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## The Dayton Constitution of Bosnia and Herzegovina

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Bosnia and Herzegovina's peace arrived in November 1995 after nearly four years of devastating warfare, the loss of a quarter million lives, and the displacement of a million people. A key feature of the peace agreement that settled the conflict was a new constitution for the new country, drafted by international mediators and negotiated by a handful of wartime leaders in the conference rooms of a U.S. Air Force base in Dayton, Ohio.

The Dayton Constitution bears the scars of the process that produced it. It was part of a compromise that reconciled the competing interests of wartime factions while trying to establish a representative democracy in a state that had not yet completed its transition from socialism. As a compromise, it both enabled and constrained Bosnia's transition toward democracy, and the tensions within the document remain central to Bosnia's experience with state building.

The Bosnian constitution-making process provides four important lessons:

1. A constitution drafted as part of an effort to end a conflict reflects the tensions that fueled the conflict.
2. When negotiating parties represent narrow interests, international mediators should press broader interests, including democratic governance and the constitution's capacity to evolve beyond the immediate purposes of the negotiating parties.
3. International leverage may be at its greatest when conflicts are being resolved. It may be better to address governance issues at that point, rather than deferring them by adopting broad principles or interim governing arrangements.
4. For a constitution crafted in a peace agreement, implementation requires ongoing negotiation and effort, just as the peace agreement does overall. The Dayton negotiations did not produce a clear mandate or plan to address lingering obstacles to implementation. An arbitrarily short and unrealistic deadline to implement the peace agreement fully, imposed by the interna-

tional community, prevented the international community from engaging on implementation as creatively and strategically as it could have. This failure meant that each step toward implementation required continual renegotiation, both within the international community and with Bosnian actors. Implementation was thus awkward, compromised, and hesitant.

## Background

Even before the war in Bosnia, the Yugoslav political system had been under strain for years due to ethnic differences, economic inequities, and weak political structures. While the Party and the country's paramount leader, Josip Broz Tito, held the system together in reality, a convoluted constitutional structure held it together in theory. In response to discontent among the republics in the federal system—especially Slovenia and Croatia, which resented the perceived Serb domination of the federal government—the 1974 federal constitution overhauled the system and devolved tremendous authority to the republics. Under the 1974 constitution, each of the six republics of Slovenia, Croatia, Bosnia and Herzegovina, Serbia, Montenegro, and Macedonia, as well as the two autonomous provinces of Kosovo and Vojvodina, which remained within Serbia in that constitution, was represented in an eight-member collective presidency. The collective presidency, in turn, selected a prime minister. Though the system survived Tito's death in 1980, it was wired to produce confusion and deadlock.<sup>1</sup>

As economic troubles mounted during the 1980s, canny politicians such as Slobodan Milosevic in Serbia and Franjo Tudjman in Croatia promoted ethnic nationalism, from opportunism or belief. Given the threat that nationalism posed to Yugoslav cohesion, ethnicity had been a taboo subject, and it proved to be a potent factor in the disintegration of the state and the onset of civil war.<sup>2</sup> In a now

infamous speech to a massive crowd of Serbs in Kosovo on June 28, 1989—the six hundredth anniversary of an epic Serbian defeat that marked the beginning of Ottoman rule in the region—Milosevic invoked that historic event to suggest that the Serb nation was once again under threat and might need to employ force.<sup>3</sup> Milosevic's nationalist rhetoric and agenda provoked equal and opposite reactions from Yugoslavia's other ethnic groups, particularly Croats.

Also throughout the 1980s, the Serbian government sought increasingly to dominate the federal institutions, while Slovenia and Croatia increasingly pursued a separatist trend. Among other moves, in March 1989, Serbia effectively gained control of half the votes in the collective presidency, first, by pushing constitutional amendments through the system that virtually eliminated the autonomy of Kosovo and Vojvodina, and second, by co-opting Montenegro. By mid-1991, the Yugoslav People's Army (JNA) was the last fully functioning federal institution.<sup>4</sup>

Though precipitated by the efforts of Milosevic's Serbian government to dominate the federal system and the unwillingness of key figures to negotiate a peaceful dissolution, Yugoslavia's actual death spiral began with Slovenia's and Croatia's declarations of independence on June 25, 1991. Prompted by international recognition of Croatian independence in January 1992, Bosnia followed suit in March 1992. While Slovenia, the westernmost republic, successfully extricated itself from the impending morass after a low-intensity ten-day conflict with JNA forces, Croatia's and Bosnia's independence moves prompted their large Serbian minorities—and in Bosnia, the Croat minority—to seek a major realignment of borders. In Croatia, rebellious Serbs declared their own so-called Republika Srpska Krajina, which they sought to keep within the rump Yugoslavia. In Bosnia, the nationalist Serb political party, the Serb Democratic Party (SDS), declared the

creation of the “Republika Srpska,” which they also sought to keep within Yugoslavia, while nationalist Croats created their own putative mini-state of Herceg-Bosna. The drive to carve ethnically defined states out of territories with ethnically mixed populations, and the support that the breakaway nationalist groups received from Milosevic (who controlled the JNA) and Tudjman in Croatia, scuttled any possibility of a peaceful transition to independence for Bosnia and Croatia.

The war in Croatia began in summer 1991 and lasted until summer 1995, when Croatian forces defeated the Serbian Krajina republic; in the end, its backers in Belgrade abandoned it.<sup>5</sup> In Bosnia, the war erupted in 1992 and continued until autumn 1995, when new North Atlantic Treaty Organization (NATO) military activity, a newly vigorous U.S. diplomatic effort, and, above all, a coordinated Croat and Bosniac offensive combined to reverse Serb gains.

By 1995, after more than three years of fighting, there was an opening for peace in Bosnia. All sides had good reason to fear another winter at war. As a result of diplomatic initiatives in 1994, Bosnia's Croats and Bosniacs—a multiethnic but predominantly Muslim group that supported the central government—were fighting and negotiating primarily in concert. Bosnia's Serbs for the first time faced Croatian and Bosnian forces that could take and hold territory; were without their buffer sister entity in Croatia, the Republika Srpska Krajina, which Zagreb had defeated in August 1995; and were bent by pressure from their former sponsor in Belgrade. For their parts, Bosniacs were concerned about cities incapable of breaking Serb blockades, and Croatia and Yugoslavia saw more benefit to supporting peace than war. Yugoslavia would see economic sanctions end and Croatia would finish its task of reuniting its territory for the first time since independence. Finally, the international

community was willing to impose a settlement if necessary, as it had been horrified by atrocities committed by Serb forces when they overran the UN-protected enclave of Srebrenica in July 1995 and worried about the war's expansion.

### **The Dayton Agreement**

From August through October 1995, U.S. Assistant Secretary of State Richard Holbrooke led a team of U.S. negotiators in multiple rounds of shuttle diplomacy in Balkan capitals and elsewhere. This process led to the November 1–21 peace conference at Wright-Patterson Air Force Base in Dayton, Ohio, at which the final peace agreement was negotiated and initialed. It was signed the following month in Paris.

The Dayton Agreement—formally, the General Framework Agreement for Peace in Bosnia and Herzegovina—comprised an overarching framework agreement and eleven annexes, one of which, Annex 4, was the new constitution. Signed by the Republic of Croatia, the Federal Republic of Yugoslavia (now Serbia and Montenegro), and the Republic of Bosnia and Herzegovina (the government of which, by this time, was dominated by the Bosnian Muslims), the framework agreement provided for the mutual recognition of the sovereignty of the three now-separate states and acknowledgment of the territorial integrity and political independence of Bosnia and Herzegovina. The signatories also committed themselves to respecting and promoting fulfillment of the provisions of the annexes. Different constellations of parties signed the various annexes: in some cases, only the Federation of Bosnia and Herzegovina (Federation)<sup>6</sup> and the Republika Srpska (RS); in other cases, those parties as well as the signatories of the framework agreement. The annexes covered a range of issues, from the military aspects of the settlement to elections to refugees and displaced persons.

The Dayton Agreement resulted in a Bosnia based on the two “Entities,” the RS and the Federation, which already de facto existed on Bosnian territory but did not recognize each other’s legitimacy. The Entities comprised a unitary state under the new constitution of Bosnia and Herzegovina, which provided for direct elections, international personality, and a set of powers and institutions for the central government adequate to carry out the responsibilities of statehood. The governing structure was strongly decentralized, however, with most government powers held at the Entity level or below.<sup>7</sup>

## Structure of the Negotiating Process

### *Structure of the Peace Negotiations:*

#### *Proximity Talks*

The structure of negotiations is a complicated question for any negotiation. There are essentially three options: shuttle diplomacy; proximity talks; and face-to-face negotiations, as in a constitutional assembly.

By November 1995, shuttle diplomacy had done what it was likely to do. From August to October 1995, an intense shuttle conducted by U.S. diplomats had produced a stable cease-fire, introduced strong NATO military action, won agreement to some basic principles for a peace agreement and constitution, and identified the key players who would participate in final peace negotiations. Continued shuttling, however, would have been less effective. It was difficult and dangerous; three U.S. diplomats died on the shuttle in August. It would have left the parties at home, open to influences and under pressure to disclose details that could damage the peace talks. Bosnia remained at war in the time before Dayton. A cease-fire was held together by exhaustion after months of intense fighting and expectations of a strong international military response to any breach. It is uncertain that the cease-fire would have

survived if the parties had rested over the winter, with the international community’s willingness to commit to pursuing a peace agreement declining.

By ending shuttle talks, the United States also added an element of drama to the choreography of its late entry into peacemaking in Bosnia. Business as usual—and after three years of shuttle talks of more or less intensity, they were business as usual—would not be accepted. The call to a peace conference was an element in preparing the environment for a push to concluding a deal. The location of the talks—in the United States, at a military base, after years of U.S. reluctance to become involved in Bosnia’s war—heightened the sense of drama. The Dayton talks were set up to close the peace deal or to fail clearly and dramatically; they were not intended to be yet another stage in an ongoing peace process. Finally, conducting a peace conference far from the region allowed the United States to control participation. Prior peace negotiations failed in large part because the array of parties participating could manipulate the process, confident that another side would reject a peace agreement. By having each side present, the U.S. negotiators could tamp down these kinds of manipulations.

Well into summer 1995, Bosnian Serb leaders gave no sign of their willingness to negotiate peace. In July 1995, the International Criminal Tribunal in The Hague indicted Radovan Karadzic and Ratko Mladic, the civilian and military leaders of the Bosnian Serbs. In August 1995, Holbrooke, the lead U.S. negotiator, announced that the United States would not negotiate with Karadzic and Mladic. Soon afterward, the patriarch of the Serbian Orthodox Church arbitrated an agreement under which Serbian President Milosevic would effectively represent Bosnian Serbs. Milosevic sought an end to economic sanctions on the Federal Republic of Yugoslavia; he was not very interested in the details of Bosnia’s governance. Given just

enough to satisfy Bosnian Serb demands, he would accept a peace agreement that Bosnian Serb leaders would reject.

Similarly, Bosnian Croats were represented by Zagreb. Bosnian Serbs and Bosnian Croats present at Dayton participated in some negotiating sessions, but each group was excluded whenever their patrons from Belgrade or Zagreb requested it. Both of these Bosnian groups rejected elements of the settlement. The head of the Bosnian Croat group resigned and the Bosnian Serb leadership allegedly "fainted" when shown the final territorial arrangement; neither group's leader initialed the agreement at Dayton or signed it in Paris several weeks later. If shuttle diplomacy had continued, these groups would have remained separate voices, speaking from their own capitals through tame media.

One technical advantage of the Dayton negotiations has faded and possibly disappeared forever: Participants agreed to negotiate under news blackout, a feat that would have been impossible in the later age of ubiquitous cell phones. Thirty-six months after Dayton, Israeli-Palestinian talks were located at the Wye Plantation in rural Maryland in part because of poor cell-phone coverage there; five months after Wye, the Rambouillet negotiations outside Paris that sought to avert the NATO-Yugoslavia conflict over Kosovo sprouted cell phones like mushrooms, with damaging leaks prejudicing the negotiations.

The international negotiators entered Dayton with the flexibility to choose proximity or face-to-face talks. Other than a ceremonial plenary session, the parties stayed separate for the first days, with negotiators arranging separate sessions. One senior face-to-face session was arranged; it produced maximal demands and harsh recriminations. Talks thereafter proceeded mostly as proximity discussions. During negotiations, parties made proposals to the negotiators, not to the other side. With few exceptions, this arrangement was at the request of the party leaders.

This allowed the international negotiators to control the pace and heat of proposals. No side knew another's reaction to the proposals, or even whether negotiators would present them, which reduced posturing. When face-to-face negotiations took place, they were private and focused on core issues at the end of negotiations.

The Dayton environment, in short, was tailored to end a war. It did not resemble a constitutional assembly or roundtable either in involving representative elements of Bosnian society (and excluding meddling outsiders) or in permitting time for reasoned deliberation. The negotiators were painfully aware of these defects. I discuss below how they were addressed within the constraints of the situation and may arguably have produced a set of governing arrangements more democratic—and certainly more durable—than Bosnians could have produced themselves by the end of the war.

### *International Control of the Process*

Formally, negotiators Holbrooke and former Swedish prime minister Carl Bildt convened the conference together. Holbrooke represented the Contact Group: at the time, the United States, United Kingdom, Russia, France, and Germany, with Italy first as an informal and later a formal member. Bildt represented both the United Nations and the European Union. However, the U.S. government had decided on its policy concerning the desired substantive outcome of the peace conference while the other international actors decided theirs. The international negotiators consulted among themselves before and during Dayton until they reached agreement on proposals to offer to the parties.

The United States was the driving force of the negotiation, generally preparing papers, controlling the drafting process, and deciding the timing for presenting proposed compromises and written drafts to the parties. Nev-

ertheless, consultations among international negotiators shaped the agreement to a large extent, and the process often was extensive and contentious. On the military, civilian implementation, and police annexes in particular, discussions among the Contact Group consumed much of the time at Dayton, with the parties receiving texts late in the talks. On the constitution, the Contact Group reached broad agreement in the first days of Dayton, though negotiations continued until the final day of the talks (see below).

Each side had talented legal advisers, with Bosnian Croats and Serbs represented often by lawyers from Croatia and Yugoslavia. The Bosniacs had a team of international experts who could work in the style of the international negotiators. The cultural differences among lawyers—public international lawyers and constitutional experts, U.S. and British lawyers used to working with ambiguous texts built to evolve, Europeans split among British and continental lawyers, Yugoslavs most closely tied to a strict interpretation of texts—slowed drafting but also allowed ideas to be examined carefully and provided for cross-fertilization among traditions while keeping Yugoslav notions foremost.

The significance of cultural differences was apparent in debates over the role of the new Bosnian presidency. Negotiators from a Yugoslav tradition wanted a presidential system, and lawyers from that culture expected the powers to be extensive, with little room for interpretation. European lawyers and negotiators maintained constant support for a strong government, headed by a prime minister and relatively autonomous from the presidency; they made the point that a Bosnia seeking to join Europe should have a modern European style of governance. Ultimately, the constitution created a government centered on a presidency comprising three members, one from each of the three main ethnic groups, with the chair rotating among the presidency's members. The presi-

dency generally was to decide by consensus, but on a limited set of issues, it could decide by majority.

The international community ruled Dayton by the sheer number of its participants. A sizable U.S. contingent comprised representatives from the State Department, National Security Council, Office of the Secretary of Defense, Joint Chiefs of Staff, office of the U.S. Permanent Representative to the United Nations, and other agencies. The European Union had its envoy, his staff, and national delegations from the Contact Group. These delegations included senior political representatives (political-director level), lawyers, technical experts, and support staff.

With these resources on site, international negotiators could cover every aspect of the talks. Drafts of each portion of the text were developed by international lawyers, agreed among the senior representatives of the Contact Group, and finally presented to the parties. U.S. and European lawyers developed separate draft constitutions over a period of weeks before Dayton, but a unified draft was agreed upon as the conference opened.

The first U.S. outline of a peace agreement was prepared in late August 1995. The draft drew heavily on previous peace efforts, including in particular the so-called Invincible draft agreement (named after the British carrier *HMS Invincible*, on which peace negotiations took place in September 1993) and the Washington Agreement establishing the Bosniac-Croat Federation.<sup>8</sup> It took organizational lessons from contemporary international practice, including agreements concerning Afghanistan, Ethiopia-Eritrea, and Namibia. It suggested a set of broad principles to support an end to the war, to be included in a general framework agreement, and a series of annexes on issues of specific importance to the parties and the international community. These included governance, elections, human rights, return of persons displaced by the war, and other issues. The suggested outline was

largely ignored for several weeks while shuttle talks focused on obtaining a cease-fire.

At several points in September 1995, U.S. negotiators discussed among themselves the framework of a peace agreement. Most attention was devoted to security concerns, though there was a general consensus that the parties would require a peace agreement to include arrangements for governing Bosnia. A more complete U.S. draft peace agreement, including the core elements of a constitution, was prepared at the end of the first week of October. In the last week before the peace conference opened, European experts presented to the U.S. team a set of proposals, and the two were synthesized in Washington. Most of the work was done over the weekend before the talks began.

At Dayton, Milosevic reportedly greeted Holbrooke by saying, "So, I hear that you are going to present us with an encyclopedia." In fact, the peace agreement was presented to the parties piece by piece; the negotiators were trying to establish a steady pace of work and a constructive environment. In the first two weeks, relatively little attention was paid to the constitution, as the bulk of work focused on issues tangential to the final agreement, including the release of a U.S. journalist being held by Bosnian Serbs, the resolution of a territorial dispute between Croatia and the Federal Republic of Yugoslavia, and the strengthening of the Federation.

### *Substance of the Constitution*

The process by which the Dayton Constitution was negotiated raised the real possibility of locking in nationalist control of the country. The international negotiators here faced a dilemma. Nationalists already controlled the country's resources, military might, and fate, so they had to make the peace. It was clear from the start of negotiations that nationalists wanted to convert their wartime power into political authority. This was ap-

parent in negotiations of the substance of the constitution. For example, some positions asserted on the structure of the government reflected the aspirations of particular individuals for particular offices. In the final week of the Dayton talks—roughly November 14 to 21, 1995—attention turned to governing arrangements. Several themes ran through these talks, which took place at both the technical and the principals' level.

First, human rights guarantees were easily accepted. The agreement enumerates a comprehensive list of human rights instruments and standards to be upheld in Bosnia; lawyers could hardly write the provisions quickly enough to stay ahead of the parties' agreement. The agreement as a whole reinforces the primacy of human rights by including annexes on several human rights issues, such as the rights of refugees and displaced persons (Annex 7), rights and avenues for redress for victims of human rights abuses (Annex 6), and police monitoring and reform (Annex 11). The provisions are to be enforced by the international community, witnessing states, and Bosnian authorities. Moreover, the agreement requires cooperation with the International Criminal Tribunal for the Former Yugoslavia and forbids fugitives from the tribunal from engaging in political life. The Dayton Constitution forbids any amendment that would "eliminate or diminish" the human rights standards that it requires, including European human rights law (see Article X[2]). The constitution also provides that European human rights law—that is, the European Convention for the Protection of Human Rights and Fundamental Freedoms—"shall apply directly" in Bosnia and "have priority over all other law" (see Article II[2]). These simple sentences were little noticed, except as an unexceptional statement of Bosnia's desire to be part of Europe.

Second, the governing institutions and their composition received extensive attention from the parties. Two issues in particular

were controversial: the authority of the central government, including mechanisms to enforce individual rights; and the ethnic distribution of key positions in the government. As a general matter, the Serb side, with support from the Bosnian Croats, wanted a decentralized state, with each ethnicity largely responsible for governing areas in which its ethnic group held a majority. There would be little if any intrusion by other governing bodies, including the central authorities. This produced a core compromise in the constitution. The central government—itself not called a government, but simply “institutions of Bosnia and Herzegovina”—was given jurisdiction mostly over areas agreed to be necessary to carry out the responsibilities of statehood. It was acknowledged that only central authorities could represent the country in international organizations such as the United Nations.

It was more difficult, however, to address subject matters in which central authority was desired by one of the parties (usually the Bosniacs) or could be efficient or helpful rather than logically necessary. One agreed solution was to provide the central institutions with broad authority, but generally phrased in terms of policy—as in “customs policy”—with the expectation that implementation might be left to the two Entities or to some special body established for a particular purpose. In the document, the line between policy and implementation is not addressed, but left to give-and-take among those responsible for implementing Bosnia’s constitution.

The result of a compromise, the delineation of the scope of the central government’s authority remains controversial. To some, the central government has limited authority expressly set forth in the constitution, particularly in the specific subject matter listed in Article III(1). Additional specific authorities are allocated to central institutions, including the parliamentary assembly (Article

IV[4]), the presidency (Article V[3]), and the council of ministers (Article V[4]), and the document grants other express powers to central institutions as well. From this point of view, the key sentence in the constitution is Article III(3a), which provides that “all governmental functions and powers not expressly assigned in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities.”

At Dayton, Bosnian Serbs and Croats pressed this position most often, as they sought to preserve their authority over those parts of Bosnia where they expected to retain political power. The Bosniacs opposed this interpretation. They sought a more powerful central government, in which they expected to have a majority. Also, the international community wanted to ensure that Bosnia’s central institutions could follow through on legal obligations and political commitments that would arise during the country’s post-war reconstruction as well as its eventual entry into European institutions.

Both the language and the structure of the constitution reflect the resulting compromise. Essentially, the central government is given broad authority to ensure that Bosnia meets its legal obligations; those obligations are framed in open-ended terms. Responsibility for implementing obligations lies initially with the Entities or lower levels of government; with the sentence granting them authority to carry out all “governmental functions and powers” not described in the constitution (quoted above), the drafters intended to ensure that they had the authority necessary to accomplish this. The drafters wanted to ensure that Entity governments, reluctant to enforce guarantees that might reduce their power, could not excuse their non-performance by claiming that their own Entity constitutions were limiting them. Under this interpretation, the possibility remains for the central institutions to take on responsibilities not fulfilled by the Entities, provided



that their doing so is necessary and appropriate to seeing that Bosnia meets its legal obligations under international law and under the Constitutional Court's particular approach to interpreting Bosnia's constitution.

The issue of who decides whether the central institutions can act was left largely unresolved. It is clear that the central judiciary has extensive authority over Entity and lower levels of government. The Entity and other substate levels of government are subject to decisions of the Constitutional Court, a central government institution empowered to act on referrals by central authorities and to hear appeals from courts in either Entity. The establishment of the Constitutional Court and the judicial system as a whole struck at a central assertion from earlier in the negotiations, made most often by Bosnian Serbs, that the Entities were to be the final arbiters of questions about whether international or domestic legal obligations were being met.<sup>9</sup>

Still, as mentioned above, the authority of the political institutions—the presidency, council of ministers, and parliamentary assembly—remains controversial. As Bosnia's international commitments become more intrusive in the society, taking on, for example, Council of Europe rules on education, a subject not addressed in the constitution, the reach of the central government can be expected to grow, at least insofar as it ensures that the Entities are implementing the international commitments appropriately. This authority can be interpreted narrowly, as related only to issues needed to protect Bosnia's international personality, or more expansively, as related to political decisions made in the exercise of Bosnia's sovereignty. The Constitutional Court has endorsed the latter approach, declaring that the central government has a role beyond its enumerated powers, as part of its broad responsibility for taking actions "necessary to preserve the sovereignty, territorial integrity, political independence, and international personality of

Bosnia and Herzegovina." This gives the central institutions responsibility beyond Bosnia's legal personality, inferring a structural role in ensuring that the broad objectives of the peace agreement—reconciliation—and of the constitution itself are implemented. The Court has carried the central government's authorities beyond those enumerated, into areas such as language (paragraph 34 of Partial Decision II) and protection of private property (paragraph 12).

The court properly has refrained from spelling out the circumstances under which the central institutions can act. The constitution deferred questions of central-government authority to the political judgment of the people governing Bosnia. This is an area that cannot be defined prospectively; probably it never can be defined entirely through judicial decisions. It will be a political negotiation among international, state, and substate political players. It seems likely that, as the tensions surrounding the war end, the political authorities can decide on the basis of efficiency and structure to give ever more responsibilities to the central government. But the process is not a ratchet; responsibilities can also be taken away.

### *Architecture of the Central Institutions*

The structure of the central institutions resulted in a cumbersome system. Drawing from their experience under the Yugoslav system, the parties agreed from the start on a multiperson presidency. But when Dayton negotiations started, they had not yet debated the extent to which a government should be constituted as the administration of the country, or whether executive powers would be subordinate to the presidency. The Serb delegation strongly opposed establishing a central government by name, so the "Council of Ministers" was established instead, with a "chair," rather than a prime minister. This body had the authority to implement all

functions of the central government, and it survived the negotiations with no clear limitations on its power, which ultimately rests on how little text is devoted to it.

Unfortunately, the absence of an international consensus in favor of a strong governmental system that might make up for the weakness of a multiheaded presidency created problems within weeks after Dayton. The High Representative agreed to have the chair position rotated on an ethnic basis, even though the constitution deliberately omitted such a requirement (the weakness of the High Representative is discussed below). Human rights enforcement was an especially contentious area. All parties readily accepted the human rights principles, but they were unwilling to sign on to any governmental arrangement that would have the authority to intervene in the affairs of the decentralized government bodies they preferred. For example, the Dayton Constitution provides that all government institutions would apply European human rights law to Bosnia; this provision was acceptable to all. The constitution goes further, however, by granting jurisdiction to a central court, unforeseen in the parties' negotiating positions, to order Entity governments into compliance. An ombudsman was given authority to require specific actions of government authorities; individuals were given the ability to reach above Entity governments by invoking domestic administrative and judicial remedies or complaining directly to international civilian officials.

Why were such provisions accepted? At Dayton, their voices muffled by Milosević's representation, Bosnian Serbs could not argue that the entire peace agreement should be jeopardized for the sake of their Entity's primacy, and Zagreb's representatives were not motivated to hold the line for Bosnian Croats on this issue. In this respect, the bundling of governance arrangements with a peace agreement, which the larger regional

powers desired, provided leverage that the international community would have lacked otherwise.

The parties also paid enormous attention to ethnic aspects of governmental arrangements, in both voting procedures and guaranteed spots in government.<sup>10</sup> Throughout the series of Yugoslav peace negotiations up to and including Dayton, the parties had insisted on special voting rights in legislative bodies for ethnic groups. These usually took the form of ethnic vetoes, whereby representatives from one of the three major groups could block any action by majority vote among themselves. In addition, the parties paid close attention to who would get which government jobs. Public administration at all levels was to be representative of the population, and seats in legislative bodies were allocated at least in part by ethnicity. In the last days of negotiation, the parties insisted on adding a second legislative chamber called the House of Peoples, in which Serbs, Croats, and Bosniacs were equally represented. Election to the House of Peoples was governed by Entity-level bodies controlled by the dominant political parties.

The presidency of Bosnia and Herzegovina was created to involve three people, one Serb, one Bosniac, and one Croat. Each was elected directly, a setback for the dominant parties, which sought control over the nominating and selection process. But ethnic guarantees ran deep. The Serb member of the presidency was to be elected only from the territory of the Republika Srpska, and the Bosniac and Croat members elected only from the Federation. This prevented anyone not a member of one of those three groups from holding a seat in the presidency and reinforced the Entities' ethnic character. The rule was designed to protect the dominant political parties, as representatives from the three delegations met jointly to discuss the rules for presidential and legislative elections. It was one of the few times that

Bosnian Serbs represented themselves in negotiations. The Bosnian Serbs calculated that the Republika Srpska would remain Serb-controlled, leaving Bosniacs and Croats to vote in the Federation. Moreover, the Bosnian Croats were concerned that Croats from the Republika Srpska would be less nationalistic than those from the territory of the self-proclaimed rump state of Hercegovina, which lay inside the Federation and had little interest in including more moderate Croats within their electorate.

Various parties sought additional guarantees, including a demand that each member of the presidency be selected by a caucus of the largest party connected with each ethnic group; given the dominance of the nationalist parties and the few nonnationalist parties' rejection of explicit ethnic group affiliation, this arrangement would have locked the presidency into nationalist control. International negotiators, however, rejected this last proposal as incompatible with an agreement negotiated under international auspices and purporting to establish a democracy. The parties apparently knew this, as their more far-reaching proposals were not made in the presence of their own international advisers.

The Dayton Agreement embedded in Bosnian law obligations toward the International Criminal Tribunal for the Former Yugoslavia. Persons indicted by the Tribunal were forbidden from participating in negotiations or holding public office.<sup>11</sup> This requirement followed from the U.S. decision leading to Dayton that persons indicted by the Tribunal would not be allowed to participate in the negotiations. Beneficially, this principle removed from talks Bosnian Serb leaders Radovan Karadzic and Ratko Mladic, who had shown themselves unwilling to conclude peace agreements. It provides an example of how the pursuit of justice can promote peace. Holbrooke has said that without the Tribunal, it would have been much more difficult to conclude an agreement.

Under the terms of the constitution, all Bosnian authorities were required to cooperate with the Tribunal and fugitives from it were forbidden from holding public office, a stipulation enforced by checking electoral lists and lists of persons holding such offices. This process was ineffective at first. Karadzic retained his title as president of the Republika Srpska until July 1996, seven months after Dayton, and war-crime suspects—a broadening of the constitutional requirement—held public office at lower levels for more than a year. But the mechanism became more effective over time, as the High Representative, the Organization for Security and Cooperation in Europe (OSCE), and international police monitors vetted appointees and candidates for public office with the Tribunal.

#### *The Tension at the Heart of the Dayton Constitution*

In fact, however, the human rights provisions in the constitution are at odds with the ethnically based provisions that the parties insisted upon: Key provisions that nationalists relied on in deciding to accept the constitution and the broader peace agreement are inconsistent with contemporary European and international human-rights norms regarding individual rights and equality of citizens. The ethnically based provisions in the constitution, which reflect a notion of ethnic group rights, not protection of minority rights, may be vulnerable to legal attack.

The ways in which the parties sought to protect themselves against political competition at the Entity level—such as by declaring the Entities in their constitutions to be “constituted” by some but not all ethnic groups in Bosnia, and by limiting eligibility for key offices to citizens from specified ethnic groups—has already begun to unravel. In 2000, the Constitutional Court established pursuant to the Dayton Constitution de-

cided that because the constitution of Bosnia and Herzegovina recognizes the equality of all three “constituent peoples” it names—Bosniacs, Croats, and Serbs—so too must the constitutions of both Entities recognize all three groups as “constituent peoples.”<sup>12</sup> The decision declared unconstitutional several provisions in each Entity’s constitution, including a provision in the RS constitution that “Republika Srpska shall be a State of the Serb people and all of its citizens” and one in the Federation constitution that excluded Serbs from “constituent people” status.<sup>13</sup> More generally, the Court found that provisions reserving public office for members of particular groups, or those granting a veto to one or two groups, are a serious breach of the Convention on Racial Discrimination and of the constitutional principle of equality of peoples.<sup>14</sup>

While the Court decision was a step forward in enhancing the rights and opportunities of Bosniacs and Croats in the RS and Serbs in the Federation, like the Dayton Constitution itself, it failed to advance the interests of citizens who were not members of any of the three groups, or who chose not to identify themselves by ethnicity. The Court felt constrained by the constitution’s ethnic architecture, and its decision, as well as a subsequent implementing agreement, therefore maintains the principle of ethnic division of power that is at the heart of the Dayton compromise.<sup>15</sup> Nevertheless, the parties almost certainly would not have accepted such a result had they foreseen it. The Bosnian Serbs in particular expected the Dayton Constitution to protect the status of the RS as a Serb enclave, not to be a basis for insisting on the equality within it of the three “constituent peoples” of the state.

#### *Perceived Need for a Complete Constitution*

Would it have been better to postpone the drafting of detailed constitutional arrange-

ments until after a peace agreement was secured? In the run-up to Dayton, negotiators discussed alternatives to a full constitution, including an interim arrangement; a decision to extend the Federation to incorporate Republika Srpska; and even the adoption of simple governing principles to serve for an interim period until permanent arrangements could be struck. None of the alternatives received lengthy consideration, however. Simply put, the interests of all of those in the talks argued for a full constitution. Each of the warring factions wanted lasting governing arrangements to lock in what they had gained by fighting and what they hoped to gain at peace talks. The Bosniacs insisted that Bosnia be a single state, with no provision for any group or territorial area to withdraw. The Croats insisted on being an equal partner in governance, even though they were the smallest of the three groups. The Serbs demanded a decentralized state, in which their self-proclaimed Republika Srpska could govern with little interference from the national capital. Finally, international negotiators, weary of the strains that the war in Bosnia imposed on transatlantic relations and eager to move the Bosnia crisis off the front pages, were looking for a final peace settlement, rather than a step in a process. An interim solution would have deferred these issues when the parties asked for them to be resolved.

Moreover, the parties’ negotiators would not have agreed to the broad outlines of the peace without assurances that their influence would continue in peacetime Bosnia. In some instances, this was a very personal struggle, as individual negotiators eyed the jobs they wanted and tried to shape the governing arrangements favorably to their future positions. Representatives of all three dominant and nationalist Bosnian political parties watched the details of negotiations carefully to ensure that any arrangement maintained, or even improved, the privileges of their party and ethnic group.

The pattern of Bosnian negotiations reflects the parties' preference for durable governing arrangements. In the Carrington plan of late 1991, the Vance-Owen plan in spring 1993, the Washington Agreement of February 1994, and the Contact Group plan in summer 1994, the parties paid close attention to governing arrangements. Each contained specific principles and even full constitutions. By the time the Dayton talks opened in autumn 1995, the parties expected a peace agreement to include durable constitutional arrangements.

The international community also had little interest in an intrusive civilian presence that could govern Bosnia without full arrangements for Bosnian self-rule. The international military presence was limited initially to one year, and without military force, the civilian international authority would be unable to prevent wartime factions either from returning to war or achieving their ends by other means. In that environment—driven by an arbitrary deadline—the maximum international leverage to decide governance was during the peace negotiations, at the start of the international presence, rather than in the face of a self-imposed, arbitrary deadline.

In addition, a full constitution allowed the introduction of more intrusive human rights provisions as well as provisions allowing the constitution to evolve as Bosnia and its region moved toward EU membership. None of the parties would allow itself to be seen as rejecting clear-cut European norms. The postwar European institutions are heavily lawyered, and the web of norms, standards, and organizations relate to one another in the nuanced, cross-referenced, and oblique language of the law. By importing that language into the constitution, international negotiators insulated these European norms—and the aspirational aspect of the constitution—from direct challenge.

Indeed, the full constitution reflects a substantial advance from the preliminary texts

negotiated in the weeks leading to Dayton. As negotiators shuttled around the region, they arrived at two sets of principles, agreed upon in September 1995. These short documents, examined minutely by the parties, set the parameters for the Dayton Agreement. They display an intention, especially from the Bosnian Serbs, to create a weak government with vague and unenforceable commitments to European norms; coercive power would rest not in representative governments but in the hands of executives at the head of each Entity. For example, the principles did not provide for a judiciary but instead provided that the Entities would seek to resolve disputes through arbitration. This would have left citizens in one Entity without practical recourse in the other and, in fact, would have left a central government without the ability to enforce constitutional requirements on either Entity. It was a proposal for a union from a feudal age, not a modern European state.

The principles constrained negotiations at Dayton, as negotiators promised that the principles would be respected in any final negotiation. As events unfolded, the international negotiators' leverage increased as a peace agreement neared, so that it became possible late in the talks to include items—such as a Constitutional Court—that had been impossible when the principles were discussed.

### *Public Participation*

There was no public involvement in Dayton negotiations. Negotiations took place under a blackout, with neither informal public consultation during negotiations—unlike the Good Friday accord negotiations in Ireland—nor formal public or democratic approval thereafter. Upon the peace agreement's signature in Paris, the constitution took effect without any provision for approval by legislatures or popular votes. At Dayton, the parties

signed an agreement in which they acknowledged that by initialing the text at Dayton, they agreed to be bound by the peace agreement. The constitutions of the two Entities, which had been adopted through democratic processes, albeit of questionable legitimacy and under wartime pressure, were required to be conformed to the Dayton Constitution. International negotiators were not entirely comfortable with the approach, which seemed less than perfectly democratic. Still, without much controversy, the lawyers proposed and the Contact Group accepted that the new constitution would enter into force once it was signed. The reason was simple: It would end the war. Parties had manipulated previous peace negotiations by pleading incapacity to conclude an arrangement without consultations or democratic approval at home.

Still, the democratic deficit was not as great as it might have been. The parties were encouraged to seek approval of the constitution from their relevant legislative bodies. They were warned, however, that they should not find themselves unable to deliver approval. Ultimately, both Entity legislatures approved the constitution. The process of conforming Entity constitutions to Dayton, which took several months, allowed them to invoke the constitutional mechanisms for amendment. However, the process worked badly if at all. The High Representative was forced to direct the RS authorities to amend their constitution, and the amendments proposed were minimal, leaving a document still largely nationalistic in character. In 2003, nearly eight years after Dayton, the High Representative again ordered amendments to the RS constitution. The process of amending Entity constitutions was theoretically adequate but in practice unsatisfactory.

The Dayton Agreement also called for elections no later than nine months after the agreement's entry into force. These elections

were intended to remedy the lack of popular engagement in the negotiation or ratification of the agreement, open the possibility that new leaders might emerge, and demonstrate that conditions in Bosnia had improved, to cement international approval for the intervention there. The elections did reduce nationalist percentages in the governments of each Entity, but nevertheless, the elections were conducted quickly in an environment insufficiently recovered from wartime hatreds. There was substantial risk that elections would convey a sense of legitimacy on wartime leaders, without there having been an electoral process robust enough to test their leadership.

The international community designed a set of safeguards that were incorporated into the Dayton Agreement. Most important, the OSCE organized and conducted elections and did not allow nationalist parties to do so.<sup>16</sup> Terms of office resulting from the first elections were kept short. The OSCE set a pattern of extensive regulation of political parties, including codes of conduct and financial requirements. These became important tools for sidelining obstructionists over the next few years.

### **The Role of the International Community after the Dayton Peace Talks**

Recognizing that the Dayton constitution would not be implemented well immediately upon signature, international negotiators decided to put in place an interim international administrator who could provide broad political guidance and also serve as the civilian interlocutor for the powerful international military force entering Bosnia. Annex 10 of the Dayton Agreement therefore establishes a High Representative who is "the final authority in theater regarding interpretation of this Agreement on the civilian implementation" of the peace settlement. This mandate deliberately tracks that of the commander of

the international military force, who is the final authority with regard to military aspects of the agreement.

However, the negotiations at Dayton did not address basic questions about the High Representative. What body would provide political oversight of the office? A peace implementation council (PIC) comprised of donor states was formed to serve this role, but not until several weeks after Dayton concluded. More direct guidance was provided by a steering board of the PIC, again composed of major donors. The High Representative had neither staff nor budget for some time after Dayton; staff was loaned from interested states and organizations, but this process took weeks, even months.

More important, there was little agreement within the international community on how the High Representative should carry out his mandate and how intrusive his authority should be vis-à-vis Bosnian institutions and officials. Initially, civilian implementation was hamstrung by a mistaken pledge that military implementation would end twelve months after the operation began. That year would be taken up by basic reconstruction and cease-fire implementation, leaving little space for the High Representative to assume a direct governing role.

The inattention to civilian implementation had direct consequences for Bosnia's political settlement, including efforts to breathe life into the new constitution. International governance—such as was later put in place under UN authority in Kosovo and East Timor in 1999—can be a powerful interim device for stabilizing a post-conflict political environment and preparing the transition to local self-rule. It can allow wartime emotions to cool, remove obstructionist elites from the scene, and permit reasoned deliberations for a permanent constitution. In Bosnia, however, the international civilian mechanism was structurally weak and without a strong mandate.<sup>17</sup>

The problem was particularly acute regarding civilian international bodies. For the High Representative to carry out his mandate, he would need to be able to set priorities and enforce them, including through instructions to civilian agencies. The Dayton Agreement did not give him this authority. Instead, although he can “coordinate” their activities, he is required to “respect their autonomy within their spheres of operation” while providing “general guidance.” The agencies themselves were “requested to assist” the High Representative by providing information, but nothing more (see Annex 10, Article II[1c]). The High Representative had no authority over military commanders, which was appropriate for security purposes but left the High Representative as just about the only official in Bosnia without armed force to back up his decisions. A proposal by the High Representative to seek line authority over international agencies met fierce opposition from the international organizations affected and was rejected by the informal group of states supervising the office. As a consequence, even when the High Representative attempted an initiative, he had to negotiate extensively with an array of ad hoc and institutional international actors. The cost in time and attention—let alone the difficulties of obtaining political support—reduced the High Representative's ability to act.

The problem was rooted partly in the process by which the constitution was negotiated. The World Bank, specialized agencies of the UN system, the European Commission, the OSCE, and other multilateral groups were invited to attend the peace conference but not promised specific roles. Some did appear at Dayton, but their actual involvement was very limited. With few exceptions, they provided advice to international negotiators rather than directly to a negotiating party. This limited participation made sense strictly in terms of ending Bosnia's war. None of the groups could drive the negotiations to conclu-

sion, and several were controversial in Bosnia, particularly the United Nations; their overt, active participation would have complicated efforts to reach peace. Their marginal role had consequences for the agreement, however. Negotiators and parties did not have the benefit of their expertise, and this hurt, especially on economic issues such as establishing a central bank (required by the agreement but still renegotiated until 1997) and reducing public control over the economy, both through privatization (begun haltingly in 1998) and lessened government expenditures. The government structure established in the Dayton Constitution, combined with the 1994 Bosniac-Croat Federation government and the residual Republika Srpska government, left Bosnia with a bloated public sector and an absurd ratio of public to private expenditures.

In addition, the marginality of specialized international agencies deferred negotiations among the international community about both the road map for implementation and the desired end state. There was little talk at Dayton itself about priorities for starting civilian implementation quickly. This discussion began several weeks after Dayton, when the specialized agencies were focused mostly on carrying out their own mandates and unwilling to consider whether they should cede control to others. These bodies did not agree to submit to the authority of the High Representative. Instead, each agency prepared its own approach without the central authority having the ability to set priorities and enforce them, either on the international agencies or on the parties.

## Conclusion

The Dayton Constitution set up an ongoing political struggle between central and Entity control over Bosnia's economic and political life. It did not dictate strict rules on these matters, but it did set individual rights and international security issues outside Entity

control and it restricted the possibility of amendment. Moreover, today the constitution remains as Bosnia's founding document. Bosnians themselves accept it as the basis for the country's political system, even those who want to see it amended.

In short, the Dayton Agreement was an ambitious and historic achievement. In Bosnia, it stopped a brutal war. It also healed a breach in the United States' relationship with Europe that had been opened by several years of disagreement and lack of cooperation over how to handle the crisis. But the achievement came at a price. The agreement bought off wartime leaders, and the constitution was the price tag. The constitution allocates political positions by ethnicity and allows for a huge governmental structure so that there are enough seats for each faction's followers. It fails to take on the roots of nationalist control over the country's resources, employment, culture, and political agenda. It also leaves untouched the assumption—put starkly by participants in the negotiations—that Bosnia's future would be determined by the people who led it during the war. The continued influence of these wartime partisans required an international presence in Bosnia that was larger, more intrusive, and longer lasting than was expected or agreed upon at Dayton.<sup>18</sup>

Subsequent peace negotiations in the Balkans and elsewhere have reacted to Dayton's nationalist hangover. In Kosovo, East Timor, and parts of Africa, international mediators deferred constitutional negotiations until after conflicts have ended. The attraction of insulating constitutions from the pressures of conflict resolution are inarguable, and it is healthy to allow a constitutional process to mature into one that is less confrontational, more inclusive, and more deeply rooted in postwar realities.

But delay and separation are narrow inferences that omit key lessons of the Dayton experience. The constitution builds into it



human and civil-rights standards and enforcement mechanisms far stronger than the parties would have accepted on their own, even after a few years. International leverage to incorporate these standards might have been much less several years after the end of Bosnia's bloody war. Paradoxically, therefore, the Bosnia example shows that there are circumstances in which it is possible to achieve more—eventually—only by addressing governance prematurely.

The process of implementing the constitution has encountered difficulties in making real the ideals it contains. This is true partly because these aspects, even though they are contained in the final text, were not agreed fully among the parties or the international community at Dayton, a function of limited time and the importance of other objectives. The difficulties also arose because the more aspirational aspects of the constitution only gradually became realistic in the years following Dayton, as the states in the region established themselves as credible members of a European neighborhood built on democracy and respect for individual rights, and the international community became willing to include them in the post-World War II European institutions.<sup>19</sup>

The text of the constitution contained certain fundamental principles that did not mean much in practice at first, and in fact were barely noticed, but which could be built upon later as the political situation stabilized and matured. A constructive procedural lesson from the open-ended nature of the text is the importance of implementation: the need for a process that could interpret the norms in the document broadly, in a way that compelled political compromises along with a strong international presence on the ground authorized to support the forging of those compromises. A negative procedural lesson is that failure to agree at the start on the desired end state requires continual renegotiation, among international represen-

tatives and with the parties, at each stage of implementation.

## Notes

1. Central Intelligence Agency (CIA), Office of Russian and European Analysis, *Balkan Battlegrounds: A Military History of the Yugoslav Conflict, 1990–1995* (Washington, DC: CIA, 2002), p. 43.

2. CIA, *Balkan Battlegrounds*, p. 44.

3. Laura Silber and Allen Little, *The Death of Yugoslavia* (New York: Penguin Books, 1995), p. 72.

4. CIA, *Balkan Battlegrounds*, p. 45.

5. Silber and Little, *The Death of Yugoslavia*, p. 386.

6. The Federation, which joined the territories of the Bosnian Muslims (Bosniacs) and the Bosnian Croats, was created pursuant to the U.S.-brokered Washington Agreement in February 1994. Prior to that agreement, those two groups were engaged in a conflict with each other separate from the conflict between both groups and Serb forces. The agreement gave rise to military coordination that greatly improved Bosnian Muslim and Bosnian Croat fortunes versus the Serbs, but political integration within the Federation continues to be a challenge to this day.

7. A nicely nuanced description of the context and the agreement by one of the participants appeared soon after Dayton was concluded. See Ivan Simonovic, "Dayton: The State, the Law, and Interests in International Relations," *West-Ost Journal*, vol. 1–2 (1996), pp. 13–14 (copy on file with author). Ambassador Simonovic was legal adviser to the Croatian delegation at Dayton and later Croatia's permanent representative to the United Nations. In different jobs he played important roles in both negotiating and implementing Balkan peace agreements throughout the 1990s.

8. Paul C. Szasz, "The Quest for a Bosnian Constitution: Legal Aspects of Constitutional Proposals Relating to Bosnia," *Fordham International Law Journal*, vol. 19, no. 2 (December 1995), pp. 363, 370–73.

9. This Serb position was the genesis of Annex 5, the Agreement on Arbitration. In September 1995, the Serbs insisted that all disputes would be resolved between the Entity governments, and this proposal was included in the principles for the negotiations announced in Geneva and New York. Once the parties agreed at Dayton on a judicial sys-

tem in which individuals could bring cases directly against governments, and in which a central court system would have the authority to review Entity decisions, the proposal lost most of its purpose.

10. The word *ethnic* is used because that is how the parties referred to their own group identity. There is no ethnic difference among Serbs, Croats, and Bosniacs, but appeals to national origin were abused throughout the Yugoslav conflict.

11. Article IX(1) of the constitution provides that “no person who is serving a sentence imposed by the International [Criminal] Tribunal for the Former Yugoslavia, and no person who is under indictment by the Tribunal and who has failed to comply with an order to appear before the Tribunal, may stand as a candidate or hold any appointive, elective, or other public office in the territory of Bosnia and Herzegovina.”

12. For an analysis of this Court decision, see Anna Morawiec Mansfield, “Ethnic but Equal: The Quest for a New Democratic Order in Bosnia and Herzegovina,” *Columbia Law Review*, vol. 103, no. 8 (2003), p. 2052.

13. Office of the High Representative (OHR) and EU Special Representative, *Constituent Peoples’ Decision of the BiH Constitutional Court*, September 14, 2000, available at [www.ohr.int/ohr-dept/legal/const/](http://www.ohr.int/ohr-dept/legal/const/) (accessed April 12, 2009).

14. OHR, *Constituent Peoples’ Decision*, Partial Decision III at paragraph 116. For a sophisticated analysis of how European human rights law can affect the ethnic participation and voting schemes of Dayton, see G. Nystuen, “Conflicts of Norms Regarding Ethnic Discrimination in the Dayton Peace Agreement,” doctoral thesis, University of Oslo, 2003 (copy on file with author).

15. See OHR, *Agreement on the Implementation of the Constituent Peoples’ Decision of the Constitutional Court of Bosnia and Herzegovina*, March 27, 2002, available at [www.ohr.int/ohr-dept/legal/const/](http://www.ohr.int/ohr-dept/legal/const/) (accessed April 12, 2009).

16. Serb opposition to OSCE conduct of the elections was intense and lasted until late in the negotiation, most likely because of Yugoslavia’s suspension from the OSCE. Instead, the OSCE’s responsibility was supervision, a term unprecedented in this context but interpreted, publicly and clearly by negotiators, as requiring that the OSCE assume all responsibility for the elections.

17. It was not until 1997, in a meeting in Bonn, Germany, that the Peace Implementation Council approved an expansive interpretation of the High Representative’s authority to include powers to order the promulgation of laws, remove officials from office, and make other binding decisions to “facilitate the resolution of difficulties” in implementation and ensure the “smooth running” of the government. These are commonly referred to as the High Representative’s “Bonn powers.” See OHR, *Peace Implementation Council Bonn Conclusions*, December 10, 1997, section XI, available at [www.ohr.int/pic/archive.asp?sa=on](http://www.ohr.int/pic/archive.asp?sa=on) (accessed April 12, 2009).

18. David Kanin sees this as part of a general pattern in which external actors impose political goals and related legal structures on Balkan societies, which he argues are built around “Big Men”—figures whose influence and economic power exist outside these externally generated structures and survive changes in them. See David Kanin, “Big Men, Corruption, and Crime,” *International Politics*, vol. 40, no. 4 (December 2003), pp. 491–526. Kanin knows the region well and I subscribe to much of his analysis. His near-fatalism about the dominance of these big men is itself a policy choice, however, and one that would deny people of the Balkans a chance to create their own alternative power structures. Even if one accepts that there will be big men in the Balkans, however, it still seems to matter who they are; those in the 1990s were spectacularly destructive. Even more, societies may flourish if the big men remain but are driven to the margins of political and legitimate economic life. Effective public policy may attack the syndicates that connect big men to political, economic, and criminal power in well-coordinated, homeostatic networks of big men. See Council on Foreign Relations, *Balkans 2010: A Center for Preventive Action Report* (New York: Council on Foreign Relations, 2003). I was a member of the task force that produced that report.

19. The Council of Europe has admitted Bosnia and Herzegovina (April 2002), Croatia (November 1996), and Serbia and Montenegro (April 2003) as members. Croatia has joined NATO’s Partnership for Peace (PfP) (May 2000) and is negotiating full NATO membership. Both Bosnia and Herzegovina and Serbia and Montenegro are negotiating PfP membership. Croatia also is currently negotiating accession to the European Union.