



## Using courts to build states: The competing spaces of citizenship in transitional justice programmes



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### ABSTRACT

This paper examines how establishing a new legal institution shapes understandings and practices of citizenship. It does so through a study of the creation of the Court of Bosnia and Herzegovina (CBIH) between 2002 and 2014 and, in particular, its emerging jurisdiction over war crimes trials since 2006. International sponsors of this institution herald the establishment of the Court as an important step toward achieving justice for the crimes committed during the 1992–1995 conflict in Bosnia and Herzegovina (BiH). But alongside its legal function, intervening agencies have emphasised an allied objective to use the Court to consolidate state structures and foster a civic sense of Bosnian citizenship. Using qualitative data, this paper argues that the creation of the CBIH illuminates a series of divergent understandings of citizenship. In particular, while the court seeks to convey a concept of liberal democratic citizenship, this is only achieved through the enrolment of civil society actors operating across BiH territory. Rather than heralding a series of ‘grassroots’ alternatives to official scripts, these social agents see the value of a universal understanding of justice structured around equality and rights, but often failed to see this expressed in the activities of the Court. The paper concludes by reflecting on the relationship between law and citizenship, where the imagined sense of universal jurisdiction is undermined by social concerns relating to the barriers that prevent access to justice.

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### Introduction

On the 6th June 2002 the then High Representative of Bosnia and Herzegovina (BiH), Lord Paddy Ashdown, attended the inaugural session of the Court of Bosnia and Herzegovina (CBIH) and addressed the assembled local and international dignitaries. Reflecting his responsibility for implementing the 1995 General Framework Agreement for Peace (GFAP) and the legislative powers of the Office of the High Representative, Ashdown had recently imposed the creation of the CBIH in the face of domestic political opposition. In doing so, the legal territory of BiH was unified for the first time since the end of the 1992–5 conflict, establishing a jurisdiction ‘above’ that of the two sub-state entities – the Federation of Bosnia and Herzegovina (FBiH) and the Republika Srpska (RS). Ashdown described the impacts of a unified court in terms of fostering liberal democratic citizenship:

[The court] is about protecting the people of this country, protecting their rights and protecting their status as free citizens in a functioning democracy. This court enshrines a simple truth – that everyone is equal before the law. Justice is the foundation on which every society is built. Everything else we want to do here, from jobs to refugee returns to establishing a democratic system, depends on the rule of law (OHR, 2002).

Just over ten years later in a conference room in central Sarajevo, on September 20th 2012, a workshop took place to discuss the findings from research exploring the implementation of the CBIH. In front of assembled Court Officials, members of international organisations, human rights non-governmental organisations (NGOs) and academics, Bakira, the president of a prominent association of women victims of war, explained the difficulties that members of her association faced pursuing justice through the CBIH. Challenging the sense of universal liberal democratic citizenship envisaged a decade earlier, Bakira shook with anger and held pictures of prominent alleged war criminals from the Visegrad area of eastern BiH (Fig. 1):

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Fig. 1. President of the association of women victims of war, September 20th 2012, Sarajevo. Photograph: authors' own.

Since I was a victim and witness at The Hague Tribunal and Court of BiH, I have heard it all and I was aware of it. I feel sorry to say that victims are fed up with all sorts of projects, all kinds of conclusions and reports and nothing has been completed by now [...]. Twenty one years have passed since the war started. Victims are dying every day and they will not live long enough to see justice (Sarajevo Workshop, September 20th 2012)

We start with these two moments in the creation and operation of a state-level court to point to some of the fundamental tensions within understandings of the geographies of citizenship. As much of the scholarship in this field has pointed out, citizenship itself is a contested term, one that orientates attention to both forms of political collectivity and individual political practices (Desforges, Jones, & Woods, 2005; Staeheli, 2011). Starting from this distinction between the collective and the individual we can begin to trace a series of tensions: between citizenship as a form of governmental technique that seeks to order and classify a population and as a set of individual behaviours that seek to intervene and shape the nature of communities and practices of rule (Staeheli, Ehrkamp, Leitner, & Nagel, 2012). Perhaps where this distinction between a governmentally-inscribed form of citizenship and a set of political practices is most starkly reflected is in the conceptual separation between liberal democratic citizenship and civic republican citizenship (Kofman, 1995). Where liberal democratic citizenship emphasises the constitution of certain universal rights that derive from membership of a political community (usually a state), civic republican citizenship emphasises the duties of the individual in serving and constituting such a political community. Therefore in Ashdown's framework, the establishment of the Court consolidates liberal democratic citizenship in BiH, a territory partitioned down ethnic-lines after the GFAP (see Campbell, 1998; Toal & Dahlman, 2011). Capturing the celebratory spirit of early works on the expansion of liberal democratic citizenship (see Marshall, 1950); the court was imagined by Ashdown to play a significant part in unifying the state and cultivating a sense of the universal rights and duties that comprised BiH citizenship.

In contrast to Ashdown's expectation of universalism, Bakira's response a decade later speaks of the uneven nature of access to the legal process. In Bakira's view the lack of legal support, the exclusion of women from decision-making bodies and the absence of victim's voice from the judicial process were all playing a role in

marginalising individuals on the basis of wealth, gender or geographical location (Sarajevo Workshop, September 20th 2012). In doing so, this statement echoes the work of critical scholars who have pointed to the multiple scales of exclusion and marginalisation that are often masked by the purported universalism liberal democratic citizenship (see Hubbard, 2013; Ong, 2007; Valentine & Skelton, 2007). For example, Painter and Philo (1995) argue that it is through the demarcation of 'insiders' and 'outsiders' that liberal citizenship asserts its right to rule (see also Isin, 2002; Isin & Turner, 2007). One of the key messages of this work has been that forms of exclusion take many forms, from the securitisation of borders and tightening of immigration controls (Leitner & Strunk, 2014; Sparke, 2006), to socially and culturally inscribed mechanisms of exclusion based on gender (Goldring, 2001), class (Pykett, 2009), sexuality (Binnie & Valentine, 1999; Hubbard, 2013), age (Jeffrey, 2010), disability (Valentine & Skelton, 2007), race (Kofman, 1995) or intersections of these lines of identity (Preston, Kobayashi, & Man, 2006). The co-presence of so many strands of potential exclusion has led scholars to rely upon a distinction between *de jure* and *de facto* citizenship to highlight the distinction between the conferment of citizenship rights and the possibility of practicing or accessing such rights (see, for example, Valentine & Skelton, 2007).

But we must be careful to avoid drawing the straightforward conclusion that this work illuminates a neat distinction between inclusion and exclusion in the operation of citizenship. Qualitative studies of the everyday mechanisms and actions through which citizenship is asserted have pointed to the complex and plural nature of claims to membership of political community, where the dividing lines between legality and illegality, the formal and the informal, or the citizens and outsider are often indistinct and more commonly disputed (Holston, 2008; McFarlane, 2012; Roy, 2005). Consequently, much of the scholarship critiquing a liberal democratic understanding of citizenship has done so in order to highlight the alternative citizenship practices that may be being masked by focussing solely on the allocation of formal political rights. In this sense Bakira's statement must be coupled with her position within a civil society organisation mobilising to enact change: her association is actively demanding its legal rights and setting about to voice concerns. This form of *active* citizenship can be interpreted in two ways. In the first it reflects a move towards a model of civil republican citizenship, rejecting the atomised individualism of the liberal democratic model and emphasising a sense of collective politics required to lay claims to rights (Lister, 1997: 32). This expectation of civic collective action has been a feature of international intervention in developmental and post-conflict environments (Mohan, 2002), and not least in BiH (Belloni, 2001). As a second interpretation Bakira's actions could be understood as a form of *activist* citizenship, a more radical form of insurgent practice that seeks to transform the existing political system and enact new forms of rights (Holston, 2008; Isin, 2009; Leitner & Strunk, 2014). Such actions may not be directed solely against the state, but instead confront the multiple scales – from the city to international organisations – from which perceived injustices stem (Mirafab & Wills, 2005; Ong, 2007; Painter, 2002, 2008).

This paper draws on this literature to trace the tensions between international expectations of liberal democratic citizenship and the forms of political and legal action that surround state building processes. By tracing the relationship between forms of governmental intervention, and in particular the establishment of a new legal institution, we are keen to pursue in empirical detail the notion of citizenship as a "dynamic concept in which process and outcome stand in dialectical relationship to each other" (Lister, 1997: 35). Rather than reifying a straightforward geometry between state-sanctioned notions of liberal democratic citizenship

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