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Moderating Politics in Post-Conflict States: An Examination of Bosnia and Herzegovina

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MODERATING POLITICS
IN POST-CONFLICT STATES:
AN EXAMINATION OF BOSNIA
AND HERZEGOVINA

Angela M. Banks*

The individuals who negotiated the peace agreement that ended the war in Bosnia and Herzegovina considered ethnicity to be the most salient division within Bosnian society. Consequently they organized Bosnia’s political structure around ethnic representation. While it is doubtful that peace in Bosnia would have been possible without guarantees for ethnic-based political representation, such guarantees have proven insufficient for building a functioning, stable, and cohesive state. This article analyzes the role that Bosnia’s political framework, which focuses exclusively on ethnic representation, has played in impeding the development of a significant cadre of moderate political actors and in hindering the success of the existing political moderates. Based on an examination of electoral and institutional approaches for increasing moderate political participation in Bosnia, this article concludes that the electoral alternatives readily available in Bosnia are unlikely to deter the extreme nationalist parties from focusing on ethnic-identity politics or to foster the development of political parties that represent the interests of Bosnians across ethnic lines. This article outlines a structural reform that could enable Bosnia’s current political structure to represent a broader range of Bosnian identities and interests and could facilitate increased participation of moderate political actors.

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INTRODUCTION

Ten years after the signing of the General Framework Agreement for
Peace in Bosnia and Herzegovina ("Dayton Peace Agreement," "Dayton Ac-
cords," or "Dayton"), 1 which ended the war in Bosnia and Herzegovina, the
Bosnian government has failed to live up to the international community's
expectation that it build an efficient and cohesive state. To fill this govern-
ance gap, Bosnia's civilian administrator, the High Representative, has assumed
a more central role in governing the country. Since December 1997, the High Representative has had the authority to unilaterally implement leg-

1 General Framework Agreement for Peace in Bosnia and Herzegovina with Annexes, Dec.
islation, rewrite existing legislation if it conflicts with the Dayton Peace Agreement, and remove government officials who obstruct the Dayton Peace Agreement or the High Representative’s efforts to fulfill his mandate. Successive High Representatives have frequently utilized these powers, with Paddy Ashdown, the current High Representative, removing nine government officials as of December 16, 2004. 

Bosnia’s governance problem is largely the result of long-term inaction by its elected officials. Elections in 1996 enabled the extreme nationalist political parties that were dominant during the war to maintain their political power. Several of these parties have worked to maintain separate ethnic territories within Bosnia and have worked to obstruct the implementation of Dayton when it would facilitate the development of a central Bosnian state. For example, government officials have blocked efforts to facilitate the return of refugees and displaced persons. Such returns would have significantly reversed the effects of ethnic cleansing in certain parts of the country.

Bosnia is in need of moderate political elites—political actors who recognize the importance of a thriving Bosnian state and the perils of political fragmentation, and who will work to improve the state’s cohesion and stability. Moderate political elites, as defined in this article, are politicians

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2 Carlos L. Yordan, Resolving the Bosnian Conflict: European Solutions, 27 FLETCHER F. WORLD AFF. 147, 157 (2003) [hereinafter Yordan]; see also Peace Implementation Council, Bonn Conclusions, art. XI(2)(c), Dec. 10, 1997, available at http://www.ohr.int/pic/default.asp?content_id=5182 (“The Council welcomes the High Representative’s intention to use his final authority in theatre regarding interpretation of the Agreement on the Civilian Implementation of the Peace Settlement in order to facilitate the resolution of difficulties by making binding decisions, as he judges necessary, on the following issues: . . . other measures to ensure implementation of the Peace Agreement throughout Bosnia and Herzegovina and its Entities, as well as the smooth running of the common institutions. Such measures may include actions against persons holding public office or officials who are absent from meetings without good cause or who are found by the High Representative to be in violation of legal commitments made under the Peace Agreement or the terms for its implementation.”).

3 On December 16, 2004, Ashdown announced that he was removing nine Republika Srpska government officials from office because he had “good reason to believe [they had] helped war criminals and their networks, or [had] failed in their duties to take active steps to catch war criminals.” Office of the High Representative (OHR), Statement by the High Representative, Paddy Ashdown at Today’s Press Conference (Dec. 16, 2004), available at http://www.ohr.int/ohr-dept/presso/pressb/default.asp?content_id=33741.


5 Id.
willing to work with representatives of different segments\(^6\) of society to resolve political disputes in a manner that promotes the state’s cohesion while addressing the concerns of citizens.\(^7\) In many respects, moderate political elites in Bosnia will support the active implementation of the Dayton Accords because they outline an agreed-upon plan for turning Bosnia into a productive, cohesive, and stable state. Unfortunately these moderates have not experienced significant electoral success in the last ten years. Without increased moderate political involvement in Bosnia, there is little chance that the government will be able or willing to adequately protect the civil, political, and social rights of the Bosnian people, as outlined in the Dayton Peace Agreement. Without such government protection, a need will continue to exist for a highly interventionist High Representative. Such involvement by the High Representative, however, cannot be relied upon given the international community’s waning interest in the Balkans.\(^8\) Thus, the development of local institutions that will operate to protect these rights is essential.

This article analyzes the role that Bosnia’s political framework, which focuses exclusively on ethnic representation,\(^9\) has played in impeding the

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\(^6\) Segments refer to socially differentiated groups within a society. Segments can be of a religious, ideological, regional, cultural, ethnic, linguistic, or racial nature among others. See Arend Lijphart, Democracy in Plural Societies: A Comparative Exploration 3-4 (1977) [hereinafter Democracy in Plural Societies]. Plural societies are divided along what Harry Eckstein terms “segmental cleavages.” Id. at 3. Segmental cleavages refer to the political divisions within a society that closely follow social divisions within that society. Id. at 4.

\(^7\) This definition draws on Arend Lijphart’s work in describing political leaders in consociational democracies. See id. at 25.

\(^8\) See, e.g., Gabrielle Kirk McDonald, Assessing the Impact of the International Criminal Tribunal for the former Yugoslavia (Nov. 6, 2003) (Keynote Address at the University of Texas School of Law International War Crimes Trials: Making a Difference? Conference, on file with author) (“The Security Council has called upon the ICTY to complete all investigations by 2004, finish all trials by 2008 and conclude all appeals by 2010. The completion strategy has three components.... First, the Tribunal will focus on the trials of major leaders. Second, cases of lower- and mid-level accused will be transferred to courts of the former Yugoslavia. Finally, it is said that guilty pleas with plea agreements will enhance the likelihood of meeting the completion goals.”) (citation omitted).

\(^9\) The Bosnian Constitution provides two bases for political representation: ethnicity and territory. Political positions are allocated to Bosniacs, Bosnian Croats, and Bosnian Serbs and to individuals from the Federation of Bosnia and Herzegovina and the Republika Srpska. General Framework Agreement, supra note 1, at Annex 4 arts. IV, V (Constitution of Bosnia and Herzegovina). Territorial representation is, however, de facto ethnic representation because of the majority Bosniac and Bosnian Croat population in the Federation of Bosnia and Herzegovina and the majority Bosnian Serb population in the Republika Srpska. See Ivo H. Daalder, Getting to Dayton 27 (2000) [hereinafter Daalder]; Paul C. Szasz, Introduc-
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development of a significant cadre of moderate political actors, and in hindering the political success of the existing political moderates. Based on an examination of electoral and institutional approaches for increasing moderate political participation in Bosnia, the article concludes that the electoral alternatives readily available in Bosnia are unlikely to deter the extreme nationalist parties from focusing on ethnic-identity politics or to foster the development of political parties that represent the interests of Bosnians across ethnic lines. In creating a political framework for Bosnia, the Dayton negotiators created a consociational-like structure for Bosnia; but they left out a key component of consociational democracy: the grand coalition.\textsuperscript{10} To address this oversight, this article outlines a structural reform that could enable Bosnia's current political structure to represent a broader range of Bosnian identities and interests and to facilitate the increased participation of moderate political actors.

The first section of this article provides an overview of the war that took place in Bosnia and Herzegovina between 1991 and 1995 and the Dayton Peace Agreement that brought the conflict to an end. The second section introduces the concept of consociational democracy and its relevance to the political structure created for Bosnia in the Dayton Peace Agreement. The third and fourth sections discuss the damage done by the extreme nationalist governments in the absence of moderate political voices, and the international community's response. The final part of this article examines electoral and institutional approaches for increasing moderate political participation in highly segmented post-conflict societies like Bosnia.

\section*{I. WAR AND PEACE}

\textbf{A. Historical Background}

Bosnia and Herzegovina has been a multiethnic political entity for centuries. When Bosnia was part of the Ottoman Empire (between 1463 and 1878), many Slavs in the area converted to Islam, which gave rise to one of the three major ethnic groups in the area.\textsuperscript{11} The other two major ethnic
tory Note: Bosnia and Herzegovina-Croatia-Yugoslavia: General Framework Agreement for Peace in Bosnia and Herzegovina With Annexes, 35 I.L.M. 75, 75-76 (1996) [hereinafter Szasz].
\textsuperscript{10} Consociational democracy is a form of government in which "the centrifugal tendencies inherent in a plural society are counteracted by the cooperative attitudes and behavior of the leaders of the different segments of the population." See, \textit{e.g.}, Democra\textsc{cy} in Plural Societies, \textit{supra} note 6, at 1, 3.
\textsuperscript{11} Noel Malcolm, Bosnia: A Short History 43-44, 135 (2d ed. 1996) [hereinafter
groups are the Croats and Serbs. As the Tadic Trial Chamber noted, however, all three groups are Slav, "so it is no doubt, inaccurate to speak of three different ethnic groups; however, this appears to be accepted common usage." As ethnicity is a socially-constructed concept in which self-definition is paramount, this article refers to these population groups as ethnic groups.

Throughout history, conflict existed between these ethnic groups in Bosnia, yet despite these historical tensions, the former Yugoslavia appeared to be a model multiethnic society in the post-World War II years under the leadership of Josip Broz Tito. Yugoslavia’s 1946 Constitution divided the country into six Republics: Serbia, Croatia, Slovenia, Bosnia and Herzegovina, Macedonia, and Montenegro. There were also two autonomous regions, Vojvodina and Kosovo, which were closely associated with Serbia and Montenegro. The people of each Republic were treated as distinct “nations” within federal Yugoslavia, except the people of Bosnia. In contrast to the other five Republics, Bosnia had no majority ethnic group and a distinct Bosnian nation was not recognized in the Yugoslav constitution until 1979. Bosnia continued to lack a majority ethnic group in 1991, when the population was 43.5% Bosniac, 32.1% Serb, 17.4% Croat, 5.5% Yugoslav, and 2.4% other.
Tito was able to construct a society in which Bosniacs, Croats, and Serbs lived side by side for approximately forty-five years with little, if any, ethnic-based conflict. This peace has generally been attributed to the repressive techniques Tito used to discourage national ethnic identities and nationalist ideas or policies. Despite these efforts, the Bosnian population remained acutely conscious of its Bosniac, Croat, and Serb identities.

B. Disintegration, War, and Ethnic Cleansing in the Former Yugoslavia

Following Tito’s death in 1980, the former Yugoslavia experienced significant financial problems that culminated in an economic crisis. In 1990, the first multi-party elections took place in the Republics, and people voted primarily along ethnic lines. This resulted in the election of strongly nationalistic parties. The three major political parties that emerged from the election in the Bosnian Republic were the Muslim Party of Democratic Action (SDA), the Serb Democratic Party (SDS), and the Croat Democratic Union (HDZ). The SDA gained a narrow margin over the SDS for the Republican Assembly, which reflected the ethnic makeup of the Republic. The SDA and the SDS initially cooperated in the Republican Assembly, but their cooperation decreased steadily over time, becoming nonexistent by January 1992.

As the former Yugoslavia disintegrated, so did Bosnia. In February 1992, Bosniacs and Bosnian Croats voted overwhelmingly for independence, via referendum, and Bosnia and Herzegovina declared its independence in

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20 Id. at 2. The 1991 figures are used because the last census was taken in April 1991.
22 See, e.g., MALCOLM, supra note 11, at 197-98, 203-04; Pesic, supra note 21, at 2; see also Tadic, supra note 12, at para. 66. Focus on these identities may have been an unintended consequence of the unavailability of a broader identity option such as Bosnian. It is this article’s contention that the lack of such an identity has been detrimental to fostering overarching loyalties that may reduce the strength and intensity of ethnic identities, which increases the likely success of consociational democracy in deeply divided societies.
23 Tadic, supra note 12, at para. 70.
24 Id. at para. 68.
25 Id.
26 Id. at para. 81.
27 The Republican Assembly was the legislative organ at the Republican level of government in the former Yugoslavia.
March 1992. Bosnian Serbs boycotted the referendum and responded to its results by declaring the existence and independence of their own state, the Republika Srpska, on January 9, 1992. The European Union and the United States recognized Bosnia as an independent state in April 1992 and war broke out that same month.

Bosniac and Bosnian Croat forces joined together to fight Bosnian Serbs, who were working with Serbia to create a “Serb-dominated western extension of Serbia.” This goal required taking over Serb-dominated areas of Croatia and Bosnia, despite their large Croat and Bosniac populations. To address this problem, the parties to the conflict adopted the strategy of “ethnic cleansing,” which involved removing individuals of the undesired ethnic group. The warring parties’ tactics for removing individuals in order to change the ethnic demographics of an area included murder, forced transfer, rape, and destruction of property. Over the course of the war and as alliances in Bosnia changed, all parties to the conflict used ethnic cleansing as a means of obtaining ethnically homogeneous areas.

The Bosniacs, Bosnian Croats, and Bosnian Serbs created new administrations in the form of Republics to govern the portions of the Bosnian territory they controlled. The Bosniac-controlled area was the Republic of Bosnia and Herzegovina, the Bosnian Croat-controlled territory was the

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28 Tadic, supra note 12, at para. 78.
29 Id.
30 Id. In December 1990 the people of Slovenia voted overwhelmingly for independence from the former Yugoslavia. Id. at para. 73. Croatia followed suit in May 1991, also voting overwhelmingly for independence. Id. at para. 74. Both Republics declared their independence on June 25, 1991, which was recognized by the European Community on January 15, 1992. Id. at para. 77.
31 Id. at para. 84.
32 Id.
34 By the spring of 1993, the Bosniacs and Bosnian Croats were no longer working together. The Bosnian Croats went to war against the Bosniacs to gain control of central Bosnia and the Muslim portion of Mostar, the capital of the Herzegovina region. This region has been historically important to Bosnian Croats.
Republic of Herceg-Bosna, and the Bosnian Serb-controlled republic was the Republika Srpska. During the war, the administrations of these republics enacted laws to solidify the desired ethnic composition that had been achieved through ethnic cleansing.

C. The Negotiating History of the Dayton Peace Agreement

The initial international effort to broker peace in the Balkans began in 1992 but did not achieve immediate success. This effort was the International Conference on the Former Yugoslavia (ICFY), organized by the European Union (EU) and the UN. The initial solution advanced was the Vance-Owen Plan, named for Cyrus Vance and David Owen, the first co-chairmen of the ICFY Steering Committee. This plan divided Bosnia into ten semi-autonomous districts in an effort to balance two competing interests: a unified Bosnia and the parties' desire for ethnic autonomy. The United States had reservations about this plan because it considered it "both a reward for ethnic cleansing and largely unenforceable." Although then-U.S. President Bill Clinton initially made it clear that the United States would not pressure the Bosniacs to accept the Vance-Owen Plan, in the end the United States exerted pressure on the Bosniacs to accept it, in large part because it was the "only game in town." By March 25, 1993, both the Bosniacs and the Bosnian Croats had signed it. Approximately one and a half months later, the Bosnian Serbs announced that they would sign the Vance-Owen Plan provided that the Bosnian Serb parliament and people agreed. The Bosnian Serbs held a referendum in Republika Srpska on May 15 and 16, 1993 and rejected Vance-Owen. Despite this setback, new negotiations began and

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35 Hastings, supra note 33, at 226.
36 Id. (describing property laws that made it difficult for minority returnees to claim their pre-war homes).
37 DAALDER, supra note 9, at 10; see also DAVID OWEN, BALKAN ODYSSEY 89-149 (1995) [hereinafter OWEN]. By the time the Vance-Owen Plan was developed, the international community had rejected a three-state solution to the conflict. The London Declaration of Principles was inspired by a vision of Bosnia and Herzegovina as a tolerant multiethnic state. Consequently Vance and Owen worked to maintain Bosnia and Herzegovina as one state. Id. at 37-38.
38 DAALDER, supra note 9, at 10-11.
39 Id. at 11-12.
40 Id. at 11-12. These signings took place days before the Bosnian Serbs had launched the now infamous assault on the UN safe area, Srebrenica, which had a predominately Bosniac population. Id. at 12.
41 Id. at 15-16.
42 Id. at 16; Szasz, supra note 9, at 75-76.
the so-called “Invincible Plan” was prepared. This plan (named for the British carrier where the final negotiations took place) provided a three-republic solution. Bosnia was to be divided into three predominately ethnic republics that would be governed by a weak statewide union. This time, however, it was the Bosniacs who rejected the plan.

The next stage of negotiations, led by the United States, resulted in the creation of a Bosniac-Bosnian Croat federation within Bosnia. By this time the Bosnian Croats had created the Republic of Herceg-Bosna as a Croat area and were fighting to maintain it as an independent entity with strong ties to the Republic of Croatia (“Croatia”). Consequently, the Bosnian Croats were accompanied by representatives from Croatia during the negotiations. The negotiations took place in February and March 1994. The basic framework called for a joint Bosniac-Croat federation consisting of approximately half of the Bosnian territory. Additionally, the federation would be linked to Croatia in an economic confederation. The parties ultimately agreed to the creation of the Federation of Bosnia and Herzegovina (the “Federation”) on territory that had a pre-war population that was majority Bosniacs and Bosnian Croats. While the Bosnian Serbs were not a party to it, the Washington Agreement, as it would come to be known, created a Bosnian Serb entity, the Republika Srpska, within a united Bosnia. The exact boundaries of the Federation in relation to the Republika Srpska were left for later negotiations because the Republika Srpska occupied 72% of Bosnia’s territory at the time and the Bosnian Serbs were not a party to the agreement.

In April 1994, the United States, the Russian Federation, France, Germany, and the United Kingdom formed the Contact Group, in cooperation

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43 Paul C. Szasz, The Quest For a Bosnian Constitution: Legal Aspects of Constitutional Proposals Relating to Bosnia, 19 FORDHAM INT’L L.J. 363, 370 (1995); see also Szasz, supra note 9, at 76.
44 Id. at 363, 370.
45 Id. at 370.
46 The Bosniacs rejected the plan because it only gave them 30% of the Bosnian territory, compared to the 36% they would have obtained under the Vance-Owen Plan. MALCOLM, supra note 11, at 370.
47 Szasz, supra note 9, at 76.
48 DAALDER, supra note 9, at 27.
49 Id.
50 Szasz, supra note 9, at 76.
51 DAALDER, supra note 9, at 27.
52 Id. at 28; see also LEONARD J. COHEN, BROKEN BONDS: YUGOSLAVIA’S DISINTEGRATION AND BALKAN POLITICS IN TRANSITION 311 (1995) [hereinafter COHEN]; Szasz, supra note 9, at 76.
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with the ICFY, as a new negotiating forum. The Contact Group developed a map for Bosnia in which the Federation would occupy 51% of Bosnia’s territory and the Republika Srpska would occupy 49%. This compromise gave the Federation a majority of the territory, yet allowed the Republika Srpska to maintain control over significant portions of land that had majority Bosniac populations before the war. Despite earlier concerns that the Vance-Owen map rewarded ethnic cleansing, U.S. officials came to see the 51/49 territory split as a “compromise between justice and reality.”

The plan was presented to the parties on July 6, 1994. The Contact Group gave the parties two weeks to respond on a take-it-or-leave-it basis, warning that any party that refused to accept the plan would face punitive actions. The Bosnian Serbs were informed that rejection could result in increased sanctions against the Federal Republic of Yugoslavia (FRY) and the Bosnian Serb area, an extension and strict enforcement of arms-exclusion zones around Bosniac safe areas, and possibly a lifting of the arms embargo against Bosniacs and Bosnian Croats that had been in place since 1991. The Bosniacs and Bosnian Croats quickly accepted the proposal. The Bosnian Serbs, however, waited until the last moment and then added so many conditions to their acceptance that it essentially amounted to a rejection.

In December 1994, the Contact Group re-evaluated its position regarding the form of the unitary Bosnian state. It offered to reconsider the constitutional provisions stressing a unified Bosnia and the territorial provisions of the Contact Group plan. The group was open to considering a loose “un-

53 DAALDER, supra note 9, at 28; COHEN, supra note 52, at 311; Szasz, supra note 9, at 76.
54 DAALDER, supra note 9, at 28. U.S. envoy Charles Redman noted, however, that “most of the major cities are within the Moslem-Croat federation.” COHEN, supra note 52, at 311.
55 DAALDER, supra note 9, at 28. In fact, it has been noted that the “map accepted the de facto division of Bosnia, long the aim of the Serbs and a premise of European effort, but antithetical to the idea of a multiethnic and territorially intact Bosnia. Its acceptance thus represented a major U.S. change of heart.” Id. at 30.
56 DAALDER, supra note 9, at 30.
57 On April 27, 1992, the Republic of the Federal Yugoslavia was created, comprised of the Republic of Serbia and the Republic of Montenegro of the former Yugoslavia. In 2003, the state changed its name to the Republic of Serbia and Montenegro.
58 COHEN, supra note 52, at 311-12.
59 DAALDER, supra note 9, at 30; Szasz, supra note 9, at 76.
60 Id. at 100 (noting Lake’s suggestions regarding carrots to convince the Bosnian Serbs to seriously negotiate); see also COHEN, supra note 52, at 317. Lord Owen stated in October that “constitutional issues were no longer important,” which has been interpreted as “hinting that Bosnian Serbs’ acceptance of the Contact Group map was the main goal, and not whether the Bosnian Serbs would remain in Bosnia and Herzegovina over the long haul.” Id.

ion” between the Federation and the Republika Srpska. Despite these concessions, the Bosnian Serbs refused to negotiate on the details of the Contact Group plan. Faced with continued Serbian opposition, the Contact Group decided to use its leverage over the President of Serbia, Slobodan Milosevic, to get the Bosnian Serbs to the negotiating table. Serbia was saddled with economic sanctions that Milosevic was anxious to have suspended or lifted. In February 1995, the Contact Group offered to suspend these sanctions on the condition that Serbia agree to recognize Croatia and Bosnia and Herzegovina, support the Contact Group’s plan, and accept the U.S. plan for addressing the continuing problems in Croatia. This offer led to protracted negotiations between the Contact Group and Milosevic, which were halted by renewed fighting throughout Bosnia in the spring of 1995.

Negotiations regarding the Contact Plan stalled for some time, but conditions changed radically by the fall of 1995, causing the Serbs to become “eager to get an agreement.” Milosevic was keen to bring about the end of the sanctions against Serbia and to further Serbia’s reintegration into the international community. The Bosnian Serbs were afraid of losing more territory, as they had lost almost 20% of the territory they had held since the summer of 1992 as a result of NATO air strikes on Bosnian Serb positions around Sarajevo in August 1995 and a Croatian-Bosnian ground offensive. Additionally, the Contact Group made both enticing offers and serious threats in order to bring the parties to the negotiating table. The next stage of negotiations would lead to the conclusion of the Dayton Peace Agreement. Although these negotiations were conducted by the Contact Group, they were “under strict U.S. management.”

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61 DAALDER, supra note 9, at 38; see also Szasz, supra note 9, at 76.
62 DAALDER, supra note 9, at 39.
63 Id. By early 1995, Croatian President Tudjman found Serb control over the Kraijina, a border section between Croatia and Bosnia and Herzegovina, unacceptable. The area was being “administered” by the UN, but Serb ethnic cleansing campaigns were taking place. President Tudjman was anxious to regain control over the area, but the United States negotiated a deal in which he would refrain from attacking in exchange for a public meeting with U.S. Vice President Al Gore. Id. at 62-63.
64 Id. at 40.
65 Id. at 135. See id. at 81-134 for a detailed discussion of military and political events during this interim.
66 Id.; see also RICHARD HOLBROOKE, TO END A WAR 101-02 (1998) [hereinafter HOLBROOKE].
67 Id.
68 Id. at 102-16 (describing the United States’ development of the Bosnia policy that culminated with the Dayton Peace Agreement, specifically the United States’ decision to push for
By early September 1995, Bosnia, Serbia, and Croatia agreed to send their foreign ministers to Geneva to restart the peace negotiations. U.S. officials produced a set of “Joint Agreed Principles” for Geneva, which used the Contact Group plan of 1994 as a starting point. These joint principles became the Agreement on Basic Principles (“Basic Principles”) that the parties approved on September 8, 1995. Pursuant to these principles Bosnia would “continue its legal existence with its present borders and continuing international recognition.” The country would be divided into two entities: a Croat-Bosniac federation (the Federation of Bosnia and Herzegovina created by the Washington Agreement) and the Republika Srpska. The Federation would have 51% of the territory, and the remaining 49% would go to the Republika Srpska. These two entities would hold elections, adhere to international human rights standards, and “enable displaced persons to repossess their homes or receive just compensation.” The enforcement of
these human rights protections was entrusted to a Commission for Displaced Persons.\footnote{See id. at art. 3.1. The parties also agreed to the creation of a Bosnia and Herzegovina Human Rights Commission to enforce general human rights obligations, joint Bosnia and Herzegovina public corporations to own and operate public facilities, and a Commission to Preserve National Monuments. Id. at arts. 3.2-3.4.}

The foreign ministers met again in New York to further develop the negotiating principles. This meeting produced the “Further Agreed Basic Principles,” which provided additional details regarding the operation of the central Bosnian government. The parties agreed that “free democratic elections [would] be held in both Entities as soon as social conditions permit[ed],” as determined by the Organization for Security and Co-operation in Europe (OSCE), and that the elections would include contests for a national parliament or assembly and a three-member presidency.\footnote{Further Agreed Basic Principles, arts. 5.0, 5.2, 6.1, 6.2 (1995) [hereinafter Further Agreed Basic Principles], available at http://www.ohr.int/other-doc/contact-g/default.asp?content_id=3526.} Two-thirds of the parliament and two of the three seats of the Presidency would be elected from the Federation with the remaining one-third of the parliament and final presidential seat elected from the Republika Srpska.\footnote{Decisions by the Presidency would be based on a majority vote, but if one-third or more of the members disagreed with a decision and declared that such decision would be destructive to a vital interest of their entity, the matter would be immediately referred to the dissenting member’s parliament. If the parliament confirmed the dissenting opinion by a two-thirds vote, the challenged action would not be taken. Id. at arts. 6.1, 6.2.} The parties also agreed to create a cabinet of ministers and a Constitutional Court, stating that the new institutions would be responsible for Bosnia’s foreign policy.\footnote{Id. at arts. 6.3, 6.4, 6.6.} The conclusion of this agreement was seen as an important moment in the negotiations because it demonstrated that the parties were not simply dividing the country into separate independent entities, but were also “building a central government, at least on paper.”\footnote{HOLBROOKE, supra note 66, at 183.} The principles agreed upon at the meetings in Geneva and New York formed the foundation for “proximity talks”\footnote{Proximity talks are “a diplomatic technique originating in Mideast negotiations held in the 1940s at the U.N., in which the mediator moves between the two parties, who rarely meet one another face-to-face—a sort of ‘shuttle diplomacy by foot.’” HOLBROOKE, supra note 66, at 205.} held at Wright-Patterson Air Force base in Dayton, Ohio.\footnote{DAALDER, supra note 9, at 117; see also Szasz, supra note 9, at 75.}

One issue that was not resolved prior to the proximity talks was the authority of the official responsible for civilian implementation efforts.\footnote{DAALDER, supra note 9, at 140; see also HOLBROOKE, supra note 66, at 224.} U.S.
policymakers decided that a senior official would be appointed to "coordinate rather than direct the divergent and sometimes competing efforts of multiple international agencies and non-governmental organizations."\footnote{DAALDER, supra note 9, at 153. Daalder identifies two key factors that were critical in the development of the civilian implementation structure that affected the early success of the Dayton Peace Agreement. First, U.S. officials did not want the UN to have a leading role in this effort because of "growing disagreement between its secretary general and the administration." Id. at 154. Second, the United States insisted that the military operation be under the sole command of NATO, completely separate from the civilian implementation effort. Id. This account differs from Ambassador Richard Holbrooke’s recollection of relevant events. Holbrooke states that the UN Secretary-General was highly interested in disengaging from Bosnia. Secretary-General Boutros-Gali informed the Security Council that he was prepared to end the UN’s role in the former Yugoslavia and told Madeleine Albright that the Contact Group would have to create its own civilian implementation mechanisms. Holbrooke comments that Secretary-General Boutros-Gali volunteered “to reduce the UN’s role at a critical moment,” which “simplified [Holbrooke’s] task considerably.” HOLBROOKE, supra note 66, at 174-75. Whatever the reason, the UN was not to play a leadership role in shaping and implementing the civilian efforts in Bosnia.}

U.S. officials understood that the civilian effort would involve coordinating continued negotiations with the parties, monitoring human rights, economic reconstruction, refugee resettlement, facilitating elections, addressing war crimes, humanitarian relief, and institution building.\footnote{DAALDER, supra, at 155.} While international organizations were identified to take the lead on particular issues, the issue of overall coordination still had to be addressed since the UN would not be the umbrella organization overseeing the civilian effort.\footnote{Id. at 156.} The Dayton drafters decided that this role would belong to a “High Representative” who would be appointed by the Peace Implementation Council (PIC).\footnote{The PIC was created in December 1995 as the successor to the ICFY, to oversee the implementation of the Peace Agreement and “create new strategies to fulfill the peace accord’s goals.” Yordán, supra note 2, at 152. The PIC currently has fifty-five members, which include forty-two states and thirteen agencies/IGOs, including the Council of Europe, the International Committee of the Red Cross, the International Criminal Tribunal for the former Yugoslavia, the UN High Commissioner for Refugees, and the World Bank. See OHR, OHR General Information, available at http://www.ohr.int/ohr-info/gen-info/ (last visited Apr. 9, 2006). The executive arm of the PIC is the Steering Board, which provides political guidance to the High Representative. Canada, France, Germany, Italy, Japan, Russia, the United Kingdom, the United States, the Presidency of the European Union, the European Commission, and Turkey (as the representative of the Organization of the Islamic Conference) are the members of the PIC Steering Board. Id.} The UN Security Council would then “bless” the structure rather than implement it.\footnote{DAALDER, supra note 9, at 156.} The U.S. staff responsible for negotiating the annex on civilian...
implementation drafted a document that gave the High Representative a strong mandate with "direct authority over the international organizations that would contribute to the implementation effort." After being briefed on the annex, the Contact Group members enthusiastically supported the strong mandate. The U.S. team had been under the impression that the High Representative was going to be an American. Upon hearing that Holbrooke had agreed, pursuant to European insistence, that a European, Carl Bildt, would be the first High Representative, the team limited the High Representative’s authority and responsibility. The team was afraid that a stronger mandate in the hands of someone outside of Washington’s control could ruin the implementation effort and hinder the military endeavor.

D. The Substance of the Dayton Peace Agreement

An agreement premised on the Basic Principles was finally reached on November 21, 1995, when the presidents of the FFY, Croatia, and Bosnia and Herzegovina initialed a peace agreement. The Dayton Peace Agreement, signed in Paris on December 14, 1995, is a treaty that includes twelve annexes, all of which entered into force automatically upon signature.

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89 Id. at 157.
90 Another factor was the need for the Europeans to pay for the civilian effort. In the fall of 1995, the Clinton Administration and the U.S. Congress were facing “the biggest budget confrontation between the two branches in this century.” HOLBROOKE, supra note 66, at 174. The President had been advised that it would be extremely difficult to get Congress to approve the use of funds for Bosnia. Consequently, members of Congress told Holbrooke’s team that the Europeans would have to pay for Bosnia’s reconstruction. It was therefore decided that the chief civilian would have to be European. Id. at 174.
91 DAALDER, supra note 9, at 157.
92 Id. at 117.
93 The following are the annexes included in the Dayton Agreement:
   - Annex 1-A Agreement on Military Aspects of the Peace Settlement;
   - Annex 1-B Agreement on Regional Stabilization;
   - Annex 2 Agreement on Inter-Entity Boundary Line and Related Issues;
   - Annex 3 Agreement on Elections;
   - Annex 4 Constitution of Bosnia and Herzegovina;
   - Annex 5 Agreement on Arbitration;
   - Annex 6 Agreement on Human Rights;
   - Annex 7 Agreement on Refugees and Displaced Persons;
   - Annex 8 Agreement on Commission to Preserve National Monuments;
   - Annex 9 Agreement for the Establishment of Bosnia and Herzegovina Public Corporations;
   - Annex 10 Agreement on Civilian Implementation;
The annexes are necessary to address specific issues in detail because the main text addresses them only in a general manner. The parties to the annexes are the Republic of Bosnia and Herzegovina and its two Entities: the Federation of Bosnia and Herzegovina and the Republika Srpska.\(^95\)

1. Office of the High Representative

As described above, the responsibility for civilian implementation was given to the High Representative. Dayton, however, gave the position a relatively weak mandate. Not only were the civilian and military components of Dayton implementation kept completely separate, the OHR was granted no explicit authority over the many organizations responsible for various aspects of the civilian implementation. The OHR was tasked to

\[\text{coordinate the activities of the civilian organizations and agencies in Bosnia and Herzegovina [in order] to ensure the efficient implementation of the civilian aspects of the peace settlement. The High Representative shall respect their autonomy within their spheres of operation while as necessary giving general guidance to them about the impact of their activities on the implementation of the peace settlement [and] [f]acilitate . . . the resolution of any difficulties arising in connection with civilian implementation.}\(^96\)

This limited mandate prevented the High Representative from guiding the civilian implementation efforts that were undertaken by various international organizations and agencies.\(^97\) Before the articulation of the Bonn Powers,\(^98\) this mandate also prevented the High Representative from actively engaging in the implementation of legislation that the OHR and other members of the international community deemed necessary for implementing Dayton.

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\(^{94}\) Szasz, supra note 9, at 75, 77.

\(^{95}\) Id. at 77. Some of the annexes have additional parties, such as Annex 10, the Agreement on Civilian Implementation, which includes the Republic of Croatia and the Federal Republic of Yugoslavia. See General Framework Agreement, supra note 1, at annex 10.

\(^{96}\) General Framework Agreement, supra note 1, at annex 10, art. II(1)(c-d) (Agreement on Civilian Implementation).

\(^{97}\) DAALDER, supra note 9, at 159.

\(^{98}\) See discussion infra Part IV.
2. Human Rights: The Return of Refugees and Displaced Persons

The success of ethnic cleansing during the war resulted in a significant number of refugees and displaced persons returning home to their municipalities as ethnic minorities, where they had previously been part of the ethnic majority. One of the main goals of Dayton was thus to “gain agreement for a multiethnic state.” In order to achieve this goal, it was important to recognize the rights of those who had been displaced by the conflict and their role in the peace process. Article VII of the Dayton Peace Agreement expresses this importance by stating that “the observance of human rights and the protection of refugees and displaced persons are of vital importance in achieving a lasting peace.” Annex 7, the Agreement on Refugees and Displaced Persons (“Refugee Agreement”), further describes how the rights of refugees and displaced persons should be protected.  

The Refugee Agreement recognizes the importance of the “early return” of refugees and displaced persons for the “settlement of conflict in Bosnia and Herzegovina.” Encouraging and supporting minority returnees is one means of reversing the development of ethnically homogeneous areas and promoting the creation of a multiethnic rather than a divided state comprising three separate ethnic territories. The parties agreed that “[a]ll refugees and displaced persons have the right to freely return to their homes of origin” and that they also “have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them.” The agreement ensures that the safety of returnees will be protected so that they do not suffer “harassment, intimidation, persecution, or discrimination” on account of their ethnicity, religion, or political opinion.

99 HOLBROOKE, supra note 66, at 232.
100 General Framework Agreement, supra note 1, at art. VII.
101 General Framework Agreement, supra note 1, at annex 7, art. I(1) (Agreement on Refugees and Displaced Persons).
102 Id.
103 Id. at annex 7, art. I(2). Art. II details the obligations the parties undertake to create suitable conditions for return. The parties agreed to:

1. . . . to create in their territories the political, economic, and social conditions conducive to the voluntary return and harmonious reintegration of refugees and displaced persons, without preference for any particular group. The Parties shall provide all possible assistance to refugees and displaced persons and work to facilitate their voluntary return in a peaceful, orderly and phased manner, in accordance with the UNHCR repatriation plan.

2. The Parties shall not discriminate against returning refugees and displaced persons with respect to conscription into military service, and shall give positive
Moderating Politics in Post-Conflict States

3. Democracy: The Promotion of Free and Fair Elections

Democratic ideals are the basis for Bosnia’s political system. The Preamble of the Constitution for Bosnia and Herzegovina, which is Annex 4 of the Dayton Peace Agreement, proclaims that the constituent peoples of Bosnia\textsuperscript{104} are “[c]onvinced that democratic governmental institutions and fair procedures best produce peaceful relations within a pluralist society.”\textsuperscript{105} It further states that Bosnia will be a “democratic state, which shall operate under the rule of law and with free and democratic elections.”\textsuperscript{106} To operationalize these goals the constitution calls for two representative governmental bodies: the Presidency and the Parliamentary Assembly.\textsuperscript{107} The manner in which individuals are elected to various positions within these bodies is guided by the Agreement on Elections, which is Annex 3 of the Dayton Peace Agreement.

a. Representation in a New Political Structure

Political representation in Bosnia’s political system is based on ethnicity consideration to requests for exemption from military or other obligatory service based on individual circumstances, so as to enable returnees to rebuild their lives.

\textit{Id.} at annex 7, art. II. The specific commitments undertaken to actualize these obligations include:

(a) the repeal of domestic legislation and administrative practices with discriminatory intent or effect;

(b) the prevention and prompt suppression of any written or verbal incitement, through media or otherwise, of ethnic or religious hostility or hatred;

(c) the dissemination, through the media, of warnings against, and the prompt suppression of, acts of retribution by military, paramilitary, and police services, and by other public officials or private individuals;

(d) the protection of ethnic and/or minority populations wherever they are found and the provision of immediate access to these populations by international humanitarian organizations and monitors; and

(e) the prosecution, dismissal or transfer, as appropriate, of persons in military, paramilitary, and police forces, and other public servants, responsible for serious violations of the basic rights of persons belonging to ethnic or minority groups.

\textit{Id.} at annex 7, art. I(3)(a)-(e).

\textsuperscript{104} The Constitution identifies Bosniacs, Croats, and Serbs as the constituent peoples and citizens of Bosnia and Herzegovina.\textit{ Id.} at annex 4, preamble (Constitution of Bosnia and Herzegovina).

\textsuperscript{105} \textit{Id.}

\textsuperscript{106} \textit{Id.} at annex 4, art. I(2).

\textsuperscript{107} This structure builds upon the Basic Principles agreed upon by the parties in New York on September 26, 1995. Further Agreed Basic Principles, \textit{supra} note 77.
and geography. Pursuant to the Constitution, the Presidency consists of three Members—a Bosniac, a Bosnian Croat, and a Bosnian Serb—elected directly from their respective Entities. The Bosniac and Croat members are elected from the Federation while the Serb member is elected from the Republika Srpska. Each voter is only allowed to vote for one Presidency seat. The Parliamentary Assembly comprises two houses, the House of Representatives and the House of Peoples. The House of Representatives has forty-two Members, two-thirds elected from the Federation and one-third elected from the Republika Srpska. Unlike the Presidency, the Constitution does not impose an ethnic division on the Parliamentary Assembly seats, but it does state that the members will be elected from their Entity in accordance with “an election law to be adopted by the Parliamentary Assembly.” The House of Peoples has fifteen Delegates, two-thirds from the Federation and one-third from the Republika Srpska. Of the ten Delegates from the Federation, five must be Bosniacs and five must be Bosnian Croats, while the five Delegates from the Republika Srpska must be Bosnian Serbs.

The above formulation created quotas in order to ensure each ethnic group numerically equal representation in the Presidency, the House of Peoples, and possibly the House of Representatives, despite the fact that Bosniacs, Bosnian Croats, and Bosnian Serbs did not represent equal percentages

108 General Framework Agreement, supra note 1, at annex 4 art. V (Constitution of Bosnia and Herzegovina). The two regional units of Bosnia, the Federation of Bosnia and Herzegovina and the Republika Srpska, are referred to as the two Entities of Bosnia. Id. at annex 4 art. I(3).
109 Id. at annex 4, art. V(1)(a).
110 Id. at annex 4, art. V(1)(a).
111 Id. at annex 4, art. V.
112 Id. at annex 4, art. V(2).
113 Id. at annex 4, art. IV(2)(a).
114 Id. at annex 4, art. V(1).
115 Id. at annex 4, art. IV(1). Federation Delegates are selected by the Bosniac and Croat Delegates to the House of Peoples of the Federation while the Republika Srpska Delegates are selected by that entity’s legislature. Id. at annex 4, art. IV(1)(a). This type of system entrenches ethnic-based campaigning, voting, and representation because candidates have little to no incentive to solicit votes from outside of their ethnic group. With each ethnic group guaranteed one representative in the Presidency the only competition is between candidates vying for the same ethnic slot. The Constitutional arrangement does not allow for two Federation members of the Presidency, but one Bosniac and one Bosnian Croat, and each voter can only vote to fill one ethnic position (presumably the position corresponding with their ethnic identity) in the Presidency. See discussion infra Part V.
of the population. Despite the secessionist desires of the Bosnian Serb and Bosnian Croat leaderships, any peace settlement acceptable to the international actors directly involved in the peace negotiations had to maintain Bosnia as one state. However, the decentralized nature of the new Bosnian state reflected the key to obtaining peace, “managing ethnic antagonisms.”

The form of representative government agreed upon in Dayton reflects this characterization of the conflict. The manner in which the ethnic antagonism was managed, however, also reflects the nationalist leaders’ desire for post-conflict Bosnia to include power structures that they controlled.

b. Agreement on Elections

The OSCE was responsible for developing the detailed guidelines governing the election process. The Agreement on Elections granted the OSCE the authority to supervise the preparation and conduct of elections for the federal House of Representatives and the Presidency of Bosnia, the House of Representatives and National Assembly for both Entities, and the Presidency of the Republika Srpska. The OSCE was also responsible for certifying whether elections could be effective under then-existing social conditions and, if necessary, for assisting the parties to create the necessary conditions.

The Dayton parties anticipated that the first elections would take place six to nine months after the Dayton Peace Agreement entered into force. They were to be governed by the rules and regulations created by the Provi-

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116 In 1991, no ethnic group accounted for a majority of the Bosnian population, as 43.5% declared themselves Bosniac, 32.1% Serb, 17.4% Croat, 5.5% Yugoslav, and 2.4% “other.” See Elections in Bosnia & Herzegovina, supra note 19, at 2.
117 See HOLBROOKE, supra note 66, at 279. (Recounting a conversation with Haris Silajdzic, in which Holbrooke reminds Silajdzic that the negotiation and subsequent creation of a single country was done at the request of Silajdzic and Izetbegovic.)
119 Id. at 279. “There was an implied acceptance of the existence of deep ethnic divisions among BiH’s three main ethnic groups around which the new institutional architecture was then structured.” Id. at 280.
120 Id. at 279-81. “It is now received wisdom among political scientists that the political élite strives for those institutional choices that best fit its own interests.” Id. at 281.
121 General Framework Agreement, supra note 1, at annex 3 art. II(2) (Agreement on Elections).
122 Id. at annex 3, art. l(2).
sional Election Commission (PEC), which was also responsible for supervising all aspects of the electoral process, including establishing voter registration procedures, ensuring compliance with the established rules and regulations, and accrediting election observers.123 Unlike the civilian implementation annex, the Agreement on Elections clearly gave the PEC the responsibility of ensuring that “action [be] taken to remedy” violations of the Election Agreement or electoral rules and regulations, “including imposing penalties against any person or body that violated such provisions.”124 The head of the OSCE Mission was designated the Chairman of the PEC and was given final decision-making authority in the face of disagreement within the PEC.125

II. POWER-SHARING IN BOSNIA: THE CONSOCIATIONAL APPROACH

Through the Dayton Peace Agreement the international community was able to realize its goal of maintaining Bosnia as a single political entity by utilizing a consensus-based power-sharing political system. Due to the intense ethnic antagonism that developed during the war, however, maintaining Bosnia as a unified state would require a political system in which no single ethnic group could be perceived as having more power than another group. The American negotiators, in cooperation with their European counterparts,126 decided to employ a form of government that is similar to consociational democracy. This form of democracy has been effective in societies with significant political divisions that closely follow lines of social stratification like the Netherlands, Belgium, and Switzerland.127 These political divisions, often referred to as social cleavages, can exist along lines of class, ethnicity, religion, language, race, or gender.128

The concept of consociational democracy acknowledges that social cleavages exist and seeks to create a governing structure in which the nu-

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123 Id. at annex 3, arts. III(2)(a-c), (e).
124 Id. at annex 3, art. III(2)(d).
125 Id. at annex 3, art. III(3). Other members of the PEC included the High Representative, representatives of parties to the Dayton Accords, and any other person chosen by the Chairman in consultation with the parties.
126 See, e.g., HOLBROOKE, supra note 66, at 240.
127 Id. at 1, 31-44.
128 DEMOCRACY IN PLURAL SOCIETIES, supra note 6, at 3 (1977) (quoting HARRY ECKSTEIN, DIVISION AND COHESION IN DEMOCRACY: A STUDY OF NORWAY 34 (1966)). See also THE BLACKWELL DICTIONARY OF POLITICAL SCIENCE 61 (Frank Bealey ed., 1999) (defining social cleavages as “those divisions in society which are wide (or deep) enough to find political expression”).
merous and often competing interests within the society can be accommodated. Consociational democracy has four elements: participation by representatives from each significant segment of society; mutual veto; proportionality in the voting and in the apportionment of public positions; and a high degree of autonomy for each segment. A basic element of consociational democracy is the existence of a grand coalition. A grand coalition is a government body in which political leaders from each of a society’s significant segments cooperate to govern the country. A grand coalition can take a variety of forms, but the most typical are parliamentary cabinets and advisory committees. In order for a grand coalition to be effective, it must


Although the creators of Bosnia’s constitution never explicitly identify the form of government established as consociational democracy, an examination of the Bosnian system reveals that it parallels consociational democracy as outlined by Lijphart. Most importantly, the Bosnian constitution accepts that ethnicity is a significant cleavage within Bosnian society and political representation is organized around ethnicity. See BOJICIC-DZELILOVIC, supra note 118. “There was an implied acceptance of the existence of deep ethnic divisions among BiH’s three main ethnic groups around which the new institutional architecture was then structured.” Id. at 280. Representatives from each of the three major ethnic groups participate in the government. The Presidency consists of one Bosniac, one Bosnian Croat, and one Bosnian Serb. General Framework Agreement, supra note 1, at annex 4, art. V (Constitution of Bosnia and Herzegovina). The House of Peoples similarly grants these three ethnic groups equal representation. Each of these groups is given a high degree of autonomy because of the decentralization of power, which is concentrated in the Entities. Id. at annex 4, art. III (Constitution of Bosnia and Herzegovina). As a result of the ethnic composition of the Entities, the territorial decentralization of power is a de facto decentralization of power along ethnic lines. Representation in governmental institutions is not divided proportionally based on the size of each ethnic group in Bosnia. Such a division would result in a majority of the political power resting with the Bosniacs and leaving the Bosnian Croats as a continual political minority. See supra notes 25-27 (electoral results would likely be similar to those in the 1990 elections when Bosnians voted along ethnic lines and the SDA was victorious). Instead, political representation is split into thirds to ensure that two-thirds of all positions are given to individuals from the Federation and one-third to individuals from the Republika Srpska. Of the forty-two Members of the House of Representatives, two-thirds are elected from the Federation and one-third from Republika Srpska. General Framework Agreement, supra note 1, at annex 4, art. IV(2) (Constitution of Bosnia and Herzegovina). The Constitutional Court utilizes a similar scheme. Of the nine members, four are selected by the Federation’s House of Representatives and two by the Republika Srpska Assembly. Id. at Art. VI(1)(a). Finally, the Bosnian Constitution provides representatives of the three major ethnic groups with the opportunity to veto actions that would harm that groups’ vital interest.

130 See DEMOCRACY IN PLURAL SOCIETIES, supra note 6, at 25.
131 Id. at 31-36.
have representatives from each of the major social groups within the society.\textsuperscript{132}

Power-sharing arrangements like consociationalism are preferred in highly segmented societies in which there is no majority group because they enable a significant cross-section of the society to participate in the political decision-making process. Broader participation in the decision-making process decreases the likelihood that decisions detrimental to the interests of the various segments will be made. Arend Lijphart has identified seven factors that make it more likely that a consociational democratic form of government will work. Consociational democracy is more likely to be successful when the state: (1) does not have a majority ethnic group; (2) does not have large socioeconomic differences among the ethnic groups; (3) has ethnic groups that are roughly the same size; (4) has a limited number of groups; (5) has a total population that is relatively small; (6) has external dangers that promote internal unity; (7) and has a prior tradition of compromise and accommodation.\textsuperscript{133} Additionally, the political elites must have overarching loyalties\textsuperscript{134} that reduce the strength of particularistic ethnic loyalties. The existence of such loyalties enables the political elites to “understand the perils of political fragmentation” and commit to maintaining the existing political system and improving its cohesion and stability.\textsuperscript{135} Consequently political elites are able to transcend the social cleavages to work with the elites of the rival social segments with the purpose, according to Lijphart, of “accommodat[ing] the divergent interests and demands of the subcultures.”\textsuperscript{136}

In the context of Bosnia, such overarching loyalties did not exist among the political elites in the early post-war years. The extreme nationalist parties had risen to power and maintained that power by extolling the dangers of ethnic integration and the need for ethnic separation. Equality, democracy, justice, tolerance, and reconciliation were supported, but only as long as they were implemented within a “separate but equal” context.\textsuperscript{137} Each nationalist

\textsuperscript{132} Id. at 31-36.

\textsuperscript{133} The Power-Sharing Approach, supra note 129, at 497-98.

\textsuperscript{134} Overarching loyalties refer to cohesive forces within a society. For example, class represents a significant cleavage within American society; however, nationality can be an overarching loyalty. Regardless of whether one is working class or upper-middle class, one is still American and can relate to other members of American society as Americans. See DEMOCRACY IN PLURAL SOCIETIES, supra note 6, at 81-83.

\textsuperscript{135} Consociational Democracy, supra note 4, at 79.

\textsuperscript{136} Id. at 79.

\textsuperscript{137} See Plessy v. Ferguson, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting) (stating United States’ Supreme Court decision holding Louisiana law requiring “separate but equal” railway
party had unfettered control within their respective portion of the Bosnian territory and thus there was no incentive to unify the various administrations within a central state government. There was also little or no interest in facilitating the return of refugees or displaced persons.

III. POLITICAL OPPOSITION TO RETURN

One of the most important elements of maintaining a lasting peace in Bosnia was to ensure the return and reintegration of the approximately 2.2 million individuals displaced during the war. The displacement of these individuals not only caused many people to lose their pre-war homes, it drastically changed the ethnic demographics of municipalities throughout the former Yugoslavia. One of the greatest challenges, particularly for minority returnees, has been the reclamation of their property after the war ended, despite the assurances provided for in the Refugee Agreement. Many of these challenges were created expressly by the Bosnian political elites who were interested in solidifying the post-war ethnic demographics throughout the country in complete contravention of the Refugee Agreement.

During the war the governing authorities in each of Bosnia’s three wartime republics enacted property laws that privileged wartime residents over pre-war owners and residents. In 1992 and 1993 the Republic of Bosnia and Herzegovina authorities enacted the Law on Temporary Abandoned Real Property Owned by Citizens and the Law on Abandoned Apartments. These laws enabled the authorities to classify property as abandoned after

accommodations for white and black passengers violated the U.S. Constitution.

138 BOJICIC-DZELOVICH, supra note 118, at 281-82 (noting the SDS, HDZ BiH, and SDA “had little genuine interest in the political compromise needed to rebuild the state of BiH on new foundations – or, indeed, to support democratic procedures.”).

139 Int’l Crisis Group, Going Nowhere Fast: Refugees and Internally Displaced Persons in Bosnia and Herzegovina (ICG Bosnia Report No. 23) at 9 (May 1, 1997) (noting the war caused 1.2 million people to become refugees and displaced 1.0 million throughout Bosnia) [hereinafter Going Nowhere Fast].

140 Id. at 33-40 (describing problems unique to minority returnees such as violence against minorities, ethnic engineering to control the ethnic demographics of resettled areas, and media propaganda against reintegration).

141 In former Yugoslavia property was owned socially and privately. Social property was owned by “society as a whole,” but was generally registered to municipalities or state-owned companies. Hastings, supra note 33, at 225. These entities were known as the “allocation right holders.” Id. The registered owners typically provided the socially-owned housing to their employees, who obtained “occupancy rights.” Id. Occupancy rights were generally granted for indefinite periods of time, and they passed onto another member of the household upon the death of the individual who possessed the occupancy rights. Id. at 225-26.
April 30, 1991, the date the war with Croatia started and population move-ments began.142 Once properties were classified as abandoned, the authori-ties could assign them to someone other than the pre-war occupant for up to one year after the end of the “direct war danger.”143 The Law on Abandoned Apartments was amended in 1995, allowing authorities to declare a property permanently abandoned if the pre-war holder of the occupancy rights did not return to the property within seven days (fifteen days if living abroad) of the end of war.144 Government officials adopted procedures to govern the distribution of abandoned property, but they were rarely followed. Authorities often assigned property based on political and ethnic affiliations.145 In the Republic of Herceg-Bosna similar laws existed,146 but the pre-war occupants or owners did not have to return to their property within a specified time-frame to avoid having the property deemed permanently abandoned.147

The situation in the Republika Srpska was different because the municipali-ties, rather than the Republic, regulated property redistribution. It was not until 1996 that the authorities for the central Republic regulated the process. In that year the Law on the Use of Deserted Property of the Republika Srpska was enacted. This law allowed all property to be classified as abandoned if it had been deserted by the owners or occupants. A new occup-ant could use abandoned property indefinitely. The law allowed pre-war owners or occupants to reclaim their property, and, as with the law in the Republic of Herceg-Bosna, there was no time limit for doing so. The prop-erty would not be turned over to the pre-war owner or occupant, however, until the current occupant, usually a Serb, had returned to their pre-war property or had been compensated for such property.148

In 1997, the Human Rights Ombudsperson149 held that the property laws

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142 Id. at 226.
143 Id.
144 The president of the Republic of Bosnia and Herzegovina, Alija Izetbegovic, proclaimed December 22, 1995, as the day the war ended, which gave displaced persons until December 29, 1995, and refugees until January 6, 1996, to return to their pre-war properties. Id. at 226-27.
145 Id. at 226.
146 The relevant law in the Republic of Bosnia and Herzegovina was the Decree on the Use of Abandoned Apartments, which was enacted in 1993. Id. at 227.
147 Id.
148 Id.
149 The Human Rights Ombudsperson is one of the constituent bodies of the Human Rights Commission established in the Dayton Accords. See General Framework Agreement, supra note 1, at annex 6, art. II(1) (Agreement on Human Rights) (“To assist in honoring their obligations under this Agreement, the Parties hereby establish a Commission on Human Rights
in both Entities violated the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).\textsuperscript{150} One year later the Human Rights Chamber made a similar ruling.\textsuperscript{151} Because the Entities committed themselves to upholding the ECHR and its protocols in the Dayton Peace Agreement,\textsuperscript{152} the property laws in both Entities had to be revised. Before these decisions were issued, Bosnian authorities had promised to revise the property laws to ensure an equitable process that would enable pre-war occupants to reclaim their property and return to their homes.\textsuperscript{153} Yet action to implement these promises did not materialize.

To address this problem, the OHR drafted new property legislation with the help of Bosnian experts and international organizations.\textsuperscript{154} As the civilian administrator in Bosnia, the High Representative is responsible for coordinating “the activities of the civilian organizations and agencies in Bosnia and Herzegovina to ensure the efficient implementation of the civilian aspects of the peace settlement” and, as necessary, to give “general guidance to them about the impact of their activities on the implementation of the peace settlement.”\textsuperscript{155} Additionally, as the High Representative “judges necessary,” he shall facilitate the “resolution of any difficulties arising in connection with civilian implementation.”\textsuperscript{156} In exercising these duties, the High Representative sent draft property legislation to the Entities on May 29, 1997.\textsuperscript{157} The

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\textsuperscript{150} Hastings, supra note 33, at 228.

\textsuperscript{151} Id. (noting that both bodies found that the Entity laws violated Articles 1 and 8 of the ECHR, which respectively protect the right to peaceful enjoyment of possessions and family life and home).

\textsuperscript{152} General Framework Agreement, supra note 1, at annex 6, art. I (Agreement on Human Rights).

\textsuperscript{153} Hastings, supra note 33, at 228.

\textsuperscript{154} Id. at 228-29. The revised legislation “declared the wartime laws void, allowed prewar occupants to reclaim their homes, and required municipalities to provide alternative accommodations to those who would have to vacate apartments reclaimed by prewar occupants.” Id.

\textsuperscript{155} General Framework Agreement, supra note 1, at annex 10, art. II(1)(c) (Agreement on Civilian Implementation).

\textsuperscript{156} Id. at annex 10, art. II(1)(d).

\textsuperscript{157} Hastings, supra note 33, at 228. The legislation for the Federation consisted of three draft laws: the Law on the Cessation of the Application of the Law on Abandoned Properties, the Law on the Cessation of the Application of the Law on Temporary and Abandoned Real Property Owned by Citizens, and the Law on Taking over the Law on Housing Relations. The draft legislation for Republika Srpska was the Law on the Cessation of Application of the Law on the Use of Abandoned Property.
PIC exerted additional pressure to encourage the Entities to adopt the revised legislation "in order to make the full implementation of Annex 7 of the Peace Agreement possible," stating that "[i]nternational support for housing reconstruction should be conditional upon fulfillment of these obligations."\(^{158}\)

The Federation initially agreed on August 6, 1997 to implement the property legislation by September 30, 1997.\(^ {159}\) By early 1998, however, the Federation had yet to adopt the revised legislation.\(^ {160}\) On February 3, 1998 the Sarajevo cantonal authorities adopted the Sarajevo Declaration in which they agreed to implement the OHR-drafted laws by March 1, 1998.\(^ {161}\) Although the Federation did not meet this deadline, a combination of international pressure and negotiations between the Federation, the OHR, and the UNHCR, resulted in the passage of the draft laws, which came into force on April 4, 1998.\(^ {162}\) This was approximately one year after the High Representative presented the draft legislation to government officials. The new property laws declared the wartime laws void, provided the owners or occupants of abandoned property the right to file a claim for the return of their property, and established a procedure for processing such claims.\(^ {163}\)

\(^{158}\) Id. at 229.

\(^{159}\) Federation Forum, Chairman’s Conclusions (Aug. 20, 1997), at http://www.ohr.int/other-doc/fed-mtng/default.asp?content_id=3622 (last visited Apr. 9, 2006); see also Hastings, supra note 33, at 229.

\(^{160}\) Hastings, supra note 33, at 229.

\(^{161}\) Id. The Sarajevo Declaration noted that:

Sarajevo should lead the country by example by taking the concrete steps set forth in this Declaration to enable the return of at least 20,000 minority pre-war residents in 1998, as proof of its determination to act as a model for reconciliation, multiethnicity, freedom of movement and the unconditional right to return throughout Bosnia and Herzegovina.


\(^{162}\) International assistance to Sarajevo was conditioned upon fulfilling the "benchmarks set out in this Declaration and on adequate progress toward meeting the 1998 goal of at least 20,000 minority returns." Hastings, supra note 33, at 229-230.

\(^{163}\) Law on the Cessation of the Application of the Law on Temporary Abandoned Real Property Owned by Citizens, OFFICIAL GAZETTE RfBH, nos. 11/93 and 13/94 (July 17, 1999) [hereinafter Law on Abandoned Real Property], available at http://www.ohr.int/decisions/plipdec/default.asp?content_id=249. In the Federation, claimants were to file their claims with the relevant municipal authority, which would issue a decision no later than thirty days after the claim was filed. Claims related to real property were to be filed with the "competent municipal, city or cantonal administrative body competent for property-law affairs." Id. at arts. 6, 11, 12. Individuals with claims for apartments were to apply to the "municipal administrative authority competent for house affairs, unless otherwise
The return of apartments proved to be politically chaotic. The new Law on Abandoned Apartments granted the current occupant of an apartment a minimum 90-day grace period in which to vacate the apartment after a decision had been issued.164 Yet the law also required the temporary user to refer their claim to the cantonal law...[who] shall decide on the claim by a decision within 30 days from the date of receipt of the claim.” Law on the Cessation of the Application of the Law on Abandoned Apartments, OFFICIAL GAZETTE OF RBH no. 6/92, 8/92, 16/92, 13/94, 36/94, 9/95 and 33/95, at arts. 4, 6 (July 1, 1999) [hereinafter Law on Abandoned Apartments], available at http://www.ohr.int/decisions/plipdec/default.asp?content_id=248.

While there was no deadline for filing claims for real property, claims for abandoned apartments had to be filed within fifteen months from the date the law entered into force. Law on Abandoned Real Property, supra, at art. 11; Law on Abandoned Apartments, supra, at art. 5. Once a claimant received a decision requiring the return of his/her real property, the law gave the temporary user of real property a minimum of ninety days to vacate the property and the temporary user of an abandoned apartment a maximum of ninety days to vacate the apartment. Law on Abandoned Real Property, supra, at art. 12; Law on Abandoned Apartments, supra, at art. 7a. In exceptional cases, the law provided that this deadline could be extended to one year if the municipality responsible for securing alternative accommodation certified to the Federation Ministry of Urban Planning and Environment that there was an absence of such accommodation in the municipality. Law on Abandoned Real Property, supra, at art. 12 (the High Representative amended this article to require High Representative-approval of any deadline extensions); Law on Abandoned Apartments, supra, at art 7a.

Republika Srpska (RS) enacted the Law on the Cessation of the Application of the Law on the Use of Abandoned Property on December 19, 1998. The RS law resembled the Federation laws, but it contained several articles that had not been agreed upon by the international community. While the Federation law required municipal authorities to provide alternative accommodation for certain temporary users, the law in the Republika Srpska stated that current occupants could not be forcibly evicted until they could return to their pre-war residences. Law on the Cessation of the Application of the Law on the Use of Abandoned Property, OFFICIAL GAZETTE OF RS, no. 38/1998 (Dec. 11, 1998), art. 6(2) [hereinafter RS Law on Abandoned Property], available at http://www.ohr.int/ohr-dept/hr-rol/property/rs-prop-leg/laws/default.asp?content_id=5922. Additional obstacles included the lack of a mechanism for initiating evictions and the ability for appeals to delay the implementation of decisions. Hastings, supra note 33, at 230. The Federation law provided that “[a]n appeal shall not suspend the execution of the decision” and the Republika Srpska law provided no similar protection. Law on Abandoned Real Property, supra, at art. 13(3); Law on Abandoned Apartments, supra, at art. 8(3); RS Law on Abandoned Property, supra, at art. 27 (“A decision on repossessing of real property may be appealed with the Ministry of Refugees and Displaced Persons within 15 days from the date of the receipt of the decision.”).

164 Law on Abandoned Apartments, supra note 163, at art. 7. This provision was suspended by the High Representative. See High Representative, Decision suspending decision-making on claims to apartments in the Federation for which a permanent occupancy right was issued after April 30, 1991, and imposing a moratorium on sale of apartments to persons who acquired their occupancy right after April 30, 1991 (Nov. 5, 1998), available at http://www.ohr.int/decisions/plipdec/default.asp?content_id=151 [hereinafter High Representative].
the case to the relevant cantonal (provincial) authority for a decision regarding the provision of alternative accommodation.\textsuperscript{165} This was an effort to balance the property rights of the current occupant, which had been acquired during the war, with those of the pre-war occupant. To implement this clause, the Federation’s Ministry of Urban Planning and the Environment issued an instruction establishing criteria for determining whose rights prevailed.\textsuperscript{166} The criteria, such as the number of household members, were to be evaluated during a special hearing.\textsuperscript{167} The High Representative realized the potential this process could have for prolonging, and perhaps preventing altogether, the return of property to pre-war owners. To prevent such an obstruction of the Refugee Agreement, the High Representative suspended the application of Article 3(6) of the Law on the Cessation of the Application of the Law on Abandoned Apartments and sought an expert opinion from the Council of Europe regarding the instruction’s compatibility with the ECHR.\textsuperscript{168} The Council of Europe concluded that the decision-making criteria created by the Federation could not be issued in an instruction, so the High Representative revoked Article 3(6).\textsuperscript{169}

The revocation of Article 3(6) eliminated the legal contest for superior rights to occupy an apartment. As a result, once the relevant municipal authority issued a decision regarding a claim for the return of an apartment, the current occupant had to vacate. This development did not, however, address the right of current occupants to alternative accommodation. Article 3(5) of the Law on the Cessation of the Application of the Law on Abandoned Apartments states that a temporary user who is required to vacate an apart-

\textsuperscript{165} This referral was to take place within thirty days after the Article 6 decision and the cantonal authority had to issue a decision within thirty days of the case being submitted to it. Law on Abandoned Apartments, supra note 163, at art. 3(6) (suspended by High Representative, supra note 164).

\textsuperscript{166} For example, the pre-war occupant would be allowed to return to the property if “the number of the family household members of the (prewar) occupancy right holder exceeds three fourths of the number of the family household members of the current occupant.” Hastings, supra note 33, at 236 (quoting Instructions on the Criteria for the Allocation of Another Apartment to Holder of Occupancy Right or Current Occupant, FBH Official Gazette, No. 40/98 (1998)).

\textsuperscript{167} Id.

\textsuperscript{168} High Representative, supra note 164. This decision was revoked after the Council of Europe issued its opinion Hastings, supra note 33, at 237.

\textsuperscript{169} See Hastings, supra note 33, at 236-37; see also High Representative, supra note 164. Before revoking Article 3(6), the High Representative revoked his 5 November 1998 Decision suspending application of Article 3(6). High Representative, Decision revoking the decision of 5 November 1998 (Apr. 14, 1999), available at http://www.ohr.int/decisions/plipdec/default.asp?content_id=157.
ment and "whose housing needs are not otherwise met, shall be provided with accommodation in accordance with the ZOSO [Law on Taking over the Law on Housing Relations] by the administrative body on the territory of which she/he had his/her latest domicile or residence." Municipal authorities often cited a lack of alternative accommodation as the reason current occupants could not be evicted. Viewing this as another effort to obstruct the return of displaced persons and refugees, the High Representative amended the law on October 27, 1999 to clarify which individuals were entitled to alternative accommodation.

The High Representative's Decision, which amended the Law on Abandoned Apartments, stated that current occupants were not entitled to alternative accommodation if they (1) had a legal right to return to their pre-war home, (2) that the home was "sufficiently intact to provide for basic living conditions (protection against weather; water installations and sanitary fittings to an appropriate level; electricity; heating; privacy; and security of belongings)," and (3) could return to such property in "safety and dignity." Additionally, current occupants, whose pre-war residence was occupied by a member of the 1991 household; or who had a 1991 household member living in the same municipality who was also ineligible for alternative accommodation; or who voluntarily sold or exchanged their April 30, 1991 property were not entitled to alternative accommodation. Furthermore, any temporary user who refused alternative accommodation or assistance for the reconstruction of their April 30, 1991 residence did not have a right to alternative accommodation.

Once it became evident that there was an imminent need to evict current occupants, the High Representative had to address local officials' refusal to execute evictions. Evictions are often a sensitive task because they can require officials to evict individuals of their own ethnicity to allow the pre-war owners, often members of a different ethnic group, to repossess the property. Various actions were taken by international organizations active in the civilian implementation of Dayton to address this obstacle. For example, the International Police Task Force, in consultation with the OSCE, advised the

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170 Law on Abandoned Apartments, supra note 163, at art. 3(6).
171 Hastings, supra note 33, at 244.
173 Id. at art. 30.
174 Id. at arts. 31-32.
175 Id. at art. 33.
Bosnian Minister of Interior that failing to assist in lawful evictions would constitute non-compliance with Dayton, which could cause a police officer to be decertified. When legislative action by the National Assembly in the Republika Srpska suspended evictions from November 1, 1999, to April 1, 2000, the High Representative responded that the action was inconsistent with his October 27, 1999 Decisions, and therefore was null and void.

Despite various amendments to the property laws in both Entities, local officials continued to obstruct the implementation of the revised laws imposed by the High Representative. In the Federation, housing authorities responsible for processing claims for the return of pre-war property charged fees that were not provided for in the property legislation. Some housing authorities refused to accept claims, while others referred claimants to bodies that were not authorized to process such claims. At the outer extreme, some municipalities simply refused to establish housing authorities, thus denying claimants a place to file their claims. Similar tactics were utilized in the Republika Srpska. A problem unique to the Republika Srpska, however, was insufficient resources, which prevented the processing of claims. Due to a lack of ink cartridges, envelopes, and stamps, Republika Srpska officials stated that there was no point in issuing decisions since they could not be printed and mailed.

Other examples of obstructionist behavior included: illegally reallocating vacated apartments; deliberately providing claimants with inaccurate information regarding the claims process; requiring claimants to provide additional documentation in contravention of the property law; failing to establish the necessary offices and commissions to process property claims; failing to process, examine, or decide filed claims; only deciding claims in favor of majority returnees; limiting municipal Ministry of Refugee officers' access to the necessary information regarding socially-owned apartments; creating parallel institutions to delay or prevent evictions; and failing to issue eviction notices and canceling scheduled evictions. Officials also blocked

176 Hastings, supra note 33, at 240.
177 High Representative, Decision Annulling the RSNA Conclusion Proclaiming a Winter Ban on Evictions (Nov. 16, 1999), available at http://www.ohr.int/decisions/plipdec/default.asp?content_id=206.
178 The fees ranged from ten to one hundred Konvertible Marka (KM) when the average monthly income in the Federation was 319 KM and 128 in the Republika Srpska. Hastings, supra note 33, at 231.
179 Id. at 231-32.
180 Id. at 232.
181 Id.
182 See High Representative, Removals and Suspensions from Office (Nov. 29, 1999), avail-
reconstruction projects, issued letters limiting returnees’ land use, made inflammatory and offensive public statements, obstructed the work of the Human Rights Chamber, \(^{183}\) refused to implement Human Rights Chamber decisions, \(^{184}\) hindered the development of transparent municipal authorities, \(^{185}\) refused to implement instructions from the High Representative regarding educational facilities for minority returnee children, and discriminated against minority officials with regard to their remuneration and integration. \(^{186}\)

The High Representative addressed the obstruction by removing or suspending government officials pursuant to the Bonn Powers. \(^{187}\) On November 29, 1999, the High Representative removed nineteen officials—the largest number of officials in one day—for obstructing the implementation of the Dayton Peace Agreement, specifically the provisions providing for the return of displaced persons and refugees. \(^{188}\) The fact that fifteen of these officials had been democratically elected prompted criticism that that the High Representative’s actions were undemocratic. \(^{189}\) One commentator involved in the implementation of the property laws in Bosnia and Herzegovina has noted, however, that most of the international community agreed with the High Representative’s decision “because it was more harmful to allow the

\(^{183}\) The Office of the High Representative concluded that Djordje Umicevic, President of the Municipal Assembly of Banja Luka, had pressured the proprietors of venues for the hearing in Case No. CH/96/29, *Islamic Community v. the Republika Srpska*, such that it had to be postponed four times. Decision removing Mr. Djordje Umicevic from his position of President of the Municipal Assembly of Banja Luka (Nov. 29, 1999), available at http://www.ohr.int/decisions/removalssdec/default.asp?content_id=290.

\(^{184}\) The Human Rights Chamber ordered that Banja Luka grant permission for the construction of seven mosques, but local officials refused to grant such permission citing local legislation enacted after the relevant Human Rights Chamber decision. Decision removing Mr. Djordje Umicevic from his position of President of the Municipal Assembly of Banja Luka (Nov. 29, 1999), available at http://www.ohr.int/decisions/removalssdec/default.asp?content_id=290.

\(^{185}\) Decision removing Mr. Elvedin Hrelja from his position of Mayor of Goradze (Nov. 29, 1999), available at http://www.ohr.int/decisions/removalssdec/default.asp?content_id=277.

\(^{186}\) See OHR, Removals and Suspensions from Office (Nov. 29, 1999), available at http://www.ohr.int/decisions/removalssdec/archive.asp.

\(^{187}\) See discussion infra Part IV.


\(^{189}\) Hastings, *supra* note 33, at 245.
Bosnian authorities to hide behind the principles of democracy in order to ultimately circumvent them than for the international community to temporarily circumvent them in order to achieve lasting democracy.”

Despite the enactment of the new property legislation, the return of refugees and displaced persons continued to take place at a level that was unacceptably low to the OHR and other international organizations involved in facilitating return. While Dayton dashed the hopes held by the HDZ in Bosnia and Herzegovina and the SDS to obtain territory for a monoethnic state, the parties succeeded in obtaining political control over distinct enclaves within Bosnia—a de facto separation or secession. Within these territories the parties worked to achieve and maintain ethnic exclusivity. In September 1996, then-Republica Srpska Entity President Biljana Plavsic stated:

> It is not our obligation to think about the Bosniac and Croat displaced persons living in the Federation. We have to solve the problem of space for our own Serb displaced persons first. They have been forced to abandon their own property in the Federation, which has belonged to them for centuries. This means that in the near future I cannot see any chance for the return of minorities to the Republika Srpska. In this sense, Dayton is more theory than anything else.

Amnesty International also reported that the Bosnian-Croat authorities frequently resisted the return of Bosniacs and did not consistently support the return of Bosnian Croats to the Republika Srpska or Bosniac-controlled areas in the Federation. In addition to discouraging minority returns, officials also engaged in ethnic engineering to solidify the ethnic demographics of the relevant enclaves. Displaced persons and refugees of the majority ethnic group were encouraged to resettle in particular areas that had been formerly inhabited by individuals of another ethnic group. They were also discouraged from returning to areas that were controlled by nationalist parties that did not correspond with their ethnicity. For example, the Bosnian Serb leadership in Pale, the wartime capital of the Republika Srpska, waged an intimidation campaign to frighten Bosnian Serbs living in the suburbs of

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190 Id.
191 Going Nowhere Fast, supra note 139 at 34.
193 Efforts to settle areas with members of the majority ethnic group were also used during the voter registration process in 1996. See discussion infra Part V(A)(1).
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Sarajevo to encourage them to move to the Republika Srpska. The campaign—involving violence, the burning of Bosnian Serb homes, and propaganda broadcasts on Pale radio and television—was successful. An estimated 80,000 Bosnian Serbs left their homes after the Bosniacs assumed control over the area in February and March of 1996.\textsuperscript{194} Bosniac authorities successfully worked to settle the abandoned areas with Bosniacs displaced from the eastern part of the country, specifically Srebrenica.\textsuperscript{195} Furthermore, Bosnian Croat leaders did not push their Bosniac counterparts to support Bosnian Croat return to Bosniac-controlled areas and Bosniac leaders similarly did not help Bosniacs return to pre-war residences that were located in Bosnian Croat-controlled areas.\textsuperscript{196} Thus there appears to have been implicit, if not explicit, collusion among the nationalist party elites to hinder returns that would upset the desired ethnic demographics in their respective territories.

In conjunction with hindering returns, the extreme nationalist parties continued to cultivate ethnic division. In the early post-Dayton years, the OHR was the only institution involved in Bosnian politics working to reverse the effects of ethnic cleansing. The OHR was also alone in its advocacy for a cohesive multiethnic Bosnian state based on a common Bosnian identity and the values of equality, democracy, justice, tolerance, and reconciliation.\textsuperscript{197} Throughout these early post-war years, the people of Bosnia received conflicting messages regarding their identity as citizens of Bosnia and Herzegovina. They were constantly reminded by democratically-elected government officials that they were Bosniacs, Croats, or Serbs, whereas OHR officials and other members of the international community reinforced every individual’s identity as a citizen of Bosnia and Herzegovina.\textsuperscript{198} This contradiction in messages hindered the development of overarching loyalties among the Bosnian people. Despite the work of the nationalist leaders to re-

\textsuperscript{194} Going Nowhere Fast, supra note 139, at 36. It is also possible that the large exodus of Bosnian Serbs was caused by pressure from Bosniacs within the Federation rather than Bosnian Serb tactics in Pale.

\textsuperscript{195} Id. at 36-37.

\textsuperscript{196} Id. at 37.


inforce ethnic identities, the OHR continued to work to return Bosnia to an ethnically integrated state. The OHR believed that achieving this goal required the unilateral revision of Bosnian laws and the removal of government officials.

IV. "EXPANDED" AUTHORITY FOR THE HIGH REPRESENTATIVE

Before the High Representative could embark on a course of action that included enacting new laws and removing officials, he had to clarify that such action was within the OHR’s authority pursuant to Annex 10 of the Dayton Peace Agreement. Carlos Westendorp, who became the High Representative in 1997, sought such clarification from the PIC. The PIC sought to “reinvigorate the implementation effort” at the June 1997 meeting in Sintra, Portugal because it was frustrated by the slow pace at which Dayton was being implemented and the low levels of cooperation between the various ethnic groups.199 The PIC Declaration made in Sintra, noted that all Bosnian authorities had failed to satisfy their Dayton obligations and concluded that such failures were unacceptable.200 The PIC demanded “a significant acceleration” in the work of government officials and established firm deadlines for the accomplishment of specific goals.201 The Declaration made clear that failure to meet the deadlines would lead to further action by the PIC.202

In late 1997, the PIC followed through on its threat. During the December meeting in Bonn, Germany, the PIC was faced with the fact that the Bosnian government officials had made little progress in the areas addressed in the Sintra Declaration. In response, the PIC indicated its willingness to see the High Representative exercise his “final authority in theater regarding interpretation of [the Agreement] on the civilian implementation of the peace settlement.”203 The PIC welcomed Westendorp’s intention to implement legislation when the Bosnian government did not or would not do so, and to rewrite existing legislation if such legislation conflicted with the Dayton

201 Id. at para. 6.
202 See, id. Full implementation of the Constitution of Bosnia and Herzegovina, id. at para. 28; cooperation with the ICTY, id. at para. 35; essential economic reform legislation, id. at para. 44; refugee return & property laws, id. at para. 46, 49; discrimination against and harassment of ethnic minorities, id. at para. 57; freedom of movement and communication, id. at para. 61.
203 General Framework Agreement, supra note 1, annex 10, art. V (Agreement on Civilian Implementation).
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Peace Agreement.\textsuperscript{204} The PIC also welcomed the High Representative’s intention to dismiss public officials who obstructed the Peace Agreement or the High Representative’s efforts to fulfill his mandate.\textsuperscript{205} This new understanding of the OHR’s mandate is referred to as the “Bonn Powers.” Armed with these new powers, the High Representative was now authorized to create and enact laws that had been blocked by Bosnian government officials and to take disciplinary action against those officials who obstructed the implementation of Dayton.\textsuperscript{206}

International authorities similar to the High Representative have been utilized in territories throughout the world to address governance problems.\textsuperscript{207} In situations like those in Bosnia, two aspects of governance problems can develop: local actors may be unable to govern, or international actors may believe that local actors will govern in ways that conflict with the policy objectives of the international actors.\textsuperscript{208} In response to these governance problems, international actors can develop reactive or proactive solutions for addressing these problems.\textsuperscript{209} Reactive projects are those that are

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\textsuperscript{204} Peace Implementation Council, Bonn Conclusions at art. XI(2)(b) (Dec. 10, 1997), available at http://www.ohr.int/pic/default.asp?content_id=5182 ("The Council welcomes the High Representative’s intention to use his final authority in theatre regarding interpretation of the Agreement on the Civilian Implementation of the Peace Settlement in order to facilitate the resolution of difficulties by making binding decisions, as he judges necessary, on the following issues: ... interim measures to take effect when parties are unable to reach agreement, which will remain in force until the Presidency or Council of Ministers has adopted a decision consistent with the Peace Agreement on the issue concerned."). [hereinafter Peace Implementation Council].

\textsuperscript{205} Yordán, supra note 2, at 157; Peace Implementation Council, supra note 204, at art. XI(2)(c) ("The Council welcomes the High Representative’s intention to use his final authority in theatre regarding interpretation of the Agreement on the Civilian Implementation of the Peace Settlement in order to facilitate the resolution of difficulties by making binding decisions, as he judges necessary, on the following issues: ... other measures to ensure implementation of the Peace Agreement throughout Bosnia and Herzegovina and its Entities, as well as the smooth running of the common institutions. Such measures may include actions against persons holding public office or officials who are absent from meetings without good cause or who are found by the High Representative to be in violation of legal commitments made under the Peace Agreement or the terms for its implementation.").

\textsuperscript{206} COUSENS & CATER, supra note 199, at 131 (emphasis in original).

\textsuperscript{207} See Ralph Wilde, From Danzig to East Timor and Beyond: The Role of International Territorial Administration, 95 AM. J. INT’L L. 583, 592 (2001); see also Simon Chesterman, Building Democracy through Benevolent Autocracy: Consultation and Accountability in UN Transitional Administrations, in THE UN ROLE IN PROMOTING DEMOCRACY: BETWEEN IDEALS AND REALITY 86-88 (Edward Newman & Roland Rich eds., 2004).

\textsuperscript{208} Id.

\textsuperscript{209} Id. at 600.
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grafted “onto an existing governance structure operated by local actors, and power is exercised in an ad hoc fashion.”

Officials operating in a reactive project exercise their authority only when local actors fail to implement necessary policy or take other needed action. Alternatively, proactive projects are designed so that international representatives exercise total administrative control from the beginning. In the proactive model, international officials do not act in tandem with local actors because the local officials are thought to be unable or unsuitable to perform the necessary administrative tasks. While proactive projects work to initiate “good governance” at the outset,” reactive projects only respond to specific instances of “bad governance.”

One of the challenges faced by the OHR was that it was created as a reactive solution to Bosnia’s governance problems. The Dayton Agreement fashioned the OHR as a tool for assisting the Bosnian government as it implemented the civilian aspects of Dayton. Thus, after governance issues developed, the OHR continued in a reactive role. The Bosnian political elites were therefore able to maintain their political power and authority and the High Representative was authorized to act only when action or inaction by Bosnian officials undermined implementation of the Dayton Accords.

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210 Id.
211 Id. (“Thus, the exercise of powers by the League in Danzig, the United Nations in Cambodia (other than conducting elections), and the supervisor in Brcko between 1997 and 2000—whether negative (e.g., vetoes) or positive (e.g., appointments, passing legislation)—was aimed at stepping in to correct ‘mistakes.’”).
212 Id. at 600-01.
213 Id. at 600.
214 Id. at 601.
215 See supra note 207; General Framework Agreement, supra note 1, at annex 10, art. II(1) (Agreement on Civilian Implementation). The Dayton negotiators initially gave the OHR a strong mandate, which included direct authority over the international organizations working to implement the civilian aspects of Dayton. See Daalder, supra note 9, at 157; Mirko Klarin, Interview: Carlos Westendorp, the High Representative in BiH, NASA Borba (Dec. 12, 1997), at http://www.ohr.int/ohr-dept/presso/pressi/default.asp?content_id=3409 (Feb. 5, 2004) [hereinafter Klarin] (“In the beginning, the Europeans wanted a strong HR. Russians, too. But Americans were hesitating back then. The situation changed: now everybody wants the implementation process to be accelerated, that’s why they support the authority which would enable the HR to achieve it.”). As discussed above, this mandate was subsequently weakened once the drafters were made aware of the nationality of the first High Representative. See discussion supra Part I(D). It is not evident, however, that the initial “strong” mandate granted the OHR explicit authority over local government officials.

The idea of a proactive project in Bosnia appears to have been rejected by the international community early on in the peace negotiating process. Lord Owen recalls in the fall of 1992 a “UN trusteeship for Bosnia-Herzegovina was much in vogue in the newspapers,” bu
Mandates for proactive projects, on the other hand, explicitly grant the international administration plenary administrative authority. Such mandates create protectorate-like conditions as is demonstrated in the mandates for Mostar, Kosovo, East Timor, and Cambodia. The Memorandum of Understanding on the European Administration of Mostar ("EUAM"), for example, states that the "Administration of the Mostar city municipality will be assumed by the European Union" and that the "Administrator will have the powers necessary to fulfil the aims and principles of the EU Administration... and to administer the Mostar city municipality properly and efficiently."\(^{216}\) As another example, in Kosovo the UN Security Council authorized the Secretary-General to establish "an international civil presence... in order to provide an interim administration for Kosovo... which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions."\(^{217}\) The interim administration in Kosovo would be responsible for "[p]erforming basic civilian administrative functions where and as long as required."\(^{218}\) Similarly, an interim administration under the auspices of the UN was created for East Timor. The mandate for this project states that "a United Nations Transitional Administration in East Timor (UNTAET) will be endowed with overall responsibility for the administration of East Timor and will be empowered to exercise all legislative and executive authority including the administration of justice."\(^{219}\) Finally, the agreement creating the UN Transi-

\(^{216}\) See Memorandum of Understanding on the European Administration of Mostar, at art. 1, 7(1) (July 5, 1994).


\(^{218}\) Id. at para. 11(b).

ational Authority in Cambodia (UNTAC) states that "all administrative agencies, bodies and offices acting in the field of foreign affairs, national defence, finance, public security and information will be placed under the direct control of UNTAC, which will exercise it as necessary to ensure strict neutrality." Additionally, other administrative agencies, bodies, and offices identified by the head of UNTAC were "placed under direct supervision or control of UNTAC and will comply with any guidance provided by it."

Unlike the specific mandates in the above examples, the High Representative's mandate is vague. Article V states that the High Representative is the "final authority . . . regarding interpretation of this Agreement on the civilian implementation of the peace settlement." High Representative Carlos Westendorp broadly construed this clause as granting him "the possibility to interpret [his] own authorities and powers." He determined that his authority to facilitate the "resolution of any difficulties arising in connection with civilian implementation" included the power to act as a mediator who could make and implement decisions. This authority could be exercised "when the parties [were] unable to reach agreement," and included the ability to suspend the enforcement of legislation that did not comply with the Dayton Peace Agreement, and to dismiss government officials who "persistently block[ed] the implementation of the Peace Agreement." After reviewing the Dayton Agreement, Westendorp concluded that "Dayton covered more powers for [his] post than [he] used in practice."

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221 Id. at annex 1, § B(2) (UNTAC Mandate).
222 See General Framework Agreement, supra note 1, at annex 10, art. II (Agreement on Civilian Implementation).
223 See General Framework Agreement, supra note 1, at annex 10, art. V (Agreement on Civilian Implementation).
225 Id. at *1-*2 ("Well then, if you like, you may call it a friendly arbiter.").
227 Id. at *2 ("I have the right to pass decisions important for the functioning of the BiH state, I would like BiH authorities to pass these decisions, but if they do not want to, then it has to be me.").
accelerate the implementation process, the PIC welcomed Westendorp’s generous interpretation of the High Representative’s mandate.228

V. CHALLENGES TO INCREASING MODERATE POLITICAL PARTICIPATION

Fundamental problems in Bosnia’s political and electoral systems enabled obstructionist nationalist leaders to obtain and sustain political power. Westendorp’s revised understanding of the High Representative’s mandate, while effective in mitigating and sometimes preventing the damage caused by Bosnia’s political elites, did not address these problems. In recent years, the Office of the High Representative has focused on fortifying Bosnia’s political institutions to withstand the pressure of internal debates and to constructively address controversial matters. The constant and invasive role of the international community and the High Representative has had the unintended effect of undermining government officials’ sense of ownership of their country.229 Rather than developing solutions to encourage the growth of domestic mechanisms to hold officials accountable for their decisions, the OHR’s invasive approach has shielded officials from having to make unpopular decisions. This creates a cycle of dependency that the international community and the High Representative have become anxious to break.230

228 Peace Implementation Council, supra note 204, at art. XI(2).
229 Gerald Knaus & Felix Martin, Travails of the European Raj, 14 J. DEMOCRACY 68 (2003) [hereinafter Knaus & Martin] (noting a desire by Bosnian officials to have the OHR make and enforce controversial policy decisions).
230 Id. In November 2000, former High Representative Wolfgang Petritsch fostered a relationship based on partnership and mutual respect with the new Democratic Alliance for Change government. This was a new type of relationship for High Representative Petritsch, as his relationship with the previous Bosnian governments, comprised of nationalists could best be characterized as “highly interventionist.” Id. He frequently used his Bonn Powers to implement legislation and remove officials deemed to be obstructionists. High Representative Ashdown has continued High Representative Petritsch’s efforts at partnership with the Bosnian government despite the return of the nationalist parties in the October 2002 election because of the officials’ expressed support of Ashdown’s reform proposals. Int’l Crisis Group, Bosnia’s Nationalist Governments: Paddy Ashdown and the Paradoxes of State Building (Balkan Rep. No. 146) (July 22, 2003), at 3. This type of partnership approach was not attempted during the earlier days of the High Representative. While the nationalist party leaders in the mid- to late-1990s expressed their support of the return goals, they continuously failed to take action to realize the goals. The international community gave the leaders several deadlines for passing new property legislation, which were consistently ignored (perhaps other examples of inaction and non-cooperation). Therefore it is understandable why the High Representative would not see the Bosnian government officials of those days as reliable partners in implementing the Dayton return goals. In the face of consistent obstruction, the
The following analysis examines Bosnia’s evolving electoral system and its political institutions. It then identifies the problems that led to the governance difficulties that Bosnia faced in the early post-war years.

A. Electoral Obstacles

The electoral system\textsuperscript{231} is one of the state’s most powerful instruments for shaping its political system\textsuperscript{232} because the electoral system “can be purposively designed to achieve particular outcomes, and [can] structure the arena of political competition” by rewarding “particular types of behavior and plac[ing] constraints on others.”\textsuperscript{233} One of the goals in deeply segmented societies is to create a political structure in which political representatives can work with one another across divisions to develop practical and enforceable solutions to contentious issues.

Lijphart has identified one key structural incentive that encourages compromise and accommodation within consociationalism: the prospect of participating in the government as a member of the governing coalition.\textsuperscript{234} In a multiparty system, where no one party carries a majority (which is assumed in consociationalism), parties must build coalitions to form a government. Consequently parties have an incentive to enter into and remain in coalition cabinets if they want to gain power. In order to build a coalition, parties must be willing to develop new policy positions (and strategies for their implementation) that reflect the various positions of the coalition partners. This process generally requires making compromises after finding a middle ground between competing positions. Thus the coalition building process is argued to have a moderating effect because extreme positions cannot survive.\textsuperscript{235}

Coalition building in Bosnia, however, has not produced the moderating

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\textsuperscript{231} The electoral system as defined by Benjamin Reilly refers to the “formula by which votes are converted into seats, including . . . the structure of electoral districts.” Benjamin Reilly, \textit{Post-Conflict Elections: Constraints and Dangers}, 9 INT’L PEACEKEEPING 118, 124 (2002) [hereinafter Reilly].

\textsuperscript{232} Arend Lijphart, \textit{The Alternative Vote: A Realistic Alternative for South Africa?} 18 POLITIKON 91 (1991) [hereinafter \textit{The Alternative Vote}] (noting that the electoral system “has long been recognized as probably the most powerful instrument for shaping the political system”).


\textsuperscript{234} DEMOCRACY IN PLURAL SOCIETIES, supra note 6, at 31.

\textsuperscript{235} See \textit{The Alternative Vote}, supra note 232, at 93.
effect desired by the international community. With their sweeping successes in most of Bosnia’s post-war elections, the extreme nationalist parties have been able to form coalition governments while compromising few of their political goals. Two factors figured significantly in the early success of the extreme nationalist parties and created an atmosphere that enabled their continued electoral success until the 2000 general elections. The first was widespread interference in and manipulation of the registration of refugee and displaced person voters. The second was the harassment and intimidation of opposition parties in an effort to limit electoral competition.

1. Voter Registration

Political elites throughout Bosnia manipulated the voter registration process to solidify the post-war ethnic demographics of their municipalities. The Agreement on Elections states that a citizen who no longer lives in the municipality in which he or she resided in 1991 shall, as a general rule, be expected to vote, in person or by absentee ballot, in that municipality, provided that the person is determined to have been registered in that municipality as confirmed by the local election commission and the Provisional Election Commission.236

Citizens could also, however, apply to the Provisional Election Commission to cast their ballots in another municipality237 by filling out a P-2 form and stating the municipality in which the voter intended to live.238 Dayton took for granted that the return of refugees would be well underway by the time of the first elections. Therefore it was assumed that refugees and displaced persons would be in the process of returning to their pre-war municipalities, thus beginning the reintegration process.239 By fall 1996, however, returns had not taken place in any significant numbers. Within the Federation, displaced Bosniacs and Bosnian Croats generally registered to vote in their 1991 municipalities by absentee ballot, while others expressed an intention to travel to that municipality on election day to vote. A smaller

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236 General Framework Agreement, supra note 1, at annex 3, art. IV(1) (Agreement on Elections).
237 Id. This was a compromise to accommodate the Bosniac desire to allow absentee voter registration to vote in the area where they lived in 1991 and the Serb position that people should register in person in Bosnia in the area they desired to vote in. HOLBROOKE, supra note 66, at 289, 309.
238 Elections in Bosnia & Herzegovina, supra note 19, at 35.
239 See, e.g., id. at 35.
number sought to vote in the municipality in which they currently lived. In the Republika Srpska an opposite pattern emerged. The majority of displaced persons from the Federation living within the Republika Srpska sought to vote in the Republika Srpska. This choice appears to have been coerced by Bosnian Serb authorities who stated that displaced persons would receive housing, aid, and other benefits only upon presenting a certificate stating an intention to live in a municipality within the Republika Srpska. A similar system existed for Bosnian Serb refugees in the FRY. A total of 123,007 Bosnian Serb refugees in the FRY registered to vote in the Republika Srpska in the municipality in which they intended to live via the P-2 form. Few were told that they had the option of voting in the Federation or that they could choose the specific Republika Srpska municipality in which they intended to live. In fact, the polling station information was already filled in on many of the P-2 forms that the refugees received. It just so happened that the pre-selected municipalities were all former Bosniac-majority areas. Bosnian Serb refugees in the FRY were bussed to the Republika Srpska to vote in person on election day and were required to produce voting slips, which were distributed outside of the polling stations, for the return trip to the FRY to maintain their eligibility for benefits.

Interest in ensuring Bosnian Serb majorities in Republika Srpska led government officials from the Republika Srpska, the FRY, and the Republic of Serbia to direct Bosnian Serb voters to vote in Republika Srpska municipalities that had Bosniac majorities before the war. This strategy concentrated Bosnian Serb voters in the Republic Srpska in an effort to minimize the influence of any remaining Bosniacs and Bosnian Croats. It also rein-

240 Id. at 35.
241 Id. at 35-36.
242 Id. at 37.
243 Id.
244 Id. at 51 (“Concentrations of refugees in Yugoslavia were clearly twined with towns in Republika Srpska to ensure that the operation ran smoothly.”) 31,278 registered for Breko, 19,746 for Srebrenica, 12,365 for Zvornik, 11,362 for Doboj, 8,595 for Foca, 5,878 for Prijevor, and 3,159 for Modrica. Id. at 37 (citing Organization for Security and Cooperation in Europe (OSCE), Report on Refugee Voter Registration, annex B4 (Aug. 24, 1996)).
245 Id. at 51.
246 Id. at 37.
247 Despite these efforts, a significant number of Bosniacs live in the Republika Srpska and have successfully elected SDA candidates to the Bosnian House of Representatives. In 1996 and 1998, the SDA garnered 17.38% and 16.55% of the votes within the Republika Srpska respectively, which granted the SDA one of the fourteen Republika Srpska seats in the Bosnian House of Representatives. See OSCE, 1998 General Elections – Results (Oct. 2, 1998)
forced the post-war ethnic demographics of municipalities, thwarting the international community’s hope that the return of refugees and displaced persons would reintegrate monoethnic municipalities. The UNHCR Special Envoy for the Former Yugoslavia, Soren Jessen-Petersen, warned that “[r]esults of the registration for the September elections herald a dismal future for multi-ethnicity in Bosnia and Herzegovina . . . [T]he tactics used in the campaign will produce hard-line winners and xenophobic nationalists committed to the maintenance of hostile homogeneous statelets.”248 The 1996 campaign tactics not only included manipulating voter registration, but also violence and intimidation to limit electoral competition.

2. Restricted Opposition

Opposition parties and candidates participating in the September 1996 elections were often denied adequate access to the media and were subject to violent attacks and intimidation tactics.249 This occurred despite agreement by the Dayton parties to ensure the existence of a “politically neutral environment.” Haris Silajdzic, the former Prime Minister of Bosnia and the leader of one opposition party, the Party for Bosnia and Herzegovina (SBiH),250 was physically attacked at a rally when it was interrupted by SDA supporters in Cazin, a northern town near Bihac.251 The International Crisis Group reported that another senior SBiH official was physically assaulted in Cazin, a northern town near Bihac.252 The OSCE documented that explosives were found in the room where the Socialist Party of Republika Srpska (SPRS) had a scheduled meeting in Brcko.253 The SPRS was the target of

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249 General Framework Agreement, supra note 1, at annex 3, art. I(1) (Agreement on Elections); Elections in Bosnia & Herzegovina, supra note 19, at 20.

250 The abbreviation is taken from the Bosniac/Croatian/Serbian name of the party, Stranka za Bosnu i Hercegovinu. Elections in Bosnia & Herzegovina, supra note 19, at 20.

251 Id. The Election Appeals Sub-Commission (EASC), mandated by the PEC Rules and Regulations to ensure compliance with the PEC Rules, found that the SDA was responsible for the attack on Silajdzic and punished the party by removing the first seven names on the SDA party list for the municipal elections in Cazin. Id. at 38.

252 Id. at 20.

253 Elections in Bosnia & Herzegovina, supra note 19, at 20 (citing OSCE, Democratisation...
violence when a vehicle used by an SPRS member was blown up in downtown Doboj.\textsuperscript{254} Explosives were also used against the Social Democratic Party (SDP) when the party’s headquarters in Cazin were bombed.\textsuperscript{255} Individuals affiliated with the Union of Bosnian and Herzegovinian Social Democrats (UBSD) were subject to similar attacks. Masked police officers beat up Representative Zoraid Mehici after a radio show in Tesanj in August 1996.\textsuperscript{256} Additionally, a group of unidentified males yelled that they “wouldn’t allow the UBSD to divide Bosniacs, because as a nation they didn’t need more than one party” as they fired gunshots through the front door of Ismet Subasic’s home, who was the UBSD representative in Majlaj.\textsuperscript{257}

Less violent means were also used to undermine political opposition in the months preceding the September election. For example, the deputy mayor of Ilidza and three of his staff were dismissed after they changed their political affiliation and joined the SBiH; however, the deputy mayor was later reinstated.\textsuperscript{258} In Bihac, the police seized 349 United List campaign posters and 5,000 leaflets because the items were “against the ruling party.”\textsuperscript{259}

By limiting the field of electoral competition, the extreme nationalist parties significantly increased the likelihood of their electoral success. Without moderate political parties taking part in the coalition government-forming process, there was little chance that the process would have a moderating effect. Coalition building can have a moderating effect because parties interested in staying in power have to reach compromises with their coalition partners.\textsuperscript{260} This assumes, however, that the parties have different policy positions on which they can compromise. The positions of the extreme nationalist parties regarding issues such as minority returns and the development of a functioning, unified central Bosnian state are more similar than different from one another, requiring little compromise. Thus, a high-priority item on the international community’s agenda for Bosnia has been to limit the power and effectiveness of the extreme nationalist parties. This has

\textsuperscript{254} \textit{Id.} (citing OSCE, Democratisation and Human Rights Periodic Report: 30 July – 12 August 1996 (1996)).
\textsuperscript{255} \textit{Id.} at 26.
\textsuperscript{256} \textit{Id.} at 25.
\textsuperscript{257} \textit{Id.} at 25-26.
\textsuperscript{258} \textit{Id.} at 26.
\textsuperscript{259} United List (Zdruzena Lista) was a significant opposition coalition in the Federation. \textit{Id.}
\textsuperscript{260} \textit{The Alternative Vote, supra} note 232, at 93.
resulted in the PEC taking disciplinary action against political parties that used physical violence to intimidate non-nationalist political parties as per the High Representative's Bonn Powers.\textsuperscript{261} While these strategies effectively limit the detrimental effect of obstructionist elites, they do not address the structural aspects of Bosnia's electoral system or political structure that fail to moderate extremists and limit the election of moderate political elites.

There are several strategies that could have been adopted by the OHR or the OSCE to increase the likelihood that Dayton's consociational democratic structure would succeed. For example, specific electoral engineering tools such as preferential voting could have been utilized.\textsuperscript{262} As will be discussed below, preferential voting can be a viable tool for improving the likelihood that moderate political parties and candidates will be elected when certain social conditions exist. Absent these conditions, the emergence of moderate candidates, let alone moderate political parties, is unlikely. Therefore, this article proposes an alternative approach that would revise Bosnia's political institutional structure to create a broadly inclusive grand coalition. Such an institution could serve as a starting point for ensuring the participation of moderate voices in the development of government policy.

\textbf{B. Preferential Voting as an Alternative}

Preferential voting is an electoral system that rewards moderation by making politicians dependent on votes from individuals outside of their own groups.\textsuperscript{263} Benjamin Reilly describes this system, also referred to as an alternative vote system, as a:

majoritarian electoral system in which voters rank-order candidates in order of their preference; if no candidate receives an absolute majority of first preferences, the lowest candidate is eliminated and his or her second preferences [are] transferred to the remaining candidates. This process continues until one candidate has an absolute majority of all votes and is declared elected.\textsuperscript{264}

Due to the requirement of an absolute majority, political parties and
candidates will not only seek to secure votes from their traditional support base, but will also reach out to obtain second preference votes from the core supporters of other political parties. In an effort to obtain second preference votes, political parties will be more likely to compromise and adopt accommodating policy positions.  

In the years leading up to the adoption of the Election Law by the Bosnian Parliament in 2001, international and local actors discussed preferential voting as a strategy for moderating Bosnian politics. This system was not utilized, however, until the 2000 Presidential and Vice Presidential elections in Republika Srpska.

In the years preceding the 2001 Election Law the OSCE experimented with a variety of electoral systems. The OSCE was able to experiment because the Bosnian Constitution does not require any particular electoral system for the Presidency or the House of Representatives. In 1996, the OSCE adopted a first-past-the-post or winner-take-all electoral system for the Bosnian Presidency and a simple quota proportional representation system with closed lists. Voting was conducted on an Entity-wide basis. By 2000 open lists were utilized along with preferential voting for the President and Vice President of the Republika Srpska, and members of the Bosnian House of Representatives were elected using multi-member constituencies within each entity.

Preferential voting was a controversial aspect of the 1999 draft election law. In 1999 the OSCE created a committee of six Bosnians and three foreign experts to draft the Election Law for Bosnia. The committee’s draft law included provisions for using preferential voting to elect the members of the Bosnian Presidency and the President and the Vice-President of the Republika Srpska. These provisions were so controversial that by May 2000 the

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265 Id. at 2. Horowitz asserts that this electoral system “will make moderation rewarding by making politicians reciprocally dependent on the votes of members of groups other than their own. The dependence is only marginal, of course, but it will sometimes be the margin of victory.” HOROWITZ, supra note 263, at 196 (1991).

266 The 2000 general election was the last election that the OSCE was responsible for running.

267 In a first-past-the-post system the candidate that wins the highest number of votes wins the election. In a proportional representation system each party presents the electorate with a list of candidates. In a closed list system the public votes for a list, not a candidate. The party lists the candidates according to its priorities and candidates at the top of the list are elected first. In an open list system, the voters indicate a preference for specific candidates on the list and the candidates with the most votes are elected first. See HOROWITZ, supra note 263, at 166.

Bosnian Parliament had not passed an election law. The PIC had intended for the 2000 elections to be run by the Bosnian government in accordance with legislation passed by the Bosnian Parliament. Without an election law, the PIC extended the OSCE’s mandate, thereby making the OSCE responsible for conducting and supervising the November 2000 elections. The PIC requested, however, that the OSCE incorporate aspects of the draft Election Law in the provisional rules and regulations for the elections; specifically open lists, multi-member constituencies, and preferential voting. Despite the controversial reaction to preferential voting, the system was used for the Republika Srpska presidential race in 2000.

In 1999, when preferential voting was first introduced, the extreme nationalist parties had a seemingly firm grip on power in Bosnia. They had been successful in the two preceding elections, and understandably did not support a change to the electoral system that could destabilize their monopoly on elected offices. It is not clear, however, that preferential voting would have undermined the political power of the extreme nationalist parties

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271 The SDS won the election for the President and Vice President of Republika Srpska after one transfer of votes. The SDS won 49.8% of the first preference votes and obtained 50.1% after the second preferences were transferred to the appropriate parties. The party obtaining the second highest number of first preference votes was the SNSD with 25.7%. The SDS, by obtaining close to an absolute majority of votes after the first preference votes were counted, did not need to obtain many second preference votes to win the election, while the SNSD had to gain a significant number of second preference votes to oust the SDS out of its first place position. See General Elections 2000, supra note 247. These election results demonstrate a caveat to the preferential voting system noted by Horowitz, the logic of the system only works if there is no majority party in the multiparty system—"[i]f a party can win on first preferences, second preferences are irrelevant." HOROWITZ, supra note 263, at 194. While the SDS could not win outright on first preferences, it was close and the party in second place was too far away from winning a majority of the vote for second preferences to be helpful. Interestingly, the SBiH received the largest number of second preference votes, but it only had 6% of the first preference votes, and the 5,220 second preference votes only gave it 6.8%. See General Elections 2000, supra note 247.
because one of the necessary preconditions for preferential voting to have a moderating effect did not exist.

As discussed above, preferential voting is intended to deliver moderate political parties and candidates because of the need to gain an absolute majority of votes. When no particular political party can win an absolute majority by itself, voters’ second and third preferences become important. Adherents of preferential voting envision political parties negotiating with the political parties of rival groups to obtain those parties’ members second preference votes.\textsuperscript{272} Donald Horowitz even stipulates that the existence of ethnically heterogeneous constituencies is a prerequisite for a system of preferential voting to be effective.\textsuperscript{273} The constituencies for the Bosnian Presidency elections were essentially monoethnic. Citizens residing in the Republika Srpska are only allowed to vote for the Bosnian Serb member of the Bosnian Presidency, while individuals in the Federation can vote for only one of two members, the Bosniac or Bosnian Croat member.\textsuperscript{274} Because ethnic cleansing was not completely effective, Bosniacs and Bosnian Croats live in the Republika Srpska and Bosnian Serbs live in the Federation. Consequently they are able to vote for a Bosnian Presidency candidate who is not of their ethnic group. Yet because these groups are minorities within each Entity and the elections take place on an Entity-wide basis, they generally are unable to provide enough leverage through second or third preference votes to elect moderate candidates, even if votes from the majority ethnic groups were split between competing political parties. Thus, it is unlikely that preferential voting for the Bosnian Presidency would be effective as a tool for moderating the positions of the extreme nationalist parties or increasing the likelihood of electoral success for moderate political parties.

In 1999, the extreme nationalist parties won each of the Bosnian Presidency seats with an absolute majority. Thus they would not have assumed that the use of preferential voting in future elections would threaten their

\textsuperscript{272} See, e.g., HOROWITZ, supra note 263, at 193.
\textsuperscript{273} Id. at 195.
\textsuperscript{274} But see Partial Decision III, Case No. U 05-98, at para. 65 (July 1, 2000) (Constitutional Court of Bosnia and Herzegovina), available at http://www.ccbh.ba/?lang=en&page=decisions/byyear/2000. The Constitutional Court stated, It must not be forgotten that the Serb Member of the Presidency, for instance, is not only elected by voters of the Serb ethnic origin, but by all citizens of the Republika Srpska with or without a specific ethnic affiliation. He thus represents neither the Republika Srpska as an Entity nor the Serb people only, but all the citizens of the Republika Srpska electoral unit. The same also holds for the Bosniac and Croat Members to be elected from the Federation.
electoral successes. A year later, however, the tide had changed. In the 2000 general elections, the extreme nationalist parties experienced their first major electoral upset. The moderate parties won a majority of the seats in the House of Representatives. In the 2002 general elections, the HDZ was the only party to win a Presidency seat with an absolute majority. Although the SDA obtained only a slim majority of the votes with 37.29%, it was sufficient to win the Bosniac seat. The SBiH, however, came in a close second with 34.79% of the votes. The SDS prevailed in the race for the Bosnian Serb seat with a greater percentage of the vote, 35.52%, compared to the SNSD, who took second place with 19.93%.

While it is unclear whether second or third preferences would have altered the SDS’ victory in the 2002 elections, it is entirely possible that preferential voting could have enabled an SBiH victory. With the SDA and the SBiH only 12,935 votes apart, subsequent preferences could have enabled either party to win. A win for the SBiH would have allowed a moderate political party to influence the selection of the Chair of the Council of Ministers. Although the extreme nationalist parties captured 50% of the seats in the House of Representative, the SBiH won six seats. Although small, this block of seats could have been used to deliver majority victories to the ex-

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275 For example, in 1996 the SDA won 80% of the votes for the Bosniac Presidential seat, the HDZ won 88.7% of the votes for the Bosnian Croat seat, and the SDS won 67.3% of the votes for the Bosnian Serb seat. See General Elections 1996, supra note 247. While the nationalist parties maintained their seats in the Presidency in 1998, their percentage of votes generally decreased. The SDA captured 86.8% of the vote as part of a coalition including Haris Silajdzic’s SBiH. The HDZ’s support dropped to 53.91%, and the SDS won 51.31% of the vote as part of a coalition with the Serb Radical Party of Republika Srpska (SRS RS). See General Elections 1998, supra note 247.

276 The HDZ captured 61.52% of the vote as part of a coalition with Demokrcanli. See Bosnia and Herzegovina Election Comm’n, Election 2002 Results (Oct. 19, 2002).

277 Id.

278 Id.

279 Id.

280 The SBiH is considered a moderate party, but it is also viewed as a pro-Bosniac party. During the 2000 election campaign, the SBiH advocated a stronger central state and the elimination of the two Entities. See Hadziosmanovic, supra note 198. The SBiH leader, Haris Silajdzic, was the Bosnian Foreign Minister during the war and defected from the SDA. The International Crisis Group has reported that the SBiH electoral success during the 2000 municipal elections was due in large part to the “defection of substantial portions of the Bosniak electorate from SDA to SBiH, which they viewed as a viable Bosniak nationalist alternative.” Int’l Crisis Group, Bosnia’s Municipal Elections 2000: Winners and Losers, 11 (Apr. 27, 2000) (ICG Balkans Rep. No. 91), available at http://www.crisisweb.org; see also Bosnian nationalists fear election tinkering, DEUTSCHE PRESSE-AGENTUR (Oct. 16, 2002) (noting that the SBiH is a pro-Bosniac political party).
treme nationalist parties on their legislative agenda. Thus, the SBiH might have been in a position to successfully negotiate compromises regarding certain Dayton goals with these seats and the Presidency.

The use of preferential voting in 2002 may have been successful in electing officials who had moderate positions on sensitive intra-ethnic issues. In 2000, many voters felt betrayed by the corruption of the extreme nationalist parties and the lack of economic progress made under their leadership. Moderate parties had an opportunity to turn this disappointment into votes. If a preferential voting system had been in place, then the moderates may have been able to win with second preference votes. Yet there is no indication that political parties that are moderate with regard to intra-ethnic issues would similarly be moderate on inter-ethnic issues.

The monoethnic electorates for Bosnia's Presidency prevented preferential voting from being a successful moderating tool. Political parties competing for the Presidential seats did not have to reach across ethnic lines to be successful, and thus they did not have to moderate controversial ethnic-related policy positions to increase the likelihood of their electoral success. This type of structural problem contributed to Bosnia’s governance problems. Another structural problem with a similar result was the failure to include a grand coalition with the Bosnian government that includes representatives from all of the significant groups in Bosnia.

C. Political and Social Obstacles to Moderate Participation

Grand coalitions are a necessary component in successful consociational democracies. To the extent that grand coalition institutions existed in Bosnia, however, they focused solely on ethnic representation. The Dayton negotiators identified ethnicity as the most significant cleavage within Bosnian society. Consequently they sought to ensure equal Bosniac, Bosnian Croat, and Bosnian Serb participation within the government. By dividing Bosnia into two Entities with distinct ethnic identities and by having a two-

281 The ethnic identity of the Bosnian territory was established in the Washington Agreement, which preceded the Dayton peace talks, and established the Federation of Bosnia and Herzegovina. Washington Agreement, Mar. 1, 1994, Bosnia-Croatia-Bosnian Croats, available at http://www.usip.org/library/pa/bosnia/washagree_03011994_toc.html. Once the parties reached Dayton, the Federation as a political entity was a given; however its physical boundaries were a matter of intense negotiations. In the Washington Agreement, the parties stated that “[t]he undersigned have agreed on the attached Framework Agreement establishing a Federation in the areas of the Republic of Bosnia and Herzegovina with a majority Bosniac and Croat population . . .” Id. at preamble. The Framework Agreement similarly states that “Bosniacs and Croats, as constituent peoples (along with others) and citizens of the Republic of Bosnia and Herzegovina, in the exercise of their sovereign rights, transform the internal
pronged basis for political representation— ethnicity and geographic location— the Dayton negotiators ensured that representation within the central Bosnian state would be divided into equal thirds between the Bosniacs, Bosnian Croats and Bosnian Serbs.

After the first national elections in 1996, it became clear that another major societal cleavage existed in Bosnia, the cleavage between those who supported the full implementation of Dayton and those who favored territorial ethnic separation.282 The division on this issue is highlighted in the state’s struggle to implement the Dayton obligations regarding the return of refugees and displaced persons. While this may appear to be a division between the Bosnian political leaders and the international community, it is equally a domestic division that has found, and continues to find, political expression. Dayton-friendly political parties and moderate politicians have existed since the first elections in 1996, and have received electoral support. For a variety of reasons, however, they have been marginalized by the overwhelming influence and power of the extreme nationalist parties. These parties’ power and influence has been possible because of the economic problems, fear, and insecurity permeating Bosnian society.283

The moderating effect of coalition building has been undermined in Bosnia by two separate but reinforcing factors that fail to ensure that representatives from all significant segments of society are represented within the government. First, the electoral system for the Presidency addresses only one social cleavage: ethnicity. The Presidency is reserved for a Bosniac, a Bosnian Croat from the Federation, and a Bosnian Serb from the Republika Srpska. Second, certain social conditions have inhibited the development of and support for moderate political parties. As discussed above, the extreme nationalist parties have manipulated voter registration, intimidated moderate political parties and candidates to limit electoral competition, and have capitalized on a climate of fear and insecurity to increase the likelihood of their electoral success.

1. The Presidency

The Dayton negotiators mixed the parliamentary and presidential systems of government in a manner that undermines each system’s structural

structure of the territories with a majority of Bosniac and Croat population in the Republic of Bosnia and Herzegovina into a Federation, which is composed of federal units with equal rights and responsibilities.” Id. at art. 1.

282 This is despite the parties’ accession to the Dayton Peace Agreement. See supra Parts 0 and V(A).

283 See e.g., supra Part V(A).
Incentives for moderation. In most parliamentary systems the executive branch of government is a cabinet that is selected by the legislature. Selection of the cabinet members, particularly the prime minister, is borne out of negotiations conducted by the parties that make up the governing coalition. In this system, the legislature has the power to dismiss the cabinet. The parliamentary system is generally contrasted with the presidential form of government in which the executive power is held by one individual who is elected directly or indirectly by the citizens. In Bosnia the Presidency is elected directly by the people and the Presidency nominates the Chair of the cabinet (the Council of Ministers), but the legislature has no power to dismiss members of the Presidency. The House of Representatives is responsible for approving the Chair of the cabinet and the Chair’s nominations for the other cabinet positions. The Council of Ministers is required to resign, however, if the House of Representatives cast a vote of no-confidence.

By having a separate majoritarian election for the Presidency, a significant aspect of the traditional coalition-forming process was altered. In order for political parties to be a part of the governing coalition they not only have to win a significant number of seats in the House of Representatives, they need to either win a seat in the Presidency or partner with a party that wins such a seat. Electoral success at both of these levels is complicated by the use of a majoritarian system within a monoethnic electorate for the Presidency and proportional representation within a multiethnic electorate for the House of Representatives. These systems provide different incentives for moderation. Thus campaign methods used to solidify success at one level could undermine the party’s success on the other level.

After the Bosnian general elections in 1996, 1998, and 2002, the nationalist parties pooled the seats they won in the elections for the House of Representatives to form exclusively nationalist coalition governments. While

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284 See, e.g., The Power-Sharing Approach, supra note 129, at 507.
285 Id.
286 General Framework Agreement, supra note 1, at annex 4 art. V(4)(c) (Constitution of Bosnia and Herzegovina).
287 It would be incorrect to refer to these governments as coalitions of convenience because the nationalist parties shared a common ideology based on ethnic segregation. These parties were committed to the de facto separation of Bosnia into ethnic territories with strong regional and local governments. None of the parties were interested in a strong central government, fearing that such an arrangement would weaken the ability of the ethnic enclaves to self-govern. Consequently, I think that it is more accurate to refer to these nationalist governments as coalitions of commitment. See DONALD L. HOROWITZ, ETHNIC GROUPS IN CONFLICT 367 (1985) (outlining the different types of coalitions that can be formed in a parliamentary system); see also infra text accompanying notes 301-305.
a coalition government made up of the SDA, HDZ BiH, and SDS can be said to constitute a grand coalition with regard to ethnicity, such governments exclude representatives of those who support active implementation of the Dayton Accords. As a result of these “not so grand” coalitions, efforts to implement aspects of Dayton, like the Refugee Agreement, have been purposely obstructed. Since none of the members of the governing coalition were interested in implementing the Refugee Agreement there were no opportunities for moderation or compromise during the formation process of the governing coalition. The parties that would have pushed for such accommodations were not successful enough at the polls to warrant participation in the governing coalition.

Without the participation of such moderate political elites in Bosnian government, the High Representative must intervene in Bosnian politics, this can be viewed as a governing coalition partner with a trump card. As discussed in Part IV, the international community has implemented a reactive project to address governance problems in Bosnia. The High Representative has the authority, pursuant to the Bonn Powers, to implement legislation when the Bosnian government fails to do so, to rewrite existing legislation that conflicts with the Dayton Peace Agreement, and to dismiss public officials who obstruct the Agreements or the High Representative’s efforts to fulfill his mandate. The Bonn Powers allow the High Representative to neutralize the governing coalition’s inaction or obstruction, but they do not require the High Representative to work with the governing coalition to develop compromises on controversial policy matters. Rather, the High Representative reacts to the actions or inactions of these governments. While the High Representative is involved in governing Bosnia, he has not been involved in the government-formation process, which is one of the few processes in which compromises between the various parties could be made.

2. Social Conditions

A second significant issue relevant for the development of moderate political elites in Bosnia relates to certain historical facts and social conditions that have made the Bosnian electorate more likely to support extreme na-

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288 These coalition governments also exclude representatives from other ethnic groups in Bosnia, like the Roma.
289 See supra notes 225-28 and accompanying text.
290 One likely reason for this approach is that representatives of the nationalist parties were present at Dayton and are actually parties to the Dayton Peace Agreements; therefore they are bound by its terms. There is no room to negotiate the substance of the Agreements, only occasionally the manner in which specific obligations will be implemented.
tionalist parties that advocate ethnic separation. In 1996, voter registration was manipulated to ensure that Bosnian Serb voters were concentrated in the Republika Srpska to minimize the strength of Bosniac and Bosnian Croat votes within the Republic. 291 Moderate political parties and candidates were physically attacked and intimidated during the campaign for the 1996 election, which undoubtedly hindered their support and development. As recently as the 2000 general election, the nationalist parties capitalized on a climate of fear and insecurity. For example, the HDZ BiH erected billboards that read “[s]elf-determination or extermination” and developed a video clip depicting what appeared to be Muslim Ottoman horsemen using sabers to kill civilians while children cried in the background. 292 The SDA had posters directed at Bosniac voters stating, “They all elected leaders of their kind, what about you?” 293 The SDA also compared the multiethnic Social Democratic Party with the communist party that prohibited religious expression during its forty-five year rule of Yugoslavia. 294 These campaign techniques demonstrate that the extreme nationalist parties perceive that there are electoral gains to be made by exploiting ethnic-based fears. Such perceptions are not unreasonable in a post-war society like Bosnia where atrocities were committed against one ethnic group for the alleged benefit of another ethnic group. 295

Group-based violence has an intense and long-lasting impact on the society in which it takes place. Members of the victim group often feel diminished and vulnerable, seeing the world as a dangerous place. 296 They also tend to see “outside” group members as hostile. 297 Staub and Pearlman contend that when victim and perpetuator groups continue to live near each other, “reconciliation is essential both to stop a potentially continuing cycle of violence and to facilitate healing.” 298 Reconciliation refers to victims and

291 See supra Part V(A)(I).
292 Hadziosmanovic, supra note 198. This video clip was banned by an independent media commission. Id.
293 Id.
294 Id.
295 All three ethnic groups have experiences as members of both the victim and perpetrator groups during the 1992-1995 war. See supra Part I(C ). Therefore, when a reference is made to victim or perpetrator groups, it does not mean any particular ethnic group.
297 Id. at *1.
298 Id. at *2.
perpetrators "coming to accept one another and developing mutual trust," accepting the past, not seeing it as defining the future, and seeing the humanity of each other. With reconciliation, the victim group's sense of security increases, while without it, feelings of insecurity and fear of violence are ever present. Thus reconciliation is essential for maintaining peace in Bosnia.

Critics of the consociational approach contend that the problems outlined above, specifically the failure of the coalition formation process to lead to the development of moderate governments, are inherent in consociationalism. Donald Horowitz and others who advocate what has been termed an "integrative approach" to power sharing have noted that a significant problem with the consociational approach is that it assumes political elites want to cooperate and accommodate. These critics doubt this assumption and find it problematic that consociationalism does not provide structural incentives for such cooperation and accommodation. Furthermore, these critics argue that consociationalism assumes that proportional representation will enable the formation of broad-based coalitions. Horowitz contends that proportional representation cannot guarantee the development of such coalitions because this system can also lead to the formation of an opposition just like other electoral systems. Without guidelines to govern the creation of a governing coalition, the political parties with the most seats can form a "coalition of convenience." Such a coalition is formed after an election for the sole purpose of forming a government even though the participating parties frequently have independent and often incompatible policy positions. Moreover, these types of coalitions may not represent all of the significant.

299 Id. Desmond Tutu, former Episcopal Archbishop of Cape Town and chairman of the South Africa Truth and Reconciliation Commission has similarly defined reconciliation as creating trust and understanding among former enemies. Desmond Tutu, Foreword, in RECONCILIATION AFTER CONFLICT: A HANDBOOK 6 (David Bloomfield, Teresa Barne, & Luc Huyse eds., 2003).
300 Id. at 2.
301 TIMOTHY SISK, POWER SHARING AND INTERNATIONAL MEDIATION IN ETHNIC CONFLICTS 33-34 (1996).
302 See, e.g., HOROWITZ, supra note 263, at 139-1; Reilly, supra note 231, at 127-28.
303 HOROWITZ, supra note 263, at 142. A similar critique put forward by George Tsebelis and Steven Burg is that "consociational institutions may provide incentives for politicians" to instigate "elite-imitated conflict." Such conflict is pursued because it increases the bargaining position of the elites "vis-à-vis other groups at the political center." SISK, supra note 301, at 38-39.
304 HOROWITZ, supra note 263, at 367. In a "coalition of convenience," the parties to the coalition are elected on separate slates and they pool their seats to form the government. Id.
groups within the society, which prevents the development of a grand coalition.\textsuperscript{305} Lijphart responds that the coalition formation process is a structural incentive for moderation because political parties will not have the opportunity to be part of the government unless they moderate extreme positions and generate accommodating policies.\textsuperscript{306}

Despite disagreements as to which political and electoral systems provide the best conditions for moderate political elites to be successful, the power-sharing theories agree that moderate political elites\textsuperscript{307} are necessary for the formation and maintenance of stable democracies in plural societies.\textsuperscript{308} Horowitz maintains that electoral systems must reward political parties for taking moderate positions on controversial matters. One means of doing this is adopting an electoral system that utilizes preferential voting. As the discussion in Part V(B) concludes, however, preferential voting would not be the best solution to Bosnia’s governance problems because of the monoethnic electorate for the Presidency. Therefore the following section addresses an institutional approach for dealing with the governance problems in Bosnia.

\textbf{D. A Grand Coalition Through Advisory Committees}

One of the key problems with the Bosnian political structure is that it did not include an institution that could serve as a grand coalition. While a grand coalition cabinet is the “prototypical consociational device,” other institutions can serve this function.\textsuperscript{309} For example, in the Netherlands, permanent or ad hoc committees and councils have been utilized. These committees or councils usually serve as advisory boards, but often exercise decisive influence. The Social and Economic Council is just one example of a permanent council that provides both solicited and unsolicited advice to the administration and Parliament. This council has been made up of representatives from each of the major segments of Dutch society that are stakeholders in the state’s social and economic policy. Today those segments are labor,
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trade, and industry, but in the past religious and political segments were represented.310

The use of such a committee is one tool that the High Representative could have used to address the Bosnian government's inaction. It is possible that the Bosnian political elites would have been more receptive to advice from the advisory committee than from the High Representative because it is an advisory body with representatives from the major societal segments. In order to be a true grand coalition, unlike the Presidency or the Council of Ministers, the advisory committee would have to include a representative from each of the three major ethnic groups in Bosnia, other ethnic groups, and supporters of the active implementation of the Dayton Peace Agreement. Over time, significant segments within Bosnian society will likely change and therefore the representatives on the advisory committee should likewise change. As ethnicity hopefully becomes a less salient aspect of Bosnians' identity within the political realm, ethnic representation will become less important. Additionally, currently weak cleavages may become stronger or new cleavages may develop. For all of these reasons a process must exist for determining which societal segments will be represented on the advisory committee. This process should be flexible enough to deal with the shifts noted above.

Once the relevant societal segments have been selected, the High Representative must have a transparent process for selecting the best individuals to serve on the advisory committee. The desired qualifications and characteristics for candidates and the criteria used by the High Representative for selecting committee members must be clear. Political parties, nongovernmental organizations, and other civil society organizations that represent the interests of the various groups identified for representation would nominate individuals for the advisory committee. As a committee established by the High Representative to assist in the effective implementation of Dayton, the High Representative would select the members from the nomi-


The labor-union representatives are chosen by the large Socialist, Catholic, and Protestant unions in proportion to their total memberships (7:5:3). The employers' representatives are mainly chosen by the large employers, farmers, and retailers associations of the Liberal, Catholic, and Calvinist blocs. The members chosen by the cabinet are individual experts, primarily professors of law or economics, but these positions are also carefully apportioned among the blocs. The law stipulates that all members vote independently and cannot be bound by the organizations they represent. Id. at 113.
nations submitted. In order for the committee to be as effective as possible, it is critical that the High Representative select representatives that accurately represent the interests and positions of the various segments. The purpose of the grand coalition is to provide a forum in which the various societal segments can work together to develop acceptable accommodations on difficult and sensitive issues. If the parties negotiating the solutions do not represent the positions and interests of their constituents, then neither the electorate nor the elected officials will deem the resulting compromises legitimate. Without legitimacy, the accommodations agreed upon by the grand coalition will be less effective in mitigating the controversial matters at issue. Therefore the High Representative should not merely appoint individuals who are most likely to support the High Representative’s view as to how the Dayton Accords should be implemented, but rather he should appoint true representatives of the various segments who understand the perils of political fragmentation, are committed to a unified multiethnic Bosnian state, and are willing work to accommodate the divergent interests and demands of the various segments of Bosnian society.

The effectiveness of the advisory committee will also depend on the committee’s mandate and rules of procedure. The committee’s mandate would be to assist the Bosnian government and the High Representative in developing Bosnia into a unitary, multiethnic, and functioning state, and implementing the Dayton Peace Accords. To fulfill this mandate the advisory committee could provide the government and the High Representative with solicited or unsolicited advice. In light of the circumstances giving rise to the need for such a committee it is unlikely that the Council of Ministers would solicit the committee’s advice, but the structure should allow for such requests.

Ideally the committee’s advice would represent negotiated solutions that would take the form of draft legislation. Such legislation would be presented to the body that solicited the advice, or to both the Council of Ministers and the High Representative if the advice is unsolicited. When the committee’s advice is solicited from the High Representative, he would review the proposed legislation and then present it to the Council of Ministers for action. The Council of Ministers would have sixty days to act upon it.

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311 Lijphart contends that this is best done by group members, but Horowitz states that it is sufficient to have representatives that incorporate the concerns and interests of the group at issue. See The Alternative Vote, supra note 232, at 96; HOROWITZ, supra note 263, at 165.
312 See Consociational Democracy, supra note 4, at 207.
313 Action in this context refers to submitting the proposed legislation to Parliament for a vote, or ratifying it in an acceptable way and submitting the revised legislation to Parliament for a
If the Council of Ministers fails to act within that timeframe, the High Representative could then either: (1) submit the proposed legislation to Parliament for a vote, and if such action was not taken within sixty days, enact the legislation himself, or (2) unilaterally implement the legislation without first submitting it to Parliament.

Using an advisory committee to brainstorm, debate, and negotiate the most acceptable solutions to the problems identified by the High Representative in a public and transparent process is a strategy for reducing government deadlock. The High Representative has consistently identified areas in which legislative action is necessary to overcome government inaction. As a result of the Bonn Powers, the early post-Bonn High Representatives unilaterally imposed any necessary legislation. This process was, however, shrouded in mystery. It was unclear how much and what kind of local consultation took place to ascertain the likelihood of success for the proposed solutions. The use of advisory councils as proposed here increases transparency and provides the Council of Ministers with proposed solutions that are deemed acceptable by the various societal segments. The Council of Ministers is thus more likely to forward such solutions to Parliament because they are politically feasible. It is possible that such a committee may do no more than provide opportunities for Bosnian officials to practice decision-making by consensus and develop effective techniques for resolving difficult political issues. Such opportunities, however, would greatly contribute to the de-

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314 The process is similar when the Council of Ministers solicits the advisory committee’s advice. The committee would send its proposed legislation or solution in another format to the Council of Ministers. If the Council of Ministers fails to take action on the items within sixty days, the advisory committee would inform the High Representative of the Council of Minister’s request for advice, the advice offered by the advisory committee, and the fact that the Council of Ministers failed to take the necessary action within sixty days. At that point the High Representative would have the choice of (1) taking no action, (2) submitting the proposed legislation to Parliament for a vote, and if such action was not taken within sixty days, to enact the legislation himself, or (3) unilaterally implementing the legislation without first submitting it to Parliament. In the case of unsolicited advice, the advisory committee would submit its recommendations to the Council of Ministers and the High Representative at the same time. If the Council of Ministers fails to take action within sixty days, then as in the case of advice solicited by the Council of Ministers, the advisory committee would inform the High Representative that the Council of Ministers had failed to take any action regarding its advice. The High Representative would then have the option of (1) taking no action, (2) submitting the proposed legislation to Parliament for a vote and if such action was not taken within sixty days enact the legislation himself, or (3) unilaterally implementing the legislation without first submitting it to Parliament.
velopment of democratic institutions and processes in Bosnia.\textsuperscript{315}

While one of the problems with the executive branch of Bosnian government has been that it is not a true grand coalition, another problem is that the officials simply refused to enact necessary legislation. Extreme nationalist Bosnian officials have indefinitely delayed measures needed for the development of the Bosnian state that conflicted with maintaining separate ethnic enclaves within the Bosnian territory. An obvious question is how the proposed advisory committee would avoid a similar fate. The lack of a grand coalition and government inaction are linked. One of the reasons the government was able to obstruct, via inaction, the implementation of Dayton was that no member of the Presidency or the Council of Ministers was committed or interested in such goals. Consequently no one in a lawmaking position ever aggressively pushed needed legislation, and, as a result, Bosnian institutions never had to address the issues. This is how the advisory committee differs. First, it would have to respond to requests for advice from the High Representative, and second, the committee would have members interested in providing solutions to the problems identified by the High Representative. Thus it would be critical to have mechanisms or external incentives to discourage and limit deadlock, rather than measures to prevent deliberate inaction. Procedures similar to those used by the PEC that grant the chairperson of the committee final decision-making authority could ensure that the committee's work is not impeded by frivolous disagreements between segment representatives.

In recent years, the High Representative has organized ad hoc commissions to develop legislative solutions for specific problems facing Bosnia. The commission members are local experts and government officials.\textsuperscript{316}

\textsuperscript{315} Even if the High Representative ended up enacting the recommendations of the advisory committee pursuant to the Bonn Powers, such an outcome is favorable to the unilateral implementation of laws and regulations. Imposing legislation that is the end product of a local debate and consensus process aids in the development of democratic institutions in a way that the High Representative's unilateral action simply does not.

\textsuperscript{316} See, e.g., OHR, Decision Establishing the Indirect Tax Policy Commission (Feb. 12, 2003), available at http://www.ohr.int/decisions/econdec/default.asp?content_id=29240. The High Representative created a commission to draft legislation that would merge separate customs administrations into one, establish a single statewide value added tax, and create an Indirect Tax Administration. \textit{Id.} The Commission has seven members. The Prime Minister of each Entity and the Chairman of the Bosnian Council of Ministers each nominate two members, one of whom should be the minister responsible for finance matters. The High Representative and Entity officials appoint the seventh member, who also serves as the commission's chairperson. \textit{Id.} The High Representative also created commissions to address defense reform and intelligence reform. OHR, Decision Establishing the Defense Reform Commission (May 9, 2003), available at http://www.ohr.int/ohr-dept/presso/pressr/default.asp?content_id=29833; Office of the High
While the High Representative has consulted with local experts in the past, the particulars of the selection process were generally unknown, as were the details regarding the local experts’ role in the decision-making process.\textsuperscript{317} The members of the new commissions, who are generally appointed by government officials representing Bosnia and each Entity, would report to the High Representative. Yet like the power-sharing institutions created at Dayton, these commissions include only representatives from a limited number of societal segments. The ad hoc commissions will mirror the government institutions in terms of which societal segments are represented because government officials nominate the commission members. Generally this will translate into a three-way division of commission seats along ethnic lines. Without broadening the scope of societal segments represented on such commissions, they will fail to serve as grand coalition institutions. Without such institutions, Bosnia’s power-sharing arrangements will continue to privilege the separatist agendas of the extreme nationalist parties at the expense of many other parts of Bosnian society.\textsuperscript{318}

\section*{CONCLUSION}

Bosnia is in need of a political strategy that would inject a moderate voice into the Bosnian government to counter the strength of the extreme nationalist parties. The Dayton structure ensures that members of the significant ethnic groups within Bosnian society are granted political representation. Unfortunately, no other societal segments are similarly ensured representation. As Bosnians and the international community have worked to implement the Dayton Peace Agreement, it has become more and more evident that a significant societal cleavage exists between those who actively supported the implementation of Dayton Accords and those who sought to obstruct such implementation. This cleavage highlights the need for the participation of moderate political actors, because in Bosnia it has been the

\begin{footnotesize}
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\item See, e.g., supra notes 154 and 268 and accompanying text (discussing local expert involvement in drafting property laws and election law).
\item For example as recently as June 2004, the High Representative threatened the HDZ, SDA, and SBiH with fines for failing to harmonize the Primary and Secondary Education legislation of specific cantons with the State-level framework law. Office of the High Representative, High Representative Imposes Fines on Parties that Challenge Rule of Law (June 7, 2004), available at http://www.ohr.int/ohr-dept/presso/pressr/default.asp?content_id=32620.
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moderates who have actively supported the full implementation of Dayton. The development of mechanisms to ensure the participation of moderates in the development of governing coalitions is thus a useful and important strategy for fostering the development of a stable and functioning Bosnian state.

In the absence of a true grand coalition, the only segments of society that have participated in the development and implementation of government policy have been the extreme nationalists from each of the three major ethnic groups. These parties generally opposed the implementation of certain Dayton goals. The formation of coalition governments can have a moderating effect on the extreme positions of political parties because of their desire to be a part of the government. In the early post-war governments, however, the coalition-forming process had no such effect because the three nationalist parties—SDA, HDZ, and SDS—that comprised the governments were more like a single majority party creating a one-party cabinet rather than three distinct parties forming a coalition. There was little disagreement amongst these parties, and hence, little negotiating to develop policy positions that were acceptable to all three parties. As a result of this situation, the consociational model did not provide a structural basis for the development of a strong, functioning, unified, and multiethnic Bosnian state. The extreme nationalist parties carried out their agenda, which consisted of limiting the development of a central Bosnian state and solidifying the post-war ethnic demographics in contravention of the Dayton Peace Agreement addressing refugees and displaced persons. To counteract this trend the High Representative began unilaterally implementing legislation and removing municipal, canton, entity, and state officials deemed to be obstructing the implementation of Dayton. While such action falls within the ambit of international territorial administration in post-conflict societies (as discussed in Part IV), it is not sustainable in the long-term. As many critics have noted, knowing that the High Representative will make unilateral decisions makes Bosnia more dependent on the international community and enables elected officials to avoid making difficult decisions. Perhaps most importantly, a highly interventionist OHR deprives Bosnian society of an opportunity to build effective institutions and techniques for resolving political conflicts. Understandably frustrated by the lack of progress in Bosnia, the High Representative developed a strategy that delivered specific results. After the

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319 See discussion infra Part IV.

High Representative’s successful intervention in revising Bosnia’s property laws, a process was created for refugees and displaced persons to regain possession of property lost during the war. A significant number of individuals have reacquired their pre-war property, thus facilitating minority returns. It is possible, however, that similar results could have been obtained by utilizing a process that revised Bosnia’s political structure in a way that truly operationalized Dayton’s consociational plan for Bosnia. Creating an advisory committee, like the one proposed above, is one tool that can be utilized to facilitate a successful power-sharing political system. Such institutions must have a clear process for identifying the society’s significant segments and a rules-based procedure for including representatives from all of these groups within the grand coalition. This is particularly important when a society’s political structure, like the one created by the Bosnian Constitution, is inflexible and fails to provide means for addressing unidentified and unimagined conflicts amongst various segments of society. With the proper mandate and procedural rules, an advisory committee could serve as a grand coalition in Bosnia, finally enabling all of significant segments of society to participate in the development of government policy. Such broad-based involvement is critical for developing legitimate and enforceable solutions to politically difficult problems. By establishing a permanent advisory committee, the High Representative can create a local democratic institution that would provide a forum in which local actors could develop solutions to human rights dilemmas. Creating such local institutions is an important part of a nation-building project because its builds a local capacity for addressing controversial issues peacefully.