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## The Third Balkan War and Political Disunity: Creating a Confederated Cantonal Constitutional System

Peter J. Cannon

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## The Third Balkan War and Political Disunity: Creating a Confederated Cantonal Constitutional System

### Cover Page Footnote

J.D., The Florida State University College of Law 1996; B.A., Florida Atlantic University 1993. I dedicate this Article to my wife Marie who supported me throughout this endeavor.

# THE THIRD BALKAN WAR AND POLITICAL DISUNITY: CREATING A CONFEDERATED CANTONAL CONSTITUTIONAL SYSTEM

PETER J. CANNON\*

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[A]nd it was in our own tongue they spoke. So we knew they were our brothers the Croats, and because they were our brothers we knew that they meant it, and so they came against us, and we had to kill them, and in the morning they all lay dead, and they were all our brothers.<sup>1</sup>

## I. INTRODUCTION

The current crisis in the region known as the former Yugoslavia<sup>2</sup> has caused international concern over modern-day peacekeeping efforts.<sup>3</sup> Since the secession and recognition of three republics in 1991 and 1992, a costly war, in both military and civilian terms, has ravaged the region. Fueled by unbridled nationalism, ethnic divisions and atrocities have taken center stage in the war's prolongment and, ultimately, play a crucial role in its resolution.

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1. REBECCA WEST, *BLACK LAMB AND GREY FALCON* 89 (1969).

2. Yugoslavia stands for "Land of the Southern Slavs." Although the term "former Yugoslavia" is used frequently, it is incorrect because the country of Yugoslavia still exists. It is currently comprised of the republics of Serbia and Montenegro, otherwise known as "rump Yugoslavia."

3. Naturally, the concern over escalation of the war causes intrepidation among many European communities because of the locale of hostilities. Within a few hundred miles of the conflict are the ancient capitals of Eastern Europe such as Sofia, Bucharest, Bern, Budapest, Vienna, and Tirana. Six countries border the region. These are Italy, Austria, Hungary, Romania, Bulgaria, Greece, and Albania.

This will come as no surprise to observers of the region. The Balkans is a crossroads of several different ethnic cultures and has been a virtual powder keg of hostilities for hundreds of years.<sup>4</sup> Only in recent history did the region comprise a single nation. After the breakup of the Soviet Union and the fall of communism, the fragile chords of union dissolved. The area most affected by the war is the independent country of Bosnia and Herzegovina.<sup>5</sup> Containing one of the ancient capitals of Eastern Europe, Sarajevo,<sup>6</sup> the country was torn asunder by the clash of Muslim,<sup>7</sup> Serb and Croat forces.

Populations of many cultures inhabit Bosnia and Herzegovina making it a natural situs for hostilities. Each major ethnicity desires control of its various ethnic regions. Unfortunately, these pockets of nationalities are not easily divisible.<sup>8</sup> Ethnic populations inhabit areas of other major ethnicities, rendering an equitable division of the country between the warring factions nearly impossible.<sup>9</sup>

This Article will focus primarily on the political solution necessary after hostilities have ceased in Bosnia and Herzegovina.<sup>10</sup> It is inevitable that the other major regions will retain their own independent status. Bosnia, however, poses difficult problems because of the confluence of different nationalities in the region.

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4. For example, the assassination of Archduke Ferdinand by Gavrilo Princep, a Serbian nationalist, sparked hostilities that culminated in the First World War. For a good understanding of the region and its many cultures, some of the most enlightening treatments are: REBECCA WEST, *BLACK LAMB and GREY FALCON* (1969), and MISHA GLENNY, *THE FALL OF YUGOSLAVIA: THE THIRD BALKAN WAR* (1992).

5. After its secession, Bosnia-Herzegovina was recognized by the U.N. and the EC. Ulrike Davy, *Refugees From Bosnia and Herzegovina: Are They Genuine?*, 18 SUFFOLK. TRANSNAT'L L. REV. 53, 54, n.2 (1995). Today, the nation is now recognized by the Dayton Peace Agreement as Bosnia and Herzegovina. DAYTON PEACE AGREEMENT ON BOSNIA-HERZEGOVINA, November 21, 1995, DEP'T ST. BULL., Nov. 30, 1995 [hereinafter DAYTON PEACE AGREEMENT]. Many of these documents are now easily accessible through the Internet on BosniaLink, the Pentagon's Web Page that is continuously updated. This information can be found at <http://www.dtic.dla.mil/Bosnia/>. In addition, the State Department operates its own Internet site at <http://dosfan.lib.uic.edu/boshome.html>.

6. Sarajevo was the site of the Winter Olympic games in 1984. The wooden stands that once held cheering spectators are now materials for the construction of coffins.

7. Under the Dayton Peace Agreement, Muslim inhabitants of Bosnia and Herzegovina are now known as Bosniacs. DAYTON PEACE AGREEMENT, Annex 4: Constitution of Bosnia and Herzegovina.

8. See John J. Mearsheimer and Stephen Van Evera, *When Peace Means War*, THE NEW REPUBLIC, December 18, 1995, at 16.

9. *Id.* Many cities, also known as enclaves, are dominated by Muslims. Cities such as Bihac, Zepa, Goradze and Sarajevo were turned into virtual battlezones as Serb forces attempted to eradicate Muslim influence. Many of these cities were designated "safe-havens" by the United Nations but, ultimately, fell to Serb forces. *Id.*

10. It should be stressed that this Article attempts only a political solution and not a behavioral one. Political scientists often agree that behavior such as that which has dominated the Balkans cannot be controlled by political systems alone.

In creating and implementing a constitution for Bosnia and Herzegovina, the problems of minority representation and protection in a republic are magnified, calling for a blend of old and new solutions. Part II of this piece will give a brief explanation of the current political and military crisis in the Balkans. Part III will then focus on the roots of the various nationalistic and ethnic problems that have plagued the region for centuries. Part IV will analyze the former Constitution of Yugoslavia and how it operated to keep these factions together for several decades. Parts V and VI will analyze two models of government and attempt to draw from the strengths of each in creating a political solution. Part VII will attempt to examine in detail the relevant portions of the Dayton Peace Agreement and Annex 4 which created a Constitution for the Republic. Finally, part VIII will conclude the piece by offering a better solution by applying those principles of constitutional government best suited to Bosnia and Herzegovina not adequately addressed by the parties under Annex 4 of the Dayton Peace Agreement.

## II. THE YUGOSLAV WARS OF SUCCESSION

On June 25, 1991, the Yugoslavian republics of Slovenia<sup>11</sup> and Croatia<sup>12</sup> seceded from the Yugoslav Federation<sup>13</sup> and became independent states. After the declarations of independence, the Yugoslavian Army ("JNA") attacked Slovenia but was defeated by the well-prepared Slovenian Territorial Defenses.<sup>14</sup> Conflict in Croatia was protracted, however, as the Serbian minority in Croatia, known as the Krajina Serbs, along with the JNA gained control of nearly one-third of the country. A mediation between the warring factions sponsored by the United Nations and brokered by former U.S. Secretary of State Cyrus Vance led to a cease-fire agreement in 1992.<sup>15</sup>

On March 1, 1992, a third republic, Bosnia-Herzegovina, declared its independence and sovereignty. In April, the JNA attacked the tiny republic and controlled within days nearly sixty percent of its territory.<sup>16</sup> After international protests, the JNA withdrew the next month leaving control of the lands in the hands of the Bosnian Serbs

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11. 88% of Slovenian voters voted for independence.

12. 94% of the Croatians voted for independence.

13. Prior to the breakup of Yugoslavia, the Yugoslav republics were Slovenia, Croatia, Bosnia-Herzegovina, Montenegro, Serbia, and Macedonia. Two other regions, Kosovo and Vojvodina were autonomous.

14. Davy, *supra* note 5, at 55. The Territorial Defense Forces were organized in the various republics as a separate and extra protection for enemy attack from external enemies of Yugoslavia.

15. *Id.*

16. *Id.* at 56.

led by General Ratko Mladic.<sup>17</sup> During this same period, the collective presidency of Yugoslavia collapsed.

Nearly forty-eight months of "civil war"<sup>18</sup> has left Bosnia-Herzegovina an indistinguishable relic of its former self. When a Serb mortar shell fell upon a Sarajevo open-air market in August of 1995, NATO warplanes attacked strategic points held by the Serb army in Bosnia.<sup>19</sup> Prior Serb indignation to international protests crippled the collective peace-keeping efforts of the United Nations, rendering its decision-making apparatus inadequate for military responses.<sup>20</sup> NATO members, fearing a widening of the war to the other former republics, ignored the UN and attempted to force the Serbs to a negotiated peace.<sup>21</sup> Repeated NATO airstrikes coupled with Croatian military advances accomplished this objective and brought the Serbs to the negotiating table.<sup>22</sup>

In October of 1995, a general cease fire was observed. Nearly two months later, the warring factions signed the Dayton Peace Agreement after several rounds of negotiations in Dayton, Ohio. These negotiations were made at the behest of the Contact Group nations consisting of the United States, Britain, France, Germany and Russia with the European Union Special Negotiator.<sup>23</sup> The Dayton Agreement included a General Framework Agreement and eleven other provisions ("annexes") which covered all aspects of the peace process and nation-building.

Prior to the outbreak of hostilities, Slovenia, Croatia, and Bosnia-Herzegovina attempted to amicably resolve differences held between the Slovenes, Croats, and Bosnian Muslims on one side and the Serbs on the other.<sup>24</sup> The attempted resolution was made difficult by the collective presidency system which virtually guaranteed four of its

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17. *Id.* at 57. Many observers of the current crisis in the region view General Mladic as the major player in the crisis. His influence in Serbia is more substantial than his civil counterpart Radovan Karadavic. Roger Thurow, *At Balkans Crossroads, No Turn Is Safe*, WALL ST. J., Sept. 6, 1994, at A7.

18. Although Western powers continuously labeled the war as an internal conflict, both Croatia and Serbia have lent a considerable amount of support to the warring factions. In August of 1995, the Croatian Army moved into Bosnia in an effort to repel the Serbs from the region around Bihac and Banja Luka. *Politics By Other Means*, WALL ST. J., April 28, 1995, at A12.

19. Thomas E. Ricks, *NATO Planes Attack Serbs Around Sarajevo*, WALL ST. J., Aug. 30, 1995, at A3.

20. Anna Husarska, *Finally, A Use for UN Weapons*, WALL ST. J., Aug. 3, 1995, at A8.

21. Takis Michas, *The Perils of Dividing Bosnia*, WALL ST. J., Sept. 7, 1995, at A14.

22. Mearshimer & Van Evera, *supra* note 8, at 18.

23. DAYTON PEACE AGREEMENT (1995).

24. Richard F. Iglar, *The Constitutional Crisis in Yugoslavia and the International Law of Self-Determination: Slovenia's and Croatia's Right to Secede*, 15 B.C. INT'L & COMP. L. REV. 213, 218 (1992).

eight votes to Serbian nationalists.<sup>25</sup> When all avenues failed, the Slovenians and Croats attempted to exercise their constitutionally protected right of secession.<sup>26</sup> The Serbs, on the other hand, wished to create a Pan-Serbian state in order to protect the Serbian "minorities" located in the several Yugoslav republics.<sup>27</sup> This was met with repeated resistance by the other republics. The resurgence in Serbian ultra-nationalism frightened the leaders of the other republics and ultimately led to the breakup of Yugoslavia.<sup>28</sup>

The crisis in Bosnia-Herzegovina has been attributed, specifically, to three main problems. First, the parties in Bosnia-Herzegovina never attempted to organize across nationalistic lines.<sup>29</sup> There were no issues greater than the cultures themselves. Prior to the elections and votes on independence, one could see scores of flags with green crescents announcing the Muslim's Party of Democratic Action ("SDA") in one village, banners depicting the *sahovnica*, the emblem of the Croatian Democratic Union, in another small hamlet, and finally, areas to the south were covered with the ancient four Cs, depicting towns that supported the Serbian Democratic Party.<sup>30</sup> By causing political friction between nationalities, Bosnian politics underestimated the threat of nationalism and its military consequences.<sup>31</sup>

Second, after the fall of communism, no party attempted or achieved political dominance across nationalistic lines.<sup>32</sup> Within the 18 month period before the outbreak of war and after the fall of communism, not a single law was passed by the Bosnian parliament.<sup>33</sup> This ineffectual leadership created a vacuum in which leaders with nationalistic undertones could gain popularity.

Finally, the path to recognition taken by Bosnia-Herzegovina created a no-win situation.<sup>34</sup> With the succession of Croatia and Slovenia, many political leaders in Bosnia, especially the Muslims, were pressured into following suit. While past successes may have been inspirational to the Bosnian Separatists, the Separatists did not take into account the proximity of Bosnia to Serbia and the military

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25. Phillip J. Cohen, *Ending the War and Securing Peace in the Former Yugoslavia*, 6 PACE INT'L L. REV. 19, 27 (1994).

26. See *infra* notes 157-64 and accompanying text.

27. Cohen, *supra* note 25, at 27.

28. *Id.*

29. GLENNY, *supra* note 4, at 146.

30. *Id.*

31. See *id.*

32. *Id.* at 147-48.

33. *Id.* at 148.

34. *Id.* at 150.

preparations made by the Bosnian Serbs under the leadership of Radovan Karadzic.<sup>35</sup> While peace raged in the region, Serbian President Milosevic<sup>36</sup> armed the Serbian nationalists in Bosnia for an all out war.<sup>37</sup> After the tanks of the JNA rolled in and out again, territory given up by Serbia in the name of peace was merely handed over to Serbs of a different banner.

### III. THE PROBLEMS OF NATIONALISM

The Balkan region is populated by several nationalities: Slovene, Croat, Montenegrin, Macedonian, Albanian and Serb.<sup>38</sup> In addition, three major religions, Eastern Orthodox, Roman Catholic, and Muslim, dominate the landscape.<sup>39</sup> The region has been a constant source of conflict dating back to the days of the Ottoman Empire in the middle of the second millennium.<sup>40</sup>

The Croats are a somewhat mysterious people in their origin. Most historians believe the Croats were Slavic people of Ukrainian origin, while others claim the original Croats were not Slavic at all but rather Sarmatians from Central Asia who arrived in Europe, along with the Huns, in the fourth century. From there, they mingled with the Slavs of Northern Europe and then traveled south to the present day Balkans.<sup>41</sup>

Regardless of which theory is correct, it is known that Croatia became an independent nation in 924 under the leadership of Tomislav who established himself as Croatia's first King. Croatian influence ran from the Danube down to Dalmatia, a result of the weakening of Byzantium's power. After the Great Schism of 1054 which split the Roman and Byzantine churches, papists from the

35. Radovan (which ironically means "Joyous One") Karadzic is the leader of the Serbian Democratic Party (SDP). He is considered the political hand of General Mladic. *Id.* He has been indicted as a war criminal by the International Court of Justice and is now subject to arrest by any international force. As a result, his individual powers of negotiating are severely limited. *Politics By Other Means*, WALL ST. J., April 28, 1995, at A12.

36. President Milosevic is the current leader of Serbia which, along with Montenegro, is still recognized as Yugoslavia. Roger Thurow, *At Balkan Crossroads, No Turn Is Safe*, WALL ST. J., Sept. 6, 1994, at A7.

37. See GLENNY, *supra* note 4, at 148-151.

38. There are differences between Serbs and Serbians as well as differences between Croats and Croatians. For example, a Croat that lives in Serbia is a Serbian but not a Serb. A Serb that lives in Croatia is a Croatian but not a Croat. When the inhabitants of the region address other ethnicities, they speak of "Croats" and "Serbs."

39. Robert W. McGee, *The Theory of Secession and Emerging Democracies: A Constitutional Solution*, 28 STAN. J. INT'L L. 451, 469 (1992).

40. See YUGOSLAVIA: A COUNTRY STUDY 12 (Glenn E. Curtis ed. 1990) (hereinafter YUGOSLAVIA).

41. *Id.* at 10-11.



Western Church took control of much of Dalmatia. In 1075, the papal legate crowned Dmitrije Zvonimir king of all Croatia.<sup>42</sup>

Upon the death of Zvonimir, conflict ensued. Unable to come to an agreeable solution, the nobles offered the Croatian Crown to King Laszlo I of Hungary. Laszlo would later form the bishopric of Zagreb, creating a lasting Catholic influence in the country that survives to this day.<sup>43</sup> This union of the two kingdoms was an important part of Croatia's legacy. The joining of Croatia and Hungary lasted up until World War I but the repercussions are still felt today as animosity between Croats and the Magyars.

Croatians claim that during the union of the two crowns, it retained its independent status as a sovereign state. Hungary, however, claims that the country was annexed in 1102. While both accounts may not be entirely accurate, the Croatians did exercise a relative degree of autonomy under Hungarian rule.<sup>44</sup>

Dalmatia, the portion of the Balkans resting on the Adriatic, was a pivotal province in the struggle over domination of the region.<sup>45</sup> In 1409, Hungarian rights to Dalmatia were sold to Venice. The area was poorly administered for centuries, leaving a bitter taste in the mouths of Croats for Italians, and the Hungarians who sold Dalmatia, that has survived to this day.<sup>46</sup>

During this period, the Ottoman empire began its slow advance on Europe. After defeating the Serbs at Kosovo in 1389, the Turks controlled most of the Balkans through outright possession or fear of invasion. With the Turkish victory over the Hungarians at Mohacs in 1526, European nobles combined the crowns of Hungary, Croatia and Austria under the Hapsburg, Ferdinand I.<sup>47</sup>

To protect Europe, Austria created a military frontier from the Dalmatian coast of present day Croatia to the edges of Transylvania which is now part of Romania.<sup>48</sup> This area was developed to both impede any Ottoman advance and to serve as a springboard against the Turks. It was called the Military Frontier Province and was comprised of Croats, Hungarians and Serbs. Austria granted a great deal of autonomy to those who settled the region, including religious freedom to the Orthodox Serbs which angered the devout Catholic Croats. Thus, if the Croats were not warring against the Turks, they

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42. *Id.* at 11.

43. *Id.*

44. *Id.*

45. *Id.*

46. WEST, *supra* note 1, at 116.

47. YUGOSLAVIA, *supra* note 40, at 12.

48. GLENNY, *supra* note 4, at 4.

were fighting among their Serb neighbors. It is this populating through the Austrian version of the Maginot Line that created the present day ethnic confluence of Serbs and Croats.<sup>49</sup>

Tensions between Austria and Hungary erupted during the Revolutions of 1848. Fearing Hungary and "Magyarization"<sup>50</sup> the Croats sided with the Austrians and eventually formed an army against the Hungarians. The Hungarian revolution was eventually crushed through the intervention of Russia. Hoping for greater freedom, the Croatians in its stead received absolutist rule and "Germanization" from Austria.<sup>51</sup>

Eventually Austrian influence waned, causing the Balkans to be divided between Austria and Hungary. Austria retained Dalmatia while Hungary obtained control over Slovenia and Croatia.<sup>52</sup>

A major policy during this period was to exploit the differences between the Croats and ethnic Serbs who populated the region. Conflicts were precipitated or condoned by the government, thus increasing tension between the Slavs. It was a perfect example of the old Roman dictum *Divide et impera*.<sup>53</sup> It worked so well that the Serbs and Croats still conquer themselves today through division.

The Serbs are thought to have originated along the same lines as the Croats either through the Ukraine or as Sarmatians. After leaving the North, the Slav Serbs settled the areas of Serbia, Montenegro, Bosnia and Herzegovina.<sup>54</sup>

In the late 12th century, the Serb leader Stefan I Nemanja ousted Byzantine rule from Serbia. His son, Stefan II, stabilized the area and maintained friendly relations with Rome while keeping the Orthodox faith, a remarkable feat in its day.<sup>55</sup> Eventually, Rome would recognize Serbia's independence and crown Stefan II as king.<sup>56</sup>

In 1389 the West under Serb leadership engaged the Turks at Kosovo on St. Vitus day.<sup>57</sup> The Serbs fought gallantly but were narrowly defeated by the Turks. Many witnessed the deaths of the brave Serb nobles who fought against superior numbers and the

49. See YUGOSLAVIA, *supra* note 40, at 12.

50. This term is used to describe Hungary's attempt to promote its own culture while restricting, or even eliminating, the Croatian culture. This was done mainly through laws that outlawed the use of Serbo-Croat, the language of the Slavs.

51. *Id.* at 15.

52. *Id.*

53. Translated from Latin, this means "Divide and conquer." WEST, *supra* note 1, at 181.

54. YUGOSLAVIA, *supra* note 40, at 16. At one time, Bosnia and Herzegovina were two separate provinces but were united in the 1800s.

55. *Id.* at 17.

56. *Id.*

57. *Id.* Currently, June 28 is a Serb holiday commemorating the Battle of Kosovo.

Turkish Sultan himself which inspired epic poems and songs.<sup>58</sup> Even with the defeat at Kosovo, the Serbs were not immediately dominated by the Turks. They persisted in small battles and clashes in an attempt to prevent Turk control.<sup>59</sup> Even their enemies began to sing of Serb heroism during this period, helping to preserve Serb nationalism and dignity.<sup>60</sup>

Eventually, in 1459, the Ottomans defeated the last Serb stronghold at Smederjevo, exercising complete dominion over Serbia.<sup>61</sup> After this, the Turks exploited the Serbs and attempted to destroy many of their social institutions. In 1690, as many as 36,000 families left Serbia and settled in southern Hungary.<sup>62</sup> The Austrian emperor promised them religious freedom and political autonomy by allowing them to elect their own vojvoda, or military governor.<sup>63</sup> The region, known today as Vojvodina, eventually was incorporated into the Military Frontier Province.<sup>64</sup> Soon afterwards, the Serbs would comprise as much as twenty-five percent of the military strip's population.<sup>65</sup>

The power of the Ottomans declined in the eighteenth century, leaving Russia to fill the void.<sup>66</sup> Although the Turks remained in physical control of Serbia, Russia won the right to protect Turk Christian subjects.<sup>67</sup> In 1787 and 1788, Austria and Russia waged war against the Ottomans but could not obtain a victory.<sup>68</sup> Abandoned by the European powers, the Serbs precipitated their own uprisings and obtained partial autonomy under Turkish rule in 1815.<sup>69</sup>

The Serbs in the Vojvodina region in Hungary did not fair any better than their brothers under Ottoman rule.<sup>70</sup> Magyarization of the Serbs was relentless. When Austria took control of Hungary and the Vojvodina after 1850, the harshness of the absolutists rule was not altered, only the rulers.<sup>71</sup> When Austria's power declined, it

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58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 18.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 19.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 21.

71. *Id.*

entered into the Dual Monarchy with Hungary.<sup>72</sup> Hungary then resumed its control and policies with respect to the Serbs.<sup>73</sup>

After the Turks were defeated, Serbia became an independent state in 1878.<sup>74</sup> Scandals, conflicts and assassinations troubled the region until the arrival of the twentieth century which saw economic and political stabilization under Petar Karadjordjevic.<sup>75</sup> This stable period would last until World War I.

As can be seen, a common piece of history between the people of the area is the resistance to the Turk invaders. Some of the most important battles in the history of Western culture were fought in the Balkans by the Slavs. The repulsion of the Islamic invaders by armies populated with the Slavs saved Western culture. Had it not been for the Croat and Serb defenders, the Ottoman Empire and its Islamic religion would have over-run the weaker kingdoms of Europe, changing the course of history.

The West's survival, however, came at a great cost. It was this geographic confluence at the behest of Austria and Hungary that initiated the tensions between Croat and Serb. Fearful of a Slavic union, Austrian and Hungarian administrators fostered ethnic nationalism instead of unity between the factions. Religion was made an important catalyst in the ethnic differences. Thus, in order to save one civilization, the West sacrificed two others.

Where do the Muslims fit into this history of confluence and conflict? The Muslims are predominately in Bosnia-Herzegovina and originated as either Croats or Serbs. The Bosnians under the leadership of Ban Kulin at the end of the twelfth century rejected the Catholic and Orthodox religions and turned to the heretical faith of Bogomilism,<sup>76</sup> a dualistic variation of Christianity.<sup>77</sup>

In 1463, Bosnia was captured by the Turks.<sup>78</sup> Twenty years later, Herzegovina fell.<sup>79</sup> The Christian inhabitants fled the area to Hungary or Austria.<sup>80</sup> The Bogomils, however, did not have this option for if they left, they would be prosecuted and exterminated for defiling the Christian faith. Eventually, in return for keeping their land and feudal privileges, many of the Bogomil nobles converted to Islam. For the Bogomils in Bosnia-Herzegovina, it was an

72. *Id.*

73. *Id.* at 21.

74. *Id.*

75. *Id.* at 21, 22.

76. "Bogomil" is old Slavonic which means "God have mercy." WEST, *supra* note 1, at 299.

77. YUGOSLAVIA, *supra* note 40, at 22, 23.

78. *Id.* at 23.

79. *Id.*

80. *Id.*

easy choice.<sup>81</sup> The Turks established capitals for the two regions at Travnik and Mostar and ruled them from a distance.<sup>82</sup>

The symbiotic relationship lasted for a number of years but a repressive tax system brought on by the decline of Ottoman power caused uprisings in Bosnia and Herzegovina.<sup>83</sup> At times, the Muslims were organized into militias to fight for their captors against their Slav brothers.<sup>84</sup> An uprising in 1875 started a European conflict which resulted in the Treaty of Berlin of 1878.<sup>85</sup> The Treaty gave the Austro-Hungarian Empire the right to occupy Bosnia and Herzegovina, bringing with it repression and persecution.<sup>86</sup> In an effort to increase the Catholic population of the area, the Austrian government sent German and Catholic Slavs into the region.<sup>87</sup> The local administrator, Baron Benjamin Kallay, fostered ethnic conflict in the region to keep the Slavs from uniting against the government.<sup>88</sup> This was a consistent policy of the Austrians in the Balkans.<sup>89</sup>

Prior to World War I, the major European powers vied with each other and the declining Ottoman Empire for control of the Balkans.<sup>90</sup> When Austria-Hungary annexed Bosnia-Herzegovina, the independent Serbia was outraged and came close to declaring war. Russian diplomacy, however, stemmed off the conflict. When the Turks were expelled from Europe during the Balkan Wars (1912-1913), Serbian influence alarmed Austria.<sup>91</sup> With the assassination of Archduke Ferdinand in Sarajevo by a Serbian nationalist, Austria finally had a reason to punish Serbia. By then, the secret but formidable alliance system systematically brought the European Powers together in World War I.<sup>92</sup>

When the Ottoman, Austrian, and Russian Empires collapsed after the end of World War I, the victorious European powers attempted to redraw national lines according to the doctrine of self-determination.<sup>93</sup> In the Balkans, however, these divisions were

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81. WEST, *supra* note 1, at 301. The Bogomils were treated as enemies of Christianity by Papal Bull along with the adherents to Islam and decided out of survival to strategically side themselves with the Turks. *Id.*

82. YUGOSLAVIA, *supra* note 40, at 24.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* Technically, the areas were still Turkish states.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 27.

91. *Id.*

92. *Id.*

93. *Id.* at 26.

imperfect at best because of the patchwork of cultures in most of the later Yugoslavian republics. The unification of the Balkans into Yugoslavia in 1918 only masked the problems.<sup>94</sup> Centuries of hostilities, which were intensified when the Serbs and Bosnians fought each other as agents of the Allies and Central powers respectively, remained.

During World War II, hostilities between Croat fascists, the Ustashas who were partisan towards Germany and Italy, and the Serbs erupted into civil war.<sup>95</sup> Yugoslavia itself was partitioned by Germany, Italy, Hungary and Bulgaria.<sup>96</sup> In addition, Germany established a puppet regime in Croatia much like they had done in Vichy France.<sup>97</sup>

German and Italian atrocities towards the Slovenes and Serbs ravaged the region as the Catholics gained protection from their captors by supporting the fascists.<sup>98</sup> The strongest of the resistance groups were the communist Partisans led by Josip Tito, a Croat.<sup>99</sup> The partisans, combined with the Serb Cetniks, led assaults against the fascists. The Cetniks, however, were staunch anti-communists, and eventually clashed with the Partisans.<sup>100</sup>

Although the Partisans were the most powerful anti-fascist resistance group in the Balkans, many of the Allied powers, including Stalin's Russia, refused to support them.<sup>101</sup> Eventually, as a result of the losses the Germans sustained at the hands of the Partisans, the Allies reluctantly threw their support behind Tito. When the Red Army crossed the border of Yugoslavia, the partisans moved into Croatia which erupted into the bloodiest campaign of the war. Finally defeating the fascist Ustashas, the Partisans gained a firm control over Yugoslavia that lasted to the end of the War.<sup>102</sup>

Stories of atrocities, even if only half true, bear witness to the long line of animosity the Croats and Serbs have towards each other. For example, in 1941, some 800 Serb civilians were massacred in an Orthodox church in Glina while close to a thousand more had been

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94. *Id.* at 29.

95. *Id.* at 38-39.

96. *Id.* at 37.

97. *Id.*

98. *Id.* at 38.

99. *Id.* at 39.

100. *Id.* at 40.

101. *Id.*

102. *Id.* at 41, 42.

killed throughout the city by the Ustashes.<sup>103</sup> Events like these were permanently etched into the Balkan mind.

Only during Josip Tito's reign and communism's supremacy did Yugoslavia remain at peace. This was not achieved through ethnic harmony, but rather through vicious force and repression.<sup>104</sup> This uneasy stability was shattered when the Soviet Union collapsed and communism fell in Yugoslavia.<sup>105</sup>

It is not easy to describe the reasons why the present conflict in Bosnia-Herzegovina has taken on such horrific attributes until one examines the complex historical factors involved with the development of the Balkans. Rarely has the region been at peace. One power after the next has occupied the Balkans. With the exception of France, each occupation brought with it repression and exploitation. In order to survive such episodes, the people of the Balkans have had to draw on their cultures and nationalities for strength to persevere. This nationalism drove a deep fear into the occupiers. To avoid an uprising and a union of the Southern Slavs, they would either crush it, as was attempted through Germanization and Magyarization, or exploit it by drafting conscripts into the conqueror's army and turning them loose on their brother Slavs. Either method of utilizing Slavic nationalism was effective in subjugating the region. One commentator present during the early years of the current war has described the region's instability with clarity:

From the beginning of the conflict in Croatia, one question above most others has exercised minds inside and outside the country: what causes this depth of hatred which has provoked atrocities and slaughter on such a wide scale over such a short period of time? . . . Obviously, the conflict has been caused by complex historical and political forces. But the hatred has a slightly different origin. To a large degree, the wars of the Yugoslav succession have been nationalistic in character. . . . Indeed what is striking about Bosnia-Herzegovina, in particular, is just how closely related are the Serbs, the Croats and the Moslems . . . . The Bosnian Serbs, Croats and Moslems have been adorned with many different cultural uniforms over the centuries by which they identify one another as the enemy when conflict breaks out. Despite this, underneath the dress they can see themselves reflected—it is the awful recognition that these primitive beasts on the other side of the barricades are their

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103. Glenny, *supra* note 4, at 92. One other story is that of the Serbian father who was forced by Ustasha soldiers to divide his children into two groups: those who would live and those who would die. After witnessing the massacre, the father was tortured and killed.

104. YUGOSLAVIA, *supra* note 40, at 172.

105. Philip J. Cohen, *Ending the War and Securing the Peace in Former Yugoslavia*, 6 PACE INT'L L. REV. at 19, 27 (1994).

brothers which has led to the violence assuming such ghastly proportions in Bosnia.<sup>106</sup>

#### IV. THE FORMER CONSTITUTION OF YUGOSLAVIA

The Constitution of The Socialist Federal Republic of Yugoslavia was once said to make *Das Kapital* appear to be light reading.<sup>107</sup> The document itself is an immense ideological and programmatic outline of the duties and responsibilities of all citizens of Yugoslavia.<sup>108</sup> The Constitution of 1974 was a small retreat from the 1968 and 1971 amendments to the 1963 version which allowed for greater autonomy in the regions.<sup>109</sup> This scaled back federalism, however, did not create a centralized bureaucracy evident in most other communist countries of the day.

Central to this form of participatory federalism was the idea of self-management<sup>110</sup> expressed in Article IV of the Constitution. It was during the second phase of Yugoslav constitutional development that the concept of self-management was emphasized, moving the Yugoslav people away from the traditional centralized soviet system that dominated the original phase of constitution building to a more "grass roots" level.<sup>111</sup> It created, or attempted to create, a pluralism of interests based on the various industries rather than ethnic divisions.<sup>112</sup> This "social fragmentation" was necessary to create stability in the country.

The third phase of constitutional development was an attempt to create greater autonomy of the regions. The Cold War events of the 1960's and 1970's moved the political leaders away from reform and more towards centralization.<sup>113</sup> Even with this change, federalism was still an integral ingredient in the Yugoslavian experiment.

The 1974 constitution remained in effect until 1990. Consisting of 406 articles, it was one of the longest constitutions in the world.<sup>114</sup> It was a balance between ethnic diversity and socialistic cultural unity and reduced the number of state presidencies from 23 to nine with

106. GLENNY, *supra* note 4, at 168-69.

107. *Id.* at 141.

108. YUGOSLAVIA, *supra* note 40, at 54.

109. *Id.*

110. The elements of self-management are: legitimacy of pluralistic interests; diffusion of power; and, regulations that foster equal rights. DENNISON RUSINOW, *YUGOSLAVIA: A FRAGMENTED FEDERALISM* 42 (1988).

111. YUGOSLAVIA, *supra* note 40, at 184.

112. RUSINOW, *supra* note 110, at 34.

113. *Id.* at 35-36.

114. YUGOSLAVIA, *supra* note 40, at 177.



one being a delegate from the communist party.<sup>115</sup> When greater autonomy was mandated, the party chief was removed, leaving the presidency with eight members.<sup>116</sup>

The Constitution of Yugoslavia operated on two principles the first of which was autonomy. The Constitution recognized that each region of Yugoslavia was independent and competent to handle its own affairs while still recognizing the duties and functions of the central government.<sup>117</sup> In other words, the Constitution implemented the American idea of dual sovereignty.<sup>118</sup>

The second principle was local participation in national government via the Chamber of Republics and Provinces. Twelve delegates from each republic and eight delegates from each province were elected by local assemblies.<sup>119</sup> The elections operated very much like the United States Senate before the passage of the 17th Amendment in 1913.<sup>120</sup> The regions themselves could serve as a check against the federal government itself or other regions which attempted to control the national agenda.

One interesting aspect of Yugoslavian Constitutional development was the 1974 changes to the amendatory process. Prior to 1974, amendments to the Constitution could be made by a "qualified" majority in the federal assembly without participation and deliberation by the regions themselves.<sup>121</sup> The 1974 constitution was a drastic alteration in the Yugoslav idea of federalism. The new constitution required a unanimous vote by the regions for amendments and "essential sectors of federal legislation."<sup>122</sup>

Was unanimity desirable? During the reign of Tito, in which ethnic conflict was repressed brutally, unanimous voting worked well. After Tito's death, ethnic tensions began to rise. Unanimity turned to gridlock, delaying essential questions or, worse yet, leaving them unresolved. When secession was pursued and unanimity required, the wheels of government and communication broke down and the engines of war started.

While Yugoslavia was a communist state under the reign of Tito and for a brief time thereafter, it did experience more federalism than many other communist countries of the time. This was a natural occurrence because of the blend of ethnic diversity inherent in the

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115. *Id.* at 187.

116. YUGOSLAVIA, *supra* note 40, at 177.

117. RUSINOW, *supra* note 110, at 80.

118. See THE FEDERALIST Nos. 32, 34 (Alexander Hamilton), No. 39 (James Madison).

119. YUGOSLAVIA, *supra* note 40, at 185.

120. See U.S. CONST. art. I, sec. 3.

121. RUSINOW, *supra* note 110, at 82.

122. *Id.*

political landscape and because of Tito's actions to secure the nation after his death. As a result, exposure to federalist principles and systems is not foreign to the inhabitants of the Balkans.

## V. THE SWISS MODEL

Switzerland, like Bosnia-Herzegovina, is a heterogeneous country. There are four major languages used by the population: German, French, Italian and Rhaeto-Romansch, a language closely related to Classical Latin. Approximately sixty-five percent of the people speak German, eighteen percent speak French, ten percent speak Italian and about one percent speak Rhaeto-Romansch. The remaining six percent of the people, a majority of them being migrant workers, speak other languages.<sup>123</sup>

The country is divided into cantons which are semi-autonomous regions similar to the state system in the United States. The first three cantons came together in 1291 in a mutual assistance pact that stressed equality and fostered stability.<sup>124</sup> Today there are 26 cantons and half-cantons in the Swiss Federation.<sup>125</sup> The population and area of each canton vary immensely.

Each canton operates under its own constitution and laws that govern and control the day-to-day lives of its citizens.<sup>126</sup> Most cantons have a single legislative body that is elected by proportional representation and an executive body that has anywhere from five to eight members.<sup>127</sup> The members of the executive body are also elected by the citizens of each canton.

The most unique feature of the Swiss National Government is its relative unimportance.<sup>128</sup> Most political decisions are made and implemented on the local cantonal level.<sup>129</sup> Very few political issues transgress and polarize the Swiss people as a whole.

The Federal Assembly is the Swiss version of Parliament and the equivalent of the American Congress. Like the United States, it is divided into two houses. The National Council consists of

123. FRANCES KENDALL & LEON LOUW, *AFTER APARTHEID: THE SOLUTION FOR SOUTH AFRICA* 116-17 (1986).

124. *Id.* at 117. The first three cantons to unite were Uri, Schwyz and Unterwalden. Prior to 1400, the cantons of Lucerne, Zurich, Bern, Zug, Sarnen, Glarus joined in the Swiss Confederation. *Id.*

125. *Id.*

126. *Id.* at 117-18.

127. *Id.* at 117.

128. Kendall and Louw report that many Swiss cannot name the President of Switzerland. KENDALL & LOUW, *supra* note 123, at 121.

129. *Id.* This may sometimes be said of the American system with important decisions being made by the several state governments. While this may be the American ideal, in actuality, the National Government interacts more with the populace than in the Swiss system.

representatives elected directly by the population of each canton.<sup>130</sup> The number of representatives for each canton is proportional to its population with each canton having at least one representative.<sup>131</sup> The President of the National Council is elected by its members to a term of one year. The Council of States is somewhat equivalent to the United States Senate.<sup>132</sup> Each canton sends two representatives; the cantons themselves determine the term of the members.

Under the Swiss model, all laws passed by the Federal Assembly are not necessarily final.<sup>133</sup> They may be subject to one of two types of referenda.<sup>134</sup> The first is called the Obligatory Referendum which ensures all changes to either the state or federal constitutions are decided by popular vote.<sup>135</sup> The second, and more powerful, is the Optional Referendum.<sup>136</sup> This allows the citizenry to pass judgment on the sufficiency of laws or policies passed by the Federal Assembly.<sup>137</sup> If 50,000 citizens or eight cantons request an Optional Referendum within ninety days after passage and publication, the issue is put to popular vote.<sup>138</sup>

The Federal Council consists of seven ministers elected by the Federal Assembly.<sup>139</sup> The ministers are responsible for the agency they are assigned to lead.<sup>140</sup> Each year, one of the sitting councilors is elected by the Federal Assembly to the office of Federal President. The President acts as the national figure head for protocol purposes and as the chairperson for the Federal Council.<sup>141</sup> As such, the powers of the President are few and limited.

Under a Cantonal system, there is not much interaction between the citizen of a canton and the central government. The spheres of sovereignty between the levels of government often do not conflict. Domination of national affairs by one interest group is not achieved and rarely is it done on the canton level. Concomitant with minority protection is the idea of factional control. An example of the Swiss

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130. *Id.* at 119.

131. *Id.*

132. *Id.*

133. *Id.* at 120.

134. *Id.*

135. *Id.*

136. *Id.*

137. This optional referendum is very similar to the doctrine of nullification espoused by the South prior to the War Between the States. This feature will be discussed in more detail in part VI.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

system is the case of the canton of Jura.<sup>142</sup> Jura is split between French and German speaking peoples, with their nationalistic attitudes evenly divided by their linguistic differences.<sup>143</sup> The Bern canton always contested that the Jura portion of Bern cost the cantonal government more than the rest of the area.<sup>144</sup> This helped precipitate a separatist movement within Jura for independence from Bern.<sup>145</sup> In addition, within Jura, there was a reactionary unionist movement that was content with its relationship with Bern.<sup>146</sup> While Bern clearly sided with the unionists, the cantonal government could not decide the issue. Under Swiss law, it could only be decided by a vote.<sup>147</sup>

To the Swiss, however, mere majority domination would not suffice. Such a determination would be undemocratic and therefore, several referendums would be held.<sup>148</sup> As such there were three levels of voting with each member of Jura possessing a possibility of three votes.<sup>149</sup> One vote was for the whole of Jura, one for the border communities which would be affected by independence and finally, one for each district in which twenty percent of the people petitioned for it.<sup>150</sup>

The result would be the utmost in minority protection as guaranteed by the tri-level voting. If the members of the separatist movement would be denied independence as to the whole of Jura, they could still become independent in those parts in which they were the majority.<sup>151</sup>

In the end, a majority of Jura voted for independence.<sup>152</sup> Jura was independent but not yet Swiss. If, for some reason, the rest of the Swiss Confederation did not approve of Jura's actions, they could bar Jura's admission into Switzerland. This was the majority's protection of Jura's minorities against the separatists, if they so chose.<sup>153</sup> In 1978, however, the citizens of Switzerland voted to admit Jura, thus ending their "struggle" for independence.<sup>154</sup>

142. AREND LIJPHART, *DEMOCRACY IN PLURAL SOCIETIES: A COMPLETE EXPLORATION* 95-97 (1977).

143. KENDALL & LOUW, *supra* note 123, at 231.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 232.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

In all, the Swiss system is designed for minority protection and popular participation on the canton and federal level. There are no dominant political groups for each must share equally the political stage. This is quite an impressive feat given the diverse cultures within the Swiss borders.

## VI. THE CSA MODEL

The Confederate States of America ("CSA") existed between 1861 and 1865 as a result of the War Between the States popularly known as the Civil War.<sup>155</sup> The people of the South, however, formed a common unity based on culture long before the political organization of the region. Southerners considered themselves a unique class of persons separated from the ideals of the North.<sup>156</sup> They resented the North in large part for the economic repression imposed by the unfair distribution of resources. The plight of many of the Southern Slavs runs parallel to the Southern experience in the Confederate States. Many Croat inhabitants of Croatia, including Dalmatia, resented the unfair allocation of resources to Belgrade, the Serb city that became the capital of Yugoslavia. Belgrade, the non-Serbs argued, depleted the coffers of the republic to finance the extravagant public works projects in the capital and to line the pockets of many corrupt Serb bureaucrats.<sup>157</sup>

To the everyday observer, the CSA embodied a tyrannical government whose only purpose was to perpetuate the South's economic system which relied on human bondage.<sup>158</sup> As such, the Confederacy was viewed then, and now, as a "Slaveocracy." This, however, is not an entirely accurate representation.<sup>159</sup>

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155. A civil war connotes hostilities between people within the same country where as a regular war may be regarded as hostilities between people of different countries. Historians have long debated whether the Southern states actually seceded and formed a new nation. While this may appear to be an exercise in semantics, the question strikes at the very heart of American constitutional analysis. Constitutional scholars have disputed whether the federal constitution allowed secession which was, at the federal constitution's adoption, an acceptable doctrine. For a complete analysis see MARSHALL L. DEROSA, *THE CONFEDERATE CONSTITUTION OF 1861: AN INQUIRY INTO AMERICAN CONSTITUTIONALISM* (1991).

156. Many contemporary observers of the time saw this dichotomy between the North and the South. Thomas Jefferson wrote on the differences between the two: "In the North they are cool, laborious, persevering, independant, jealous of their own liberties, and just to those of others, interested, chicaning, superstitious and hypocritical in their religion. In the South they are fiery, voluptuary, indolent, unsteady, independant, zealous for their own liberties, but trampling on those of others, generous, candid, [and] without attachment or pretentions to any religion but that of the heart." *THE PORTABLE THOMAS JEFFERSON* 387 (Merrill D. Peterson ed. 1975).

157. WEST, *supra* note 1, at 84.

158. MARGARET L. COIT, JOHN C. CALHOUN: *AMERICAN PORTRAIT* 291-92 (1991).

159. *Id.* at 291. Coit reports that only one-quarter of southerners owned slaves. *Id.*

It is conceded that the institution of slavery played a major part in the crisis that occurred between 1861 and 1865.<sup>160</sup> The conflict that arose, however, had its roots much deeper than the question of slavery and can be traced back to the formation and adoption of the Constitution in 1787.<sup>161</sup> The War resulted from the timeless struggle for limited resources, primarily political power.<sup>162</sup> Fueled by clashing economic systems and the question of slavery, each side attempted to interpret the federal constitution in a particular way that would aid its way of life. When constitutional compromise gave way to political gridlock, the South seceded and formed the CSA.

One of the first actions of the CSA was to perpetuate constitutional government by blending its ideal and current form into one document. Influenced by the series of constitutional questions that arose between the adoption of the federal constitution and the South's secession, the delegates from the Southern states met in Montgomery, Alabama, and ratified the document in 1861.<sup>163</sup>

A cursory glance at the CSA Constitution will reveal that it is not much different from its federal counterpart.<sup>164</sup> This should not be surprising since southerners as well as northerners helped draft the constitution of 1787 and incorporated many principles indigenous to the American system.<sup>165</sup> What the South rebelled against was northern constitutional interpretation.<sup>166</sup> Thus, rather than redraft a document that was quite satisfactory to southerners, the delegates to the CSA constitutional convention undertook the task of improving the original federal charter by incorporating some of the amendments into the main body<sup>167</sup> and adding other refinements.

A major source of influence for the changes to the CSA constitution was the theories of John C. Calhoun.<sup>168</sup> Calhoun's ideas dealt

160. *Id.* at 447. Coit writes: "Whether or not slavery was essential to the South, it was essential to the South to have the power to maintain slavery. If the North could control the one, it could control all. This was the issue, the tragedy, that slavery became the proving ground of the South's fight to maintain her rights as a minority in the union." *Id.*

161. See ALEXANDER P. STEPHENS, *A CONSTITUTIONAL VIEW OF THE LATE WAR BETWEEN THE STATES* (1867); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787* (1969); RAOUL BERGER, *FEDERALISM: THE FOUNDER'S DESIGN* (1987).

162. BERGER, *supra* note 161.

163. DEROSA, *supra* note 155, at 17.

164. *Id.* at 135.

165. See generally WOOD, *supra* note 161, at 593-96.

166. DEROSA, *supra* note 155, at 10-11.

167. Many provisions contained in the first ten amendments of the U.S. Constitution were incorporated into Article II, Section 9 of the CSA Constitution. The final two clauses of Article VI in the CSA Constitution are deviations from the Ninth and Tenth Amendments to the U.S. Constitution. Finally, the Twelfth Amendment to the U.S. Constitution is contained in Article II, Section 1 of the CSA Constitution.

168. DEROSA, *supra* note 155, at 23.

generally with the Southern experience, that is maintaining and ensuring protection and participation of political minorities in a federal system.<sup>169</sup> For Calhoun, and eventually the drafters of the CSA constitution, this was to be achieved through the use of "super-majorities" in the appropriations process,<sup>170</sup> a unique revision to the federal charter contained in the confederate constitution.<sup>171</sup>

For Calhoun and many Southerners, the political alienation of the South resulted partially from the inequitable distribution of federal revenues to the Northern states for internal improvements and other purposes.<sup>172</sup> To ensure against this occurring again, the drafters of the CSA Constitution provided that a two-thirds majority would be necessary for expropriating funds from the treasury.<sup>173</sup> In addition, the necessary and proper clause, a past and contemporary source of constitutional conflict and interpretation, was deleted entirely from the document.<sup>174</sup>

An additional theory not expressly contained in the CSA Constitution was that of nullification.<sup>175</sup> Simply put, nullification occurred when a designated number of people, in convention in a given state, voted against a measure passed by Congress.<sup>176</sup> The effect of the nullification of a law by a state meant that it was inoperable in that

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169. Calhoun's political insights and beliefs can be ascertained in his posthumously published works on government entitled: JOHN C. CALHOUN, A DISQUISITION ON GOVERNMENT AND A DISCOURSE ON THE CONSTITUTION AND GOVERNMENT OF THE UNITED STATES (C. Gordon Post ed. 1953) (1853).

170. Calhoun also relied on what he termed a concurrent majority which operated as a negative veto. A concurrent majority was basically the largest minority which voted together against the numerical majority.

171. The U.S. Constitution actually utilizes supermajorities in several respects; in six areas, a two-thirds majority is necessary. Supermajorities were also required for: a conviction by impeachment by the Senate; approval of treaties; expelling a member of the House or Senate; overriding a presidential veto; proposed amendments to the Constitution before they may be submitted to the states for ratification; and, selection of the President by the House when no candidate receives a majority of electoral votes.

172. CALHOUN, *supra* note 169, at xvi. Naturally, the other source of disunity was the abolition of slavery in certain territories of the country.

173. Article I, Section 9 states in pertinent part:

Congress shall appropriate no money from the Treasury, except by a vote of two-thirds of both Houses, taken by yeas and nays, unless it be asked and estimated for by some one of the heads of the departments, and submitted to Congress by the President; or for the purpose of paying its own expenses and contingencies; or for the payment of claims against the Confederate States, the justice of which shall have been judicially declared by a tribunal for the investigation of claims against the Government, which it is hereby made the duty of Congress to establish.

Another interesting aspect of this provision is the exception to the two-thirds requirement if the budget was submitted by the President.

174. *Id.*

175. DEROSA, *supra* note 155, at 19.

176. COIT, *supra* note 158, at 237-38.

jurisdiction.<sup>177</sup> The only way to override the nullification was to amend the national constitution.

Nullification was not included in the CSA Constitution because it was thought to be unnecessary as it was the natural right of a sovereign state to declare a law null and void.<sup>178</sup> This expanded view of state sovereignty, and thus decentralization of federal power, was preserved by revising the Ninth and Tenth Amendments<sup>179</sup> of the U.S. Constitution and placing them in Article VI of the CSA Constitution.<sup>180</sup> As such, under the CSA constitutional form of government, the traditional belief that a state could nullify an act of Congress was perpetuated.

In all, the CSA Constitution ensured a more decentralized form of government than its federal counterpart by amending some of the vague language utilized by northern abolitionists. The resulting document, with exception to its protection of the institution of slavery, was seen as an improvement to the concept of federalism initially envisioned by the founding fathers.

177. Many states attempted to nullify laws during the first half of the Republic's existence. For example, many New England states were against the embargo of 1807-08 and attempted to nullify its enforcement. Delegates from that same region met at the Hartford Convention in 1815 out of protest to the War of 1812 and threatened nullification and secession. Massachusetts declared the Fugitive Slave Laws null and void just prior to the Civil War. The best example of nullification and its constitutional brinkmanship is seen during the Nullification Crisis of 1832 when South Carolina declared the Tariff of 1828 null and void. President Jackson threatened to use force and South Carolina, along with several other states, threatened secession.

178. DEROSA, *supra* note 155, at 19.

179. These revisions stated:

5. The enumeration, in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people of the several states.

6. The powers not delegated to the Confederate States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people thereof.

In addition, Article I, Section 1 of the CSA Constitution emphasized this point by stating that "[a]ll legislative powers herein *delegated* shall be vested in a Congress of the Confederate States, which shall consist of a Senate and House of Representatives."

DEROSA, *supra* note 155, at 135 (emphasis added).

180. An important revision is that, generally, rights "retained by the people" were those retained by a national community and those "retained by the people of the several states" designated people only in their capacity as state citizens. This was a major revision to the CSA Constitution which helped decentralize the government. *Id.*



## VII. THE DAYTON PEACE AGREEMENT AND CONSTITUTION

A. *An Overview*

The Dayton Peace Agreement is the fourth peace plan produced since hostilities began in 1992.<sup>181</sup> It divides Bosnia into two separate states. The first is the joining of Muslims, officially recognized as Bosniacs, and Croats into the Muslim-Croat Federation (hereinafter Federation). The second is a Serb Republic called Republika Srpska. In addition, the Dayton Agreement created a central government with an Assembly, Presidency, Constitutional Court and Central Bank.<sup>182</sup>

The Dayton Agreement is a comprehensive plan designed to assist the parties in establishing peace, creating a form of government and protecting the human rights of the citizens of Bosnia and Herzegovina.<sup>183</sup> The agreement is separated into twelve sections called annexes preceded by a General Framework Agreement.

The General Framework Agreement, agreed upon by the parties on November 21, 1995, is a statement of principles which were incorporated in more detail in the final draft of the Dayton Peace Agreement.<sup>184</sup> The Dayton Peace Agreement has eleven articles. The original purpose of the Agreement was to serve as a springboard for the creation of the geographic boundaries of the entities within Bosnia and Herzegovina and the creation of a constitutional form of government.<sup>185</sup>

B. *The New Constitution*

The Constitution of Bosnia and Herzegovina is contained in Annex 4 of the Dayton Agreement.<sup>186</sup> The Constitution creates two

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181. Mearsheimer & Van Evera, *supra* note 8, at 16. The first plan was sponsored by the European Community in Lisbon During the early months of 1992. The second attempt came as a result of the Vance-Owen plan which was negotiated from September 1992 to May 1993. This plan called for the division of the country into ten semiautonomous cantons. The third plan was another European attempt from July 1993 to January 1994. Like the Lisbon plan, it attempted to form three republics in a confederation without a strong centralized government. *Id.*

182. DAYTON PEACE AGREEMENT (1995).

183. *See Id.*, Annex 6 (1995).

184. DAYTON PEACE AGREEMENT, GENERAL FRAMEWORK AGREEMENT (1995). The framework agreement was between Bosnia and Herzegovina, Croatia and the Federal Republic of Yugoslavia. It requires that Bosnia and Herzegovina and Yugoslavia recognize each other, that all disputes are to be resolved peacefully, promote the Dayton Peace Agreement Annexes and to cooperate with the UN Security Council in prosecuting war crimes. *Id.*

185. *Id.*

186. *Id.*

states within Bosnia and Herzegovina called Entities.<sup>187</sup> Article II provides for the protection of human rights as recognized in the European Convention for the Protection of Human Rights and Fundamental Freedoms rather than relying on UN charters.<sup>188</sup>

Article III of the Constitution governs the relationship between the central government of Bosnia and Herzegovina and the Entities. The powers of the central government are limited to foreign policy; foreign trade policy; customs policy; monetary policy; finances of the government institutions and for the internal obligations of Bosnia and Herzegovina; immigration, refugee, and asylum policy and regulation; international and inter-Entity criminal law enforcement; communication facilities; inter-Entity transportation; and, air traffic control.<sup>189</sup>

The Entities have all powers not expressly delegated to the central government.<sup>190</sup> In addition, the Entities must also provide for the honoring of international obligations of debt made prior to the election of an Assembly and must maintain a civilian law enforcement agency or agencies to protect all people within their borders.<sup>191</sup> In addition, Article III reserves to the Entities "the right to establish parallel relationships with neighboring states consistent with the sovereignty and integrity of Bosnia and Herzegovina."<sup>192</sup> In essence, this last provision allows the Federation and the Republika Srpska to enter separately into agreements with Croatia and Yugoslavia, something expressly forbidden by the United States Constitution.

Article IV creates a bicameral legislature divided into the House of Peoples and the House of Representatives.<sup>193</sup> The upper house, the House of Peoples, has fifteen Delegates. Two thirds of the upper house are to be chosen from the Federation with the requirement that five be Croats and five be "Bosniacs."<sup>194</sup> The Delegates of the House

187. CONST. OF BOSNIA AND HERZEGOVINA art. I, §3.

188. *Id.* art. II.

189. *Id.* art. III, §1.

190. This provision is similar to the Tenth Amendment to the United States Constitution and to Article VI, ¶6 of the Confederate Constitution. The Bosnian Constitution's provision states:

(a) All governmental functions and powers not expressly assigned in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities.

CONST. OF BOSNIA AND HERZEGOVINA art. III, §3(a).

Clearly, the main difference between the three is sovereignty. Under the Bosnian Constitution, sovereignty flows from the Entities without a residuary going to the people. Under C.S.A. constitutional theory, the people were sovereign as residents of the states. Under U.S. constitutional interpretation, the people as a nation are sovereign.

191. *Id.* art. III, §2.

192. *Id.* §2(a).

193. *Id.* art. IV.

194. *Id.* art. IV, §1.

of Peoples are chosen by republican principles. The Federation Delegates are chosen by the upper house of its own legislature while the Republika Srpska's delegates are chosen by its National Assembly.<sup>195</sup>

The lower house of Bosnia and Herzegovina is the House of Representatives which consists of 42 Members.<sup>196</sup> Twenty-eight Members are to be elected from the Federation.<sup>197</sup> No requirement exists that a certain number of these Members be Croat or Muslim.<sup>198</sup> The remaining fourteen Members are to be elected from the Republika Srpska.<sup>199</sup>

The most interesting and anticipated provision of the Constitution, and perhaps to legal scholars, is Article IV, §3 which relates to "procedures." This provision creates what has been discussed as a minority veto. The minority veto is actually set out in three sections.<sup>200</sup> There are two types of vetoes. The first is with regards to representation on the Entity level, the Federation and the Republika Srpska.<sup>201</sup> The second veto operates along ethnic lines, ensuring protection for Croats, Muslims and Serbs.<sup>202</sup> The differences between

195. *Id.* It is unclear as to how the legislatures of the Entities operate at this point. From the wording of the Constitution, it appears that only the upper house of the Federation chooses delegates while those delegates from the Republika Srpska are chosen from both houses of its legislature. If true, this is clearly only a procedural difference.

196. *Id.* art. IV, §2.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* art. IV, §3(d), (e) & (f).

201. Paragraph (d) reads:

All decisions in both chambers shall be by majority of those present and voting. The Delegates and Members shall make their best efforts to see that the majority includes at least one-third of the votes of Delegates or Members from the territory of each Entity. If a majority vote does not include one-third of the votes of Delegates or Members from the territory of each Entity, the Chair and Deputy Chairs shall meet as a commission and attempt to obtain approval within three days of the vote. If those efforts fail, decisions shall be taken by a majority of those present and voting, providing that the dissenting votes do not include two-thirds or more of the Delegates or Members elected from either Entity.

*Id.* §3(d).

202. Paragraph (e) reads:

A proposed decision of the Parliamentary Assembly may be declared to be destructive of a vital interest of the Bosniac, Croat or Serb people by a majority of, as appropriate, the Bosniac, Croat, or Serb Delegates selected in accordance with paragraph 1(a) above. Such a proposed decision shall require for approval in the House of Peoples a majority of the Bosniac, of the Croat, and the Serb Delegates present and voting.

*Id.* §3(e).

Paragraph (f) of section 3 continues the operation of the second veto:

When a majority of the Bosniac, of the Croat, or of the Serb Delegates objects to the invocation of paragraph (e), the Chair of the House of Peoples shall immediately convene a Joint Commission comprising three Delegates, one each selected by the

what shall be called the "factional veto" and the "ethnic veto" are vital.

The factional veto attempts to create a calhounian concurrent majority that creates divisions among political factions rather than ethnicities. Such a split is preferable because one of the reasons the young Republic of Bosnia-Herzegovina disintegrated was the inability to form coalitions among lines other than ethnicities. This provision attempts to force the three groups into two, a herculean task.

How is this to be achieved? It is done through the suggestion that "best efforts" should be made to pass legislation with a concurrent majority that includes at least one-third of the votes from the territory of each Entity.<sup>203</sup> It is, in effect, a supermajority in that legislation should have at least two-thirds approval. As discussed above, the theory of the concurrent majority helps foster compromise: "That of the concurrent, as has been shown, is to unite the community, let its interests be ever so diversified or opposed, while that of the numerical [majority] is to divide it into two conflicting portions, let its interest be ever so united and diversified."<sup>204</sup> If there is no concurrency, there is formed a commission in order to attempt to work out the differences.<sup>205</sup> If no compromise can be found, then the matter is put to a simple, or numerical, majority vote. As such, because of the "best efforts" requirement and resort to a simple majority, it is not a true concurrent or supermajority.<sup>206</sup>

The ethnic veto is triggered if a majority of Muslim, Croat or Serb Delegates from the House of Peoples declares proposed legislation to be "destructive of a vital interest."<sup>207</sup> No definition is given for "vital interest." If a vital interest is declared to be threatened, then the matter can proceed in one of two ways. First, it can be put to a majority vote in the House of Peoples.<sup>208</sup> This majority vote requires "a majority of the Bosniac, of the Croat, and of the Serb Delegates present and voting."<sup>209</sup> The second path this declaration can travel is

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Bosniac, by the Croat, and by the Serb Delegates, to resolve the issue. If the Commission fails to do so within five days, the matter will be referred to the Constitutional Court, which shall in an expedited process review it for procedural regularity.

*Id.* §3(f).

203. *Id.* art. IV, §3(d).

204. CALHOUN, *supra* note 169, at 36.

205. CONST. OF BOSNIA AND HERZEGOVINA art. IV, §3(d).

206. *Id.*

207. *Id.* art. IV, §3(e).

208. *Id.*

209. This is a curious veto procedure which will be discussed in the next section in more detail.

through paragraph (f). Under this procedure, if a majority of the Bosniac, Croat, or Serb Delegates objects to the invocation of the paragraph (e) ethnic veto, then there is created a commission of one Bosniac, Croat and Serb Delegate to attempt to find a solution within five days.<sup>210</sup> If there is no agreement from the Commission within five days, the matter is referred to the Constitutional Court which reviews it for "procedural regularity" only.<sup>211</sup>

Article V of the Constitution creates a collective presidency similar to the previous presidency that existed under the old Yugoslavian Constitution.<sup>212</sup> The Presidency of Bosnia and Herzegovina is comprised of equal representation from each of the three major ethnicities.<sup>213</sup> The Bosniac and Croat Members are to be directly elected from the Federation and the Serbian Member is to be elected from the Republika Srpska.<sup>214</sup>

The Presidency is responsible for conducting foreign policy; appointing ambassadors and other ministers; representing the nation in international and European organizations; ratifying, with the consent of the Assembly, treaties; executing the decisions of the Assembly; proposing an annual budget; reporting to the Assembly on expenditures; coordinating with international organizations in the nation; and performing other duties assigned by the Assembly or the Entities.<sup>215</sup>

Each Member of the Presidency is urged under Article V, §2(b) to adopt all measures by consensus, equivalent to Article IV's "best efforts" requirement.<sup>216</sup> If there is no consensus, however, action may still be taken by two of the three Members.<sup>217</sup> Any dissenting Member may declare the decision taken by the other Members, within three days, to be "destructive of a vital interest of the Entity from the territory from which he was elected."<sup>218</sup> While this appears to be a factional veto, it is an ethnic veto. The declaration is to be

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210. CONST. OF BOSNIA AND HERZEGOVINA art. IV, §3(f).

211. Again, this is a rather strange attempt at creating a veto and, as such, will be analyzed in the next section.

212. See *supra* note 114 and accompanying text.

213. It should be noted that Calhoun also proposed that the United States adopt a dual presidency system which each President being elected from a different section of the country and responsible for different areas of politics. For example, one President would be elected from the North and one from the South. They would each be responsible for either domestic or foreign matters and would hold veto power over the other President's decisions. See Calhoun, *supra* note 123, at 169 at 100.

214. CONST. OF BOSNIA AND HERZEGOVINA art. V, §1.

215. *Id.* art. V, §3.

216. *Id.* art. V, §2(c).

217. *Id.*

218. *Id.* art. V, §2(d).

passed to the Bosniac, Croat or Serb Delegates in the respective assemblies of the Entities from which the dissenting Member comes.<sup>219</sup> For example, if the declaration was made by the Serb Member of the Presidency, then it is referred to the Assembly of the Republika Srpska. If the declaration is confirmed by a two-thirds supermajority, then the decision made by the collective Presidency will not take effect.<sup>220</sup>

As stated above, the Presidency consists of three members. It may also operate as a collegial system comprised of one member of the Presidency which acts as a chair and a "cabinet."<sup>221</sup> Under a collegial system, the executive department is the most decentralized and perhaps the least open to aggrandizement by one faction. If the Constitution does not expressly adopt this system,<sup>222</sup> then a revision should be made so as to utilize the collegial system.

Article VI of the Constitution of Bosnia and Herzegovina establishes the Constitutional Court. It is comprised of nine members, four of which are chosen from the Federation and two from the Republika Srpska.<sup>223</sup> In an unprecedented act of foreign intervention, three members of the Court are to be chosen by the President of the European Court of Human Rights after consultation with the Presidency.<sup>224</sup> The initially appointed judges are to serve for five years and are not eligible for reappointment.<sup>225</sup> Judges chosen after the initial judges retire are to serve until they reach the arbitrary age of seventy, thus creating a motive to appoint younger, less qualified jurists.<sup>226</sup> Finally, judges may be removed by consensus of the other judges on the Court.<sup>227</sup> It is hard to conceptualize how this may work in the "rough-and-tumble" world

219. *Id.*

220. *Id.*

221. Florida's government is unique in its method of decentralization. It is a collegial system in which the Governor and Cabinet are all elected officials and may represent different parties. According to the constitution, they will come together and vote as a whole on certain issues within their jurisdiction. On other occasions, the Governor may exercise his or her powers exclusively.

It is unclear whether the Bosnian Constitution actually operates as a collegial system. Under section 2, the Constitution states that the Members of the Presidency shall appoint from themselves a Chair. It does not mention any duties of the Chair. Section 4 then states that the Presidency "shall nominate the Chair of the Council of Ministers, who shall take upon the approval of the House of Representatives." There is no mention whether this is the same Chair. Most likely it is not. There is no mention, however, of any prohibition on the Chair of the Presidency becoming the Chair of the Council of Ministers.

222. *See supra* note 221.

223. CONST. OF BOSNIA AND HERZEGOVINA art. VI, §1(a).

224. *Id.* §1(b).

225. *Id.* §1(c).

226. *Id.*

227. *Id.*

of constitutional adjudication. In the American system where the Supreme Court is also a policy institution, this would be a major cause of instability.<sup>228</sup>

The mandate imposed upon this branch is that the "Constitutional Court shall uphold this Constitution," a task much easier stated than accomplished.<sup>229</sup> The jurisdiction of the Court is limited to three areas. First, the Court is to decide any disputes arising under the Constitution between the Entities or between the government of Bosnia and Herzegovina and the Entities.<sup>230</sup> This includes contesting the validity of an Entity's constitution or any of its provisions. Standing under this section is severely limited to certain officers of both levels of government.<sup>231</sup> Second, the Court is to exercise appellate jurisdiction over issues arising under the Constitution from the courts of Bosnia and Herzegovina.<sup>232</sup> Finally, any court may "certify" a question to the Constitutional Court on issues arising under the Constitution or international laws affecting the country.<sup>233</sup>

Of final import to this analysis, Article VII creates the Central Bank of Bosnia and Herzegovina. Its duties are to be determined later by the Parliamentary Assembly.<sup>234</sup> It may not, however, extend credit by printing money for six years. This is to reduce any chances of rapid inflation.

The Bank is to be administered by a Governing Board to be initially comprised of four members.<sup>235</sup> Three members are to be appointed by the Presidency. Two of these three members are to be a Bosniac and a Croat, who shall share one vote, from the Federation and the other shall be a Serb from the Republika Srpska.<sup>236</sup> The first Governor of the Board shall be appointed by the International

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228. It is easy to imagine Justice Stevens being removed by the other justices because of the "complexity" of his legal arguments or Justice Scalia for his sometimes ascerbic tongue.

229. CONST. OF BOSNIA AND HERZEGOVINA art. VI, §3 (1995).

230. *Id.* art. VI, §3(a).

231. *Id.*

232. *Id.* §3(b).

233. *Id.* §3(c). This privilege is similar to the constitutional provision of several states that allow the certification of important legal questions. For example, the Constitution of Florida states that the Supreme Court:

(4) May review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance, or that is certified by it to be in direct conflict with a decision of another district court of appeal.

(5) May review any order or judgement of a trial court certified by the district court of appeal in which an appeal is pending to be of great public importance, or to have a great effect on the proper administration of justice throughout the state, and certified to require immediate resolution by the supreme court.

FLA. CONST. OF 1885 art. V, §§4,5 (revised 1968).

234. CONST. OF BOSNIA AND HERZEGOVINA art. VII, §1.

235. *Id.* at §2.

236. *Id.*

Monetary Fund ("IMF") and shall serve a six year term with the other members.<sup>237</sup> The IMF Governor may only vote to break a tie in the voting.<sup>238</sup> After the initial Board has served for six years, the Presidency appoints five persons thereafter to serve on the Board.<sup>239</sup>

It is unclear how the Constitution will operate. It clearly has minority protection as its guiding principle. Power is decentralized by creating a two-tiered government and diffused by dividing it among Bosniacs, Croats and Serbs. This diffusion may be the document's downfall as each ethnic group has the power to stall government, if not indefinitely, then briefly. Overcoming the emotions of war, something a constitution may not be able to do, will be its biggest test.

#### VIII. THE PROBLEMS OF PEACE AND SUITABLE SOLUTIONS

What form of government is best suited for the region?<sup>240</sup> Of all democratic variations, a decentralized form of federalism with strong minority protection would be the best plan and this is what the Dayton Peace Agreement has attempted to produce.<sup>241</sup> Arend Lijphart, the renown political scientist, calls this form of government segmental autonomy.<sup>242</sup> In constructing a government based on segmental autonomy, several principles should be followed. First, it is necessary that the inhabitants of Bosnia and Herzegovina be exposed previously to the structure of the government envisioned. There must be a tradition inherent in their history that would allow the people to fully understand and implement its system or it will be

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237. *Id.*

238. *Id.*

239. *Id.*

240. Political Scientists have argued over the definition of a political system, and hence, government itself. Max Weber defined the state as "a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory." Lasswell and Kaplan explained the powers of the state as "a special case of the exercise of its influence: It is a process of affecting policies of others with the help of (actual or threatened) severe deprivations for non-conformity with policies intended." BERNARD SUSSEY, *APPROACHES TO THE STUDY OF POLITICS* 211-12 (1992). Clearly these definitions focus on the coercive nature of a political system. These are not new concepts. John Calhoun in his *Discourse* states that government is the "controlling power" against man's natural tendency to act on behalf of his own self-interests. Thomas Paine also described government in this manner: "Society is produced by our wants, and government by our wickedness; the former promotes our happiness positively by uniting our affections, the latter negatively by restraining our vices. The one encourages intercourse, the other creates distinctions. The first is a patron, the last a punisher." THOMAS PAINE, *COMMON SENSE* (1986 ed. Isaac Kramnick).

241. LIJPHART, *supra* note 142, at 42-4; BERGER, *supra* note 161, at 184 (1987).

242. LIJPHART, *supra* note 142, at 4.



unaccepted.<sup>243</sup> Second, the form of federalism must be decentralized enough so as to prevent any nationality from gaining dominance.<sup>244</sup> Third, the federalist system should not be so decentralized so as to render the central government ineffectual.<sup>245</sup> This will only create a "power vacuum" as was evident after the collapse of the communist party. Fourth, the system should try and promote issues that cross lines of nationalities. Social fragmentation as envisioned by the original constitution of the Republic of Yugoslavia is a necessary prerequisite.<sup>246</sup> Fifth, a form of minority veto on legislation and policies is necessary to ensure further minority protection apart from those guaranteed by the federal system.<sup>247</sup> Lastly, a system of peaceful secession should be drafted in the constitution so as to prevent hostilities in the case of political gridlock.<sup>248</sup> This secession can be either to independent status or from one republic to another. Unfortunately, the constitution created by the Dayton Peace Agreement does not adequately address these issues.

Thomas Jefferson once said that a people should only be given as much liberty as they can safely handle.<sup>249</sup> Shocking as this may be from one of history's greatest exponents of freedom, it is also a statement grounded in historical truth. Certain forms of government are superior over other forms depending on the people governed by its administration.<sup>250</sup> One group of people, for example, may have the sophistication necessary for a decentralized participatory democracy while others may not.<sup>251</sup>

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243. WOOD, *supra* note 161, at 95. Many people prior to, and during, the American Revolution held a strong conviction that the genius of the American people would not sustain a republican form of government and urged adherence to England's constitutional monarchy.

244. THE FEDERALIST No. 10 (James Madison). Madison begins this most famous exposition:

Among the numerous advantages promised by a well constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction. The friend of popular governments never finds himself so much alarmed for their character and fate when he contemplates their propensity to this dangerous vice.

245. *Id.*

246. It should be noted that a careful balance should be struck. While fragmentation should be encouraged, loss of national identity, history and culture should not be advocated.

247. LIJPHART, *supra* note 142, at 36-8. (Exploring the nature of the mutual veto and Calhoun's theories). See also, *supra* note 129, and accompanying text.

248. Iglar, *supra* note 24, at 218.

249. NOBLE E. CUNNINGHAM, IN PURSUIT OF REASON: THE LIFE OF THOMAS JEFFERSON 40 (1989).

250. ARISTOTLE, THE POLITICS 270 (ed. 1968).

251. A people may be cultured in a centralized form of government. For example, many countries in South America have a repeated history of political instability and replete with military dictatorships. See *supra*, note 117.

As stated above, the people of Bosnia and Herzegovina have a political history that is both consonant with the concept of federalism and with totalitarianism. Much of their history involves a basic self-sufficiency that endured even while were suppressed by a foreign power.<sup>252</sup> Most recently, under the Constitution of 1974, the people of Yugoslavia exercised many political ideals shared by ancient and contemporary republics. This was overshadowed by the power of the Communist Party in Yugoslav politics and by the cult of personality of Josip Tito who controlled the communist apparatus in Yugoslavia, from 1945 until his death in May, 1980. Even so, the Southern Slavs are autonomous in their thinking and their relationships with the other republics.

The Constitution of 1974, although directed by a communist regime, has as its guiding principle Socialist Self-Management.<sup>253</sup> This form of socialism was especially suitable for the decentralized federal government which allowed a great deal of autonomy to the several regions of Yugoslavia.

Socialist Self-Management and Yugoslavia's former federalism were important features of the Constitution of 1974 and its predecessors. This exposure to federalism will help Bosnia's transition to ordered liberty which is unavailable immediately to people of other emerging nations. The new Constitution of Bosnia and Herzegovina must operate differently than its predecessor. The obvious factor is the former constitution's failure.<sup>254</sup> The change necessarily must balance the opposing forces of centralization and decentralization.

Decentralization should be a guiding factor. This principle proved successful for the Swiss model and was the ultimate goal for the CSA Constitution.<sup>255</sup> The new Constitution is decentralized, creating two states: the Federation and the Republika Srpska. Initially, the most critical query was the delineation of the Entities.

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252. WEST, *supra* note 1, at 195. West writes with regards to this: "Moreover, I cannot see how these people can ever fit into a modern state. They are essentially the children of free cities. Because all these towns, even while they were exploited and oppressed so far as their external relations were concerned, possessed charters that gave them great freedom to manage their internal affairs." *Id.*

253. See *supra* note 110 and accompanying text.

254. In addition, some of Yugoslavia's key constitutional provisions to this crisis seem contradictory and susceptible to varying interpretations. This was especially true of secession.

255. Some have argued that the downfall of the Confederate Government was its overenthusiastic federalism which prevented the necessary military coordination of the armies of the several states. This, however, is not entirely accurate. The leaders of the Confederacy were strict adherents to the proposition that the means must justify the end result. In other words, an undemocratic centralization of power to win the war would prove the very error of their beliefs. History has shown that the main reason for the defeat of the South was the superior numbers and resources of the North.

Creating Entities strictly from ethnic divisions or nationalities, as stated above, has been avoided somewhat by the new Constitution. Exercising the right to self-determination based on nationalism is what proved disastrous after World War I.<sup>256</sup>

The demographic distribution of the major ethnicities reveal that they are spread throughout the various regions. Prior to the current war, the Serbs accounted for 13.2% of Kosovo, 54.4% of Vojvodina, 11.5% of Croatia, and 32% of Bosnia-Herzegovina.<sup>257</sup> The Croats, the second most numerous peoples in the Balkans, are dispersed throughout. In Croatia, Croats make up approximately 75% of the population. They account for 18.4% of Bosnia-Herzegovina, 1.4% of Montenegro, 2.9% of Slovenia, .5% of Serbia and 5.4% of Vojvodina.<sup>258</sup> Finally, the Muslims account for the largest percent of Bosnia-Herzegovina with 39.5% while occupying small percentages elsewhere.<sup>259</sup>

By dividing the country into two parts, there are still pockets of varying nationalities that remain, but overall there is overwhelming homogeneity. The Constitution does nothing to maintain this arrangement. It actually fosters the movement of people from their present locations to the geographic location controlled by their nationality, creating a further concentration of homogeneous nationalities in the two Entities. For example, Serbs residing in Sarajevo most likely will leave the Bosniac-Croat Federation and move to the Republika Srpska.<sup>260</sup> This is because the government of the Entities, which also controls the ethnic veto, is elected directly by the people from that Entity. A Serb residing in the Federation is prohibited by Article IV of the Constitution from being elected. Thus, without a chance for participation, the Serb most likely will emigrate to Srpska.

In order to reduce the occurrences of emigration, more Entities should be created. Creating Entities to reduce emigration and homogeneity can be done in a way that resembles the American practice of gerrymandering.<sup>261</sup> While done in the U.S. to achieve homogeneity,

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256. Iglar, *supra* note 24, at 221-23.

257. YUGOSLAVIA, *supra* note 40, at 74.

258. *Id.* at 78.

259. *Id.* at 83. The Muslim Slavs account for 13.4% of Montenegro, 3.7% of Kosovo and 2.7% of Serbia. Prior to the fall of the Ottoman Empire in 1918, Muslim Slavs accounted for nearly 91% of Bosnia's landowners. *Id.*

260. Serbs residing in Sarajevo have already began an exodus out of the city rather than live under the control of the new Bosnian Government. *What's News*, WALL ST. J., February 21, 1996, at A1.

261. The term gerrymandering comes from the days of Elbridge Gerry, Governor of Massachusetts in 1812. District lines were drawn in order to maximize the advantage of a political party. These districts, however, rarely ended up as a neatly compact geographical

or at least political homogeneity,<sup>262</sup> gerrymandering in Bosnia and Herzegovina can help reduce overwhelming ethnic majorities in the Entities. In addition, residents of the same Entities do not even have to be contiguous.<sup>263</sup> They can be of a non-territorial form. Such systems exist in the Netherlands, Austria and to a lesser extent, Belgium.<sup>264</sup>

Heterogeneous cantons have worked remarkably well for Switzerland. It is a fair statement to say that those of French and German origins do not have a history of affinity for each other. Recent examples in this century alone<sup>265</sup> demonstrate ethnic hostilities between these two highly nationalistic peoples. In Swiss politics, however, the French and Germans function well together.<sup>266</sup> This is mainly due to the genius of the Swiss model.

Simple map drawing, however, may only cure the geographic problems created by the ethnic patchwork existing in Bosnia. The most serious threat to any establishment of government is the nature of the "cleavages"<sup>267</sup> in society and the presence of "overarching loyalties."<sup>268</sup> If the Entity system is to survive, it must foster a "political socialization and recruitment" process necessary to a stable political system.<sup>269</sup> Political socialization occurs by perpetuating cultures and institutions over a temporal continuum which tends to induct a person into a "citizenship" role.<sup>270</sup> Political recruitment is a continuation of this process which focuses on the individual and places that person into specific roles which will eventually define the person's political outlook.<sup>271</sup> It takes people, albeit not completely, out of social units, such as ethnic and religious communities, and trains them in certain political skills.<sup>272</sup>

shape. Many times they resembled dragons, snakes or salamanders. When one editorial cartoonist saw this new district, he drew it to resemble a dragon and called it a "Gerrymander."

262. See *Shaw v. Reno*, 113 S.Ct. 2816 (1993).

263. There is no international convention that disallows non-contiguous countries. Alaska and Hawaii, for example, are separated from the other states by Canada and the Pacific Ocean, respectively. In addition, some nations, such as the Philippines and Micronesia, in the Pacific are spread among various islands that are separated by expanses of water.

264. LIJPHART, *supra* note 142, at 43.

265. World War I and the resulting failure of the peace that followed which culminated in World War II. In addition, German reunification in the late 1980s and early 1990s was seen as a threat to European stability by France.

266. KENDALL & LOUW, *supra* note 123, at 120.

267. See LIJPHART, *supra* note 142, at 75-81. Segmental cleavages can be "religious, ideological, linguistic, regional, cultural, racial or ethnic nature." *Id.* at 4.

268. *Id.* at 81-83.

269. SUSSER, *supra* note 240.

270. *Id.* at 232.

271. *Id.* at 236-37.

272. *Id.*

Applying these principles to the Bosnian question, there must be a two step process. First, those institutions that exist in the region must be broadened to encompass interests greater than the nationalities themselves. Education, religion and local government must not focus primarily on the Croat *qua* Croat or Serb *qua* Serb but rather as the Croat or Serb as Bosnian. This, indeed, will most likely be the hardest objective put forward in this piece to accomplish but it is also one of the most vital elements in creating a solution. Without a relative degree of success in the first step, it is almost impossible to advance to the second step.

One interesting step was taken toward this objective under Article IV of the Constitution. Under section 3(d), a factional veto is created that does not focus on nationality but rather on the political institution of local government. As such, it may form ties or coalitions that go beyond ethnicity.

Second, these institutions, once reconfigured, must be able to train individuals in the "art" of being Bosnian by giving them a political blueprint that goes beyond nationality. In a sense, it is applying the first step to the individual. Serbs and Croats must be able to act not according to what is best for a Croat or Serb but what is best for a Bosnian.<sup>273</sup>

At first glance, these steps seem to be aimed more at the behavioral aspect of the current crisis than at forming a constitution and government that will secure political stability. In a sense this is true. It should be remembered, however, that much of the region's problems stem from behavior, behavior that was taught to the Bosnians via the institutions of government. Therefore, in attempting to decentralize the government, some sort of behavioral modification is going to be necessary.

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273. The goals of political socialization and political recruitment are somewhat analogous to the civic republican form of government. The civic republican theory holds that the state acts only in furtherance of the "common good." Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1528 (1992). This conception of the common good, however, is not a value judgement by an individual or interest group. Rather, it is "an ongoing process, inclusive of all cultures, values, needs, and interests, to arrive at the public good." *Id.*

Civic republicanism operates under four basic assumptions. First, in order to arrive at the best decision to further the common good, the government must engage in public discourse. *Id.* at 1529. Second, those responsible for the decision must explain how the adopted policy and procedures will further the public good. *Id.* at 1530. Third, this decisionmaking process must be open and informative to the public. All those interested must have access, whether it be through interest groups or individuals. *Id.* Finally, all interests must be regarded equally by the decisionmaker. *Id.* at 1531. This means that the positions of the interest group should be evaluated according to the substance of their ideas, not to the status of their interest. *Id.*

Decentralization should begin with the governments of the Entities. In the Swiss model, each canton is separated into communes varying in size and population. Each commune has a constitution which establishes the powers granted by the canton. Some communes have a great deal of autonomy. This is evident by their powers of taxation.<sup>274</sup> In the United States, and as the South existed under the CSA Constitution, communes are roughly equivalent to the county system. Some counties are populous while others are not. They vary in size and resources. Like communes, counties are granted powers by their respective state constitutions. They usually operate under charters. Some counties can levy taxes and operate prisons and transportation systems.

The judicial department of each Entity should follow the state system under the CSA Constitution because of the concurrent jurisdiction between the state high courts and the CSA federal judiciary.<sup>275</sup> In summarizing judicial power of the cantons, it is necessary to include and contrast those powers of the federal Bosnian judiciary. To better explain the CSA Constitution's innovations and how they may be adapted to Bosnia and Herzegovina, the CSA model will be contrasted with the U.S. Constitution.

Judicial powers of the CSA represented a move towards decentralization by textually changing the U.S. Constitution in three ways, one of which merits discussion here.<sup>276</sup> Under the CSA Constitution, the jurisdiction of the CSA courts extended to "all cases arising under this Constitution,"<sup>277</sup> whereas the U.S. Constitution stated "to all cases in Law and Equity."<sup>278</sup> This change was directed at curbing the equitable powers of federal judges. While the CSA Constitution did not abolish the equitable jurisdiction of the federal judiciary, it did condition its existence on statutorily granted powers.<sup>279</sup> By reducing equitable remedies of the federal courts, state equity powers could remain unaffected by the federal court by reducing federal discretionary powers. By limiting federal power to cases arising under law, the state government would be afforded an extra degree of protection.

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274. KENDALL & LOUW, *supra* note 123, at 117-18.

275. DEROSA, *supra* note 155, at 101.

276. The second and third textual changes were closely related in their purposes. Specifically, lawsuits against states by citizens of foreign states were prohibited. C.S.A. CONST. art. III, § 2. While this was akin to the U.S. Constitution's Eleventh Amendment, the CSA's change was thought to be more protective of sovereign immunity. DEROSA, *supra* note 155, at 103.

277. C.S.A. CONST. art. III, §2.

278. DEROSA, *supra* note 155, at 101.

279. *Id.*

Important to the CSA judicial model was the idea of concurrent jurisdiction between the state and federal courts. Under the leadership of John Marshall, the Supreme Court of the United States was granted superiority over state courts by virtue of its appellate powers.<sup>280</sup> This was the issue in *Cohens v. Virginia*<sup>281</sup> in which the State of Virginia maintained that the federal courts did not have the power to hear state appeals unless they evolved out of an issue relating to the federal constitution. The U.S. Supreme Court rejected Virginia's contention, relegating state decisions to a subordinate status.<sup>282</sup> The CSA Constitution rejected this idea and adopted the principle of concurrent jurisdiction.

Inherent in the concept of concurrent jurisdiction was the power of the state courts to define the limits of the constitutional compact themselves.<sup>283</sup> This had been the Southerner's position from the creation of the United States.<sup>284</sup> This prohibited the power of the federal judiciary from expanding the powers of the federal government at the expense of the states. As such, it provided another measure of protection against centralization. Under the new Constitution, however, this is not allowable. As established under the new Constitution, the Entities appear to be self-sufficient and autonomous in running the day to day affairs of their citizens. The federal system will have to ensure that this balance remains. In so doing, the Swiss model is a good example.<sup>285</sup>

As discussed above, the federal Swiss government is akin to the CSA model with regards to the legislative branch. The National Council is roughly equivalent to the CSA and U.S. House of Representatives with direct proportional representation. The Council of States is related to the CSA Senate and the U.S. Senate before the

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280. *Id.* at 109.

281. 19 U.S. 264 (1821).

282. DE ROSA, *supra* note 115, at 111.

283. *Id.* at 113.

284. This idea was advocated by Jefferson in the Kentucky Resolution of 1798 which protested against the Alien and Sedition Acts passed by the Federalist Congress. To this end, Jefferson stated:

[T]hat to this compact each State acceded as a State, and is an integral party, its co-States forming, as to itself, the other party: that the government created by this compact was not made the exclusive or final judge of the extent of its powers delegated to itself; since that would have made its discretion, and not the Constitution, the measure of its powers; but that as in all other cases of compact among parties having no common Judge, each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress.

THE PORTABLE THOMAS JEFFERSON 281 (Merrill D. Peterson ed. 1975).

285. See WEST, *supra* note 1, at 112.

adoption of the 17th Amendment in 1913.<sup>286</sup> An important consideration with regard to the Assembly should be the way laws are passed. Two innovations that have made their way into the new Constitution should be explored, that of supermajorities and the concurrent veto.

The U.S. Constitution and, to a greater degree, the CSA Constitution utilize supermajorities in voting on certain subjects. Under the CSA model, a two-thirds majority is needed for appropriating money from the treasury.

This concept of the supermajority accomplishes two goals. First, it provides another minority check against the "tyranny of the majority." Second, it helps foster cooperation between factions. For example, if one party does not have the necessary supermajority to pass legislation, it will have to enlist support from another party. To gain support, the faction originally proposing the legislation will have to make concessions to the other party. As such, this will ensure that legislation is acceptable to as many people as possible.

As discussed above, the new Constitution of Bosnia and Herzegovina does incorporate the concept of the supermajority into Article IV, Section 3 by requiring that "best efforts" be made to ensure that legislation passes by a two-thirds majority, one-third from each Entity. This, however, is not a strict requirement. If there is no two-thirds majority, and if the commission does not resolve the dispute, then the issue is put to a simple majority vote. Due to this last reversion back to the numerical majority, there is no incentive for compromise. Instead, the numerical majority must be able to last as long as the process and then put the issue to a majority vote. As such, it is a paper lion.

The second innovation is the concurrent majority as envisioned by Calhoun.<sup>287</sup> According to Calhoun, the concurrent majority operates

to give each interest or portion of the community a negative on the others. It is this mutual negative among its various conflicting interests which invests each with the power of protecting itself, and places the rights and safety of each where only they can be securely placed, under its own guardianship.<sup>288</sup>

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286. Prior to the adoption of the Seventeenth Amendment, state senators were chosen by the legislatures of the several states. This ensured that the states themselves would be represented in the federal government. This made local elections very important because the ruling party in state government most likely would choose a senator belonging to the same party.

287. LIJPHART, *supra* note 142, 36-38.

288. CALHOUN, *supra* note 169, at 28.



Arend Lijphart examined Calhoun's concept of the "mutual veto" and how it would operate in pluralistic societies.<sup>289</sup> Critics argue that the concurrent majority would lead to "minority tyranny." This of course is a natural fear in a democracy in which rules are passed by majorities. According to Lijphart, however, the dangers of the mutual veto are not as grave as they may first appear for three reasons.<sup>290</sup> First, all minorities can possess the mutual veto. It is not relegated to just one party or one particular faction. For example, any coalition of voters from issue to issue can comprise a majority and minority. The minority on issue A may be entirely or even somewhat different than the minority on issue B. The use of the mutual veto by all minorities creates a safety-valve on its frequent use by a particular minority. This is so because the veto can be used by other minorities to defeat legislation passed by the former minority.<sup>291</sup>

The second limitation is due to the "brinkmanship" nature of the veto. The feeling of security in itself without the utilization of it may not lend to feelings of disunity.<sup>292</sup> A minority with clear possession of a powerful procedural tool would not feel or be isolated from the political process. It would even be a positive bargaining tool for receiving concessions from the majority. An example would be the executive veto in the United States. Congress, in its wisdom, recognizes that it should not pass programs that conflict with those of the President. Therefore the two branches will come together and compromise, creating measures that are acceptable to both sides. While the President may never use his veto, Congress' recognition that it does exist makes it an important part of the political process. The final safeguard against the mutual veto is the awareness that political gridlock may result from its overzealous use.<sup>293</sup>

Under the new Constitution of Bosnia and Herzegovina, the Muslims, Croats and Serbs all have a limited mutual veto under Articles IV and V. As discussed above, a decision of the Parliamentary Assembly may be declared to be destructive of the vital interests of one of the three nationalities by a majority of that nationality's members. Had this been the extent of the veto, it would have been powerful and useful. Before the declaration can be approved, however, it must be passed by a majority of Bosniac, Croat and Serb

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289. LIJPHART, *supra* note 142, at 36-38.

290. *Id.*

291. CALHOUN, *supra* note 169, at 28.

292. *Id.*

293. *Id.*

delegates to the House of Peoples present and voting.<sup>294</sup> In other words, legislation must be defeated by a majority that helped to pass it in the first place. As such, the effects of the mutual veto are nugatory.

In addition, a further weakening of the mutual veto is accomplished in paragraph 3(f), in which a majority of Bosniac, Croat or Serb Delegates can object to the declaration under Section 3(e).<sup>295</sup> If this objection is raised and passed, it moves on to a commission which must try to resolve the issue. If there is no agreement by the commission, the issue is referred to the Constitutional Court.

This process does little to protect the minority for two reasons. First, the Constitutional Court can only rule with regard to procedure, not the substantive issue of whether the decision is destructive of a vital interest *vel non*. Second, the minority veto can be negated by another minority veto by sending it to the commission. As it is presently understood, it may be a strategic disadvantage to bring a 3(e) veto to a vote if it is at all likely that the veto will be negated under 3(f). This may not always be true but the possibility does exist.

The veto under Article V provides greater protection than the veto under Article IV because Article V provides a more streamlined and certain procedure for nullifying a decision by the Presidency. If a dissenting Member of the Presidency declares a decision to be destructive of a vital interest, the only impediment to "nullification" is a two-thirds vote in an Entity's assembly.<sup>296</sup>

Bosnian national laws and policies should be subject to veto or nullification by the citizens of the various Entities as an added protection. Theoretically, the Article V ethnic veto may operate as a veto on legislation by not allowing the Presidency to execute the decisions of the Parliamentary Assembly under Section 3(e). This, however, may be an expansive view of the veto and may not be accepted by the Constitutional Court. The Swiss system, on the other hand, allows for two types of referenda to be initiated on the citizen level. The CSA model allowed for the nullification of laws on the state level either through the judiciary or convention. Both of these models of veto will be examined.

As discussed *supra*,<sup>297</sup> a unique feature of the Swiss model is that all laws passed by the Federal Assembly are subject to two types of

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294. See *supra* notes 209, 210 and accompanying text.

295. See *supra* notes 209, 210 and accompanying text.

296. CONST. OF BOSNIA AND HERZEGOVINA art. V, §2(d).

297. See *supra* notes 134-38 and accompanying text.

referenda.<sup>298</sup> The first is called the Obligatory Referendum which assures that all changes to either the state or federal constitutions are decided by popular vote. The second is the Optional Referendum which allows the citizenry to pass judgment on the sufficiency of laws or policies passed by the Federal Assembly. If 50,000 citizens or eight cantons request an Optional Referendum within ninety days after passage and publication, the issue is put to popular vote. If the measures are voted down they are stricken and have no force.

Under the CSA model, a federal law could be nullified in one of two ways. First, the highest court of a state could declare the law to be beyond the power of the CSA Constitution. As noted, the state courts had the jurisdiction to decide the extent of the powers of Congress. This process, however, had its limitations in that it had to be based in law. The judiciary could not arbitrarily invalidate legislation.

Second, a state could nullify a law through convention.<sup>299</sup> In a convention, the people of a state could vote for representatives to a convention who in turn would vote for or against the nullification of a federal law. If a law was nullified by convention, it would suspend its enforcement in that state only. Other states could follow suit, holding similar conventions. If the federal government wished to overturn the actions of a convention or conventions, it could only do so by the amendment process. If a designated majority of the states voted for adoption, the previously nullified legislation would be enforceable in all states.

Both models have advantages and disadvantages. Under the Swiss model, a referendum could pass on a numerical majority of the nation as a whole, subjecting minorities to the will of a larger minority or majority. For example, the Croats and Muslims could join to out vote the Serbs, or the Serbs and Muslims could join to out vote the Croats. Under the CSA model, nullification is dependant upon the numerical majority of a state.

Of the two systems, the CSA model of nullification is superior for several reasons. First, because it is established along state lines, it has the extra protection inherent in a heterogeneous system. Second, nullification of a law would only remain in effect in those states. This added protection would reduce the power of numerical majorities along a national basis. Thus, if several Entities disagree with the Parliamentary Assembly and nullify legislation, it is up to the Assembly to begin the amendatory process. If there are not

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298. See *supra* section V discussing the Swiss model.

299. DEROSA, *supra* note 155, at 19.

enough Entities to support the amendment, then the law was passed in contravention to the will of the people. Those Entities that wish to remain under the force of the suspect law may do so. In addition, the Assembly, realizing that it does not have popular support for the measure may also elect either to amend it, to make it more agreeable or to repeal the law altogether.

Finally, the Entities should have the right to secession.<sup>300</sup> This right is inherent in the Swiss model as well as in the CSA Constitution. Under the Yugoslav Constitution of 1974, secession was arguably present. The operation of that right, however, led to the present conflict.

Under the former constitution of Yugoslavia, the several republics had the right to secede.<sup>301</sup> This right, however, was severely limited by other vague articles in the constitution. First, Article 203 prohibited the use of constitutional rights that would threaten the existence of the state.<sup>302</sup> Arguably, secession by several republics would threaten the security of the remaining regions. Second, Article 244 guarantees the territorial integrity of the state. This would also seem to prohibit secession.<sup>303</sup> Article 5 required the consent of all republics before the borders of Yugoslavia could be altered. This was Serbia's main contention during the secessions of the three republics in 1991 and 1992.<sup>304</sup> Finally, Article 283 gives the Assembly the power to determine any changes in the state's boundaries.<sup>305</sup>

As such, the former constitution granted the republics a very limited form of secession. The constitutions of the Swiss Federation and the Confederate States of America ensure the right of secession. Under Articles 3 and 5 of the Swiss constitution, the cantons are sovereign as long as their sovereignty is not limited by the federal constitution. Under the CSA Constitution, those rights not specifically delegated to the federal government are reserved by the states.<sup>306</sup> The provisions contained in both these constitutions recognize that

Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it, and to institute new Government,

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300. LIJPHART, *supra* note 142, 44-7.

301. Iglar, *supra* note 24, at 218.

302. *Id.*

303. *Id.* at 218.

304. *Id.*

305. *Id.*

306. C.S.A. CONST. art. VI, §§ 5, 6.

laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.<sup>307</sup>

A secession provision should be incorporated into the Bosnian constitution. The Swiss model should be followed, with additions from the CSA Constitution, because of its specific enumerations of federal power. Matters of constitutional interpretation, which are the concurrent jurisdiction of both levels of the judiciary, will become infrequent occurrences.

Entities in the Bosnian system will therefore be able to secede in two ways: by leaving the federation altogether, or by joining another Entity, irrespective of the fact that they may share a border. This will ensure minority protection. Critics will argue that people in a given Entity, or a Entity as a whole, will secede to join other Entities so as to create an ethnic majority in that Entity. This may be true. This would work, however, as a disadvantage for the seceding Entity. While it may combine with another Entity, giving an ethnic population a numerical majority and thus more delegates in the House of Representatives, the combined Entity will in effect lose representation in the House of Peoples. This occurrence should operate as a disincentive to secession except in the most egregious cases.

Critics may also argue that secession leads to the breakup of the state, which is not desirable in any form of government. This is the position of the United States.<sup>308</sup> As Lijphart argues, however, secession is a final solution when plural divisions deteriorate and become the foundation for hostility rather than cooperation.<sup>309</sup> Secession is more desirable than civil strife.

The dissolution of the Bosniac-Croat Federation is not inconceivable. The two parties were indeed engaged in a bloody war, a war just as horrible as the one with the Serbs. The United States brokered an uneasy alliance so as to give the Muslims and Croats more bargaining power with the Serbs.<sup>310</sup> The alliance, however, is more of a truce. It is no secret that Croatian President Franjo Tudjman covets half of Bosnia and Herzegovina and even drew a map for a member of British Parliament that divided the country between Croatia and Serbia, an act reminiscent of Hitler's division of Poland with Russia's Stalin.<sup>311</sup>

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307. THE DECLARATION OF INDEPENDENCE (1776).

308. Mearshimer & Van Evera, *supra* note 8, at 16.

309. LIJPHART, *supra* note 142, at 44-45.

310. Mearshimer & Van Evera, *supra* note 8, at 16-17.

311. *Id.* at 18.

The Croats in the Federation have already begun the process of disassociation with the Muslim controlled government. They have created their own political organization called the Republic of Herzog-Bosna with its own 50,000-man army.<sup>312</sup> Croats in the Federation also perform other autonomous tasks such as delivering the mail, running schools and collecting taxes.<sup>313</sup> In other areas, Federation Croats associate more with Croatia than with the Federation by using Croatian money, passports and vehicle tags, voting in Croatia's elections and routing all telephone calls through Croatia.<sup>314</sup> It is abundantly clear that the Federation Croats want to secede. The only question is the manner, democratically or militarily, in which it will be accomplished.

In summation, the new Republic of Bosnia and Herzegovina should reduce internal conflict by decentralization and fragmentation. Should these two principles falter, the protection afforded by nullification and secession will stand as a bulwark.

#### IX. CONCLUSION

In no respect should this analysis be considered a solitary list of constitutional necessities. Beyond the scope of this analysis lies a multitude of other issues. For example, the question of a standing army is imperative to internal peace because of the temptations inherent in resorting to military power when the political process breaks down. The new Constitution allows for each Entity to have its own army.<sup>315</sup> In the Swiss Constitution, standing armies by the federal government are prohibited and the cantons are limited to those of no more than 300 people. Perhaps this route should be followed by Yugoslavia which has a tradition of citizen militia. Other provisions, specific to the Balkan ideal, should be incorporated so as to make the constitution more acceptable. Finally, adoption of the constitution should be by vote of all the people. This will guarantee its legitimacy among the citizenry and help close the circle of Bosnia's felicities.

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312. *Id.* at 17.

313. *Id.*

314. *Id.*

315. CONST. OF BOSNIA AND HERZEGOVINA art. V, §5(b).

## APPENDIX

## CONSTITUTION OF BOSNIA AND HERZEGOVINA

## PREAMBLE

*Based* on respect for human dignity, liberty, and equality,

*Dedicated* to peace, justice, tolerance, and reconciliation,

*Convinced* that democratic governmental institutions and fair procedures best produce peaceful relations within a pluralist society,

*Desiring* to promote the general welfare and economic growth through the protection of private property and the promotion of a market economy,

*Guided* by the Purposes and Principles of the Charter of the United Nations,

*Committed* to the sovereignty, territorial integrity, and political independence of Bosnia and Herzegovina in accordance with international law,

*Determined* to ensure full respect for international humanitarian law,

*Inspired* by the Universal Declaration of Human Rights, the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, as well as other human rights instruments,

*Recalling* the Basic Principles agreed in Geneva on September 8, 1995, and in New York on September 26, 1995, 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:

## ARTICLE I: BOSNIA AND HERZEGOVINA

1. *Continuation.* The Republic of Bosnia and Herzegovina, the official name of which shall henceforth be "Bosnia and Herzegovina," shall continue its legal existence under international law as a state, with its internal structure modified as provided herein and with its present internationally recognized borders. It shall remain a Member State of the United Nations and may, as Bosnia and Herzegovina, maintain or apply for membership in organizations within the United Nations system and other international organizations.

2. *Democratic Principles.* Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free and democratic elections.

3. *Composition.* Bosnia and Herzegovina shall consist of the two Entities, the Federation of Bosnia and Herzegovina and the Republika Srpska (hereinafter "the Entities").

4. *Movement of Goods, Services, Capital and Persons.* There shall be freedom of movement throughout Bosnia and Herzegovina. Bosnia and Herzegovina and the Entities shall not impede full freedom of movement of persons, goods, services, and capital throughout Bosnia and Herzegovina. Neither Entity shall establish controls at the boundary between the Entities.

5. *Capital.* The capital of Bosnia and Herzegovina shall be Sarajevo.

6. *Symbols.* Bosnia and Herzegovina shall have such symbols as are decided by its Parliamentary Assembly and approved by the Presidency.

7. *Citizenship.* There shall be a citizenship of Bosnia and Herzegovina, to be regulated by the Parliamentary Assembly, and a citizenship of each Entity, to be regulated by each Entity, provided that: (a) All citizens of either Entity are thereby citizens of Bosnia and Herzegovina. (b) No person shall be deprived of Bosnia and Herzegovina or Entity citizenship arbitrarily or so as to leave him or her stateless. No person shall be deprived of Bosnia and Herzegovina or Entity citizenship on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. (c) All persons who were citizens of the Republic of Bosnia and Herzegovina immediately prior to the entry into force of this Constitution are citizens of Bosnia and Herzegovina. The citizenship of persons who were naturalized after April 6, 1992 and before the entry into force of this Constitution will be regulated by the Parliamentary Assembly. (d) Citizens of Bosnia and Herzegovina may hold the citizenship of another state, provided that there is a bilateral agreement, approved by the Parliamentary Assembly in accordance with Article IV(4)(d), between Bosnia and Herzegovina and that state governing this matter. Persons with dual citizenship may vote in Bosnia and Herzegovina and the Entities only if Bosnia and Herzegovina is their country of residence. (e) A citizen of Bosnia and Herzegovina abroad shall enjoy the protection of Bosnia and Herzegovina. Each Entity may issue passports of Bosnia and Herzegovina to its citizens as regulated by the Parliamentary Assembly. Bosnia and Herzegovina may issue passports to citizens not issued a passport by an Entity.



There shall be a central register of all passports issued by the Entities and by Bosnia and Herzegovina.

## ARTICLE II: HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

1. *Human Rights.* Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms. To that end, there shall be a Human Rights Commission for Bosnia and Herzegovina as provided for in Annex 6 to the General Framework Agreement.

2. *International Standards.* The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law.

3. *Enumeration of Rights.* All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include: (a) The right to life. (b) The right not to be subjected to torture or to inhuman or degrading treatment or punishment. (c) The right not to be held in slavery or servitude or to perform forced or compulsory labor. (d) The right to liberty and security of person. (e) The right to a fair hearing in civil and criminal matters, and other rights relating to criminal proceedings. (f) The right to private and family life, home and correspondence. (g) Freedom of thought, conscience and religion. (h) Freedom of expression. (i) Freedom of peaceful assembly and freedom of association with others. (j) The right to marry and to found a family. (k) The right to property. (l) The right to education. (m) The right to liberty of movement and residence.

4. *Non-Discrimination.* The enjoyment of the rights and freedoms provided for in this Article or in the international agreements listed in Annex I to this Constitution shall be secured to all persons in Bosnia and Herzegovina without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

5. *Refugees and Displaced Persons.* All refugees and displaced persons have the right freely to return to their homes of origin. They have the right, in accordance with Annex 7 to the General Framework Agreement, to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any such property that cannot be restored to them. Any commitments or statements relating to such property made under duress are null and void.

6. *Implementation.* Bosnia and Herzegovina, and all courts, agencies, governmental organs and instrumentalities operated by or within the Entities, shall apply and conform to the human rights and fundamental freedoms referred to in paragraph 2 above.

7. *International Agreements.* Bosnia and Herzegovina shall remain or become party to the international agreements listed in Annex I to this Constitution.

8. *Cooperation.* All competent authorities in Bosnia and Herzegovina shall cooperate with and provide unrestricted access to: any international human rights monitoring mechanisms established for Bosnia and Herzegovina; the supervisory bodies established by any of the international agreements listed in Annex I to this Constitution; the International Tribunal for the Former Yugoslavia (and in particular shall comply with orders issued pursuant to Article 29 of the Statute of the Tribunal); and any other organization authorized by the United Nations Security Council with a mandate concerning human rights or humanitarian law.

### ARTICLE III: RESPONSIBILITIES OF AND RELATIONS BETWEEN THE INSTITUTIONS OF BOSNIA AND HERZEGOVINA AND THE ENTITIES

1. *Responsibilities of the Institutions of Bosnia and Herzegovina.* The following matters are the responsibility of the institutions of Bosnia and Herzegovina: (a) Foreign policy. (b) Foreign trade policy. (c) Customs policy. (d) Monetary policy as provided in Article VII. (e) Finances of the institutions and for the international obligations of Bosnia and Herzegovina. (f) Immigration, refugee and asylum policy and regulation. (g) International and inter-Entity criminal law enforcement, including relations with Interpol. (h) Establishment and operation of common and international communications facilities. (i) Regulation of inter-Entity transportation. (j) Air traffic control.

2. *Responsibilities of the Entities.* (a) The Entities shall have the right to establish special parallel relationships with neighboring states consistent with the sovereignty and territorial integrity of Bosnia and Herzegovina. (b) Each Entity shall provide all necessary assistance to the government of Bosnia and Herzegovina in order to enable it to honor the international obligations of Bosnia and Herzegovina, provided that financial obligations incurred by one Entity, without the consent of the other prior to the election of the Parliamentary Assembly and Presidency of Bosnia and Herzegovina, shall be the responsibility of that Entity, except insofar as the obligation is necessary for continuing the membership of Bosnia and Herzegovina in an international organization. (c) The Entities shall provide a safe and secure environment for all persons in their respective jurisdictions, by maintaining civilian law enforcement agencies operating in accordance with internationally recognized

standards and with respect for the internationally recognized human rights and fundamental freedoms referred to in Article II above, and by taking such other measures as appropriate. (d) Each Entity may also enter into agreements with states and international organizations with the consent of the Parliamentary Assembly. The Parliamentary Assembly may provide by law that certain types of agreements do not require such consent.

3. *Law and Responsibilities of the Entities and the Institutions.* (a) All governmental functions and powers not expressly assigned in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities. (b) The Entities and any subdivisions thereof shall comply fully with this Constitution, which supersedes inconsistent provisions of the law of Bosnia and Herzegovina and of the constitutions and law of the Entities, and with the decisions of the institutions of Bosnia and Herzegovina. The general principles of international law shall be an integral part of the law of Bosnia and Herzegovina and the Entities.

4. *Coordination.* The Presidency may decide to facilitate inter-Entity coordination on matters not within the responsibilities of Bosnia and Herzegovina as provided in this Constitution, unless an Entity objects in any particular case.

5. *Additional Responsibilities.* (a) Bosnia and Herzegovina shall assume responsibility for such other matters as are agreed by the Entities; are provided for in Annexes 5 through 8 to the General Framework Agreement; or are necessary to preserve the sovereignty, territorial integrity, political independence and international personality of Bosnia and Herzegovina, in accordance with the division of responsibilities between the institutions of Bosnia and Herzegovina. Additional institutions may be established as necessary to carry out such responsibilities. (b) Within six months of the entry into force of this Constitution, the Entities shall begin negotiations with a view to include in the responsibilities of the institutions of Bosnia and Herzegovina other matters, including utilization of energy resources and cooperative economic projects.

#### ARTICLE IV: PARLIAMENTARY ASSEMBLY

The Parliamentary Assembly shall have two chambers: the House of Peoples and the House of Representatives.

1. *House of Peoples.* The House of Peoples shall comprise fifteen Delegates, two-thirds from the Federation (including five Croats and five Bosniacs) and one-third from the Republika Srpska (five Serbs). (a) The designated Croat and Bosniac Delegates from the Federation shall be selected, respectively, by the Croat and Bosniac Delegates to the House of Peoples of the Federation. Delegates from the Republika Srpska shall be selected by the National Assembly of

the Republika Srpska. (b) Nine members of the House of Peoples shall comprise a quorum, provided that at least three Bosniac, three Croat, and three Serb Delegates are present.

2. *House of Representatives.* The House of Representatives shall comprise forty-two Members, two-thirds elected from the territory of the Federation, one-third from the territory of the Republika Srpska. (a) Members of the House of Representatives shall be directly elected from their Entity in accordance with an election law to be adopted by the Parliamentary Assembly. The first election, however, shall take place in accordance with Annex 3 to the General Framework Agreement. (b) A majority of all members elected to the House of Representatives shall comprise a quorum.

3. *Procedures.* (a) Each chamber shall be convened in Sarajevo not more than 30 days after its selection or election. (b) Each chamber shall by majority vote adopt its internal rules and select from its members one Serb, one Bosniac, and one Croat to serve as its Chair and Deputy Chairs, with the position of Chair rotating among the three persons selected. (c) All legislation shall require the approval of both chambers. (d) All decisions in both chambers shall be by majority of those present and voting. The Delegates and Members shall make their best efforts to see that the majority includes at least one-third of the votes of Delegates or Members from the territory of each Entity. If a majority vote does not include one-third of the votes of Delegates or Members from the territory of each Entity, the Chair and Deputy Chairs shall meet as a commission and attempt to obtain approval within three days of the vote. If those efforts fail, decisions shall be taken by a majority of those present and voting, provided that the dissenting votes do not include two-thirds or more of the Delegates or Members elected from either Entity. (e) A proposed decision of the Parliamentary Assembly may be declared to be destructive of a vital interest of the Bosniac, Croat, or Serb people by a majority of, as appropriate, the Bosniac, Croat, or Serb Delegates selected in accordance with paragraph 1(a) above. Such a proposed decision shall require for approval in the House of Peoples a majority of the Bosniac, of the Croat, and of the Serb Delegates present and voting. (f) When a majority of the Bosniac, of the Croat, or of the Serb Delegates objects to the invocation of paragraph (e), the Chair of the House of Peoples shall immediately convene a Joint Commission comprising three Delegates, one each selected by the Bosniac, by the Croat, and by the Serb Delegates, to resolve the issue. If the Commission fails to do so within five days, the matter will be referred to the Constitutional Court, which shall in an expedited process review it for procedural regularity. (g) The House of Peoples may be dissolved by the Presidency or by the House itself, provided that the House's decision to dissolve is approved by a majority that includes the majority of Delegates from at least two of the Bosniac, Croat, or Serb peoples. The House of

Peoples elected in the first elections after the entry into force of this Constitution may not, however, be dissolved. (h) Decisions of the Parliamentary Assembly shall not take effect before publication. (i) Both chambers shall publish a complete record of their deliberations and shall, save in exceptional circumstances in accordance with their rules, deliberate publicly. (j) Delegates and Members shall not be held criminally or civilly liable for any acts carried out within the scope of their duties in the Parliamentary Assembly.

4. *Powers.* The Parliamentary Assembly shall have responsibility for: (a) Enacting legislation as necessary to implement decisions of the Presidency or to carry out the responsibilities of the Assembly under this Constitution. (b) Deciding upon the sources and amounts of revenues for the operations of the institutions of Bosnia and Herzegovina and international obligations of Bosnia and Herzegovina. (c) Approving a budget for the institutions of Bosnia and Herzegovina. (d) Deciding whether to consent to the ratification of treaties. (e) Such other matters as are necessary to carry out its duties or as are assigned to it by mutual agreement of the Entities.

#### ARTICLE V: PRESIDENCY

The Presidency of Bosnia and Herzegovina shall consist of three Members: one Bosniac and one Croat, each directly elected from the territory of the Federation, and one Serb directly elected from the territory of the Republika Srpska.

1. *Election and Term.* (a) Members of the Presidency shall be directly elected in each Entity (with each voter voting to fill one seat on the Presidency) in accordance with an election law adopted by the Parliamentary Assembly. The first election, however, shall take place in accordance with Annex 3 to the General Framework Agreement. Any vacancy in the Presidency shall be filled from the relevant Entity in accordance with a law to be adopted by the Parliamentary Assembly. (b) The term of the Members of the Presidency elected in the first election shall be two years; the term of Members subsequently elected shall be four years. Members shall be eligible to succeed themselves once and shall thereafter be ineligible for four years.

2. *Procedures.* (a) The Presidency shall determine its own rules of procedure, which shall provide for adequate notice of all meetings of the Presidency. (b) The Members of the Presidency shall appoint from their Members a Chair. For the first term of the Presidency, the Chair shall be the Member who received the highest number of votes. Thereafter, the method of selecting the Chair, by rotation or otherwise, shall be determined by the Parliamentary Assembly, subject to Article IV(3). (c) The Presidency shall endeavor to adopt

all Presidency Decisions (i.e., those concerning matters arising under Article III(1)(a)-(e)) by consensus. Such decisions may, subject to paragraph (d) below, nevertheless be adopted by two Members when all efforts to reach consensus have failed. (d) A dissenting Member of the Presidency may declare a Presidency Decision to be destructive of a vital interest of the Entity from the territory from which he was elected, provided that he does so within three days of its adoption. Such a Decision shall be referred immediately to the National Assembly of the Republika Srpska, if the declaration was made by the Member from that territory; to the Bosniac Delegates of the House of Peoples of the Federation, if the declaration was made by the Bosniac Member; or to the Croat Delegates of that body, if the declaration was made by the Croat Member. If the declaration is confirmed by a two-thirds vote of those persons within ten days of the referral, the challenged Presidency Decision shall not take effect.

3. *Powers.* The Presidency shall have responsibility for: (a) Conducting the foreign policy of Bosnia and Herzegovina. (b) Appointing ambassadors and other international representatives of Bosnia and Herzegovina, no more than two-thirds of whom may be selected from the territory of the Federation. (c) Representing Bosnia and Herzegovina in international and European organizations and institutions and seeking membership in such organizations and institutions of which Bosnia and Herzegovina is not a member. (d) Negotiating, denouncing, and, with the consent of the Parliamentary Assembly, ratifying treaties of Bosnia and Herzegovina. (e) Executing decisions of the Parliamentary Assembly. (f) Proposing, upon the recommendation of the Council of Ministers, an annual budget to the Parliamentary Assembly. (g) Reporting as requested, but not less than annually, to the Parliamentary Assembly on expenditures by the Presidency. (h) Coordinating as necessary with international and nongovernmental organizations in Bosnia and Herzegovina. (i) Performing such other functions as may be necessary to carry out its duties, as may be assigned to it by the Parliamentary Assembly, or as may be agreed by the Entities.

4. *Council of Ministers.* The Presidency shall nominate the Chair of the Council of Ministers, who shall take office upon the approval of the House of Representatives. The Chair shall nominate a Foreign Minister, a Minister for Foreign Trade, and other Ministers as may be appropriate, who shall take office upon the approval of the House of Representatives. (a) Together the Chair and the Ministers shall constitute the Council of Ministers, with responsibility for carrying out the policies and decisions of Bosnia and Herzegovina in the fields referred to in Article III(1), (4), and (5) and reporting to the Parliamentary Assembly (including, at least annually, on expenditures by Bosnia and Herzegovina). (b) No more than two-thirds of all Ministers may be appointed from the territory of the

Federation. The Chair shall also nominate Deputy Ministers (who shall not be of the same constituent people as their Ministers), who shall take office upon the approval of the House of Representatives. (c) The Council of Ministers shall resign if at any time there is a vote of no-confidence by the Parliamentary Assembly.

5. *Standing Committee.* (a) Each member of the Presidency shall, by virtue of the office, have civilian command authority over armed forces. Neither Entity shall threaten or use force against the other Entity, and under no circumstances shall any armed forces of either Entity enter into or stay within the territory of the other Entity without the consent of the government of the latter and of the Presidency of Bosnia and Herzegovina. All armed forces in Bosnia and Herzegovina shall operate consistently with the sovereignty and territorial integrity of Bosnia and Herzegovina. (b) The members of the Presidency shall select a Standing Committee on Military Matters to coordinate the activities of armed forces in Bosnia and Herzegovina. The Members of the Presidency shall be members of the Standing Committee.

#### ARTICLE VI: CONSTITUTIONAL COURT

1. *Composition.* The Constitutional Court of Bosnia and Herzegovina shall have nine members. (a) Four members shall be selected by the House of Representatives of the Federation, and two members by the Assembly of the Republika Srpska. The remaining three members shall be selected by the President of the European Court of Human Rights after consultation with the Presidency. (b) Judges shall be distinguished jurists of high moral standing. Any eligible voter so qualified may serve as a judge of the Constitutional Court. The judges selected by the President of the European Court of Human Rights shall not be citizens of Bosnia and Herzegovina or of any neighboring state. (c) The term of judges initially appointed shall be five years, unless they resign or are removed for cause by consensus of the other judges. Judges initially appointed shall not be eligible for reappointment. Judges subsequently appointed shall serve until age 70, unless they resign or are removed for cause by consensus of the other judges. (d) For appointments made more than five years after the initial appointment of judges, the Parliamentary Assembly may provide by law for a different method of selection of the three judges selected by the President of the European Court of Human Rights.

2. *Procedures.* (a) A majority of all members of the Court shall constitute a quorum. (b) The Court shall adopt its own rules of court by a majority of all members. It shall hold public proceedings and shall issue reasons for its decisions, which shall be published.

3. *Jurisdiction.* The Constitutional Court shall uphold this Constitution. (a) The Constitutional Court shall have exclusive

jurisdiction to decide any dispute that arises under this Constitution between the Entities or between Bosnia and Herzegovina and an Entity or Entities, or between institutions of Bosnia and Herzegovina, including but not limited to: whether an Entity's decision to establish a special parallel relationship with a neighboring state is consistent with this Constitution, including provisions concerning the sovereignty and territorial integrity of Bosnia and Herzegovina; and whether any provision of an Entity's constitution or law is consistent with this Constitution. Disputes may be referred only by a member of the Presidency, by the Chair of the Council of Ministers, by the Chair or a Deputy Chair of either chamber of the Parliamentary Assembly, by one-fourth of the members of either chamber of the Parliamentary Assembly, or by one-fourth of either chamber of a legislature of an Entity. (b) The Constitutional Court shall also have appellate jurisdiction over issues under this Constitution arising out of a judgment of any other court in Bosnia and Herzegovina. (c) The Constitutional Court shall have jurisdiction over issues referred by any court in Bosnia and Herzegovina concerning whether a law, on whose validity its decision depends, is compatible with this Constitution, with the European Convention for Human Rights and Fundamental Freedoms and its Protocols, or with the laws of Bosnia and Herzegovina; or concerning the existence of or the scope of a general rule of public international law pertinent to the court's decision.

4. *Decisions.* Decisions of the Constitutional Court shall be final and binding.

#### ARTICLE VII: CENTRAL BANK

There shall be a Central Bank of Bosnia and Herzegovina, which shall be the sole authority for issuing currency and for monetary policy throughout Bosnia and Herzegovina.

1. The Central Bank's responsibilities will be determined by the Parliamentary Assembly. For the first six years after the entry into force of this Constitution, however, it may not extend credit by creating money, operating in this respect as a currency board; thereafter, the Parliamentary Assembly may give it that authority.

2. The first Governing Board of the Central Bank shall consist of a Governor appointed by the International Monetary Fund, after consultation with the Presidency, and three members appointed by the Presidency, two from the Federation (one Bosniac, one Croat, who shall share one vote) and one from the Republika Srpska, all of whom shall serve a six-year term. The Governor, who shall not be a citizen of Bosnia and Herzegovina or any neighboring state, may cast tie-breaking votes on the Governing Board.



3. Thereafter, the Governing Board of the Central Bank of Bosnia and Herzegovina shall consist of five persons appointed by the Presidency for a term of six years. The Board shall appoint, from among its members, a Governor for a term of six years.

#### ARTICLE VIII: FINANCES

1. The Parliamentary Assembly shall each year, on the proposal of the Presidency, adopt a budget covering the expenditures required to carry out the responsibilities of institutions of Bosnia and Herzegovina and the international obligations of Bosnia and Herzegovina.

2. If no such budget is adopted in due time, the budget for the previous year shall be used on a provisional basis.

3. The Federation shall provide two-thirds, and the Republika Srpska one-third, of the revenues required by the budget, except insofar as revenues are raised as specified by the Parliamentary Assembly.

#### ARTICLE IX: GENERAL PROVISIONS

1. No person who is serving a sentence imposed by the International Tribunal for the Former Yugoslavia, and no person who is under indictment by the Tribunal and who has failed to comply with an order to appear before the Tribunal, may stand as a candidate or hold any appointive, elective or other public office in the territory of Bosnia and Herzegovina.

2. Compensation for persons holding office in the institutions of Bosnia and Herzegovina may not be diminished during an officeholder's tenure.

3. Officials appointed to positions in the institutions of Bosnia and Herzegovina shall be generally representative of the peoples of Bosnia and Herzegovina.

#### ARTICLE X: AMENDMENT

1. *Amendment Procedure.* This Constitution may be amended by a decision of the Parliamentary Assembly, including a two-thirds majority of those present and voting in the House of Representatives.

2. *Human Rights and Fundamental Freedoms.* No amendment to this Constitution may eliminate or diminish any of the rights and freedoms referred to in Article II of this Constitution or alter the present paragraph.

## ARTICLE XI: TRANSITIONAL ARRANGEMENTS

Transitional arrangements concerning public offices, law, and other matters are set forth in Annex II to this Constitution.

## ARTICLE XII: ENTRY INTO FORCE

1. This Constitution shall enter into force upon signature of the General Framework Agreement as a constitutional act amending and superseding the Constitution of the Republic of Bosnia and Herzegovina.
2. 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 in accordance with Article III(3)(b).

## ANNEX I: ADDITIONAL HUMAN RIGHTS AGREEMENTS TO BE APPLIED IN BOSNIA AND HERZEGOVINA

1. 1948 Convention on the Prevention and Punishment of the Crime of Genocide
2. 1949 Geneva Conventions I-IV on the Protection of the Victims of War, and the 1977 Geneva Protocols I-II thereto
3. 1951 Convention relating to the Status of Refugees and the 1966 Protocol thereto
4. 1957 Convention on the Nationality of Married Women
5. 1961 Convention on the Reduction of Statelessness
6. 1965 International Convention on the Elimination of All Forms of Racial Discrimination
7. 1966 International Covenant on Civil and Political Rights and the 1966 and 1989 Optional Protocols thereto
8. 1966 Covenant on Economic, Social and Cultural Rights
9. 1979 Convention on the Elimination of All Forms of Discrimination against Women
10. 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
11. 1987 European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
12. 1989 Convention on the Rights of the Child
13. 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
14. 1992 European Charter for Regional or Minority Languages

15. 1994 Framework Convention for the Protection of National Minorities

ANNEX II: TRANSITIONAL ARRANGEMENTS

1. *Joint Interim Commission.* (a) The Parties hereby establish a Joint Interim Commission with a mandate to discuss practical questions related to the implementation of the Constitution of Bosnia and Herzegovina and of the General Framework Agreement and its Annexes, and to make recommendations and proposals. (b) The Joint Interim Commission shall be composed of four persons from the Federation, three persons from the Republika Srpska, and one representative of Bosnia and Herzegovina. (c) Meetings of the Commission shall be chaired by the High Representative or his or her designee.

2. *Continuation of Laws.* all laws, regulations, and judicial rules of procedure in effect within the territory of Bosnia and Herzegovina when the Constitution enters into force shall remain in effect to the extent not inconsistent with the Constitution, until otherwise determined by a competent governmental body of Bosnia and Herzegovina.

3. *Judicial and Administrative Proceedings.* All proceedings in courts or administrative agencies functioning within the territory of Bosnia and Herzegovina when the Constitution enters into force shall continue in or be transferred to other courts or agencies in Bosnia and Herzegovina in accordance with any legislation governing the competence of such courts or agencies.

4. *Offices.* Until superseded by applicable agreement or law, governmental offices, institutions, and other bodies of Bosnia and Herzegovina will operate in accordance with applicable law.

5. *Treaties.* Any treaty ratified by the Republic of Bosnia and Herzegovina between January 1, 1992 and the entry into force of this Constitution shall be disclosed to Members of the Presidency within 15 days of their assuming office; any such treaty not disclosed shall be denounced. Within six months after the Parliamentary Assembly is first convened, at the request of any member of the Presidency, the Parliamentary Assembly shall consider whether to denounce any other such treaty.

