

Comment

The Dayton Peace Agreement: Constitutionalism and Ethnicity

Ronald C. Slye[†]

It has been almost five years since the violent dissolution of Yugoslavia. An estimated 200,000 civilians have been killed, over two million people have been displaced from their homes, tens of thousands have been tortured and raped, and Europe has hosted yet another of the world's genocides.¹ While the recently concluded Dayton Peace Agreement has resulted in a temporary cessation of the armed conflict,² serious concerns have been raised regarding efforts to rebuild and repair the institutions of civil society.³ Little attention has been paid, however, to the constitutional structure of the newly created state of Bosnia and Herzegovina.⁴ While the long term viability of the region depends on a number of factors, the constitutional structure of the government, and its allocation of power among the parties to the peace agreement, is crucial for the long term viability of an independent Bosnian state. This Comment examines only one aspect of the constitutional structure of Bosnia and Herzegovina: the institutionalization of ethnicity.⁵

† Associate Director, Orville H. Schell, Jr. Center for International Human Rights at Yale Law School; Visiting Lecturer, Yale Law School; J.D. 1989, Yale Law School; M.Phil. 1985, Cambridge University; B.A. 1984, Columbia University. I would like to thank David Forsythe, Jim O'Brien, Paul Szasz, and David Wippman for thoughtful suggestions and resources; Rob Edwards, a superb editor who offered a wealth of suggestions that have immensely improved this Comment; and Harold Hongju Koh for his limitless inspiration and support in this and other endeavors.

1. See, e.g., DAVID RIEFF, *SLAUGHTERHOUSE: BOSNIA AND THE FAILURE OF THE WEST* 23 (1996) (noting 200,000 Bosnian Muslims killed and over two million people forcibly displaced); *Report of the Secretary General Pursuant to Security Council Resolution 1026*, U.N. Doc. S/1995/1031 (1995), reprinted in 35 I.L.M. 237, 240 (noting 1.2 million displaced persons within Bosnia-Herzegovina and 900,000 refugees outside country).

2. While the armed conflict has generally ceased, incidents of violence continue among the parties. See, e.g., 3.17 BALKAN WATCH (Balkan Inst., Wash., D.C.), Apr. 22, 1996 (noting clash between Bosnian Serbs and Croats and Muslims attempting to visit their homes in Serb-controlled area of northern Bosnia); *id.* (noting Zagreb's accusation that Croatian-Serb forces attacked oil well in eastern Slavonia).

3. In particular, the transition of control from one ethnic group to another has led to systematic arson and looting. See, e.g., Julian Borger, *Serb Police Leave with Bang*, MANCHESTER GUARDIAN WKLY., Mar. 17, 1996, at 1 (describing Serb destruction of Ilidza prior to relinquishing to Federation control). The Bosnian Serbs have also boycotted efforts to raise money from the international community for the rebuilding of Bosnia. See William Drozdiak, *Bosnia Secures \$1.8bn Aid Package*, MANCHESTER GUARDIAN WKLY., Apr. 21, 1996, at 3.

4. But see Paul C. Szasz, *The Quest for a Bosnian Constitution: Legal Aspects of Constitutional Proposals Relating to Bosnia*, 19 FORDHAM INT'L L.J. 363 (1995). The state of Bosnia and Herzegovina is the legal successor to the Republic of Bosnia and Herzegovina, which was created after the dissolution of Yugoslavia and was admitted to the United Nations in 1992. *Id.* at 363 n.1.

5. I do not attempt to define ethnicity in the context of the former Yugoslavia. While many link ethnicity to immutable characteristics such as birth, genealogy, or race, it is in fact a fluid concept. For a nuanced discussion of the concept of ethnicity and its indicators, see DONALD L. HOROWITZ, *ETHNIC GROUPS IN CONFLICT* 41-54 (1985). For the purposes of this Comment, I adopt the term ethnicity to

It is clear that the conflict in the former Yugoslavia was caused only in part by ethnic tensions. The more immediate cause of the conflict was the political ambitions of certain leaders, most notably Slobodan Milosevic, who manipulated ethnic identity in order to amass territory and political power.⁶ Nevertheless, the genocidal slaughter and mass rape of "ethnic cleansing," and the attendant ideology of ethnically pure states and nations, raised ethnicity — or at least the rhetoric of ethnicity — as the dominant factor to be addressed in the region. Ethnicity has succeeded so well in becoming the language of the region that the Bosnian Muslims refer to themselves as Bosniacs — an ethnic designation that drops religious identity.⁷ The protection and preservation of ethnic identity has dominated all efforts to end the conflict and create a just peace.⁸ This emphasis on ethnic identity has resulted in one of the few constitutional structures in the world that specifically incorporates ethnicity into its decisionmaking structures.⁹ In fact, the Bosnian constitution may be the only one that establishes explicit incentives for ethnic groups to segregate themselves politically and territorially.

International human rights law generally embodies the traditionally liberal view of rights as trumps held by individuals to curtail state power.¹⁰ The prohibition against discrimination based on a variety of characteristics, including ethnicity, is found in all the major international human rights instruments.¹¹ The ubiquity of prohibitions against discrimination and the

describe the three dominant self-described groups in Bosnia: the Bosniacs, Croats, and Serbs. For a critical discussion of Serbs and Croats as more a religious identification than a political one, see NOEL MALCOLM, *BOSNIA: A SHORT HISTORY* 165-66 (1994).

6. For a good history of the events leading to the breakup of Yugoslavia and the role of Milosevic, see LAURA SILBER & ALLAN LITTLE, *YUGOSLAVIA: DEATH OF A NATION* (1996); see also MALCOLM, *supra* note 5, at xix-xxi (stating that main basis for hostility in region was economic rather than ethnic or religious). *But cf.* SUSAN L. WOODWARD, *BALKAN TRAGEDY: CHAOS AND DISSOLUTION AFTER THE COLD WAR* 333-73 (asserting that nationalism and claims for territorial rights, rather than ethnic tensions or ambitions of Milosevic, explain conflict).

7. See WOODWARD, *supra* note 6, at 315 (relating decision of Bosnian Prime Minister Haris Silajdzic to adopt term Bosniac instead of Muslim).

8. For a summary of proposals to end the Yugoslav conflict, see Paul C. Szasz, *Protecting Human and Minority Rights in Bosnia: A Documentary Survey of International Proposals*, 25 CAL. W. INT'L L.J. 237 (1995); see also WOODWARD, *supra* note 6, at 281 (describing assumption of European Union negotiators that key to conflict was ethnicity).

9. The few examples of such constitutional incorporation of ethnicity or other group identity include the constitutions of Fiji and Lebanon. For a critical analysis of the Fijian Constitution and the role of ethnicity, see Ved P. Nanda, *Ethnic Conflict in Fiji and International Human Rights Law*, 25 CORNELL INT'L L.J. 565 (1992).

10. On rights as trumps, see RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* at xi-xii (1978). For a good survey of the scholarly literature on rights in the international human rights context, see HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 167-92 (1996).

11. See, e.g., African Charter on Human and Peoples' Rights, *opened for signature* June 26, 1981, art. 2, OAU Doc. CAB/LEG/67/3 Rev. 5 (entered into force Oct. 21, 1986), *reprinted in* 21 I.L.M. 58; American Convention on Human Rights, Nov. 22, 1969, art. 1(1), O.A.S.T.S. No. 36, OEA/ser. L/V/II.23, doc. 2, rev. 6, 1, O.A.S.O.R. OEA/ser. K/XVI/1.1, doc. 65, rev. 1, corr. 2 (1970) (entered into force July 18, 1978), *reprinted in* 9 I.L.M. 673; International Covenant on Civil and Political Rights, Dec. 16, 1966, arts. 2(1), 26, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1967) (entered into force Mar. 23, 1976), *reprinted in* 999 U.N.T.S. 172 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, art. 2(2), G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1967) (entered into force Jan. 3,

related, although conceptually different, idea of group rights, is not surprising given that modern international human rights concepts were developed in response to the persecution of individuals because of their membership in a particular group — the extermination of the Jews, Romas, and gays and lesbians under Nazi Germany and, earlier, the persecution of ethnic minorities that dominated international politics during World War I and the interwar period. The constitutionalization of ethnicity raises issues of international human rights law that the scholarly literature is only beginning to address. Of course, many of the issues raised by group ethnic rights fall into a similar category as issues raised by efforts to redress past discrimination, such as affirmative action. While the compatibility of the constitutionalization of group rights with international human rights law is too broad a topic to discuss in detail in this Comment, I will indicate where appropriate some of the more troublesome issues raised by the current Bosnian constitutional structure.

Although the constitution¹² of the newly created state of Bosnia and Herzegovina (hereinafter also referred to as Bosnia) declares that it reflects the will of the constituent peoples (i.e., the Bosniacs, Croats, Serbs, and “Others”),¹³ the constitution and the agreements surrounding it were drafted in large part by members of the international community.¹⁴ The Bosnian constitution was drafted in connection with the Proximity Peace Talks held at the Wright-Patterson Air Force Base in Dayton, Ohio, from November 1 to 21, 1995. It is included as Annex 4 to the General Framework Agreement initialed in Dayton on November 21, 1995, and was officially signed in Paris on December 14. The state of Bosnia and Herzegovina consists of two Entities: the Federation of Bosnia and Herzegovina (hereinafter the Federation), and the Republika Srpska (hereinafter Srpska), each of which has its own constitution.¹⁵ The Federation itself consists of a number of cantons,

1976), reprinted in 993 U.N.T.S. 3; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 14, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953) [hereinafter ECHR]; Universal Declaration of Human Rights, adopted Dec. 10, 1948, art. 2, G.A. Res. 217(III)A, U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948) [hereinafter UDHR].

12. The Constitution of Bosnia and Herzegovina [hereinafter BOSNIA CONST.] is included as Annex 4 to the General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Agreement) and is reproduced at 35 I.L.M. 117 (1996).

13. BOSNIA CONST. pmbl. The category “Others” is barely mentioned in the Bosnian constitution, although it plays some role in the Constitution of the Federation of Bosnia and Herzegovina. See *infra* note 27 and text accompanying notes 39-41. It is clear by the terms of the Bosnian constitution and all of the events leading to the peace talks that groups other than the three specifically enumerated are given much less constitutional power and protection.

14. For brief summaries of the drafting history and pedigree of sections of the Bosnian constitution and other parts of the General Framework Agreement, see Szasz, *supra* note 8.

15. The Proposed Constitution of the Federation of Bosnia and Herzegovina (hereinafter FEDERATION CONST.), reprinted in 33 I.L.M. 740 (1994), was unanimously approved by the parliament of Bosnia and Herzegovina on March 30, 1994. As of this writing, the 1992 constitution of the Serbian Republic of Bosnia-Herzegovina (hereinafter 1992 CONST.) is being amended to conform with the provisions of the General Framework Agreement, and will become the constitution of Srpska. The 1992 constitution states up front that it is “a state of Serbian people,” 1992 CONST. art. 1, and that “[t]he territory of the Republic consists of regions of Serbian ethnic entities including the regions where genocide has been committed upon the Serbian people.” *Id.* art. 2. It also states that the Republic may “enter into union with state forms of other peoples constitutive of Bosnia-Herzegovina.” *Id.* art. 4. The only other reference to ethnicity in the 1992 constitution concerns the composition of the National Assembly, where “national representation shall be established in the most proportional manner possible.” *Id.* art. 71. A copy of the 1992 constitution of the Serbian Republic of Bosnia-Herzegovina is on file with the author.

most of which are divided ethnically between the Croat and Bosniac peoples.

The Bosnian constitution sets forth the enumerated powers of the government; as is the case with the states of the United States vis-à-vis the federal government, the Bosnian constitution supersedes any conflicting provisions of the constitutions of the Entities, but all powers not expressly granted to the Bosnian government by the constitution remain with the governments of the two Entities.¹⁶ While international organizations and international law play a prominent role in the Bosnian constitution,¹⁷ the constitution explicitly states that regional human rights law as embodied in the European Convention for the Protection of Human Rights and Fundamental Freedoms shall be preeminent over all other law.¹⁸ By its terms, the constitution thus gives priority to regional law over other international law, and thus seems to create a new category of legal system between monism (which gives ultimate authority to international law generally) and dualism (which gives ultimate authority to municipal law).

I. INDIVIDUAL ETHNIC AND POLITICAL IDENTITY

The Bosnian constitution establishes a dual citizenship regime, which allocates more power to the Entity governments than to the Bosnian government in determining citizenship. The Parliamentary Assembly regulates the citizenship of Bosnia, and the Entities regulate their own citizenship.¹⁹ While all citizens of either Entity are automatically citizens of Bosnia,²⁰ the reverse is not true. Thus, the Entities have the power to grant Bosnian citizenship, but the Bosnian government does not have the power to grant Entity citizenship. An individual could be declared a citizen of Bosnia by the rules established by the Parliamentary Assembly, without being a citizen of either the Federation or Srpska. Since political power in Bosnia is so dependent on the Entities, such an arrangement might violate that individual's rights, specifically the prohibition against discrimination, the right to self-determination, or the right to participatory governance. For example, representation in Bosnia's two legislative houses is allocated by Entity.²¹ The Entity-level legislatures, in fact, directly select the delegates to the Bosnian House of Peoples.²² It is not clear that a citizen of Bosnia who is not a citizen of either Entity could be elected to, or even vote for delegates to, the House of Peoples.

Certain minimum requirements do apply to the regulation of citizenship by both the Bosnian and Federation governments, although these restrictions address only deprivation of citizenship and not its acquisition.²³ These

16. BOSNIA CONST. art. III, § 3.

17. The constitution requires, for example, that Bosnia become a party to specific international human rights instruments. *Id.* art. II, § 7.

18. *Id.* art. II, § 2.

19. *Id.* art. I, § 7.

20. *Id.*

21. *Id.* art. IV, §§ 1-2.

22. *Id.* art. IV, § 1.

23. *Id.* art. I, § 7(b); FEDERATION CONST. art. II.A.5.

provisions are consistent with the requirements of international law.²⁴ No person is to be deprived of either Bosnian or Entity citizenship arbitrarily, nor if such deprivation would result in that person becoming stateless. In addition, no one shall be deprived of citizenship "on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."²⁵

The Bosnian and Federation constitutions are less clear about which individuals have a right to be citizens. In other words, the constitutions do not explicitly limit governmental discretion to grant Federation, Srpska, or Bosnian citizenship. The only provision in the Bosnian constitution concerning the right to citizenship specifically grants Bosnian citizenship to those persons who were citizens of the former Republic of Bosnia and Herzegovina — the legal precursor to Bosnia and Herzegovina — immediately prior to the coming into force of the Bosnian constitution. However, this rule of automatic citizenship is immediately contradicted by a provision stating that those persons who were naturalized between April 6, 1992 and the coming into force of the constitution will have their citizenship determined by the Parliamentary Assembly.²⁶ The resolution of Entity level citizenship rights and the limits, if any, on parliamentary discretion in promulgating citizenship rules, are left open for determination — presumably by either the parliament itself or the Constitutional Court.

II. GOVERNMENT POWER, DECISIONMAKING, AND ETHNICITY

A. *The Constitutional Framework*

The Bosnian constitution creates an elaborate and seemingly unwieldy decisionmaking structure that involves numerous checks and balances. The checks and balances are found not only among competing functional branches of government, but also among the three identified ethnic groups and between the two Entities. The Federation constitution contains similar provisions.²⁷ These provisions require that a certain percentage of government offices be reserved not only for representatives of the different ethnic groups, but also for individuals who themselves are of a certain ethnicity. These requirements have at least two negative effects. First, they make certain citizens of the two

24. While international law does not set forth clear criteria for determining in what circumstances, if any, a state is obligated to offer citizenship to an individual, international human rights law does provide that an individual generally has the right to citizenship. See UDHR, *supra* note 11, art. 15(1), at 74 ("Everyone has the right to a nationality."). The prohibition against arbitrarily depriving an individual of his or her citizenship is clear. See *id.* art. 15(2), at 74. ("No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality."). For an interpretation based on cultural and associational rights, see *Lovell v. Canada*, Communication No. R.6/24, *Report of the Human Rights Committee*, U.N. GAOR, 36th Sess., Supp. No. 40, at 166, U.N. Doc. A/36/40, *reprinted in* 2 HUM. RTS. L.J. 158 (1981) (holding that Canadian legislation allowing Indian tribe to discriminate between men and women in revoking tribal membership violated individual right to live with ethnic, religious, or cultural group of like-minded people guaranteed by article 27 of ICCPR).

25. BOSNIA CONST. art. I, § 7(b).

26. See *id.* art. I, § 7(c).

27. The checks and balances in the Federation constitution are among the three ethnic groups: Bosniacs, Croats, and "Others." FEDERATION CONST. art. I.1.

Entities ineligible for some representative offices based solely on their ethnicity. Second, they create an incentive for ethnic groups to segregate themselves into separate Entities. In other words, Serbs have a constitutional incentive to become citizens of Srpska, and Bosniacs and Croats have a constitutional incentive to become citizens of the Federation. In addition to creating these two negative effects, Bosnia's governmental structure provides unequal power to the three ethnic groups, in some cases providing an effective veto to Serbs in Srpska without granting similar power to either the Bosniacs or the Croats in the Federation.

The Parliamentary Assembly of Bosnia consists of two chambers, one of which has explicit numerical quotas for ethnic representation, and the other of which has explicit numerical quotas for territorial representation. There are two types of representatives: members and delegates. Members are those elected to the House of Representatives and are forty-two in number. Two-thirds of the members are elected from the territory of the Federation, and one-third are elected from the territory of Srpska. There is no ethnic requirement for becoming a member. Members are thus representatives of what I call territorial-citizenship groups.

Delegates are those elected to the House of Peoples²⁸ and are fifteen in number: five Croats and five Bosniacs from the Federation, and five Serbs from Srpska. These are representatives of what I call ethnic-citizenship groups — that is, they are defined as pools of people who have both a common ethnicity and a common citizenship. It is not enough to be of a particular ethnicity to be elected to the House of Peoples; one also has to be a citizen of the Entity that corresponds to one's ethnic group. The Bosnian constitution thus eliminates certain individuals from the pool of eligible delegates to the House of Peoples. An ethnic Serb can only be elected as a delegate if he or she is also a citizen of Srpska. A popular citizen of Srpska who is not an ethnic Serb could not be elected to the House of Peoples. In the short term, the use of ethnic-citizenship criteria in electing delegates to the House of Peoples may have little practical effect, since it is unlikely that a non-ethnic Serb in Srpska would amass enough political support in the current ethnically charged atmosphere to be elected. Unfortunately, it is also unlikely that many Serbs will want to be citizens of the Federation or that many Croats and Bosniacs will want to be citizens of Srpska.²⁹

The House of Peoples institutionalizes at the constitutional level a strong relationship between ethnicity and citizenship, which results in discrimination based on ethnicity. The fact that a citizen of one of the Entities may be unable to become a member of a legislative body solely because of his or her

28. The House of Peoples is envisioned as a temporary body, although its dissolution requires either a decision by the presidency or a decision of the House of Peoples itself, supported by a majority of two of the three ethnic groups. BOSNIA CONST. art. IV, § 3(g).

29. *But see* Patrick Moore, *Bosnian Catholic Archbishop Warns the Croatian Army*, OMRI SPECIAL REPORT: PURSUING BALKAN PEACE, No. 4 (Jan. 30, 1996) (recounting Croatian army's forcible removal of Bosnian Croats from areas that will be occupied by Bosnian Serbs); Mike O'Connor, *Nationalism Checkmates Pawns, Too*, in *Bosnia*, N.Y. TIMES, Mar. 28, 1996, at A3 (suggesting that Bosnian Serbs were willing to reconcile with Bosnian Muslims but were ordered not to do so by Bosnian Serb government in Pale). Ironically, if an ethnic Serb defied the wishes of the government in Pale and stayed in Federation territory, she would be ineligible for election as a delegate.

ethnicity violates international prohibitions against discrimination³⁰ and may also violate the right to governmental participation.³¹ In addition, the creation of ethnic-citizenship groups through the House of Peoples heightens the importance of ethnicity and creates an incentive for ethnic groups to congregate in separate territories.³² An ethnic Croat will have less political power in Srpska than in the Federation, and thus less of an incentive to become a citizen of Srpska.³³

The strong ethnic-based identity of the House of Peoples contrasts with the purely political identity of the House of Representatives. If the eligibility rules of the House of Peoples, however, create strong ethnic-citizenship groups, the effect may be a House of Representatives with strong ethnic blocs. Although an ethnic Croat or Bosniac *could* represent Srpska in the House of Representatives, the number of Croats and Bosniacs who will choose to become citizens of Srpska may diminish as a result of the criteria used to determine delegates to the House of Peoples,³⁴ thus making it more likely that members of the House of Representatives from Srpska will in fact be ethnic Serbs.

The entrenchment of ethnic-citizenship groups is accomplished not only through representation in the House of Peoples, but also through representation in the presidency and in the ministerial offices of the Bosnian government. The presidency, for example, consists of three members: a Bosniac and a Croat elected from Federation territory, and a Serb elected from Srpska.³⁵ In the case of Bosnian ministers,³⁶ no more than two-thirds may come from the territory of the Federation. There is no limit on how many can come from Srpska.³⁷ While ministers are chosen based on the

30. See ICCPR, *supra* note 11, art. 2(1), 999 U.N.T.S. at 173; ECHR, *supra* note 11, art. 14, 213 U.N.T.S. at 233. *But see* Council of Europe: Framework Convention for the Protection of National Minorities, Feb. 1, 1995, art. 4, 34 I.L.M. 351, 354 [hereinafter Framework Convention] (prohibiting discrimination except in case of measures designed "to promote . . . full and effective equality between persons belonging to a national minority and those belonging to the majority"). The Framework Convention has not been signed by Bosnia.

31. See ICCPR, *supra* note 11, art. 25, 999 U.N.T.S. at 179; UDHR, *supra* note 11, art. 21, at 75. For a discussion of ICCPR article 25 and the right to governmental participation, see Benedict Kingsbury, *Claims by Non-State Groups in International Law*, 25 CORNELL INT'L L.J. 481, 494-95 (1992); Henry J. Steiner, *Political Participation as a Human Right*, 1 HARV. HUM. RTS. Y.B. 77 (1988).

32. This may violate, for example, article 16 of the Framework Convention, which provides: "The Parties shall refrain from measures which alter the proportions of the population in areas inhabited by persons belonging to national minorities and are aimed at restricting the rights and freedoms flowing from the principles enshrined in the present framework Convention." Framework Convention, *supra* note 30, art. 16, 34 I.L.M. at 357. The creation of a strong identification between political identity and ethnicity strengthens individual identification with ethnicity. See HOROWITZ, *supra* note 5, at 66 (noting that territorial boundaries are important source of group identity).

33. See Marshall Freeman Harris, *Three Months After Dayton: The View from the Ground*, BALKAN MONITOR, No. 9 (Balkan Inst., Wash., D.C.), Apr. 5, 1996, at 3 (on file with author) (noting concern of Serbs living in Federation).

34. Of course, this constitutionally based incentive is heightened considerably by the current ethnic hostilities in Bosnia. See sources cited *supra* note 1.

35. BOSNIA CONST. art. V.

36. The presidency nominates the chair of the Council of Ministers, who in turn nominates the ministers and deputy ministers. The House of Representatives must approve nominated ministers and deputy ministers. *Id.* art. V, § 4.

37. See *id.* art. V, § 4(b). A similar restriction exists for ambassadors and representatives to international organizations: no more than two-thirds may come from the Federation, but there is no limit

territory they represent, deputy ministers are to be of a different "constituent people," or ethnicity, than the minister under whom they serve.³⁸ The result is that a particular territory may dominate a ministry if the territory is rich enough in different constituent peoples. Thus, if a Serb from Srpska becomes the minister of foreign affairs, the only restriction on the deputy is that he or she not be a Serb. The deputy minister of foreign affairs could thus be a Bosniac or a Croat from Srpska, resulting in a Ministry of Foreign Affairs dominated by representatives from one of the Entities. Entity dominance of a ministry is much more likely to occur in the case of the Federation, in which two of the three major ethnic groups predominate. Ministerial membership requirements, therefore, unlike almost all the other membership restrictions, reward ethnic diversity in the Entities.

The Federation constitution does not itself utilize ethnic-citizenship requirements, although it does include ethnic representation and diversity requirements. The Federation consists of a number of cantons. Either Bosniacs or Croats dominate in most of the cantons.³⁹ Like the Bosnian government, the Federation government has a House of Peoples, which consists of thirty Bosniacs, thirty Croats, and an undetermined number of "Others"; the number of "Others" is calculated to be in direct proportion to the number of cantonal legislators that are not identified as either Bosniac or Croat. Thus, regardless of the numerical or political strength of Bosniacs and Croats, the two groups enjoy equal power in the House of Peoples. The Federation constitution makes no distinction among different ethnic groups characterized as "Other." Delegates to the House of Peoples are elected by cantonal legislatures in proportion to the population of the cantons. The ethnicity of the delegates from each canton is to approximate the ethnic breakdown of the cantonal legislature, although there shall be at least one Bosniac, one Croat, and one "Other" delegate from each canton, assuming that there is at least one such member in the cantonal legislature.⁴⁰

The constitutional requirements of the Federation presidency include ethnic membership restrictions. The Federation presidency consists of a president and a vice president — one of whom is nominated by the Bosniac delegates to the House of Peoples and one by the Croat delegates. The two nominees must be approved by the Federation legislature, including a majority of both the Bosniac and Croat delegates in the House of Peoples. Thus, a majority of any one ethnic group may block the presidential nominee of the other group. While the individual nominated by the Bosniac or Croat delegates can be of any ethnicity, the two nominees cannot be of the same ethnicity. This is more tolerant than the membership requirements of the Bosnian presidency discussed above, in that the Bosniacs and Croats may nominate someone of any ethnicity to the presidency. Unless there are many of "Other" ethnicity, however, the reality is that the Bosniacs or Croats will probably

on how many may come from Srpska. *Id.* art. V, § 3(b).

38. *Id.* art. V, § 4(b).

39. In the two cantons where an ethnic group does not clearly dominate, ethnic requirements similar to those found at the Bosnian government level exist. *See* FEDERATION CONST. art. V.12 ("Special Regime for [Middle Bosnia] and [Neretva] Cantons") (brackets in original).

40. *Id.* art. IV.A.6-9.

nominate someone of their own ethnicity. If the Bosniacs were to nominate a Croat, there would be two possible results: (1) the Croats could block the nomination by a majority vote of the House of Peoples, or (2) the Croats would have to nominate a non-Croat — either a Bosniac or an “Other.”⁴¹

The other Federation requirements for office membership are similar to those that apply to the presidency. The prime minister and deputy prime minister are not to be of the same ethnicity, and the deputy prime minister will be either the defense minister or the foreign minister, thus ensuring that no one group dominates the major offices of the government.⁴² At least one-third of the Federation ministerial positions are to be filled by Croats.⁴³

Both the ethnic-citizenship and territorial-citizenship representatives in the Bosnian government and the ethnic representatives in the Federation government enjoy some form of veto power over governmental decisions. The Bosnian constitution establishes an elaborate system of checks on parliamentary power by the three ethnic and political groups, vesting ultimate authority in a case of gridlock with the Constitutional Court. Two-thirds of the delegates or members representing the Federation or Srpska can veto a proposed parliamentary decision. Parliamentary decisions are to be made in both chambers by majority vote, although each chamber must make its “best efforts” to ensure that the majority includes at least one-third of the delegates or members from the territory of each of the two Entities.⁴⁴ The minimum voting requirement of one-third of the representatives from each Entity means that, under this mechanism, the Serbs are the only ethnic bloc that may alone block a parliamentary decision. The Bosniacs and Croats must convince individuals from the other ethnic group in order to amass the required one-third. For example, if all of the Bosniac delegates in the House of Peoples voted against a proposed decision and all of the Croats voted in favor, fifty percent of the vote of the Federation Entity (i.e., the Croat delegates) would be in favor, and the decision would pass.

The Bosnian constitution addresses this disparity between the parliamentary veto power of the three ethnic groups in part by creating a mechanism through the House of Peoples for each ethnic group alone to veto proposed legislation. However, the ultimate decision in the case of a dispute among the three groups again rests with the Constitutional Court. A majority of any one group of ethnic delegates in the House of Peoples may determine that a proposed decision of either parliamentary chamber is “destructive of a vital interest of the Bosniac, Croat, or Serb people,”⁴⁵ in which case the

41. See *id.* art. IV.B.2.

42. *Id.* art. IV.B.4.

43. *Id.* art. IV.B.5(1).

44. BOSNIA CONST. art. IV, § 3(d). If the desired one-third of each group is not achieved, then the chamber must create a commission (consisting of the chair and two deputy chairs of the chamber) to try to reach an agreement that will result in obtaining such support. If the commission fails to create a consensus, the decision reverts to a majority vote of those present and voting, provided that two-thirds of the members or delegates from either Entity do not dissent. *Id.* Thus, if the creation of a commission does not result in one-third of the delegates or members of each Entity affirmatively voting in favor of a decision, the decision may still pass if enough delegates or members fail to appear and affirmatively vote against the decision so as to reach the two-thirds requirement.

45. *Id.* art. IV, § 3(e).

decision will pass only if a majority of delegates from each of the three ethnic-citizenship groups votes in favor of the proposed decision. If a majority of any one of the three groups objects to a determination by another group that a proposed decision is a threat to its vital interests, a commission, consisting of a representative of each of the three groups, must attempt to resolve the conflict. If after five days the commission fails to reach a solution, the matter is referred to the Constitutional Court.⁴⁶ Each ethnic-citizenship group, therefore, has the power on its own, through its representatives in the House of Peoples, to refer a parliamentary decision to the Constitutional Court.

Bosnian presidential decisions, like parliamentary decisions, may be vetoed by any one of the three ethnic groups. A member of the presidency may declare that a presidential decision is destructive of a vital interest of its constituents. The decision will not take effect if that declaration is affirmed, in the case of a Bosniac or Croat vital interest, by a two-thirds vote of the respective ethnic-citizenship delegates in the House of Peoples or, in the case of a Serb vital interest, of the members of the National Assembly of Srpska.⁴⁷ There is no provision for the Constitutional Court to reverse such a veto.⁴⁸ It is not clear why the assertion of a Bosniac or Croat vital interest is confirmed at the Bosnian government level rather than at the Entity government level.⁴⁹ A Serb vital interest, by contrast, is confirmed at the Entity government level. In the case of the determination of a Bosniac or Croat vital interest, power is concentrated in the Bosnian House of Peoples, whereas the determination of a Serb vital interest requires the participation of members elected to the Srpska government in addition to their Bosnian representatives.

The constitutional structure of presidential decisionmaking outlined above appears to apply only to some decisions of the presidency — those labeled Presidency Decisions.⁵⁰ Presidency Decisions are those decisions that fit into the following substantive categories: foreign policy, foreign trade policy, customs policy, monetary policy, and finances of the institutions and for the international obligations of the government.⁵¹ The enumerated *powers* of the presidency, however, are broader in scope than Presidency Decisions and include, for example, executing decisions of the Parliamentary Assembly.⁵² In addition, the presidency — in fact each member of the presidency — has civilian command authority over the armed forces.⁵³ It would appear that for

46. *Id.* art. IV, § 3(f).

47. *Id.* art. V, § 2(d).

48. *See id.*

49. The constitution could have empowered the relevant delegates to the Federation House of Peoples to confirm a Bosniac or Croat vital interest. *See* FEDERATION CONST. art. IV.A.6.

50. BOSNIA CONST. art. V, § 2(c).

51. *Id.* art. III, § 1(a)-(e).

52. *Id.* art. V, § 3(e).

53. *Id.* art. V, § 5(a). It is not clear what this means, although one obvious result is a weak or even nonexistent Bosnia-wide military. The enumerated powers of the Bosnian government do not mention military policy or national defense. *See id.* art. III, § 1. After years of armed conflict filled with war crimes and crimes against humanity, it is not surprising that the drafters of the Bosnian constitution were pessimistic about the ability of integrating the three military forces into one.

The use of the armed forces is itself constitutionally limited: neither Entity is to threaten or use force

decisions not classified as Presidency Decisions, including those involving the armed forces, the presidency has discretion to determine its own rules of procedure.⁵⁴ The determination of rules of procedure itself does not appear to fall under the constitutionally mandated decisionmaking procedures, and thus, like decisions regarding the civilian command of the armed forces, is not subject to elaborate ethnic and political checks and balances.

At the Federation level, the “vital interest” check only exists at the ministerial level. One-third of the ministers (excluding the prime minister and deputy prime minister) may veto a decision of the cabinet by declaring that the decision concerns the vital interest of a constituent people. Since at least one-third of the ministers are to be Croats, the Croats are assured a mechanism for vetoing decisions that affect their interests. However, because there is no minimum requirement for Bosniac or “Other” ministers, these groups may need to gather a coalition in order to make a “vital interest” declaration. If such a declaration is made, the ministers must reach a consensus to validate the decision. Otherwise, a ministerial “vital interest” declaration may be reviewed by the Federation’s Constitutional Court.⁵⁵

The Bosnian Constitutional Court, which is entrusted with the ultimate resolution of parliamentary disputes among the three ethnic groups, is the only branch of the Bosnian government whose members are chosen partly by a non-Bosnian institution. Three of the nine members of the court are chosen by the president of the European Court of Human Rights in consultation with the Bosnian presidency.⁵⁶ Four of the remaining six justices are selected by the House of Representatives of the Federation, and two by the National Assembly of Srpska. There is no ethnic requirement for the justices of the court, but the three justices chosen by the European Court of Human Rights are to be citizens neither of Bosnia nor of any neighboring state.⁵⁷ The Federation’s Constitutional Court has a similar structure, although the foreign members of the court are appointed by the president of the International Court of Justice.⁵⁸ The Federation constitution requires an equal number of Bosniac and Croat judges on each Federation court, and “Other” ethnic groups are to be proportionally represented.⁵⁹

B. Other Governmental Bodies with Ethnic Requirements

While the legislative, executive, and, to a lesser extent, judicial bodies balance membership and power based on ethnicity, the Central Bank of Bosnia is structured to emphasize equality between the two Entities as political, rather than ethnic, bodies. The governing board of the Central Bank consists of four

against the other Entity, and the armed forces of one Entity may not enter the territory of the other Entity without the consent of the government of the latter and of the Bosnian presidency. *Id.* art. V, § 5(a).

54. *See id.* art. V, § 2(a).

55. FEDERATION CONST. art. IV.B.6(1).

56. BOSNIA CONST. art. VI, § 1(a).

57. The parliament may modify the manner of appointing justices to the European Court of Human Rights after five years. *Id.* art. VI, § 1(d).

58. FEDERATION CONST. art. IX.9(c).

59. *Id.* art. IV.C.6. This requirement would thus apply to all lower Federation courts as well as cantonal courts.

members: a governor — who is appointed by the International Monetary Fund and who is not to be a citizen of either Bosnia or a neighboring state — and three members appointed by the presidency — two from the Federation and one from Srpska. The two members from the Federation are to be one Bosniac and one Croat. There is no explicit ethnic requirement for the member from Srpska.⁶⁰ While the Federation has two members — one for each dominant ethnic group — the Federation as a whole has only one vote, as does Srpska. The governing board thus allocates power equally between the two Entities, and not equally among the three ethnic groups. Thus, the Srpska representative has twice as much power as each representative from the Federation. The equal allocation of voting power between the Entities contrasts with the revenue obligations of the Entities: the Federation is to provide two-thirds of the revenue of the Bosnian government, and Srpska one-third.⁶¹ The externally appointed governor is empowered to vote in case of a tie between the members of the Federation and the member of Srpska.⁶² It is not clear what happens if the Bosniac and Croat members disagree on how to cast their one vote.⁶³

The bodies created by the Dayton Agreement outside of the constitution place some restrictions on membership, but generally have far fewer ethnic requirements. The General Framework Agreement establishes the Commission on Human Rights and the Commission for Displaced Persons and Refugees in separate annexes from the constitution.⁶⁴ The agreement contemplates that both of these bodies will be transitional; after five years, Bosnia, the Federation, and Srpska can agree to transfer the functions of both of these commissions to the constitutional institutions of the Bosnian government. The only membership requirement of these commissions is that a certain number of seats are reserved for appointees of the two Entities, but no ethnic or other restrictions are placed on whom the Entities can appoint. Therefore, there is no use of ethnic-citizenship criteria. One Entity could, if it so desired, appoint a citizen of the other Entity as one of its representatives on either of these commissions. As between the two bodies, the restrictions that apply to membership of the Human Rights Commission are slightly more strict than those that apply to the Commission for Displaced Persons and Refugees. Both bodies contain members appointed by a European regional organization, but only in the case of the Commission on Human Rights must those members not be citizens of Bosnia nor of any neighboring state.

The Commission on Human Rights consists of the Office of the

60. These constitutional restrictions are temporary; they are to be in force only during the first six years after the adoption of the constitution. After the initial six-year term, the governing board will consist of five members appointed by the presidency for six-year terms. BOSNIA CONST. art. VII, § 2.

61. *Id.* art. VIII, § 3.

62. *Id.* art. VII, § 2.

63. A transitional body created by the constitution, the Joint Interim Commission, is to address practical questions concerning the implementation of the Bosnian constitution and the Dayton Peace Agreement. The commission consists of four members from the Federation, three from Srpska, and one from Bosnia. *Id.* annex II, para. 1(b).

64. Agreement on Human Rights, General Framework Agreement, annex 6, Dec. 14, 1995, 35 I.L.M. 130 [hereinafter Agreement on Human Rights]; Agreement on Refugees and Displaced Persons, General Framework Agreement, annex 7, Dec. 14, 1995, 35 I.L.M. 136 [hereinafter Agreement on Refugees]; see also BOSNIA CONST. art. II, § 1 (referring to Human Rights Commission).

Ombudsman and the Human Rights Chamber.⁶⁵ The Human Rights Ombudsman is appointed, after consultation with the parties, by the Chairman-in-Office of the Organization for the Security and Cooperation in Europe (OSCE).⁶⁶ The Chamber, similar to the Constitutional Court, has both Bosnian and non-Bosnian members. The Federation appoints four members, Srpska appoints two, and the Council of Europe appoints eight. The members appointed by the Council of Europe cannot be citizens of Bosnia or any neighboring state.⁶⁷ The Federation and Srpska members can be of any ethnicity. Human rights related disputes are to be heard by panels of the Chamber, consisting of two members from the Federation, one from Srpska, and four Council of Europe appointees.

The Commission for Displaced Persons and Refugees consists of four members appointed by the Federation, two by Srpska, and three by the European Court of Human Rights. The European Court of Human Rights is not restricted to appointing members of any particular citizenship. The agreement clearly contemplates the possibility that some members may not be citizens of Bosnia,⁶⁸ but does not mandate such a result. Similar membership requirements apply to the Commission to Preserve National Monuments⁶⁹ and the Commission on Public Corporations.⁷⁰

III. CONCLUSION

The Bosnian constitutional structure establishes an elaborate web of ethnic and citizenship criteria for government officeholders and institutional representation, some of which violate international human rights law and raise serious concerns about the future of ethnic pluralism in the region. In fact, by embedding ethnic-citizenship criteria in the constitutional structure, the Dayton Agreement institutionalizes the ethnic segregation that was the goal of ethnic cleansing and creates incentives for further ethnic segregation. Some constitutional membership restrictions emphasize ethnic-citizenship criteria, while others emphasize territorial or political citizenship. There does not appear to be a consistent use of one type of criteria over the other. This inconsistency at times privileges one ethnic group over the others. For example, only Serbs from Srpska may invoke an ethnic veto of a parliamentary decision.⁷¹

The creation of the predominantly biethnic Federation, combined with the emphasis on ethnicity and the rights of ethnic groups, logically leads to the use of ethnic-citizenship criteria. Serbs are represented as an ethnic group

65. Agreement on Human Rights, *supra* note 64, art. II, para. 1, 35 I.L.M. at 131.

66. *Id.* art. IV, para. 2, 35 I.L.M. at 132.

67. *Id.* art. VII, para. 2, 35 I.L.M. at 133.

68. See Agreement on Refugees, *supra* note 64, art. X, para. 3, 35 I.L.M. at 139 (providing explicit privileges and immunities protection to "[m]embers of the Commission, and their families, who are not citizens of Bosnia and Herzegovina").

69. Agreement on Commission to Preserve National Monuments, General Framework Agreement, annex 8, art. II, para. 1, 35 I.L.M. 141, 142.

70. Agreement on Establishment of Bosnia and Herzegovina Public Corporations, General Framework Agreement, annex 9, art. I, para. 2, 35 I.L.M. 144, 145.

71. See *supra* text accompanying notes 44-46.

through Srpska. However, since the current constitutional structure does not include a political entity that is primarily Bosniac or Croat in composition,⁷² the drafters of the constitution presumably felt the need to use ethnic-citizenship requirements in order to ensure that Bosniacs and Croats received adequate ethnic representation.⁷³ It is not clear why, however, the constitution could not have set aside offices for representatives of certain ethnic groups without requiring that the representatives themselves be from a particular territory or of the same ethnicity as the group represented. As detailed in this Comment, there are many cases, especially at the Bosnian governmental level, where constitutional restrictions limit the power of ethnic and political groups to choose their representatives. This use of ethnic-citizenship criteria is a hybrid between representation based purely on ethnicity (which might result in the reservation of certain seats to members of a particular ethnic group regardless of where they lived) and representation based purely on territory. It would be naive, of course, to argue that a stable pluralistic society could be created in Bosnia today. The massive and systematic violations of fundamental human rights during the last few years have inflicted tremendous wounds that will take years, if not generations, to heal. While the current ethnically charged atmosphere in Bosnia may result in an ethnically segregated society regardless of the constitutional structure, the constitutionalization of ethnic-citizenship criteria raises serious questions about the ability of the Bosnian government as currently conceived to adapt to future changes in the political importance of ethnic identity.

The Dayton Peace Agreement has resulted in at least a temporary cessation of the violent conflict. Is the Dayton Agreement, however, what Donald Horowitz has called a "grand settlement"⁷⁴ — a settlement that all the parties can accept and that will provide the basis for future negotiation and compromise? Does the agreement provide a minimal basis for the parties to live together, at least in the short run? It is not clear whether the cease-fire will last beyond the end of 1996, when U.S. troops are scheduled to pull out, or whether the proposed constitutional structure is strong enough and equitable enough to last. The variety of membership restrictions, and the use of both ethnic-citizenship and territorial membership criteria, make it difficult to determine which group, if any, benefits most from the current structure. This ambiguity may, in fact, turn out to be the constitution's greatest strength. The question is whether the advantages created by this ambiguity will offset the unwieldy decisionmaking procedures and the perverse incentives to segregate ethnic groups. These incentives toward segregation may assist others in their efforts to create ethnically based states out of the former Yugoslavia. In fact, experts in the region have expressed this fear, pointing to a possible trend toward the partition of Bosnia into three authoritarian and ethnically pure

72. However, the Croat state of Herzeg-Bosna, which was to have been disbanded in January 1996, was still functioning in April 1996. See John Pomfret, *Muslim-Croat Federation Falling Apart*, MANCHESTER GUARDIAN WKLY., Apr. 7, 1996, at 13.

73. The future of the Federation, however, is in serious doubt. See *id.* (noting rising incidence of ethnic-based violence and displacement, and creation of secret police force divorced from Federation control).

74. HOROWITZ, *supra* note 5, at 580-88.

areas.⁷⁵ By succumbing to an ethnically based analysis of Bosnia, and by embedding such intolerance in the constitution, those who in good faith fought hard to end the slaughter may find that history judges them harshly. Ultimately, history may conclude that the Dayton Agreement facilitated ethnic segregation and intolerance.

75. See, e.g., Harris, *supra* note 33, at 1.

