COLONIAL LEGACIES, DEMOCRATIC FUTURES (M. Jacqui Alexander & Chandra Talpade Mohanty eds., 1997). In particular, see Chandra Talpade Mohanty, Women Workers and Capitalist Scripts: Ideologies of Domination, Common Interests, and the Politics of Solidarity, in id. at 3.

206. Eisenstein, supra note 68, at 68.

vulnerable to violence and theft. Undocumented workers fear deportation and are unable to leave an exploitative and dangerous environment because they lack legal status. 208 Far from enjoying transnational citizenship, migrant workers become in some sense a global underclass.

The objective of a stable democracy is to open the state to the free flow of capital and foreign investment. Although an ultimate aim is to make Bosnia and Herzegovina a country with a free market economy that is safe for investors, the Dayton Accords appear to exist in a vacuum with no mention of transnational corporations209 and little reference to international monetary institutions responsible for the financial rebuilding of the state.210 These silences distort the formation of democracy and the concept of citizenship by pretending that they operate in an economically neutral environment that has no impact upon these issues.211 Non-citizen investors may have great influence on the way territorially-based citizens live without committing to the territorially-located rights and obligations of citizens.

"Globalisation from below" comprises transnational social movements of civil society uniting around common causes and values. Instantaneous means of communication have facilitated networking, alliance forming, and coalition building efforts that reach out to and include the most isolated areas and individuals. National civil society can be seen in contradistinction to government and, as such, outside the public sphere. However, there is an inconsistency here in that an active and vibrant civil society is considered indispensable to a functioning democracy.212 The public naming of issues, the use of media and communication networks, and the existence of organized gatherings around shared goals bring such movements very much into the public arena.

To refuse to apply the label of citizenship to the involvement of community activists, the struggles of poor women, or Black or disabled women for justice, is to reinforce the very exclusion against which these groups are fighting, in the name of a “common good” which has subordinated their interests to those of more powerful groups.213

208. Id. at paras. 55-66.
209. Id. GFA, supra note 1, Annex 9, 35 I.L.M. at 144-146 (covering Bosnian public corporations).
212. David Held asserts, “There is a profound sense in which civil society and civic associations are never separate from the state; the latter, by providing the overall legal framework of society, to a significant degree constitutes the former.” HELD, supra note 75, at 181.
213. LISTER, supra note 2, at 30.
These groups are the embodiment of active citizenship, which forms a vital link between government and the governed thus providing the fabric and culture of democracy between elections.

At the international level, the access of non-governmental organizations (NGOs) to international arenas—such as U.N. Conferences and the U.N. Commission on Human Rights—is a manifestation of international civil society. Indeed, NGOs have been seen as fostering the democratization of international life through the inclusion of citizens’ voices into intergovernmental decision-making in an inversion of the public/private dichotomy. Government decision-making is perceived as private and non-transparent while civil society opens up the public debate, often in areas where governments do not wish such openness. In recent years, NGO activity has been especially marked in areas relating to disarmament, the environment, and human rights—in particular the rights of women, children, and indigenous persons, all groups classically excluded from concepts of democracy and citizenship. Globalization from below has opened up new spaces for participation and allowed women to form cross-national identities and share in policy decision-making in ways that have not always been possible through the formal allocation of public space in national arenas. This has been empowering for women across borders and reinforcing of the legitimacy of their claims of rights. Use of a human rights-based strategy for empowerment, especially in the context of the human rights of women, supports claims of a form of inclusive, post-national citizenship that joins all citizens under the common umbrella of human rights. This strategy is especially pertinent to the situation in Bosnia and Herzegovina in light of the prominent position the GFA accords human rights and in light of the restraints upon state citizenship contained within the GFA. Bosnia is not yet a party to the European Convention on Human Rights, but it is a party to the Optional Protocol to the International Covenant on Civil and Political Rights, which accords individuals within its jurisdiction access to the Human Rights Committee. Nevertheless, it remains premature to see any idea of post-national citizenship as replacing state citizenship. It should be remembered that the nation state may still be more accessible to feminists than to multinational corporations or international institutions which are accountable to no one. The state alone retains the power to ensure allocation of entitlements to all within its jurisdiction. The current challenge is to use the standards assumed by the former to enhance enjoyment of the latter.


At the same time, support for civil society movements must be tempered. International NGOs, as manifestations of civil society, are largely unaccountable and non-democratic in that their assertions to speak on behalf of peoples are based upon self-appointment and agenda selection. There is no international constitutional process of law-making within which they can participate. Since their actions are not generally attributable to the state under traditional doctrines of state responsibility, the state may not be responsible under international law for their actions. Imputing state responsibility would undermine their independence from states and deny their stance as non-governmental, but it leaves a void in accountability. More importantly, not all expressions of civil society are benign: Nationalist and para-military movements operating across borders and receiving support from a national diaspora in their activities against the state have proved difficult to bring within any legal control at the national or international level. Effective mechanisms for the control of civil society activities that are the very antithesis of “civil” behavior remain hard to construct.218

This discussion of democracy and citizenship has demonstrated that the liberal vision offered by both concepts has been subject to critical evaluation and reinterpretation. Scholars have suggested how the reality of these concepts could offer more to those traditionally excluded, including women, social underclasses, and minority groups. David Held, for instance, argues for a “democratic public law” that goes beyond the process of democracy (epitomized by elections) to the substance, which requires more than an assertion of civil and political human rights guarantees.219 Held argues that democratic public law requires a “bundle of rights and obligations” applicable to diverse “sites of power.”220 The sites of power and the corollary rights he identifies are the body (rights to health, including reproductive and sexual health); welfare (social rights); culture (cultural rights); civic associations (civic rights); economy (economic rights); coercive relations and organized violence (rights to peace); and legal and regulatory institutions (political rights). Taken together, these rights and obligations spell out the criteria and the interrelated spaces necessary for members of a political community to participate freely and equally in a process of self-determination.221 If any one site is missing, or a right is not accommodated, there will be a democratic deficit. Held emphasizes that the list does not constitute “an endless list of goods.”222 Rather, this list of rights provides the conditions for determining whether there is free and equal participation within the polity—whether the political arrangement is democratic. It is against these ideas that the GFA should be tested as a model for democracy, in particular with respect to the empowerment of women. Before this can be done, the position of women at the time of the Agreement must be briefly examined.

220. Id. at 159-218.
221. Id. at 199.
222. Id.
VII. WOMEN AND THE TRANSITION TO DEMOCRACY

The preceding Parts have argued that the Western liberal traditions of democracy and citizenship have offered less to women than to men and that despite feminist challenges to both concepts, their promise for women remains unfulfilled. The other backdrop to the Dayton Accords is the position of women within Bosnia and Herzegovina before the outbreak of conflict. If there was a strong pre-existing culture of women’s empowerment supported by state structures that could be drawn upon in the post-conflict reconstruction, international inattention to these matters would be less significant. Accordingly, the vision and reality of the alternative communist ideology must be considered.

As part of their rejection of liberal ideals, communism and socialism made an explicit commitment to equality between women and men: to eliminate gender difference as a social construct.223 Indeed, as has been seen, women’s subordination was theorized as necessary to maintain the free market of the capitalist state.224 “Social transformation and social justice for women were articulated in the Marxist texts and in the programmes of socialists and communists everywhere. Indeed, feminists were greatly inspired by Engels’ bold, if somewhat anthropologically and historically flawed, analysis of the origins of the oppression of women.”225

However, despite the party rhetoric of communist systems, the reality of subordination remained for reasons that are strikingly similar to those that reinforce the gulf between the vision and reality of liberal democracy. First, the concept of patriarchy was associated with the centralized hierarchical power of the state and the Communist Party in a form of patriarchal-paternalism.226 Since the Party determined all matters of social justice, patriarchal structures could not be criticized, for this would be construed as unacceptable criticism of the Party. Party policies secured women’s status, primarily through women’s participation in the paid workforce.227 This location of women in relation to the Communist Party highlights another dimension to the public/private distinction.

As discussed above, the public/private divide is culturally located within Western liberal thought and practice.228 Other societies either have different understandings of what is properly regarded as public and of the consequences of any such labeling, or offer no rationale for delimitation. The hold of the public/private distinction on Western political thought has blinded critics to its particularity and has led to criticism, especially by feminists from the South,
that it cannot explain their subordination.\textsuperscript{229} For women in communist Europe, the official state commitment to women’s equality primarily played out as ensuring—indeed, requiring—women’s participation in the paid workforce. The state rendered the public/private divide fluid, in that women were simultaneously classified as workers fulfilling the public task of working for the state and as mothers, supported in public but bearing the burden in private.\textsuperscript{230} The unpaid labor of women sustained the public economy. For example, in East Germany in 1988, nearly half of the working population was female, but the vast majority of women were occupied in non-productive sectors of the economy. Party ideology with respect to women as workers did not extend to the private sector; women were defined as “workers \textit{and} mothers without any parallel conceptualization of men’s role,” ensuring that women assumed the major responsibility for domestic tasks.\textsuperscript{231} Within the productive economy, the sexual division of labor entailed women performing the “less qualified and accordingly less well-paid tasks,” earning on average twelve percent less than male colleagues.\textsuperscript{232} Whole occupations could be classified according to gender: textiles, light industries, secretarial, cleaning, and office jobs.\textsuperscript{233} Women’s participation in the public sphere was coupled with a range of protective social measures—including childcare, crèche services, and maternity leave—to assist women’s management of their private lives, but these measures were neither empowering nor emancipatory for women:

\begin{quote}
Indeed the double burden was often worsened into a treble burden in that the state would also pressure women to perform some public, political role (within the ambit of the required political ideology) in a form of active citizenship that discounted the time required for performance of women’s other roles.

These contradictions surrounding the public/private demarcation have caused many Eastern European women to become ambivalent about the promises of both Western democracy and Western feminism. On the one hand, the private sphere could provide Eastern women with a haven free from a state intervention that was otherwise controlling. Women could use the
\end{quote}

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230. Women’s equality was thus structured around being like a man in the workplace and protective legislation to ensure her ability to fulfill her maternal role. \textit{See Eisenstein, supra} note 223, at 19.

231. Einhorn, \textit{supra} note 67, at 16. “Surveys in Hungary, Poland and the GDR have shown that women were responsible for 75 per cent of domestic labour.” \textit{Id.} at 20.


\end{quote}
home as an arena for oppositional politics by fostering values contrary to those of the Party leadership. However, the more the private sphere was enjoyed as a refuge from state coercion and oppression, the less space remained for articulating and working through gender conflicts. The requirement to work, for instance, may have burdened Eastern European women and set them in direct opposition to Western women, many of whom evinced a desire to access the paid workforce. Since the rhetoric of women’s work in Eastern Europe was tied to their supposed emancipation and equality, it is not surprising that Eastern European women view Western feminists’ goal of participation in the labor force and politics with some skepticism. Some Eastern European women have welcomed the fall of communism as offering them space to make choices—including the choice to remain in the home. But withdrawal of economic benefits has frequently meant that Eastern European women must make the same choice between career and work faced by many Western women in an environment of high unemployment.

The controversy over abortion is yet another example of the contradictions surrounding the public/private divide. Debates around abortion rights across much of Eastern Europe indicate the collapse of any sensible dividing line between the public and private spheres and the tensions that the line’s shifting nature creates for women. Where abortion was legalized in the East, it was not as a matter of women’s privacy or human rights but as a matter of state ideology. An aspect of transition to democratic regimes in Eastern European states is that abortion rights “seem to be almost universally under attack in campaigns by the Catholic Church and [by] male politicians to assert new/old spiritual and moral values centred on the family.” In nationalist settings, restraints on reproductive choice also serve to essentialize women as the bearers of “babies for the nation.” Thus, so-called private, spiritual, and moral values are harnessed for public, nationalist goals that undermine women’s privacy and right to their bodies.

The civil society revolutionary movements of the late 1980s have lost their raison d’être, leaving only men involved with political power. In the post-1989 period, women’s equality rights have become associated with the rejected state ideology and with the approved women’s organizations of that era. Women, including those who were in the forefront of the revolution,

236. Dölling, supra note 226, at 12.
238. Einhorn, supra note 67, at 24. However, abortion politics were also part of a broader agenda about population policies at a time of intense nationalist demands. E.g., Vlasta Jalusic, Women in Post-Socialist Slovenia: Socially Adapted, Politically Marginalized, in GENDER POLITICS IN THE WESTERN BALKANS, supra note 69, at 109, 117-20.
239. Einhorn, supra note 67, at 24. Abortion was not legalized in all the communist European states. In Romania, for instance, state policy required women to have children. Harsanyi, supra note 227, at 46. In the case of both legalized and non-legalized abortion, the subjection of women’s bodies to state policies undermines the public/private division.
240. On the emergence of an oppositional civil society in the 1980s, see Mary Kaldor, Transnational Civil Society, in HUMAN RIGHTS IN GLOBAL POLITICS 195 (Tim Dunne & Nicholas J. Wheeler eds., 1999).
241. Women's participation in dissident movements was rarely articulated in terms of a feminist agenda but rather to support broader political goals. Jaquette & Wolchik, supra note 67, at 7.
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are now in a no-win situation. If they argue for their own interests, they are recalling, apparently with favor, the previous discredited regime, while acceptance of the current regime leaves them with limited choices. Because women’s equality was incorporated within communist ideology, most women’s movements that existed under communism were organized within party structures. Women in Eastern Europe thus have little tradition or experience of independent organizing and fighting for their rights. Women in Bosnia and Herzegovina cannot look back to their socialist past to provide a model for their empowerment, either through the formal legal system or civil society movements.

Nevertheless, women in the former Yugoslavia did organize politically and, as the grip of communism weakened, formed political parties. However, the window of opportunity was short-lived, as women faced first the growing nationalisms and organization of society along ethnic lines and, subsequently, the war. Pursuit of a separate women’s agenda is incompatible with the intolerance of independent or separate discourse exhibited by nationalism. Feminist political organization was thus “unable to withstand the onslaught of rabid nationalism in the media and in public life and largely withered away.” The economic decline in the 1980s fueled appeals to nationalism and for women to return to “traditional” household activities. Women’s unemployment increased, and men were accorded preference in job hiring and retention, demonstrating that communist ideology had not displaced deep-rooted gender cultures, which, while differing across the former Yugoslav republics and between urban and rural areas, remained to some degree patriarchal everywhere. While extreme forms of female subordination were most manifest in Serbia, fledgling feminist activities across the former Yugoslavia were put on the defensive by the demands of presidential nationalism, as in Croatia, and “chauvinist authoritarianism,” as in Serbia. Both expressions of nationalism are essentially antithetical to women’s autonomy.

This account has provided a background to the contextual framework of liberal democracy that the GFA was to construct. It has criticized the Western concept of democracy as failing women, while showing that the concept of citizenship is fluid and contingent. It has also demonstrated that women’s

243. Such organization was occurring before the break-up of the former Yugoslavia; the Yugoslav Independent Alliance of Women, for example, was an independent, non-party affiliated organisation that cut across national lines. EISENSTEIN, supra note 223, at 33-34; see also CYNTHIA COCKBURN, THE SPACE BETWEEN US: NEGOTIATING GENDER AND NATIONAL IDENTITIES IN CONFLICT 159-60 (1998); Adjella Milic, Nationalism and Sexism: Eastern Europe in Transition, in EUROPE’S NEW NATIONALISM, supra note 218, at 169, 178-79.

244. Milic, supra note 243, at 174.

245. RAMET, supra note 3, at 127.

246. Id. at 127-28.

247. Id. at 128.

248. The proportion of women who were unemployed reached fifty-five percent during the 1980s. Id. at 126.

249. Id. at 127-28.

250. See supra Part III.

251. See supra Part IV.
equality as espoused by socialist ideology was not emancipatory, and that economic transition and growing nationalist demands forced it further into retreat. The irony of the reconstruction of Bosnia and Herzegovina has been that, on the one hand, the transition to a free market economy posited on state nonintervention was central to the overthrow of the previous communist regime, while on the other hand, international intervention was essential to put an end to the war and to prevent further violence. The result has been an extraordinary blurring of public and private functions with an unprecedented degree of international intervention aimed at preventing the nationalist entities from wielding unbridled autonomy. The political or social systems of a state are traditionally regarded as within the domestic jurisdiction of the state (and thus private), and therefore excluded from international scrutiny or intervention.\(^2\) In Bosnia and Herzegovina, all aspects of civilian life have become subject to international (public) intervention to support the privatization and economic reform that are a major focus of donor support in post-war Bosnia.\(^3\) The following Part will examine the GFA along the same lines as the previous discussion—that is, by looking at the vision of a democratic state in Bosnia and Herzegovina and its potential to provide autonomy and empowerment for all.

VIII. THE MODEL OF DEMOCRACY AND CITIZENSHIP WITHIN THE GFA: A GOOD DEAL FOR WOMEN?

A. Participation in the GFA Negotiation Process

The GFA provides the framework for a democratic public law within Bosnia and Herzegovina and, as such, defines the understanding of citizenship within the state. This Part will consider the construction and intersection of democracy and citizenship within the GFA. Crucial preliminary questions are whether democracy can be transplanted where there is no culture or history of democracy, and how such a transplant can be attempted. Francis Fukuyama has argued that democratization is not a unidimensional process. Rather, four levels of democratic institution-building are needed for a sustainable democracy: a belief in the legitimacy of democracy; the integration of democracy at the institutional level; the inclusion of civil society; and the incorporation of democracy at the cultural level.\(^4\) This typology provides a useful framework against which to analyze democracy-building in Bosnia and Herzegovina under the GFA, and, more explicitly, the construction of women's citizenship it provides.

The primary focus of the GFA is institution-building aimed at nurturing a democratic culture. The envisaged interaction of international, regional, national, and sub-national institutions provides a testing ground for democracy-building by the international community, perhaps even for some

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form of cosmopolitan democracy as proposed by Held. However, the reality has been considerably more limited, both in design and implementation. The democratic model constructed by the GFA is limited in absolute terms, and even more so when gender is factored into the evaluation. Indeed, there are failures of democratization at all four levels of Fukuyama’s typology.

The Dayton negotiation process itself was highly non-democratic. The GFA was negotiated at the international level between designated international leaders under the control of a U.S. negotiating team. Although the United Nations was excluded from negotiations, the Security Council welcomed the Agreement and used its Chapter VII powers to call upon the parties to implement their commitments. This acceptance does not democratize the process; the Security Council is a non-democratic body that is not accountable for its decisions, which are made in a non-transparent manner.

The indictments issued by the ICTY against Karadzic, leader of the Bosnian Serbs, precluded his participation at Dayton and President Milosevic of the Federal Republic of Yugoslavia negotiated and accepted the GFA on behalf of the Bosnian Serbs. While the refusal to negotiate with indicted war criminals is commendable, the presumption of the legitimacy of the Federal Republic of Yugoslavia to speak and accept terms on behalf of the Bosnian Serbs undermines the appearance of democracy in the negotiation process.

As is common with internationally brokered agreements, also missing from the negotiations were people who lived through the conflict and who are essential for implementation of the Agreement on the ground: representatives from Bosnian civil society, including local women and women’s groups. Local NGOs report that they were given no information about the peace processes. They knew no details about participation or who was representing various interests and had no opportunity to contribute or receive any information. The media provided news of the Agreement, and local support was sought by the government of Bosnia and Herzegovina. The overwhelming desire for peace meant that such support was forthcoming; nevertheless the local NGOs felt that peace was imposed rather than achieved. Indeed, “[p]erhaps the biggest failure in the former Yugoslavia was the failure of the international organizations involved—primarily the U.N. and the EU—to recognize that their natural partners were local peace and human rights groups, however small . . .”

\[255. \] Held, supra note 75, at 219-86.
\[256. \] S.C. Res. 1031, supra note 19, at para. 1.
\[257. \] The prospect of lifting the economic sanctions imposed against the Federal Republic of Yugoslavia during the war in Bosnia provided an incentive to Milosevic to agree to peace negotiations and to distance himself from the Bosnian Serbs in the acceptance of the GFA.
\[258. \] However, on June 2, 1999, President Milosevic—who had been indicted by the ICTY on May 27, 1999—was a party to the agreement that brought an end to the NATO bombing of Serbia. SC Res. 1244, U.N. SCOR, 54th Sess., 4011th mtg., at annex 2, U.N. Doc. S/Res/1244 (1991).
\[260. \] Interview with members of Zene Zenama: Women to Women, Sarajevo, in Sarajevo, Bosnia and Herzegovina (Sept. 26, 2000).
\[261. \] Mary Kaldor, Cosmopolitanism Versus Nationalism: The New Divide?, in Europe’s New Nationalism, supra note 218, at 42, 56.
Notably, the negotiation process also failed to recognize the value of women’s exchanges across lines of conflict. Women’s groups, most especially those providing humanitarian assistance, had been active throughout the war, working across ethnic lines to maintain networks and lines of communication.262 Senior diplomats generally failed to recognize women’s activities, disregarding the knowledge that women acquired through them as having no value, perhaps because the activities did not accord with male behaviors. The women’s groups were thus excluded from international decision-making—to the detriment of the process.

Such omissions are relevant to the construction of citizenship. As has been seen, local consultation by state agencies in national systems is increasingly regarded as an indicator of active citizenship.263 Similarly, the participation of NGOs in law- and policy-making in the international arena, through, for instance, attendance at diplomatic conferences is becoming accepted.264 However, wider participation has been less readily accepted in peace negotiations, even where the outcome includes reconstruction through electoral reform and conclusion of a state Constitution.265 This frequent exclusion of local NGOs contrasts strongly with the level of consultation involved in the adoption of the South African Constitution, an example of societal transformation entered into at the local—rather than international—level. Admittedly, it might be argued that such participation and consultation would be time-consuming, could not be fitted into pressing agendas, and might threaten the momentum of international negotiations. Perhaps a compromise would be to hold preparatory meetings with local NGOs before a peace conference266 and to arrange follow-up information sessions where concerns could be expressed.

In an unfortunate replication of the small number of women included in national structures for decision-making around issues of security and foreign affairs around the world,267 women were also not included in the Dayton process.268 Thus, the GFA entirely disregarded the objective articulated in the

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262. Einhorn, supra note 217, at 109.
263. See supra notes 135-137 and accompanying text.
265. Similarly, women were not included among international and local participants in the peace process for Cambodia. CAMBODIA—THE 1989 PARIS PEACE CONFERENCE: BACKGROUND ANALYSIS AND DOCUMENTS (Amitav Acharya et al. eds., 1991). For a discussion of the subsequent evolution of women’s NGOs in Cambodia, see UNITED NATIONS DEV. FUND FOR WOMEN, WOMEN AT THE PEACE TABLE: MAKING A DIFFERENCE 24-25 (2000).
266. Holbrooke’s account makes it clear that diplomacy required informative meetings to be held with other actors such as Russia and states excluded from the Contact Group. HOLBROOKE, supra note 8, at 136-37, 201 (discussing Italy), and 212-14 (describing Russia’s involvement). These meetings were often fitted in despite great time constraints. The construction of the international system dictates the inclusion (even at the margins) of states that are not playing a central role, but not that of members of civil society whose lives will be directly affected by the Agreement.
267. For example, THE BEIJING DECLARATION AND THE PLATFORM FOR ACTION, supra note 4, states that globally women held only ten percent of positions on national legislatures in 1995. Id. at para. 182.
268. The exception was the British negotiator, Ms. Pauline Neville-Jones, who initialled the Agreement on behalf of the United Kingdom. Holbrooke’s account of the negotiation process refers to
Beijing Platform for Action that governments and intergovernmental institutions should “[t]ake action to promote equal participation of women . . . in all forums and peace activities at all levels, particularly at the decision-making level.” The question must be whether the almost total omission of women from among the senior government negotiators at Dayton and the lack of any input from civil society matters—that is, whether the inclusion of women exerted any significant impact upon the outcome. There can be no categorical answer; however, some points can be made. First, this is a question of gender equity and democracy. Indeed, as the Beijing Platform for Action asserts in paragraph 118:

Women’s equal participation in decision-making is not only a demand for simple justice or democracy but can also be seen as a necessary condition for women’s interests to be taken into account. Achieving the goal of equal participation of women and men in decision-making will provide a balance that more accurately reflects the composition of society and is needed to strengthen democracy and promote its proper functioning.

Second, opinions vary on whether women negotiate differently from men and the consequences of any such differences. What is apparent is that women experience conflict differently from men, and that excluding both governmental and local-level women from peace settlements limits the agenda by omitting consideration of female experiences in proposals for reconstruction. Women’s experiences of the war were diverse, but their perspectives would differ from those of their male counterparts. Thus, the inclusion of women would offer a wider range of opinions about the causes of conflict and priorities for reconstruction, including experience in grassroots peace discussions across ethnic divides.

That the involvement of broader constituencies, including women, can impact the content of peace agreements is suggested by the Agreement Reached in Multi-Party Negotiations (The Good Friday Agreement) in Northern Ireland. In Northern Ireland, as in Bosnia and Herzegovina, democracy is being reconstructed after decades of conflict and divide between identified groups. Unlike at Dayton, however, the more developed civil society in Northern Ireland was not excluded from the peace process.

her interventions on a number of points which did not include the situation of women. HOLBROOKE, supra note 8, at 251, 276-77.

269. The Beijing Declaration and Platform for Action, supra note 4, at para. 142(a).
272. For a discussion of these differences at the domestic level, see for example Eve Hill, Alternative Dispute Resolution in a Feminist Voice, 5 OHIO ST. J. ON DISP. RESOL. 337 (1990), and Deborah M. Kolb, Her Place at the Table: Gender and Negotiation, in NEGOTIATION: STRATEGIES FOR MUTUAL GAIN 138 (Lavinia Hall ed., 1993). At the international level, see United Nations Dev. Fund for Women, supra note 265.
274. COCKBURN, supra note 243, explores peace discussions between women from across conflict zones, including the former Yugoslavia. She argues that the feminist methodology of “rooting” and “shifting” is valuable for building transversal relationships. Each participant remains rooted in their own history and belief system while shifting to understand the roots of the other. Id. at 8-9. See also Nira Yuval-Davis, Women, Ethnicity and Empowerment, in Who’s Afraid of Feminism? Seeing Through the Backlash 77, 95-97 (Ann Oakley & Juliet Mitchel eds., 1997).
Representatives of local NGOs, including the Northern Ireland Women’s Coalition, participated in the formal talks, which were themselves in contact with the “parallel peace process” operating outside the talks. This construction of a parallel peace process is another technique that allows the formal process to follow its own path while providing the space for civil society input. The process comprised individuals committed to peace drawn from among the socially excluded, including women’s coalitions—a “constituency of the rejected” that understood that people (citizens) “care far more about their prospects of getting a job and a fair deal for their children” than about legal niceties and definitions. Their influence ensured the centrality of equality and human rights issues to the peace process and constructed a vision of citizenship divorced from territoriality that reached across the divided communities. The Good Friday Agreement contains a Strand on Rights, Safeguards and Equality of Opportunity that includes “the right of women to full and equal political participation” among its list of specified rights. As a result of popular consultation, the British Government agreed to the establishment of a new unitary Equality Commission to replace previously existing specialized Equality Commissions.

The Good Friday Agreement negotiation process is an illustration of an active, “bottom-up” citizenship that took account of non-traditional political fora to influence a major political and social reconstruction. No such citizens’ coalition or parallel process penetrated the Dayton talks. According to Fukuyama, the first proposed level for sustainable democracy-building is a belief in the legitimacy of democracy. A top-down process that makes no effort to gain the acceptance of those whose lives it will shape does not engender such a belief. Again, it might be argued that even asking questions about inclusion of gender issues would be time-consuming and might undermine the flow of negotiations to bring an end to conflict. In response, it might be noted that international agreements traditionally take many years and rounds of negotiation. Dayton built on a number of earlier plans for peace including that proposed by Lord Carrington (1991), the Vance-Owen plan (1992-3), the Owen-Stoltenberg plan (1993), the EU plan (1994), and the Contact Group plan (1994). There was a strong desire at Dayton for comprehensiveness and an expressed concern that omissions could not later be rectified. Amongst the many and complex issues that were included in the GFA, it would not have been difficult to factor in gender considerations, especially if they had been on the agenda throughout the entire process from 1991 onwards. The reality is that gender concerns have not been perceived as

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276. McCrudden, supra note 7, at 1725.
277. The expression is that of Bea Campbell. Id.
278. Id. at 1725 (citing Mary Holland).
279. Good Friday Agreement, supra note 275, at para. 1.
280. The “mainstreaming” of all equality issues in this way was controversial and many amendments were introduced into the implementing legislation. McCrudden, supra note 7, at 1738-55. However, the process provided explicitly for gender equality in a way that did not occur at Dayton. Good Friday Agreement, supra note 275, at para. 6.
281. SILBER & LITTLE, supra note 3, at 190-204 (discussing the Lord Carrington plan), 276-90 (dealing with the Vance-Owen plan), 303-08 (considering the Owen-Stoltenberg plan), 323 n.1 (making reference to the EU action plan), 335-44 (addressing the Contact Group plan).
282. HOLBROOKE, supra note 8, at 233.
essential elements of societal reconstruction, even when the need to go beyond military to civilian matters has been recognized. Taking account of gender does not appear to be a priority on anyone's agenda, nor is expertise on gender issues sought to the same degree as in a broad range of other fields. To ignore these particular issues is simply to assert their irrelevance.

B. Democracy and Citizenship Under the GFA

The second level of democracy suggested by Fukuyama is institution-building, one aspect of which is electoral reform. Under the GFA, the OSCE is given far-reaching control over the electoral process, which includes supervision of the preparation and conduct of elections. The GFA provides for a year of international supervision, to be followed by the establishment of common institutions in Bosnia and Herzegovina after the elections of September 1996. International bodies planned and supervised the elections, and the OSCE Provisional Election Commission (PEC) prepared the election rules and other practical aspects of the elections. Despite campaigns in 1996 that were criticized for failing to conform to international electoral standards and violating human rights, the 1996 Entity and federal elections went ahead. Subsequent analysis of the elections by the High Representative included no relevant gender data. There was no indication as to whether women voted in greater or lesser numbers than men, or of the reasons why people did not vote (for example, passivity or protest). Nor did the OHR Report consider whether the voter manipulation that caused the postponement of municipal elections had any gender implications. The Report did not analyze the election results in terms of gender breakdown. General elections were held again in 1998. Municipal elections have also taken place regularly within the Entities.

283. GFA, supra note 1, Annex 3, 35 I.L.M. at 114-17.
284. O'Flaherty, supra note 24, at 73. Municipal elections planned for the same time were postponed because of evidence of manipulation of the voter registration option enabling refugees to vote where they intended to live. Office of the High Representative in Bosnia and Herzegovina, Report of the High Representative for the Implementation of the Peace Agreement on Bosnia and Herzegovina to the Secretary-General of the United Nations, para. 26 (Oct. 1, 1996), at http://www.ohri.int/reports/r961001a.htm. The elections were held in September, 1997.
285. Id. at paras. 21-26.
286. In fact, the 1996 elections led to the election of 1 woman of 42 members (2.38%) in the Bosnia and Herzegovina House of Representatives, 7 of 140 (5%) in the Federation House of Representatives, and 2 of 106 (1.89%) in the Republika Srpska Parliament. INT'L HUMAN RIGHTS LAW GROUP, A NATIONAL NGO REPORT ON WOMEN'S HUMAN RIGHTS IN BOSNIA AND HERZEGOVINA 181 (1999). This was a marked decline compared to women's representation in the Yugoslav Republic of Bosnia and Herzegovina in 1986, 24.1% of the seats in the Republic Parliament, achieved through a quota system. In 1990, without a quota, the percentage of women in the Republic Parliament was reduced to 2.29%. Id.
287. The 1998 elections were seen as evidence of "steady, incremental progress towards a more moderate and pluralistic political environment in [Bosnia and Herzegovina]," especially in the losing of ground by the nationalist, mono-ethnic parties and the gaining of seats by opposition parties in the BiH House of Representatives and Entity parliaments. The main cause for disquiet was the election of Mr. Poplasen as President of the Republika Srpska. Office of the High Representative in Bosnia and Herzegovina, Report of the High Representative for the Implementation of the Peace Agreement to the Secretary-General of the United Nations, paras. 3-5 (Oct. 14, 1998), at http://www.ohri.int/reports/r981014a.htm. Mr. Poplasen's obstructionism led to his removal by the OHR on March 5, 1999. Office of the High Representative in Bosnia and Herzegovina, Report of the High Representative for
While elections provide democratic frameworks, the commitment to societal institution-building within the culture of the particular society must also be developed. European institutions have adopted a regulatory approach toward institution-building in the former communist states of Eastern Europe. In Bosnia and Herzegovina, this approach has extended to the regulation of consolidatory measures going beyond any instrumentalist acts, such as the introduction of quotas or weighted voting to international management and control over internal bodies that are answerable to the international regulators. The structure is reminiscent of the U.N. Trusteeship system where non-self-governing entities were placed under international supervision for the supposed benefit of the Territories’ inhabitants until such time as they were deemed ready for self-rule.

This invasive form of international control raises several questions, including: How long should international supervision continue? When does intervention/regulation in the name of institution-consolidation undermine democratization? To what extent can the international community in the name of democracy intervene to ensure election results and national institutions based on the “morally right” choices approved by the international community rather than those of internal civil society? Does international intervention mean in practice that no individual may make a “morally wrong” choice by supporting the nationalist parties, and if so, what becomes of democratic plurality and individual citizenship choice? If socially engineered democracy can be pursued to achieve other objectives of the international community, why is women’s full participation in and enjoyment of democracy not given the same priority? The answer to the last question ignores more recent analyses and may well lie in assumptions derived from the historical understandings of democracy and citizenship described above.

Peace in Bosnia and Herzegovina provided local civil society with its first opportunity for setting local agendas and priorities. However, it also meant the immediate entry into Bosnia and Herzegovina of new military forces—specifically, the Implementation Force (IFOR)—and a range of European and international agencies. Such bodies occupied physical, communicative, and societal space, limiting the space available to local bodies and preventing them from considering these challenges for themselves.


288. The second municipal elections were held on April 8, 2000. Office of the High Representative in Bosnia and Herzegovina, Report by the High Representative for Implementation of the Peace Agreement to the Secretary-General of the United Nations, para. 7 (May 3, 2000), at http://www.ohr.int/reports/r20000503a.htm [hereinafter May 2000 Report by the High Representative]. See also id. at para. 81.

289. Such an approach was adopted by the European Community in the establishment of the Badinter Commission to determine claims for recognition. On the Badinter Commission, see supra note 60 and accompanying text.

290. See U.N. CHARTER, arts. 75-85.

291. CHANDLER, supra note 156, at 28.

292. See generally supra Parts V-VI.

293. War had broken out in Bosnia and Herzegovina with its assertion of independence. There had therefore been no opportunity for social planning except in the context of war and dominated by warring parties.
Furthermore, the establishment of a “parallel system of internationally-run committees and task forces”²⁹⁴ responsible for policy-making in Bosnia undermines local democracy in a number of ways. First, international institutions are not bound by the GFA, an agreement between states. These bodies thus possess an unprecedented degree of flexibility to extend their authority. Second, international governmental organizations are not themselves democratic or accountable. As the concept of democratic entitlement with national legal structures has gained force, there has been growing concern regarding the democratic deficit of international institutions themselves, including the European Union and the United Nations. It might be argued that this is of little concern, since international institutions do not make law.²⁹⁵ However, the GFA makes the U.N. bodies responsible for the development and monitoring of the Civilian Implementation of the Peace Settlement, including law-making. The combination of broad subjective powers within the Dayton Accords, the lack of accountability of the relevant bodies, and the extension of mandates have reduced the Bosnian state and Entity bodies to little more than working groups, left with little more to do than discuss policies conceived and made operational by international agencies.²⁹⁶

The OHR’s powers have been used undemocratically and extensively against nationalist parties. For example, the OHR has used its powers to request that the Stabilization Force (SFOR) occupy four Serbian Radio Television transmitters, preventing transmission from Pale within the Republika Srpska and reducing the dissemination of nationalist programs.²⁹⁷ Another example of the OHR’s actions against nationalist parties is the removal of the President of the Republika Srpska in March 1999.²⁹⁸ The assumption that people would not vote for nationalist parties if the international community could be more effective in controlling these parties has been used to justify the undeniable interference with freedom of expression these actions entail.²⁹⁹ These assertions of international power in turn deny Bosnian people the space to advance their own ideas for sustainable institution-building, making them ever more dependent upon the so-called experts within the international community. Opportunities for the local consolidation of democratization on its own terms are thus lost. This assumption has the potential to become a self-fulfilling prophecy: Bosnia and Herzegovina will revert to national conflict unless the international community monitors and supervises all aspects of civilian nation-building. However, without the opportunity to develop in these areas, the situation will remain the same.

²⁹⁴. CHANDLER, supra note 156, at 55. Chandler’s book gives a complete list of these numerous committees, working groups, steering groups, and offices.
²⁹⁶. See CHANDLER, supra note 156, at 64.
²⁹⁷. Id. at 126-27.
²⁹⁹. CHANDLER, supra note 156, at 111-14.
Although the OHR has intervened in a number of areas, it has not concerned itself with the construction of gender relations or, until recently, with the implementation of reforms for women, matters it appears not to deem relevant to the goal of integration into Europe. The extent of international supervision in Bosnia and Herzegovina could have potentially facilitated intervention for the enhancement of women’s rights. While any such process might be subject to the criticism that it had been imposed and would not therefore be sustainable, such a criticism does not differentiate the intervention from the other intrusions that undermine Bosnian sovereignty.

Another aspect of institution-building is citizenship. Citizenship within the GFA is distorted. The Preamble to the Constitution of Bosnia and Herzegovina states “Bosniacs, Croats and Serbs as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina hereby determine that the Constitution of Bosnia and Herzegovina is as follows.”

As has been seen, this assertion is untrue; these peoples did not make such a determination, for they were not consulted. Furthermore, the provision legitimates a distinction between the three nations—Bosniacs, Serbs, and Croats—who are constituent peoples and citizens. Those who do not identify with one of the three nations (including women’s groups) are rejected as constituent peoples (“Others”) and are given lesser status. Privileged positions—i.e., delegates to the House of Peoples and participation within the Chambers—are designated along national lines.

While the GFA preserves distinctions along national lines, it makes no attempt to ensure representation according to other identities, like gender. Special procedures are provided for decisions of the Parliamentary Assembly that are determined to be “destructive of a vital interest of the Bosniac, Croat, or Serb people by a majority of, as appropriate, the Bosniac, Croat, or Serb Delegates.” This provision, which essentializes both interests and peoples, recognizes no other “vital interests” and gives no account to multiple interests.

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300. GFA, supra note 1, Annex 4, pmbl., 35 I.L.M. at 118. On citizenship, see id. Annex 4, art. I(7), 35 I.L.M. at 124. Attention was given early on to citizenship in Bosnia and Herzegovina. One of the working groups appointed by the Council of Ministers in cooperation with the OHR and the Council of Europe prepared a draft. The OHR imposed the law on an interim basis in December 1997. Office of the High Representative in Bosnia and Herzegovina, Report of the High Representative for Implementation of the Bosnian Peace Agreement to the Secretary-General of the United Nations, para. 21 (Apr. 9, 1998), at http://www.ohr.int/reports/r980409a.htm.

301. Many who rejected nationalist identification were women’s groups. Mertus, supra note 12, at 805.

302. On July 1, 2000 the Constitutional Court of Bosnia and Herzegovina decided the Constituent Peoples’ Case, a highly contested decision, which was not published until September 2000. The case holds that no ethnic group on the territory of Bosnia and Herzegovina shall be excluded from exercising its rights in the Entities. Office of the High Representative in Bosnia and Herzegovina, Report by the High Representative for Implementation of the Peace Agreement to the Secretary-General of the United Nations, para 10-11 (Oct. 17, 2000), at http://www.ohr.int/reports/r20001017a.htm. The OHR notes the mixed reactions to the decision that will require constitutional changes. This also indicates that the Constitution enshrined within the GFA is subject to change where necessary, in accordance with GFA, supra note 1, Annex 4, art. X, 35 I.L.M. at 125.

303. GFA, supra note 1, Annex 4, art. IV(1), 35 I.L.M. at 121 (“The House of Peoples shall comprise 15 Delegates, two-thirds from the Federation (including five Croats and five Bosniacs) and one-third from the Republika Srpska (five Serbs).”).

304. Id. Annex 4, art. V, 35 I.L.M. at 122-23 (stating that the Presidency shall be filled by three Members, one from each of the national groups).

305. Id. Annex 4, art. IV(3)(c), 35 I.L.M. at 121.
and identities. Similarly, there is no requirement in the GFA for gender balance on the Constitutional Court or even for any women members. While a male-dominated Court can develop a gender-sensitive jurisprudence, the failure to consider the gendered composition of the Court emphasizes the lack of significance accorded to gender issues, a significance that is becoming accepted elsewhere. The Agreement thus imprisons and makes static the separate communities within territorial lines and ignores other multiple, pluralist, or overlapping identities.

The claim here is not that women should be privileged or that there is an essentialist woman’s position with respect to decision-making or substantive issues, but rather that, as experience suggests, without giving special attention to women’s inclusion in decision-making bodies their concerns will be excluded. It is not necessary to identify particular attributes of women to realize their isolation from such institutions. Karen Knop has noted that underrepresentation of women in international decision-making impinges upon what she terms their collective autonomy. She argues that “women should be able to decide at least certain international issues not because they will decide them better than or even differently from men, but because they as a group . . . should be able to make the decisions that affect their lives.” This argument can be applied to a discussion of gender parity in the supreme national judicial body. Instead, the model of citizenship participation contained in the GFA makes no attempt to address gender-specific forms of discrimination within and between the individual polities and leaves gender equality to be achieved through human rights guarantees.

C. Human Rights and the GFA

Access to human rights guarantees has been called a defining feature of European citizenship and of liberal democracy. By making the European Convention on Human Rights and its Protocols directly applicable in Bosnia

306. Id. Annex 4, art. VI(1), 35 I.L.M. at 123-24. Four members shall be selected by the House of Representatives of the Federation, and two by the Assembly of the Republika Srpska and the others by the President of the European Court of Human Rights. In 1999, the first woman was appointed to the Constitutional Court.


309. For example, in international tribunals where there is no requirement of gender balance women are significantly under-represented. There has only been one permanent woman Judge on the International Court of Justice. There are no women judges on the International Tribunal on the Law of the Sea or the Appellate Body of the World Trade Organization Dispute Settlement Procedures.


311. Bhabha, supra note 56, at 21. This claim is also supported by the accession to the European Convention on Human Rights by the former socialist states as an aspect to membership of the Council of Europe and possible accession to the European Union. The European Union has also placed greater focus upon human rights through its proposed Draft Charter of Fundamental Rights of the European Union, Sept. 28, 2000, at http://www.europarl.eu.int/charter/activities/docs/pdf/convant50_en.pdf.
and Herzegovina and by mandating acceptance of a broad range of other European and international human rights treaties, the GFA places greater importance on human rights in political reconstruction than any previous peace agreement. The failure to address particular aspects of women’s citizenship would be of less significance if it were redressed by a commitment to human rights. However, there are two major problems with reliance upon human rights for the construction of women as equal citizens within a framework of democracy. First, the individualist concept of human rights law is inadequate for seeking change within a collectivity. Second, feminist critiques of human rights suggest that the historical evolution of international law from Western liberal thought means that while human rights discourse assumes gender neutrality and universality, it in fact reflects many of the same gendered exclusions of democracy and citizenship discussed above. This second argument is especially pertinent to the European Convention, which embodies the “common heritage of political traditions, ideals, freedom and the rule of law” of the Members of the Council of Europe. Three aspects of the European Convention will be examined from both of these perspectives to determine its viability for fulfilling the promise of autonomous citizenship for women.

First, although the guarantee of human rights is founded upon the concept of the equality of all persons, there is no free-standing equality clause in the European Convention. Article 14 provides that the rights contained in the Convention “shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” This normative assertion falls short of a full theory of equality, in that it assumes that securing selected rights on the basis of non-discrimination will allow all peoples the enjoyment of human dignity. As with the construction of liberal citizenship, the human dignity envisaged is that of men, and the harms protected against are those that men fear will befall them. These harms constitute wrongful state action in the public sphere, such as torture by public officials, denial of life, denial of a fair trial, and denial of freedom of movement and of association. The non-discrimination clause does not engage with the situation where there is no equivalent harm committed to

312. See Einhorn, supra note 217, at 103.
314. These arguments are considered more fully in Christine Chinkin, Strategies to Combat Discrimination Against Women, in POST-WAR PROTECTION OF HUMAN RIGHTS IN BOSNIA AND HERZEGOVINA, supra note 30, at 173-94.
317. CHARLESWORTH & CHINKIN, supra note 48, at 201-49.
men, or with the structural inequality that underlies the distinction between formal equality and equality of opportunity.

Moreover, the bald assertion of equality in Article 14 of the European Convention provides no indications as to how it might be achieved. The Convention does not promote societal rethinking of gender relations, including stereotyping and prejudice.\textsuperscript{318} Indeed, Article 14 offers no definition of discrimination, nor is there one elsewhere within the European Convention, and it does not provide proactive measures for understanding gender relations, identifying systemic discrimination, or introducing measures to change attitudes and behaviors. The Convention does not address how openness and fairness can replace discrimination and prejudice in decision-making, nor does it provide for the introduction of special measures to redress imbalance\textsuperscript{319} or to indicate compliance. The jurisdiction of the Office of the Ombudsman and the Human Rights Chamber established by the GFA is simply reactive, and is limited to public officials: It can consider alleged violations of the European Convention or alleged discrimination—including on the grounds of sex—committed by any organ of the Parties, Cantons, or Municipalities, or by any individual acting under the authority of such official or organ.

Second, the European Convention offers an individual harm-based model in a society that has been characterized by systemic deprivation and violence. It does not require consideration of any gendered inequalities caused or exacerbated by the war or of how these inequalities might be addressed. For example, the requirement of non-discrimination inadequately addresses the specific problems facing the large number of women-headed households where male relatives are dead or missing.\textsuperscript{320} The standard of non-discrimination also fails to address gender-specific harms—those harms that occur to women (or men) because of their sex, where such harm is not directed against the other sex, or not as frequently or as seriously. For example, the Convention has no provisions on reproductive rights, as men do not need the same protection from interference with their reproductive functions with respect to forced impregnation and access to contraception or abortion.\textsuperscript{321} The Convention also fails to designate violence against women as a violation of human rights. These exclusions reduce the effectiveness of the human rights regime for women and entrench a second-class citizenship.

The critique of the European Convention based on the inadequacy of the liberal assumption of individual autonomy is connected with a critique of the Convention based on its location in the public sphere. The harms that the Convention protects against are those that are committed by the state. This

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\item \textsuperscript{318} But see Convention on the Elimination of All Forms of Discrimination Against Women, \textit{supra} note 122, art. 5, 1249 U.N.T.S. at 17.
\item \textsuperscript{319} But see \textit{id.}, art. 4, 1249 U.N.T.S. at 16 (allowing for “temporary special measures” to bring about gender equality).
\item \textsuperscript{321} David Held has argued for the importance of reproductive rights to citizenship. \textit{Lister}, \textit{supra} note 2, at 18 (quoting Held).
\end{itemize}
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focus upon the public sphere means that private harms—those committed by private individuals or within private spaces—are not encompassed in the traditional human rights discourse. Thus, although domestic violence occurs across the globe, the perception of partner violence as private has prevented it from entering the international human rights agenda until the last decade. Violence against women undermines their autonomy, citizenship status, and human rights. Subjection to or fear of gendered violence impedes women from exercising public rights and fully participating in public activities, leading to an absence of women in public life that is antithetical to democracy. The state is obliged to provide its citizens with security and protection, but these safeguards are often denied to battered women. Violence that is committed with impunity both directly denies fundamental human rights (the right to bodily integrity and even the right to life) and prevents the enjoyment of other human rights, such as the right to health, free movement, and access to justice. It is a denial of equality to women because of their womanhood.

The struggle to have violence against women recognized as a violation of human rights dominated the activities of women’s legal NGOs throughout the late 1980s and early 1990s. The campaign’s success is shown by its inclusion of issues related to violence against women in the Vienna Declaration and Programme for Action of 1993, the General Assembly Declaration on the Elimination of Violence Against Women in the same year, and the Beijing Platform for Action concluded shortly before Dayton. These documents cut across the public/private distinction by asserting state responsibility for failure to exercise due diligence to eliminate and punish violence against women, whether committed by public or private actors. Inclusion of violence against women as a violation of human rights requires effective remedies against commission as well as steps for elimination of the violence, for example through tort/delict as well as through criminal law. These documents also require the state to develop national plans of action to combat violence against women and to work toward rehabilitation through the provision of assistance in child care, counseling, health and social services, and other support structures.

Concerns about violence permeated the Dayton negotiations: The wartime atrocities and the NATO bombing in 1995 formed the backdrop of the peace process, and the GFA’s over-riding purpose was to provide an alternative to this violence. Yet, the GFA makes no reference to state

322. “In all societies, to a greater or lesser degree, women and girls are subjected to physical, sexual and psychological abuse that cuts across lines of income, class and culture.” THE BEIJING DECLARATION AND THE PLATFORM FOR ACTION, supra note 4, at para. 112.
325. VIENNA DECLARATION AND PROGRAMME FOR ACTION, supra note 6, at I.18, II.38.
327. THE BEIJING DECLARATION AND THE PLATFORM FOR ACTION, supra note 4, paras. 112-30, at 73-82.
328. See, e.g., Declaration on the Elimination of Violence Against Women, supra note 326, at art. 4(g).
accountability or to state responsibility for stopping the continuation of violence after the end of the war, and this omission is of particular significance to women, especially in the context of Bosnia and Herzegovina. The failure to address wartime violence against women as women means that this violence was not seen as an obstacle to peace.\textsuperscript{329} Indeed, the policy of seeking the return of refugees places a premium upon presenting Bosnia and Herzegovina as a safe environment. The GFA fails to call for acceptance of responsibility by any party or individual for the commission of international crimes during the war, leaving this to the ICTY.\textsuperscript{330} Crimes were of course committed against both women and men, and in this sense, the Agreement is gender-neutral. However, the crimes committed against women during the war have particular ongoing consequences that merit recognition and response.\textsuperscript{331}

Despite the purported peace following Dayton, violence against women continues. A 1999 NGO study has reported a disturbing incidence of violence against women in Bosnia and Herzegovina for reasons directly connected with the war, including tensions caused by men returning to households headed by women during the war; unemployment on return; forced migrations during the war; destroyed communities that might previously have offered a safety-net; and post-traumatic stress after the war.\textsuperscript{332} War exacerbates a culture of violence and promotes its use to resolve disagreements, including within personal relations. The causal link between violence in armed conflict and post-conflict domestic violence would seem to require the state and the Entities to take steps, including training police officers and the judiciary, and providing safe havens, health care, and counseling services.

The reality, however, is very different. Legislation on domestic violence is supposed to be Entity-based, but the Republika Srpska has no provisions on domestic violence, and the Federation’s Criminal Code of 1998 has only limited provisions with respect to violence against a spouse or co-habitee (including criminalization of rape in marriage).\textsuperscript{333} However, the Federation’s Criminal Code imposes responsibility for prosecution in cases of “light” bodily injury on the individual, rather than on public officials.\textsuperscript{334} This exposes the victim to the risk of further injury and is an abdication of duty by the state. Neither Entity provides a definition of gender-based violence, leaving law-enforcement agencies and courts to formulate their own responses in the

\textsuperscript{329} To women working to provide assistance, “it sometimes seems as if the Yugoslav wars of 1992-95 were waged against women . . . against all that women stand for.” COCKBURN, \textit{supra} note 243, at 156.

\textsuperscript{330} GFA, \textit{supra} note 1, Annex 4, art. II(8), 35 I.L.M. at 120, requires the competent authorities in Bosnia and Herzegovina to “cooperate with and provide unrestricted access to . . . the International Tribunal for the Former Yugoslavia (and in particular [to] comply with orders issued pursuant to Article 29 of the Statute of the Tribunal).”

\textsuperscript{331} Interestingly, Richard Holbrooke recounts that in 1997, he viewed \textit{Calling the Ghosts}, a documentary film about the rape of two women in Omarska prison camp during the war. HOLBROOKE, \textit{supra} note 8, at 206 n.*. He had urged assault on Prijedor (the women’s home town) before the ceasefire at the end of the war, \textit{id.}, but had not carried the issues surrounding gendered violence into the negotiations.

\textsuperscript{332} INT’L HUMAN RIGHTS LAW GROUP, \textit{supra} note 286, at 170.

\textsuperscript{333} \textit{Id.} at 171.

\textsuperscript{334} \textit{Id.} at 172.
absence of any protective measures. The low number of women in police
forces lessens the chances of effective response. There are 200 female police
officers out of 11,000 in the Federation, and thirty out of 8,500 in Republika
Srpska. This deficit has serious implications for the proper response to
gender-based violence and rape. Police and other workers who deal with
victims of violence receive little or no gender sensitivity training. Failure to
offer such measures should be recognized as a violation of the international
standards contained within the GFA, but none of the listed treaties in Annex
4, including the directly applicable European Convention on Human Rights,
has a provision on violence against women. Notably, the Vienna Declaration
and Programme for Action, the General Assembly Declaration on the
Elimination of Violence Against Women, and the Beijing Platform for
Action—which require states to eliminate and punish violence against
women—are not included.

Rape as an instrument of war should have been central to the Dayton
negotiations. But instead the process conflated harms specific to women with
those experienced by men. Furthermore, there has been a tendency to perceive
the rapes committed in the war as crimes of ethnicity, not as crimes against
women. As Sabrina Ramet writes:

> What is so staggering about all of these accounts... is that the act of rape, an act of
> violence and power by the male against the female, is given a specifically national
> content: it is the rape of a Muslim woman by a Serbian man, or of a Serbian woman by a
> Muslim man. Rape is thus used to act out, in symbolic terms, the subjection of one nation
> by another, transmuted to the level of subjection of one sex by another. At the same time
> rape affirms the subordination of gender issues (such as respect for the equality of the
> other sex) to nationalist concerns.

The same invisibility of violations of human rights directed against women
because they are women is apparent in the Report of the PIC Mid-term
the Peace Agreement. Although this Report protects fundamental freedoms,
including non-discrimination and protection of the person, these rights are
described solely in terms of ethnicity and make no reference to violations
perpetrated against women. Thus, ethnic boundaries have been consolidated
and legitimated while those of women’s bodies have been violated with
impunity, thereby denying Bosnian women an equal stake in the post-conflict
reconstruction. There can be little sense of belonging where such important
needs are ignored by the government. The omission may be explained by
the exclusion of women from the negotiation process, by the low imperative
given to issues—even well-known issues—concerning women, and by the

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337. *Sabrina Petra Ramet, Balkan Babel: The Disintegration of Yugoslavia from
the Death of Tito to the War for Kosovo* 261 (3d ed. 1999).
338. Office of the High Representative in Bosnia and Herzegovina, *Implementation of the
Human Rights Provisions of the Peace Agreement: Mid-term Review Conference, Florence, June 13,
339. *Id.*
much greater weight given to the protection of national minorities.\textsuperscript{341} It also creates a particular form of public/private divide that exacerbates the divide already enshrined in human rights law. Government agencies of the federal state lack the legal authority to penetrate Entity affairs. Since these affairs include responsibility for criminal legislation and implementation, the Entities are provided with a shield against intrusion by federal authorities even when crimes against fundamental rights of women are being committed. Such insulation may also occur without the legal framework. For example, the authors have been told that in Northern Ireland the police and other state bodies have been unable to enter ethnic communities to investigate crime. This inability provides another obstacle to the prosecution of domestic violence by containing it within a shield of ethnicity.

The crimes committed against women during the war have received some attention at the ICTY, but with mixed results. On the one hand, the failure to bring Karadzic and Mladic before the ICTY despite their indictments under Rule 61; the revision of Rule 96 to make consent a possible defense to rape even in armed conflict (albeit under limited circumstances);\textsuperscript{342} the widespread unwillingness to accept the concept of anonymity for survivors who testify;\textsuperscript{343} and the lack of any conviction for genocide in the Bosnian war have all limited the understanding of the role that sexual violence played in the conflicts. Women have been literally silenced by the system. On the other hand, rape has been defined under international law, recognized as a war crime,\textsuperscript{344} and as constituting torture as an element of a crime against humanity.\textsuperscript{345} This jurisprudence is a significant step in integrating women’s experience of harm at the international level, but it is not sufficient to redress the failure to ensure adequate measures at the national level.

The third inadequacy of the European Convention for women is that it encompasses only civil and political understandings of democracy and human rights, in opposition to the European Social Charter,\textsuperscript{346} which encompasses economic and social understandings of human rights. In the early 1990s, the European Social Charter was strengthened procedurally,\textsuperscript{347} indicating

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\textsuperscript{341} Provisions in the League of Nations peace treaties for the protection of minorities typically demanded protections irrespective of birth, nationality, language, race, or religion. Gender was not mentioned. Mertus, \textit{supra} note 12, at 815.

\textsuperscript{342} ICTY R.P. & Evid., IT/32/REV.18 (amended 2000), at http://www.un.org/icty/basic/rpe/IT32_rev18.htm. Rule 96 applies in cases of sexual assault. It does not unconditionally reject consent as a defense to rape in armed conflict but states that “consent shall not be allowed as a defence if the victim (a) has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or (b) reasonably believed that if the victim did not submit, another might be so subjected . . . .” \textit{Id.} at Rule 96(ii).


\textsuperscript{347} Protocol Amending the European Social Charter, \textit{supra} note 346.
\end{small}
recognizing its importance as a component of democratic ordering and making its absence from the list of conventions in the GFA all the more striking. The guarantee of economic and social rights has been considered especially significant for women's pursuit of citizenship.\footnote{PAUL HUNT, RECLAIMING SOCIAL RIGHTS 71-106 (1996).} David Held relates health rights, social rights, and economic rights to the sites of power of the body, welfare, and the economy, respectively.\footnote{HELD, supra note 75, at 192-93.} The lack of emphasis on such rights in the GFA weakens its claim to embedding a democratic order in Bosnia and Herzegovina. For instance, the only economic or social right enumerated in the GFA is the right to education,\footnote{GFA, supra note 1, Annex 4, art. II(3)(i), 35 I.L.M. at 120.} and the GFA's only reference to economic and social rights is the inclusion of the International Covenant on Economic, Social and Cultural Rights among the listed conventions. Again, a comparison with the Good Friday Agreement is relevant here. The Good Friday Agreement provides for the establishment of a consultative Civic Forum comprising representatives of the business, trade union, voluntary sectors, and such other sectors as are agreed.\footnote{Good Friday Agreement, supra note 275, at para. 34.} The lack of attention to economic and social rights in the GFA reflects the West's preoccupation with civil and political rights, and in particular the United States' unwillingness to recognize this category of rights.\footnote{352. The United States is not a party to the International Covenant on Economic, Social and Cultural Rights, nor to the Convention on the Elimination of All Forms of Discrimination Against Women or the Convention on the Rights of the Child, the latter two of which also contain economic and social rights.} The exclusion fails to take account of the economic and social imperatives of post-conflict reconstruction, which are left to the international financial institutions whose mandate does not include human rights or gender.

Ongoing discrimination results from the combined effects of not incorporating an equality clause into the Constitution and lack of attention to economic and social rights. Unsurprisingly, most attention in Bosnia and Herzegovina is focused on ethnicity-based discrimination, but human rights reports indicate persistent discrimination on grounds of political affiliation, gender, age, and disability.\footnote{353. \textit{Situation of Human Rights}, supra note 319, at para. 8. See also HUMAN RIGHTS COORDINATION CENTRE, HRCC HUMAN RIGHTS SEMI-ANNUAL REPORT, paras. 68, 76, 83, 89-93 (Apr.-Sept. 1999), at http://www.ohr.int/hr-report/hr9902.htm.} Discrimination against women and gender stereotyping remain salient, especially in employment-related matters (including access to pensions) and in education. As economic rights, labor rights are not included in the European Convention, and there is no state-wide labor law. There has been indirect discrimination against women by the employment preference given to demobilized soldiers, as in Republika Srpska, where labor law gives priority to the families of deceased members of the Republika Srpska army if no other member of the family is employed, disabled war veterans, demobilized Republika Srpska soldiers, and those unemployed for over two years.\footnote{354. INT'L HUMAN RIGHTS LAW GROUP, supra note 286, at 154.} Women have also been in a double bind with respect to labor legislation that reflects pre-war socialist ideology. The legislation provides women with various protective measures and entitles
them to certain benefits, especially with respect to reproduction and maternity. Even as this legislation undermines women's equality by limiting their access to certain forms of employment, its protections have often remained unimplemented, impeding collection of benefits.\textsuperscript{355}

New and pending legislation in the Entities seeks to address this persistent employment-based discrimination. The Federation's new labor legislation, passed in August 2000, has been scrutinized by international human rights lawyers. This new labor law prohibits workplace discrimination and lifts the prohibition on night work for women, but retains the prohibition on women working in mines except to perform non-manual labor.\textsuperscript{356} It also endorses parental and maternity leave provisions. The Republika Srpska has not yet adopted its new labor laws, but draft legislation prohibits discrimination and removes the preferential employment of demobilized soldiers. However, pregnant women, single mothers, and mothers of young children are excluded from overtime, and there are still limitations on women working at night and in mines. The draft legislation provides for maternity but not paternity leave, unless the mother is unable to care for her child.

It remains to be seen whether labor law reforms eliminate the disparity in wages\textsuperscript{357} and under-representation in management and executive positions that currently exist.\textsuperscript{358} Experience in other European countries suggests that equality enshrined in labor laws does not automatically ensure equal pay for equal work.\textsuperscript{359} Addressing discrimination is hard, especially where unemployment is high. Lawyers have not been trained in anti-discrimination law, and there is a lack of confidence in the independence of the judiciary and in the suitability of law as a means of redress. People are reluctant to litigate for lack of confidence in a fair hearing or for fear of retaliation.\textsuperscript{360} There is also uncertainty about the proper jurisdiction, since privatization has in many instances taken employers outside the public sphere and thus outside of the jurisdiction of the Human Rights Chamber. In addition, there is a "paralysis of legal remedies which are either inaccessible, inefficient, or politicized."\textsuperscript{361}

Education is central to the reconstruction of society, and especially to the reconfiguration of gender relations. However, discrimination in education along ethnic lines remains endemic in Bosnia and Herzegovina, and both Entities have resisted change. This discrimination in education also implicates gender concerns: There is a shortage of women in senior posts; textbooks engage in gender stereotyping; and girls may be funneled toward economics, 

\begin{itemize}
  \item \textsuperscript{355} See, e.g., \textsc{Human Rights Coordination Centre, supra} note 353, at para. 89.
  \item \textsuperscript{356} \textit{May 2000 Report by the High Representative, supra} note 288, at para. 41.
  \item \textsuperscript{357} A household survey conducted by the European Commission and World Bank suggests that women receive wages 25-50\% lower than their male counterparts. \textit{Int'l Human Rights Law Group, supra} note 286, at 156.
  \item \textsuperscript{358} \textit{Id.}
  \item \textsuperscript{359} While there are obviously variations globally, in the mid-1990s women earned approximately three quarters of the average male wage. \textit{United Nations Dev. Programme, Human Development Report 1995}, at 36-37 (1995).
  \item \textsuperscript{360} On deficiencies in the legal system's ability to address discrimination, see \textit{Int'l Human Rights Law Group, supra} note 286, at 155, 161; \textit{Situation of Human Rights, supra} note 320, at para. 23; and \textit{Human Rights Coordination Centre, supra} note 353, at paras. 42-45, 68.
  \item \textsuperscript{361} \textit{Human Rights Coordination Centre, supra} note 353, at para. 68.
\end{itemize}
textiles, and social sciences, while boys are directed toward mechanics, civil engineering, agriculture, and forestry.\textsuperscript{362}

These issues of economic rights and equality in education are not addressed in the European Convention. Indeed, the Convention includes only two of the seven sites of power and related rights (civic and political) listed by Held as essential to a democratic public order, and those not covered have been deemed in feminist critiques of human rights law especially important for women's autonomy in public and private life.\textsuperscript{363} Thus, the GFA cannot be understood to construct an adequate democratic public order or accord equal citizenship to women. In no section does the GFA address the particular problems women face. For example, Annex 7 does not consider female refugees or issues with respect to the return of property.\textsuperscript{364} It can, of course, be argued that the GFA lists fifteen other human rights treaties in Annexes 4 and 6, including the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child.\textsuperscript{365} Many of these Conventions cite explicit economic and social rights, and the Convention on the Elimination of All Forms of Discrimination Against Women is directed explicitly at discrimination against women. The prohibition against discrimination in the Constitution of Bosnia and Herzegovina applies to all rights listed in the international instruments in the GFA, and therefore extends the requirement of equality beyond that of Article 14 of the European Convention on Human Rights. However, the direct applicability of the European Convention accords it priority, and the link between the Human Rights Ombudsman, the Human Rights Chamber, and the European institutions reinforce that Convention's predominant position. The work by the Committee on the Elimination of Discrimination Against Women\textsuperscript{366} on the interpretation and application of the Convention on the Elimination of All Forms of Discrimination Against Women is probably less well-known than that of the institutions of the European Convention, and without a specific requirement to do so, it is unlikely to be drawn upon by these institutions.

Perceiving human rights as "empowerment rights" or "entitlement capacities" might free them from the limitations imposed by the international framework and ensure their integral place within a democratic framework.\textsuperscript{367} However, throughout the 1990s, women's NGOs have expended a great deal of energy and achieved considerable success in enhancing the effectiveness of the international human rights regime for women.\textsuperscript{368} They have used

\begin{itemize}
  \item \textsuperscript{362} Id. at para. 91.
  \item \textsuperscript{363} E.g., CHARLESWORTH & CHINKIN, supra note 48, at 201-49. Held's seven sites of power and related rights are the body, welfare, culture, civic associations, economy, coercive relations and organized violence, and legal and regulatory institutions. See supra notes 219-222 and accompanying text.
  \item \textsuperscript{364} GFA, supra note 1, Annex 7, 35 I.L.M. at 136-41. See also ENGENDERING THE PEACE PROCESS: A GENDER APPROACH TO DAYTON—AND BEYOND 24-25 (Anna Lithander ed., 2000).
  \item \textsuperscript{365} GFA, supra note 1, Annex 4, 35 I.L.M. at 118-25; id. Annex 6, 35 I.L.M. at 130-36.
  \item \textsuperscript{366} The Committee operates under Article 18 of the Convention. Convention on the Elimination of All Forms of Discrimination Against Women, supra note 122, art. 18, 1249 J.N.T.S. at 22.
  \item \textsuperscript{367} HELD, supra note 75, at 223.
  \item \textsuperscript{368} See supra notes 324-328. See generally Chinkin, supra note 214, a 133 and
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transnational networks for the articulation of international standards in terms applicable to women, and have sought greater access to and dialogue with international bodies, precisely to transcend the shortcomings of territorially limited citizenship. The GFA's status as an internationally negotiated treaty incorporating a state constitution made it a suitable arena for recognition of these understandings and a potential model for their entrenchment within peace agreements. In this way, any gap between human rights and national entitlements could have been bridged through a form of governance based upon "global ethics," a concept of cosmopolitan democratization, and supra-national citizenship. Instead, the dilemma for Bosnian women is that space for the enjoyment of citizenship has been closed down by the constitutionalization of the Entities, even while the potential has been opened up by the inclusion of international standards within the GFA. However, the GFA offers only a restrictive understanding of the use of international instruments for transforming status by undermining economic and social rights and ignoring forward-thinking international and regional instruments such as the Beijing Platform for Action, the Council of Europe's work on mainstreaming gender and transforming democracy, and the European Commission's Third and Fourth Community Action Programme work on similar issues.

Women in Bosnia and Herzegovina are trapped in a concept of citizenship that is defined along nationalist lines, demarcated by legally drawn borders, and enforced by the international community in a way that leaves little room for renegotiation. The collusion of nationalism with religious affiliation that was furthered by the war means that women's experience of citizenship is also constrained by religious stipulations. The West simply failed to investigate the reality of nationalism as inevitably sexist and antithetical to women's expressions of choice. The internal borders are legally constructed as porous, in that freedom of movement of persons, goods, services, and capital is guaranteed throughout Bosnia and Herzegovina. The GFA also recognizes the possibility of ethnic association across external borders, but it does not explicitly mention other forms of external association. However, the free movement of persons across the Entities is an illusion when other identities—family, gender, neighbors—have been destroyed by the violence perceived primarily in ethnic terms. Movement accompanying text.

369. See HELD, supra note 75, at 223 (arguing that the formulation of rights in international instruments takes them beyond the limiting territorial framework in which they were spawned).
370. Id. at 227.
373. GFA, supra note 1, Annex 2, 35 I.L.M. at 112-14.
375. The GFA allows the Entities the right "to establish special parallel relationships with neighbouring states consistent with the sovereignty and territorial integrity of Bosnia and Herzegovina." Id. Annex 4, art. III(2)(a), 35 I.L.M. at 120.
376. Discussion of interference with the right to return typically does not include any gender breakdown. This leaves unanswered questions about whether there are differences between women's
for women is too often coerced through trafficking and other forms of organized crime.

Despite their shortcomings, the incorporation of European and international treaties into domestic law offers the liberating prospect of supranational identification. However, since Bosnia and Herzegovina is not a party to the European Convention on Human Rights its citizens have no direct access to the European Court but only to the internal human rights institutions, with the limitations noted above. Access to European citizenship (in the broad sense) is held out as the prize, but in the meantime the exclusion is all the greater. Those negotiating the GFA failed to take account of thinking, programs, and research that has been carried out through Europe-wide cooperation on understandings of democracy, citizenship, and human rights.⁷⁷ Much of this work is multidisciplinary and draws upon women’s experiences. Such writings might have informed the Dayton negotiations with respect to the particular circumstances of women in Bosnia and Herzegovina. Explanations for the failure to include this work may be offered—such as the cumulative nature of the peace process, the consequences of war, and the immediate need to stop the fighting—but it seems that real reconstruction was not sought.

IX. WOMEN AS CITIZENS OF BOSNIA AND HERZEGOVINA: FIVE YEARS AFTER DAYTON

Matters have not stood still since the signing of the GFA. Dayton was not a closure but was rather part of an ongoing peace and democratization process, supported by international and regional agencies, bilateral programs, and NGOs. In the first years after the GFA, gender concerns were largely invisible in the processes of reconstruction. However, more recently there have been signs of change. Women in Bosnia and Herzegovina have started to respond to the various ways in which their citizenship has been undermined. They have both harnessed support from the international agencies (governmental and non-governmental)⁷⁸ and responded to initiatives that have been offered to them in various renegotiations of their status. Indeed, in 1999 the OHR Report for the first time contains a discussion of gender.⁷⁹ This Part considers some of these recent developments. Finally, the Article considers the lessons that may be learned about the negotiation and implementation of peace agreements for the restructuring of gender relations.

and men's desire to and experience of return. See, e.g., HUMAN RIGHTS COORDINATION CENTRE, supra note 353, at paras. 1-26.

⁷⁷. See supra notes 169-175 and accompanying text.

⁷⁸. For a description of the international and regional organizations operating in Bosnia and Herzegovina, see O’Flaherty, supra note 24.

⁷⁹. Office of the High Representative in Bosnia and Herzegovina, Report by the High Representative for Implementation of the Peace Agreement to the Secretary-General of the United Nations, para. 79 (Nov. 1, 1999), at http://www.ohr.int/reports/991101a.htm [hereinafter November 1999 Report by the High Representative]. However, the section is limited to women’s involvement in the Stability Pact discussed below. See infra notes 406-413 and accompanying text.
A. Building Civil Society

The GFA—and hence the Constitution of Bosnia and Herzegovina—offer no direct role to civil society, Fukuyama’s third level of democratization. However, the proliferation of NGOs within the internationalized environment of Bosnia and Herzegovina provides spaces for women’s renegotiations of their status. Local women’s groups were active before Dayton, both in working with women from particular national groups and more broadly with all women across ethnic lines. The war also led to the proliferation in Bosnia and Herzegovina of international NGOs with diverse agendas and fields of operation, most notably in humanitarian, medical, and counseling services. In many cases, such groups have adapted to the post-war situation and have assumed political agendas and objectives, including democracy-building and enhancing women’s citizenship, and many new NGOs have appeared since about 1997. One such group, Zene Zenama: Women to Women, Sarajevo, has been giving professional and educational support to other newly established NGOs in 1998 and advocating an end to discrimination against women since 1997. Since 1995, when there was no coordination between the international agencies and the women’s groups, international governmental agencies working on democratization have begun actively to encourage the formation and strengthening of local NGOs, by assisting them in seeking funding and offering training. State governments are also working with local NGOs in bilateral programs and the World Bank has included civil society groups as stakeholders in consultations for its country strategy.

Local NGOs are an important vehicle through which unbiased alternative views to those espoused by nationalist institutions can be channeled, and for local women NGOs provide channels for communications free from the restrictions of nationalist priorities. Nevertheless, there are reservations about the burgeoning civil society from both internationalist and local perspectives. From the internationalist perspective, there are two main concerns. The first is the anxiety that formal laws offer no legal framework for the protection and regulation of NGO activity, and the second relates to the need to ensure long-term NGO sustainability, viability, and willingness to engage in the political process. Partnership between international governmental and non-governmental organizations and local bodies is one

380. Cockburn, supra note 243, at 163-73; Einhorn, supra note 217, at 109, 119.
381. For an account of the work of one such foreign (Swedish) NGO, the Kvinna till Kvinna Foundation, both during and after the war, see Engendering the Peace Process, supra note 364, at 14, 41-43.
384. Draft Laws at the State and Entity levels have been approved by the OHR and are expected to become law in the near future. May 2000 Report by the High Representative, supra note 288, at para. 76.
preferred means of building such a sustainable framework. From the local perspective, it is important that international agendas do not swamp local voices, that local priorities are not deflected by those of foreign donors, and that the international institutions take account of and work within the framework of local initiatives. There is a concern that incorporation of women’s groups into the international program risks their co-option, while remaining outside means women’s groups risk marginalization or being ignored by international entities. These anxieties are heightened by those about funding, which are always an issue for NGOs that rely upon “soft” money in the form of grants that can make their continued existence and priorities uncertain.385

After Dayton, mainstream NGOs in Bosnia and Herzegovina—that is, NGOs that do not focus directly on women—have made considerable use of the networks (including contacts with international women’s groups) developed by women’s NGOs during the war when other forms of contact and communication were inoperable.386 However, many of these mainstream NGOs have no clear gender strategies.387 While mainstream NGOs follow the calls of international institutions to develop viable “oppositional politics” against nationalist positions, women’s groups have sought to maintain the centrality of their own agendas. Sometimes, these agendas cut across nationalist agendas and priorities, causing tension with mainstream groups that make opposition politics their primary goal.

B. Enhancing Women’s Participation

The GFA’s request to the OSCE that it “adopt and put in place an elections program for Bosnia and Herzegovina”388 has meant that the OSCE has become the major player in democratization by means of a program somewhat illogically separate from human rights. This program is organized into four main programs: civil society, political parties, governance, and the rule of law.389 The OSCE democratization report reflects growing attention to women and women’s concerns.390 OSCE democratization activities with respect to women have focused on facilitating direct political action to remove barriers to women’s participation and network building across Entity and international lines.391

Several OSCE strategies reflect a concern for women and women’s rights. First, the OSCE has convened roundtables that bring NGO representatives together across Entity lines to identify local priorities and agendas. Such locally “owned” programs are more sustainable than those that are internationally prescribed. For example, approximately forty women from all three communities (Bosniac, Croatian, and Serbian), including displaced

385. Einhorn, supra note 217, at 112.
386. Interview with members of Zene Zenama: Women to Women, Sarajevo, in Sarajevo, Bosnia and Herzegovina (Sept. 26, 2000).
387. ENGENDERING THE PEACE PROCESS, supra note 364, at 34.
388. GFA, supra note 1, Annex 3, art. II(1), 35 I.L.M. at 115.
390. See id. at 12, 16-18, 21.
391. Id. at 16.
persons, refugees, and residents, and rural and urban women, have been participating in a Women’s Roundtable in Brcko, a place more frequently associated with division than with seeking common objectives. Second, within the context of governance, the OSCE has sought to redress the Beijing Platform for Action’s omission in the GFA. The Engendering Governance Programme has organized the translation of the Platform into the three Entity languages and arranged for distribution of these translations. Women members of the Federation Parliament wrote a preface to the document, calling for its implementation. The document was formally presented to the Parliament on March 8, 1999.

Another important initiative has been directed at women’s participation in political bodies. Like other states in the former Eastern European bloc, after 1989, women in Bosnia and Herzegovina lost considerable ground in political participation. Since 1998, the OSCE Women in Politics Programme has been working to address obstacles to women’s political involvement. The Programme has developed strategies for networking, targeting potential candidates, and educating women voters. Thus, in 1998, a coalition of women’s groups was formed to work for change in the provisional election rolls so as to require three women to be evenly distributed among the top ten candidates on each party list. This strategy led to significant electoral gains at the canton, Entity, and state levels in 1998. The campaign continued in 1999 with the specific goal of increasing women’s empowerment as voters, activists, candidates, and officials. As part of the educational program, a local documentary on women in politics has been filmed to educate women about the grassroots campaigns that led to these changes in the electoral rolls. Women have also sought to strengthen the legislative capacities of those women who had been elected since 1998 and to establish networks aimed at assisting and encouraging women to participate in municipal elections. In the April 2000 elections, these efforts ensured that women represented one-third of each candidate list. The increase in legislative representation is not matched in the executive branch: There are no women in the Councils of

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392. Id. at 5-6, 12.
393. No agreement could be reached over Breko at Dayton, leading to arbitration over its status. See Arbitral Tribunal for Dispute over Inter-Entity Boundary in Breko, The Federation of Bosnia and Herzegovina v. the Republika Srpska (Final Award), 38 I.L.M. 534 (1999); Arbitral Tribunal for Dispute over Inter-Entity Boundary in Breko Area, Award in the Republika Srpska v. the Federation of Bosnia and Herzegovina, 36 I.L.M. 396 (1997).
394. Id. at 17, 21.
395. Id. at 16.
396. Id.
397. Id. This change became OSCE Provisional Election Committee Rules and Regulations, Rule 7.50 (May 1998). INT’L HUMAN RIGHTS LAW GROUP, supra note 286, at 182.
398. Indeed, after the 1998 elections, the number of women in legislative bodies in Bosnia and Herzegovina has increased. As of 1999, 15% of the members of the Federation House of Representatives were women, as were 22.8% of the members of the Republika Srpska National Assembly. INT’L HUMAN RIGHTS LAW GROUP, supra note 286, at 182.
399. OSCE Semi-Annual Report, supra note 382, at 18.
400. Id. at 16.
401. May 2000 Report by the High Representative, supra note 288, at para. 81. The OHR has supported these initiatives. Id.
Ministers of Bosnia and Herzegovina, of the Federation, or of the Republika Srpska.\textsuperscript{402}

Election law reform has been presented as being at the heart of Bosnia and Herzegovina’s relations with Europe and as a precondition for membership in the Council of Europe. Indeed, the OSCE’s Election Law Information Coordinator has asked:

Will Bosnia choose to join the nations of Europe? Will its politicians lead it into Europe? Will they choose to be a constructive force of change as it continues its transition to a more stable democracy? Will it choose to adopt the election law recently introduced to the BiH Parliamentary Assembly?\textsuperscript{403}

However, as of this writing, Parliament has rejected the draft Law several times,\textsuperscript{404} and in the words of the OHR, “it remains to be seen whatever alternatives will also ensure women’s greatest representation.”\textsuperscript{405}

C. Focus on Gender

In an expression of transnational unity, women parliamentarians and representatives from Southeastern Europe (including Bosnia and Herzegovina, Slovenia, Romania, Federal Republic of Yugoslavia, Hungary, Croatia, and the former Yugoslav Republic of Macedonia) called for an active and equal role for women in the development and implementation of the Stability Pact process initiated by the European Union for the Southern Balkans.\textsuperscript{406} The end of the NATO bombing of Yugoslavia in 1999 facilitated progress on regional stabilization through acceptance of the Stability Pact to enhance security, democracy, and economic development in the Balkans. Unlike Dayton, where the agenda was limited to Bosnia and Eastern Slovenia, the Stability Pact encompasses the broader region.\textsuperscript{407} The women parliamentarians listed a number of common problems faced by women in the region, including the under-representation of women in political decision-making, women’s poverty and unemployment, and human rights violations, such as trafficking in women.\textsuperscript{408} The women explicitly rejected the notion “that women of this region are victims of predominantly male politics” and, “as a vital part of civil society,” accepted responsibility for working together towards lasting peace.

\textsuperscript{402} INT’L HUMAN RIGHTS LAW GROUP, supra note 286, at 182-83.


\textsuperscript{404} The draft electoral law was ready to be submitted to Parliament in 1999. \textit{November 1999 Report by the High Representative}, supra note 379, at paras. 4, 46. It was voted down twice by the State Parliament. \textit{May 2000 Report by the High Representative}, supra note 288, at paras. 3, 81.

\textsuperscript{405} The OHR reported that the rejected draft election law had obliged political parties to secure the same kind of ensured representation for women. \textit{May 2000 Report by the High Representative}, supra note 288, at para. 81.


\textsuperscript{407} The exclusion of Kosovo from Dayton was an important factor in the growing crisis in Kosovo that culminated in the bombing campaign from March to June 1999. INT’L COMMISSION ON KOSOVO, THE KOSOVO REPORT (2000), at http://www.kosovocommission.org.

\textsuperscript{408} \textit{November 1999 Report by the High Representative}, supra note 379, at para. 79.
good neighborliness, and stability.\textsuperscript{409} Theirs was a statement that lasting peace must incorporate women as agents for, as well as objects of, reconstruction. The OSCE’s special envoy for Southeastern Europe and the President of the OSCE Parliamentary Assembly endorsed this appeal.\textsuperscript{410} A Stability Pact Gender Task Force has been established, with a mandate that concerns “[r]eview and implementation of women’s empowerment programmes[,] [a]nalysis of region’s electoral laws from a gender perspective[, and s]upport for creation of national gender machinery throughout the region.”\textsuperscript{411}

Women’s participation in the Stability Pact process is an example of women accessing a transnational movement to gain support for agendas seeking to escape the restrictions of the nationalist identity imposed at Dayton and for their goals of inclusion in Europe. The Gender Task Force has set up offices in Budapest and Sarajevo to disseminate information and has established working tables on a number of issues.\textsuperscript{412} However, in late 2000, there is some uncertainty among local NGOs as to the Task Force’s potential effectiveness, especially with respect to funding.\textsuperscript{413}

A note of caution should be sounded about the increasing attention being paid in Bosnia and Herzegovina to gender rather than to women. This trend is consistent with gender mainstreaming policies within the United Nations\textsuperscript{414} and within European bodies.\textsuperscript{415} In addition to the Stability Pact Gender Task Force, an initiative—funded by the Finnish government and implemented by the Independent Bureau for Humanitarian Issues—is establishing gender focal points to work with the executive at all levels of government to complement the OSCE’s work with parliamentarians and legislatures and to provide gender training.\textsuperscript{416} In January 2000, gender focal points were established in all municipalities.\textsuperscript{417} One of the aims of this initiative is to strengthen the capacity of local partners by providing early gender training and using gender mainstreaming as a development tool.

Another example of the focus on gender rather than on women is the Gender Co-ordination Group within the OHR, which seeks to pool and share information about gender policies and programs among all the international governmental and non-governmental bodies in Bosnia and Herzegovina.

\begin{footnotes}
\item[409] Women Demand Greater Role, \textit{supra} note 406.
\item[410] Id.
\item[412] ENGENDERING THE PEACE PROCESS, \textit{supra} note 364, at 16.
\item[413] Interview with members of Zene Zenama: Women to Women, Sarajevo, Bosnia and Herzegovina (Sept. 26, 2000).
\item[415] McCrudden, \textit{supra} note 7, at 1699-1704.
\item[416] Republic of Finland & Ministry of Foreign Affairs, Bosnia and Herzegovina, Ministry for Foreign Affairs, Gender and Equity and Equality Project: Bosnia and Herzegovina: Project Document (Jan. 2000) (unpublished project document, on file with The Yale Journal of International Law) [hereinafter Gender and Equity Project].
\item[417] Id.
\end{footnotes}
There are hopes that soon it will also include national NGOs. These initiatives are advantageous in that they require analysis of the differential impact of policies and practices upon women and men and promote democratic concepts of equality and equity. However, they do not solve the problems women face, and they can deflect attention away from women and women's human rights and absolve international bodies of the need to talk about women. They can also marginalize women's NGOs while facilitating funding for other bodies that include “gender” in their proposals. If the problems women face had been identified and addressed from the outset, then a shift towards gender might now be appropriate. However, the failure to consider women in the GFA has meant that women’s concerns—such as violence against women—have come late to the reconstruction agenda, and there is a risk that they will be prematurely submerged in gender mainstreaming, which itself is poorly understood in Bosnia and Herzegovina.

D. Human Rights

Despite the strong emphasis in Dayton on human rights, there remain many obstacles to their general implementation, in particular for women. In 1999, the Special Rapporteur of the Commission on Human Rights, Jiri Dienstbier, painted a depressing picture of little change in Bosnia and Herzegovina. There had been minimal progress in the human rights arena and toward the development of a tolerant, multi-ethnic society. Human rights enforcement also remained susceptible to being slowed (or reversed) by external setbacks, such as the 1999 crisis in Kosovo. Thus, the fourth level of democracy-building—the establishment of a culture of human rights and dignity—remains to be achieved.

Alongside the continuing work of women's NGOs in Bosnia, more institutional attention is now being paid to women's human rights concerns. The U.N. Office of the High Commissioner for Human Rights in Bosnia and Herzegovina has placed special emphasis on gender and discrimination, even appointing a gender specialist to the Sarajevo office. Since 1998, the Office

418. For a survey of the Gender Co-ordination Group, see ENGENDERING THE PEACE PROCESS, supra note 364, at 29-31.

419. We were told that society within Bosnia and Herzegovina has no understanding of gender, for which there is no word. Interview with members of Zene Zenama: Women to Women, Sarajevo, in Sarajevo, Bosnia and Herzegovina (Sept. 26, 2000). It is noticeable that training programs include exploring the meaning of gender. E.g., Gender and Equity Project, supra note 416.


421. Id. at para. 5.

422. Women's NGOs have continued their focus upon such issues as violence against women throughout this time, for example, the work of Medica Women's Therapy Center in Zenica that began work in 1993. Women's Association Medica Zenica, Introductory Description (2000) (institutional overview, on file with The Yale Journal of International Law); see also A SECOND LOOK 2 – EXCERPTS: TO LIVE WITH(OUT) VIOLENCE, FINAL REPORT, VIOLENCE AGAINST WOMEN, ZENICA, BOSNIA-HERZEGOVINA (Holly Peele & Duska Andric-Ruzicic ed., 1999). Medica has expanded to include both a Center for Education and Visoko, providing psycho-social consulting for women and children. An offshoot is the Centre of Legal Assistance for Women, also in Zenica, which has been informing women of their rights and offering them legal advice since 1993. ENGENDERING THE PEACE PROCESS, supra note 364, at 43.
has had an agreement with the U.N. Mission in Bosnia and Herzegovina to work together on human rights.\textsuperscript{423} In his May 2000 Report, the High Representative indicated his support for appropriate measures to combat violence against women.\textsuperscript{424} He reported on a pilot project organized by his Office and the IPTF that involves the training of Zenica police, the judiciary, and social workers on issues of domestic violence, and welcomed the prospect of its repetition across the state. He also expressed his commitment to establishing state-run shelters for victims of domestic violence and to ensuring a more gender-sensitive legal framework, particularly with respect to the criminal codes in the Republika Srpska and in the Federation.

Since 1998, trafficking—another aspect of women’s human rights that is especially relevant to issues of citizenship—has also come to the forefront in Bosnia and Herzegovina. Globalization, open borders, and free markets have contributed to the incidence of organized crime accompanied by specific human rights abuses of women around the commodification of their bodies. Freedom of the market and of expression has increased the prevalence of pornography and sex shops in Eastern Europe.\textsuperscript{425} Other causes of trafficking include employment discrimination, obstacles that women face in realizing economic rights, limited access to credit, and other aspects of privatization.\textsuperscript{426} Trafficking forces women into an underclass that further reduces their status as citizens within their own states. Where they are illegal entrants into other states, they are unable to seek assistance from state agencies for fear of prosecution and deportation. This enhances their vulnerability to violence and further exploitation. Trafficking is a much wider problem than one affecting only Bosnia and Herzegovina and its manifestations are not attributable to the GFA. Nevertheless, the increase of trafficking in Eastern Europe after the collapse of socialist regimes, the regional conflicts, and the connection with organized crime all made the incidence of trafficking in post-Dayton Bosnia predictable and as such an issue that could have been addressed in the GFA. Furthermore, sexist policing and implementation of criminal laws coupled with the lack of training of police and other authorities in Bosnia and Herzegovina concerning organized trafficking in women all reinforce women’s vulnerability to state institutions, including under the new legal regime established by Dayton.

Until recently, Bosnian authorities have focused on violations of immigration laws and supposed offences committed by women trafficked into the state, rather than on those committed against these women, including illegal detention in slavery-like conditions, forced prostitution, sexual assault, and rape.\textsuperscript{427} Police raids in both Entities have targeted café bars suspected of


\textsuperscript{424} May 2000 Report by the High Representative, supra note 288, at para. 80.

\textsuperscript{425} The fact that pornography was not legally allowed in the East and women were nevertheless oppressed exposes still further complexities and contradicts assertions from some Western feminists about the centrality of pornography to women’s subordination. Frigga Haug, The End of Socialism in Europe: A New Challenge for Socialist Feminism?, 39 FEMINIST REV. 37, 38 (1991).

\textsuperscript{426} Situation of Human Rights, supra note 420, at para. 37.

\textsuperscript{427} Id. at para. 21.
being sites of prostitution activities, and police have arrested and detained many women, primarily non-Bosnian nationals.428 These women were often convicted based on inadequate evidence and procedures.429 In March 1999 the Office of the High Commissioner on Human Rights and the U.N. Mission in Bosnia and Herzegovina launched a trafficking project that works to protect trafficked persons and to increase effectiveness in combating the incidence of trafficking. Among other objectives the project gives attention to the provision of secure shelters, counseling, healthcare, and legal advice, and to information gathering.430 The International Organization for Migration has commenced a complementary pilot project (funded by the United States) that also focuses on providing protection and assistance to trafficked persons rather than on their criminalization. This project works to arrange the orderly, safe, and dignified return of trafficked migrants—in particular women who have been entrapped in the sex industry—in Bosnia and Herzegovina. It also arranges for reception in the home country and in many cases coordinates with appropriate NGOs in those countries.431 The Gender Task Force of the Stability Pact is also examining trafficking,432 and the OHR has stated that law enforcement authorities must investigate and prosecute the criminal elements involved in trafficking, establish safe-houses for victims and witnesses, and ensure access to medical care and other assistance.433

X. CONCLUSIONS

Five years after the Dayton negotiations, women’s concerns are slowly becoming more visible in Bosnia and Herzegovina. There are now programs that focus directly upon women, such as the OSCE Women in Politics Programme, and others that include a gendered dimension. This raises the question of whether the GFA’s failure to include women matters, given that women have subsequently been included when the time was right. This Article suggests that it does.

First, the omission of women from an Agreement of such significance reinforces the position that sex and gender do not matter in international law and relations. While the GFA deemed essential many aspects of societal reconstruction, it granted no such prominence to gender relations. Second, this silence allowed international organizations to commence their work in Bosnia and Herzegovina with no reference to women or to the impact of their operations on women. The GFA provided the framework that has been built upon and expanded by the Peace Implementation Conferences as well as by the implementing agencies. These Conferences have both reviewed progress and further elaborated the necessary building blocks for development within Bosnia and Herzegovina. Gender sensitivity was not part of the agenda. The

428. Id.
429. Id. at para. 22.
430. Office in Bosnia Herzegovina, supra note 423.
431. Id.
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early Conferences made no mention of the particular issues faced by women and thus offered no guidance in this respect to planning and operations.\textsuperscript{434} Admittedly, this international presence has provided secure space for some initiatives to emerge, but it is only because of the determination and efforts of a few individuals and because of the coincidence of women’s issues with other priorities that subsequent attention has been paid to women’s experiences by the international governmental community. Third, the legitimacy of the actions of the international community in Bosnia and Herzegovina derives from the GFA, which has come to be seen not just as a negotiated document but as almost having taken on a life of its own.\textsuperscript{435} Silence in the Agreement on a particular issue can justify inaction and there are always other agenda items that, due to their inclusion, must be given priority. Failure to pay any attention to women or women’s specific concerns in the GFA has enabled officials to disregard them as irrelevant or as a time-consuming, poorly understood extra. It has also allowed a growing awareness of gender, rather than women, to evolve with the danger of still further obscuring their concerns. Fourth, there is a high turnover of international personnel in Bosnia and Herzegovina, and many people are seconded from their own state or work under short-term contracts. Institutional practice and memory are slow to develop, especially where there is no specification in the GFA itself, making inclusion of all important facets especially significant. Fifth, the GFA serves as a precedent for the rebuilding of Kosovo and for other instances of societal reconstruction across Europe as well as in other locations, such as Haiti and East Timor. Many of the same people move from one such situation to another, inevitably taking their own experiences with them and perpetuating the omissions. This Article suggests that the failure to include women in the GFA represents the loss of an important opportunity to ensure inclusion of women throughout such reconstructions.

Several questions remain. Is it even possible to include women in the text of a peace agreement? Is there a model that might have been applied in the Dayton negotiations? Taking account of gender in a process requires testing the assumptions upon which a transaction is based and asking specific questions to do this. Thus, in the context of peace agreements, consideration of the following questions could have assisted in constructing an enabling


\textsuperscript{435} People in Bosnia and Herzegovina spoke of the GFA becoming personified as a body with power so that “Dayton says . . .” or “Under Dayton we must . . .” are determinative of the required course of action. Interview with members of Zene Zenama: Women to Women, Sarajevo, in Sarajevo, Bosnia and Herzegovina (Sept. 26, 2000); Interview with members of Women’s Association Medica Zenica, in Sarajevo, Bosnia and Herzegovina (Sept. 27, 2000). The OHR has exhibited the same attitude in statements about the need “to support Dayton.” \textit{July 1999 Report by the High Representative, supra} note 29, at Annex 1.
citizenship for women and in giving them a share in the democratic society envisaged:

- What are the goals of the agreement? Who decided them? Who was consulted? Are the goals shared equally between women and men? By all women and all men? How do we know? If these goals are not widely supported, why should they be pursued?

- Does the agreement contain gender-specific or gender-inclusive terms? At whom is it really directed? Women? Men? Both? Do they have similar roles under the agreement? How are they conceptualized: As active agents of change, passive victims, stakeholders, beneficiaries, experts, or professionals? What is the gender breakdown of this conceptualization, and how is it rationalized?

- Who has constructed “woman” and “man”? Who will do so in the future? How do those negotiating peace agreements know what is good for women?

- Whose constraints and potentials are addressed throughout the agreement?

- Whose interests are given priority through the agreement? Why?

- What assumptions are made about the gendered division and allocation of resources? On what evidence are these assumptions made?

- What are the presumed benefits of the agreement? What are the disadvantages? Are they shared equally by all? Who is going to have to implement them?

- Does the agreement take account of the immediate, underlying, and structural causes of the conflict? Whose account of those causes is given credence? Is the analysis gender-blind or gender-aware? Are any strategic gender interests addressed by the intervention? Does addressing gender interests require the transformation of existing gender relations and gender culture? If so, can this transformative potential be built into the agreement? What kinds of resistance would follow? How should that resistance be met?

- Does the envisaged reconstituted society take account of gender relations? How will gender be constructed within political, legal and social reform, and institution-building?  

It might finally be fair to ask whether there is a better model elsewhere. Is it in fact possible to construct a functioning democracy that takes full account of gender in the wake of war? This question should not be given either a positive or negative answer. Bosnia might be dismissed as a “basket case” in line with the tendency to pathologize the Balkans and to demonize nationalist leaders, but civil society initiatives that provide important insights for women’s agency in developing participatory citizenship despite the restraints of ethnicity show the falsehood of this assumption. In addition, the international community has invested too much in Bosnia for us to ignore the broader objectives of reimagining democracy and citizenship.

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436. These questions are adapted from Skjelsbaek, supra note 273, at Part 2.
437. COCKBURN, supra note 243, at 174-210; Einhorn, supra note 217, at 118.