IMPLEMENTING EQUALITY:

THE "CONSTITUENT PEOPLES" DECISION IN BOSNIA & HERZEGOVINA

16 April 2002

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EXECUTIVE SUMMARY AND RECOMMENDATIONS

In July 2000, the Constitutional Court of Bosnia & Herzegovina made an historic ruling requiring the two entities, the Federation of BiH and Republika Srpska (RS), to amend their constitutions to ensure the full equality of the country's three "constituent peoples" throughout its territory.

This ruling offers a probably unrepeatable chance to push the Dayton Peace Accords (DPA) to their limits and to permit BiH to become a functional multinational state. As it stands, the Dayton model of three constituent peoples and two entities is inherently unstable. It can be pushed in one of two directions: towards recognising the right of the third and smallest people, the Croats, to have their own mini-state, or towards making both entities truly and effectively multinational. The "constituent peoples" decision represents the best means to reform the existing entities within the Dayton architecture and to move Bosnia in the second direction.

Opponents of effective Bosnian statehood quickly denounced this decision as an effort to overturn the DPA. Having succeeded in delaying serious debate about implementation for a year and a half, these factions are now determined to protect their fiefdoms by diluting the consequent reforms to the greatest possible extent.

Supporters of an integral Bosnian state, by contrast, hailed the Court's decision as a political and constitutional watershed, and have urged the domestic authorities to agree or, if necessary, the international community to impose far-reaching reforms that would improve upon the Dayton structures.

Since January 2001, the High Representative, the Council of Europe and several Western capitals have nudged the entities towards considering and drafting the constitutional changes necessary to implement the Court's decision. This process included the establishment of multinational constitutional commissions attached to the entities' legislatures, the engagement of political parties in drafting proposals of their own, consultations with international constitutional experts, a period of public debate, inter-party negotiations and, finally, a month of intensive haggling in the Office of the High Representative (OHR).

The parties struck a political deal in Sarajevo on 27 March 2002, agreeing a package of precepts and principles to be embodied in both entities' constitutional amendments. Having superintended the marathon bargaining sessions, the High Representative, the U.S. Ambassador and the Spanish Ambassador (representing the EU presidency) praised the parties for having had the courage to compromise, and swore to see that the Sarajevo Agreement would be translated faithfully into workable amendments.

While this agreement did not represent the best possible interpretation of the Constitutional Court's ruling, or a complete catalogue of all the required amendments, it offered an acceptable framework based on compromise – until now a dirty word in Bosnian politics. Unfortunately, the honeymoon has so far proved less happy than the wedding. The RS party leaders who had signed the agreement returned to Banja Luka to preside over the passage of a set of amendments by the National Assembly (RSNA) that violated the agreement in

several places, added caveats and 'minor' changes in others, and introduced new amendments either contrary to the spirit of the Court's decision or – in some instances – to the DPA itself.

Even more brazen than the amendments themselves was the manner in which the speaker of the RSNA forced them through: over the objections of Bosniak and Croat members whose "constituent" status they were meant to safeguard, and in the face of ineffectual hand-wringing on the part of OHR representatives.

Acceptance of the RSNA amendments would mean abandoning this opportunity to remodel the entities and to bring Bosnia closer to effective statehood. It would confer a bogus stamp of multinational legitimacy upon the RS without actually ensuring that the Constitutional Court's demand for equal rights throughout the country was realised.

Moreover, it would destabilise the position of the non-nationalist Alliance for Change coalition in the Federation, exposing it to accusations of treachery from Bosniak and Croat opposition parties for having signed up to a failed pact. By compromising, the Alliance parties hoped to make a start on ensuring national equality in the entities while showing that Bosnia was ready to manage its own affairs. If the international community allows these parties to be shown up as having miscalculated on both counts, it will help to return their nationalist opponents to power.

This report recounts the origins of the "constituent peoples" case and the scope of the Court's decision. It then describes the unprecedented debate on fundamental aspects of the DPA that has occurred in both entities since December 2001. It analyses the Sarajevo Agreement, the amendments enacted by the RSNA and the draft amendments awaiting debate in the Federation parliament in terms of the guarantees needed to ensure equal rights for Bosnia's "constituent peoples" and "others". Finally, it analyses changes not specifically regulated by the Sarajevo Agreement, but mandated by the decision of the Constitutional Court.

ICG believes that "symmetry in substance" requires both entities to have legislative bodies empowered not only to object to laws that violate "vital interests", but also to participate in their revision. This means endowing the RS with a second chamber, even if its competence need not extend beyond legislation affecting such "vital interests" It will also be essential to base representation of the "constituent peoples" in the RS government on no lesser standard than that agreed in Sarajevo. To accept anything less would legitimise 'ethnic cleansing'. Nor would it be just to exclude Bosnia's "others" from government or the bodies mandated to safeguard "vital interests". Implementation of the "constituent peoples" decision in the entities' courts, law enforcement agencies and local governments is no less important than securing equitable representation for all nations in their cabinets and parliaments.

Neither the High Representative nor the Peace Implementation Council (PIC) to which he is accountable should allow themselves to be deterred by Serb and Croat extremists into accepting half-baked or unjust sets of amendments. Although the Federation looks set to adopt a set of amendments fully in line with both the Court's decision and the Sarajevo Agreement, pressure or imposition could prove necessary in that entity – as it is now required in the RS. In order to overcome resistance, however, any imposition will need to be accompanied by mobilisation of the full arsenal of international weapons and inducements. Otherwise, constitutional amendments imposed upon dissenting parties will not stick, and Bosnia will remain a dysfunctional and resentful Western dependency.

RECOMMENDATIONS

GENERAL

1. The constitutional reforms now under discussion must provide equal protection for "constituent peoples" and citizens throughout the country. If the entities fail to provide such a solution, the High Representative should impose it.

   (a) In Republika Srpska (RS), this will mean imposing changes to the amendments passed on 4 April 2002, bringing some into line with the Sarajevo Agreement and altering others that diverge from the original ruling of the Constitutional Court.

(b) Imposition may be required in the Federation as well, if its parliament fails to pass adequate amendments.

INTERNATIONAL IMPOSITION AND IMPLEMENTATION

2. The Peace Implementation Council (PIC) Steering Board – including Britain, France, the U.S., Russia, Germany, Canada, Spain, Italy, the European Union (EU) presidency, and the European Commission (EC) – should support the High Representative fully in imposing and implementing an appropriate solution.

3. International donors should be prepared to impose economic sanctions on any party that refuses or fails to implement aspects of the Constitutional Court's decision. This would include the withdrawal of 'soft' loans and budget support grants by the World Bank and other international financial institutions.

4. SFOR's troop-contributing countries should buttress security for returnees, particularly in hard-line areas of eastern RS and of Croat-controlled western Herzegovina, with ostentatious patrols if necessary.

5. The international community should adopt a 'zero-tolerance' stance towards violence against 'minority' returnees, holding the entity authorities directly responsible for infractions.

FAIR REPRESENTATION

6. A just, appropriate and workable package of constitutional amendments on fair representation would include the following elements:

   (a) Fair representation of the constituent peoples and "others" in the governments of both entities would be assured under the terms of the Sarajevo Agreement. RS Amendment LXXXIV contradicts the agreement's transitional formula for government before the implementation of Annex 7, and the High Representative needs to correct this if the RSNA will not. He should also ensure that the Federation passes an amendment on government in accordance with the agreement.

   (b) The RS definition of the implementation of Annex 7, also contained in Amendment LXXXIV, reduces the substantial obligations which the authorities have under the DPA to support return to the mere issuance of a few thousand administrative decisions. It sets a dangerous precedent and should be annulled by the High Representative if the RSNA fails to reconsider.

   (c) In both entities, the international community should ensure that either the House/Council of Peoples or the two vice-presidents participate in the election of government members.

   (d) The requirement that no one constituent people hold more than two of six top entity positions (premier, speaker/president of the National Assembly/House of Representatives, chair of the House/Council of Peoples, president of the constitutional court, president of the supreme court, and entity public prosecutor) is not an ideal solution, but should be upheld in both entities as an element of the political compromise reached in the Sarajevo Agreement. This need not preclude the entities from adding a provision that the president and premier cannot come from the same people.

   (e) The entity president and vice-presidents, coming from the three separate peoples, should rotate during the course of their mandate in both entities.

   (f) The number of deputies to the Federation House of Representatives and House of Peoples should be reduced, as provided in the Federation government's proposal and the Sarajevo Agreement, as a first step towards streamlining Bosnia's governing structures.

(g) The "others" must be adequately represented in the RS Council of Peoples and the Federation House of Peoples, as the Sarajevo Agreement provides.

(h) The Sarajevo Agreement requirement that regional (cantonal and district) and municipal courts should have national representation based on the 1991 census is a good solution and should be upheld. This will mean changing RS Amendment LXXXV, paragraph 3, which violates this principle.

(i) For the entity constitutional courts, the Sarajevo Agreement's stipulation that at least two judges come from each constituent people (and one from the category of "others") is acceptable. The RS and Federation constitutions should include amendments making this requirement explicit.

(j) The benches of the entity supreme courts, about which the Sarajevo Agreement is mute, should be constituted on the basis of parity, with a lesser number of places for "others". The constitutions should make this explicit.

(k) Constituent peoples and "others" must be adequately represented in the other public institutions of the entities, including the administration of the entity ministries, the cantons and the municipalities. This should be according to the 1991 census until Annex 7 is implemented. Strict benchmarks and timelines should be set to ensure that the authorities do not drag their feet on implementing this provision.

VITAL INTERESTS

7. Appropriate amendments on "vital interests" would include the following elements:

(a) "Vital interests" must be defined in the same way in both entities and, ultimately, at state level. The set of interests contained in the Sarajevo Agreement is adequate, but should also include matters related to refugee return and the calling of a referendum.

(b) As a parliamentary mechanism for protecting "vital interests", the Federation House of Peoples will have to be retained and Serbs accorded parity of representation with Bosniaks and Croats.

(c) The Council of Peoples defined in the Sarajevo Agreement is an acceptable body for the protection of vital interests in the RS.

(d) RS Amendment LXXXII alters the vital interest procedure for halting and amending legislation, regulations and general acts specified in the Sarajevo Agreement. Either the RSNA or the High Representative must rectify this.

OTHER ENTITY REFORMS

8. Both the House and Council of Peoples should have the right to consider whether legislation is of a generally discriminatory character.

9. They should also have the right, for a period of two to three years, to review and suggest revision or nullification of existing legislation, regulations, acts and decisions in force at the entity, cantonal or municipal levels.

10. The political structures of the cantons and municipalities of the Federation and of the municipalities of the RS must reflect the reforms at entity level. The cantons, in particular, will have to amend their constitutions.

11. Integration of the entity public sectors and police forces – within entity ministries and, most importantly, in the cantons and municipalities – should begin forthwith. This means setting targets (based on the 1991 census) and requiring that representation should conform to election results within two years. The benchmarks

for minority recruitment of police in the RS and Federation should be harmonised.

12. RS Amendment LXXXV, paragraph 2, negates this formula based on the 1991 census, to which the RS parties agreed in Sarajevo Agreement. It must be reconsidered by the RSNA or changed by the High Representative.

13. Either the RSNA or the High Representative must remove the designation of "Bosniak" as one of the official languages of the RS (Amendment LXXI, paragraph 1) and replace it with the term "Bosnian", as authorised by the DPA.

14. RS Amendment LXVII, paragraph 1, should be reviewed for consistency with the DPA. It asserts the "independence" of the RS constitutional and judicial order, in seeming violation of the supremacy of the BiH Constitutional Court.

15. The second paragraph of Amendment LXVII, referring to all authority of the RS belonging to the people and being expressed through a referendum, should either be altered or the calling of referenda should be included among vital national interests.

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I. BACKGROUND

The constitution of Bosnia & Herzegovina (BiH), contained in Annex 4 of the Dayton Peace Accords (DPA), affirms the absolute right of all citizens to basic "Human Rights and Fundamental Freedoms". Article II obliges the institutions of the state and its two entities to "ensure the highest level of internationally recognised human rights" and freedom from discrimination, and guarantees the rights of refugees and displaced persons to reclaim their properties and to return to their pre-war homes.

Bosnian institutions have not succeeded in delivering these fundamental entitlements. The partition of BiH between two entities – Republika Srpska and the Federation of Bosnia & Herzegovina – and the subdivision of the latter into ten powerful cantons have meant that the rights and freedoms of citizens depend overwhelmingly on the goodwill of regional (usually mono-national) power structures. While the frequent failures of the police, courts and local administrations to provide impartial protection and services to all Bosnia's citizens largely reflect the agendas and prejudices of the authorities, they also mirror the bias inherent in the Dayton constitutional order itself.

More than six years after Dayton, Bosnian politicians and their international supervisors are faced with the responsibility of implementing a decision of the state Constitutional Court that could go a long way towards removing this bias. By decreeing that the entities must amend their constitutions and reform their institutions to prevent the domination of any one nation in either entity, the Court initiated a process which should ensure that the rights enshrined in the state constitution are in fact available to all persons, regardless of where they live or aim to live in BiH.

Contrary to the claims of scaremongers in the RS or wishful thinkers in the Federation, this exercise is neither a "revision" of Dayton nor an attempt to eliminate the entities. Rather, it is the outcome of a ruling by Bosnia's highest court that the entities cannot exist as nationally exclusive mini-states within a purely notional single state framework.

According to the Court's decision, "despite the territorial delimitation of Bosnia and Herzegovina by the establishment of the two Entities, this territorial delimitation cannot serve as a constitutional legitimation for ethnic domination, national homogenisation or a right to uphold the effects of ethnic cleansing".[1] Therefore, if the ruling is fully implemented, it will be both a major step towards realising the constitution's guarantees to citizens of freedom from discrimination and the right to return and an enhancement of the authority of the state.[2] On the other hand, if the entities adopt and the international community accepts sets of constitutional amendments that provide bogus guarantees of national equality in one or both

[1] Constitutional Court of Bosnia and Herzegovina, "Request for evaluation of certain provisions of the Constitution of Republika Srpska and the Constitution of the Federation of Bosnia and Herzegovina", Case No. U 5/98-III, Third Partial Decision, 1 July 2000, Paragraph 61.

[2] Speaking at St Antony's College, Oxford, on 8 March 2002, Dr Haris Silajdzic, Bosnia's wartime foreign minister and effective leader of the Party for Bosnia & Herzegovina (SBiH), extolled the decision in the following terms: "If properly implemented, it would change everything. We wouldn't need another Dayton. It would put BiH on the right path".

entities, the Court's ruling will have further cemented the unworkable divisions of the Dayton Agreement.

A. THE "CONSTITUENT PEOPLES" CASE

In 1998, Alija Izetbegovic, the then Bosniak chair of the state presidency and leader of the Party for Democratic Action (SDA), brought a case before the Constitutional Court arguing that fourteen provisions of the RS constitution and five provisions of the Federation constitution violated the BiH constitution.[3] Among these, the most controversial and potentially far-reaching challenge related to the status of Bosnia's "constituent peoples" in both entities' constitutions.[4] The preamble to the state constitution invokes and enumerates both the "constituent" nations (including "others") and individual citizens as the sources of this political act:

> Bosniacs, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina…hereby determine that the Constitution of Bosnia and Herzegovina is as follows…

Thus the Dayton constitution is a hybrid, enshrining both collective and individual rights. In the constitutional law and practice of the former Socialist Federative Republic of Yugoslavia – and in the popular understanding of such matters that still prevails today – to be a "constituent people" (*narod*) amounts essentially to being a "state-creating" people and to not being a national minority (*narodnost*, literally 'nationality'), regardless of whether the people in question is a numerical minority in the polity.[5] In post-Dayton Bosnia, the constituent peoples possess rights to representation at the levels of the state and

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[3] Article VI of the Dayton constitution mandated the establishment of a BiH Constitutional Court. It has nine justices: four selected by the Federation House of Representatives, two by the RS National Assembly and three by the European Court of Human Rights "after consultation with the [BiH] presidency". In practice, this has meant that the court is composed of two Bosniaks, two Croats, two Serbs and three foreigners. Part of the court's remit is to determine "[w]hether any provision of an Entity's constitution or law is consistent with this Constitution". In addition, Article XII of the state constitution required that within "three months from the entry into force of this Constitution, the Entities shall amend their respective constitutions to ensure their conformity with this Constitution…" The General Framework Agreement for Peace in Bosnia and Herzegovina, Annex 4, Article VI,1(a), Article VI,3(a) and Article XII,1.

[4] The other contentious provisions related to special state-like powers granted to the entities and their institutions by their constitutions, and which appeared to infringe upon those of the state, including, for example, the empowerment of entity presidents to appoint heads of diplomatic missions and military officers. Other disputed articles conferred special privileges on national groups, such as Article 28 of the RS constitution, which calls for cooperation between the "state" and the Serbian Orthodox Church "in all fields" and provides for material support of the Church by the "state". By explicitly naming "Croatian" and "Bosnian" as the official languages of the Federation – and "Serbian" as the official language of the RS – the respective constitutions ignored or denied the languages of the other constituent people (or peoples).

[5] Collective rights, although nowadays increasingly acknowledged in both theory and practice in Western states, are nonetheless secondary to rights based on individual citizenship. The language and cultural rights of national minorities are protected (in some cases by international conventions), and native peoples have often reasserted pre-existing territorial entitlements, but they remain citizens of the states in which they live. Although the examples of Switzerland and (less often) Belgium are invoked in BiH to justify the empowerment of peoples, their relevance is only partial. The Swiss Confederation, for instance, provides for a system of power sharing among cantons inhabited by speakers of different languages, but it does not define these groups constitutionally as separate nations. They are all Swiss.
The communist rulers of the new Yugoslav federation did not attempt after the Second World War to define BiH (unlike other republics) as the homeland of anything other than its (unspecified) peoples and their working class. By 1974, however, and after the effective recognition of Muslims (or Bosniaks) as a nation in their own right in the late 1960s, the new BiH constitution listed the "Muslims, Serbs and Croats, and members of other nations (*naroda*) and nationalities (*narodnosti*) who live in it" as Bosnia's peoples, but accorded pride of place to "working people and citizens". *Ustav Socijalisticke Republike Bosne i Hercegovine* (1974), Part I, Article 1.
The salience of these distinctions and the potency of popular fears of relegation to 'minority' status were much increased by the 1992-95 war. In the course of massacring and expelling Bosniaks in the Drina valley town of Visegrad in 1992, Milan Lukic (subsequently indicted for war crimes by the International Criminal Tribunal in The Hague) explained to BBC journalist Allan Little that the Serbs' aim was to drive the non-Serb population down below 5 per cent, since a people who fell under that threshold could not be "constituent" according to Yugoslav law.

Federation which are intended to empower them to promote and defend their collective rights. These, in turn, are termed "vital interests" in the Dayton constitution.[6]

The case before the Constitutional Court alleged that the Federation constitution denies equality to Serbs, while its RS counterpart discriminates against Bosniaks and Croats. Indeed, the Federation constitution names only Croats and Bosniaks as constituent peoples, remaining conspicuously silent on the question of Serbs and their rights. This reflects the circumstance that when, with U.S. mediation, the Bosnian army (Armija BiH) and the Croat Defence Council (HVO) made peace in early 1994, they created a federation to which it was thought the Serbs might adhere in a future and comprehensive settlement. Yet when peace was made at Dayton in November 1995, Republika Srpska was recognised as a second "entity" rather than becoming the third member of a BiH federation or confederation. As a consequence, the national power sharing mechanisms of today's Federation continue to deny the constituent status of Serbs, despite the facts that many Serbs either remained during the war or have since returned.

The situation of Republika Srpska is quite different. While the RS constitution makes no reference to "constituent peoples" *per se*, the preamble refers to the "untransferable right of the Serb people to self-determination", to "the centuries-long struggle of the Serb people for freedom and State independence", and to "the will and determination of the Serb people from Republika Srpska to link its State completely and tightly with other States of the Serb people".[7] These declarations, in combination with articles requiring support for the Orthodox Church and specifying Serbian as the official language – not to mention the name of the entity itself – provide the rhetorical backdrop to systematic discrimination against non-Serbs and a long-running and generally successful battle to perpetuate the results of wartime 'ethnic cleansing'.[8]

Essentially, the constituent peoples case hinged on the question of whether the list of Bosnia's constituent peoples in the preamble to the state constitution meant that all three nations (and the "others") were "constituent" throughout Bosnia & Herzegovina or whether they were equal only at the level of the state. If it were the latter, then Serbs were entitled to their privileged status in the RS, and Croats and Bosniaks to theirs in the Federation. Representatives of the RS National Assembly argued precisely this before the Court, their stance reflecting an interpretation of Dayton that denies that state citizenship has equality with (let alone primacy over) citizenship of the entities.[9] According to this view, the state is merely a meeting point of delegates of the entities and their peoples which also happens to have a few (and the fewer the better) common institutions.

B. THE CONSTITUTIONAL COURT DECISION

After much delay, the Constitutional Court finally ruled on the constituent peoples issue in July 2000, declaring by a five-to-four majority that the provisions of the entities' constitutions relating to the "constituency" of peoples were unconstitutional.[10] While the relevant texts ceased to be legally valid with immediate effect, the difficult task of drawing up and implementing appropriate amendments remained for the entity legislatures and governments. It will be useful to

[6] See discussion in ICG Balkans Report No. 108, *After Milosevic: A Practical Agenda for Lasting Balkans Peace*, 26 April 2001, pp. 156-7.

[7] Constitution of Republika Srpska, Preamble (as amended by Amendments XXVI and LIV). On the other hand, Article 1 (as amended by Amendment XLIV) now defines the RS as "the State of Serb people and of all its citizens." The constitution can be accessed on the OHR web site: www.ohr.int.

[8] See ICG Balkans Report No 118, *The Wages of Sin: Confronting Bosnia's Republika Srpska*, 8 October 2001.

[9] The constitution (Article 7) acknowledges citizenship as pertaining to both the state and the entities, without, however, defining their meaning or mutual relationship.

[10] The Court decided on the "constituent peoples" provisions by a five to four majority, with the two Croat and two Serb justices dissenting. The judges from the RS later argued that the decision was not legitimate, complaining that the two Bosniaks and the three foreign judges appointed by the European Court of Human Rights had ganged up on the Croats and Serbs. As the mandates of the Constitutional Court judges expire this May, politicians from the RS have argued that the Court should now be 'nationalised' to exclude the foreign judges. Yet in circumstances in which domestic jurists still feel obliged to espouse or conform to national-political imperatives, the presence of foreign judges remains crucial to the integrity of the Court.

review here the reasoning behind the decision in order to understand the bases of the reforms required.

The Court rejected the RS argument that Bosnia's national communities enjoy equal rights at the state level by virtue of their preferential status within the territories of the two entities. To accept the territorial entitlement of 'separate but equal' nations would underwrite a form of segregation and violate a number of international human rights conventions built into the DPA, as well as Article I.2 of the constitution and its preamble. The DPA asserts "that democratic governmental institutions and fair procedures best produce peaceful relations within a pluralist society".[11]

Of particular significance for the implementation of the decision was the Court's judgment that:

> This constitutional commitment, *legally binding for all public authorities*, cannot be isolated from other elements of the Constitution, in particular the ethnic structures, and must therefore be interpreted by reference to the structure of the Constitution as a whole… Therefore, the elements of a democratic state *and* society and the underlying assumptions – pluralism, fair procedures, peaceful relations following from the text of the Constitution – *must serve as a guideline to further elaborate the question of how BiH is construed as a democratic multi-national state*.[12]

The requirement that the entities ensure that no one national group should dominate politically is made even more explicit in the conclusion that "the constitutional principle of collective equality of constituent peoples following from the designation of Bosniacs, Croats and Serbs as constituent peoples prohibits any special privilege for one or two of these peoples, any domination in governmental structures or any ethnic homogenisation through segregation based on territorial separation".[13]

Moreover – and referring to the parties' obligation under Annex 7 of the DPA to create the political, economic and social conditions to support refugee return[14] – the court cited population figures to demonstrate that the entity constitutions establish discriminatory frameworks that discourage return. These showed an increase in the Bosniak proportion of the population on the territory of the post-war Federation from 52.09 per cent to 72.61 per cent between 1991 and 1997, and a corresponding drop in the Serb population from 17.62 per cent to just 2.32 per cent in the same period. (The Croat share of the population remained much the same.) The demographic change was more striking still in what became the RS, where the Serb majority jumped from 54.3 per cent in 1991 to 96.79 per cent in 1997.[15] The court dismissed the claim by representatives of the RS National Assembly (RSNA) that post-war refugee return to the RS had been sluggish due to complex social and economic factors unrelated to discrimination or victimisation, noting that only 10 per cent of those who had returned to the RS after the war were *not* Serbs.[16]

The Court also cited the domination by favoured nations of official institutions to illustrate the discriminatory effect of the entities' constitutions. It noted that 97.6 per cent of judges and prosecutors and 93.7 per cent of police officers in the RS in 1999 were Serbs, whereas in the Federation there was an analogous predominance by Bosniaks and Croats.

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[11] Cited in Constitutional Court of Bosnia and Herzegovina, op. cit., Paragraph 54.

[12] Ibid. Emphasis added.

[13] Ibid., Paragraph 60.

[14] "The Parties undertake 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 General Framework Agreement for Peace in Bosnia and Herzegovina, Annex 7, Article II,1.

[15] The Court noted that the effects of 'ethnic cleansing' were even more marked in the eastern RS, where Bosniak pluralities or majorities before the war were transformed into Serb homogeneity. Constitutional Court of Bosnia and Herzegovina , op. cit., Paragraph 87.

[16] Rates both of refugee return and of property law implementation have improved markedly since the Court's ruling. More refugees and DPs went back to their homes in the RS in 2001 than in the previous five years. Yet the number of returnees to the Federation remains twice as high as to the RS, even though Federation Premier Alija Behmen does not expect total returns to the Federation to exceed 50 per cent of all registered refugees and displaced persons from that territory until mid-2002. Returnees to the RS tend to be elderly villagers, whereas much property repossession in the Federation takes place with the object of effecting a sale as soon as the law allows. "Povratak u Federaciju dvostruko veci", *Oslobodjenje*, 21 March 2002.

These points in the Constitutional Court's decision suggested what the priorities for implementation should be. First of all, it would not be sufficient for the entities merely to amend their constitutions. They would also have to make structural, legal or institutional changes to protect the rights of all three nations and, in particular, to create the social, economic and political conditions for refuges and DPs to return. Secondly, the decision explicitly condemned domination by any national group or groups of public bodies, suggesting that equitable representation of all three peoples (and "others") should be assured in government, parliamentary assemblies and the judicial and law enforcement systems. Finally, the references to particularly high levels of ethnic homogenisation in localities suggested that the consequent reforms should encompass those municipal and cantonal acts, laws and structures that have served discriminatory ends.

C. CONSTITUTIONAL COMMISSIONS AND PUBLIC DEBATE

The initial reaction of the entity governments and parliaments was to do nothing. Their procrastination over taking steps to implement the decision demonstrated yet again why guarantees of national equality at state level are inadequate: the state is weak and the entities can ignore it. After waiting six months, the High Representative intervened in January 2001, charging temporary constitutional commissions in each entity parliament with drafting the requisite constitutional amendments and serving, in the meantime, as interim bodies for the protection of vital interests.[17] In consultation with the main political parties, he appointed sixteen members to each constitutional commission: four from each constituent people, plus four "others".[18]

As interim bodies with veto powers over laws, regulations and decisions of the entities, the commissions were to ensure that the "vital interests of the constituent peoples along with Others are fully protected…and that there should, pursuant to the European Convention on Human Rights and Fundamental Freedoms, be *freedom from discrimination throughout Bosnia and Herzegovina*".[19] This last clause is crucial because it acknowledges that effective mechanisms must protect not only constituent peoples against laws that violate their "vital interests", but also individual people against discrimination.

In practice, any three members of an interim commission have been able to challenge a law, regulation or decision that they deem to threaten a "vital interest", to violate the European Convention on Human Rights, or to be discriminatory. This challenge has the effect of suspending implementation of the disputed law or decision and convening a special panel charged with reconciling matters. Should this prove impossible after three days, the High Representative is meant to rule on the admissibility or otherwise of the contested act. For example, the Bosniak members of the RS Constitutional Commission compelled the entity government to increase its projected funding of

[17] Specific reference is made in the decision to Annex 10, Article II.1 (d), which empowers the High Representative to "Facilitate, as the High Representative judges necessary, the resolution of any difficulties arising in connection with civilian implementation". Cited in "Decision establishing the interim procedures to protect vital interests of Constituent Peoples and Others, including freedom from discrimination", 11 January 2001. These temporary powers – and an expanded, multinational membership - were grafted on to existing constitutional commissions in the respective parliaments. Their previous function was to propose and advise on constitutional amendments.

[18] The "others" provided the chairmen: Jakob Finci in the Federation and Miroslav Mikes in the RS. Although invited by OHR to suggest candidates for the commissions, the largest Croat party, the Croat Democratic Union (HDZ), ignored the offer. It was boycotting the Federation parliament and campaigning for "Croat self-rule" following the imposition by the OSCE of a temporary election regulation changing the basis on which representatives would be elected to the Federation House of Peoples. (The House of Peoples [*Dom Naroda*] is the chamber charged with protecting vital interests.) The HDZ abandoned its boycott of the House of Representatives – if not its quest for "self-rule" – in autumn 2001, and has latterly entered into the public debate over constitutional changes in the entities and participated in the meetings of the big eight BiH parties. It seems likely that the HDZ will also soon take up the empty seats in the House of Peoples that would have been its due had it permitted elections in the cantonal assemblies it controls following the November 2000 elections.

[19] Office of the High Representative, "Decision establishing interim procedures to protect vital interests of Constituent Peoples and Others, including freedom from Discrimination", 11 January 2001. Emphasis added.

refugee return programs by invoking the "vital interest" veto on passage of the 2002 budget at the beginning of the year. This is an illustration of the impact that permanent and effective mechanisms in the entity parliaments would have on influencing or reversing policies that discriminate against 'minority' groups.

In drafting amendments to recommend to the entity parliaments, the constitutional commissions had mixed success. Seven months after the High Representative ordered their establishment, the Federation Commission members reached consensus on a single set of constitutional amendments. These, however, were kept under wraps while the RS Commission proceeded more slowly. In the meantime, Federation parties and politicians drafted their own proposals or launched their own trial balloons. Several went well beyond the scope of the Court's decision, suggesting that the amendments should also seek to streamline the entity's bloated governmental structures by doing away with cantonal premiers or presidents, the entity vice-president and cutting the number of seats in the parliamentary assembly.

The Federation government could have submitted an agreed set of draft amendments to parliament by early 2002. Yet the main parties in the Federation agreed that they would not make constitutional changes unless and until they felt reasonably certain that "symmetrical" amendments were assured of passage in the RSNA.

The narrow spectrum of hard-line and 'moderate' Serb parties in the RS agreed that fewer and weaker protections of 'minority' rights were required in 'their' entity than were being discussed in the Federation.[20] Not only did they argue that what was being proposed in the other entity went beyond the letter of the Court's decision, but they also contested its spirit. In fact, the 'moderates', led by Premier Mladen Ivanic, attempted to occupy the moral high ground, hailing citizens' rights and promising to end national discrimination, but deprecating collective entitlements, keys and quotas as outdated, anti-democratic and even dangerous legacies of the old Yugoslavia. There was certainly no justification for "symmetrical" arrangements. The RS had no need of a second chamber or any of the elaborate power-sharing, parallelism and devolution of the Federation.

The High Representative supported the principle of "symmetry in substance", but not necessarily in form. What was essential, he said in January 2002, was not that the mechanisms for protecting the rights of the constituent peoples should be identical, but that they should ensure identical levels of protection in both entities.[21] The political establishments of the two entities appeared to disagree profoundly over what mechanisms would be required to protect vital interests in the RS, how "fair representation" of non-Serbs in its government, courts and public administration should be defined and guaranteed and what would be the official languages of that entity.

When the RS Constitutional Commission proved unable in December 2001 to agree on a single proposal for amendments, the RSNA resolved to present the Commission's "working materials" - along with draft amendments suggested by some of its members, by national caucuses and by individual RSNA deputies - for "public debate".[22] RS politicians and legal experts used this period to rally and galvanise public opinion against significant changes. A series of articles by supposed experts, published in the pro-regime newspaper *Glas Srpski,* challenged the legitimacy of the Constitutional Court's decision, warned of the possible extinction of the Serbs and claimed, at the very least, that implementation of the decision would destroy the DPA and the RS. These became themes, too, of the hastily arranged celebrations of the tenth birthday of the RS on 9 January 2002.

In a clear demonstration of the national-political partiality of the judiciary in BiH, Snezana Savic, the current president of the Constitutional Court

[20] The term 'minority' in this context is tendentious but widely employed by the international community. The point of the Constitutional Court decision is that Bosniaks, Croats and Serbs, regardless of their numbers in any locality, cannot be considered minorities anywhere in BiH.

[21] The High Representative elicited howls of Bosniak protest for this and other supposed evidence of backsliding. During January 2002, before the eight principal BiH parties began their series of meetings with each other and with the High Representative, the rhetorical temperature ran very high as parties and the media belatedly engaged with the issue and struck extreme postures.

[22] Thus the "working materials" and proposals of the SDP, SDS, SBiH, SNSD and other parties were published in *Glas Srpski*, on 27 December 2001.

and one of the justices who dissented from the "constituent peoples" decision, argued that the RSNA should by no means seek to implement the decision of her own court:

> If the decision of the Constitutional Court of BiH on the constituent peoples in Republika Srpska and in the Federation is implemented, then the survival of the structures defined in the BiH constitution will be called into question. This decision opens the possibility of changing the constitution of BiH, which is very dangerous, because it calls into question the Dayton Agreement.[23]

D. THE SARAJEVO AGREEMENT

Despite meeting regularly both among themselves and with the High Representative since January 2002, by early March the leaders of the big eight RS and Federation political parties had yet to engage in serious or concrete negotiations. They preferred instead to strike public and incompatible postures. With his latest deadline of 15 March threatening to slip, the High Representative, Wolfgang Petritsch, summoned the politicians to attend an intensive round of talks at OHR's Sarajevo headquarters to thrash out a mutually acceptable package of constitutional amendments.

For obvious reasons, Petritsch and the international community insisted that the Bosnians take responsibility for forging a compromise. The achievement of such concord would be a notable victory for "ownership", "partnership" and other catchwords portending international disengagement from BiH. Moreover, changes agreed by the parties would be less likely to produce ructions in an election year and more likely to stick. The facts that Milorad Dodik's SNSD opted out and then back into the talks, that the HDZ was uncooperative throughout, and that the SDA walked out in the last days were signs, however, that compromise, ownership and concord remained anathema to many.

Yet after more than 70 hours of haggling among the parties and cajoling by OHR since 8 March, the remaining and actively participating parties struck an agreement in the early hours of 27 March. Zlatko Lagumdzija from the SDP, Safet Halilovic from the SBiH and Kresimir Zubak from the NHI signed up to the deal in its entirety. The four RS representatives, including Premier Ivanic of the PDP and RSNA Speaker Dragan Kalinic of the SDS, signed a separate document supporting the agreement, but noting specific "reservations" about certain clauses. The HDZ refused to sign anything. The High Representative, the U.S. Ambassador, and the Spanish Ambassador (representing the EU presidency) signed as witnesses, along with the head of OHR's Legal Department.

In a joint press conference, Petritsch and Lagumdzija presented the agreement to the public, lauding it as a "historic" step towards ensuring equal protections in both entities and bringing Bosnia closer to European integration. The ambassadors representing the PIC Steering Board countries praised it as "a decisive step forward in terms of Bosnia and Herzegovina's democratic development and commitment to the rule of law".[24]

Given the electoral calendar, the signatories from the Alliance for Change coalition that governs the Federation (the SDP, SBiH and NHI) demonstrated both political courage and long-term vision. For the agreement made significant concessions to the RS parties, allowing for a set of amendments less far-reaching than those proposed in the Federation. By both accepting the need for and signing up to a domestic compromise, these parties hoped to make a start on ensuring national equality in the entities while showing the international community that Bosnia was ready to manage its own affairs. But in adopting this statesmanlike approach, they also exposed themselves to reproaches from their nationalist opponents in the SDA and HDZ that they had betrayed the interests of Bosniaks and Croats.

The document itself (hereafter referred to as the Sarajevo Agreement) was in some ways less significant for what it said or left unsaid than for the fact that it emerged at all. It may have bound its signatories – with or without "reservations" – but it remained for the entities to translate its principles and provisions into constitutional

[23] "Odluka o konstitutivnosti vrijedja Ustav BiH", *Dnevni avaz*, 6 February 2002, and "Okrugli sto u susret ustavnim promjenama u RS: Jezik za unitarizaciju", *Glas Srpski*, 2 January 2002.

[24] Communiqué of the PIC Steering Board, 27 March 2002.

amendments. In a communiqué issued on 27 March, the PIC Steering Board called upon the entity parliaments to enact amendments in line with the agreement during the first week of April. In the case of the RS, the Steering Board advised the RSNA to disregard the Serb party leaders' reservations.[25] Several ambassadors met with members of the RS Constitutional Commission and RS party chiefs to warn of possible sanctions if the RSNA failed to comply. The OHR spokesperson pointed out, meanwhile, that the agreement represented a baseline below which the entities must not go if they if they were to avoid sanctions.[26]

The rush to pass amendments is the result of the elections' timetable. If the first Bosnian-run general elections are to take place as scheduled on 5 October 2002, they must be officially announced in the state parliament 170 days beforehand, that is, by 18 April. In addition, several holes in the current election law need plugging. These relate to the means of electing representatives to the Federation House of Peoples, the RS president and vice-president, and such new or altered offices as will be required by the constitutional amendments. The state parliament is waiting for the entities to amend their legislation before dealing with the state election law.[27]

To hold elections before the amendments are in place would prolong the agony of political uncertainty. If the October elections were to proceed without the previous implementation of the Constitutional Court's decision, then the changes to government and parliamentary structures might have to wait four years, until the next general election. By then, the international presence will presumably be much reduced, many refugees and DPs would have decided definitively against return, and Bosnia's irreconcilable nationalists would have scored another victory.[28]

Upon returning to Banja Luka from Sarajevo, the RS politicians were quick to deny having signed a binding agreement. Instead, they called it a good starting point for discussions, stressing both their specific reservations and the ultimate responsibility of the RSNA for passing amendments.[29] While the SDA and HDZ denounced the agreement for failing to transform the RS into a fully multinational polity, Ivanic, Kalinic and the others claimed that it went *too far* in that direction, but that their reservations had ensured that the damage could be contained.

As the RSNA prepared to debate the agreement, the local media took up cudgels against the concessions supposedly made in Sarajevo. Vitomir Popovic, one of the RS judges on the BiH Constitutional Court, attacked the agreement as anti-Serb and anti-Dayton: "This agreement leads to the disappearance of the RS and it will, insofar as it is accepted, remain but dead words on paper".[30] RS President Sarovic and Premier Ivanic met with the heads of the RS veterans associations

[25] "RS pred sankcijama?", *Nezavisne novine*, 28 March 2002.

[26] "Dopuna da, promjena ne", *Nezavisne novine*, 29 March 2002.

[27] Like most deadlines – and certainly deadlines in Bosnia – that implied by the electoral calendar is technically artificial. Failure to fill the holes in the election law would simply mean that the appropriate passages from the 1998 OSCE Rules and Regulations would apply for the October 2002 poll. Alternatively, the elections could be postponed until after the entities enact the requisite amendments. But this is not the point. The perception of a deadline has done much to create the political momentum that has finally impelled the parties and the international community to grapple seriously with the changes required to alleviate the national discrimination built into the entities' constitutions. The old guards in both entities would have preferred to maintain the status quo indefinitely. The sense of urgency created by the elections' deadline has deprived them of this chance.

[28] In theory, an early second round of elections could be called if the parliaments passed changes too late for the October poll. But this would also be undesirable. Bosnia's governments have been unable to raise sufficient funds to finance the coming elections, and another poll soon thereafter would be totally beyond their means. More seriously, a second election campaign would burden Lord Ashdown's new administration at the OHR with another long period of nationalist posturing.

[29] A hastily convened special session of the RSNA met and adjourned after five minutes on 28 March 2002, Speaker Kalinic arguing that the Constitutional Commission needed a further week to prepare amendments in line with the agreement.

[30] "Prekrsen dejtonski sporazum", *Nezavisne novine*, 29 March 2002. Popovic thus followed the example of his colleague, Snezana Savic, in making inappropriate comments in the debate over the implementation of his own court's decision. Popovic's political partisanship is hardly surprising. He is linked closely with the SDS and served as RS deputy premier with responsibility for internal affairs in 1993-94

to discuss the agreement, which the latter then condemned for sacrificing Serbs' wartime gains.[31]

On the other hand, Yugoslav President Vojislav Kostunica took the opportunity of a meeting with an RS delegation to endorse the agreement as a good basis for amendments, but also to note that "some political parties in the RS reserve the right to make minor corrections to this deal". Sarovic also pointed to the RS parties' reservations and pledged that they would attempt to "fix the disputed issues" in the Assembly. Continuing the softening up process, Constitutional Commission Chairman Miroslav Mikes argued that "The substance of this agreement cannot be changed. However, it is possible to improve certain details".[32]

E. RSNA Amendments and OHR Wobbles

Commenting on the constitutional amendments rammed through the RSNA by its 68 Serb deputies on the evening of 4 April, Ivanic boasted that "No one in Europe can object to the amendments adopted because they secure the vital national interests of the peoples who live here while, on the other hand, also guaranteeing a Serb majority in Republika Srpska". As Sarajevo columnist Gojko Beric nicely noted, "Ivanic claims that the wolf is full, but all the sheep have been accounted for".[33]

This 'happy' result was produced by Speaker Dragan Kalanic's skilful use of a loophole in the RSNA procedures, a united bloc of Serb deputies, and an apparently strong desire on the part of OHR and the international community to see amendments passed at whatever cost. The amendments not only deviate in significant respects from the Sarajevo Agreement, but were enacted over the objections of the "constituent peoples" they are allegedly designed to protect and without further reference to the commission created by the High Representative for that purpose. In the process, the draft amendments produced for the RSNA by the Constitutional Commission were rejected, and a new set of amendments supposedly prepared by "68 Serb delegates to the RSNA" were introduced and adopted at the session without either debate or the concurrence of the Constitutional Commission.

While the amendments themselves are inadequate and in places set dangerous precedents (see Section II, below), the manner in which they were enacted demonstrates most forcibly the irrelevance of non-Serbs' current political representation in the RS and the necessity of real safeguards for their vital interests. The passivity of OHR representatives in Banja Luka on the day – and the extraordinarily unhelpful assurances by the U.S. Ambassador that no international sanctions would follow if the RS did not adhere to the Sarajevo Agreement[34] – suggested that the international community is more committed to avoiding confrontation with the RS than to supporting the parties that proved brave enough to compromise.[35]

The Assembly session began with a reading and explanation by Mikes of the draft amendments prepared by the Constitutional Commission on the basis of the Sarajevo Agreement. After his hour-long presentation, a PDP deputy called for a two-hour break to "consider the amendments". During the break, Sarovic, Ivanic, Zivko Radisic (the Serb member of the BiH presidency), and other leading politicians met with Serb deputies to secure their unanimous support for an alternative set of amendments which had apparently been drafted earlier and in secret. In order to get them into the parliamentary procedure immediately, the amendments had to be proposed by the RS president, the government, or 30 per cent of the deputies. While either Sarovic or the SDS

[31] "He [the president of the Assembly of Soldiers Organisations of RS] judged that this continues the practice of 'losing that which was gained in the war behind the green [i.e., Bosniak negotiating] table and that the soldiers consider this agreement to represent the destruction of results achieved during the fight for the fatherland'". "Jedinstveno i odgovorno", *Glas Srpski*, 2 April 2002.

[32] OHR Media Round-up, 1 April 2002.

[33] Gojko Beric, "Vuk i ovce", *Oslobodjenje*, 6 April 2002.

[34] Ambassador Clifford Bond told a joint press conference with his French colleague in Banja Luka on 4 April 2002 that the question of constitutional amendments was a strictly internal matter. He later reassured the RS public that there was no need for them to change the name of their entity. "Nema razloga da RS mijenja svoje ime", *Nezavisne novine*, 6 April 2002.

[35] For an analysis of the international approach to RS since Dayton, see ICG Balkans Report No. 118, *The Wages of Sin: Confronting Bosnia's Republika Srpska*, 8 October 2001.

members alone could have proposed the amendments, all 68 Serb members (comprising 82 per cent of the body and representing all the Serb parties in the RSNA) did so. This had the desired effect of presenting a united Serb front and sharing out responsibility for what amounted to a direct challenge to the Sarajevo Agreement.

When the Assembly reconvened, the Serbs introduced their proposal. Kalinic had earlier instructed the members of the Constitutional Commission to be on hand during the afternoon for an emergency session. This was necessary because, according to the RSNA Rules and Procedures (Article 222, paragraph 3), if the Commission rejects such a proposal *in the course of a session,* then the Assembly can vote on both the Commission's proposal *and* the alternative which it has rejected. The Commission duly met and rejected the new amendments, owing to the opposition of the Bosniak and Croat members and two of the "others". This meant that the Assembly could now vote on both sets of amendments.

Deputies from the SBiH and SDP reportedly attempted to warn OHR representatives that the RS parties were preparing to pass amendments that the Bosniak and Croat members of the Commission had rejected because they did not conform to the Sarajevo Agreement. They referred to Petritsch's decision creating the constitutional commissions, which requires the High Representative to arbitrate if three or more commission members do not agree on "vital interest" grounds with a particular entity law, regulation or act. If the amendments were now to be voted on and passed without Petritsch's intervention, the RS Commission's terms of reference would be violated.

The OHR representative reportedly answered that he had spoken with Serb negotiators after the Commission meeting and extracted concessions in the form of three minor changes to the Serb deputies' amendments but could expect no more. These were not substantial concessions, including, for instance, a change in the name of the body charged with protecting vital interests. Yet, as the SDP and SBiH deputies pointed out, if OHR could suggest and the Serbs accept three new changes to the amendments without these being considered by the Commission, that would be a second breach of the High Representative's decision, not to mention of parliamentary procedure.

The OHR representative replied that the three changes did not need to be considered by the Commission because they were in line with the Sarajevo Agreement. The non-Serb deputies then asked if OHR could not intervene to analyse both sets of proposed amendments and suggest revisions going neither beyond nor below the terms of the Sarajevo Agreement. The OHR expert refused, arguing that the Serbs were already making great sacrifices. He asked, in turn, if the SDP and SBiH deputies would support the Serb amendments if the reference to the "Bosniak" language in Amendment LXXI were changed. They declined.

In the meantime, Kalinic called the Assembly back into session. The SDP and SBiH members entered the chamber, and the former sought the floor. He argued that the Serbs' amendments had been sprung on them unawares and asked for more time to review and debate them. After all, the Commission's proposal had received an hour-long reading and a two-hour suspension so that deputies could consider it. The SDP representative also referred to the procedural irregularities noted above and requested another break. After some argument, Speaker Kalinic agreed to a half-hour pause, despite accusing the SPD deputy of wasting time. After 25 minutes, the speaker resumed the session and immediately called for a vote on the 68 Serb deputies' amendments. All were passed without discussion, although the SDP leader attempted and failed to take the floor. Kalinic gavelled the session to an end.

What do these intrigues in the RSNA mean? First, they represent an abuse of procedures by the Serb majority in which the views of the other constituent peoples were ignored on the very question of protecting their vital national interests. This demonstrates the RS establishment's lack of good faith when it comes to incorporating non-Serbs in decision-making processes. It is also a lesson in how any lacunae or ambiguities in the amendments themselves are likely to be exploited to the detriment of non-Serbs.

Secondly, the OHR official on the spot permitted Kalinic *et al* to ride roughshod over the Constitutional Commission set up by the High Representative, disregarding both its prerogatives and the objections of the other constituent peoples – apparently for the sake of getting a quick fix.

Thirdly, OHR allowed Serb MPs to water down the already fairly thin wine of the Sarajevo Agreement, despite earlier tough talk by OHR spokespersons and the PIC Steering Board that nothing short of the agreement would be acceptable. In so doing, they abandoned the Alliance for Change leaders who had compromised to accommodate both the Serbs and the High Representative.[36]

At the time of writing, it remains uncertain whether Petritsch will intervene to quash or alter the amendments passed by the RSNA and perhaps even to discipline those who drove a coach and horses through his own regulations on the role and responsibility of the RS Constitutional Commission. There have been worrying indications that key Steering Board countries have no stomach for a fight with the RS and would prefer an inadequate settlement to which the RS consents than an imposition that upholds the letter of the Sarajevo Agreement.

The Federation parliament must now pass its own amendments in line with the agreement. The government has adopted a set of amendments derived from the Sarajevo Agreement, but which also fill in many of the gaps in a progressive way. Getting these amendments through parliament could prove difficult, however, since the SDA and HDZ oppose the deal and occupy 45 per cent of the seats in the House of Representatives. Nor will the 4 April antics in Banja Luka make it any easier for the parties that signed up to the agreement to convince either their coalition partners or their opponents to subscribe to amendments based on a pact that has been disregarded in important aspects in the RS. Already one of the signatories of the agreement, the SBiH, has threatened to withdraw its support for fear that OHR will not ensure full compliance by the RS.[37]

As will be discussed below, the inter-party negotiations in Sarajevo produced a package of constitutional amendments that made notable concessions to the RS. The RS parties then arrogated to themselves the right to take more. To let the RSNA amendments stand would be to put the stamp and seal of democratic legitimacy on a swindle. It would also mean betraying the Federation-based parties that were prepared to compromise and abandoning a probably unique opportunity to realise more from Dayton than has proved possible during the past six years. This concession to the RS would permit a 'republic' founded on acts of genocide to clean up its reputation without cleaning up its act.

Simply because it exists, the Sarajevo Agreement will have to stand as the point of reference for discussions inside OHR and among the Steering Board countries over the decisions that need to be taken. Although flawed, the agreement can be made to serve those principles which must be upheld if BiH is to have a future as a viable state. Not only are equivalent (if not wholly "symmetrical") safeguards for protecting national rights essential in both entities, but effective mechanisms must be put in place for ensuring fair representation and challenging existing or future legislation and official acts that discriminate against either nations or citizens. The RS has upped the ante, leaving the High Representative and the Steering Board with no alternative save imposition if this long and tortuous process is to bear any but bitter fruit.

[36] Also worth noting is the apparent reversion to tried and tested techniques of the wartime Serb leadership, when the RS assembly was used to overturn agreed 'concessions'. The most notorious such precedent occurred in May 1993, when the assembly threw out the Vance-Owen Peace Plan after Mr Karadzic had initialled it.

[37] The last clause of the agreement asserts that "[t]he High Representative is the final authority in interpretation of this document until its full implementation by the parliaments of the Entities."

II. THE ISSUES

The Sarajevo Agreement establishes "symmetrical" limits on the entities' arrangements for sharing power among and safeguarding the vital interests of the constituent peoples. The agreement, however, is silent on many points. This has given some plausibility to the RS effort to evade a full or effective institutionalisation of the non-Serbs' constituent status and, thereby, to negate or diminish the spirit of the Sarajevo Agreement.

In a few important respects the RSNA amendments directly violate the agreement. In other places – such as the issue of language – the amendments offer unacceptable solutions to aspects of the Constitutional Court decision on which the Sarajevo Agreement did not touch. Finally, a number of new amendments seem to violate the DPA or set up redoubts for further opposition to the Court's decision. For example, amendment LXVIII asserts that "[t]he Republic shall independently perform the activities falling under its constitutional, legislative, executive and judicial competence". This seems to deny the supremacy of the BiH Constitutional Court over the constitutional and judicial order of the RS and, hence, to violate the Dayton constitution.

Of greater concern is the second paragraph of the same amendment, which outlines the principle that "[a]ll the authority in the Republic shall come out from the people and shall belong to the people. The people shall execute their authorities directly, through a referendum, and through their elected representatives". Earlier references in the RS constitution to sovereignty, self-determination, statehood, and tight links with other Serb "states", which the court struck down, clearly reflected the aspiration of its drafters that the RS should eventually secede from BiH and join Serbia. In interviews with a spectrum of Serb, Bosniak and Croat politicians in the Federation, ICG repeatedly heard the argument that the constitutional changes would have to preclude the RS from seceding from Bosnia against opposition from the other constituent peoples.

The above-quoted amendment giving "all authority" to the people (not peoples) and to the expression of its will through referendum would not be out of place in the constitution of a sovereign state. But the RS is neither a state nor sovereign. Moreover, resort to referenda has a menacing meaning in the recent history of BiH. The Federation parties attempted during the Sarajevo negotiations to get referenda added to the list of vital interests requiring approval by the Council/House of Peoples, but the RS parties refused.

In the Federation, on the other hand, the pre-existing guarantees of the constituent status of Bosniaks and Croats – and the readiness to add Serbs to the power-sharing system – mean that the amendments that will eventually be adopted are likely to be more far-reaching and less deceptive than those enacted by the RSNA. Indeed, the draft amendments to be considered by the Federation parliament cut and paste provisions from the Sarajevo Agreement and seek to define issues that the agreement leaves open while remaining within its spirit.

The following sections analyse the main areas in which reforms are required if the equality of Bosnia's constituent peoples and "others" are to be assured in both entities. This analysis will focus on the provisions of the Sarajevo Agreement, as well as mentioning earlier proposals by the entity constitutional commissions and political parties. It will suggest which provisions of the agreement provide adequate protections and which do not. It will also measure the amendments passed by the RSNA on 4 April against the agreement.

A. "FAIR" REPRESENTATION IN GOVERNMENT

1. Republika Srpska

The BiH Constitutional Court noted in its decision that the constituent status of Bosnia's peoples means that it is illegitimate for one national group to have "any domination in government structures". In the early phase of negotiation on constitutional amendments, all the parties agreed that the RS constitution must henceforward include provision for "fair representation" of non-Serbs in the entity's institutions.[38] This stemmed directly

38 One of the draft constitutional amendments proposed in the RS Constitutional Commission duly suggested that "The Republic shall, in particular, ensure that the members of all constituent peoples and Others are fairly represented

from the Court's assessment that the entities' public bodies have failed to fulfil their Dayton obligation to create the social and economic conditions necessary to support refugee returns.

Mandating "fair" representation of non-Serbs in the RS government is thus a first step towards improving the climate for return, by diluting Serb hegemony and providing for representatives of returnees to have a voice in decision-making. There was, however, no consensus among the parties in private negotiations or public debates over how "fair" that representation should be.

The amendment passed by the RSNA on 4 April 2002 relating to the distribution of government posts among the constituent peoples and "others" does not adequately implement the Court's decision. It also challenges the Sarajevo Agreement in two important respects: by altering the formula for transitional representation and offering a new and narrow definition of Annex 7 implementation. In common with the Sarajevo Agreement, however, this amendment fails to clarify responsibility for constructing a government.

Just as crucial as the distribution of posts in government is the question of how the government is elected, and whether the representatives of all the constituent peoples are to be consulted. This is an example of an issue that the Sarajevo Agreement leaves open, the Federation draft fleshes out in the spirit of the constituent peoples decision, and the RS amendments shroud in ambiguity.

According to the Sarajevo Agreement, the RSNA and the Federation House of Representatives "elect" their respective governments. Does this mean in the RS, however, that the new Council of Peoples (see below) must also be consulted? Under the current RS system, the entity president (popularly elected) proposes a candidate for premier to the RSNA. The nominee presents a list of his proposed ministers to the Assembly, which must then approve or reject them all. Since the 4 April amendments introduce no changes to this procedure, the Council of Peoples appears to be excluded.

in the legislative, executive and judicial authority". Working Materials of the RS Constitutional Commission, Amendment LXIX/2.

As for the make-up of the government itself, the Sarajevo Agreement adopted a formula for fair representation that combined proportional entitlements based on the 1991 census with the notion of minimum and maximum levels of representation. The Federation-based parties had earlier insisted that places in government must be based on the relative populations of the constituent peoples (and "others") according to the last pre-war census. A much-touted compromise would have made 1991 the baseline, but only until such time as DPA Annex 7 (on refugee return) had been implemented, so giving the RS authorities an incentive to accelerate return while allowing the Federation parties and the international community to score a moral victory.[39]

The census of 1991 is an important symbol. Using pre-war population figures as the standard against which "fair" representation should be tested would represent repudiation of 'ethnic cleansing' and refusal to legitimise its effects. The RS-based parties vigorously resisted any such effort to turn back the clock, arguing that use of the 1991 census would be undemocratic because it would empower "dead souls" and fail to reflect the "demographic changes" that have occurred in the interim.[40]

Although reflecting 1991 census figures in its calculation of ministerial entitlements, the Sarajevo Agreement avoids explicit reference to it, so allowing the RS parties to save face. On the other hand, the agreement does openly embrace the Annex 7 compromise, providing for Serbs to have eight posts in government, Bosniaks five and Croats three – until such time as Annex 7 is implemented.[41] The premier does not count as a

[39] The international community could also thereby redeem its 1998 concession to the RS in the matter of 'minority' police recruitment. It then agreed to accept the 1997 local election results as providing targets for the enlistment of non-Serb policemen in the RS, whereas the 1991 census had provided the standard in the earlier agreement with the Federation government.

[40] Prior to the Sarajevo Agreement, the RS parties, invoking democratic norms, argued that representation must be based on election results, with each constituent people getting seats in government in proportion to its number of deputies in the RSNA. On present form, such a calculus would give 82 per cent of government posts to Serbs.

[41] The agreement also provides that one "other" may be nominated by the premier from the quota of the largest constituent people, that is, from the Serb contingent.

member of the cabinet, but two cabinet ministers would also serve as deputy premiers. The premier and his deputies must come from different peoples. The agreement gives no indication whether the deputy premiers would enjoy anything more than their titles. Nor does the relevant RSNA amendment.

Following the implementation of Annex 7, the Sarajevo Agreement decrees that a new formula on representation should apply. Each constituent people must have a minimum of 15 per cent of posts in government, and at least one post should go to an "other". Moreover, the agreement requires that a minimum of 35 per cent of government members must come from two constituent peoples. This means that one nation can have no more than 65 per cent of posts in government – excluding the premiership.

RSNA Amendment LXXXIV repudiated the transitional formula in the Sarajevo Agreement, replacing it with a provision requiring proportional representation for national groups based on "their representation in the Republika population according to the *most recent census*" until Annex 7 is fulfilled. Although a violation of the agreement, this amendment appears at first glance to accept the 1991 census, something which Ivanic and others had vowed never to do, even if the international community were to attempt to impose it.

But this seemingly generous concession means that if a new census were to be taken before the implementation of Annex 7 was complete, non-Serb representation in government could be cut back to reflect the "ethnically cleansed" reality of the RS today. There appears to be nothing to stop the RS from conducting its own census for this very purpose. In that case, provisions ostensibly designed to encourage refugee return during the transitional period would in fact become disincentives. Adding a sentence to the RSNA amendment to the effect that "No census will be taken until Annex 7 is implemented" would remove this temptation.

Even more problematic is the self-serving manner in which Amendment LXXIV defines fulfilment of Annex 7 as the passage of "positive decisions on three-fourths of the submitted requests for the return of property rights" by the competent RS bodies. This is inadequate. First, neither entity can be accorded the right of setting such crucial benchmarks. Secondly, Annex 7 not only requires the authorities to implement the property laws, but also obliges them to create the social, economic and security conditions conducive to return. Thirdly, even if implementation of the property laws were to be regarded as equivalent to fulfilling Annex 7, why set the pass mark at 75 per cent? Why not 80 per cent, or 90 per cent? Fourthly, the issuance of "positive decisions" does not require the authorities actually to ensure that claimants get their properties back, only that they should receive a piece of paper confirming their right to it.

More generally, a constitutional definition of Annex 7 implementation that is as narrow and synthetic as that contained in Amendment LXXXIV could have ramifications well beyond the rights of non-Serbs to places at the cabinet table. It might mean allowing the RS to get away with declaring that it had made amends for "ethnic cleansing" by issuing a few thousand administrative decisions, so releasing the entity from further obligations under Annex 7. Instead of creating better conditions for return, as the Constitutional Court decision demands, this amendment would diminish the authorities' obligation to do so.

2. Federation

Unlike the RS, the Federation is already replete with national power-sharing mechanisms among Bosniaks, Croats and "others", built into its governmental, legislative and judicial structures. These emanate directly from the constituent status of Bosniaks and Croats, but they clearly violate the co-equal status now required for Serbs. They must be altered to accommodate this third nation.

The proposals of the Federation Constitutional Commission, political parties and (latterly) government that were made before the signature of the Sarajevo Agreement had much in common. They assumed that fair representation in government should start from the principle that there must be no *majorizacija* ('majoritarianism') and that no more than 49 per cent of ministerial posts should be filled by members of any one constituent people.

The most controversial question during earlier debates related to the "others": should they be entitled to one ministerial post or to a *minimum* of

one? Croat politicians expressed concern that the category of "others" could be manipulated by the Bosniaks to achieve *majorizacija* through 'phoney' others. (Similar fears were voiced by both Bosniak and Croat parties about the authenticity of "others" in the RS.)

Yet "others" represent a numerically significant category in Bosnia, consisting not just of members of national minority groups, but also of the offspring of once-common mixed marriages and those persons who reject the tyranny of national labels.[42] Thus, while worries over manipulation should be taken into account, excluding the "others" and, in particular, excluding the option of declaring one's national origins or identity to be politically irrelevant, would diminish the possibility of non-nationalist politics in Bosnia.

The Sarajevo Agreement specifies a formula for proportional national representation in the Federation government as it does in the RS, allotting eight ministerial posts to Bosniaks, five to Croats and three to Serbs.[43] It thus discards the Federation government's more flexible proposal, made in February 2002, of a 20 per cent minimum and 49 per cent maximum for each national contingent. The agreement also provides for a premier (who does not count in the national quotas) and two deputy premiers. They are to come from different constituent peoples and be selected from among the ministers.

Also in line with the provisions for the RS, a minimum complement of 15 per cent for each nation and 35 per cent for any two nations is prescribed once Annex 7 has been implemented. The HDZ opposes the application of this permanent formula in the Federation, since it offers less to Croats than had previous proposals. The party argues – with some justice – that whatever minimum level of representation is set for Croats will also effectively be the maximum.

On the other hand, according to the amendments to be considered by the Federation parliament, all three constituent peoples, including Croats, would have a larger say in appointing the government than is to be the case in the RS. As mentioned in the previous section, the Sarajevo Agreement simply stipulates that the RSNA and the House of Representatives elect the entity governments, but does not specify how. In the Federation, according to the proposed amendments, the president would appoint the government in agreement with the two vice-presidents, all three of whom are to come from different nations and must be elected by majorities in *both* houses of parliament.

B. DISTRIBUTION OF THE HIGHEST FUNCTIONS IN THE ENTITIES

The requirement of "fair" representation in the entity governments implies sharing out the highest executive, legislative and judicial posts. In the RS, these are the president, the premier, the speaker-president of the RSNA, and the chair of the new parliamentary body for the protection of vital interests, the Council of Peoples (described in detail in Section C below). In the Federation, they are the president, the premier, the speaker of the House of Representatives, and the speaker of the House of Peoples. Bosniaks and Croats already divide these (and almost all other) posts in the Federation.

The Sarajevo Agreement shrinks from challenging Serb dominance in the RS. It seems this was one of the sacrifices made by the Alliance leaders who signed the agreement. Under its terms, the positions of president, premier and RSNA speaker could all be filled by Serbs. The agreement stipulates that no constituent people or "other" may hold more than two from a list of six top jobs: the premier, the speaker of the RSNA, the chair of the Council of Peoples, the president of the Supreme Court, the president of the Constitutional Court, and the public prosecutor. By excluding the entity president from this list and adding three judicial offices, the Sarajevo Agreement ensures that non-Serbs will get some important functions, while effectively reserving the most important for the Serb majority. Although these provisions apply to the Federation as well, both its existing power-sharing arrangements and ethnographic profile will lessen the possibility that the president, premier and speaker of the House of Representatives could come from the same nation.

[42] "Others" represented as much as 8 per cent of the BiH population in 1991, which was not a good year to be nationally agnostic.

[43] Again, one "other" may be nominated by the premier from the quota of the largest constituent people, i.e. the Bosniak contingent.

The entity presidents are of special significance, particularly in the RS. Given RS pretensions to statehood, the RS president enjoys significantly greater power than his Federation counterpart – and greater national prestige as the heir to Radovan Karadzic's throne.[44] This difference is reflected in the fact that while the Federation president is elected by both chambers of parliament (as will probably be the case in future with the two vice-presidents), the RS president is popularly elected.

Parties from the Federation sought in some of their proposed amendments and in the inter-entity negotiations as well to eliminate the entity presidents altogether. The RS parties' absolute refusal to consider this led the Federation parties to demand, at the least, that the RS president should also be elected by parliament. The Sarajevo Agreement ducked this issue, leaving presidential election procedures to the entities.

Rather than place the entity presidents on the list of key political posts to be divided up among the constituent peoples, the Sarajevo Agreement creates two vice-presidents for each entity, and requires that they and the president should come from different constituent peoples. The likelihood that the RS vice-presidents will be purely decorative is underscored by the relevant RSNA amendments: LXXVII and LXXXIII. The president will continue to be popularly elected, but the vice-presidents will be proposed by the president for election by the RSNA after "consultations and agreement with the [national] caucuses". The Federation, meanwhile, is likely to maintain the practice of rotating the presidential and vice-presidential offices, only now ensuring that a Bosniak, Croat and Serb each serves as president for a third of their collective term. Needless to say, no such rotation will take place in the RS.

A more equitable arrangement than that prescribed by the Sarajevo Agreement would require that none of the constituent peoples (or "others") could occupy more than two of the four highest posts in the entities: president, premier, and speaker/chair of the two parliamentary chambers/councils. The parcelling out of judicial functions would be better regulated separately. The RS president and vice-presidents should all be either popularly elected or, preferably, elected by the RSNA, in which case they should also rotate in Federation fashion.

The fact that the RSNA amendments stick to the letter of the Sarajevo Agreement when it offers concessions to the RS but deviate from it when it insists on real reforms is, alas, symptomatic.

C. "VITAL INTERESTS": DEFINITIONS AND MECHANISMS OF PROTECTION

The right to invoke "vital interests" as a means of stopping legislation in its tracks is already incorporated in the structures of the state and the Federation, in particular through their second chambers, known in both cases as the House of Peoples. But what constitutes a "vital interest" has not been defined. Throughout the constitutional debate, the HDZ vehemently resisted any definition that would limit the scope for 'ethnic vetoes' and thereby restrict its power in Croat-majority cantons and municipalities. RS politicians, on the other hand, tried to confine the application of collective (and entity) rights to the level of the state, maintaining 'their' entity as a bastion of majority rule.

Although the Council of Peoples to be introduced in the RS for protecting vital interests will differ from the Federation House of Peoples, the parties were brought to acknowledge that the interests themselves must be defined in the same manner in the two entities. The challenge has been to compose a list of issues which is not so broad as to give a small number of deputies licence to kill off any and all legislation of which they disapprove[45] but leaves scope for the national caucuses to prevent legislation which perpetuates ethnically-based discrimination.

The March negotiations among the big eight parties resulted in a fairly lengthy catalogue of "vital interests". These included political matters such as the right of the constituent peoples to be

[44] Thus, Article 69 of the RS constitution declares, "The Republic is represented and its national unity symbolised by the President of the Republic".

[45] In its opinion on the Constitutional Court decision, the European Commission for Democracy through Law (the "Venice Commission") specifically argued that any solution that opened the possibility for the exercise of such a *liberum veto* was not in the spirit of democratic compromise.

"adequately represented in legislative, executive and judicial bodies" (as mandated by the Constitutional Court), equal rights "in the process of decision-making", the "organisation of public authorities", "constitutional amendments", and "territorial organisation". The issues agreed to be "vital" were "identity" and the following list: "education, religion, language, promotion of culture, tradition, and cultural heritage".[46] Finally, the Sarajevo Agreement conceded that other issues could be treated as being of "vital interest" if two-thirds of any one national caucus in the House of Peoples or Council of Peoples claimed it was.[47] The RSNA amendments repeat this definition.

As a compromise between parties that would have preferred a short and narrow list confined to traditional national issues like culture, religion and language and those who deprecated any definition whatsoever, the Sarajevo Agreement strikes an acceptable balance. Unfortunately, it remains incomplete. In the absence of a constituency opposed to any sort of discrimination, it fails to empower the bodies charged with defending "vital interests" to assess whether legislation might be generally discriminatory – whether against women, children, the elderly, the disabled or other groups. Nor does it allow for the retrospective review of acts and laws already in force.[48] A third omission relates to the right of return. The Constitutional Court's decision called specifically for a new clause in the RS constitution establishing "a positive obligation" for the authorities to stop discriminating against returning refugees and displaced persons. This, too, should fall within the purview of "vital interests".

1. Republika Srpska

The RS has had no parliamentary mechanism to protect "vital interests" and prevent discriminatory legislation from reaching the statute book – save the temporary Constitutional Commission created by the High Representative in January 2001. Before March 2002, the RS parties hotly rejected the Federation model of a full-fledged second chamber, i.e. a House of Peoples. Yet, in the 27 March agreement, they acceded to the creation of a Council of Peoples with some of the attributes of a second chamber, including the power to block and amend legislation related to "vital interests".[49]

The creation of a separate though weaker chamber in the RS was one of the principal arguments in favour of the compromise Sarajevo Agreement. If the procedures of this chamber would indeed allow non-Serbs to block and/or amend legislation to their detriment, then a major victory in the effort to remake both entities as multinational polities would have been won. However, although the procedures set out in the Sarajevo Agreement are quite complicated and detailed – especially in comparison to the cursory nature of most of its other provisions – they leave certain important steps unclear.

The amendments subsequently passed by the RSNA preserve much of the ambiguity, and hence the opportunities for manipulation. Other seemingly minor changes in the Sarajevo Agreement embodied in the RSNA amendments could significantly weaken the ability of the Council of Peoples to influence legislation.

According to the Sarajevo Agreement, all laws and other regulations passed by the RSNA that affect a "vital interest" must also be adopted by the Council of Peoples, composed of equal numbers of Bosniaks, Croats and Serbs, as well as some "others". Rather than prescribing how many members this body should have, the agreement stipulates that a minimum of eight and a maximum of seventeen members should represent each constituent people. The number of "others", meanwhile, cannot exceed half the number of members from each of the constituent peoples.

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[46] Missing from the list adduced in the Sarajevo Agreement are national symbols, a concession to the RS representatives who balked at losing or revising the Serb nationalist insignia and hymn of the RS.

[47] One of the RS signatories' two specific reservations related to this provision for "other issues" to be treated as vital, despite the fact that the two-thirds rule makes such an invocation procedurally more difficult than would be the case if a listed item were in question.

[48] There is much discriminatory legislation to be annulled or amended. The Federation Deputy Minister of Justice told ICG in early 2001 that, in the Federation alone, implementing the Constitutional Court decision would entail amending some 3,000 laws.

[49] Thus, the creation of a Council of Peoples did not figure among the reservations appended to the Sarajevo Agreement by the Serbs.

The method of electing representatives to the Council of Peoples was reportedly a bone of contention during the Sarajevo negotiations. The RS politicians wanted the RSNA to elect members of the Council of Peoples by general vote. The Federation parties argued that delegates from the municipal assemblies should elect its members. The RS parties insisted on election by the RSNA for two reasons. The first is that election from the municipalities would echo Federation practice, whereby cantonal assemblies "elect up" members to the House of Peoples. Such a method, combining regional and national representation, would give the Council of Peoples more clout as a proper second chamber. Secondly, election from the RSNA would suit the RS parties because it is at the level of individual municipalities that the Federation-based parties are strongest, reflecting geographically variable patterns of refugee return. On the other hand, the RSNA is overwhelmingly dominated by the Serb parties and, in particular, by the SDS.

In the end, a compromise was struck by which the national caucuses in the RSNA would elect "their" members to the Council of Peoples. But in case the number of delegates needed for the national caucus in the Council of Peoples is higher than a group's number of deputies in the RSNA, additional delegates would be elected by caucuses in the municipalities. For example, there is currently only one Croat in the RSNA, while there must be at least eight Croats in the Council of Peoples. The agreement also stipulates that, after the next municipal elections, the RSNA and the Council of Peoples will determine "the final manner" for election to the Council of Peoples, leaving open the possibility of a municipal-based election system.

The parliamentary procedure for protecting "vital interests" under the Sarajevo Agreement is labyrinthine. There are two ways for a "vital interest" to be raised. First, any two of the national chairs in the House of Peoples can claim that a law falls within the ambit of "vital interests", thus putting the law on the agenda of the Council of Peoples. A significant gap in the agreement, however, is its failure to explain how the chair and two deputy chairs that it envisages are to be selected. The presumption seems to be that they will represent their respective national caucuses, but this is not spelled out. In any case, a "vital interest" can also be raised by two-thirds of the members of a single national caucus, though in this circumstance a higher degree of consensus is required to block the law.

If an issue is raised in the first manner, a majority of members of each national caucus must approve the legislation if it is to pass. Significantly, both the Federation House of Peoples and the RS Council of Peoples would have the power to agree amendments and to re-submit the law, regulation or act to the other chamber. The RSNA amendments provide that if agreement within the Council of Peoples is not possible – or if the Assembly rejects amendments on which the Council does agree – a Joint Commission based on parity of representation is established. The Joint Commission is charged with harmonising the law with the "vital interest" at stake. If no harmonisation is possible, the law fails. There is no recourse to the RS Constitutional Court.

As for the second means of raising a "vital interest", if two-thirds of one national caucus bring up an issue, a higher standard must be met for the law to be changed or defeated. The law goes through the same procedure, but if the Joint Commission fails to reach consensus, the matter is referred to a "vital interest" panel of the RS Constitutional Court. Two-thirds of the members of the panel must agree on the admissibility of the "vital interest" case within one week and reach a decision on the issue itself within one month.

The Sarajevo Agreement provides that the "vital interest" panels of the entity constitutional courts are in both cases to be composed of seven judges: two from each constituent people and one "other". The judges are elected by both chambers. Securing a two-thirds majority of these panels would require five of the seven judges to support the claim. This sets an almost impossibly high standard. It would be more reasonable, for instance, to require a simple majority among all nine justices of each constitutional court in order to block legislation – provided, of course, that their benches were effectively multinational.

The amendments adopted by the RSNA on 4 April 2002 maintain some of the ambiguities in the Sarajevo Agreement and alter other clauses in such a way as to weaken the Council of Peoples. The main shortcomings of these RSNA amendments are as follows:

- The amendments omit the clause from the Sarajevo Agreement allowing for the method of election to the Council of Peoples to be changed after the next municipal elections.

- Neither the Sarajevo Agreement nor the RSNA amendments require the RSNA to forward copies of all legislation under consideration to the Council of Peoples in time for it to determine if a vital interest is at stake. While this may appear a procedural triviality, the manner in which the RSNA introduced and passed constitutional amendments without the support of the temporary Constitutional Commission demonstrates how procedural loopholes can be exploited to bypass supposed 'stakeholders'.

- The amendments allow the RS president to dissolve the Council of Peoples with the consent of the vice-presidents. If the vice-presidents do not concur, the president must seek the approval of the RS Constitutional Court. But the amendments make no provision for the Court to be reorganised on the basis of national parity.

- The procedures for halting or amending legislation vary significantly from those of the Sarajevo Agreement in defining the composition of the Joint Commission to be formed if the national caucuses cannot agree. The agreement stipulates that the commissions should be based on national parity. But the relevant RSNA amendment (LXXXII) simply states that the Joint Commission will have equal numbers of members from the RSNA and the Council of Peoples, leaving open the theoretical possibility that eight Serbs from each body could determine whether a law violates a vital interest of Bosniaks or Croats.

- The RSNA amendments also alter the Sarajevo Agreement's procedure for halting or amending legislation when two-thirds of a national caucus object. The agreement requires that two-thirds (five) of the members of the seven-member constitutional court panel must confirm that a vital interest is jeopardised in order to stop a piece of legislation. RSNA Amendment LXXXII raises the required majority to three-quarters (i.e., six of the seven), meaning that if any two judges on the panel think a vital interest is not at stake, the legislation passes. This is another example of setting an almost impossibly high standard, so rendering the successful invocation of a vital interest by two-thirds of one national caucus in the Council of Peoples an exceedingly remote possibility.

As noted above, another cause for concern is the fact that in neither the Federation House of Peoples nor the RS Council of Peoples will members have the authority to block legislation of a generally discriminatory character or to consider return-related issues among "vital interests". It also remains unclear whether the House/Council of Peoples will have any say in the appointment of government ministers, despite the inclusion of "the rights of constituent peoples to be adequately represented" in the executive among the Sarajevo Agreement's list of "vital national interests". Finally, the agreement fails to afford powers of retrospective review of existing legislation to the House/Council of Peoples.[50]

In short, by altering some and omitting other clauses of the Sarajevo Agreement, the RS parties have gone a long way towards neutering the Council of Peoples. Such changes cannot be allowed to stand. While the ultimate aim in BiH must be to create a citizen-based democracy in which individual rights take precedence over collective rights, as long as the state and Federation possess legislative mechanisms for safeguarding national entitlements, it will be unjust and unworkable – as well as unsymmetrical – if the RS is allowed to get away with lesser protections.

Paradoxically, it is the Serbs' absolute mastery of the RS that has allowed them to take such successful advantage of the "vital interest" mechanisms in state institutions. If, however, Bosniak and Croat caucuses in the RS have the power to block certain categories of legislation, that might make RS representatives think twice about their inveterate obstruction of state-level laws – unless, of course, a "vital interest" were really at stake.

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[50] As matters stand, the Federation House of Peoples can initiate legislation, but the RS Council of Peoples cannot.

2. The Federation

The Federation House of Peoples is already a powerful parliamentary mechanism for the defence of "vital interests". The Federation constitution provides for a House of Peoples composed of delegates elected from the ten cantonal assemblies: 30 Bosniaks, 30 Croats and a number of "others" proportional to their representation in those assemblies.[51] Although only a simple majority is normally required to pass legislation, a majority of the Croat or Bosniak caucuses can invoke a "vital interest" in a given matter, at which point the law cannot pass without securing a majority of votes of *both* Bosniaks and Croats.[52]

Although this procedure certainly offers adequate assurance of collective rights, it is too easily abused by canton-based national blocs to obstruct legislation. Since "vital interests" have not previously been defined, the national caucuses of the House of Peoples have had effective veto power over all legislation.[53] Before the Alliance for Change came to power in early 2001, the threat to invoke the "vital interests" clause was frequently abused to block or force amendments to legislation on innocuous issues such as highway construction that ought not to have come within its purview. In fact, the clause has actually been invoked only a few times, including on one occasion to declare that the parliamentary agenda itself violated a national interest!

The Sarajevo Agreement provides that the House of Peoples will remain the defender of "vital interests" in the Federation but requires parity of representation among the three constituent peoples. The "others" are to be "represented by a number not exceeding one half of the representatives of a single constituent people". In line with earlier proposals to cut the number of seats in both houses of the Federation Parliament, the agreement reduces the size of the House of Peoples.[54] As for questions of vital interest, the Sarajevo Agreement alters the procedures for their invocation in the House of Peoples in accordance with those specified for the new RS Council of Peoples. This means limiting the scope for national vetoes – a development that has outraged the HDZ.

Another objection of the HDZ has concerned the inclusion of "others" in the House of Peoples. The party has long argued that the "others" cannot, by definition, have "vital national interests" because they are a hodgepodge of minority groups. Many of the proposals for constitutional amendments circulated in the Federation before the signature of the Sarajevo Agreement thus excluded the "others" from the House of Peoples, but promised that a new law on national minorities would guarantee their rights. The Sarajevo Agreement's failure to set a minimum level of representation for the "others" in the House/Council of Peoples (although according them full voting rights) means that this argument will continue when the Federation parliament considers its set of amendments.[55]

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[51] The Constitution of the Federation of Bosnia and Herzegovina, Chapter IV, Article 6, Article 8, Article 19.

[52] Ibid., Chapter IV, Article 18.

[53] Ibid. If a majority of delegates in the chamber opposes an invocation of vital interests, and the question cannot be otherwise resolved, the FBiH Constitutional Court has the final word.

[54] The current Federation constitution allocates 30 seats to Bosniaks, 30 seats to Croats and a number of seats to "others" proportional to their representation in the cantonal assemblies. At the time of writing, this formula has resulted in a House of Peoples with 71 members, although this does not include delegates still to be appointed from Croat-majority Canton 10. The Sarajevo Agreement reduces the number of possible seats to 59, specifying that the House of Peoples (as well as the RS Council of Peoples), have no more than seventeen delegates from each constituent people, and no more than eight "others". The proposal before the Federation parliament sets the number of deputies in the House of Peoples at 58: seventeen from each of the constituent peoples and seven "others".

[55] The disturbing aspects of this argument are (1) that it ignores the significant number of citizens who once identified themselves as Yugoslavs (8 per cent in 1981 and 5.5 per cent in 1991) because they came from mixed marriages or had adopted a civic identity and (2) that it is implicitly discriminatory towards the members of Bosnia's 25 national minority groups (who accounted for 2.4 per cent of the population in 1991). Since there is no legal or accepted definition of what it means to be a Serb, Croat or Bosniak, the Croat contention that Bosniaks would manipulate the "others" to produce extra Bosniak votes could just as easily be turned on its head: that it would be the "others" who could manipulate the system by declaring themselves to be members of a constituent nation. This has surely happened on a large scale already. In any case, it would be retrograde to marginalise politically all those persons who consider themselves primarily to be citizens - or who might actually wish to be 'Bosnians'.

D. LANGUAGE

In addition to the challenge over how the entities' constitutions dealt with the constituent peoples, the Constitutional Court examined other disputed provisions. These included an article of the RS constitution making Serbian (in the Cyrillic alphabet) the language of "official use" in that entity and an article of the Federation constitution ruling that Croatian and Bosnian (in the Latin script) are the official languages of the larger entity.

Serbian, Croatian and Bosnian are mutually comprehensible and philologically indistinguishable; the dialectal differences among them are regional rather than national; and the term Serbo-Croat (or Croato-Serb) was generally accepted for most of the last century as encompassing a single linguistic and literary standard. Nevertheless, certain lexical and syntactical differences persisted and were cherished by nationally minded intellectuals. Over the past decade these differences have been assiduously nurtured, and sometimes officially endorsed, as badges of national identity.[56] The conviction, by no means unique to the Balkans, that any self-respecting nation must have its own language – or at least its own name for its language – means that there is nowadays no public disagreement among the national establishments either that three languages exist or that all three (in both alphabets) should be official in both entities. What is disputed is what the tongue spoken by Bosniaks should be called.

Bosniaks are in no doubt that they speak "Bosnian". But some Serb politicians in the RS argue that the Bosniaks' language must be called "Bosniak". To do otherwise would be to make Bosniaks the *Staatsvolk* or 'people of state', thereby promoting *majorizacija* and disadvantaging Serbs and Croats. On the other hand, many citizens of BiH – of any and all national persuasions – are prepared to describe their language as "Bosnian", if only because the term is regarded (except by extremists) as nationally neutral. As with the contention over the right of the "others" to be represented in the Federation House of Peoples, it would be perverse to outlaw an element of commonality.

It would be even more absurd to permit the members of one nation to forbid another nation to call its language what it wants. Indeed, by even the narrowest of definitions, language is a vital interest of Bosnia's constituent nations. Moreover, defining one of the variants as "Bosniak" would contradict the DPA, which endorses "Bosnian" – not Bosniak – as one of the languages of the agreement.[57]

Yet this is what the RSNA amendment (LXXI) on official languages has done, defining the third language as "Bosniak". Just because this may appear at first glance an issue of symbolism rather than substance, Serb wilfulness is all the more disturbing. When the Serb majority uses its parliamentary predominance to decree that the language of a numerical minority should be called something other than that minority wishes, the realities of power in the RS are demonstrated even more clearly than would have been the case had Serbian remained the entity's sole official language.

E. NATIONAL REPRESENTATION IN THE COURTS

The Constitutional Court decision pointed to the absence of non-Serbs among judges and prosecutors in the RS and of Serbs on the benches and in the courtrooms of the Federation as proofs of systematic national discrimination in the entities.[58] Judicial appointments in BiH (as

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[56] Ironically, the stokavian dialect selected in the first half of the nineteenth century by the great linguistic reformers of both the Serbs (Vuk Karadzic) and the Croats (Ljudevit Gaj) for elevation as their peoples' literary standard was that of eastern Herzegovina. This means that what became Serbo-Croat originated in Bosnia and Herzegovina.

[57] The General Framework Agreement for Peace in Bosnia and Herzegovina, Article XI. "Done at Paris, this [14th] day of December, 1995, in the *Bosnian*, Croatian, English and Serbian languages, each text being equally authentic". At Dayton there were three booths and three channels for simultaneous interpretation to and from the Bosnian, Croatian and Serbian languages, but only one common service. No one complained.

[58] IPTF figures made available to the Court showed, as of 17 January 1999, that 97.6 per cent of judges and prosecutors and 93.7 per cent of police officers in the RS were Serbs. In the Federation, 71.72 per cent of judges and prosecutors were Bosniaks, 23.26 per cent were Croats and 5 per cent were Serbs. No figures were available for "others". The Federation police employed 68.81 per cent

elsewhere) have long depended on the political conformity of appointees with the prevailing regime but during and since the war, they have also depended on the favour of the ruling nationalist political parties in their respective areas of control. Furthermore, in areas where civilians of the 'wrong' nation were illegally detained, raped, tortured, and murdered – or from which they were expelled – judges could scarcely avoid contamination by processes that were sometimes dignified with a spurious legality.[59]

True to their roles as upholders of national-political interests, judges from the benches of the BiH and RS constitutional courts have been busy lobbying on the implementation of the state Constitutional Court's decision. For example, RS judges have been among those warning that going "too far" in implementation would risk destroying Republika Srpska. Such engagement by the judiciary illustrates why representatives of the 'minority' nations are necessary on the entities' benches if nationally blind justice is ever to be established and refugees given the confidence to return to their homes.

Since the formation of the constitutional commissions, predictably different views of what would constitute "fair representation" of the constituent peoples in the judiciary have prevailed in the entities. The Federation government's February 2002 draft amendments asserted the general principle of national parity in the entity Constitutional and Supreme Courts, but with at least one judge representing the "others". Lower instance courts were expected to maintain proportional national representation based on the 1991 census figures in a given area.

RS politicians, judges and lawyers universally condemned basing judicial appointments on anything but merit. The RS Association of Judges and Prosecutors announced its opposition to quotas, keys or assigned places for non-Serbs, arguing that such positive discrimination would subvert the principle that professional qualifications should be the basis for judicial appointments.[60] The trouble with this argument, as with so many others advanced in the RS regarding constitutional reform, was that it was self-interested and selectively applied. At least two participants in the meeting at which the association adopted its stand had elsewhere disputed the legitimacy of the constituent peoples decision in its entirety, protesting that the foreign and Bosniak judges had ganged up to outvote the Serbs and Croats.[61] This very argument demonstrates that RS judges *do* see the courts as places where judges defend 'their' people's "vital interests".

In denying the need for national quotas in the judiciary, the president of the RS Supreme Court, Jovo Rosic, whose wartime past as a member of the Krajina Regional Crisis Staff is questionable at best,[62] pointed out that the RS Law on Courts and Court Services states that "[i]n the courts, multi-ethnicity, gender and national structures must be taken into account."[63] Yet this fact actually supports the opposite argument. Given the national homogeneity of the judiciary decried in the Constitutional Court's decision, the presence in RS law of an explicit call for multi-ethnicity shows that current RS mechanisms for ensuring fair representation in the judiciary are wholly inadequate.

The Sarajevo Agreement asserts no specific requirement of parity in the judiciary. As noted above, however, it does mandate the creation of seven-member panels of the entities' constitutional courts that would supervise the protection of vital interests. The panels are to consist of two judges from each of the constituent nations and one "other". By implication, this would mean that at least two Bosniaks, two Croats, two Serbs and one "other" would have serve on or be appointed to each constitutional court, the membership of which the agreement limits to nine judges. Draft Amendment XLVIII of the latest Federation

Bosniaks, 29.89 per cent Croats, 1.22 per cent Serbs, and 0.08 per cent "others". Constitutional Court of Bosnia and Herzegovina, "Request for evaluation of certain provisions of the Constitution of Republika Srpska and the Constitution of the Federation of Bosnia and Herzegovina", Case No. U 5/98-III, Third Partial Decision, 1 July 2000, Paragraphs 92 and 136.

[59] For an analysis of the state of the BiH judiciary and international reform efforts, see ICG Balkans Report No. 127, *Courting Disaster: The Misrule of Law in Bosnia & Herzegovina*, 25 March 2002.

[60] "Struka ispred kljuca", *Glas Srpski*, 9-10 February 2002.

[61] Interview with President of the Constitutional Court, Snezena Savic, "Bosnjaci koriste strance", *Glas Srpski*, 19-20 January 2002.

[62] See ICG Balkans Report No 103, *War Criminals in Bosnia's Republika* Srpska, 2 November 2000.

[63] "Struka ispred kljuca", *Glas Srpski*, 9-10 February 2002.

proposal, based on the Sarajevo Agreement, makes this implication explicit by requiring that the Constitutional Court should have at least two judges from each nation and one "other". In the RSNA amendments, however, the possibility is left open that the seven judges on the vital interest panel of the RS Constitutional Court need not actually be judges of the Court!

As for the composition of regional courts (cantonal courts in the Federation and district courts in the RS) and municipal courts, the Sarajevo Agreement calls for proportional representation, based on the 1991 census, until such time as Annex 7 is implemented. The Agreement wisely obliges the authorities to implement national proportionality according to strict timelines. Without such a requirement, it would be in the interest of nationalist parties to delay appointing new judges until Annex 7 had been implemented and the requirement ceased to apply. One significant gap in the Sarajevo Agreement, however, is that it fails to regulate national representation in the entities' supreme courts.

The 4 April RSNA amendments violate the Sarajevo Agreement by basing national representation in the judiciary on current population figures rather than on the 1991 census.[64] The draft amendments now before the Federation parliament repeat the formula of the Sarajevo Agreement.

While full parity among the constituent peoples in both entities' constitutional and supreme courts (with a certain number of places for "others") would be ideal, the solution implied by the Sarajevo Agreement for the entity constitutional courts is acceptable. It would prevent a single constituent people from occupying the majority of seats on the bench. But a means should be found to provide for national parity in the entity supreme courts. In the courts of lower instance, proportionality based on the 1991 census – as prescribed by the Sarajevo Agreement – is a good measure and should be applied in the RS, notwithstanding the RSNA amendments. Proportional representation should also apply to public prosecutors, even though the Sarajevo Agreement mentions only chief entity prosecutors among the key offices to be shared.

As the international community prepares for what the 28 February 2002 meeting of the PIC euphemistically termed a "reinvigorated strategy for judicial reform",[65] the consequent restructuring of the courts will in any case have to take the Constitutional Court's decision into account in ensuring that the principle of "fair representation" is entrenched throughout the judiciary.

F. THE POLICE, ADMINISTRATION AND PUBLIC AUTHORITIES

Both the decision of the Constitutional Court and the recommendations of the Council of Europe's Venice Commission indicated that full implementation should include guarantees of representation for the constituent peoples and others at the cantonal and municipal levels, in the administrations of the entities, in the police, and in other public authorities.[66] Thus one of the implications of the Constitutional Court's decision is that local government, the police, public schools and hospitals, the courts, and public companies will need to integrate all three peoples and "others" into their ranks. Integrating returning "minorities" into public life and offering them opportunities for employment is one of the pre-conditions for sustainable return.

[64] This provision also creates a Catch 22, since the current national composition of the RS population could only be determined by a new census, but a new census would mean even fewer non-Serbs in government, the legislature and judiciary.

[65] Communiqué of the Steering Board of the Peace Implementation Council, Brussels, 28 February 2002.

[66] The Committee of Ministers of the Council of Europe established the European Commission for Democracy through Law – known as the "Venice Commission" – in 1990, after the fall of the Berlin Wall. The commission, "initially conceived as a tool for emergency constitutional engineering at a time of revolutionary change", has "played a leading role in the adoption, in Eastern Europe, of constitutions that conform to the standards of Europe's constitutional heritage". The commission's main task is providing "constitutional assistance" to countries in transition. Members include academic specialists in constitutional and international law, supreme and constitutional court judges, public officials, and national members of parliament appointed by the Council of Europe's member states. More information about the commission and its views on the Bosnian "constituent peoples" case can be found on the commission's internet site: www.venice.coe.int.

The Sarajevo Agreement provides for proportional representation in "public authorities" to be based on the 1991 census until Annex 7 has been implemented. Among those "public authorities" it lists lower instance courts, the ministries of the entity and cantonal governments and the municipal governments. It fails to mention the police or other categories of civil servants.

RSNA Amendment LXXXV not only departs from the Sarajevo Agreement in regard to the courts, but also in relation to municipal authorities, stipulating that in "the municipal authority bodies the representation of the constituent people and group of the minority national and ethnic communities shall be proportional to the ethnic composition of the population and composition of the Municipal Assembly."

This refusal to respect the Sarajevo Agreement at the local level (though the RS representatives did not record their objections at the time of the agreement) reflects the political significance of the municipalities in the RS and, particularly, in its eastern marches. It is there that hard-line SDS politicians and warlords have their power bases and secessionist sentiment is strongest. Towns such as Bratunac, Foca, Rogatica, Srebrenica, Visegrad, Vlasenica and Zvornik all had Bosniak majorities or pluralities in 1991 that were "ethnically cleansed" during the war. The SDS resettled Serbs from the Sarajevo suburbs and other parts of the Federation in these areas as part of its project to partition and destroy BiH. In many of these places the same people who organised or took part in war crimes against non-Serbs retain power in municipal councils, the police and networks of organised crime. They are the bedrock power base of the SDS functionaries in Banja Luka.

Although an encouraging movement of Bosniak returns to the area has occurred over the last two years, returnees have met with systematic discrimination from local public authorities, including the police, who have largely failed to protect them from violent, sometimes deadly, attacks.[67] Integration of public authorities in these areas would represent the greatest challenge yet to Serb dominance and Karadzic's project.

It should be no surprise, therefore, that RSNA Amendment LXXV would only apply the Sarajevo Agreement's formula for representation in public authorities to "elected administrative officials in the Ministries" at the entity level.[68]

The draft amendments to be considered in the Federation parliament merely cut and paste the required texts from the Sarajevo Agreement. A separate and potentially thorny issue in the Federation, however, is the question of implementation at the level of the cantons. The Sarajevo Agreement states that the cantons must apply "the principles contained in this document" within nine months of their adoption as constitutional amendments by the entities. Moreover, "Vital interest protection bodies shall be established in the Cantons and minimum representation has to be guaranteed with regard to the Cantonal Governments". The nine-month time limit presumably applies in this case as well.

The proposed Federation amendments follow the Sarajevo Agreement in regard to all other public authorities, including municipalities. Certain Federation municipalities have heretofore done their worst to inhibit refugee return, including west Mostar, the Stari Grad municipality of east Mostar, Srebrenik, Visoko, and Glamoc.[69] Both the Federation government and the international community can expect opposition to real power sharing in these towns.

As for the police, both the Sarajevo Agreement and the resulting entity amendments or draft amendments remain silent. The UN International Police Task Force (IPTF) has long since sought to promote 'minority' (and female) recruitment to the entities' police forces, both as a means of reforming their ethos and operations and as a contribution towards encouraging refugee return. Although minority recruitment levels remain far below target, affirmative action in the enrolment of cadets for the police academies has at least

[67] Low rates of property law implementation in the eastern RS confirm the region's reputation as a virtual no-go area for non-Serbs. Rates are particularly dispiriting in Bratunac, Foca, Srebrenica, Visegrad, and Zvornik. Review of Implementation of the Property Laws in Republika Srpska, 31 January 2002. See www.ohr.int/plip/pdf/plip_02.02.pdf.

[68] Again, the RS amendment does not specifically cite the 1991 census, referring instead to the "last census".

[69] Review of Implementation of the Property Laws in the Federation, 31 January 2002. www.ohr.int/plip/pdf/plip_02.02.pdf.

initiated a process of integration. Unfortunately, police reform in the RS began later than in the Federation and was compromised at the outset by a deal in which IPTF agreed to base RS minority recruitment quotas on post-war election results, rather than on the 1991 census as in the Federation.[70] One implication of the Constitutional Court's ruling is that recruitment standards between the entities will need to be equalised.

National integration on the level of the municipality is likely to encounter the greatest resistance in the eastern RS and in parts of Herzegovina, where the political imperative to preserve the achievements of 'ethnic cleansing' is also greatest. One of the key tasks of the entities' executive, legislative and judicial branches will be to ensure that the arrangements for protecting those "vital interests" that they will themselves embody are also applied in the municipalities. Given the Constitutional Court's focus on creating political, economic and social conditions conducive to refugee return, local implementation will be critical.

[70] Framework Agreement on Police Restructuring, Reform and Democratisation in the Republika Srpska, Article 8, 1998.

III. WHICH DAYTON?

As blueprints for a functional and equitable multinational state, the DPA and the constitution it contains are deeply flawed. The constituent peoples case and the debates surrounding it in the two entities have highlighted the fundamental Dayton contradiction of attempting to guarantee the highest level of individual rights while, at the same time, accommodating the demands of nationalists and separatists to preserve and reify collective rights in 'cleansed' enclaves. The constituent peoples decision is important because it attempts to square this particular circle and to use Dayton to improve upon Dayton.

It would be tempting to throw up one's hands in despair: to call for a constitutional convention or 'Dayton II' to redefine the organisational structure of BiH and create a 'citizen-based' democracy within a state actually possessed of state-like powers and functional institutions. After so many years of trying and failing to make 'Dayton I' work, some have understandably yielded to this temptation. While implementation of the Constitutional Court decision cannot achieve such a radical result, it does promise to break the stalemate.

The model of three constituent peoples and two entities can be pushed in one of two directions: either towards recognising the right of the third and smallest people, the Croats, to have their own mini-state, or towards making both entities truly and effectively multinational. The constituent peoples decision represents an attempt to transform the existing entities within the Dayton architecture and to move Bosnia in the second direction. As long as BiH is obliged to struggle with the concept of constituent peoples, it is illegitimate for one half of the country to deny and repudiate this principle within its territory and for the other half to embrace it only in part. While it cannot deliver ideal equality, implementing the Constitutional Court's decision will be a big step towards reintegrating and reconciling Bosnia's peoples. It should also set the stage for streamlining the state structures.

Those in the Federation who have eagerly hailed the decision as heralding a fundamental revision of Dayton and those in the RS who have denounced it in apocalyptic terms as a violation of Dayton are

both mistaken. Constitutions are not static. They contain mechanisms, including judicial ones, for their revision. In fact, the Constitutional Court's ruling relies on the absolute principles of individual rights, collective rights and the right to return that are enshrined in the DPA, particularly in Annex 7. These are the integrative aspects of the agreement that the RS authorities have sought consistently to subvert, minimise or deny, while exaggerating the state-building implications of the territorial division legitimised by Dayton.

This bad-faith interpretation of Dayton sees BiH as a legal fiction that serves to prevent another war by recognising the RS as the "nation-state" of the Bosnian Serbs with virtually all the attributes of full sovereignty, including the right one day to secede. In arguing before the Constitutional Court against changes to the entity constitutions, Petar Kunic, the expert of the RSNA, contended that the entities' "peoples have a collective right of 'self-organisation' of their own state so that the entities would act "according to the decisions taken at the level of the common institutions only if they conform with their own interests". In particular, "*[I]t is entirely clear that the RS can be called a state because her statehood is the expression of her original united ethnic basis and forms an independent system of power in order to live really independently, although as an independent entity in the framework of a complex state community*".[71] Kunic could not bring himself even to describe BiH as a "complex state". Rather, he had to call it a "complex state *community*".

Having long asserted their right to a collective Serb entity (and national) veto at the level of this non-existent state, the RS leaders started to champion the virtues of a citizen-based democracy only when asked to institutionalise the collective rights of non-Serbs within the RS. This was a transparently expedient step, taken to justify the denial of due collective rights to non-Serbs. However, in arguing that their entity should be organised on the basis of citizens' rather than national rights, they unintentionally negated the founding concept of an entity heretofore defined by its constitution as the homeland of a single nation, the Serbs. Aside from the preamble to its constitution, the RS is indeed structured as a 'state' of all its citizens. It just so happens that it has contrived to create a body politic largely restricted to those citizens who were not murdered, terrorised or forcibly expelled between 1992 and 1995.

This, of course, is the point. While hailing election results and individual merit as the proper bases for representation in government and public institutions – and disparaging an eleven-year-old census and national quotas as proper alternatives – appeared at first glance to be both logical and democratic, such casuistry accords neither with Bosnia's recent history nor with the DPA. Dismissals of the relevance of the 1991 census and references to subsequent "demographic changes" not only verged on the obscene, but effectively sought to ensure that those who were 'cleansed' will never exercise their right to return.

[71] Emphasis added. Constitutional Court of Bosnia and Herzegovina, "Request for evaluation of certain provisions of the Constitution of Republika Srpska and the Constitution of the Federation of Bosnia and Herzegovina", Case No. U 5/98-III, Third Partial Decision, 1 July 2000, Paragraph 13.

IV. CONCLUSION

The current process of constitutional reform has the potential to relieve a good deal of the pain arising from Dayton's attempt to fit three constituent peoples (and "others") into two entities, as well as to facilitate 'minority' return. Although the RS parties complained long and bitterly about having to compromise – and did not shrink from comparing circumstances in 2001-02 to those that led to war in 1992 – Serbs will retain their political and "demographic" dominance of the RS even if the terms of the Sarajevo Agreement are strictly applied. The fact that the RSNA was not prepared to abide in full or in good faith with the agreement means that the international community in general and the High Representative in particular now confront a challenge that always appeared likely.

They must decide between accommodating themselves to RS duplicity and bluster or upholding the integrity of the Sarajevo Agreement; between betraying the Federation parties that accepted a less than perfect compromise or seizing a probably unique opportunity to realise Dayton's better half. The choice may be difficult, but it is also clear. If the RSNA will not 'correct' its amendments, then the High Representative will have to do so through imposition. The existence of Serb signatures on the agreement makes this a far less daunting or ominous prospect than would have been the case before 27 March 2002. The predictable threats of resistance and claims that the very existence of the RS is at risk can now be taken with a grain of salt. Serb politicians may well succeed in rallying and terrifying their constituents with warlike noises, but they must not succeed in scaring the High Representative or the PIC Steering Board into accepting an inadequate, unworkable and unjust set of amendments.

Although Bosniaks now form a large majority in the Federation, their representatives in the Alliance for Change have been ready both to share power more comprehensively in the Federation and to eschew utopian demands for the utter transformation of the RS. They have understood that by compromising they will take a small step towards reintegrating BiH and a large step towards creating the conditions for refugees and DPs to return to their homes. If the Sarajevo Agreement is not enforced, the Alliance will be likely to break up and its parties punished at the polls for surrendering so much to achieve so little. The SBiH is already threatening to withdraw its signature from the Sarajevo Agreement, and the SDA is saying 'We told you so'.

The moderate Croat parties are similarly afflicted. Like its long-time SDA partner in parallelism, the HDZ relishes the current situation. The refusal of the RSNA to live up to the terms of the Sarajevo Agreement enhances the ability of the HDZ to make trouble in the forthcoming debate on constitutional amendments in the Federation parliament. It and the SDA may team up to force changes in the current draft amendments that would also deviate from the Sarajevo Agreement.

As the smallest of the three constituent peoples, Croats fear that if Bosniaks lose faith in a multinational state, they will seek to dominate the Croats in the Federation. The HDZ machine lives off this fear. The moderate Croat parties need reasonable – and reasonably symmetrical – solutions in both entities, allowing them to demonstrate that moderation pays, that Croats can have a secure home throughout BiH, and that the HDZ is not their only or compulsory national refuge.

As discussions continue over the international response to the RSNA amendments and other threats to the Sarajevo Agreement, it ought to become obvious, even to the most timorous advocates of "ownership", that the High Representative will have to intervene. The latent threat of imposition not only produced, between January and March 2002, more inter-party and inter-entity talks than post-war BiH had ever seen; it also lay behind the last-minute achievement of the Sarajevo Agreement. This means that an imposition to uphold the terms of the agreement would be no radical departure, and could be portrayed in any case as a matter of dotting 'i's and crossing 't's. But a failure to realise the potential of the moment would be a major departure – in the wrong direction.

Sarajevo/Brussels, 16 April 2002

APPENDIX A

GLOSSARY OF ABBREVIATIONS

BiH Bosnia & Herzegovina

DPA Dayton Peace Accords

DPs Displaced persons

EC European Commission

EU European Union

FBiH Federation of Bosnia & Herzegovina

HDZ Croat Democratic Union (predominant party of the Croat nationalist establishment in BiH)

HVO Croat Defence Council

ICTY International Criminal Tribunal for the former Yugoslavia

IPTF UN International Police Task Force

NHI New Croat Initiative (small centrist party in the Alliance for Change coalition)

OHR Office of the High Representative

OSCE Organisation for Security & Cooperation in Europe

PDP Party of Democratic Progress (ostensibly moderate party of RS Prime Minister Mladen Ivanic)

PIC Peace Implementation Council

RS Republika Srpska

RSNA Republika Srpska National Assembly

SBiH Party for Bosnia & Herzegovina (mainly Bosniak party of wartime foreign minister Haris Silajdzic, member of Alliance for Change)

SDA Party of Democratic Action (principal Bosniak nationalist party, in opposition to the Alliance for Change coalition)

SDP Social Democratic Party (multinational party and strongest member of the Alliance for Change coalition)

SDS Serb Democratic Party (largest RS party, maintains legacy of its first president, Radovan Karadzic)

SFOR NATO-led Stabilisation Force

SNSD Party of Independent Social Democrats (swing party led by former RS Premier Milorad Dodik)

APPENDIX B

MAP OF BOSNIA & HERZEGOVINA

Map No. 3729 Rev. 2 UNITED NATIONS
January 2000

Department of Public Information
Cartographic Section

APPENDIX C

ABOUT THE INTERNATIONAL CRISIS GROUP

The International Crisis Group (ICG) is a private, multinational organisation committed to strengthening the capacity of the international community to anticipate, understand and act to prevent and contain conflict.

ICG's approach is grounded in field research. Teams of political analysts, based on the ground in countries at risk of conflict, gather information from a wide range of sources, assess local conditions and produce regular analytical reports containing practical recommendations targeted at key international decision-takers.

ICG's reports are distributed widely to officials in foreign ministries and international organisations and made generally available at the same time via the organisation's Internet site, www.crisisweb.org. ICG works closely with governments and those who influence them, including the media, to highlight its crisis analysis and to generate support for its policy prescriptions. The ICG Board – which includes prominent figures from the fields of politics, diplomacy, business and the media – is directly involved in helping to bring ICG reports and recommendations to the attention of senior policy-makers around the world. ICG is chaired by former Finnish President Martti Ahtisaari; former Australian Foreign Minister Gareth Evans has been President and Chief Executive since January 2000.

ICG's international headquarters are at Brussels, with advocacy offices in Washington DC, New York and Paris and a media liaison office in London. The organisation currently operates eleven field offices with analysts working in nearly 30 crisis-affected countries and territories and across four continents, including Burundi, Rwanda, the Democratic Republic of Congo, Sierra Leone-Liberia-Guinea, Somalia, Sudan and Zimbabwe in Africa; Myanmar, Indonesia, Kyrgyzstan, Tajikistan, Uzbekistan, Pakistan and Afghanistan in Asia; Albania, Bosnia, Kosovo, Macedonia, Montenegro and Serbia in Europe; Algeria and most countries in the Middle East; and Colombia in Latin America.

ICG raises funds from governments, charitable foundations, companies and individual donors. The following governments currently provide funding: Australia, Canada, Denmark, Finland, France, Germany, Ireland, Luxembourg, the Netherlands, Norway, the Republic of China (Taiwan), Sweden, Switzerland and the United Kingdom. Foundation and private sector donors include The Ansary Foundation, The Atlantic Philanthropies, Bill and Melinda Gates Foundation, Carnegie Corporation of New York, Charles Stewart Mott Foundation, Ford Foundation, John D. and Catherine T. MacArthur Foundation, John Merck Fund, Open Society Institute, Ploughshares Fund, Ruben and Elisabeth Rausing Trust, Sasakawa Peace Foundation, and William and Flora Hewlett Foundation.

April 2002

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