The Fractured Soul of the Dayton Peace Agreement: A Legal Analysis

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ESSAY

THE FRACTURED SOUL OF THE DAYTON PEACE AGREEMENT: A LEGAL ANALYSIS

Fionnuala Ni Aolain*

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* Fionnuala Ni Aolain, Assistant Professor. Hebrew University Faculty of Law. This paper was first presented at a conference held at Columbia University on November 21, 1997 entitled Justice and Social Reconstruction: A Conference on the Experience of Bosnia and the Rule of Law. I would like to thank Professor Lance Liebman for inviting me to that event. Some of the ideas for this essay were developed while the author was the Special Representative of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia (ICTY), observing domestic war crimes trials in November 1996. This article does not reflect the views of the ICTY, all opinions expressed are the author's own. However, I would like to note my acknowledgments to all those I met during my visit to Bosnia in the fall of 1996 including Prof. Zavko Grebo, Zdravka Grebo-Jevtic, Amra Kapetanovic-Steers, Prof. Cazim Sadikovic, Michael O’ Flaherty, and Amira Sadikovic. My appreciation to Professor Colm Campbell and Dr. Moshe Hirsch for their helpful comments. The final product remains entirely the responsibility of the author.
And as a result of centuries of war and migration, one nation's historical claims can only be one layer of an archeology of claims by separate nations for the same land, on which now live populations mixed ethnically or with multiple national identities.¹

INTRODUCTION

The Dayton Peace Agreement ("DPA," "Dayton Agreement," or "Agreement") was signed as a means to bring to an end the war in Bosnia and Herzegovina.² In the Western guarantor states the agreement was widely heralded as a triumph of diplomacy over chaos, a reasoned agreement over crude warfare, and a multilateral agreement that forced confirmation of the legal existence and viability of the Bosnian state by all parties to the conflict. Despite the undeniable accomplishment of ending mass fratricidal violence on Bosnian territory, the Agreement is a paradox of both substance and implementation. The DPA confirms the existence of the state yet contains the ingredients that divide it into separate political and legal entities. The treaty pays homage to the language of self-reliance while ensuring that a long-term international presence remains a necessary element for the survival of the state. The Dayton Agreement fortifies the tripartite division of nation, community and individual in the new Bosnia where ethnic identity is all, and the body politic is a fractured soul.

The Dayton Agreement was negotiated in a purposefully created hot-house environment at the secluded Wright Patterson Air Force Base in Dayton, Ohio. It was signed by the negotiating parties and a group of guarantor states, who were prepared to endorse and materially support a peace settlement for the Bosnian war, in Paris, on December 14, 1995. The Dayton Agreement came after numerous failed diplomatic attempts by Western mediators to secure an end to war. The DPA is a complex package of inter-related texts augmented by Security Council resolutions that establish the international forces and organs which support the Agreement. The DPA is the core of the compact among the belligerent parties. Its preamble acknowledges the need for a comprehensive settlement among all factions. The text of the DPA makes broad commitments to military arrangements among the parties, demarcation lines, election programs, constitutional arrangements for Bosnia-Herzegovina, and the establishment of new Commissions and Institutions to support a peaceful transition and the observance of human rights. In addition, the terse general text is supported by numerous detailed Annexes which spell out in greater depth the parties’ commitments. Annex 1A concerns itself with the military aspects of the Peace settlement, including the cessation of hostilities, the redeployment of forces, and the deployment of the Implementation Force (“IFOR”).


4. These included the EC Conference on Peace in Yugoslavia (“Carrington”); the UN/EC co-sponsored *International Conference on the Former Yugoslavia*, August 26–27, 1992; and the Vance-Owen Plan (the Principle stages of the Vance/Owen Plan are set out in UN Documents S/24795, Annex VII, 31 I.L.M. 1584 (1992)). It should be noted that the argument may be made that the inclusion of Russia in the Contact Group, facilitated largely by the United States, was a mechanism to avoid movement on “hard” issues. On one view the inclusion of Russia appears to create a varied international presence and consensus on Bosnia, it also creates the indefinite inclusion of internal competing agendas in the management of the conflict.


6. See DPA, supra note 2, at 89.
7. See id.
8. See id. at 90.
9. See id.
10. See id.
11. See id.
12. See id.
the measures dealing with regional stabilization, including confidence
and security measures, and regional arms control principles.\textsuperscript{14} Annex 2
establishes the inter-entity boundaries.\textsuperscript{15} Annex 3 is concerned with the
modalities of elections, guarantees for the protection of fundamental
rights, democratic structures, and inter-institutional relationships.\textsuperscript{16} An-
nex 4 contains the constitutional framework for Bosnia-Herzegovina.\textsuperscript{17} Annex
5 provides for the binding arbitration of disputes arising between
the Bosnian Federation and the Republika Srpska.\textsuperscript{18}

Annex 6 devises the domestic institutional structures designed to
protect and enforce human rights in the post-war phase.\textsuperscript{19} These struc-
tures include a Human Rights Commission, an Ombudsperson, and a
human rights judicial chamber. Annex 7 establishes the mechanisms
intended to facilitate the return and protection of refugees, including a
Commission for displaced persons and refugees.\textsuperscript{20} Annexes 8-11 con-
cern themselves respectively with the preservation of National
Monuments, Public Corporations, Civilian Implementation and the
creation of an International Police Task Force.

The DPA is an agreement with inherent limitations. Yet, despite
these congenital defects, it is the sole framework that guides the new
Bosnia in its post-war phase. This essay examines the prognosis for one
element of Bosnia's institutional reconstruction: the Bosnian legal sys-
tem. This essay also illustrates the inherent problems of the DPA with
respect to legal institutions and culture in Bosnia. By understanding the
shortfalls of the international support structure and its domestic fledg-
lings, we may still have time to correct some of the deficiencies that
have been imposed or agreed upon since December 1995.

In this corrective process there should also lie some deeper
reflection. It leads me to deliberate on the wider issue of whether the
international community should require any minimal thresholds in its
facilitation of peace agreements among factious third parties. Is any
agreement acceptable as a means to end mass violence? Or rather, are
there minimal protections related to both the integrity of the individual
and state that are non-negotiable in such processes. An agreement born
out of the policies of ethnic cleansing and massive human rights

\textsuperscript{14} See \textit{id.} at 108-11.
\textsuperscript{15} See \textit{id.} at 111-13.
\textsuperscript{16} See \textit{id.} at 114-25.
\textsuperscript{17} See \textit{id.} at 125-30.
\textsuperscript{18} See \textit{id.} at 130.
\textsuperscript{19} See \textit{id.} at 130-34.
\textsuperscript{20} See \textit{id.} at 136-41.
violations must ensure that it is not a vehicle to facilitate the continuation of the war by other means.

This essay also examines the substantial bilateral relationships between the domestic and international legal systems that have had enormous effects on the perception and efficacy of the local legal order. In particular, it charts the effect of the International Tribunal for the Former Yugoslavia on local legal culture and the potential for greater liaison and support between local and international legal entities. This essay also notes the extent to which overlapping and confused mandates by a myriad of international organizations, many of which exercise legal functions, have been unresponsive to or dismissive of localized capacity.

A. Restoring Legality—Some Principles

In the process of reviving Bosnian civil society, an indispensable element is the capacity and strength of the Bosnian legal system to regenerate and revitalize. Equally, regeneration on any level in Bosnia requires tackling some hard issues from the outset. Each institutional structure is a part of the larger conflict of whether this state can be reborn as an ethnically mixed and inter-mixed one, or whether it will continue to perpetuate a fight over nation within territory.

Justice systems are among those institutions which suffer most during violent conflicts. In a state born out of the breakdown of law and legality, law frequently has little currency for either political leadership or the general populace. The descent to conflict is a rejection of law and legality in its most crude form. Rehabilitation of the legal system is not only about rebuilding courthouses and appointing unbiased court officials to interpret the reinvented rules. The rehabilitation process is far more fundamental than that. It requires no less than re-establishing the legitimacy of law itself.

I begin this discussion from the departure point of three principles which I use to inform the discussion of the interrelationship between the national and international in the reconstruction of a failed state entity: in this case, the Bosnian legal system. The first of these principles is interdependence. The Bosnian legal system, as with most other aspects of life in a shattered state entity, is not and cannot expect to be independent for some considerable period of time. In its post-Dayton guise the legal system is not only dependent on, it is also a construction of, the international community. The international community is the guarantor and

21. See generally BASSIOUNI ET AL., GUIDING PRINCIPLES FOR COMBATING IMPUNITY FOR INTERNATIONAL CRIMES (on file with author).
chief architect of the shape and structure of Bosnia as it exists today. This is a relationship of responsibility, notwithstanding domestic political rhetoric in endorsing states, which seeks to undermine this obligation by advocating unilateral withdrawal of international support pillars be they military, civilian, or financial in character. In as much as the Bosnian legal system is a situation of dependency on the international community, so too is the latter reliant on a strong and functioning system of Bosnian law. No withdrawal or long-term solution to the political crises that have beset Bosnia can be envisaged without a legal structure to ease the way out for the international community. Dependence is a bilateral, symbiotic relationship.

The second principle is accountability. Just as it is paramount that restructuring take place, it must take place in an environment of openness and trust, both from the international community and from the insider Bosnian communities. Accountability reflects dual duties of the receiving state and the facilitators of reconstruction. Some have argued that accountability is achieved through “the requirement that a government’s continuation in office depends on the active approval of the people as expressed in competitive elections.”22 As this essay will explore in greater depth later, periodic elections in a society fraught by multiethnic tensions and competing nationalisms is neither sufficient to protect accountability nor even democracy itself. A wider vision of accountability includes respect for the rule of law and individual rights, popular participation, pluralism, fair competition, and market development.23 Accountability requirements also apply to states facilitating reconstruction with military and economic aid. Accountability means not only the translucence of financial investments, but also the transparency of agendas and full knowledge as to expectations and intentions on both sides.

The third principle is that of respect. Restructuring is not another form of neo-colonialism in legal guise. The international community has taken over the functions of the state in various ways (albeit with the rhetoric of temporariness). They are conflict mediators, police forces, rule makers, standard bearers, watch dogs, and charity organizations. This must not impede or stifle the capacity of internal political communities to rebuild institutional capacity. In this view, real assistance to

23. See David Williams & Tom Young, Governance, the World Bank and Liberal Theory, XLII POL. STUD. 84, 85 (1994).
persons in Bosnia-Herzegovina means developing the capacity to solve problems for themselves. It means assisting and not hindering. To find lasting, stable solutions to the Bosnian crisis, outsiders have to think about really supporting the development of institutions and a political climate that would enable people to generate solutions. This is meaningful localization and not lip-service to subsidiarity. Such a simple principle stands in notable contradiction to much of the philosophy behind institution-building and democratization efforts undertaken by many Western states in recent years. At the root of these efforts has been the concept of institutional modeling. The underlying idea being that if each major socio-political institution could become like counterpart institutions in Western democracies, the society as a whole would transform. This model has a tendency to overlook existing domestic structures that function adequately in the rush to import foreign exports. This model suffers from the defect that its institutional components, presumed universalistic, have country-specific, often American features. In short, institution-building programs are blithely unaware of the variety of political and legal forms that democracy and rule of law come in. Respect means that the mass importation of other legal systems' structures and principles must be avoided, and that due consideration be given to the validity of cultural legal pedigree of the jurisdiction.

B. The Responsibility of the International Intervener

Some argue that the DPA was the “best” deal that could be made in the particular circumstances of its birth. The realities of an ongoing armed conflict, the political marginalization of a number of key negotiators, the limited patience of the contact states, and the fragile consensus among them would inevitably hamstring any outcome. While all these empirical assessments are true, they are an overstatement of the limitations on the process.

It is easily conceded that the major task confronting the Western powers who convened the Dayton conference was the ending of violence. This

25. As Carothers points out:
Consciously or unconsciously, many Americans have a tendency to confuse the particular forms of American democracy with the basic idea of democracy itself, either out of the hubristic belief that America is the most democratic country in the world or out of ignorance about the forms of political life in other democratic countries... The United States is scarcely the only donor country that bases its democracy assistance programming on country specific models.

Id. at 121.
was the primary goal and a goal of immense rhetorical power. The Bosnian war was unique in modern terms, as a slow genocide was visualized for worldwide television audiences on a nightly basis. Thus, ending violence had a significance not only for civilians and combatants directly concerned with hostilities, but also for a wider, watching public. The effect of this was clearly and correctly to focus attention on ending armed conflict. However, the danger of this concentration was that the ending of violence in itself was the goal, rather than addressing the causal roots of conflict or the creation of meaningful structures that would prevent its recurrence.

Getting the balance right in such situations is difficult for the states facilitating resolution. There was no possibility that clashing communities in the midst of ongoing destruction were interested in or able to create common norms or institutions from the “bottom up.” Indigenous solutions are impossible to cultivate when mass killings and expulsions continue. However, a heavier burden is placed on the interveners and facilitators. Peacemaking comes with obligations. While a worthy endeavor, facilitating the transition from armed conflict to co-existence is not the end in itself. The intervener is judged on whether the facilitated transition to co-existence is a durable one. Intervention is judged equally on the rhetoric used by the facilitating states in creating the process and its outcome. To compromise on setting high standards of accountability for intervening states is to settle for a position that failed or weakened states and their citizenry are entitled to a lesser version of statehood because the components of state are being created by international mediation.

When facilitating states are prepared to set low thresholds of conflict resolution from the outset, weak settlements are made.26 The


It is only too easy to concede that the Dayton Agreement was driven by the compromise that had to reflect the realities of four long years of war, ethnic homogenization, and the mapping of ethnically defined territories in the region. The diplomatic achievement of this compromise should not be underestimated, but its compatibility with the universal demand for the protection of individual human rights and freedoms must be tested.

Id. at 135.

28. Zoran Pajic is strongly critical of the Dayton Agreement on the basis that it sends the wrong message to those who engage in genocide as a means to acquire territory. Pajic
contact states and the fault lines between them, which characterized the management of the Bosnian conflict, are squarely at the root of a compromise on Bosnia that is flimsy on procedure and substance. The result is a weakened and compromised state, the very opposite of the stated rationale for negotiation. This resort to placing responsibility firmly on the shoulders of the international community may seem simplistic; finding an easy scapegoat for a complicated problem. Nonetheless, I would assert vigorously that negotiated settlements facilitated and prompted by the international community remain its responsibility, as much as they do that of the representatives at the table. By setting the agenda of facilitation the international sponsors also prophesy the outcomes that emerge. There should be no illusions about weak settlements solving complex problems. The opposite is true. The Dayton Agreement leaves open wide fissures that the international community has little choice but to constantly renegotiate, making detachment from Bosnia impossible in the short or medium term.29

What then is the choice in the Bosnian context? Renegotiation of the peace agreement is both unlikely and undesirable in the short term. Ethnically driven internal politics might view a reopening of negotiations as a means to limit positive and conciliatory commitments already made, rather than as a step towards deconstructing the ethnic monolith. However, as this essay shall illustrate, to view the Dayton Agreement as fixed, is to eschew the possibility of recreating Bosnia as an ethnically mixed, multinational state. Thus, I propose a middle position. That is, that the international community, which has much of the day-to-day responsibility for Bosnian societal activity, needs to view and execute the DPA as a transitionary structure, whose primary advantage has been to

argues, "the Dayton Agreement sends the wrong message to warlords worldwide by implicitly legitimizing the gains of sectarian violence that often amount to the commission of war crimes and crimes against humanity." Pajic, supra note 27, at 126. One could argue that a weak settlement is evidenced by two factors. First, the physical reality that the inter-entity boundaries conform to the frontlines carved out along ethnic cleansing during the war. Second, the map of Bosnia and Herzegovina is constructed on the basis of the polices of forced expulsions and displacement of persons during the war, based on their ethnic identity. See Francis A. Boyle, Negating Human Rights in Peace negotiations, 18 HUM. RTS. Q. 515 (1996).

create a stable and secure environment. Thus, by encouraging civil society and emphasizing to the ethnic elites that ethnic hegemony and partisanship is only an intermediate stage, guarantor states may create a climate in which alternative structures are encouraged and fostered. By fortifying the DPA's divisive structures, the alternative message from the international guarantors emboldens those whose stock rises in the divided, ethnically purified entities that currently comprise the nation of Bosnia.

C. The Challenges to Rebuilding

The Bosnian legal system is the direct descendant of the legal system of the former Yugoslavia. Each one of the successor states to the former Yugoslavia did not instantly create new legal systems and insti-

30. A practical example of fostering alternative structures can be seen in the existing electoral process and in the possibilities that exist to reform it for the international community. As the International Crisis Group has pointed out, "The fundamental flaw in the existing electoral system is that candidates need only to seek votes from one ethnic group to win office and the consequences is a vicious cycle of fear and insecurity." INTERNATIONAL CRISIS GROUP, BEYOND BALLOT BOXES: MUNICIPAL ELECTIONS IN BOSNIA AND HERZEGOVINA ii (1997) [hereinafter ICG]. All electoral processes in Bosnia are facilitated, funded, and overseen by the international community in various guises. Thus, the OSCE Supervisory bodies include the Provisional Election Commission, the Election Appeals Sub-Commission, and the Media Experts Commission. Additional bodies with international appointees include the Citizenship Verification Sub-Commission and the Future Municipality Sub-Commission. Finally, during September 1996 and September 1997, municipal elections the OSCE Office of Democratic Institutions and Human Rights set up an Election Observation Mission, which brought in hundreds of external short-term observers plus a core team of ten to twenty-five observers to evaluate the entire election process. See ICG, supra, at 7; see also DPA, supra note 2, at 114–125; Daniel J. Blessington, From Dayton to Sarajevo: Enforcing Election Laws in Post War Bosnia and Herzegovina, 13 AM. U. INT’L L. REV. 553 (1998). This massive effort to ensure a working electoral process tells us that the international community is not without resources and a capacity to encourage structural changes to an electoral system which may inadvertently provide pseudo-democratic legitimization of extreme nationalistic power structures. The ICG has advocated the following:

It is possible, however, to design an electoral system which would generate very different results and help restore trust between the peoples of Bosnia and Herzegovina. If, for example, candidates were obliged to seek support from voters of other ethnic backgrounds in addition to their own in order to be elected, the political equation would be transformed. Critically, a Bosniac could only in practice be elected if acceptable to Croats and Bosniacs, and a Croat could only be elected if acceptable to Bosniacs and Serbs. This may be achieved in many ways. One is to set the ethnic proportion of legislative bodies to be elected in advance, that is the number of Bosniacs, Serbs, Croats and Others to be elected, and then let all Bosnians vote for representativeness of all groups.

ICG, supra, at 22.

31. As Bosnia has not been able to draft new legislation since independence in 1992, the applicable law is still largely the legal codes of the former Socialist Federal Republic of Yugoslavia, which continues to bind its successor states.
The Dayton Peace Agreement

Institutions. The outward forms and the symbols in the courtroom may have changed, but this is fundamentally the legal system of a socialist state with both a legal pedigree worthy of recognition and a notable number of built-in problems which need to be addressed. Further, while the new constitution of Bosnia-Herzegovina guarantees the democratic minimal of multiparty elections, free elections, and an open media, there is no reservoir of tradition to support a transition to their normalization as part of ordinary political currency.

While there are admirable criticisms to be made of the pre-existing legal and political order in Yugoslavia, what should not escape notice for the purposes of this discussion is the extent to which the pre-war system sustained a complex web of constitutional checks and balances. In short, identity was central to political structures, but identity and territory were not crudely matched pairs in the prewar constitutional arrangements. While it is also true that not all identities were equal, Albanians being the case in point, the exceptions should not detract attention entirely from an ordered constitutional structure that sought to create a balance between group identity and national cohesion. The founding peoples of Yugoslavia were Croats, Macedonians, Montenegrans, Serbs, and Slovenes, with Muslims being added after the 1963 constitution. Susan Woodward describes the arrangement as follows:

"The six republics of the federation recognized nations as historical-territorial communities. Individual members of the six constituent nations (not fully coincident with the territorial boundaries of the republics) had rights as members of those nations as ethnic peoples (defined by a common religion, language, and political consciousness)." 34

32. As Hansen points out: "Neither of the successor states has traditions of multiparty democracy, free elections and independent media as laid out in the new Bosnian Constitution. In addition, there is a deep mistrust towards security forces, the police and the judicial system." Annika S. Hansen, Political Legitimacy, Confidence-building and the Dayton Peace Agreement, 4 INT'L PEACEKEEPING 74, 75 (1997).

33. The situation of Kosovo highlights all the deficiencies of the pre-existing constitutional structure of the former Yugoslavia. Kosovo is populated by a large majority of ethnic Albanian Muslims, seeking the right to self-determination, and posited against a dominant Serbian political culture that views Kosovo as the cradle of their civilization. For recent views on the upsurge of political activity on Kosovo, see generally Jonathan Clarke, Don't Encourage Separatist Aims of Kosovo Albanians, INT'L HERALD & TRIB., Jan. 12, 1998, at A4. See generally David L. Phillips, Comprehensive Peace in the Balkans: The Kosovo Question, 18 HUM. RTS. Q. 821 (1996); Rod Usher, Kosovo's Crisis, TIME, May 4, 1998, at 18–19; Massimo Calabresi, Kosovo Smolders, TIME, May 11, 1998, at 36; Anna Husarska, It's Too Late for a "Preventative Deployment" in Kosovo, INT'L HERALD & TRIB., June 14, 1998, at 36.

34. Woodward, supra note 1, at 31.
The DPA and its current epilogues makes no attempt at either sophistication or intricacy. The territory/identity pair has been forged and its limitations are being clearly seen. The Bosnia that came into being after the Dayton Agreement was the effective consolidation of division. Within the guise of unity was the de facto partition of the country among communities to form more homogenous ethnic zones. The incompatibility of this duality with basic democratic principles illustrates the wide chasms of visioning for Bosnia's future stability.

In the pre-war context the privileged ethnic groups were regarded not as minorities but as "constituent people." There is a vast difference between both concepts. A constituent people is equal in status with all other "peoples." Its rights are not the product of majority charity but an entitlement on the basis of parity. No doubt, it can be said that the terminology of "constituent people" gave rise to the language of self-determination and secession. While I acknowledge that this link was made as a political matter, one does not necessarily lead to the other. But, it means without any doubt that to move from the status of a "constituent" people to that of a minority is a demotion and was collectively understood as such in the break-up of the Yugoslav Federation. In the DPA framework, the protection of "entities" has hidden this demotion quite strategically. The DPA does not address the problem of accommodating peoples accustomed to formal legal equality as a constitutional matter. It simply papers over the problem by entrenching the segregation of those same peoples. Yet, this problem is not solved. This is because the international community also continues to insist rhetorically that Bosnia and Herzegovina must be rebuilt as an ethnically integrated state. Should that rhetoric move to practical action, internal and external actors will be faced with the conundrum that moving peoples towards integration requires a confrontation with their group

35. See Sophie Albert, The Return of Refugees to Bosnia and Herzegovina: Peace-building with People, 4 INT'L PEACEKEEPING 1 (1997). Albert argues that the DPA was a compromise between two views of the causality of the war. The first thesis depicts the war in Bosnia as a war of aggression, in the context of the breakup of the Yugoslav Federation, motivated by Serb leadership, strengthened by nationalist propaganda. Id. at 3. The second thesis views the conflict as internal ethnic conflict. In this viewpoint the war can be summarized as "a struggle between the creation of Bosnian nation grounded on a non-ethnic political citizenship on the one hand, and on the other the creation of political communities grounded on ethnic identity with ethnic borders which could secede." Id. at 3. Albert insists that the international community fluctuated between these positions, and that the tensions between them are also inherent in the Dayton Agreement. She says: "Dayton did not comply with the Commission's [Badinter] legalist ruling about the concept of self-determination. This has become the pretext to divide the country into two self-determined entities, whilst at the same time, providing a facade of unity and integrity for the state of Bosnia and Herzegovina." Id. at 4.
status. As yet, the international community has not learned the historical lesson from the former Yugoslavia that there must be a half-way house between complete apartheid and integration on the basis of de-motion in status for one group. This half-way house is the unknown recipe for stability and meaningful equality in a multi-ethnic state.

D. The Constitutional Conundrum

Deeply implicit in the Dayton Agreement is the overarching goal of the guarantor states to germinate democratic roots in the ashes of the successor states to the former Yugoslavia. At least, that is the theory. Elections, constitutions, constitutional courts, human rights protections, and due process mechanisms play a rhetorical and public role in the political transformation that has been wrought by Dayton. The war is over, and peace is brought by the carriage of democracy. Less overtly examined is the question of what form of democracy has been exported to Bosnia, a minimalist or maximalist version? Arend Lijphart has made strong claims that the form of democratic structure most appropriate for a deeply divided society is that of “consociationalism.” In this way of thinking majoritarian structures undermine the project of remolding culturally fragmented societies. Consociational or consensus democracy requires a number of a priori schematic commitments: first, grand coalitions; second, stabilizing elite behavior; third, segmental autonomy;

36. In some ways this problem is already being encountered in the attempts to reintegrate refugees into their former communities. As Albert points out, the testing ground for integration and re-creating multi-ethnicity lies with returning refugees. She notes:

By returning, people have been expected to rebuild the multi-ethnic composition of Bosnia and Herzegovina. But in that matter the Peace Agreement is ambiguous and inconsistent. It does not provide sufficient safeguards in terms of institutions, guarantees for the re-possession of property and homes for those who have been evicted, or freedom of movement and security for returnees if they are returning to an entity where another ethnie is in a dominant position.

Id. at 1. For Albert, it is the vulnerable refugee population which is being used as the tool to create an ethnically homogenous nations in a fragile, multinational state. They are the bodies expected to erase the consequences of ethnic cleansing and contribute to the rebirth of multi-ethnicity. For recent evidence of failure of that political goal, see Chris Hedges, Fearful Serbs Fleeing Last Enclave in Croatia, INT'L HERALD & TRIB., Dec. 18, 1997, at A4. See also R. Jeffrey Smith, Legal Ethnic Cleansing Keeps Sarajevo Muslim, INT'L HERALD & TRIB., Feb. 3, 1998, at A4.

37. Arend Lijphart, Consociational Democracy, XXI WORLD POL. 207 (1969); see e.g., AREND LIJPHART, DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION (1977); Arend Lijphart, Democratic Political Systems Types, Cases, Causes, and Consequences 1 J. THEORETICAL POL. 33 (1989).

38. For Lijphart, the behavior of elites is crucial to creating a stable democracy in a highly plural society. Citing Claude Ake, Lijphart argues that as a result of overarching cooperation between elites, a divided society can “achieve a degree of political stability quite
fourth, proportionality; and finally, mutual veto. While some of these elements are present in the political legacy of the Dayton Agreement, many are missing. Elite political behavior remains combative, continuing to aggravate mutual tensions and political instability. Political cooperation is markedly absent in the common institutions, and extensive governmental coalitions are not on the horizon. This leads to a more fundamental question: whether in fact, the form of democracy envisaged by Dayton can be properly termed "democracy" at all, or is more aptly characterized as a form of liberalization with some democratic coating? This is a highly significant question. If the Dayton Agreement was content to set and endorse low democratic thresholds, arguably such schema will serve to reinforce ethnic political partition, rather than to encourage an inclusive political spectrum. If we view the DPA as the commodity of intensely divided political elites, determined to maintain internal political hegemony in the physical space accorded out of proportion to its social homogeneity;" See Lijphart, Consociational Democracy, supra note 37, at 212. The lack of will by political elites in Bosnia and Herzegovina to stabilize the system by acting as a cartel of elites in cohort rather than in conflict, points to the limitation of democratic roots inherent in the existing political structures. Hansen points out, "The political leadership has shown little will to cooperate productively and governing institutions are either non-existent, ineffective or corrupt, and seriously undermine all efforts to develop people's confidence in peace." See Hansen, supra note 32, at 77.

39. See e.g., Smith, supra note 36, at A4.

40. Under the Dayton agreement, the legislative function is performed by the Parliamentary Assembly. In both chambers, the House of Peoples and the House of Representatives, power is distributed in a two-to-one ratio with respect to the two entities, but equally in regard to each ethnicity: Croat, Bosnian, and Serb. The House of Peoples consists of fifteen members with five Croats, five Bosnians and five Serbs. The basic ratio must be fulfilled for the quorum to function. The members of the House of Peoples are elected by each entity's bodies. The House of Representatives has forty-two members, with two-thirds from the Federation and one-third from the Serb Republic. They are directly elected. The combined houses are headed by a rotating chair, and two deputy Chairs, one from each "nationality." One view of these ethnic quotas is that they were meant to instill confidence for each ethnic group that their concerns would be accommodated, and that each group would receive fair representation. In reality, it is arguable that these quotas do not force cooperation but ensure the perpetuation of ethnic division. Moreover, they may simply paralyze the function of government.

41. Liberalization in the guise of democracy is not a phenomena unique to the Dayton Agreement. As Freji and Robinson point out in a case study of recent electoral trends in Jordan, what is frequently at the core of a political liberalization policy, is a mode of transition from authoritarian to democratic rule. They argue, "it is much more fruitful in a state such as Jordan to understand liberalization as a product of 'strategic choices' made by 'authoritarian incumbents' in response to 'contingencies' then to focus solely on political, social and economic structures as the causal precondition for democracy." Hanna Y. Freji & Leonard C. Robinson, Liberalization, the Islamists, and the Stability of the Arab State: Jordan as a Case Study, LXXXVI THE MUSLIM WORLD 1, 2 (1996). The point is a valid one to keep in mind in the Bosnian context. The liberalization process is not necessarily the product of rational choices by state elites which have their mutual guarantees to the forefront of strategic political choices.
to them, there is strong evidence of "low" and not "high" democracy in their product.\textsuperscript{42} For the purpose of the legal analysis here it is important to reflect on the fact that implicit in this "democratic export" by the mediating Western states is the legal system which supports and enforces it. Legality may not only fail on its own internal terms of reference, but be complicit in a much deeper wound on Bosnian society.

The Dayton Agreement spelled out the new constitution of Bosnia and Herzegovina,\textsuperscript{43} which provided that the two entities, Republika Srpska and the Federation of Bosnia and Herzegovina, are to be regarded as members of a federal state, the Republic of Bosnia and Herzegovina.\textsuperscript{44} It guarantees that Bosnia and Herzegovina "shall be a democratic state, one which shall operate under the rule of law and with free and democratic elections."\textsuperscript{45} From the outset we must understand that the Constitution of Bosnia and Herzegovina is a child of the international community. The Constitution was negotiated at Dayton and accepted by the internal parties concerned in three separate declarations.\textsuperscript{46} This is a Dayton constitution and not a Bosnian constitution. The

\textsuperscript{42} The political elites in Bosnia are clearly driven by real and strategic ethnic nationalism. As Liah Greenfeld points out in her comparative analysis with Russian nationalism, "the respective social elites of these societies have a vested interest in ethnic nationalism, while democratization is emphatically contrary to the interests of these elites, perhaps even more so than was communism." Liah Greenfeld, \textit{War and Ethnic Identity in Eastern Europe: Does the Post-Yugoslav Crisis Portend Wider Chaos?}, in \textit{This Time We Knew: Western Responses to Genocide in Bosnia} 304, 309 (T Cushman \& S. Mestrovic eds., 1996).

\textsuperscript{43} See DPA, supra note 2, at 125–30.

\textsuperscript{44} The EC countries had moved to recognize Bosnia on April 7, 1992. See generally Roland Rich, \textit{Recognition of States: The Collapse of Yugoslavia and the Soviet Union}, 4 EUR. J. INT’L L. 36, 50 (1993). Prior to this, the Arbitration Commission of the Conference on Yugoslavia (the "Badinter Arbitration Commission") had concluded in its Opinion No. 1 of November 29, 1991, that Yugoslavia was in the process of dissolution. See Alain Pellet, \textit{The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples}, 3 EUR. J. INT’L L. 178, 182 (1992). It has further noted in Opinion 4, that although correct constitutional processes had been followed in seeking to gain independence for the peoples of Bosnia-Herzegovina, the absence of a referendum on the matter meant that the conditions for independence has not been satisfied. See \textit{id.} at 49. A referendum quickly followed, which was boycotted by the Serbian minority, but overwhelmingly passed by a turnout of 63.4% of the remaining population. See \textit{id.} Bosnia and Herzegovina was recognized as an independent state when admitted to the United Nations on May 22, 1992. See NOEL MALCOLM, \textit{BOSNIA A SHORT HISTORY} 234–52 (1996). The agreement to create a Muslim-Croat federation was signed in Washington on March 1, 1994, with United States assistance. For greater detail on the substance of the agreement, see MALCOLM, \textit{supra}, at 256–58.

\textsuperscript{45} See DPA, \textit{supra} note 2, at 125.

\textsuperscript{46} See Paolo Gaeta, \textit{The Dayton Agreements and International Law}, 7 EUR. J. INT’L L. 147, 161 (1996). The international scope of the document as Gaeta points out is underlined by the observation that the Constitution was drafted in English and not in the language of any of the three parties primarily concerned with its contents. See \textit{id.} at 160.
difference in what that means is quite substantial. The Constitution is not the product of a lengthy internal "consensus" seeking. While not foisted upon the parties either, and thus not external to them, the Constitution is a document born of the reality of a compact made between an existing and internationally recognized state with insurrectional groups wielding de facto control over part of the territory of that state.47

1. Entities and Citizens

The Constitution is not a document of one nation, but a document that recognizes three nations within its confines. Under the Constitution, the Republika Srpska is recognized as one "entity," a concession to the aspirations of nationhood demanded by its political leadership.48 Equally, the Federation of Bosnia and Herzegovina is acknowledged as an "entity." In fact, the term "entity" appears fifty-five times in the document, the term "citizen" only appears seven times.49 The schizophreria of the document is located in its attempts to reconcile multiple personalities. Thus, there is both the state of Bosnia Herzegovina and the "entities," there is citizenship for the individual located both in the state and the "entities,"50 and passports are issued both by the state and the "entities."51 This is not a constitution whose primary goal is navigating the relationship between the individual citizen and the state.52 The Constitution is a document binding "entities," politically estranged territories forced into a marriage of convenience by the international community. It is not the product of political consensus between leaders and peoples. This is not a peoples' constitution, but an agreement of geographical coercion glued together by common institutions of which the constitution is a part.

At Dayton, there was little hope that the parties negotiating settlement were in a position to avoid the imposition of a constitution.53 The

47. Id. at 161.
48. See DPA, supra note 2, at 125-30.
49. See id.
50. See id. By this, citizenship is granted at two levels, the national and the entity level, and the entity has the first right to issue a passport. Only those not covered by their entities will receive their passport from the national government of Bosnia and Herzegovina.
51. See id.
52. As pointed out to me by Dr. Zoran Papic, the word citizen does not appear in the normative portion of the Constitution. See id.
53. Wolin notes that a constitution in setting limits to politics also sets limits to democracy, frequently constituting it in ways compatible with and legitimating of the dominant power groups in the society. See Sheldon S. Wolin, Fugitive Democracy, in DEMOCRACY AND DIFFERENCE; CONTESTING THE BOUNDARIES OF THE POLITICAL 35 (Seyla Benhabib ed., 1996). The Dayton constitutional result reflects this reality. The negotiating parties were well aware of the Western demand for a constitutional document, and the perceived centrality of
guarantor states, all democratic in orientation, would have seen the commitment to a constitution as proof of the parties' good-will towards negotiation and peaceful resolution. For the parties themselves, a minimalist view of the obligations contained in a democratic constitution (regular open elections held periodically) would allow them to constitute the internal structural arrangements to their own nationalistic advantage. This is precisely the outcome that has been achieved. The Constitution seals the tripartite division of the state, neatly concealed in a package that glosses division with the illusion of rapprochement.

2. Sovereignty and Integrity

The Constitution itself is capable of undermining the sovereignty that comprises the notion of the nation state. State sovereignty is indisputably linked with territorial integrity. The integrity of the state is weakened when the state is divided into self-reliant entities and cracked further by power-sharing formulas that encourage fissure. This is another paradox contained in the Constitution. It bases Bosnia's claim to sovereignty and territorial integrity on international law, recognizing the state to exist within its internationally acknowledged borders. With that claim to sovereignty goes the creation of central government for the state. However, the political reality is that central government is a misnomer. It is the entities who have the greater autonomy; the ceding of power has come from the center, from the state to the internal statelets. For example, while the central government conducts foreign

the Western constitutional model to transition and stability by the guarantor states. It takes little imagination to understand that if the parties were content to concede the principle that they accepted a constitution for which they gained Western approval, while in fact they really only agreed to a minimalist constitution while advancing their own ethnic hegemony within the document.

It is worth noting that the constitutional structure for Bosnia has its basis in a 1982 proposal of the five-state “Contact Group” that prepared recommendations for Namibia’s independence. This was also the basis for the Paris Agreements on the Cambodian transition. See Agreement on a Comprehensive Political Settlement of the Cambodian Conflict, October 23, 1991, 31 I.L.M. 74. See generally Stephen P. Marks, The New Cambodian Constitution: From Civil War to a Fragile Democracy, 26 COLUM. HUM. RTS. L. REV. 45, 56 (1994).

54. See generally Wolin, supra note 53. Wolin argues persuasively that constitutions are tools which facilitate limitations to both politics and democracy. He states:

Constitutional democracy is democracy fitted to a constitution. It is not democratic or democratized constitutionalism because it is democracy without the demos as actor. Its politics is based not, as its defenders allege, upon “representative democracy” but on various representations of democracy: democracy as represented in public opinion polls, electronic town meetings and phone-ins, and as votes. In sum, a constitution regulates the amount of democracy that is let in.

*Id* at 34.
policy, defense policy is the responsibility of the entities. While the rhetoric of the DPA has concentrated on the international commitment to a united Bosnia, both politically and militarily the reality is very different. As Hansen points out, "the distribution of power between national and federal levels illustrates a grave disjunction between the military and political sphere." The presumptions in the divisions of power within the state do not presuppose a unified Bosnia, rather the opposite, fragmented and polarized statelets.

Most problematic is that there is the potential for the Constitution itself to endanger rights rather than protect them. For example, the multi-ethnicity of the Federation may well be unconstitutional by the Constitution itself. The Constitution leaves little scope for protecting multiple rather than singular identities. It is not a document that seeks to carve out a middle ground of inclusiveness protecting rights. Rather, rights are the product of one's self and community definition, presumed to be based on exclusivity.

3. Multiplying Constitutions

The problem of fragmentation has been compounded by the creation of separate constitutions within each of the recognized "entities" under the DPA. Each of the entities has established their own Constitutions and has been given wide powers under Annex 4 to proscribe and enforce laws in fields such as, inter alia, defense, police, citizenship, the issuing of passports, criminal matters, property law, finance, and even external relations and cooperation with other states. It would seem inconceivable to most states to create and endorse opposing centers of legal and political powers within their domestic confines. In short, it would be a form of sovereign suicide for a state. In allowing each entity enormous autonomy to make and enforce law, a natural consequence has been the strengthening of the ethnic partition of Bosnia and Herzegovina. In each entity the institutional structures of the "semi" states reflect one group and are dominated by nationalist parties who are largely committed to


56. See Hansen, supra note 32, at 80.

57. In addition, each entity was given the autonomy to enter into special parallel relationships with neighboring states. See DPA, supra note 2, at 125–130.
their own communities and not to minorities. This weakness of the common institutions serves only to make the entities more self-reliant and to create a situation in which they build up institutional and governance capacity premised on separation while the communitarian representation lags behind. In this manner also, the common institutions are perceived of as weak by their clients, the ordinary citizens of Bosnia and Herzegovina, while the localized “ethnic” structures deliver and seem both legitimate and credible statist structures.

The Republika Srpska has pursued its internal nationalistic agenda by writing a separate constitution considerably at odds with the principle of a unitary state that rhetorically underpins the DPA. The Federation has also written a separate constitution, compounding the legal splintering of the jurisdiction. Recognizing the inherent problems of accommodating two competing and irreconcilable constitutional visions of the state, the Office of the High Representative (OHR) sought in the summer of 1997 to highlight these problems and suggest means for their resolution. The “entity” constitutions have sought to exacerbate the stranglehold of ethnicity politics by law. For example, the Republika Srpska Constitution recognizes only Serbs as citizens of the entity. Bosniacs and Croats are legally constituted as lesser minorities.

The observation by Yugoslav political theorist Vladimir Gligorov has been solidly fortified, “Why should I be a minority in your state when you can be a minority in mine?” This policy is not only a demotion in status from the principle of equality the international community allegedly sought to

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59. As Hansen points out, “The only characteristic of a state denied to the entities is the right to patrol or in any way enforce the inter-entity border.” Hansen, supra note 32, at 80. The lack of agreement on meaningful unitary state structures is illustrated by the deadlock over currency between the entities. Serbs, Croats, and Muslims cannot agree on whose portraits should adorn their common banknotes.

60. As Pajic notes:

... the preamble of the [state] constitution defines Bosniacs, Croats, and Serbs as “constituent peoples” of Bosnia and Herzegovina, while “Others” and “citizens” are mentioned only in passing. Thus, the preamble takes away state sovereignty from the citizens and transfers it to the three ethnic groups; but even this rigorous concept does not apply throughout the country. To be very precise, Bosniacs and Croats are not constituent peoples in the entity of the Republika Srpska, and in the same way Serbs are denied constituent people status in the Federation.

Pajic, supra note 27, at 134.

61. Woodward, supra note 1, at 108.
inject into the peace-making process, it is a thorough reversal of the pre-existing standing of peoples prior to the war. In the former Socialist Federal Republic of Yugoslavia these peoples were defined as belonging to constituent nations, to whom equal rights among and within the nations accrued. The war and the state entities which emerged from it, demoted these rights from those of nationhood and equality to minority status. Thus, while the national structure of enforced constitutionalism has not addressed the gap between minority and constituent nationality head-on, the entities have done so by demoting minority rights in the pursuit of a nationalistic agendas. It bears reminding that all persons in Bosnia and Herzegovina are minorities, but that minority is a feature of geographical location. While the status of individual as minority is relative in Bosnia, legal affiliation should strive to be normative and not dependent here. Such a leap is still missing, absent on the grounds of political expediency.

4. International Standards and the Constitution

A notable feature of the document is its "internationalist" character. It is "international friendly," a clear consequence of the environment of its birth. Thus, it is a constitution which attaches great importance to international rules and principles, with a notable emphasis on human rights. Particular attention can be given to Art. II, para. 2 whereby "the rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia Herzegovina. These shall have priority over all other law." There can be no doubt that the status given to the European Convention on Human Rights (ECHR) is of great symbolic value in the new

62. These include the International Covenant on Civil and Political Rights, International Covenant on Economic and Social Rights, and, the Universal Declaration. However, concrete protection for human rights has been markedly absent from the peace-making process. Carl Bildt pointed out the failures as follows: "Respect for human rights and rule of law are perquisites for a lasting peace in Bosnia and Herzegovina. Despite commitments to uphold the highest standards of human rights protections, the parties have not fulfilled their obligations in this regard." UNITED NATIONS, REPORT OF HIGH REPRESENTATIVE CARL BILDT TO THE SECRETARY-GENERAL, U.N. Doc. S/1996/542 (1996). One commentator has noted that the Preamble to the Constitution lacks reference to the general principles of international law, viewed as regrettable but explained by the United States influence on the drafting of the text. See Pajic, supra note 27, at 129.

63. Eric Stein notes that drafters of constitutions in the post-communist states of Central and Eastern Europe tend to recognize that respect for basic rights and rule of law are foundations of a new democratic order and for admission to the "Western European democratic community of nations." See Eric Stein, International Law in Internal Law: Towards Internationalization of Central-European Constitutions?, 88 AM. J. INT'L L. 427, 429 (1994).
legal order. If it were to be accorded practical daily significance in parallel with that status, its importation might have far reaching results. However, there are inherent shortcomings to be acknowledged, both of the Convention itself and of the deep seated problems within the local legal order which will need to be resolved within the European Convention framework. There is a grave danger that a failure of the Convention in Bosnia would undermine the credibility of the ECHR protection system itself. The ECHR has been the leading regional human rights system since its inception in 1953. It has been stalwart in creating an accessible human rights structure with a marked emphasis on the protection of individual rights. The hallmark of the system has been its commitment to the individual. This convention has developed a sophisticated jurisprudence, marked by a commitment to due process and an expansion of the boundaries of entitlement for the singular person. The ECHR is not a system or a jurisprudence marked by a pre-occupation with group or minority rights, nor is its jurisprudence noted for confronting situations of gross and systematic violations of rights. A number of commentators have remarked upon the limited capacity of the European system to confront mass violations of human rights.

we acknowledge that the European human rights order is struggling to gain institutional capacity in confronting massive human rights violations, premised not only on individual denials of rights but premised upon destruction polices aimed at the group, Bosnia will be a testing ground. The European Convention has to learn a language for systematic violations and must evolve mechanisms, either through the adjustment of individual rights or through the creative absorption of group issues into the individual rights prism in order to confront the kinds of violations that have taken place in Bosnia adequately.\footnote{The struggle for this language and an adequate response to systematic violations are not unique to Bosnia. The European Court and Commission have been plagued by similar issues, particularly in respect of human rights violations from Turkey. One recent response by the Court has been to place a greater emphasis on the implementation of Article 13 of the Convention in the domestic context. See \textit{id}.} The European Convention has been “smuggled into the legal order of Bosnia and Herzegovina.”\footnote{Pajic, supra note 27, at 131.} There should be no expectations that it has tailor-made solutions to the scale and type of human rights violations that took place during the war in Bosnia and which accompany the post-war phase.

Positively, the use of the Convention in Bosnia may set a new and innovative course for the European system in its dealings with the hard issues of group identity in divided societies and the appropriate remedies necessary to confront gross violations of rights. These are the kinds of issues that lie ahead of the European Convention as it expands eastward and absorbs the former Soviet states under its mantle.\footnote{On the issues related to Russia’s accession to the Council of Europe, see generally Bill Bowering, \textit{Russia’s Accession to the Council of Europe and Human Rights: Compliance or Cross-Purposes}, 6 EUR. HUM. RTS L. REV. 628 (1997). Bowering raises the concern that Russia’s non-compliance with the Convention would have major consequences for the legitimacy of the Council of Europe. Rolv Ryssdal also pinpoints concerns about the expansion of the Council that have a clear resonance for Bosnia. He states:} For Bosnia, it should be evident that there is no panacea to confront its human rights

\begin{itemize}
\item the Convention community will be exposed to new influences and traditions. It is no secret that despite the best efforts of these states their legal traditions are not yet in a position to meet the standards required by the Convention. When the Convention was drafted, the rights selected for protection . . . were presumed to be already guaranteed in the legal order of those states. The Convention was thus based on already existing constitutional rights. For many of the new Member States the situation has been inverted; their new constitutions, in so far as they concern human rights, have often drawn heavily on the Convention.
\end{itemize}
violations, past and present. The Convention is a tool which gives a concrete language to human rights in the domestic sphere, but needs adjustment and creative expansion if it is to come to meet the expectations that have been set for it. Equally important to grasp is the reality that notwithstanding the impressive importation of rights and freedoms from international human rights law, they cannot by themselves undo the deleterious effects of the establishment of entities with single or dominant ethnies, whose very existence continue to undermine the most basic of rights.

Finally, the importation of international standards with precedential status over local law is a reminder of the anxiety of the international community over the willingness of the parties to comply with the commitments they were undertaking. International standards and oversight mechanisms were an insurance policy for domestic failure. Unfortunately, it remains the case that these impressive human rights protections are hostage to political fortunes. They can be completely paralyzed by the strong political institutions in the entities which cement the country’s ethnic divisions.

5. Constitutional Evolutions?

Given the limitations described above, what hope is there for the Constitution to facilitate a meaningful amelioration for the status of the rule of law and the protection of rights in post-Dayton Bosnia? First, despite its limitations and the uncomfortable compact it contains, a written constitution has enormous symbolic importance in the post-war period. It stands as a commitment to legalism and structure, a stark

72. This is evident in examining DPA Annex 4, supra, Art. II, para. 8, entitled cooperation. It binds the authorities to co-operate with and provide unrestricted access to: “any international human rights monitoring mechanisms established for Bosnia and Herzegovina; the supervisory bodies established by any of the international agreements listed in Annex I to [the] Constitution; the International Tribunal for the Former Yugoslavia... and any other organization authorized by the United Nations Security Council with a mandate concerning human rights or humanitarian law.” DPA, supra note 2, at 120–121.


74. A Bosnian journalist highlights the point admirably:

Everyone swears on the Dayton peace agreement, on an integral Bosnia, on human rights and respect and pluralism, on the importance of free and fair elections and a dozen nice similar phrases, which are tomorrow supposed to turn Bosnia into a Balkan Switzerland. However, the contrast between reality and words is increasing. Today’s Bosnia is nothing but a castle in the air, whose parts are still being held together by some curious miracle.

Zoran Pirolic, Will Bosnia Survive the Dayton Peace? A Game with Open Cards, DANI, April 26, 1996.
contrast to the trenchant engagement in military politics that characterized political life in Bosnia since 1991. Installing a constitution is a signal to society that the rules on political and social behavior are being regulated and will bear scrutiny. The absorption of that basic creed by a state's citizenry may have a crucial sociological impact on their perception of the state and their status within it.

Second, constitutions can also be subject to change and evolution. The Bosnian Constitution specifically includes provisions for amendment. The procedure requires a decision of the Parliamentary Assembly, with a two-thirds majority of those present in favor of any change. Article X(2) specifically limits constitutional amendments from extinguishing or limiting any rights set out in Article II of the Constitution. It is clear that in the current polarized political climate, constitutional amendment is unlikely in the short-term. Nonetheless, with greater public awareness of the extent to which the Constitution itself is responsible for the tripartite fragmentation of the state along ethnic lines, some movement may be possible. Equally, the international community must play its part. A greater acknowledgement that the Dayton Constitution does little to facilitate an integrative multi-ethnic state may encourage the international community, which is in a de facto position of trusteeship in Bosnia, to foster domestic politics that seek to outgrow the nationalistic straightjacket produced by the Constitution. Similar to my proposals on the Dayton Agreement itself, significant

75. For this view in the context of the framing of the United States Constitution, see generally M. FARRAND, FRAMING OF THE CONSTITUTION OF THE UNITED STATES (1913).

76. This observation is equally valid for any society that has adopted a written constitution. See Letter to Samuel Kercheval, July 12, 1816, in THE PORTABLE THOMAS JEFFERSON 557–558 (M. PETERSON ED. 1975), in which Thomas Jefferson suggests that the Constitution should be amended in every generation, in part in order to promote general attention to public affairs.

77. See supra note 2, at 125.

78. International law recognizes many kinds of dependant states, the status of the state being largely governed by the facts of each state's own situations. Various terms can be employed to describe dependant states. They include vassal states, protected states, protectorates, colonial protectorates or trusteeships. On these entities, see generally I HACKWORTH, INTERNATIONAL LAW 74–97 (1940); 1 OPPENHEIM, INTERNATIONAL LAW §§ 90–94 (Lauterpacht, 8th ed. 1995). Trusteeship may be one appropriate analogy for the situation of the Bosnian state. The trusteeship system was established under Article 75–91 of the United Nations Charter. Brierly outlines the functions of the International Trusteeship system as follows: "to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement." J.L. BRIERLY, THE LAW OF NATIONS 181 (Sir Humphrey Waldock, 6th ed. 1963).
portions of the Constitution should be viewed as transitional. As Bosnia progresses away from violence, society and the constitution should evolve towards a more homogenous framework, premised on multiculturalism and multi-ethnicity. The goal should be to create the conditions that would facilitate positive constitutional growth to take place. This would require carving out a space for the “middle” non-ethnic political voice, which is entirely excluded from the current political spectrum.

It would also require another step. This is the more pervasive project of creating and building constitutional consciousness and consensus within the state. This is a long-term educational process, which seeks to involve citizenry intimately in the legitimization and building of the bedrock for a constitution. It requires political elites and the international community to seek out and inform local communities and ordinary citizens about their constitution. This project, demonstrated concretely in the South African transition, gives citizenry a sense of ownership in their constitution. It promotes knowledge, encourages input into the unfolding constitutional structure, and encourages litigation. In the context of concrete physical needs in Bosnia, such an enterprise has the air of luxury. This is not the case. If Bosnia is to be transformed into a rule of law state, ordinary citizens must be co-opted into that process. Equally, if state building is viewed as a fluid co-operative exercise, movement upon and participation in the constitutional process is an assertive addition to the endeavor.

6. The Common Institutions—A Closer Look at the Constitutional Court

Just as it has been ill-conceived to perceive of ethnic conflict in unidimensional terms, so too must the international community avoid the dangerous path of conceiving of reconstruction in simplistic terms. It is clear that the unification of Bosnia and Herzegovina has little prospect for success unless there is more to hold it together than the “common institutions,” which receive minimal funding and grudging support from the Republika Srpska. There has been no intensive thought given to the extent to which legal institutions constitute
“common institutions.” Foremost among such legal structures is the Constitutional Court. At best, this body could operate as a standard bearer for rebuilding confidence in the rule of law, a meaningful symbol of a functional unitary Bosnia. At worst, it could degenerate into a squabbling forum for the hand-picked representatives of the “entities,” a means to subvert rather than support the inter-dependency of the state.

Article VI of Annex 4 of the DPA sets up the Constitutional Court. Its task is to uphold the constitution. The Constitutional Court of the Federation was officially inaugurated on January 11, 1996 in Sarajevo. Three of its nine members are selected by the President of the European Court of Human Rights, after consultation with the Bosnian Presidency, the other six shall be elected by the Entities. All of the members of the Constitutional Court are to be appointed for an initial term of five years and are not eligible for reappointment. The Constitutional Court’s mandate includes determining whether laws made within the legislative competence of the “entities” are consistent with the constitution. It will also have appellate jurisdiction over issues under the Convention arising out of any judgment from a court in Bosnia-Herzegovina. Its decisions are final and binding. As the institutions and political hierarchies in both entities are dominated by nationalist political personages, there can be real concern that the judicial appointment process will be a reflection of those politics. Other power-sharing institutions in Bosnia-Herzegovina,

80. INTERNATIONAL CRISIS GROUP, AID AND ACCOUNTABILITY: DAYTON IMPLEMENTATION iii (November 1996) [hereinafter AID AND ACCOUNTABILITY]. Carl Bildt, the first High Representative for the implementation of the Dayton Agreement, outlined the difficulties of the common structures in September 1996 stating that the “most difficult and most decisive phase of peace implementation” in 1996, following elections, would be the setting up of common institutions and the arrangements for “true and genuine power sharing.” See 33 UN CHRONICLE (1996).

81. See AMERICAN BAR ASSOCIATION, CENTRAL AND EAST EUROPEAN LAW INITIATIVE ANNUAL REPORT (1995). The CEELI program was significantly involved in making the startup of the Court possible. It provided technical assistance and a two-week workshop for the justices in Washington D.C., in June 1995.


83. Such a fear is confirmed by the recent decision of the Bosnian Parliament to designate for the position of head of the Parliament’s Human Rights and Refugee Affairs Board a man who is suspected in 1992 for having organized rape camps and other atrocities. All three political parties in the Parliament voted in favor of his appointment. Until news spread of his alleged prior actions no challenge was made to his position. Thereafter, the Party of Democratic Action acknowledged its mistake in supporting his candidacy. It is also notable that the internal and external international community ignored the event and its implications for local confidence in the rule of law.
based on the principle of ethnic quotas, have resulted only in gridlock and have not been productive.

The role of an independent judiciary in a society, which has and continues to experience violence, is paramount.\textsuperscript{84} Discharging that obligation is most difficult for the judges in states such as Bosnia which manifest the ongoing effects of a prolonged conflict and a difficult peace. Under the Bosnian Constitution, the judiciary retains significant room for recognizing fundamental rights when interpreting statutory provisions, implementing provisions that conform to principles of fundamental justice, and conducting judicial proceedings. Doing so impartially and professionally is pivotal to maintaining and securing confidence in the rule of law and justice itself. It is of paramount importance that the judiciary itself is aware of its obligations. In order for this to occur a minimum requirement is that officials appointed to judicial office hold the minimal degree of training and are appointed with a view to their independence.\textsuperscript{85} In fulfilling the requirements of judicial impartiality, appointed judges themselves have a particular responsibility to act in a manner that furthers the perception and the reality of their independence from the state. Judges in Bosnia-Herzegovina will carry a heavy burden of distrust and skepticism about law and legality that is the legacy of violent internal conflict. It is a burden that only their active participation and collective integrity may overcome. At the top of the judicial apex is the Constitutional Court. The example set by this judicial body will have definite a effect on other courts and on the response of the watching public.

The Constitutional Court is one of the common institutions envisaged by Dayton as a means to mesh the entities into a state-like existence and force reliance and inter-dependence. Political cooperation among the entities has been sparse and intermittent with respect to both common institutions and other matters.\textsuperscript{86} While the Constitutional Court


\textsuperscript{85} Article 10 requires that “In the selection of judges, there shall be no discrimination against a person on the grounds of race, color, sex, religion, political or other opinion, natural or social origin, property, birth or status” This minimal standard is clearly enunciated in the UN Principles on the Judiciary. See id.

\textsuperscript{86} Inter-ethnic co-operation is still sparse and subject to political dictates. Many of the common institutions outlined in the DPA have not seen the light of day, and institutions of the wartime Bosnia-Herzegovina are still in place. The international conference on Bosnia held in Paris on November 14, 1996 saw this as one of its major points of concern. For example the Human Rights Chamber has been faced with almost a complete lack of cooperation from the Entities governments. See HUMAN RIGHTS CHAMBER FOR BOSNIA AND
has been less subject to interference than have other bodies, it still remains in a precarious position, a hostage to the political fortunes of nationalistic agendas.

E. The Role of Internal International Actors

The role of the High Representative is crucial to any analysis of post-conflict re-building in Bosnia. The Office of the High Representative has primary responsibility for promoting "full compliance with all civilian aspects of the peace settlement." In addition, the High Representative is to oversee the efforts of the parties to rebuild the structures and institutions of government and their endeavors to promote human rights. The High Representative is able to call on international donors, including the World Bank and the European Union, and to withhold aid from those who fail to live up to their Dayton commitments. The High Representative's function is a hybrid of executive and enforcement responsibilities. On the one hand he is a political trouble-shooter, on the other hand he is a mere civil servant overseeing the formal agreements consentingly entered into by the parties themselves. His office is a layer of the cast on the broken body of the Bosnian state. In seeking to mend the physical structures, external actors play the critical role in holding the broken pieces together. The potential for success is predominantly linked to the willingness of the fragmented entities to be thus bound.

Nonetheless, the High Representative has some independent capacity to enforce compliance by the parties to the Dayton Agreement. Security Council Resolution 1022 gave the High Representative the power to recommend the immediate re-imposition of sanctions, should the parties fail to fulfill their obligations. The High Commissioner has been subject to some criticism for his narrow interpretation of that

HERZEGOVINA, DECISIONS ON ADMISSIBILITY, May 1997. Recommendations by the Ombudswoman for Human Rights have equally remained impotent. Some progress has been made. For example, following extensive negotiations the central government (the Council of Ministers) with the two co-prime ministers was formed on January 3, 1997 by the Parliamentary Assembly. This was the first time that the representatives of the three communities sat down together in the Assembly. It remains the case that neither the Presidency nor the Assembly fulfill their constitutional roles.

87. The DPA, supra note 2, Annex 10, Art. II, para. 1, directs the High Representative to "(a) monitor the implementation of the peace settlement; [and] (b) maintain close contact with the Parties to promote their full compliance with all the civilian aspects of the peace settlement and a high level of cooperation between them and the organizations and agencies participating in those aspects."

88. See id. In addition, the High Representative has access to all the information concerning the activities of all external and national bodies who are operating in Bosnia. See id., Annex 10, Art. II, para. 1(f).
power and for remaining silent "in the face of mounting evidence of the 
parties' non-compliance with crucial parts of their civilian obligations 
under the Peace Agreement." A early lack of confidence in the High 
Commissioner's Office is also blamed for the paucity of investment in 
materials and diplomatic resources in that agency, which contributed to 
subsequent robust criticisms of its lack of effectiveness in the field.

The Office of the High Representative is also responsible for draft-
ing a quick start program of legislation aimed at piecing Bosnia and 
Herzegovina back together. This has not yet been implemented. The 
quick-start program includes provisional laws on international economic 
relations, citizenship and passport provisions, a provisional central 
bank, the duration of the parliamentary mandate, immunity, presidential 
succession, air traffic regulations, and the 1997 state budget. In addi-
tion, other international non-governmental organizations have concerned 
themselves with drafting domestic legislation. The Central and East 
European Law Initiative (CEELI) has been advising the Bosnian gov-
ernment in respect of the forthcoming criminal procedural and penal 
codes. While these international efforts are well intentioned attempts to 
transform the framework of law inherited from the former Yugoslavia, a 
word of caution is warranted. Fundamental structural changes to the le-
gal order need to maintain a delicate balance between intrusion and 
genuine assistance. For such changes to take root in the local legal and 
political culture there must be an attempt to build a "bottom up" consen-
sus that such changes are warranted and will be supported by domestic 
legal actors and institutions. It is insufficient for outsiders to create per-
fect paper rules, if they are meaningless to and suffer a lack of support 
from the community that they are intended to benefit.

1. The Human Rights Commission

The Human Rights Commission ("the Commission") was 
established under Annex 6 of the Dayton Agreement. It consists of an 
Ombudsperson and a Human Rights Chamber. The task of both

89. HUMAN RIGHTS WATCH, HUMAN RIGHTS IN BOSNIA AND HERCEGOVINA POST 
90. See Elizabeth M. Cousens, Making Peace in Bosnia Work, 30 CORNELL INT'L L.J. 
789, 815 (1997).
91. See REPORT OF THE HIGH COMMISSIONER TO THE SECRETARY-GENERAL, U.N. DOC. 
S-1996/814, para 86.
93. For a thorough discussion of these bodies, see Jessica Simor, Tackling Human 
Rights Abuses in Bosnia, 6 EUR. HUM. RTS. L. REV. 644 (1997). Thus far, the Chamber has 
heard six cases and made eight admissibility decisions. As of May 31, 1997, 1003 provi-
institutions is to investigate alleged violations of the Human Rights protections entrenched by Dayton. In essence, this means that both bodies have the duty of ensuring that the European Convention on Human Rights, its Protocols, and all additional rights protected by the international agreements listed in Appendix to Annex 6 are observed and enforced in the post-war Bosnia.

The creation of the Commission is a testament to the reality that external standards and actors were essential to facilitate the protection of Human Rights in post-war Bosnia. The intimate responsibility of the international community for the day-to-day upkeep of legal protections is illustrated by the Human Rights Commission. The institution is the creation of the international community. The indefinitely envisaged appointment of eight members of the Human Rights Chamber by the Council of Europe is indicative of the long-term tutelage the domestic legal system faces. The Commission is an example of the lack of faith in the domestic state’s ability to run certain affairs to international satisfaction, thereby creating the need for international personnel to do the job instead. While this ambivalence about domestic capacity and goodwill may well have been warranted at the time of signing the Dayton Agreement, there are some inherent dangers in choosing the path of internal trusteeship for the international and local community. External responsibility may create a monopoly that does not encourage internal capacity building. The international community cannot hope (nor wish) to act in loco parentis to the Bosnian state indefinitely. However, without practically encouraging localized responsibility for enforcement and oversight of legal protections, the path to genuine rather than superficial reconstruction will be much slower.

2. The Office of Ombudsperson

The Human Rights Ombudsperson is authorized to investigate “alleged or apparent violations of human rights.” Her role is to take

94. The eight members were appointed by the Committee of Ministers of the Council of Europe, pursuant to resolution (93)6, as foreign members who were not citizens of neighboring states.

95. DPA, supra note 2, Annex 6, Chapter 2 sets out the framework of the Commission on Human Rights. It is to consist of an Ombudsman and a Human Rights Chamber. The first appointee, who is to hold office for five years (non-renewable term), is not to be a citizen of Bosnia and Herzegovina or of any neighboring state. The Ombudsman is to appoint his own staff. The appointment is to be made by the “Chairman-in-Office of the OSCE” after Consultation with the parties. See id., Art. IV, para 2.

96. Id., Annex 6, Art. V, para. 2. Other Ombudsmen include the international Ombudsperson and the Office of the Federation Ombudspersons report that seventy percent of all
cases only where an individual complainant is prepared to come forward. She has no authority to investigate violations on behalf of a class of complainants. The findings of the Ombudsperson are to be made public, and where a party in violation fails to adhere to the conclusions and recommendations made, this is to be brought to the attention of the High Representative. Simor has argued that the decision by the Ombudsperson to adopt procedural rules of admissibility mirrored upon the European Convention (Articles 26 & 27) creates doubts as to the efficiency and accessibility of her office. She suggests that the office could be creatively reformed by a number of internal reforms. These include: first, that the Ombudsperson should take a less onerous position on admissibility procedures, thus being able to exert jurisdiction over human rights violations clearly outside the less expansive mandate of the Human Rights Chamber; and second, in those cases in which the Ombudsperson decides not to proceed with an investigation, there should be no need for expansive report for non-review. This would allow her office greater time and resources to spend on those cases which merit serious and committed investigation. In this context, the Ombudsperson would be well-served by taking note of the imaginative approach taken by the ECHR in relation to admissibility criteria in the recent past, particularly in relation to cases which demonstrate elements of administrative practice. Finally, the office should proceed with an investigation prior to deciding whether the case information discloses a violation.

The Office of the Ombudsperson has the potential to be a tool that directly responds to human rights violations in an immediate and efficient manner. The procedural reforms to make such a role possible are well-documented and self-evident. However, the role of the Ombudsperson cannot be detached from the extensive international “take-over” of domestic legal functions. The Ombudsperson is appointed by the Organization for Security and Co-Operation in Europe. There can be no doubt that the selection procedure is designed to remove bias and partisan appointments. This is to be commended. However, in this wider examination, it raises serious issues about the ability of the domestic legal system to become self-reliant in the short and long term.

claims received concern property issues. It is estimated that over 600,000 people may be affected by issues relating to property claims. The Commission for Real Property Claims of Displaced Persons and Refugees was established by the DPA (Annex 7) to ensure the right of displaced persons to have their homes restored to them or to receive compensation. See generally Aid and Accountability, supra note 80.

97. See Simor, supra note 93, at 651–2.
98. See id. at 649–50.
99. See DPA, supra note 2, Art. VI.
3. The Human Rights Chamber

The Human Rights Chamber (the "Chamber") is composed of fourteen members, four from the Federation, two from the Republic Srpska, with the remaining eight appointed by the Committee of Ministers of the Council of Europe. \(^{100}\) The powers of the Chamber include the ability to decide upon complaints of human rights violations referred to it by the Ombudsperson or on the basis of complaints made directly by individuals. \(^{101}\) The propagation of accountability mechanisms such as the Ombudsperson has created layers of legal structure that overlap and to some extent have similar aims. Significantly, the Dayton Agreement does not spell out the relationship between the Ombudsperson and the domestic prosecutorial system. Proliferation does not necessarily mean efficiency or improved accountability. One strong image is that a two-tier system of legal accountability has been created. This consists of an existing and insufficiently funded domestic system, the supra-national system of the International Criminal Tribunal for the Former Yugoslavia, and a domestic-international structure which is an overlay on the indigenous legal system. The linkages among the three structures remain imprecisely defined and subject to much local ambivalence.

4. Policing—The Internal and External Dimensions

The rehabilitation of domestic police forces is a crucial aspect of transition in a society that has experienced conflict. This has a two-fold aspect. First, civilianized police forces in a post-war society frequently absorb demilitarized soldiers as a means to contain discontent resulting from demobilization. This may create a surplus of unsuitable police officers and a public perception of their lack of professionalism. In addition, where police forces may have been partisan to a particular "side" of the conflict, their function mandates a restoration of neutrality and the perception of even-handedness. Both of these problems need to be overcome quickly. Second, police officers have an important confidence-building role in demonstrating impartiality among communities and satisfying the requirements of representativeness in ethnically mixed and divided communities. The international community can be instrumental in advancing both goals. \(^{102}\) In practice, the Implementation

\(^{100}\) Again, these members cannot be citizens of Bosnia, Herzegovina, or neighboring states.

\(^{101}\) See DPA, supra note 2, Art. VIII, para. 2.

\(^{102}\) Similar international operations involving police rehabilitation include the experience of the U.N. transitional authority in Cambodia, in 1993. The civil police component of the United Nations Transitional Authority in Cambodia (UNTAC) was supposed to supervise
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Force (IFOR, now SFOR) has had only a limited involvement in the civilian implementation, including the establishment of the police force, and the U.N. International Police Task Force (IPTF) has interpreted its mandate in a limited manner.

The IPTF role, outlined in Annex 11 of the Dayton Agreement, is entitled the "Agreement on International Police Task Force." Annex 11 outlines that the parties to the peace agreement were to request that the Security Council establish a U.N. civilian police operation to assist with law enforcement training, local law enforcement, and the facilitation of a transition to civilian policing. Once the Dayton Agreement was signed, the Secretary-General sent a police reconnaissance mission to Bosnia. He subsequently outlined that "the Task Force will not exercise any executive law enforcement functions. Its effectiveness will depend, to an important extent, on the willingness of the parties to cooperate with it in accordance with Article VI of Annex 11 to the Peace

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103. DPA, supra note 2, Annex 11.

104. Article III of Annex 11 sets out the role of the IPTF as follows:

1. IPTF assistance includes the following evidence, to be provided in a program designed and implemented by the IPTF Commissioner in accordance with the Security Council decision described in Article I(2).

   (1) monitoring, observing, and inspecting law enforcement activities and facilities, including associated judicial organizations, structures and proceedings;

   (2) advising law enforcement personnel and forces;

   (3) training law enforcement personnel;

   (4) facilitating, with the IPTF's mission of assistance, the Parties' law enforcement activities

   (5) assessing threats to public order and advising on the capability of law enforcement agencies to deal with such threats;

   (6) advising governmental authorities in Bosnia-Herzegovia on the organization of effective civilian law enforcement agencies; and

   (7) assisting by accompanying the Parties' law enforcement personnel as they carry out their responsibilities, as the IPTF deem appropriate.

Id., Annex 11.
Based on this cooperative principle, the mandate of the IPTF was confirmed by Security Council Resolution 1035 of December 21, 1995.

The IPTF has deployed more than 1,600 policemen from thirty-four countries in forty stations around the country. Their primary function is to advise and monitor the local police. They are authorized under the Dayton Agreement to have access to all places and records of law enforcement and criminal justice. The IPTF Commissioner has much leeway with the Minister of Interior of both entities owing to his influence with donors regarding aid to the Bosnian police forces. In many localities of Bosnia-Herzegovina, the IPTF, having daily connection with local authorities and communities alike, is the visible face of the Dayton Agreement.

a. Operational Problems for the IPTF

The IPTF has encountered a number of problems since its conception and actualization on the territory of Bosnia-Herzegovina. One outstanding and consistent problem for the IPTF has been the lack of sufficient resources to fulfill their obligations under Dayton. This was initially experienced in the limited deployment of police officers by donor states in the jurisdiction. While the numbers deployed are now consistent with the original mandate, problems persist in the technical and material assistance provided to the officers on the ground. In order to carry out their commitments in a complete and efficient manner, having the resources needed for their work is a matter of priority.

However, as with many mixed post-conflict missions, it is clear that international financial assistance is targeted to the high-profile actors, currently the SFOR contingent. It is harder to convince donors that

106. Note that the High Representative is to provide guidance to and receive reports from the Commission of the International Police Task Force. See DPA, supra note 2, Annex 11, Art. II, para. 1(g).
108. Human Rights Watch reports the following problems:

For example, IPTF in Sanski Most, when Human Rights Watch visited on July 14, has seventeen monitors and only two vehicles (one of which was on loan because the second vehicle was being repaired). The station had only two translators, no telephone, and no base radio. The station commander reported to Human Rights Watch/Helsinki that IPTF/Sanski Most was unable to perform at even the most rudimentary level due to these resource problems.

equal assistance should be prioritized to the “bread and butter” rebuilding, which over the long-term will create the means and the stability to ensure that the high-profile military actors can actually withdraw.

b. Differences in Legal Culture

A particular problem in the early stages of the IPTF deployment was a notable lack of sensitivity to and knowledge of domestic legal culture and rules. Examples of IPTF observers stopping or interfering with local court proceedings alleging an unfair trial were frequent. In many cases the IPTF observers simply had no knowledge of how court procedure in a civil law system operated. Their assumption was that because it looked “different” it had to be unfair. It is these kinds of enforcement problems that can create enormous obstacles to genuine cooperation and assistance. External legal actors must avoid imbuing their contact community with a sense of their own cultural and legal superiority. Rebuilding must incorporate a genuine appreciation for the validity of the local legal culture and not an attempt to override it with a foreign import.

c. Rebuilding Local Police Forces

Building confidence in the local police is a crucial component of reconstruction. The role of the IPTF is cuspidate in monitoring the work of local police forces. IPTF has the major task of screening and training local forces. This task is a delicate one, given the link that has emerged between political affiliation and the capacity to gain state employment in areas that are dominated by nationalist politics which actively disfavor minorities. Generally, local police forces are composed of members from the dominant ethnicity of the region. From the outset,

109. Interview on file with author. (The author conducted a number of interviews while serving as the Special Representative of the Prosecutor of the ICTY. These interviews were granted on the condition of complete anonymity.)

110. Human Rights Watch has documented patterns of employment discrimination against individuals based on their political affiliation or ethnic identity. See HUMAN RIGHTS WATCH, POLITICS OF REVENGE, THE MISUSE OF AUTHORITY IN BIHAC, CAZIN, AND VELIKA KLADUSA 16–22 (1997). One of their reported interviews articulates the experienced discrimination as follows:

I've never been a soldier. I worked in the school during the whole war... I was fired because of being on the side of the aggressor. I never got it in writing. There were nine of us who were teachers before and don't teach now, none have jobs... I was director of the school for nine years... as soon as they heard that my son left the Fifth Corps to join the 'autonomy' (autonomous movement) they fired me. They turned my office into a mosque.

Id at 18.
their unrepresentativeness is a burden in ethnically mixed communities. This factor is exacerbated by the persistent allegations of human rights abuses by local police forces. With this lack of confidence in the enforcers of law the role of the international overseer is vital. The IPTF is mandated to screen individuals joining the local police forces. The IPFT spokesperson has stated that:

These reports [of human rights abuses] will be independently investigated and the IPTF will demand disciplinary action to be taken against those found guilty of human rights abuses. The IPTF will not hesitate to publish the names of the officers involved and will ensure that they no longer serve as policemen.

Despite these verbal commitments, difficulties persist. Vetting police officers has been a cumbersome and slow process which has inevitably meant that abuses continue and that the objective of police impartiality is threatened. The vetting process is further encumbered by the additional need to reduce the numbers of policemen serving in the jurisdiction. The IPFT has been slow in practice to publish the names of officers proven to have engaged in abuses of power. Further, despite commitments to ethical and human rights training for police officers by the IPTF, such training has been slow to materialize on the ground.

The IPTF must also be seen to be accessible to the ordinary citizen. Creating easy procedures for ordinary persons to submit information about police chiefs or officers that might render them unfit for their positions, including information about involvement in war crimes, would greatly assist the IPFT's own work and its currency with local populations. Another crucial goal for the IPTF mission is that of transparency. It should be transparent in its oversight functions and demonstrate to the local political and legal communities how it undertakes its work. The IPTF could further this, for example, by publishing information about its processes of supervising the vetting and restructuring of the Federation police.

As with many other international organizations operating in Bosnia, the IPTF faces a dual task. On the one hand, the IPTF's function is to help rebuild and restructure a particular component of the society in

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111. Id. at 31–37. See also ongoing human rights abuses by police forces are documented by Simor, supra note 93, at 660, with specific reference to Mostar.

112. POLITICS OF REVENGE, supra note 110, at 40.

113. There are currently approximately 20,000 policemen serving in the Bosnian-Croat Federation, and about 12,000 in the Republika Srpska. See No Justice No Peace, supra note 108, at 9.

114. Id. at 9.
which it is placed. The importance of rehabilitating the police is underlined by the reminder that it is local police who will be the standard bearers for law and order, after the departure of international forces. They are the foundations upon which a rule of law state will be built. On the other hand, the IPTF must remain attuned to the dangers of facilitating indefinite dependency by taking over extensive powers of the local police forces. The object of international oversight is not to cripple domestic civilian capacity but to encourage it to flourish.

5. The Proliferation of External Organizations

Finally, a self-evident observation is that there are a myriad of international organizations in Bosnia. They include the Human Rights Commission created under Dayton, the Office of the High Representative (OHR), the U.N. International Police Force (IPTF), U.N. Civil Affairs, the U.N. High Commissioner for Refugees (UNHCR), the U.N. High Commissioner for Human Rights (UNHCHR), the European Community Monitoring Mission (ECMM), and the International Committee for the Red Cross (ICRC) to mention only the institutional actors. Many of these have overlapping mandates. As one commentator has pointed out: "Through the end of 1996, senior officials at most major implementing agencies described a chaotic blend of different mandates, incompatible timetables, and divided leadership among their respective executive bodies."115

Ensuring that there is no duplication of efforts requires constant cooperation and information sharing among these organizations. In addition, such a vast array of external institutional power and structure can be overwhelming for the domestic system upon which it is imposed. It is important that the international community, in its genuine and commendable efforts to assist rebuilding the fragile Bosnian state, also acknowledge that it must not create a crippled state that merely functions indefinitely on the crutches of the international community. This is in the interests of neither Bosnia nor the guarantor states.

Doubtlessly, the competing and myriad agendas of the international organizations were skillfully manipulated by the Bosnian parties who used such divisions to further their own political ends. The international intervention in Bosnia was marked by a decentralized peace implementation, splintered into multiple supra-national mandates. Also problematic is the profound ambivalence which exists among the local international actors about the shape of post-war Bosnia. This creates

115. See Cousens, supra note 90, at 815.
competing dynamics both on the ground and in thinking about long term strategies of rehabilitation for the jurisdiction. Most forcefully it intensifies uncertainty, which benefits those who wish to foreclose the capacity of a multiethnic democracy to be born in the wake of ethnic conflict. The lesson to be learned here is that international efforts need to be internally unified and organizationally coherent.  

F. Domestic and International Complimentarity,

The International War Crimes Tribunal and the Domestic Legal System

An obvious bi-polar legal relationships exists between the Bosnian legal system and the jurisdiction of the International Criminal Tribunal for the Former Yugoslavia (ICTY). The relationship is a fragile one. One the one hand, the relationship is premised on the notion that the Tribunal's function is to support the ability of the domestic jurisdiction to account for war crimes committed on the territory of the former Yugoslavia (the principle of complementarity). On the other hand, it is a relationship of subordination. The ICTY has the right to require deferral of competence meaning that a war crimes proceeding can be transferred by request, from the domestic to the international level of accountability. This deferral can occur either before or during the investigation of crimes within the competence of the Tribunal at the domestic level. In creating the ICTY the international community was not, it must be stressed, taking over the entire responsibility of prosecuting all persons who may have been responsible for committing crimes in the

116. See id.

117. Complementarity is a vague principle. On the one hand, it incorporates a notion of equality, in that it presupposes that some domestic proceedings will take place. On the other, the kinds of cases in which complementarity arises, presume that the domestic court is either unwilling or unable to exercise jurisdiction over the violations in question. See generally Bartram S. Brown, Primacy or Complementarity: Reconciling The Jurisdiction of National Courts and International Criminal Tribunals, 23 YALE J. INT’L L. 383 (1998).

118. Under Rule 9 of the Tribunal’s Rules of Procedure and Evidence, the ICTY may request deferral to its competence while criminal proceedings are being conducted before national courts on the following grounds:

1) if the act being investigated or that which is the subject of the proceedings characterized as an ordinary crime.

2) if there is a lack of impartiality or independence or the investigations or proceedings are designed to shield the accused from international criminal responsibility or the case is not diligently prosecuted; or

3) when what is in issue is closely related to or otherwise involves significant factual or legal questions that may have implications for investigations or prosecutions before the International Tribunal.
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The ICTY is premised on a two-tier system of war crimes prosecution. In such a system, primary responsibility for war crimes prosecution lies with the national courts. The international ad hoc tribunal steps in where the scope of the crime (or the alleged perpetrator) warrants international prosecution, where national trials may not be carried out, or where substantive/procedural irregularities need to be corrected.

It is important that the international community and an already overburdened Tribunal assist and facilitate the capacity of the domestic legal system to process war crimes trials. It stands to reason that the ICTY will (at best) process only a fraction of those suspected of having committed war crimes. This is both a matter of finance and practicality. In the ideal world, national courts are in the best position to process war crimes; they are located in the territory, they apply law that the perpetrators cannot claim to be ignorant of, and they can apprehend suspects more easily. Equally important are the psychological consequences of facilitating national courts in this endeavor. They demonstrate the willingness to be active rather than passive in the face of massive violations of human rights, fair and open trials can allow for confidence building the idea of the rule of law itself, and they are the first step in meaningful institutional building within the legal system.

1. Rebuilding the Bosnian Legal System

However, for institution building to occur some very practical measures must be put in place. What is most immediately in need of redress is the lack of practical resources available to the legal system. For example, the main courthouse in Sarajevo, which would try a significant portion of any domestic trials, was severely damaged during the war. Similar damage has been caused to many legal buildings in the territory of Bosnia. A practical program of re-building damaged facilitate is a vital component of capacity building. Internal legal resources are

120. Some international scholars have already recognized the need for extensive and supportive assistance to domestic legal system in post conflict situations. The Draft Guiding Principles for Combating Impunity for International Crimes sets out one model for such assistance. It advocates that an International Legal Assistance Consortium (ILAC) be established to rehabilitate the judicial systems of states who have suffered violent conflict. This body would co-ordinate NGO, government and U.N. efforts to 1) bring war criminals to justice and 2) rehabilitate the national judicial and legal system. Principle 22 of the Guiding Principles outlines that the ILAC would provide technical legal assistance to the domestic state. This would be aimed at the prosecution of alleged war criminals and on judicial re-structuring. See generally Bassionii, supra note 21.
also scarce. Facilities to record oral evidence in Bosnian courtrooms are grossly inadequate. At this point, the domestic legal system is only dealing with a handful of cases. One shudders to think of the practical obstacles with the potentially huge number of impending cases. The technical assistance required by the courts and their staff is glaringly absent. Current writing on democracy-building notes that judicial and legal reform play a crucial part in democracy assistance and the prioritization of aid. This has not yet been the case in Bosnia. In part, this can be explained by the emphasis placed on making sufficient financial resources available to the international tribunal, while the domestic legal system lags behind in priority and visibility. While this is a matter of prioritizing resource allocation, there is also a need to recognize that technical support for the legal system is not a luxury.

Some practical measures which might assist in re-prioritizing the legal sphere include convening a steering committee of donors to promote better coordination among funding programs. Greater international "transparency" and accountability in the priority setting for technical assistance would help to establish empirically the basis, upon which resource allocation is made, and to facilitate reprioritizing. For example, the World Bank, IMF, and the European Commission should publish information regularly on their economic assistance packages, including

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121. See interviews, supra note 109. An old-fashioned manual typewriter is the only means for recording oral evidence at trial in many courtrooms. Thus, the recording of evidence is difficult, particularly where there was any to-and-fro or dispute over interpretation.

122. Not all prosecutors have a telephone, many do not have computers, and most of the computers in the prosecutors' offices do not have database facilities. The lack of database capacity means that it would be impossible (without long hours of manual labor) to cross-reference and compile information. Such process is crucial to the cases concerning command and control responsibility. In addition, my interviews with legal professionals also revealed that many were paid paltry sums for their occupations. In the "black-market" of services in a post-war economy, U.N. drivers are paid substantially more than the Bosnian judges and prosecutors dealing with war crimes and other cases.

123. See Carothers, supra note 24, at 113.

124. In theory, the amount of inward investment to Bosnia-Herzegovina will be massive. In 1996, under the auspices of the World Bank, a framework for investment was put in place to jump start the economy of the Federation and that of Republika Srpska. A total of $1.8 billion was pledged for Bosnia-Herzegovina at two donor conferences in 1996, of which $1.5 billion was fully committed. Reconstruction contracts worth $1.02 billion had been signed by the end of 1996, of which $950 million had been spent by the end of that year. See AID AND ACCOUNTABILITY, supra note 80, at 10. The difficulties of economic rebuilding should not be underestimated. Stitching together Bosnia's ravaged economy has proven an arduous task. "You spend half of your time getting each of the three electric companies to recognize the other two," said Zsuzasana Hargitai of the European Bank for Reconstruction and Development. "We have been negotiating mini 'Daytons' all over the place". Bosnia's Continued Squabbling Blocks Reconstruction, INT'L HERALD & TRIB., Dec. 11, 1997, at A13.
criteria for starting or ending projects. More particularly, the resource needs of the legal system in Bosnia need to be made visible to the international donor community. The allocation of resources is a vital component of rebuilding faith in civilian structures and the rule of law. Adequate resources are a means to ensure that the rule of law can be delivered to the citizens it is intended to serve.

Resource allocation is a crucial issue with respect to the legal materials and training available to judges and lawyers. Domestic war crimes are proceeded with under Article 142 of the Criminal Code of the SFRY. This provision had never been litigated domestically. There is little guidance on its scope and interpretation. The domestic interpretative process can only go to international jurisprudence and writing for clarification. Access to international material was and remains limited for many local legal actors. Many domestic judges are cognizant of the fact that they are making "new" law. There can be no doubt that greater liaison with the ICTY, training programs and technical assistance would make this task much easier for both judges and lawyers. If the domestic system fails to apply the international standards correctly they will, no doubt, be roundly criticized. By failing to give the system the information needed to do what the international community expects, we set up the domestic legal system to fail at its task, through no absolute fault of its own. In rebuilding the domestic legal system the war crimes trials will be viewed as the testing ground. For the domestic system to traverse the chasm successfully, the knowledge gap needs to be filled.

At worst, a lack of resources might be prejudicial to open, fair and competent judicial procedures. The number of war-crimes cases will increase domestically, thus increasing the resource strain. The Bosnian legal system will be closely watched (evident by the number of international observers present at any domestic war crimes trials) by the international world. The Bosnian Federation has demonstrated genuine good-will to conduct these trials openly, fairly, and competently. However, assistance, which is currently lacking, is sorely needed to do so.

There are specific problems posed by the Republika Srpska’s attitude towards the processing of domestic war crimes trials. In short, concerns pervade about the willingness of the Republika Srpska to be

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126. See interviews, supra note 109.
127. Id.
equally willing to undertake genuine and fair accountability within its “entity” boundaries. Specific problems encountered there include inadequate monitoring of due process violations, including access to counsel during the investigation stage of criminal proceedings. In addition, following the Dayton signing an early practice emerged in Republika Srpska of arresting ethnic minorities on what appeared to be weak grounds for political considerations. Given the overall lack of cooperation by the Republika Srpska with the Dayton process, law has been one among many causalities of an unwillingness to support accountability and transparency in the jurisdiction. Effective legality in the Republika Srpska poses a threat to the hegemony of political forces who were the principal actors in the war project. Reestablishing the primacy of law is one of the most effective means to channel international resources to those constituencies within the Republic committed to resuming safe and normal lives.

G. The Rules of the Road Agreement

An important component of the bi-lateral relationship between the International Tribunal and the domestic legal system is the Rules of the Road agreement. Rules of the Road was an understanding hastily concluded by the guarantor states and the successor states following the Dayton Agreement in February 1996. It arose from the specter that indicted war criminals could be picked up by chance, particularly those viewed as instrumental to the success of the Dayton Agreement, thereby endangering the peace process. Rules of the Road sought to put the brakes on zealous arresting by local police forces. It established that in order for any domestic arrest or prosecution to proceed in the successor states, the International Tribunal would first have “signed off” on the relevant legal papers. In practice, this meant that local police forces

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128. See interviews, supra note 109.
129. See Procedures and Guidelines for Parties for the Submission of Cases to the International Criminal Tribunal for the Former Yugoslavia under the Agreed Measures of Feb. 18, 1996 (hereinafter Rules of the Road) (on file with author).
130. Rules of the Road was signed by President Tudjman of Croatia, President Milosevic of Serbia and President Izetbegovic of Bosnia in Rome on February 18, 1996.
131. The General Introduction to the Agreement sets out the following:

Persons other than those already indicted by the International Tribunal, may be arrested and detained for serious violations of international humanitarian law only pursuant to a previously issued order, warrant, or indictment that has been reviewed and deemed consistent with international legal standards by the International Tribunal. Procedures will be developed for expeditious decision by the Tribunal and will be effective immediately upon such action.
would have to send all information and evidence that they had available to them concerning suspicions that an individual had committed war crimes to the Hague for review.\footnote{RULES OF THE ROAD, supra note 129.} Arrest of an individual could only occur where the International Tribunal indicated in writing to the local authorities that there existed sufficient evidence to provide a basis for proceeding further.\footnote{See id., Art. 7.}

Rules of the Road created a multitude of problems. The speed of the pact meant that there was little time for consultation with the International Tribunal or with local legal authorities about how it would actually work in practice. The burden placed on the International Tribunal was considerable. The Tribunal had an additional working priority added to its mandate without additional resources or personnel to facilitate the task directly. The short-term result was a paper log-jam at the Tribunal, which did not have the resources to spend on a flood of domestic case briefs.

Rules of the Road also created a number of problems for the domestic legal system. The aim of preventing ethnically motivated arrests was a genuine and positive one. After the signing of the Dayton Agreement the authorities in the Federation of Bosnia and Herzegovina and the Republika Srpska had started publicizing lists of persons whom they considered to be responsible for war crimes.\footnote{See HUMAN RIGHTS WATCH, POLITICS OF REVENGE, supra note 110, at 31.} Many of these compilations were based on questionable evidence and were also a mechanism to intimidate, discouraging refugees from returning to their homes which were under the control of another ethnic group.\footnote{See id.} Charging persons with war crimes was an effective means to intimidate and harass former enemies as well as a means to prevent full ethnic re-integration, which would be held hostage to politically motivated misuse of war crimes trials.

Acknowledging this, it is nonetheless important to chart the negative effects that Rules of the Road has had upon the domestic legal system. Undeniably, the rule of law in Bosnia was in tatters at the end of the war. The legal system was fragile and in need of substantial rebuilding. Unfortunately, the immediate effect of the Rules of the Road has been to entirely over-ride the domestic legal structure in the area of war crimes.

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\footnote{RULES OF THE ROAD, supra note 129.}
132. Article 5 of the Rules of the Road Agreement sets out that the request for review had to be accompanied by a case file containing the following information: a copy of the document to be reviewed; a summary of the personal history of the individual alleged to have committed crimes; a summary of the procedural steps already taken in the case; a summary of the circumstances of the crime; and a summary of the available evidence. See id.
133. See id., Art. 7.
134. See HUMAN RIGHTS WATCH, POLITICS OF REVENGE, supra note 110, at 31.
135. See id.
The following flaws emerge with the approach. Under Rules of the Road evidence gathering and case presentation is undertaken by the MUP (local police). Thus, it is the local police who gather evidence under Rules of the Road and present the case to the International Tribunal. To the common law observer this is not an unusual nor problematic division of labor. In most common law systems is the police who have the primary role in relation to the charging and collating of evidence in criminal proceedings. This is not the case in the civil law system. Instead, in the civil law structure the police play a secondary role to that of the investigating magistrate, who conducts investigations and directs evidence gathering. Under Rules of the Road there is no role carved out for the investigating magistrate, a pivotal figure in the civil law system in the establishment of evidence and prime facie case for criminal proceedings. Rules of the Road imposed a version of the common law system of evidence gathering on a civil law system, without replacing the safeguards that existed in the civil law structure. The over-ride was taken, without consultation with domestic judges and prosecutors, creating feelings of impotency and marginalization. As a result, the Rules of the Road are a source of unanimous resentment by the local judiciary and prosecutorial services. Many felt that they were being by-passed by external agreement, and that no consideration had been given to the integrity of their own legal culture in the process. International success in rebuilding an integrated and multiethnic Bosnia will also be measured by the successful rehabilitation of the rule of law in the jurisdiction. Maintaining the cooperation and goodwill of local legal actors is not ancillary to this project but innately linked to it. Thus, the resentment created by Rules of the Road is important to address, as it remains likely to be a feature of the Bosnian legal landscape in the short-term.

While the need for preventing politically motivated arrests was evident immediately following the Dayton Agreement, there was also a balancing necessity to rebuild confidence in the rule of law in Bosnia. Where external international actors compliment or replace local legal systems in times of crisis there is a need for sensitivity and long-term thinking. The sensitivity is located in the obligation to take account of local legal culture in the imposition of internal structures. The long-term view needs to take account of the potential of the local legal system to be regenerated and for its integrity to be protected in the transition period. Rules of the Road is lacking on both counts.

136. See interviews, supra note 109.
137. See id.
One practical result of implementing the Rules was a paucity in arresting suspects. This created a real possibility that those under investigation would flee as the papers awaiting a “signing off” are processed. To ensure the efficacy of the system created by the Rules of the Road, the International Tribunal needs structural and financial resources specifically directed toward processing reports. Equally, there are a number of other issues about the workings of the Rules of the Road Agreement which merit a revisit. It is now apparent that the Rules of the Road agreement has also failed to prevent local police authorities from abusing the power of arrest to intimidate, harass and coerce political opponents from differing ethnic groups. Human Rights Watch have reported widespread instances in some localities involving flagrant violations of the Rules of the Road Agreement.  

These abuses are partly related to the inadequate monitoring and selection of police forces, thereby failing to identify and dismiss officers who may have formerly or are currently engaged in violating the rights of citizens and suspects. But further, as Rules of the Road does not institutionalize the civil law mechanism of supervision for police by giving a role to the investigating magistrate, the work of the police in this arena is completely lacking domestic supervision. If the International Tribunal continues to have a direct long-term role in Bosnian war crimes trials, it is imperative that the structure of that involvement be re-configured to give adequate and necessary recognition to the value of the civil law structures of control over the investigations conducted by local police forces.

H. The Link between Local and International Accountability

Ultimately rebuilding legal capacity aims to make the enforcement of law meaningful to citizens. Building confidence in the rule of law in

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138. Human Rights Watch have noted in their report on three municipalities (Bihac, Cazin, and Valika Kladusa) that there are ongoing and unredressed violations of the Agreement. The Report states:

In direct violation of the principles of the Rome Agreement, the Una Sana cantonal authorities arrested and detained twelve individuals within the past two years on charges of war crimes without prior authorization from the ICTY. Once arrested, the cantonal authorities failed to forward the files on these individuals to the ICTY, in some cases for as long as nine months after arrest and imprisonment. Though some of those detained have been in prison in Bihac since before February 1996, none of the files were submitted to the ICTY until December 1996, ten months after the signing of the Rome Agreement.

See HUMAN RIGHTS WATCH, POLITICS OF REVENGE, supra note 110, at 32.
Bosnia has many components. Not least of these is the obvious starting point that accountability for past crimes is an immeasurable component of any forward progress. The legal obligations of the state parties and the guarantor states in this respect is not subject to any ambiguity. The U.N. Security Council had stated that:

... compliance with the requests and orders of the International Criminal Tribunal for the Former Yugoslavia [to arrest and surrender to the Tribunal people indicted for war crimes] constitutes an essential aspect of implementing the Peace Agreement.\(^{139}\)

This obligation also follows from the Genocide Convention, the Geneva Conventions of August 12, 1949, its Additional Protocol 1, and Security Council Resolution 827 of May 25, 1993. This has clearly not been the case. The small numbers of those indicted for war crimes who are currently being held at the Hague attest to the lack of international will to make these commitments meaningful.\(^{140}\) This is not a new comment. What must be realized, however, is the extent to which international inaction in this sphere has profound long-term effects within Bosnia for confidence in legal process domestically. There is a bi-partisan relationship between meaningful accountability on the international plane and its effects on the appreciation for the rule of law in the local setting. Embedding the rule of law in Bosnia is not a free-standing enterprise, it is a precarious balancing act with a mammoth international dimension. That international component must remain consistently self-aware, attuned not only to its own demands but to the breathing of the system it supports.

**Conclusions**

Whatever our views on the pre-existing legal and political order in the former Yugoslavia, some aspects of its legal structure should remain to the fore as the reconstruction of Bosnia-Herzegovina is undertaken. First, Yugoslav space, (in the literal and physical sense) comprised a multinational environment. Through the mechanism of constitutional rights, multiple and incompatible claims on the territory and identity of its many nations were accommodated, partly or significantly (dependent


\(^{140}\) As of August 1, 1998, twenty-seven persons are in custody, one is provisionally released on health grounds, and thirty-one persons who have been publicly indicted are still at liberty.
on one’s views), through a layered rights discourse of complicated constitutional arrangements. Bosnia must also accommodate multiple and incompatible claims of territory and identity. Its choice is threefold; first, separation of the internal political entities (unidimensional statelets within the state); second, long-term international cuckolding; or third, the precarious route of accommodation and intersection. In this context, to dismiss entirely the relevance of the forerunning state entity may be to discard potential solutions to a problem that is not new to the physical territory of the Balkans.

At this historical moment, the idea of a Bosnian state has little internal cohesion. Three statelets bundled into co-existence have mutually exclusionary ideas about what being a part of the state called Bosnia means. The territory of the Serb Republic still clings to secessionist principles, aggravated by ideological nationalism that fluctuates between rejection and conciliation to the Dayton Agreement. The Croat-Bosnia Federation is a fragile detente with grave disjunctions between two political leaderships as to the conception of their mutual coexistence. As Hansen points out, “Whereas Croats regard it as a federation of two political administrative units and emphasize the importance of links to Croatia, Bosnians see their partnership as a community of two constituent peoples, who underline the integrity of Bosnia, as essential.”

Out of these mutually exclusionary visions of the state there seems little room for maneuver or compromise. Yet, despite all the shortcomings illustrated throughout this work, Dayton itself is testament to the capacity for finding a middle ground, albeit a narrow one. The real challenge lies in widening that narrow ledge and with it creating the means to ensure a functional, not a deformed state. For the short term, Dayton has provided a home to group identity and has created spaces in

141. It is to be noted that in the Yugoslav constitution, both the republics and the constituent nations bore national rights. Under the Yugoslav constitution, Bosnia-Herzegovina was a republic composed of three political (constituent) nations, none of whom were a majority. One of the products of the Yugoslav disintegration was the terminology of “minority” as opposed to “nation” as it was seen to be particularly inadequate for the protection of the rights of the republics and the groups that composed them. This was obviously acute in Bosnia-Herzegovina. For example, as Susan Woodward points out,

They [European Community politicians] referred instead to the need to guarantee minority rights, as if these assurances would be a positive cause of conflict in Croatia (and eventually Bosnia-Herzegovina) - the demotion of other constituent nations to minority status in the 1990 republican constitution and therefore their loss of political equality and of a right to self-determination.

WOODWARD, supra note 1, at 210.

142. Hansen, supra note 32, at 82.
which some (though not all) people may feel secure to rebuild. It bears
reminding that the homes and spaces provided by group identity can be
suffocating.\textsuperscript{143} Rebuilding Bosnia in a meaningful way requires modal-
ities of transition from the starting point of a settlement premised on the
cohesion of the group, to a society that nurtures the individual and cele-
brates its multi-ethnicity, multiculturalism, and diversity. Legal
structures are one bridge for this passage. The rigidity of the Dayton
agreements could leave one pessimistic on its capacity to encourage this
kind of societal transformation. Thus, much depends on the encourage-
ment of the international community to view Dayton as a means to a
much more inclusive end, rather than the end itself.

\textsuperscript{143} See generally MIROSLAV VOLF, EXCLUSION AND EMBRACE: A THEOLOGICAL