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Cover Page Footnote

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INTERNATIONALLY GUARANTEED CONSTITUTIVE ORDER: CYPRUS AND BOSNIA AS PREDICATES FOR A NEW NONTRADITIONAL ACTOR IN THE SOCIETY OF STATES

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I. INTRODUCTION

The purpose of this article is to discuss two state building projects in comparative perspective—one attempted in Cyprus from 1960 to 1963, and another in Bosnia begun in 1995 and still under way. In cooperation with local parties, segments of the international community undertook in both Cyprus and Bosnia to establish constitutive structures that could accommodate mutually antagonistic ethnic groups in a single state and secure a position for the state in international society. Faced with problems similar in several essential aspects, the framers of the Bosnian constitutive structures of 1995, and their forebears in Cyprus in 1960, formulated similar solutions. This article, while noting where the two state building projects took different forms, emphasizes those points where the Cypriot and Bosnian constitutive orders converge. In closing, this article notes some possible implications these similarities may have for the ongoing effort to settle the Cypriot conflict, for the fate of the state building project now in its fourth year in Bosnia, and for international society generally.

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II. TWO STATES MADE BY INTERNATIONAL GUARANTEE

A. Historical Background

Though scholars differ as to the role the past has played in the Cypriot and Bosnian crises,[1] some aspects of the modern troubles there seem traceable to remote antecedents. Cyprus and Bosnia both lay at the meeting point of civilizations at a time when the ethnic boundaries along the southern flank of Europe were solidifying. Cyprus, awash for millennia by changing tides of politics and population, was part of the contested frontier between Byzantium and the Muslim world until the fall of Constantinople to the Turks. After a period of uncertainty punctuated by Crusader and Venetian occupations, the island became part of the Ottoman Empire. Turkish settlement began shortly after the 1571 Ottoman takeover, and this eventually gave the island something resembling its present ethnic make-up: approximately seventy-eight percent Greek-speaking and of the Orthodox religion, and eighteen percent Turkish and Muslim.[2] Bosnia was located at the frontier between Byzantine Orthodoxy and Roman Catholicism, and then, after the displacement of the former by Ottoman Turkey, at the frontier between Islam and Christianity.

Bosnia was also marked by ethno-religious division. Serbs and Croats were there from the Middle Ages, the former Orthodox and using a Cyrillic alphabet, the latter Catholic and using the Latin alphabet. Turkish power was introduced to the region in the fourteenth century.[3] The Ottomans offered the Serbo-Croatian nobility in Bosnia the choice of conversion to Islam or expropriation, and many chose conversion. Thus emerged the modern ethno-religious mosaic of that country: approximately forty percent Muslim, thirty-one percent Orthodox, and fifteen percent Catholic, but all Serbo-Croat speakers.[4]

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1. Susan L. Woodward, for example, takes the view that ancient Balkan ethnic and religious animosities did not play the leading role that many observers attributed to them in the Yugoslavian civil wars. *See* SUSAN L. WOODWARD, BALKAN TRAGEDY: CHAOS AND DISSOLUTION AFTER THE COLD WAR 15-16 (1995). According to Woodward, four contemporary factors are responsible for the Bosnian crisis: (1) "the politics of transforming a socialist society to a market economy and democracy;" (2) economic decline brought on by "a program intended to resolve a foreign debt crisis;" (3) end of a Cold War order which had given Yugoslavia a special geopolitical position upon which Yugoslav leaders had capitalized to extract trade preferences and credits from the West; and (4) insistence by Western governments and financiers that Yugoslavia implement fiscal austerity. *Id.*

2. *See* Central Intelligence Agency, The World Factbook 103-05 (1994) [hereinafter Factbook].

3. *See* Speros Vryonis Jr., The Decline of Medieval Hellenism in Asia Minor and the Process of Islamization from the Eleventh through the Fifteenth Century 120-142 (1971); *see also* Paul Wittek, The Rise of the Ottoman Empire 46 (1938).

4. *See* FACTBOOK, *supra* note 2, at 51-53.

Bosnia inherits a simpler linguistic landscape than does Cyprus, but a confessional landscape more complex. Though Serbs and Croats use different scripts, their languages in spoken form are essentially the same. The Greek and Turkish languages by contrast, whether spoken or written, are very different. Although two religions divide Cyprus and three divide Bosnia, the net results of linguistic, ethnic, and religious division in Cyprus and Bosnia are quite similar.

The modern political histories of Cyprus and Bosnia contain some noteworthy parallels. Both remained Turkish possessions until 1878. In 1878, Russia invaded Turkey for the second time since Peter the Great. Russia justified the attack as a protective measure for Christian rebels in the Balkans, including Bosnia. In fact, Tsar Alexander II, like his forebears, was aiming to establish a foothold on the Mediterranean or Aegean. Russian ambitions were thwarted by an unexpectedly resilient Turkish defense and a European concert wary of tsarist aggrandizement. However, war with Russia did weaken Ottoman power to the point that the Muslim Turkish empire could no longer keep hold of certain territories along its Balkan and Mediterranean peripheries. Great Britain, anxious for a base in the Eastern Mediterranean from which to protect the approaches to the Suez Canal, negotiated a treaty with Turkey whereby Britain, in effect, became the protecting power over Cyprus. Austria-Hungary, theoretically on behalf of the European powers ensemble but in essence on its own account, established a protectorate over Bosnia and Herzegovina. Later, in a complex piece of intrigue, which almost precipitated World War I six years early, the Austrian foreign minister, Count Aehrenthal, annexed the territory outright. When war actually broke out in 1914, Turkey sided with Britain's opponents, and Cyprus was formally annexed to the British Empire.

The Austro-Hungarian Empire disappeared with its defeat alongside Germany at the end of World War I. In 1918, Bosnia and Herzegovina became part of a new state in Europe, the Kingdom of Serbs, Croats, and Slovenes—known after a 1929 constitutional revision as Yugoslavia. Bosnia shared in the unexpected changes of that polyglot state for most of the remainder of the twentieth century. Bosnians infrequently acted as a coherent single force in the conflicts that plagued Yugoslavia from 1918 onward. Bosnia's mixed religious make-up and lack of a well-defined national identity made it more of a stage in Yugoslav disputes than an actor in its own right.

Indeed, during the inter-war period of 1918 through 1939, internal administrative divisions did not trace a separate Bosnia.[5]

During World War II, Bosnia was the chief theater in a civil war between Serbs and Croats, though the Bosnians, as a people, did not form a distinct party to that conflict. The civil war nonetheless claimed more lives than the clashes between Axis occupiers and the Yugoslavs.

Cyprus witnessed agitation for an end to British rule as early as the 1920s. However, the two chief ethnic communities did not offer equal support. Greek Cypriots were more determined to oust the British, but with the objective of unifying the island with Greece. Turks, anxious about the risks of life under Greek rule, either abstained from the decolonization debate or advocated an independent federated state structured to protect the minority community. Like Bosnia, Cyprus had no modern history of independence and little ethnic identity of its own. Cyprus would, however, join the stream of independent states that sprang from the retreating of the British Empire. Fighting between Greeks and Turks escalated in the mid-1950s, and negotiations began in earnest in Zurich in 1959 to devise a plan for independence acceptable to all parties concerned.

The end of another major episode of human organization—communism—sent Bosnia down a similarly uncertain road to independence. As had been the case for many Cypriots from 1959 to 1960, many Bosnians from 1991 to 1992 were unconvinced that independence was the most prudent course. Croats and Serbs in Bosnia desired partition of the country between Serbia and Croatia, while the Muslims, lacking obvious bonds to any proximate state, tentatively opted for a delicately balanced multi-ethnic republic. Shortly after Bosnia declared independence in April 1992, constituent parts of the republic seceded, precipitating civil war and leaving the country ungovernable. Negotiation continued throughout the conflict, and complex international accords were at last formulated in

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5. After the kingdom was renamed "Yugoslavia" in 1929, the government aimed to emphasize unity. The administrative map was redrawn to de-emphasize ethnic affiliation. Toward this end, extreme gerrymandering was employed, mixing disparate populations under single subdivisions as much as possible. Ten new administrative subdivisions—called *banovine*—were unpopular and impractical. *See* ROBERT W. SETON-WATSON, EASTERN EUROPE BETWEEN THE WARS, 1918-1941 (1946); *see, e.g.*, BARBARA JELAVICH, HISTORY OF THE BALKANS 200 (1983); Robert W. Seton-Watson, *The Background of the Jugoslav Dictatorship*, 10 SLAVONIC & E. EUR. REV. 363 (1931). For a list of the *banovine* established in 1929, see JOSEPH ROTHSCHILD, EAST CENTRAL EUROPE: BETWEEN THE TWO WORLD WARS 238 (1974). For a map of the 1929 subdivisions, see H.C. DARBY & R.W. SETON-WATSON, SHORT HISTORY OF YUGOSLAVIA 198 fig. 36 (1966).

Dayton and signed in Paris in 1995. These reconstituted the state along new federal lines.[6]

In both countries, a multi-national process produced an externally guaranteed constitutive structure. In Bosnia, this happened only after nearly half a decade of bloodshed, while in Cyprus, civil strife, though serious, did not escalate to such scope before the advent of the 1960 state. International involvement was animated in the two cases by similar concerns. Both Cyprus and Bosnia experienced substantial forced population relocations. Adversaries in both countries aimed to establish ethnically homogenous zones of control and perpetrated atrocities toward that end. External powers observing both situations feared that the internal crisis might involve nearby and related powers: in the Bosnian case, Serbia, Croatia, and possibly others; in the Cypriot case, Greece and Turkey, with the crisis that a conflict between two NATO allies might entail.

Parallel histories culminated with outside powers intervening to structure states in the two countries and guaranteeing those states with a system of interlocking international agreements. The forging of internationally guaranteed federal states in Cyprus and Bosnia took place at different times and both have their own unique features. However, their constitutive structures, the purposes behind those structures, and their general histories bear such remarkable resemblance that the fates of those states under international law cannot be ignored for their mutual relevance.

B. Internal Constitutive Structures

Cyprus, as constituted in 1960, and Bosnia, as constituted in 1995, were intended to accommodate antagonistic ethnic and religious communities. Similarities between the states include: an apportionment of functions heavily weighted toward constituent communities, rather than central government; powerful constitutional courts to mediate disputes among constituent communities and within the small federal or central government; constitutionalized and precisely elaborated numerical provisions to assure balanced community representation in central government organs and to limit occasions for contest over apportionment of posts in government and civil service; special geographic zones for the constituent communities; and

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6. *See* BOSN. & HERZ. CONST. art. III, ¶ 1, 35 I.L.M. at 93 (annex 4 to GFA, *infra*). The Constitution of Bosnia and Herzegovina is Annex 4 to the General Framework Agreement for Peace in Bosnia and Herzegovina, initialed at Wright-Patterson Air Force Base near Dayton, Ohio on November 21, 1995 and signed in Paris on December 14, 1995. *See* General Framework Agreement for Peace in Bosnia and Herzegovina with Annexes, Dec. 14, 1995, 35 I.L.M. 75 [hereinafter GFA].

acknowledgment, pervasive through the constitutional text, of the dual- or multi-community character of the state.

1. Decentralized Power

A distinguishing characteristic of the two states is the limited competence of central government. The Cyprus constitutive arrangement of 1960 and its Bosnian counterpart of 1995 produced weak central governments and strong component communities.[7]

In the Republic of Cyprus, a House of Representatives held all the power that was not expressly reserved to two Communal Chambers,[8] but two factors substantially diminished the strength that such a general conferral of legislative jurisdiction might imply. First, the institutional structure of the House itself was designed to maximize the discrete representation of the two communities and their mutual autonomy. Election procedure played a chief role in that structure, as House delegates were chosen from separate electoral lists defined along community lines,[9] not from a consolidated national list, which might have encouraged thinking about political power as derivative of a single Cypriot people. Further crafting the House as a manifestation of two communities, rather than an organ of unitary governance, the constitution required ratification of important initiatives, such as dissolution of the House by minimum percentages of the Turkish community, in addition to approval by the body as a whole.[10] Any change in electoral laws, imposition of a duty or tax, or law relating to the municipalities required not only a simple majority of the House of Representatives, but also a simple majority of those delegates from each community.[11] The communities thereby enjoyed a veto over central legislative proposals.

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7. In Cyprus, the components are referred to as "Communities." *See generally* REP. OF CYPRUS CONST., Cmnd. 1093 app. D. The text of the Constitution of the Republic of Cyprus was first published as CONFERENCE ON CYPRUS, APP. D, 1959, Cmnd. 679, at 91, then reprinted in 382 U.N.T.S. 5475 (1960); 397 U.N.T.S. 5712 (1961); Republic of Cyprus, Press and Information Office, *Constitution* (visited Nov. 30, 1998) <http://www.pio.gov/constitution/index.htm>; *see also* ALBERT P. BLAUSTEIN, CONSTITUTIONS OF THE OF THE WORLD (1993). In Bosnia, they are referred to as "Constituent Peoples." *See generally* BOSN. & HERZ. CONST., 35 I.L.M. 118 (app. 4 to GFA, *supra* note 6). When referring in a general sense to the peoples of the two states, I will not capitalize terms and will attempt to avoid the constitutional nomenclatures. When referring to ethnic units as contemplated in the constitutive instruments of the Cypriot state, I will use the term "Communities." When referring to ethnic units as contemplated in the constitutive instruments of the Bosnian state, I will use the term "Constituent Peoples."

8. REP. OF CYPRUS CONST. art. 61, *in* Cmnd. 1093, *supra* note 7.

9. *See id.* art. 62, ¶ 2.

10. *See id.* art. 67.

11. *See id.* art. 77.

The second factor diminishing the strength of the Cypriot House of Representatives was the jurisdiction of the Communal Chambers. Though the Communal Chambers were of limited jurisdiction in the legal sense of "limited" (*i.e.*, restricted to powers enumerated), articles 86 through 111 of the constitution conferred sweeping powers to each Chamber over its respective community. Religion, education, personal status, the form of civil courts responsible for personal status and religion, sports and culture, producers' and consumers' cooperatives, and credit agencies fell under Communal Chamber jurisdiction.[12] The Chambers had the power to tax,[13] to set general policy direction,[14] to exercise administrative power,[15] to decide on their own number,[16] and to set their own procedures.[17] Adding to the fiscal power inherent in the authority to levy taxes, the Chambers received fiscal contributions from the central government, which had to meet substantial minimums set by the constitution.[18] The bicommunal nature of Cyprus was further emphasized at the expense of central power by constitutional clauses mandating that certain posts be held by Greek Cypriots, and others by Turkish Cypriots.[19]

The Constitution of Bosnia and Herzegovina, though reflecting features specific to the country it is designed to govern (the *tri*-communal nature of Bosnia), sets up a similarly weak central government and strong component communities. Under the Bosnian Constitution, jurisdiction of the central government is restricted to enumerated powers. These enumerated powers include: foreign trade, customs, and monetary policies; financing republican institutions and external debt; immigration, refugee, and asylum policy and regulation; international law enforcement and law enforcement between the component "Entities" of the republic;[20] establishment and operation of national and international communications facilities; inter-Entity transport; and air traffic control.[21] All other powers not expressly assigned to the central government belong to the

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12. *See id.* art. 87, ¶ 1.

13. *See id.* arts. 87, ¶ 1(f) & 88, ¶ 1 (giving tax power to the Communal Chambers over their respective communities).

14. *See id.* art. 89, ¶ 1(a)(i) (giving policy initiative to the Communal Chambers in regards to their respective communities).

15. *See id.* art. 89, ¶ 1(a)(ii) (giving administrative power to the Communal Chambers over the bureaucracies of their respective community governments).

16. *See id.* art. 92.

17. *See id.* art. 102.

18. *See id.* art. 88.

19. *See infra* text accompanying notes 67-87.

20. *See infra* text accompanying notes 125-137.

21. *See* BOSN. & HERZ. CONST. art III, ¶ 1, 35 I.L.M. at 120 (app. 4 to GFA, *supra* note 6).

Entities.[22] Though the constitution assigns extensive powers to the republican government, these are essentially cancelled out by even more extensive powers vested in the constituent ethnic groups. The component communities of Bosnia can veto and delay federal initiatives. This power stems both from their control of the governments of the Entities and from their representation in the national legislative chambers. The national legislative chambers are the House of Peoples and the House of Representatives, comprising together the Parliamentary Assembly. Ten of the fifteen House of Peoples delegates are chosen by the legislative chamber of the Croat-Muslim Entity (the Federation), and the other five delegates to the House of Peoples are chosen by the legislative chamber of the Serb Entity (the Republika Srpska).[23] The House of Representatives, with seventy two members, is elected two thirds from the Croat-Muslim Entity, and one third from the Serb Entity.[24] Legislation requires a majority vote by both chambers of the Parliamentary Assembly.[25] If, however, a vote is not joined by at least one third of the delegates[26] or members[27] from the territory of each Entity, then the Chair and Deputy Chairs of the chamber or chambers must attempt to obtain at least one third of the votes of the delegates or members from that Entity.[28] If such a third cannot be garnered, then majority vote governs—provided that legislators equaling or exceeding two thirds of the legislators from either Entity do not vote against the proposal.[29] Either Entity can thereby veto national legislative initiatives.[30]

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22. *See id.* art III, ¶ 3, 35 I.L.M. at 120 (app. 4 to GFA, *supra* note 6).
23. *See id.* art. IV, ¶ 1.
24. *See id.* art. IV, ¶ 2.
25. *See id.* art. IV, ¶ 3(c-d).
26. *See id.* art. IV, ¶ 1 (members of the House of Peoples are called "delegates").
27. *See id.* art. IV, ¶ 2 (members of the House of Representatives are called "members").
28. *See id.* art. IV, ¶ 3(d).
29. *Id.*
30. It is important to recall that House of Peoples delegates are sent to the House of Peoples by their respective Entity chambers. The constitution is silent as to voting procedures and the structure of the legislative chambers of the two Entities. The Entity chambers may freely choose the representatives they wish to send to the national legislative organs. A simple majority of one Entity chamber might thus instruct the legislators it sent to the national chambers to vote *en bloc* against any proposal it, the Entity chamber, opposed. The appointment power held by the Entity chambers presumably would give them enough leverage on their national delegates to dictate the voting pattern of at least two thirds of those delegates. One commentator who has speculated on the potential of the Bosnian central government to function effectively agrees that the Entities have a veto. *See* Sienho Yee, *The New Constitution of Bosnia and Herzegovina*, 7 EUR. J. INT'L L. 176, 191 (1996) ("The ethnic sovereignty prevailing in the legislative and executive branches of the government is likely to paralyze the government and ultimately the nation.").

Article IV, paragraph 3(d) of the Bosnian Constitution requires consultation before a veto becomes effective, but at the end of the day, that provision still leaves the Entities a veto over national legislation. The paragraph reads in pertinent part:

> 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.[31]

The constitution puts a procedural buffer between the initial vote and Entity veto, but the veto remains.

Consistent with its weak legislative mandate, the central government relies heavily on the Entities to enforce the national laws[32] and even to execute international obligations.[33] Decentralization in Bosnia is furthered still by the structure of the Republic Presidency. The Presidency is composed of three members, one each from the three ethnic groups, or "constituent peoples."[34] Any member of that collective executive organ can veto a Presidential decision adverse to the interest of his Entity, if his opposition to a decision is ratified by two-thirds of his respective Entity's legislative assembly (in the case of the Bosniac or Croat Presidency member, if two-thirds of the Bosniac or Croat delegates to the House of Peoples of the Bosniac-Croat Federation ratifies).[35] Thus, in both the Cypriot and Bosnian experiments, the component communities of the state are granted substantial powers, while the central organs of the state are left but a residue of lawmaking and administrative competence.

2. *Constitutionalization of Ethnic Division*

(a) Acknowledgment of Ethnic Groups

As a predicate to an apportionment of powers, which substantially disfavors the central governments, the constitutions of Cyprus and Bosnia expressly acknowledge the existence of the constituent ethnic groups. The groups are, in effect, given legal status of a constitutional magnitude. Constitutionalization of ethnic groups was

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31. BOSN. & HERZ. CONST. art. IV, ¶ 3(d), 35 I.L.M. at 121 (app. 4 to GFA, *supra* note 6).

32. *See id.*

33. *See id.* art. III, ¶ 2(b), 35 I.L.M. at 120.

34. *Id.* art. V, 35 I.L.M. at 121 (stating that the Presidency will consist of one Bosniac and one Croat both elected by the Federation, and one Serb elected from the Republic Srpska.).

35. *Id.* art. V, ¶ 2(d), 35 I.L.M. at 122.

not only a necessary first step toward granting the groups the greater share of government power, it also amplified their status. The first paragraph of the Cypriot Constitution describes the state as "a presidential regime, the President being Greek and the Vice President being Turk *elected by the Greek and the Turkish Communities of Cyprus.*"[36] The constitution proceeds to define the Communities,[37] and to require that persons neither Greek nor Turkish who wish to remain citizens of the republic must elect to be counted as members of one or the other Community.[38] The concept of the ethnic Communities is integral to the remainder of the constitution, with virtually all those clauses prescribing procedures and institutions of governance doing so in terms of the Communities.[39] Personal rights, too, are expressed

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36. REP. OF CYPRUS CONST. art. 1, *in* Cmnd. 1093, *supra* note 7 (emphasis added).

37. *Id.* art. 2(1) (defining the Greek Community as citizens of Greek origins whose first language is Greek or share Greek cultural traditions or are members of the Greek orthodox Church); *id.* art. 2(2) (defining members of the Turkish Community as citizens of Turkish origin whose mother tongue is Turkish or share Turkish cultural traditions or Muslims).

38. *Id.* art. 2, ¶ (3).

39. *Id.* art. 1 (providing that the Greek Community elect the President from within the Greek Community; and the Turkish Community elect the Vice President from within their Community); *id.* art. 38 (regarding conferral of honors on members of the Turkish community by the Vice President); *id.* art. 44, ¶ 3 (prescribing procedure for determining the incapacity of the President or Vice President by resolution of the Representatives of their Community); *id.* arts. 47(i), 53 (concerning the powers of the President and the Vice President to pardon members of their Community in capital cases and in instances where the victim and offender were from different Communities); *id.* art. 48(l) (providing recourse to Supreme Constitutional Court in cases of conflict between Communal Chambers of the Communities); *id.* art. 60, ¶ 1 (pertaining to the Council of Ministers secretariat); *id.* art. 61 (establishing powers of House of Representatives as against those of Communal Chambers); *id.* art. 62 (election provisions for House of Representatives with 70 percent elected by the Greek community and 30 percent by the Turkish community); *id.* art. 63 (electoral lists separate for each Community); *id.* art. 67, ¶ 1 (dissolution of the House of Representatives requiring the vote of at least one third of Turkish representatives); *id.* art. 70 (incompatibility of the office of a Representative with that of religious functionary of the Turkish community); *id.* art. 72, ¶ 1 (President and Vice President of the House of Representatives the President shall be Greek and the Vice President Turkish); *id.* art. 73 (community representation on special standing House "committee of selection"); *id.* art. 77 (adjournment of House debate by majority of community representatives); *id.* art. 78 (separate simple majorities of Representatives of each community for new taxes and duties and for laws relating to the municipalities and elections); *id.* arts. 86-111 (regarding the Communal Chambers); *id.* art. 112, ¶ 1 (the Attorney General and Deputy Attorney General shall not be of the same Community); *id.* art. 112, ¶ 5 (prosecutorial discretion); *id.* art. 118, ¶ 1 (the Governor and Deputy Governor of the Issuing Bank of the Republic shall not be of the same community); *id.* art. 123, ¶ 3 (officers in the public service shall be seventy percent Greek and thirty percent Turkish); *id.* art. 131 (heads of the branches of the armed services divided between the communities); *id.* art. 132 (stationing of armed forces in areas dominated by one of the communities); *id.* art. 137, ¶ 1 (recourse to Supreme Constitutional Court by President or Vice President in cases of suspected discrimination against either community); *id.* art. 139, ¶ 1 (jurisdiction of Supreme Constitutional Court over contests between House of Representatives and Communal Chambers); *id.* art. 139, ¶ 3 (providing recourse to Supreme Constitutional Court by either Communal Chamber); *id.* art. 141 (recourse to Supreme Constitutional Court by President or Vice President in cases where newly promulgated or soon-to-be-promulgated regulations of professional activity are suspected of being contrary to the interests of a community); *id.* art. 142 (power in President or Vice President to initiate legislative review by Supreme

with reference to the Communities.[40] The language of each Community is recognized as official, with detailed prescriptions as to the use of Greek and Turkish for public purposes.[41] Further acknowledging the Communities, the constitution provides that its Greek and Turkish texts "shall both be originals and shall have the same authenticity and the same legal force."[42]

The linguistic element in the Bosnian Constitution is less pronounced, as the three ethnic communities comprising that state share an essentially uniform spoken tongue, though different scripts (Cyrillic and Latin). Like the Cypriot Constitution, the Constitution of Bosnia initially recognizes within the text that the Republic is comprised of separate communities.[43] Also, like its Cypriot predecessor, the clauses of the Bosnian Constitution prescribing governmental structures and processes repeatedly affirm the importance of the constituent communities. The Bosnian Constitution goes further than its Cypriot counterpart by frequently emphasizing the territorial manifestations of the separate communities—the so-called "Entities."[44] Article I, paragraph 3 provides: "Bosnia and Herzegovina shall consist of the two Entities, the Federation of Bosnia and Herzegovina and the Republika Srpska."[45] The Entities and the "constituent

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Constitutional Court of acts promulgated by the Communal Chamber of his community); *id.* art. 152, ¶ 2 (apportioning jurisdiction between High Court and courts created under communal law); *id.* art. 153, ¶ 2 (appointments to High Court of Justice); *id.* art. 155, ¶ 3 (discretion in High Court to determine the composition of courts trying civil cases in which parties belong to different communities); *id.* art. 156 (composition of criminal trial courts); *id.* art. 159, ¶¶ 1-4 (composition of courts for civil trials); *id.* art. 159, ¶ 5 (providing that coroners must belong to the same community as did the deceased); *id.* art. 160 (establishment of communal courts); *id.* art. 165, ¶ 2 (funds of Communal Chambers); *id.* art. 171 (allotments between the communities for radio and television broadcasting time); *id.* art. 174 (municipal fees, rates, and taxes); *id.* art. 175 (barring grants of licenses or permits by a municipality to persons not belonging to the community of the municipality); *id.* art. 182, ¶ 3 (constitutional amendments); *id.* art. 186, ¶ 1 (defining 'community'); *id.* art. 196 (term of office of the first Communal Chambers); *id.* art. 199 (British aid to Turkish community).

40. *Id.* art. 6 (concerning ethnic discrimination); *id.* art. 20, ¶ 2 (providing free primary education controlled by Communal Chambers); *id.* art. 22, ¶ 2 (concerning marriage); *id.* art. 23, ¶ 4 (providing protection in case of government takings for the interest of the owner's community); *id.* art. 23, ¶ 6 (governing land reform, agricultural lands will be distributed to a member of the same community as the owner from whom it was acquired); *id.* art. 24, ¶ 8 (further providing for takings by the Republic or by Communal Chambers); *id.* art. 24, ¶ 10 (concerning property of Turkish religious institutions); *id.* art. 25, ¶ 3 (prohibiting restrictions on professional activities contrary to either community's interests); *id.* art. 34 (qualifying that the rights constitutionalized in articles 6 through 33 do not allow either community to undermine "the constitutional order").

41. *Id.* art. 3.

42. *Id.* art. 180.

43. BOSN. & HERZ. CONST. pmbl., 35 I.L.M. 118 (app. 4 to GFA, *supra* note 6) (referring to "Bosniacs [Muslims], Croats, and Serbs" as "constituent peoples . . . of Bosnia and Herzegovina").

44. *Id.* art. I, ¶ 3.

45. *Id.*

peoples" they represent figure prominently throughout the text of the constitution.[46]

Two constitutional devices for further securing the status of the constituent communities appear in both constitutions: (1) provisions for geographic zones particular to each community; and (2) numerical clauses apportioning specific public posts among the communities and assuring certain levels of representation in the public sector by members of the communities.

(b) Constitutionalized Ethnic Geography

The authorities who formulated the constitutive structures of Cyprus and Bosnia acknowledged that the constituent ethnic groups required separate spaces within the state territory. The goal of an internationally guaranteed federation in both places was to prevent national disintegration, and in both places keeping the component groups at some physical distance from one another was deemed conducive, if not indispensable, to that goal. An ethnic geography is prescribed in the constitutive instruments of both states, but implementation of the ethnic geography was to be accomplished at different stages of constitutive development.

In Cyprus, ethnic geography was to have been implemented *after* the founding of the state, whereas in Bosnia, the constitutive instruments set up ethnic division from the very inception of the state.[47] The zonal arrangement in Bosnia is implemented in full by the constitution and related constitutive instruments.[48] Indeed, the constituent peoples of Bosnia were given little or no discretion to

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46. *Id.* art. I, ¶ 4 (barring Entities from establishing controls on inter-Entity movement); *id.* art. I, ¶ 7 (Entity citizenship regulation); *id.* art. I, ¶ 7(e) (issuance of passports by Entities); *id.* art. II, ¶ 1 (providing that the Entities must guarantee human rights and fundamental freedoms); *id.* art. II, ¶ 4 (guaranteeing non-discrimination regardless of a person's "association with a national minority"); *id.* art. II, ¶ 6 (binding Entities to all rights provisions of article II); *id.* art. III (concerning "Responsibilities of and Relations Between The Institutions of Bosnia and Herzegovina And the Entities"); *id.* art. IV, ¶ 1 (representation of the three constituent peoples in the House of Peoples); *id.* art. IV, ¶ 2 (representation of the two Entities in the House of Representatives); *id.* art. IV, ¶ 3 (procedures guaranteeing that no two constituent peoples can promulgate rules of which the third constituent people disapproves); *id.* art. V (collective Presidency composed of representatives of the constituent peoples); *id.* art. V, ¶ 2(d) (veto over Presidential decision by any one of the three Members if supported by two-thirds of the delegates to that Member's Entity legislative assembly); *id.* art. V, ¶ 3(i) (competence of the Entities to assign functions to the Presidency not already enumerated in article V, ¶ 3 (a-h)); *id.* art. V, ¶ 5(a) (barring the separate armed forces of one Entity from attacking the other Entity); *id.* art. VI, ¶ 1 (origin of persons comprising the Constitutional Court of the Republic); *id.* art. VI, ¶ 3(a) (jurisdiction of Constitutional Court over matters concerning Entities); *id.* art. VIII, ¶ 3 (dividing financial contributions between the two Entities); *id.* art. XII, ¶ 2 (requiring that the Entities bring their constitutions into conformity with the Republic Constitution).

47. *See id.* art. I, ¶ 3.

48. *See id.*

interpret or alter the ethnic geography of their state once the Dayton-Paris instruments entered into force.[49] The completed character of the Bosnian ethnic geography reflects the fact that the constitutive instruments for Bosnia are part of the General Framework Agreement for Peace in Bosnia and Herzegovina with Annexes (General Framework Agreement)—a comprehensive set of instruments incorporating the Republic Constitution designed to end a civil war and, to an extent, to crystallize some of the ethno-geographic divisions established during the war.[50] Recalling the Zurich negotiations which led to the foundation of the Republic of Cyprus in 1960, the constituent peoples of the state *in statu nascendi* in Bosnia were parties to the Dayton negotiations.[51] By contrast with the Cypriot example, however, the Bosnian peoples arrived at the negotiations with several years' experience governing state-like entities of their own. The Muslim (Bosniac), Croat, and Serb peoples each had functioning governments, exercising largely independent and effective control over certain, if fluctuating, patches of Bosnia. They commanded separate armies, conducted their own foreign affairs, and, at least in the Serb case, claimed independent statehood.[52] The two Communities, party to the Zurich negotiations had not functioned as such fully formed, state-like organisms prior to 1959. Thus, the ethnic geography of Cyprus was less tightly connected to formal constitutive structures and, thus, there was less impetus to include a detailed description of ethnic geography in the founding instruments of the island republic. Annex 2 to the Bosnian General Framework Agreement, entitled "Agreement on Inter-Entity Boundary Line and Related Issues," delineates the two component Entities of Bosnia.[53]

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49. The Dayton-Paris accords were accomplished through negotiations led by the United States and other nations to resolve the conflicting interests of the constituent people. *See* Paul C. Szasz, *Introduction* to GFA, *supra* note 6, 35 I.L.M. at 75.

50. The negotiators responsible for the Dayton-Paris Accords (with the exception of those representing the Republika Srpska, and, to an extent, the Croat Community) did not portray the project as one that would verify changes in the ethnic geography of Bosnia. To the contrary, there was some effort to deny that the Accords would 'reward' aggressors by ratifying changes effectuated by force. However, the Accords in fact do ratify within Bosnia an apportionment of territory partly the result of the civil war.

51. *See* GFA, *supra* note 6.

52. The Muslims did not claim a state of their own as such; they claimed to represent a multi-ethnic republic of Bosnia and Herzegovina. For analysis of claims that the Republika Srpska in fact did receive recognition as a state before 1996, see Thomas D. Grant, *Comment: Territorial Status, Recognition, and Statehood: Some Aspects of the Genocide Case (Bosnia and Herzegovina v. Yugoslavia)*, 33 STAN. J. INT'L L. 305, 305-09, 312-16 (1997) [hereinafter Grant, *Comments*].

53. *See* Agreement on Inter-Entity Boundary Line and Related Issues, 35 I.L.M. at 112 (annex 2 to GFA, *supra* note 6) [hereinafter Agreement on Boundaries].

This is accomplished with highly detailed maps incorporated by reference into the Annex 2 Agreement.[54]

The Cypriot Constitution approached geographic division somewhat differently, itself not setting borders, but instead prescribing a process by which separate Turkish municipalities were to be delineated in each of the five largest towns.[55] For each of these towns (Nicosia, Limassol, Famagusta, Larnaca, and Paphos), a Turkish municipality would exercise certain competences, prescribed constitutionally.[56] However, the "region" of each town comprising the Turkish municipality was to be "fixed for each municipality by agreement of the President and the Vice President of the Republic."[57] The regions were to have been delineated *after* foundation of the Cyprus republic. To be sure, the Bosnian constitutive arrangement also conceived certain post-foundation processes for ethno-geographic delineation, but in Bosnia the processes were designed to settle points of disagreement between *existing* entities, rather than to set up such entities in the first place.[58] Another distinction in the two approaches to ethnic geography is that, with the exception of Sarajevo (a special federal city), the entire territory of Bosnia is designated part of one or the other constitutionally prescribed zones, while in Cyprus, only portions of the five largest towns were to form such zones. The remainder of Cyprus was to be left "unzoned."[59] The differences notwithstanding, both the Cypriot and Bosnian constitutive arrangements are curious for their constitutionalization of ethnic geography. In both countries, that constitutionalization, whether by pre-foundation prescription or post-foundation process, further emphasized the precedence of constituent communities over central government.

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54. *See id.* art. IV, ¶ 1, 35 I.L.M. at 112 (the maps appear as an appendix to GFA annex 1-A and show that the territory is split by a 51/49 percentage, with the majority delegated to the Federation and the minority to the Republic Srpska).

55. REP. OF CYPRUS CONST. art. 173, *in* Cmnd. 1093, *supra* note 7.

56. *Id.* arts. 174-176.

57. *Id.* art. 177.

58. GFA annex 2 in particular provides two ethno-geographic processes: 1) a consultation system between the Entities and the Commander of the NATO Implementation Force (IFOR), *see* Agreement on Boundaries, *supra* note 53, art. IV, 35 I.L.M. at 112; and 2) a binding arbitration to settle a dispute over a length of the Inter-Entity Boundary Line near the town of Brcko, *see id.* art. V, 35 I.L.M. at 113. The terms of reference for the Brcko arbitration provide that UNCITRAL rules will govern procedure. *See id.* ¶ 3, 35 I.L.M. at 113. The Agreement on Boundaries also apparently contemplates future adjustments to the Inter-Entity Boundary Line by consultation among the Entities and IFOR, *see id.* art. II, 35 I.L.M. at 112, though not by artificial changes in a water course not done in conformity with a special agreement, *see id.* art. III, 35 I.L.M. at 112.

59. REP. OF CYPRUS CONST. art. 178, *in* Cmnd. 1093, *supra* note 7 (ethnic division and representation in all other Cypriot localities was to occur through proportional voting).

Some scholars have argued that such geographic division suits multi-ethnic states such as Cyprus and Bosnia. The point behind the arrangement is the same in both places—to establish spaces for the constituent communities in which each can develop its own institutions with a minimum of friction with its co-community (or communities). Richard Epstein argues that separate existence and minimal central government may be the best formula for multi-ethnic states, especially where antagonism is acute among constituent peoples:

> The principle of limited government should be of special usefulness in Eastern Europe where the divisions between people are so deep that *any* collective decision is likely to leave a sorely aggrieved minority. The animosities of centuries are not likely to disappear with a few days or weeks of earnest constitutional conversation. It is far better therefore to promote a regime of individual liberty and freedom of association to avoid the dangers associated with extensive forced interactions. So long as government power is used to keep people apart until they choose to come together, there is a greater chance that people of fundamentally different preferences can live together under a single government than there is if the state is given extensive powers to bind, regulate, tax, and coerce by collective decision. Indeed the greater the internal disparity, the more critical it is to have a small list of core government functions on whose discharge all can agree.[60]

Its merits aside, this is apparently the logic that produced the system of hypertrophied community competences and *de minimus* central power in Cyprus and Bosnia.

(c) Constitutional Assignment of Office by Ethnic Group

Clauses assuring representation of the component ethnic groups in the leadership cadres further reflect the importance of those groups in the constitutive schema of Cyprus and Bosnia. In Cyprus, the President was always to be Greek, and the Vice President Turkish.[61] In Bosnia, a three person collective presidency is to include one member from each constituent group.[62] At least one-third of Bosnian ambassadors must be from the Serb Entity.[63] Similar provisions apply to the composition of the Constitutional Court,[64] the

60. Richard A. Epstein, *All Quiet on the Eastern Front*, 58 U. CHI. L. REV. 555, 568 (1991).
61. REP. OF CYPRUS CONST. art. 1, *in* Cmnd. 1093, *supra* note 7.
62. BOSN. & HERZ. CONST. art. V, 35 I.L.M. at 122 (app. 4 to GFA, *supra* note 6).
63. *Id.* art. V, ¶ 3(b).
64. *Id.* art. VI, ¶ 1(a).

Central Bank,[65] the House of Representatives,[66] and the presidium (chairs and deputy chairs) of the two republican assemblies.[67]

The Cypriot Constitution is yet more detailed in the ethnic apportionment of public posts. This may owe to the fact that, as noted above, the component Cypriot communities did not possess the crystallized geographic bases and independent governmental institutions of their Bosnian counterparts. The existence of well-developed ethnic entities afforded Muslims, Serbs, and Croats in Bosnia substantial pre-existing bailiwicks of their own. Those with ambitions in public life or concerns over equality of representation could, to some extent, look to their respective Entities for satisfaction or reassurance. In contrast, the central government of Cyprus, comparatively more developed than the Cypriot communal organs, would have been an arena comparatively more attractive for playing out Community tensions and, thus, an arena requiring a fuller regime of Community balances. Whatever the reason, the Cyprus Constitution of 1960, like the Bosnian Constitution, made provision for apportionment of offices along ethnic lines, but in considerably more detail. The constitution, in addition to dictating that the President shall be Greek and the Vice President Turkish, elaborates upon how these officers are to confer credentials and honors, and upon whom.[68] House of Representatives resolutions requiring inquiry into the competence of either officer takes place along Community lines.[69] A Council of Ministers is composed in prescribed ethnic proportion, seven-to-three, Greek-to-Turk.[70] Appointment and removal of Greek cabinet ministers is done by the (Greek) President,[71] and Turkish cabinet ministers by the (Turkish) Vice President.[72] One co-secretary of a Joint Secretariat of the Council of Ministers must be Greek, the other Turkish.[73] The House of Representatives is elected in a fixed proportion, with seventy percent Greek, and thirty percent Turkish.[74] The presiding officer (President) of the House must be a Greek chosen by the Greek representatives from amongst themselves, and the deputy presiding officer (Vice President) must be a Turk similarly chosen.[75]

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65. *Id.* art. VII, ¶ 2.
66. *Id.* art. IV, ¶ 2.
67. *Id.* art. IV, ¶ 3(b).
68. REP. OF CYPRUS CONST. art. 38, *in* Cmnd. 1093, *supra* note 7.
69. *See id.* art. 44.
70. *See id.* art. 46.
71. *See id.* art. 48.
72. *See id.* art. 49.
73. *See id.* art. 60.
74. *See id.* art. 62, ¶ 2.
75. *See id.* art. 72 ¶ 1.

Committee assignments are governed by a Committee of Selection comprised of the presiding and deputy presiding officers, six Greek representatives, and two Turkish representatives.[76] The Attorney General and Deputy Attorney General must not belong to the same Community.[77] Article 123 provides that the "public service" be composed seventy percent of Greeks and thirty percent of Turks.[78] The constitution further specifies that, to localities where members of one Community constitute one hundred percent or nearly one hundred percent of the population ("in a majority approaching one hundred percentum"), only public service employees belonging to that Community shall be posted for duty.[79] The ethnic apportionment regime for Cyprus is, in short, comprehensive.

3. Courts as Mediators of the Constitutive Structure

One further distinctive feature of the internal constitutive structure shared by the two states is a potent judiciary. The strength of high courts reflects again the fact that the two countries are amalgamations of separate constituent peoples. The framers of the constitutions were apprehensive that the constituent peoples would altercate over how to work the complex mechanisms prescribed to accommodate their antagonistic communities and, accordingly, attempted to equip the states with courts capable of adjudicating such altercation.

The Supreme Constitutional Court of Cyprus is given jurisdiction over: (1) matters brought to it by the President or Vice President alleging that a law passed by the House of Representatives discriminates against either component Community;[80] (2) contests brought to it between any organs of the Republic or Communal Chambers;[81] (3) challenges by the President or Vice President to changes proposed in regulation of the professions;[82] (4) Presidential or Vice Presidential challenges to decisions and laws promulgated by the respective officer's Communal Chamber;[83] (5) contests over election results;[84]

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76. *See id.* art. 73, ¶ 2, ¶3.

77. *See id.* art. 112, ¶1. The same rule applies as between the Auditor General and Deputy Auditor General, *id.* art. 115, ¶ 1; the Governor and Deputy Governor of the Issuing Bank of the Republic, *id.* art. 118, ¶ 1; the Accountant General and Deputy Accountant General, *id.* art. 126, ¶ 1; and the Heads and Deputy Heads of the army, police, and gendarmerie, *id.* art. 131, ¶ 2.

78. *Id.* art. 123, ¶1.

79. *Id.* art. 123, ¶ 3. A similar provision governs deployment of armed and security forces. *See id.* art. 132.

80. *See id.* art. 137, ¶ 1. Article 138 amplifies this jurisdiction by specifically including contests over the Republic budget. *See id.* art 138.

81. *See id.* art. 139, ¶ 1.

82. *See id.* art. 141.

83. *See id.* art. 142.

(6) challenges by any government agency or any other person against government actions allegedly violating the constitution or amounting to an abuse of powers;[85] and (7) conflicts between the Greek and Turkish language texts of the constitution.[86] Notably, there is no case-and-controversy requirement, and the President and Vice President have recourse to the Court against suspect laws and acts even before they are promulgated.[87] A High Court has jurisdiction over all matters not under Supreme Constitutional Court jurisdiction, but it too reflects the bi-communal basis of the Republic and the apprehension that ethnic clashes could undo the constitutive order. In particular, the High Court must compose its bench in a manner not likely to offend the notions of ethnic parity required throughout the constitution. This requirement is implemented by elaborate prescriptions as to ethnic representation on the bench.[88] Thus, even the court adjudicating matters that do not on their face touch the constitutive order of the Republic of Cyprus was designed to be sensitive to the bi-communal character of that order.

A Constitutional Court also holds a prominent place in the Bosnian constitutive scheme, and, like its Cypriot predecessor, is charged with mediating inter-community tensions likely to manifest themselves within and between state organs. The Constitutional Court of Bosnia has jurisdiction to decide: (1) disputes among Entities, between Entities and the central government, and between institutions of the central government; (2) the constitutionality of special foreign relations activities of an Entity;[89] (3) the consistency of an Entity constitution with the Republic constitution; (4) appeals from other courts where a case raises constitutional issues; and (5) on referral from other courts, questions as to compatibility of laws with the European Convention for Human Rights and Fundamental Freedoms or with the laws of the republic, or as to the existence or scope of a general rule of public international law.[90] The negotiators at Dayton also were concerned that conflict between the constituent

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84. *See id.* art. 145.

85. *See id.* art. 146.

86. *See id.* art. 149.

87. *See id.* art. 140, ¶ 1. "The President and the Vice President acting jointly may, *at any time prior* to the promulgation of any law or decision of the House of Representatives, refer to the Supreme Constitutional Court for its opinion the question as to whether such law or decision . . . is repugnant to . . . this Constitution . . . ." *Id.* (emphasis added). A similar pre-enactment recourse is furnished by Article 141 as regards changes in professional standards.

88. *See id.* arts. 153 & 159.

89. *See infra* text accompanying notes 163-183.

90. *See* BOSN. & HERZ. CONST. art. VI, ¶ 3, 35 I.L.M. at 124 (app. 4 to GFA, *supra* note 6); *see also infra* text accompanying notes 163-206 (on the position of international law in the constitutive orders of the Cypriot and Bosnian republics).

peoples might spill outside the confines of government organs. The constitutive framework, if not the constitution itself, had to address the prospect of a resumption of inter-personal violence and violence by institutions against individuals. Annex 6 to the General Framework Agreement provides for a Commission on Human Rights,[91] composed of an Office of the Ombudsman and a Human Rights Chamber.[92] The Human Rights Ombudsman has jurisdiction to investigate claims of human rights abuses.[93] Any person, organ, party, or institution has standing to request investigation,[94] but the Ombudsman has discretion in deciding whether to investigate a matter brought to its attention.[95] If it does investigate and find a violation of human rights, it shall indicate so in written findings and require the perpetrator to explain in writing how he, she, or it will comply with human rights laws in the future.[96] An allegation received by the Ombudsman, but within the jurisdiction of the Human Rights Chamber, may be referred by the Ombudsman to the Chamber at any time.[97] The Chamber itself has jurisdiction over allegations of human rights abuses, including allegations brought by referral from the Ombudsman and directly from individuals.[98] The Chamber is to attempt to achieve compromise among parties to a claim, but may also prescribe interim and other measures that are binding upon the parties.[99]

C. International Guarantee

In both Cyprus and Bosnia, complex internal structures are guaranteed by an equally complex system of interlocking international engagements. Again, like the internal constitutive arrangements, the external guarantees bear notable similarities. The centerpiece of those guarantees in both cases is a network of treaties binding the key interested outside states to foster the domestic structures provided in the constitution. Those treaties provide for: (1) semi-permanent deployment of troops from key guarantor states in the territories of the newly constituted states; (2) extensive rights in the guarantors to intervene in the mundane as well as high political functions of the states; and (3) collective oversight of the

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91. *See* Agreement on Human Rights, ch. 2, 35 I.L.M. 130 (annex 6 to GFA, *supra* note 6).
92. *See id.* art. II, ¶ 1, 35 I.L.M. at 131.
93. *See id.* art. V, 35 I.L.M. at 132.
94. *See id.* art. II, ¶ 3, 35 I.L.M. at 131.
95. *See id.* art. V, 35 I.L.M. at 132.
96. *See id.* art. V, ¶ 6, 35 I.L.M. at 132.
97. *See id.* art. V, ¶ 5, 35 I.L.M. at 132.
98. *See id.* art. VIII, 35 I.L.M. at 133.
99. *See id.* art. XI, ¶ 6, 35 I.L.M. at 134.

constitutive structures of the states and consultative process among the guarantors in case of degradation of those structures. To emphasize even further the international aspect of the two states, the constitutions are themselves wholly incorporated as appendices or annexes to the multi-lateral treaties. Specific provisions of the constitutions amplify the on-going international character of the states and the international character of the processes through which the states were constituted. Chief among these provisions is the requirement that principal officers of key judicial institutions be nationals of third states. The constitutions also prescribe openness to international law, and critical parts of each are made inalterable but through international agreement. Finally, and perhaps most unusual among the structural provisions of the two republics, express acknowledgment is given to special relationships between their constituent communities and proximate states.

1. Constitutions by International Process

The most distinctive characteristic of the governmental systems instated in Cyprus in 1960 and Bosnia in 1995 is that they bear multiple and integral contacts to processes external to the polities they govern. The effective linkage of the constitutive order to international law and to foreign guaranteeing states is nowhere more explicit than in the very context of the constitutions. Both are enmeshed in an interconnected series of international instruments, parties to which include the states themselves, a number of proximate states, and more remote guaranteeing powers. The Constitution of Bosnia and Herzegovina appears as an annex to the General Framework Agreement.[100] The Constitution of the Republic of Cyprus was similarly part of a comprehensive settlement that led to the establishment of a new state.[101] The relationship of those constitutions to the surrounding network of treaties is not just incidental. The relationship is integral in a number of respects.

First, treaties associated with the constitutions in both cases bound external powers to guarantee the constitutions. In the case of Cyprus, a Treaty of Guarantee between Cyprus on the one part, and Greece, Turkey, and the United Kingdom on the other, bound the parties to "recognise and guarantee . . . the state of affairs established by the Basic Articles of [the Republic's] Constitution."[102] The Treaty

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100. *See* BOSN. & HERZ. CONST., 35 I.L.M. at 118 (annex 4 to GFA, *supra* note 6).

101. *See supra* notes 7-8.

102. Treaty of Guarantee art. 2, Cmnd. 1093, app. B; Republic of Cyprus, Press and Information Office, *Constitution* (visited Nov. 30, 1998) <http://www.pio.gov/constitution/index.htm>. The "Basic Articles" are enumerated at Article 182 of the Constitution, which is

of Guarantee was incorporated into the text of the constitution itself as Article 181, titled as Annex I. In a similar fashion, the Bosnian Constitution is the subject of formal international undertakings. The General Framework Agreement binds the Republic of Bosnia and Herzegovina, Croatia, and the Federal Republic of Yugoslavia to "welcome and endorse" and to "fully respect and promote the fulfillment of" the Constitution of Bosnia.[103] Amplifying the element of guarantee, six additional signatures appear on the agreement on behalf of a group of powers acting as "witnesses" to signature by the parties. Five of the additional "witnessing" signatories—France, Germany, Russia, the United Kingdom, and the United States—had acted as a "contact group" during the negotiations that resulted in the Dayton accords. The other witnessing signatory, the European Union, had been active in the Yugoslav crisis more generally since August 1991.[104] This unusual device of witnessing a treaty signing[105] goes to emphasize the international support underpinning the constitutive structure of Bosnia. It also expressly draws external forces into on-going domestic Bosnian processes of governance. The constitution itself is incorporated into the General Framework Agreement as Annex 4.[106]

The integration of international elements with the constitutive structures of the two states goes beyond straightforward undertakings to protect the constitution. To start, it is important to appreciate the complexity of the constitutive structures. They are established in part by written instruments expressly entitled "constitutions," but the constitutions do not posit the whole plan of domestic order in either country. In both countries, domestic order is established by constitutions acting in interplay with a number of surrounding international instruments. The comparative importance of the interplay as a constitutive force is greater in Bosnia, but in Cyprus, too, the plain text of the Constitution of 1960 was only one part of a larger scheme of state structuring. A Joint Commission in Cyprus drafted a constitution relying on a "Basic Structure" set forth at Zurich in

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titled as Annex III to the Constitution. They include all provisions for the balance of community interests and protection of human rights and fundamental freedoms in the republic. Insofar as the Constitution is designed primarily to balance the rights of the majority (Greek) and minority (Turkish) communities, the Basic Articles cover the core of the constitutive structure of the republic.

103. *See* GFA, *supra* note 6, art. V, 35 I.L.M. at 90.

104. On European Union involvement in the Yugoslav crisis, *see* DAVID OWEN, BALKAN ODYSSEY (1995).

105. One commentator notes that "[t]his is an infrequent form of approval." Paola Gaeta, *The Dayton Agreements and International Law*, 7 EUR. J. INT'L L. 147, 154 (1996).

106. BOSN. & HERZ. CONST., 35 I.L.M. 118 (app. 4 to GFA, *supra* note 6).

February 1959.[107] The Joint Commission submitted its draft constitution to the United Kingdom on April 6, 1960.[108] Discussions then began in London at Lancaster House to develop the comprehensive set of constitutive instruments with which the constitution would be intertwined. Agreement on a complete structure for an independent Cyprus was reached on July 1, 1960, by the heads of the two Cypriot Communities, the foreign ministers of Greece and Turkey, and the Secretary of State for Foreign Affairs of Britain.[109] In addition to the Constitution and the quadripartite Treaty of Guarantee annexed thereto, the structure included a Treaty of Establishment and a Treaty of Alliance. The United Kingdom, Greece, Turkey, and Cyprus were party to the Treaty of Establishment, and Greece, Turkey, and Cyprus were party to the Treaty of Alliance.

In addition to this total of three multilateral treaties, the settlement creating Cyprus comprised fifteen exchanges of notes (eight annexed to the Treaty of Establishment, and seven free-standing),[110] one Statement concerning the Rights of Smaller Religious Groups in Cyprus,[111] and one Statement concerning the Republic of Cyprus and the [British] Commonwealth.[112] The quadripartite Treaty of Establishment takes note of the Treaty of Guarantee. Its substantive provisions are elaborated upon by its annexes. These include: (1) a definition of Cypriot national territory;[113] (2) provisions for Sovereign Base Areas (SBAs), which the United Kingdom would retain at Akrotiri and Dhekelia;[114] (3) provisions that Cyprus and the three guarantor states "consult and co-operate in the common defense of Cyprus;"[115] (4) status of forces;[116] (5) guarantees of human rights and fundamental freedoms;[117] (6) nationality provisions;[118] (7) undertakings between the United Kingdom and Cyprus to settle financial and

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107. Introduction, pt. I, ¶ 2, Cmnd. 1093; Republic of Cyprus, Press and Information Office, *Constitution* (visited Nov. 30, 1998) <http://www.pio.gov/constitution/index.htm>.

108. *See id.*

109. *See id.* at ¶ 6.

110. *See* Introduction, pt. II, Cmnd. 1093; Republic of Cyprus, Press and Information Office, *Constitution* (visited Nov. 30, 1998) <http://www.pio.gov/constitution/index.htm>.

111. Cmnd. 1093 app. E; Republic of Cyprus, Press and Information Office, *Constitution* (visited Nov. 30, 1998) <http://www.pio.gov/constitution/index.htm>.

112. Cmnd. 1093 app. F; Republic of Cyprus, Press and Information Office, *Constitution* (visited Nov. 30, 1998) <http://www.pio.gov/constitution/index.htm>.

113. *See* Treaty of Establishment, art. 1, Cmnd. 1093, app. A; Republic of Cyprus, Press and Information Office, *Constitution* (visited Nov. 30, 1998) <http://www.pio.gov/constitution/index.htm>. Annex A elaborates on this.

114. *See id.* art. 2. Annex B sets forth United Kingdom rights in the SBAs and Cypriot responsibilities relating thereto.

115. *See id.* art. 3.

116. *See id.* art. 4. Annex C provides further detail.

117. *See id.* art. 5.

118. *See id.* art. 6. Annex D provides further detail.

administrative matters arising out of the transition to independence;[119] (8) provisions on state succession between the United Kingdom and Republic of Cyprus;[120] and (9) trade and commerce provisions to be implemented by the parties.[121] All annexes to the Treaty of Establishment are incorporated into it as "integral parts" of the Treaty.[122] Thus, the Treaty of Establishment contributes to structuring the new Republic by creating a web of four-way and two-way obligations, set forth by the annexes in great detail. The Treaty of Establishment builds key parts of the new state edifice, such as territorial delineation, succession to rights and liabilities, and international security, and it amplifies the international aspect of the constitution itself.

The third treaty composing the constitutive scheme of Cyprus is the Treaty of Alliance. A tripartite agreement among Cyprus, Greece, and Turkey, the Treaty of Alliance binds the three states in a cooperative defense pact. The Treaty of Alliance establishes a Tripartite Headquarters to coordinate a defense apparatus[123] and provides that the parties will "resist any attack or aggression, direct or indirect, directed against the independence or the territorial integrity of the Republic of Cyprus."[124] Like the Treaty of Guarantee, the Treaty of Alliance is expressly incorporated into the constitution,[125] and, like both of the other treaties, it contributes to constitutive structure. The Treaty of Alliance emphasizes the international aspect of the new Republic and installs a distinctive feature of this form of state order, an enduring multilateral military presence.[126]

The constitutive structure of Bosnia is also established by a network of international instruments interacting with one another and with a constitution. As previously discussed, the Constitution of the Bosnian Republic is nested inside the General Framework Agreement as Annex Four.[127] Annex Four and the other eleven annexes are described by the Legal Adviser to the International Conference

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119. *See id.* art. 7. Annex E provides further detail.

120. *See id.* art. 8.

121. *See id.* art. 9.

122. *See id.* art. 11.

123. *See* Treaty of Alliance, art. III, Cmnd. 1093, app. C; Republic of Cyprus, Press and Information Office, *Constitution* (visited Nov. 30, 1998) <http://www.pio.gov/constitution/index.htm>.

124. *See id.* art. II.

125. *See* REP. OF CYPRUS CONST. art. 181, *in* Cmnd. 1093, *supra* note 7 (providing that the Treaty of Alliance has "constitutional force" and that it be incorporated into the Constitution under 'Annex II').

126. For a detailed discussion of the defense undertakings contained in the Treaties of Guarantee and Alliance, see Thomas Ehrlich, *Cyprus, the "Warlike Isle": Origins and Elements of the Current Crisis*, 18 STAN. L. REV. 1021, 1032 (1966).

127. *See* BOSN. & HERZ. CONST., 35 I.L.M. 118 (app. 4 to GFA, *supra* note 6).

on the Former Yugoslavia as having two objectives: to implement the settlement reached at Dayton and to prescribe the constitutional arrangement of Bosnia.[128] Toward the first objective, certain annexes set up a NATO Implementation Force (IFOR) to take over from a United Nations Protection Force (UNPROFOR);[129] establish a regional stabilization process including conventional arms reduction terms;[130] establish an office of a "High Representative" to monitor implementation of the settlement;[131] and establish an International Police Task Force (IPTF) to assist in developing civilian policing systems in the republic.[132] Toward the objective of internal constitutive order (though, as soon illustrated, it may be artificial to segregate these constitutive instruments on the basis of whether they are international or domestic in effect), the annexes provide for an Inter-Entity Boundary Line;[133] a Constitution;[134] a process for the first elections to the new state organs created under the Constitution;[135] a Commission on Human Rights, an Office of the Human Rights Ombudsman, and a Human Rights Chamber to implement the human rights provisions of the Constitution;[136] a Commission for Refugees and Displaced Persons to attempt to mitigate forced population movements perpetrated during the civil war;[137] a Commission to Preserve National Monuments;[138] public corporations in the newly constituted republic;[139] and an arbitration process to resolve disputes

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128. *See* Szasz, *supra* note 49, at 75.

129. *See* Agreement on Military Aspects of the Peace Settlement, 35 I.L.M. 92 (annex 1-A to the GFA, *supra* note 6). This also includes: Status of Forces Agreement (SOFA) between Bosnia and NATO; a SOFA between Croatia and NATO; and an agreement between Yugoslavia and NATO to govern "Transit Arrangements for Peace Plan Operations."

130. *See* Agreement on Regional Stabilization, 35 I.L.M. 108 (annex 1-B, to GFA, *supra* note 6)

131. *See* Agreement on Civilian Implementation of the Peace Settlement, 35 I.L.M. 147 (annex 10 to GFA, *supra* note 6).

132. *See* Agreement on International Police Task Force, 35 I.L.M. 150 (annex 11 to GFA *supra* note 6).

133. *See* Agreement on Boundaries, *supra* note 53. This includes the arbitration process to settle the Brcko area boundary dispute. *Id.* Paul C. Szasz notes that the provisions of annex 2, which require the parties to allow free movement of goods across the Inter-Entity boundaries, dovetail with the Constitution Article I.4, which provides for similar freedom. *See* Szasz, *supra* note 49, at 79.

134. *See* BOSN. & HERZ. CONST., 35 I.L.M. 118 (annex 4 to GFA, *supra* note 6).

135. *See* Agreement on Elections, 35 I.L.M. 115 (annex 3 to GFA, *supra* note 6).

136. *See* Agreement on Human Rights, *supra* note 91.

137. *See* Agreement on Refugees and Displaced Persons, 35 I.L.M. 137 (annex 7 to GFA, *supra* note 6).

138. *See* Agreement on Commission to Preserve National Monuments, 35 I.L.M. 142 (annex 8 to GFA, *supra* note 6).

139. *See* Agreement for the Establishment of Bosnia and Herzegovina Public Corporations, 35 I.L.M. 145 (annex 9 to GFA, *supra* note 6).

that may arise between the two entities.[140] Szasz points out that, though the Bosnian Constitution refers to some annexes in part, it does not incorporate them by reference, thereby leaving imprecise the legal relationship among these instruments and the constitution.[141] However, the net result is familiar from the Cyprus experience. An interwoven system of international engagements acts in interplay with prescriptions for domestic governance to establish and guarantee a new state.

2. Ongoing Armed Intervention

By far the most potent element of international guarantee in Bosnia is IFOR and its continuation, the NATO Stabilization Force (SFOR). Established by Annex 1-A, the force has sweeping discretion within the republic. Moreover, IFOR does not have to rely on the Dayton instruments alone for its legal authority, however completely those instruments may clothe it. The General Framework Agreement invites the United Nations Security Council to adopt a resolution in effect verifying IFOR's mandate.[142] This resolution was adopted on December 15, 1995.[143] The mechanisms for implementing the constitutive structure of Bosnia thus enjoy a double mandate: one part deriving from treaties embracing Bosnia, the two principal proximate states, and the contact group powers; the other from a Security Council resolution. The former creates a set of obligations among the eight state parties most intimately involved with the state building process, while the latter gives the process a foothold in general international law.[144]

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140. *See* Agreement on Arbitration, 35 I.L.M. 129 (annex 5 to GFA, *supra* note 6). The arbitral organ has authority to issue holdings binding on the Entities.

141. *See* Szasz, *supra* note 49, at 80.

142. *See* Agreement on Military Aspects of Peace Settlement, art. 1, ¶ 1(a), 35 I.L.M. 92 (annex 1-A to GFA, *supra* note 6).

143. *See* U.N. SCOR, Res. 1031, 3607th mtg. (1995) (welcoming the final signatures on the Dayton instruments and endorsing IFOR). For further discussion, see James Sloan, *The Dayton Peace Agreement: Human Rights Guarantees and their Implementation*, 7 EUR. J. INT'L L. 207, 220 (1996). The Security Council passed several other resolutions relating to the settlement for Eastern Slavonia, Baranja, and Western Sirmium—parts of Croatia which had become theaters of war in summer and fall 1991 and had been in dispute since then between Yugoslavia and Croatia. U.N. SCOR, Res. 1023, 3596th mtg. (1995); U.N. SCOR, Res. 1025, 3600th mtg. (1995); U.N. SCOR, Res. 1037, 3619th mtg. (1996). Also, the Security Council passed a resolution the day after the initial signing at Dayton through which it immediately suspended sanctions against the Federal Republic of Yugoslavia and the Bosnian Serb Republic. U.N. SCOR, Res. 1022, 3595th mtg. (1995). Though the United Nations would become integrally involved in the Cyprus crisis *after* the breakdown of the 1960 constitutive arrangement, it did not play such a role during the creation of that arrangement; this marks a difference between Cyprus and Bosnia.

144. It is also noteworthy that NATO is not participating in IFOR *qua* NATO but rather is acting as the provider of a command, control, communications, and intelligence infrastructure

According to Gaeta, "[t]he powers granted to IFOR are extensive and all-embracing. In many respects they are not dissimilar to those of an occupying army."[145] IFOR controls the movement of goods and persons in the country, and enjoys substantial autonomy, including unlimited freedom of movement for its members. All crossing points between the entities lie under the control of IFOR units. Under Annex 1-A of the General Framework Agreement, "IFOR shall have the unimpeded right to observe, monitor, and inspect any Forces, facility or activity in Bosnia and Herzegovina that the IFOR believes may have military capability."[146] Annex 1-A further grants IFOR unlimited rights to "bivouac, maneuver, billet, and utilize any areas or facilities" in Bosnia; immunity to liability for its acts in Bosnia;[147] and control over the entire band of electromagnetic frequencies.[148] No Bosnians may enter defined Zones of Separation between the three constituent Entities unless supervised by IFOR.[149] Annex 1-A of the General Framework Agreement does not provide any form of judicial process to limit the discretion of IFOR.[150] Naturally, critics of IFOR and the Bosnian settlement generally argue that the military arrangement violates Bosnian sovereignty.[151] The Cyprus constitutive arrangement also contained a notable military element.[152] Though not as large as IFOR, nor drawing on as many

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to those states that do compose IFOR. *See* Niccoló Figà-Talamanca, *The Role of NATO in the Peace Agreement for Bosnia and Herzegovina*, 7 EUR. J. INT'L L. 164, 165 (1996). This is not dissimilar to how some NATO Member States envision the defense pact could support Combined Joint Task Forces (CJTFs) consisting of some but not all NATO Member States. IFOR foreshadows a mode of intervention which some NATO Member States argue should be used extensively in the years ahead. On Combined Joint Task Forces, see NATO HANDBOOK, 13, 152-53, 163-64 (Brussels: NATO Office of Information and Press) (1995).

145. Gaeta, *supra* note 103, at 153 n. 18.

146. Agreement on Military Aspects of Peace Settlement, art. VI, ¶ 6, 35 I.L.M. 92, 97 (annex 1-A to GFA, *supra* note 6).

147. *Id.* art. VI, ¶ 9(a), 35 I.L.M. at 98.

148. *See id.* art. VI, ¶ 10, 35 I.L.M. at 98.

149. *See id.* art. II, ¶ 2, 35 I.L.M. at 93.

150. The U.N. Security Council, in its resolution 1031 (1995) endorsing IFOR, calls on periodic reporting by IFOR to the Security Council. U.N. SCOR, Res.1031, 3607th mtg. at ¶ 25 (1995).

151. *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.), 1996 I.C.J. 21, (July 11) (dissenting opinion of Judge *ad hoc* Krec'a). For an analysis of Judge *ad hoc* Krec'a's argument that Bosnia faces illegal intervention by IFOR and is a protectorate, see Grant, *Comments*, *supra* note 52, at 322-328 (proposing that parts, but not the whole, of Judge Krec'a's argument deserved more attention than the I.C.J. majority gave).

152. The military element which I discuss here is not to be confused with the United Nations Force in Cyprus (UNFICYP). Created after the constitutive structures of 1960 fell apart, UNFICYP became operational on March 27, 1964. *See, e.g.*, U.N. SCOR, Res. 186 (1964) (creating UNFICYP); Thomas Ehrlich, *supra* note 124, at 1049-1051. Unlike IFOR, and unlike the Greek-Turkish-British deployments envisaged for Cyprus in 1960, UNFICYP was not part of the original constitutive plan of its host country, but rather an intervention after that plan

states (thirty-five countries have contributed to IFOR and SFOR),[153] the military component lay at the heart of the constitutive arrangement. The Treaty of Alliance, as noted earlier, tied Cyprus, Greece, and Turkey in a multi-lateral defense pact,[154] and also provided for the permanent stationing of Greek and Turkish contingents on the island. Greece, under the Treaty of Alliance, was to deploy 950 officers, non-commissioned officers, and men, while Turkey was to deploy 650.[155] More remarkable than the deployment provisions, the Treaty of Guarantee provides a right of intervention by the guaranteeing powers in the event of a degradation of the Republic's constitutive structures: "In the event of a breach of the provisions of the present Treaty, Greece, Turkey and the United Kingdom undertake to consult together with respect to the representations or measures necessary to ensure observance of those provisions."[156]

Though the standing military presence in Cyprus was not as substantial as IFOR in either size or mandate (neither contingent had the sweeping discretion of IFOR and both were comparatively small), more robust armed intervention was contemplated in time of crisis. Such escalated intervention could occur after the guaranteeing powers had resorted to a prescribed consultative process. However, there was an alternative course to intervention, which would prove problematic some fourteen years after the foundation of the republic. Article IV of the Treaty of Guarantee provided that any one guaranteeing power could intervene unilaterally to restore the constitutive balance in Cyprus: "In so far as common or concerted action may not prove possible, each of the three guaranteeing powers reserves the right to take action with the sole aim of re-establishing the state of affairs created by the present Treaty."[157]

If this substantial reserve of unilateral discretion had not been included in the treaty, Greece and Turkey might not have come to the signing table. The reserve also may have been a structural response to apprehension that the other mechanisms for maintaining

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had deteriorated. The text above refers to a force structure prescribed in the constitutive instruments of Cyprus to guarantee the cohesion of the state. IFOR may resemble UNFICYP in the sense that both rested on U.N. mandates, but IFOR differs broadly from UNFICYP in terms of its role in the structure of the host state. UNFICYP was called into Cyprus after state order disintegrated. IFOR was called into Bosnia at the inception of the new state order. In its role as guarantor of state cohesion, IFOR is analogous to the force structure prescribed for Cyprus in 1960.

153. *See* CNN Interactive, *Bosnia dilemma: SFOR, What For?* (visited Dec. 18, 1997) <http://www.cnn.com/WORLD/9712/18/sfor.future/index.html.>.

154. *See* Treaty of Alliance, *supra* note 121.

155. *See id.* Additional Protocol No. I, ¶ I.

156. *See* Treaty of Guarantee, *supra* note 99, art. IV.

157. *See id.* art. IV.

the constitutive order would prove inadequate. It is indeed a sad irony if the framers of the Cyprus settlement intended the provision for unilateral intervention to *strengthen* the constitutive structure, as Turkey would cite Article IV as authorizing an invasion of northern Cyprus in July 1974. A serious further degradation of inter-communal relations had taken place earlier that month, and Turkey, claiming to exercise its Article IV right, sent a large force to the island, ostensibly to protect the Turkish Community. In operation, the Treaty of Guarantee and associated instruments appear to have put in place too few permanent forces to secure the constitutive order they prescribed, yet under certain conditions they opened the door to a wild exercise of state discretion in the name of securing that order. From the standpoint of the internal logic of the structures set up in 1960, the reserve of discretion to intervene unilaterally would also undue an elaborate effort to provide a consultative process to settle disputes among the component Communities of the Republic and among the guarantor states.

3. International Consultative Process

The constitutive instruments of Cyprus identify a number of consultative channels to be employed in case frictions arise among Greek, Turkish, or British forces. Though the network of oversight provisions, spread across the three international instruments associated with the foundation of the republic, would be rendered inoperative by Article IV of the Treaty of Guarantee, it nonetheless suggests a model for international consultation and decision-making, which might prove capable of maintaining equilibrium in a delicate, internationally guaranteed state. The Treaty of Alliance, contemplating a three-country force to defend Cyprus, requires Cyprus, Greece, and Turkey to form a Tripartite Headquarters stationed in Cyprus.[158] As a permanent command center, such a headquarters theoretically could have provided a venue for ironing out differences on a day-to-day basis and minimizing smaller frictions. The Treaty of Alliance, in its Additional Protocol No. II, further provided that the three-country military command would be complemented by a Committee consisting of the foreign ministers of the three allies.[159] As the "supreme political body of the Tripartite Alliance,"[160] the Committee would meet in ordinary session once a year and in cases of

158. *See* Treaty of Alliance, *supra* note 121, art. III.
159. *See id.* at Additional Protocol No. II, ¶ I.
160. *Id.*

emergency.[161] The Committee would "take cognisance of any question concerning the Alliance which the Governments of the three Allied countries shall agree to submit to it."[162] Under the Treaty of Establishment, "[a]ny question or difficulty" arising under the provisions of the Treaty would be referred first to the Tripartite Headquarters of the Republic of Cyprus, Greece, and Turkey with authorities of the United Kingdom armed forces there participating in the ensuing deliberations as appropriate.[163] Failing resolution at the military level, an international tribunal would be seated to resolve the problem.[164] Finally, as noted above, the Treaty of Guarantee contemplated a consultative process including Greece, Turkey, and the United Kingdom in the event of alleged breaches of the Treaty of Guarantee.[165]

A number of international deliberative processes were also prescribed to regulate the structures established by the Dayton accords. Among those already mentioned is a binding arbitration for the Brcko area Inter-Entity Boundary and arbitration for any disputes arising between the Entities.[166] Other multilateral processes incorporated into the Bosnian settlement aim to smooth out differences during implementation of the constitutive scheme. An Agreement on Civilian Implementation establishes a staff to coordinate civilian organizations[167] and calls for a High Representative to act as monitor during implementation.[168] Particular areas of responsibility for the High Representative include: humanitarian aid; infrastructure and economic reconstruction; establishment of political and constitutional institutions; human rights; elections; and the return of displaced persons and refugees.[169] The High Representative is to "[m]aintain close contact with the Parties to promote their full compliance with all civilian aspects of the peace settlement."[170] The Agreement on Civilian Implementation requires the High Representative to facilitate "resolution of any difficulties arising in connection with civilian

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161. *See id.* art. II.

162. *Id.* art. I.

163. *See* Treaty of Establishment, *supra* note 111, art. 10(a).

164. *See id.* art. 10(b). The tribunal would consist of one nominee each by Cyprus, Greece, Turkey, and the United Kingdom. The President of the International Court of Justice would nominate an independent chairman.

165 *See* Treaty of Guarantee, *supra* note 99, art. III.

166 *See supra* text accompanying notes 130-137.

167. *See* Agreement on Civilian Implementation of the Peace Settlement, art. I, ¶ 2, 35 I.L.M. 147 (annex 10 to GFA, *supra* note 6).

168. *See id.* art. I, ¶ 2, 35 I.L.M. at 147.

169. *See id.* art. I, ¶ 1, 35 I.L.M. at 147.

170. *Id.* art. II, ¶ 1(b), 35 I.L.M. at 147.

implementation."[171] The High Representative also oversees a Joint Civilian Commission, comprised of senior political representatives of Bosnia, Croatia, and Yugoslavia, the IFOR commander (or the commander's representative), and representatives of any civilian organizations the High Representative deems necessary.[172] Subordinate Joint Civilian Commissions also may be established at the High Representative's discretion at local levels throughout the country.[173] The High Representative must maintain constant contact with the IFOR Commander[174] and advise IFOR on political-military matters.[175] The Annex to the General Framework Agreement creating the office of the High Representative further provides that the "[p]arties shall fully cooperate with the High Representative and his or her staff, as well as with the international organizations and agencies [assisting to implement the peace settlement]."[176]

Another consultative body permanently in session is the Joint Military Commission, established pursuant to Annex 1-A of the General Framework Agreement, entitled Agreement on the Military Aspects of the Peace Settlement.[177] The Joint Military Commission is comprised of the IFOR Commander (as chair), the senior military commander of the forces of each of the three parties in Bosnia, and any other persons the IFOR Commander elects to invite to the Commission.[178] Croatia and Yugoslavia are also represented on the Joint Military Commission.[179] Croatia and Yugoslavia (plus the three Bosnian parties) each may send two civilian representatives to the Joint Military Commission in an advisory capacity.[180] Like the Joint Civilian Commission, the Joint Military Commission can establish subordinate local commissions.[181] The Commission and any subordinate commission created under its mandate are to "function as a consultative body for the IFOR Commander," with the goal of solving any problems "promptly by mutual agreement."[182] Ultimately, however, the IFOR Commander has final say over all

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171. *Id.* art. II, ¶ 1(d), 35 I.L.M. at 147.
172. *See id.* art. II, ¶ 2, 35 I.L.M. at 147.
173. *See id.* art. II, ¶ 3, 35 I.L.M. at 148.
174. *See id.* art. II, ¶¶ 5,6, 35 I.L.M. at 148.
175. *See id.* art. II, ¶ 7, 35 I.L.M. at 148.
176. *See id.* art. IV, 35 I.L.M. at 148.
177. *See* Agreement on Military Aspects of Peace Settlement, 35 I.L.M. 92 (annex 1-A to GFA, *supra* note 6).
178. *See id.* art. VIII, ¶ 3(a), (b), 35 I.L.M. at 99.
179. *See id.* art. VIII, ¶ 3(a), 35 I.L.M. at 99.
180. *See id.* art. VIII, ¶ 3(c), 35 I.L.M. at 99.
181. *See id.* art. VIII, ¶ 8, 35 I.L.M. at 99.
182. *See id.* art. VIII, ¶ 5, 35 I.L.M. at 99.

military matters.[183] Paralleling the wording of the Joint Civilian Commission mandate, Article X of the Agreement on the Military Aspects of the Peace Settlement provides that the "[p]arties shall cooperate fully with all entities involved in implementation of this peace settlement."[184]

The Joint Civilian and Joint Military Commissions are also mentioned in the Agreement on International Police Task Force, and the Task Force is called on to coordinate its work with those Commissions and the High Representative.[185] Thus, together, the two Commissions and other bodies[186] overseeing the implementation of the constitutive order prescribed at Dayton provide a consultative process in case of disputes between the constituent peoples of the republic. The multilateral nature of that process further develops the international guarantee of the Bosnian federal experiment.

The elements of international guarantee discussed so far stem from international instruments that directly implicate specific foreign countries in the affairs of the new federal state. At least four additional elements identify the Cypriot and Bosnian experiments as international in character. Though these elements may in various ways draw outside powers into municipal governance, they stem from the constitutions of the two federal states, and, therefore, may be distinguished from the international treaties that work with the constitutions to make the constitutive arrangement.

4. "International Law Friendliness"

A flurry of constitution-making coincided with the end of the Cold War. In Central and Eastern Europe, but farther afield as

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183. *See id.* art. VIII, ¶ 5, 35 I.L.M. at 99.

184. *See id.* art. X, 35 I.L.M. at 100.

185. *See* Agreement on International Police Task Force, art. II ¶ 8, 35 I.L.M. 150 (annex 11 to GFA *supra* note 6).

186. Other institutions set up under the constitutive framework in Bosnia also host consultative processes aimed at resolving disputes. The institutions include the Commission for Displaced Persons and Refugees, which does its work through its own international staff or through international organizations or nongovernmental organizations, *see* Agreement on Refugees and Displaced Persons, art. XII, ¶ 1, 35 I.L.M. 137 (annex 7 to GFA, *supra* note 6); a Commission to Preserve National Monuments, which consists of non-Bosnian members appointed by the Director General of the United Nations Education, Scientific and Cultural Organization and has decision-making power over the classification and protection of national monuments, *see* Agreement on Commission to Preserve National Monuments, *supra* note 136, arts. II, V, 35 I.L.M. at 142-143; and a Commission on Human Rights, *see* Agreement on Human Rights, art II, *supra* note 91, 35 I.L.M. at 131. The Commission on Human Rights itself consists of two parts: a Human Rights Ombudsman, who must not be a Bosnian or Herzegovinian, appointed by the Organization for Security and Cooperation in Europe, and later appointed by the Presidency of Bosnia and Herzegovina, *see id.* art. IV, ¶ 2, 35 I.L.M. at 132 ; and the Human Rights Chamber, which settles disputes and reports to the Secretary General of the Council of Europe, *see id.* art. IX, 35 I.L.M. at 133-134.

well,[187] new constitutions were drafted, in part to reflect changed aspirations among national polities, and in part to affirm or adapt the position in the international order of the countries adopting them. Concomitant with the growth in constitution-making, scholarly interest in the topic has increased. It has been remarked of various constitutions produced in this period that they evince what Antonio Cassese called in 1985 a "friendliness to international law."[188] Judge Vereshchetin of the International Court of Justice writes that "[o]ne of the common features of all new constitutions [in Eastern and Central Europe] is their openness to international law."[189] A.E.D. Howard also noted this feature in the new constitutions of Eastern Europe.[190] New constitutions elsewhere have been formulated to integrate international law into domestic legal systems, and they too have drawn comment. The interim South African Constitution, for example, incorporated into South African law general, regional, local, particular, and universal rules of international law. Though it permitted the Parliament and the Constitution to override a putative international law rule, the new Constitution defined international law as superior to case law and Roman-Dutch law—the chief law sources in South Africa's hybrid common law system. The new

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187. *See, e.g.*, Rashed Aba-Namay, *The Recent Constitutional Reforms in Saudi Arabia*, 42 INT'L & COMP. L.Q. 295 (1993); Dermott J. Devine, *The Relationship Between International Law and Municipal Law in the Light of the Interim South African Constitution*, 44 INT'L & COMP. L.Q. 1 (1995) (discussing the 1993 post-Apartheid constitution and its relation to international law); John Dugard, *International Law and the South African Constitution*, 8 EUR. J. INT'L L. 77 (1997) (discussing the South African Constitution of 1996, which replaced the Interim Constitution of 1993, and its relation to international law); Gerhard Erasmus, *The Namibian Constitution and the Application of International Law*, 15 S. AFR. Y.B. INT'L L. 81 (1990); A. Michael Tarazi, *Saudi Arabia's New Basic Laws: The Struggle for Participatory Islamic Government*, 34 HARV. INT'L L.J. 258 (1993). While it became noticeably more pronounced after the end of the Cold War, interest in the role of international law in domestic constitutional instruments was not new. For an earlier example of international law analysis of a domestic constitution, see Emmanuel J. Roucounas, Le Droit International dans la Constitution de la Grèce du 9 Juin 1975, 29 REVUE HÉLLÉNIQUE DE DROIT INTERNATIONAL 51 (1976).

188. Antonio Cassese, *Modern Constitutions and International Law*, III ACADEMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS 331, 343 (1985) (positing four degrees of deference in national constitutions to international law).

189. Vladlen S. Vereshchetin, *New Constitutions and the Old Problem of the Relationship between International Law and National Law*, 7 EUR. J. INT'L L. 29, 32 (1996). Section 7(1) of the Hungarian Constitution, one of the earliest in Eastern Europe to undergo reform, provides, typically, "[t]he Hungarian Republic's legal system accepts the generally recognised rules of international law and shall continue to ensure the consistency of Hungary's international legal obligations and her domestic law." *See* Istvan Pogany, *Constitutional Reform in Central and Eastern Europe: Hungary's Transition to Democracy*, 42 INT'L & COMP. L.Q. 332, 353 (1993) (quoting the Hungarian Constitution and observing that openness to international law is an important feature of the Hungarian Constitution).

190. A.E. Dick Howard, *Constitution-Making in Central and Eastern Europe*, 28 SUFFOLK U. L. REV. 5 (1994); *How Ideas Travel: Rights at Home and Abroad*, 22 STETSON L. REV. 893 (1993).

Constitution also excluded the use of act of state doctrine as a device to override an international law rule.[191]

The "international law friendliness" of the Bosnian Constitution may, therefore, plausibly be described as a product of the current trend. Commentators have certainly described it in this manner.[192] However, at the same time, the integration of international law into the Bosnian constitutive structure is part of the comprehensive network of internationalizing elements characteristic of the special type of federal state of which Bosnia is an example. International law friendliness (*Völkerrecht freundlichkeit*)[193] is a distinctive trait of the Bosnian constitution and, albeit less explicitly, its Cypriot forbear as well.

The Constitution of Cyprus provides that any international undertaking of the republic becomes operative after approval by the House of Representatives.[194] There is no requirement that follow-up legislation be passed to effectuate treaties and conventions. Accordingly, courts of the Republic have not hesitated to interpret the terms of international conventions to which Cyprus is a party, even when there is no intermediating domestic legislation (apart from treaty ratification). Direct effect was given, for example, to the European Convention on the Legal Status of Children Born Out of Wedlock of 1975.[195] The Convention provides that the rights of children born out of wedlock shall be the same as those of children born in wedlock.[196] A Cypriot municipal law gave preference to "legitimate" children.[197] The Supreme Court, in a private law matter, held that the

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191 *See* Dermott J. Devine, *supra* note 184, at 12-13; *see also* A.J. Cunningham, *The European Convention on Human Rights, Customary International Law and the Constitution*, 43 INT'L & COMP. L.Q. 537 (1994) (discussing relationship between international law and the domestic constitutive structure of the United Kingdom and examining in particular whether the Convention for the Protection of Human Rights and Fundamental Freedoms should be enacted as part of English law by way of statute).

192 *See, e.g.*, Gaeta, *supra* note 103, at 161 (stating that the Bosnian Constitution shows a "great degree of . . . 'friendliness to international law'").

193 Albert Bleckmann, *Die Völkerrechtsfreundlichkeit der deutschen Rechtsordnung*, 32 DIE ÖFFENTLICHE VERWALTUNG 309 (1979) (observing openness to international law in the German legal order).

194. REP. OF CYPRUS CONST. art. 170, ¶ 1, *in* Cmnd. 1093, *supra* note 7.

195. Ratified by Cyprus Law No. 50 of 1979; *see also* Malchtou v. Armefti (Cyprus 1987), *reprinted in* 88 I.L.R. 199, 200 (1992) (citing the European Convention on the Legal Status of Children Born out of Wedlock of 1975).

196. *See Malchtou*, 88 I.L.R. at 217 (quoting language from the European Convention on the Legal Status of Children Born out of Wedlock of 1975).

197. *See* The Wills and Succession Law, Cap. 195, *cited in Malachtou*, 88 I.L.R. at 199, 217 (providing that legitimate children and their descendants could succeed as lawful heirs to the estate of a deceased person); *see also* Illegitimate Children Law, Cap. 278 , *cited in Malachtou*, 88 I.L.R. at 199, 217 (restricting the rights of succession of illegitimate children to the estate of the mother and her relatives by blood).

Convention takes precedence over all domestic laws except the Constitution. "Such [a] ratified convention," the Court wrote, "delineates not only the international obligations of the State, as defined by the convention, but also the internal law until the day that, under the provisions of the convention or the Vienna Convention on Treaties, it ceases to be operative."[198] The Court elaborated that "[t]he convention has superior force over any municipal law not on the principle of lex posterior derogat priori but rather on the principle of lex superior derogat inferiori."[199] Cypriot judges, therefore, take the progressive monist view that international undertakings derogate contrary provisions of municipal law and can be applied by the courts directly.[200]

Other provisions of the Cypriot Constitution of 1960, though not enunciating "international law friendliness" as explicitly as would the Bosnian Constitution thirty-five years later, reflected then dawning trends in the international law of human rights and personal freedoms. Discrimination adverse to the interests of the minority Community is a principle integral to the Constitution, and provision is made for it not only by express terms but also through the constitutive structure of the state itself.[201]

Previously explained is how the structure of the Republic of Cyprus aims to protect minority interests.[202] Article 6 of the Cyprus Constitution expressly provides that "no act or decision of any organ, authority or person in the republic exercising executive power or administrative functions, shall discriminate against any of the two Communities or any person as a person or by virtue of being a member of a Community."[203] Other provisions assure that no person is charged or tried in a language unintelligible to that person.[204] The comprehensive protection afforded the constituent peoples of the republic reflects a substantial inroad of principles developing in international law at the time. Minority rights began to play a role in international instruments before World War I,[205] but received their

198. *Malachtou*, 88 I.L.R. at 206.

199. *Id.* at 205. The Court relied in particular on the plain meaning of article 169, paragraph 3.

200. On monism, *see* ANTONIO CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD 20-22 (1986).

201. *See supra* text accompanying notes 7-18 (describing community balancing regime).

202. *See supra* text accompanying notes 35-41.

203. REP. OF CYPRUS CONST. art. 6, *in* Cmnd. 1093, *supra* note 7.

204. *See id.* art. 12, ¶¶ 5(a), (e).

205. Barbara Mikolajczyk, *Universal Protection of Minorities: Selected Problems*, 20 POLISH Y.B. INT'L L. 137, 140 n.14 (1993). Mikolajczyk outlines comprehensively the history of minority rights treaties. Among the early modern treaties addressing minority rights, she cites the Treaty of Westphalia of 1648 (protecting Protestants in the German principalities); the Treaty of

first great push toward status as a general principle during the first years after the war.[206] Though perhaps in abeyance during the 1920s and 1930s,[207] minority rights resumed development after World War

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Oliva of 1660 (protecting Catholics in Livonia); Treaty of Ryswick of 1697 (protecting Catholics in territory France ceded to Holland); and Treaty of Paris of 1763 (protecting Catholics in Canada) *See id.* The chief subject of minority rights provisions through the late nineteenth century indeed remained religion. Consider (also cited in Mikolajczyk) the General Act of the Congress of Berlin of 1878 (protecting Christians in the Ottoman Empire); and the International Convention of Constantinople of 1881 (protecting Muslims in Greece). *See id.*

206. In the aftermath of the Great War, there was an efflorescence of treaties containing minority rights provisions. The Treaty of Saint-Germain-en-Laye provided that Czechoslovakia would make treaty provisions guaranteeing minority rights. Treaty of Saint-Germain-en-Laye, Sept. 10, 1919, art. 57, 11 Martens Nouveau Recueil (ser. 3) 691, 707. Romania was held to similar terms under article 60, *id.* at 708; and articles 62-69 provided that Austria would likewise guarantee the rights of minorities within its borders, *id.* at 708-10. Also representative of the period was the Treaty Concerning the Protection of Minorities in Armenia, Aug. 10, 1920, 12 Martens Nouveau Recueil (ser. 3) at 795, concluded between the Allied Powers and Armenia. There were several others. *See, e.g.*, Treaty of Paris, December 9, 1919, 13 Martens Nouveau Recueil (ser. 3) 529 between Romania and the other Allied Powers. Romania, receiving Transylvania (from Austria-Hungary) and Bukovina (from Russia), was one of the states substantially remade by the post-World War I settlement. The Treaty of Paris concerned the protection of minorities—especially Hungarians—in the aggrandized Romania. *Id.* The Treaty Concerning the Recognition of the Independence of Poland and the Protection of Minorities, June 28, 1919, *id.* at 504, was signed at Versailles and had similar provisions to protect minorities in the reborn Polish state. The minorities covered by the Polish treaty were chiefly German and Ukrainian, though also Belorussian, Lithuanian, and Jewish. *Id.* Consider also the Treaty of the Trianon, June 4, 1920, 12 Martens Nouveau Recueil (ser. 3) 423. Article 44 therein provided that the Kingdom of Serbs, Croats, and Slovenes (the future Yugoslavia) would guarantee minority rights, *id.* at 436; and article 47 provided that Romania would do likewise, *id.* at 36. Articles 54-60, *id.* at 438-40, paralleling articles 62-69 of the Treaty of Saint-German, 11 Martens Nouveau Recueil at 708-710, provided that Hungary would pledge to respect minority rights. The Treaty of Neuilly-sur-Seine, Nov. 27, 1919, 12 Martens Nouveau Recueil at 323, 333-336, was another example. The Treaty of Sèvres, Aug. 10, 1920, *id.* at 664, effectuating the final terms of the surrender of Turkey, contained particularly interesting minority rights terms. Article 36 pertains to minorities at Constantinople, *id.* at 671; article 62 pertains to minorities at Kurdistan (the "Assyro-Chaldéen" people), *id.* at 677; and article 72 to Greek administration of Smyrna, *id.* at 680. Smyrna, on the Turkish Aegean coast, had a Greek majority, and the Allied Powers assigned the city and its hinterland to the Hellenic Kingdom, but with the proviso, built into article 72, that Greece would set up a "local parliament," giving proportional representation to all minorities. *Id.* Article 140 provided for the protection of minorities in Turkey-proper. *Id.* at 693. The Treaty of Sevres clauses pertaining to Greeks in Turkey would be mooted shortly after the signing of the instrument. Greece would invade Turkey; Turkey would defeat the invader; and, in retribution, Turkey would expel the Greek minority from Asia Minor. Most of these treaties were discussed by Helmer Rosting, *Protection of Minorities by the League of Nations*, 17 AM. J. INT'L L. 641 (1923).

207. The Permanent Court of International Justice did entertain important cases addressing minority rights in the interwar period. *See, e.g.*, Access to German Minority Schools in Upper Silesia, 1931 P.C.I.J. (Ser. A/B) No. 40; Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, 1932 P.C.I.J. (Ser. A/B) No. 44. The heyday of minority rights in the post-World War I period was however short. Cassese agrees with most writers that the guarantees of minority rights were a "fall-back solution resorted to as a result of the unwillingness [of the Great Powers] to apply self-determination" to minority groups; and that, in any case, minority rights enshrined in the post-war treaties were in practice of limited scope. ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAAPRAISAL 26-27 (1995).

II,[208] and, particularly, during the period of European decolonization.[209] By the 1960s and 1970s, if not firmly established, minority rights were sufficiently developed to be integrated into numerous General Assembly resolutions,[210] international conventions[211] and, most notably, sanctions regimes against Rhodesia[212] and South Africa.[213] Article 5 of the Treaty of Establishment provides:

> The Republic of Cyprus shall secure to everyone within its jurisdiction human rights and fundamental freedoms comparable to those set out in Section I of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed at

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208. United Nations practice representative of the trend included, *Convention on the Prevention and Punishment of the Crime of Genocide*, G.A. Res. 260 (III), 78 U.N.T.S. 277 (1998), and the *Universal Declaration of Human Rights.*, G.A. Res. 217 (III), U.N. Doc. A/810 at 71, arts. 6 & 7 (1948).

209. *See Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514 (XV), Dec. 14, 1960 (opposing colonialism and urging acceleration of decolonization). On the era of decolonization, see JORRI C. DUURSMA, FRAGMENTATION AND THE INTERNATIONAL RELATIONS OF MICRO-STATES: SELF-DETERMINATION AND STATEHOOD 63-75 (1996).

210. *See Charter of Economic Rights and Duties of States*, G.A. Res. 3281 (XXIX), Dec. 12, 1974 (positing in its chapter I(g) equal rights and self-determination of peoples); G.A. Res. 3314 (XXIX), Dec. 14, 1974 (clarifying that nothing in its definition of "aggression" "could in any way prejudice the right of self-determination"). Further reflecting an increasing cognizance of minority rights, the United Nations Commission on Human Rights by 1974 included a Sub-Commission on Prevention of Discrimination and Protection of Minorities. *See* DUURSMA, *supra* note 206, at 37-48.

211. *See* International Covenant on Civil and Political Rights (ICCPR), Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights (ICESCR), Dec. 16, 1966, 993 U.N.T.S. 3. These early landmarks in international human rights law are discussed at length in DUURSMA, *supra* note 206, at 27-35. Both covenants are reproduced in full in BLACKSTONE'S INTERNATIONAL LAW DOCUMENTS 142, 160 (Malcolm D. Evans ed., 3d ed. 1996). For an analysis of a recent regional convention on minority rights, see Florence Benoît-Rohmer, *La Convention-cadre du Conseil de l'Europe pour la protection des minorités nationales*, 6 EUR. J. INT'L L. 573 (1995) (discussing a Counsel of Europe Framework Convention for the Protection of National Minorities).

212. *See* HARRY R. STRACK, SANCTIONS: THE CASE OF RHODESIA (1978); Myres S. McDougal & W. Michael Reisman, *Rhodesia and the United Nations: The Lawfulness of International Concern*, 62 AM. J. INT'L L. 1 (1968); J.E.S. Fawcett, *Security Council Resolutions on Rhodesia*, 41 BRIT. Y.B. INT'L L. 103, 112 (1966); G.A. Res. 2022(XX), Nov. 5, 1965 (calling on "all States...not to recognise any government in Southern Rhodesia which is not representative of the majority of the people"); U.N. SCOR, Res. 216, Nov. 12, 1965 (calling on "all States not to recognise this illegal racist minority regime in Southern Rhodesia"); U.N. SCOR, Res. 232, Dec. 16, 1966 (imposing mandatory economic sanctions against Rhodesia); U.N. SCOR, Res. 253, May 29, 1968 (reiterating and reinforcing sanctions regime). The sanctions regime against Rhodesia ultimately proved as complete as any in history. Even South Africa, the tacit patron of the Smith regime, finally cut the rogue state's one link to the world. On South Africa's eventual cessation of support to Rhodesia, see Christopher Ashley Ford, *Defensor Fidei: Explaining South African Foreign Policy Behavior: The Case of Ian Smith's Rhodesia* (Unpublished Harvard Prize Thesis Harvard University Library, HU89.184.756).

213. *See Policies of Apartheid of the Government of South Africa*, G.A. Res. 3411, U.N. GAOR, 30th Sess., Supp. No. 34, at 37, U.N. Doc. A/10034 (1975) (condemning apartheid); G.A. Res. 31/6 A, U.N. GAOR, 31st Sess., Supp. No. 39, at 10, U.N. Doc. A/31/39 (1976) (condemning establishment by South Africa of nominally independent "homelands").

> Rome on the 4th November, 1950, and the Protocol to that Convention signed at Paris on the 20th of March, 1952.[214]

The 1960 Constitution does not attribute its minority rights principles to international law, but those principles were a prominent emerging feature of international law at the time. Article 5 of the Treaty of Establishment makes explicit reference to the European Convention for the Protection of Human Rights and Fundamental Freedoms, thus identifying an international law source for the principles elsewhere incorporated into Cypriot law.[215]

Further evidence of openness to international law in Cypriot constitutive structure appears in the Treaty of Alliance. In its preface, the treaty posits among Cyprus, Greece, and Turkey a "common desire to uphold peace and to preserve . . . security" and states that efforts toward peace and security will be "in conformity with the purposes and principles of the United Nations Charter."[216] The Treaty of Alliance is incorporated directly into the Constitution and is assured "constitutional force."[217] International law found its way into Cypriot law, through the Constitution and ancillary constitutive instruments, both in the form of structural provisions and express guarantees.

The Constitution of Bosnia and the other constitutive instruments of the Republic clearly evince intent to incorporate international law into the structure and laws of that federal state. Paola Gaeta, an early commentator on the Dayton settlement, notes that among other provisions, the Constitution calls for respect of human rights and fundamental freedoms, and in particular for enforcement of the provisions and protocols of the European Convention for the Protection of Human Rights and Fundamental Freedoms,[218] the Universal Declaration of Human Rights,[219] the International Covenant of Civil and Political Rights,[220] the International Covenant of Economic and Cultural Rights,[221] and the Declaration on Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.[222] A

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214. Treaty of Establishment, *supra* note 111, art. 5.

215. *Id.* art. 5.

216. Treaty of Alliance, *supra* note 121, ¶¶ I-II.

217. REP. OF CYPRUS CONST. art. 181, *in* Cmnd. 1093, *supra* note 7 (providing for incorporation of Treaty of Military Alliance as annex II to the Constitution).

218. *See* BOSN. & HERZ. CONST. art. II, ¶ 3, 35 I.L.M. at 119 (app. 4 to GFA, *supra* note 6).

219. *See id.* at pmbl.

220. *See* BOSN. & HERZ. CONST. pmbl., 35 I.L.M. at 118 (app. 4 to GFA, *supra* note 6); *id.* annex I, ¶ 7, 35 I.L.M. at 126.

221. *See* BOSN. & HERZ. CONST. pmbl., 35 I.L.M. at 118 (app. 4 to GFA, *supra* note 6); *id.* annex I, ¶ 8, 35 I.L.M. at 126.

222. *See* BOSN. & HERZ. CONST. pmbl., 35 I.L.M. at 118 (app. 4 to GFA, *supra* note 6); Gaeta, *supra* note 103, at 161-62.

number of additional instruments are incorporated into the Constitution by reference in Annex I, titled Additional Human Rights Agreements to be Applied in Bosnia and Herzegovina.[223] The Constitution emphasizes that its reference to these instruments is not merely hortatory, but are given ". . . priority over all other law."[224] Moreover, the Constitution expressly instructs the government to implement rules relating to human rights and fundamental freedoms and cooperate with international bodies having competence over those matters:

> 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.[225]

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223. *See* BOSN. & HERZ. CONST. annex I, ¶¶ 1-15, 35 I.L.M. at 126 (app. 4 to GFA, *supra* note 6). The list numbers fifteen: (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; and (15) 1994 Framework Convention for the Protection of National Minorities. *See id.*

224. *Id.* art. II, ¶ 2, 35 I.L.M. at 119.

225. BOSN. & HERZ. CONST. art. II, ¶ 8, 35 I.L.M. at 120 (app. 4 to GFA, *supra* note 6). The U.N. Security Council reached the decision in principle to establish a tribunal for the former Yugoslavia. *See* U.N. SCOR, Res. 808, Feb. 22, 1993, U.N. Doc. S/Res/808 (1993). The Secretary General produced a Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, and this was adopted by the Security Council. *See* U.N. SCOR, Res. 827, May 25, 1993, U.N. Doc. S/Res/827 (1993). The Secretary General's Report, containing the proposed text for the Statute, was adopted without change. U.N. SCOR, Res. 827, *reprinted in*, 32 I.L.M. 1159 (1993). The Statute of the Tribunal, as part of the report, appears in full at Security Council Resolution 827. Resolution 827 adopted the Statute as a measure under Chapter VII of the U.N. Charter to restore peace and security in the territory of the former Yugoslavia. Article 29 of the Statute provides:

> It should be pointed out that, in assigning to the International Tribunal the task of prosecuting persons responsible for serious violations of international

Further guaranteeing that international norms on human rights will be operative in Bosnia, the constitutive instruments formulated at Dayton establish a set of rights-related institutions with jurisdiction to mediate and enforce. A Commission on Human Rights,[226] a Human Rights Ombudsman,[227] and a Human Rights Chamber[228] have extensive and overlapping competences to guarantee rights and freedoms. The rights of displaced persons and refugees, both under general international law and under specific terms in the Dayton settlement,[229] are protected and enforced by a Commission for Displaced Persons and Refugees.[230] The constitutive structure of Bosnia incorporates an abundance of international human rights norms, and, moreover, it provides robust enforcement mechanisms.

The Constitution of Bosnia expressly grants the Constitutional Court jurisdiction to determine the "existence or the scope of a general rule of public international law" when such a rule is pertinent to a decision before the Court.[231] A recent suggestion that federal courts in the United States lack competence (or at least the case law)

> humanitarian law, the Security Council would not be creating or purporting to 'legislate' that law. Rather, the International Tribunal would have the task of applying existing international humanitarian law.

U.N. SCOR, Res. 827, *reprinted in*, 32 I.L.M. 1203 (1993).

For a detailed analysis of the Statute, see Daphna Shraga & Ralph Zacklin, *The International Criminal Tribunal for the Former Yugoslavia*, 5 EUR. J. INT'L L. 360 (1994). For treatment of jurisdictional aspects, see George H. Aldrich, *Jurisdiction of the International Criminal Tribunal for the Former Yugoslavia*, 90 AM. J. INT'L L. 64 (1996). John Dugard discusses international criminal tribunals more generally in *Obstacles in the Way of an International Criminal Court*, 56 CAMBRIDGE L.J. 329 (1997). For comment on two of the initial cases before the Tribunal for the Former Yugoslavia, *see* Luisa Vierucci, *The First Steps of the International Criminal Tribunal for the Former Yugoslavia*, 6 EUR. J. INT'L L. 134 (1995) (discussing the *Nikolic* and *Tadic* cases); *see also* Walter Gary Sharp, Sr., *International Obligations to Search for and Arrest War Criminals: Government Failure in the Former Yugoslavia?* 7 DUKE J. COMP. & INT'L L. 411 (1997); William A. Schabas, *Sentencing by International Tribunals: A Human Rights Approach*, 7 DUKE J. COMP. & INT'L L. 461 (1997). The articles by Sharp and Schabas appear in a symposium entitled *Justice in Cataclysm: Criminal Trial in the Wake of Mass Violence.*

226. Agreement on Human Rights, *supra* note 91, arts. II-III, 35 I.L.M at 131-32; *see also* Sloan, *supra* note 141, at 213.

227. Agreement on Human Rights, *supra* note 91, arts. IV-VI, 35 I.L.M. at 132; *see also* Sloan, *supra* note 141, at 213-14.

228. Agreement on Human Rights, *supra* note 91, arts. VII-XII, 35 I.L.M. at 133-34; *see also* Sloan, *supra* note 141, at 213-14.

229. *See* Agreement on Refugees and Displaced Persons, arts I-II, 35 I.L.M. 137 (annex 7 to GFA, *supra* note 6) (providing for a right of return to homes of origin; right to return free of harassment, intimidation, persecution, or discrimination; restoration of property deprived of refugees during the civil war; and barring incitement of ethnic or religious hatred; and requiring Parties to create conditions conducive to the return of refugees).

230. Agreement on Refugees and Displaced Persons, arts. VII-XVIII, 35 I.L.M. 137, 138-141 (annex 7 to GFA, *supra* note 6).

231. BOSN. & HERZ. CONST. art. VI, ¶ 3(c), 35 I.L.M. at 124 (app. 4 to GFA, *supra* note 6).

to make determinations of customary international law[232] highlights the noteworthiness of the Bosnian provision. Article III, paragraph 3(b) amplifies the point: "The general principles of international law shall be an integral part of the law of Bosnia and Herzegovina and the Entities."[233] At the federal level and at the level of the constituent peoples, international law requires no intervening legislative action to become part and parcel of the municipal system. The Bosnian Constitution indeed displays an extraordinary transparency to international law.

A number of interesting implications for the international legal system may stem from this integration of international law into the Bosnian constitutive order. First, the Constitution and its first annex transform a number of international declarations and conventions into the law of the Republic. Though some of the international instruments woven into the Bosnian domestic legal fabric may be well established as binding rules in international society, others are at best "soft law."[234] The Bosnian Constitution—at least for domestic purposes—makes "hard law" out of them. This bold step puts a sign of intent and authority to enforce rules behind a large body of putative rules that previously reflected aspirations more than they created obligations.[235] To be sure, the immediate impact of this effecting of rules is only Bosnian. Nonetheless, it seems to give a new foothold to an extensive set of principles, formulated at the international level.

Second, the Constitution of Bosnia establishes a law-finding mechanism for general, public international law by creating the Republic's Constitutional Court. By affording Bosnia such a law-finding mechanism, the Constitution will clarify an area of law seldom understood by municipal legal communities. Principles that often strike domestic lawyers as amorphous and of doubtful

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232. *See* Curtis A. Bradley & Jack Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 876 (1997).

233. BOSN & HERZ. CONST. art. III, ¶ 3(b), 35 I.L.M. at 120 (app. 4 to GFA, *supra* note 6).

234. *See* Gunther F. Handl, et al., *A Hard Look at Soft Law*, 82 AM. SOC'Y INT'L L. PROC. 371-395 (1988) (presenting the views of five distinguished publicists).

235. W. Michael Reisman posits that four elements compose an effective legal rule: (1) a statement of what the rule bars or requires; (2) an expression of intent to enforce the rule; (3) some signal that the institution making the statement and the expression has authority to state rules and enforce them; and (4) enforcement in practice. Reisman & Suzuki, *Recognition and Social Change in International Law: A Prologue for Decisionmaking*, *in* TOWARD WORLD ORDER AND HUMAN DIGNITY: ESSAYS IN HONOR OF MYERS S. MCDOUGAL 403 (W. Michael Reisman & Burns H. Weston, eds. 1976).

authority may come, in Bosnia, to be stated with clarity and binding force.[236]

5. Inalterable Constitutional Provisions

Perhaps to cement delicate structures, perhaps further to emphasize the international guarantee of those structures, the constitutive instruments of Cyprus and Bosnia provide that certain constitutional provisions may be altered only through international agreement. Article 182, paragraph 1 of the Constitution of Cyprus reads:

> The Articles or parts of Articles of this Constitution set out in Annex III hereto, which have been incorporated from the Zurich Agreement dated 11th February, 1959, are the basic Articles of this Constitution and cannot, in any way, be amended, whether by way of variation, addition or repeal.[237]

The constitutive structure of the Republic of Cyprus was further guaranteed by Article 185, providing that "the Republic is one and indivisible" and that an "integral or partial union of Cyprus with any other State or the separatist independence is excluded."[238] These provisions became objects of controversy soon after foundation of the Republic.

The Constitution of Bosnia provides that it may be amended, though it seems to furnish no more than a minimum procedural requirement, rather than a complete formula for amendment. The "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."[239] The amendment provision does not indicate how, if at all, the House of Peoples participates in the amendment process. It may be that the framers of the Constitution aimed to discourage amendment and saw ambiguity in the amendment process as a means of dissuading lawmakers from seeking change. However, omitting a complete

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236. The persuasiveness of the Bosnian Constitutional Court as a public international law source of general application may increase if the two Constitutional Court members appointed from outside Bosnia and the space of the former Yugoslavia are eminent jurists. Article 38, paragraph 1(d) of the Statute of the International Court of Justice declares the decisional law of major national tribunals a "subsidiary" means of determining rules of international law.

237. REP. OF CYPRUS CONST. annex III, art. 182, *in* Cmnd. 1093, *supra* note 7. Annex III contains an extensive list of provisions related to the structure of the Cypriot state, including the status of the communities, basic rights, position of constitutional law in the legal hierarchy, the competences of various state organs, and other matters. *Id.* annex III.

238. *Id.* art. 185, ¶¶ 1, 2.

239. BOSN. & HERZ. CONST. art. X, ¶ 1, 35 I.L.M. at 125 (app. 4 to GFA, *supra* note 6) (emphasis added).

formula for constitutional revision itself produces a locus of possible contest. In any event, ambiguity here contrasts with concreteness and detail elsewhere in the network of instruments, which provides for most aspects of the structure and processes of the Bosnian state.[240]

The Bosnian Constitution does not specify inalterable articles, as did the Cypriot Constitution. However, it does provide that "[n]o amendment . . . may eliminate or diminish any of the rights and freedoms referred to in Article II."[241] It is not implausible that this provision in fact guarantees state structure as well as rights and freedoms. Comparatively, scholars examining the Constitution of the United States have argued that prescriptions for the structural organization of governance and the Bill of Rights are mutually reinforcing.[242] Thus, specific enunciation of rights and freedoms in the Constitution of the United States, though perhaps linguistically sufficient to stand alone, are reinforced by, and integrated into, a structural logic pervasive throughout the instrument. The same may be argued about the Constitution of Bosnia. The rights and freedoms guaranteed in Article II do speak for themselves, but, by the same token, they are difficult to isolate from the constitutive structure of the Republic. For example, Article II guarantees a right to "liberty of movement and residence."[243] The physical geography of the country and transport through it are, however, strictly regulated by the structure of the Entities—a structure constitutionally mandated. Non-discrimination

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240. Consider, for example, the ethnic geography provisions. Essentially all details are prescribed and are to be implemented immediately upon creation of the new state. By detailing most aspects of the ethnic geography, little is left to the political imagination of the parties, and thus the potential occasions for disagreement are minimized. With the constitutional amendment procedures, by contrast, there could arise substantial controversy. The Bosnian instruments appear to have improved upon their Cypriot forebears, as far as ethnic geography is concerned: separate Community zones were to be created by the parties in Cyprus *after* the inception of the state and by the communities; nearly all ethnic delineation in Bosnia was established *before* the state began to function. This may serve Bosnia well, as it removes a source of friction, which in Cyprus proved destructive of the state order. The 1995 settlement however does not equip Bosnia with a constitutional amendment process free from potential controversy. *Id.*

241. *Id.* ¶ 2. Article II, entitled Human Rights and Fundamental Freedoms, describes its subject in exhaustive detail and provides for implementation of guarantees thereof.

242. *See* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1137-38 (1991). Amar argues that the Bill of Rights contains a structural element often ignored but evidenced by debates during the drafting of the Bill of Rights and by the text of the Bill of Rights itself. Scholars have neglected this facet of the Constitution, because there appears to be a clear-cut division of labor between the Bill of Rights and the basic articles of the Constitution: the former appears to deal with rights alone; the latter with structure alone. According to Amar, in the Constitution of the United States, the provisions guaranteeing rights and the provisions prescribing governmental organization form an integral whole. Thus, The Bill of Rights and the basic articles cannot be interpreted or effectuated independent of one another.

243. BOSN. & HERZ. CONST. art II, ¶ 3(m), 35 I.L.M. at 119 (app. 4 to GFA, *supra* note 6).

and the rights of refugees and displaced persons are also guaranteed.[244] These rights are inextricably intertwined with the multi-ethnic character of the Republic. The multi-ethnic character of the Republic, in turn, is indelibly branded on the governmental structures prescribed elsewhere in the constitution. The right of each of the three constituent peoples to be free from discrimination would be substantially weakened without constitutional provision for Entity autonomy. Conversely, the purpose behind Entity autonomy would be obscured without a constitutional provision for minority rights. The structural logic of the 1995 Constitution arguably dictates that the "inalterability" rule of Article X be extended to provisions besides the human rights article specifically referenced in Article X, paragraph 2.[245]

6. Non-national Judges on Domestic Courts

Under the 1960 Constitution, the Supreme Constitutional Court of Cyprus is composed of one Greek, one Turkish, and one neutral judge. The neutral member of the Court sits as the President of the Court.[246] The neutral member "shall not be a subject or a citizen of the Republic [of Cyprus] or of the Kingdom of Greece or of the Republic of Turkey or of the United Kingdom and the Colonies."[247]

The High Court of Cyprus similarly includes a presiding judge, who is not a national of the Republic or the guaranteeing powers.[248] The non-national judge serves as a neutral President of the Court and sits with two Greek judges and one Turkish judge.[249] The judges of both the High Court and the Supreme Constitutional Court are to be appointed by agreement of the President and Vice President of the Republic, unless they disagree, in which case the President appoints the Greek judges, and the Vice President appoints the Turkish

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244. *Id.* art. II, ¶¶ 4, 5.

245. Close analysis of the language of the Constitution of Bosnia and Herzegovina, article X, paragraph 2, also suggests an expansive application of inalterability. The paragraph provides that "[n]o amendment . . . may eliminate or diminish any of the rights and freedoms referred to in Article II." *Id.* art. X, ¶ 2, 35 I.L.M. at 125. If inalterability were intended to be applied narrowly—that is, only to Article II—then a more natural construction would have been along the following lines: "no amendment may eliminate or change any part of Article II enumerating and protecting human rights and freedoms." However, the provision, as it actually appears in the Constitution, does not protect from change Article II alone. It protects as well the *rights and freedoms* that happen to be enunciated in Article II. Accordingly, any amendment which derogates those rights and freedoms violates Article X, paragraph 2. Changes to Article II are likely to run afoul, but so too are changes that weaken any of those structural provisions that give substance and effect to the rights and freedoms.

246. *See* REP. OF CYPRUS CONST. art. 133, ¶ 1(1), *in* Cmnd. 1093, *supra* note 7.

247. *Id.* art. 133, ¶ 3.

248. *See id.* art. 153, ¶ 3.

249. *See id.* art. 153, ¶ 1(1).

judges.[250] No express provision is made for choosing the neutral judges in cases where the republican executives cannot reach agreement. A possible locus of appointment power in case of such disagreement is a pair of judicial Councils. One Council, consisting of the President of the High Court as Chair and the senior Greek and Turkish judges of the High Court as members, has final authority over retirements, dismissals, or terminations of judges on the *Constitutional* Court.[251] The other Council, consisting of the President of the Supreme Constitutional Court as Chair and the Greek and Turkish judges of the Supreme Constitutional Court as members, has final authority over retirements, dismissals, or terminations of judges on the *High* Court.[252] Although the constitution does not give the Councils power to nominate judges, the Councils may have served that function in the breach.

Similarly, the chief judicial bodies in Bosnia include neutral chairs chosen from outside the country and the region. The Constitution of Bosnia, filling the lacunae noted in the Cyprus Constitution, expressly provides for outside bodies to appoint the neutrals. The Constitutional Court consists of nine members: four selected by the legislative organ of the Croat-Muslim Federation; two by the legislative organ of the Republika Srpska; and three by the President of the European Court of Human Rights after consulting with the Bosnian Presidency.[253] The three judges selected by the President of the European Court of Human Rights must not be citizens of Bosnia and Herzegovina or of any neighboring state.[254] The human rights organs provided for under Annex 6 to the General Framework Agreement have quasi judicial competences and, like the Constitutional Court, consist of officers selected from countries other than Bosnia.[255] Initially, the Human Rights Ombudsman, who cannot be a citizen of the Republic, shall be appointed for a non-renewable period of five years by the Chair of the Organization for Security and Cooperation in Europe (OSCE) after consultation with the parties.[256] Under Annex 6, the Human Rights Chamber also

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250. *See id.* art. 133, ¶ 1(2); *id.* art. 153, ¶ 1(2).

251. *See id.* art. 133, ¶ 8.

252. *See id.* art. 153, ¶ 8.

253. BOSN. & HERZ. CONST. art. VI, ¶ 1(a), 35 I.L.M. at 123 (app. 4 to GFA, *supra* note 6).

254. *Id.* art. VI, 1(b). This provision excludes from the three externally appointed seats any persons from Bosnia, Croatia, Serbia, and Montenegro (the last two composing the Federal Republic of Yugoslavia from the three externally appointed seats).

255. *See supra* text accompanying notes 91-96 on the functions of the Commission on Human Rights and its two components, the Ombudsman and the Human Rights Chamber.

256. Agreement on Human Rights, *supra* note 91, art. IV, ¶ 2, 35 I.L.M. at 132 (providing for a non-national until the transfer described in Article XIV occurs); *id.* art. XIV, 35 I.L.M. at 135 (providing that responsibility for the Commission's continued operation shall be

includes non-nationals appointed by outside authorities.[257] The Chamber consists of fourteen members: four appointed by the Croat-Muslim Federation; two by the Republika Srpska; and eight by the Committee of Ministers of the Council of Europe.[258]

The presence of non-nationals in a judiciary is a matter of some current interest and has attracted criticism.[259] The Yugoslav judge *ad hoc*, in a dissenting opinion in the July 1996 *Genocide* case heard by the International Court of Justice, questions whether Bosnia is an independent state, and, in arguing that it is in fact a "protectorate," the judge *ad hoc* points to the constitutional requirement that foreigners sit on the Constitutional Court.[260] Foreign presence on a national judiciary is not, however, unique to Bosnia, nor did the idea begin with Cyprus. In fact, it is rather common among states whose internal constitutive structure or external security is uncertain. Jorri Duursma, studying five European "micro-states," notes that they occupy a precarious position in international relations, and "have been obliged to regulate their independence in a certain way."[261] One aspect of this regulation has been the inclusion in the domestic courts of non-nationals from larger neighboring states. In Liechtenstein, three of eight "Sole Judges" are Austrian.[262] The San Marinese judiciary, by law, consists of non-nationals, with the single exception of a special "Conciliatory Judge" who can (but need not) be a citizen of the Republic of San Marino.[263] The Convention of July 1930 between France and Monaco requires that a majority of the judges in the Monégasque judiciary be French nationals.[264] The French and ecclesiastic co-princes of Andorra (the President of France and the Bishop of Urgell) appoint members of the Principality's Constitutional Tribunal and Supreme Council of Justice.[265] Judges in the

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transferred from the Parties to the Bosnia and Herzegovina five years after the agreement enters into force).

257. Agreement on Human Rights, *supra* note 91, art. VIII, ¶ 2, 35 I.L.M. at 132.

258 *Id.* art. VII, ¶¶ 1, 2, 35 I.L.M. at 132.

259. *See* Thomas D. Grant, *Between Diversity and Disorder: A Review of Jorri C. Duursma, Fragmentation and the International Relations of Micro-States: Self-Determination and Statehood*, 12 AM. U. J. INT'L L. & POL'Y 629, 681-85 (1997) (book review) [hereinafter Grant, Diversity and Disorder].

260. *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.), 1996 I.C.J. 21 (July 11) (dissenting opinion of Judge *ad hoc* Krec'a). For further discussion of the autonomy and statehood of Bosnia, see Grant, *Diversity and Disorder*, *supra* note 259, at 651-54.

261. DUURSMA, *supra* note 206, at 145.

262 *See id.* at 154-55.

263. *See id.* at 214-17.

264. *See id.* at 268.

265. *See id.* at 320-29.

courts of the Vatican need not be Vatican nationals.[266] Seating non-nationals on municipal courts may well be a signature of a distinct mode of judicial organization. Such a mode of judicial organization has been proposed as a means to stabilize domestic order in countries emerging from civil war. Studying Cambodia, Trevor Findlay notes that the complete lack of a functioning legal system impedes stabilization there, and proposes that the United Nations Transitional Authority in Cambodia (UNTAC), or similar operations in other countries, might profit by including what he calls "judicial packages."[267] By "judicial packages," Findlay means placing foreign prosecutors, defense counsel, judges, and prison administrators in office in the country subject to U.N. intervention—in short, "importing" whole cloth an independent judicial system. A judicial package as Findlay conceives it would raise questions of independence probably not raised by the more modest external contribution to judiciaries witnessed in Cyprus, Bosnia, and elsewhere. Whatever the future of this type of judicial structure, the international influence over the Cypriot and Bosnian judiciaries further emphasizes the character of those states as states by international guarantee.

7. Constituent Communities and Proximate States

The constitutive instruments of Cyprus and Bosnia expressly acknowledge special relationships between constituent communities of the republics and proximate states. This is arguably one of the most distinctive elements of internationalization in the constitutive structure of the two republics. In both, forces within and without fought to integrate portions of state territory with proximate states. Cypriot Greeks argued for some time that the island should be incorporated into Greece, while some Turks believed that at least the majority Turkish areas should become part of Turkey. Constituent peoples of Bosnia similarly held allegiances to nearby countries. Indeed, when Bosnian Serbs rebelled against the central government after it declared independence in 1992, they professed to have the chief aim of attaching Serb inhabited parts of the country to Serbia proper. Croats in Bosnia also have suggested at times that their districts become part of Croatia. Serb leaders in Belgrade and Croats in Zagreb have encouraged their co-ethnics in Bosnia to pursue integration with Serbia and Croatia. It was necessary in both Cyprus

266. *See id.* at 379.

267. TREVOR FINDLAY, CAMBODIA: THE LEGACY AND LESSONS OF UNTAC 238 (1995); *see also* Jamie Frederic Metzl, *Cambodia: The Legacy and Lessons of UNTAC*, 37 HARV. INT'L L.J. 293, 302 (1996) (book review) (discussing Findlay's "judicial packages" proposal).

and Bosnia that the constitutive order address ambitions to dismember the state territory. The solution attempted in both countries was simultaneously: (1) to acknowledge and make concessions to the forces pressing for radical territorial revision; and (2) in unambiguous language, to enjoin any changes derogatory of the sovereignty and physical integrity of the state.

The relationship between the constituent peoples of the two republics and proximate states is symbolically acknowledged. The Cypriot Constitution permits authorities of the Republic on national holidays to fly the Greek and Turkish flags at the same time as the Republic flag.[268] Communal authorities may fly the flag of Greece or Turkey *alone* with the Republic flag on holidays.[269] Individuals and private organizations are not to be restricted from flying any of the flags at any time.[270] Article 5 of the Constitution provides further, "[t]he Greek and the Turkish Communities shall have the right to celebrate respectively the Greek and the Turkish national holidays."[271]

Beyond such symbolic concessions, the constitutions also provide for material ties between the constituent communities and proximate states. The Constitution of Cyprus provides that the Communities may receive subsidies from the government of Greece or Turkey, for education, culture, athletics, and charity.[272] The Communities, in case of shortage of qualified personnel, may accept clergy and teachers furnished by the Greek or Turkish government.[273] Also, the Republic must accord most-favored-nation treatment to the three guaranteeing powers (Britain, Greece, and Turkey).[274] Perhaps the most important provision of the Cypriot Constitution that acknowledged a special relationship to proximate states did not mention those states by name. Article 185 provides that: "[t]he territory of the Republic is one and indivisible," and "[t]he integral or partial union of Cyprus with any other State or the separatist independence is excluded."[275] This language acknowledges that many Cypriots aimed to incorporate the island into Greece or Turkey or to divide it between the constituent Communities. It simultaneously prohibits both of those objectives. Thus, one set of terms makes concessions to the bonds of habit and affection between the Communities and

268. *See* REP. OF CYPRUS CONST. art. 4, ¶ 2, *in* Cmnd. 1093, *supra* note 7.
269. *See id.* art. 4, ¶ 3.
270. *See id.* art. 4, ¶ 4.
271. *See id.* art. 5.
272. *See id.* art. 108, ¶ 1.
273. *See id.* art. 108, ¶ 2.
274. *See id.* art. 170.
275. *See id.* art. 185.

proximate states (flags, subsidies, and most-favored-nation status), while Article 185 forbids those bonds from altering the constitutive order of the Republic. The Bosnian Constitution takes a similar approach, yielding certain points to ethnic particularism and drawing a line against erosion of territorial integrity.

The most distinctive concession to the constituent peoples is the discretion to carry on elements of foreign policy independent of the policy set for the Republic as a whole. This provision includes freedom to enter into "special parallel relationships with neighboring states,"[276] and to "enter into agreements with states and international organizations with the consent of the Parliamentary Assembly."[277] Centrifugalism in state organization rarely extends to foreign policy competencies. The provision allowing separate Entity relations with foreign countries highlights just how pronounced a centrifugal tendency the Bosnian Constitution permits. It is not entirely clear what the Constitution means by "special parallel relationships," but the limits placed on the freedom to establish such relationships may hint at the depth of ties envisaged. The paragraph providing for the special parallel relationships also provides that those relationships must be "consistent with the sovereignty and territorial integrity of Bosnia and Herzegovina."[278] The framers of the constitution, therefore, appeared to contemplate highly integral relationships between the Entities and neighboring states—or at least sufficiently close relationships to raise concern over the impact such relationships might have on cohesion of the Republic. Practically, it would appear that one "parallel relationship" in particular is envisaged—one between the Republika Srpska and the Federal Republic of Yugoslavia. Article III, paragraph 2(a) limits the relationships to "neighboring states," meaning that the only candidates are Croatia and Yugoslavia. It would be difficult to obtain a majority in the Croat-Muslim Entity in favor of a special relationship with Croatia, as the Muslims form a large majority in that Entity and have no particular bonds to that neighbor (though they may harbor some animosities). There is no apparent rationale for a special relationship between the Croat-Muslim Entity and Yugoslavia.[279] A large majority in the Republika Srpska, by contrast, overwhelmingly appears to harbor sentiments in

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276. BOSN. & HERZ. CONST. art. III, ¶ 2(a), 35 I.L.M. at 120 (app. 4 to GFA, *supra* note 6).

277. *Id.* art. III, ¶ 2(d).

278. *Id.* art. III, ¶ 2(a).

279. If the Croats of Bosnia were to form a separate Entity of their own, then the parallel relationship clause would be relevant to such an Entity. Croats might wish to establish formal ties to Croatia, and champions of the Republic to preserve Republic cohesion would have to set limits on such ties. In its present form however, the Republic ensconces Croats in an Entity unlikely to choose special association with a neighboring state.

favor of Yugoslavia. Indeed, those who fought for a separate Serb state within Bosnia professed to desire as a final settlement amalgamation with Serbia proper. Constitutional allowance for a "special parallel relationship" is a concession to a particular constituent people. The provision that any such relationship must leave the Republic of Bosnia and Herzegovina intact marks the limit of the concession.[280]

Central governments in a number of federal states have meted out to sub-units of the state limited competencies over foreign policy—an area traditionally monopolized by central governments.[281] When discussing legal personality, the International Court of Justice in the *Reparations* case noted that "the progressive increase in the collective activities of States has . . . given rise to instances of action upon the international plane by certain entities which are not States."[282] *Reparations* concerned a supranational entity (the United Nations) and whether that entity possessed international personality. It is, therefore, not directly apposite to the question of *sub*-state entities possessing limited competencies in international relations, but it is instructive nevertheless. The proposition has been accepted for some time that entities other than states may play an active role in international affairs, and some even enjoy the legal personality once attributed solely to states.[283] Recent developments in the legal systems of certain federal states have led to sub-state entities assuming responsibilities for international activity previously seldom observed at such a subsidiary level. Examples of sub-state entities engaging in foreign relations, albeit not over the entire range of foreign relations subjects, seem to have multiplied. For example, the state of Sabah reportedly supported rebels in the Moros without the

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280. It may be that the "special parallel relationship" envisaged between the Entity and Yugoslavia is something like the "associated statehood" that has developed in the final stages of decolonization in the Pacific. The Republic of Palau, The Marshall Islands, and the Federated States of Micronesia have special ties to the former administering power, the United States. Yet they remain independent states. It is this limited bonding of one state to another without derogating the statehood of either that distinguishes associated statehood as a device in international law. In Bosnia, the challenge will be to develop a "special parallel relationship" which does not disrupt the Entity's status as a constituent of independent Bosnia.

281. For a wide ranging survey of federalism, including analyses of several cases where modest foreign policy competencies have been assigned to constituent units of federations, see FEDERALISM AND NATIONALISM (Murray Forsyth ed., Leicester Univ. Press 1989). See especially, chapters on Spain and Belgium.

282. *Reparations for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174, 178 (April 11).

283. For a discussion at the frontier of the notion of nontraditional actors in international law, see IGNAZ SEIDL-HOHENVELDERN, CORPORATIONS IN AND UNDER INTERNATIONAL LAW 4, 23 (1987) (proposing international legal personality for multinational business entities); *see also* Grant, *Diversity and Disorder*, *supra* note 259, at 674 n. 269.

approval of the central government of Malaysia.[284] The Austrian province of Carinthia entered into agreements with Slovenia pertaining to trade, industry, handicrafts, tourism, and agriculture in late 1991.[285] A three-way agreement among Slovenia, Croatia, and northeast Italian authorities was signed in December 1991 to promote economic and cultural integration of Croatia and Slovenia into Europe.[286] It may well turn out that the parallel relationships permitted under the Bosnian Constitution go further than past examples of sub-state foreign policy. The connection the parallel relationship clause permits is deep enough to pose a risk to the constitutive structure of the Republic and must, therefore, be checked by an associated provision protecting that structure. Few past examples go so far. However, the existence of similar provisions in Cyprus suggests that acknowledgment of links between component ethnic groups and proximate states is another distinctive feature of the internationally guaranteed state. Insofar as foreign affairs competences are growing at the substate level in states other than internationally guaranteed states, Cyprus and Bosnia may also belong to a more general trend. Viewed in conjunction with other acknowledgments of the links between constituent communities and foreign states, the parallel relationships clause is a distinctive element of internationalization.

Meir Ydit, writing shortly after the foundation of the Republic of Cyprus, remarked that the international aspects of the constitutive order made Cyprus "unique in its character."[287] He could find analogy only in an arrangement crafted by the European powers for the occupation and government of Crete between 1897 and 1909.[288] Paola Gaeta, writing in 1996, concludes that Bosnia, too, is unusual, though she compares the 1995 settlement to peace settlements of the past twenty years, particularly the Camp David Accords of September 17, 1978 and the Israel-Egypt Peace Treaty of March 26,

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284. *See* Alexis Heraclides, *Secessionist Minorities and External Involvement*, 44 INT'L ORG. 341, 367 (1990).

285. *See* Joze Sircelj, *Firmer Economic Ties with Carinthia*, DECO (Ljubljana) Dec. 10, 1991, *quoted in*, Foreign Broadcast Information Services, EEU-91-242 (Dec. 17, 1991).

286. *See* Foreign Broadcast Information Services, EEU-91-234 (Dec. 5, 1991); *Slovenia, Croatia, Northeast Italy Sign Agreement*, Belgrade, TANJUG Domestic Service, Dec. 4, 1991 (describing agreement signed by Lojze Peterle, the prime minister of Slovenia; Jurica Pavelic, the deputy prime minister of Croatia; Andriano Biasutti, president of the regional council of Friuli-Venezia Giulia; Gianfranco Cremonese, president of the regional council of Veneto; Tarciso Andreolli, president of the regional council of Trento-Alto Adige; Mario Malossini, president of the Trento Provincial Council; and Luis Durnwalder, president of the Bolzen Provincial Council). Note the pairing of national level executive officers with mere regional counterparts.

287. MEIR YDIT, INTERNATIONALIZED TERRITORIES 81-83 (1961).

288. See id.

1979.[289] Gaeta views the international aspect of the Bosnian settlement as particularly noteworthy:

> This hypertrophy of international guarantees undertaken at Dayton by Croatia and the Federal Republic of Yugoslavia and strengthened by the Security Council in resolution 1022 of 22 November 1995 is striking, for normally States are reluctant to assume obligations concerning complex situations the outcome and ramifications of which are essentially beyond their control.[290]

But Gaeta's identification of interstate guarantees to ensure compliance with the General Framework Agreement as a "unique feature" of the settlement[291] may obscure the striking similarity between the Bosnian case and its Cypriot forbear. The constitutive structures prescribed for Cyprus and for Bosnia, both in their domestic aspects and in their integration of internal order with external processes, bear such resemblance that it is reasonable to characterize them as two examples of a similar genre of the internationally guaranteed state. In both places, an attempt was made to settle inter-community conflict and create a domestic order capable of accommodating hostile ethnic groups, while, at the same time, create an unambiguous place for the resultant new state in an international legal framework.

III. IMPLICATIONS FROM THE INTERNATIONALLY GUARANTEED STATE

Convergent forms of constitutive structure were put in place in Cyprus in 1960 and Bosnia in 1995, which may have a number of implications. One implication is that internationally guaranteed statehood describes a particular type of nontraditional actor in international law and international relations. This article attempts to show that 1960 Cyprus and 1995 Bosnia do, in fact, represent the same general form of state organization, both in their internal and international dimensions. Balancing mechanisms to foster comity between antagonistic constituent ethnic groups, the elaborate nesting of constitutive instruments with international treaties, and the permeation of the domestic order by external processes of authority are general features shared by the two states. Further marking them as examples of one *sui generis* form of international actor are numerous unusual structures, including: special relationships between component communities and foreign states; non-national judges on municipal courts; geographic delineation of ethnic zones; radical decentralization; and external guarantee of state form, enshrined in

289. *See* Gaeta, *supra* note 103, at 147.
290. *Id.* at 155.
291. *Id.* at 153.

treaties integral to the constitutive framework and given substance by multilateral commitment of armed forces. This last feature—external intervention in internal constitutive processes over an extended period—has drawn the attention of commentators skeptical of the state building projects.

It may well be fruitful to examine the new form of international actor represented by Cyprus and Bosnia in light of the history of protected states. The term 'protectorate' carried a negative connotation through much of the twentieth century, suggesting derogation of independence and recalling colonial usurpation of local rights. Cyprus and Bosnia however, though criticized by some as 'protectorates', at least at their inceptions enjoyed the ratification of important segments of the community of states. If Cyprus and Bosnia indeed represent a single form of nontraditional actor, then the place of that actor in international society merits further analysis. Widespread acceptance that multilateral intervention is a permissible means of guaranteeing the statehood of precarious territorial entities would have a far-ranging effect.

The international community, confident of the legality of internationally guaranteed states, might apply constitutive devices in other places where local conditions invite such solutions. For example, if a multi-ethnic territory such as Daghestan claimed independence but fell into inter-community conflict, a solution very similar to that attempted in Cyprus and Bosnia might well be appropriate.[292] International guarantees would not have to possess a federal dimension, however. Guaranteeing states applied an explicitly federal solution in Bosnia, and it may be that many, if not most, states susceptible to the type of instability that invited international action in Cyprus and Bosnia will contain antagonistic ethnic groups. Insofar as internationally guaranteed statehood responds to inter-community strife, it will most often contain a pronounced federal aspect. In some cases it may not. If, for example, the Palestinian Authority seeks to acquire the status of a full-fledged state, a solution acceptable to the Authority and to Israel may involve external oversight, but it will in all likelihood not involve creating a two-community Arab-Jewish federation.[293] Multilateral intervention has already aimed to

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292. Any territorial entity making an effective claim to statehood but suffering destabilization on account of internal ethnic or religious antagonisms would be a candidate. Examples might plausibly arise in Kashmir, Tatarstan, Tibet, Assam, or, less conceivably, Quebec. Existing states that slip into ethnic or religious strife threatening the very identity of the state on the international plane would also be candidates for internationally guaranteed federal structures. Examples of this might plausibly arise in Sri Lanka, Sudan, or Romania.

293. *See* Peter Malanczuk, *Some Basic Aspects of the Agreements Between Israel and the PLO from the Perspective of International Law*, 7 EUR. J. INT'L L. 485 (1996); Kathryn M. McKinney, *The*

reconstitute states in Haiti[294] and Cambodia,[295] even though ethnic community antagonism is not the principal source of crisis in those countries.

Proliferation of internationally guaranteed statehood, whether in federal or other form, would substantially alter the landscape of international society. It would promote growth in the ability of international law to permeate municipal order. It would multiply the population and territory subject to direct multinational jurisdiction. Moreover, it would create a host of situations in which international institutions exercise territorial power, possibly increasing the number or strength of such institutions. The greater willingness of states in recent years to enter into multilateral conventions at once reflects and promotes the growth of international competence over certain aspects of trade, human rights, and health and environmental regulation. International subject matter competence, in short, has become more widespread and more robust. Proliferation of internationally guaranteed states would multiply the territorial bases for international competence. If multilateral conventions have been extending the reach of international law into new substantive fields, then the internationally guaranteed state extends that reach to territory.

The existence of a legally valid form of internationally guaranteed statehood would also have implications for the effort to settle the Cyprus dispute. Actions pursued by the Turkish Cypriots since 1974 have militated against a settlement based on the constitutive structures of 1960.[296] Turkish Cypriot publicists have maintained, however, that Cyprus should be reunified as a "bi-communal republic," with the 1960 Constitution as the chief point of reference.[297] The Greek community, through the Republic of Cyprus, has seemingly wavered in its commitment to the 1960 structures. Indeed, the crisis that precipitated the breakdown of the Cypriot state in 1960 involved

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Legal Effects of the Israeli-PLO Declaration of Principles: Steps Toward Statehood for Palestine, 18 SEATTLE U. L. REV. 93 (Fall 1994); DAVID MCDOWELL, THE PALESTINIANS: THE ROAD TO NATIONHOOD (1994).

294. *See* Olivier Corten, *La résolution 940 du conseil de sécurité autorisant une intervention militaire en Haïti: L'émergence d'un principe de légitimité démocratique en droit international?*, 6 EUR. J. INT'L L. 116 (1995).

295. *See* Steven R. Ratner, *The Cambodia Settlement Agreements*, 87 AM. J. INT'L L. 1 (1993); FINDLAY, *supra* note 267.

296. Turkey invaded Cyprus in July 1974 and subsequently protected a putative independent state on the northern part of the island. *See* Ann Van Wynen Thomas & A.J. Thomas, Jr., *The Cyprus Crisis 1974-75: Political-Juridical Aspects*, 29 SW. L.J. 513 (1975); *see also* Thomas Ehrlich, *supra* note 124, at 1075.

297. *See, e.g.*, Zaim M. Necatigil, The Cyprus Question and the Turkish Position in International Law 318 (2d ed. 1993).

a proposal, advanced by the Greek community, that would have substantially altered those structures.[298] Both sides have at times argued that the 1960 constitutive framework is illegal. Critics of the framework have relied in particular on a theory that international involvement in the republic (military bases, restrictions on constitutional amendment, neutral non-nationals on judicial organs) impermissibly derogates its independence. Ratification of internationally guaranteed statehood would, however, increase the burden on those arguing against the 1960 constitutive framework. By employing constitutive devices in Bosnia in 1995 strikingly similar to those employed in Cyprus in 1960, the parties and witnesses to the Dayton-Paris Accords arguably have reinforced the original Cypriot state structures, if not in practical terms, at least on a legal plane.

Conversely, how observers and the parties to negotiations over the future of Cyprus treat the 1960 framework may have an effect on the legal status of the 1995 Bosnian settlement. If the constitutive structures established in Cyprus were indeed void *ab initio* or so flawed as almost to be automatically overwhelmed by the force of facts, then the legal validity of similar structures today in place in Bosnia must be cast in doubt. Practical failure in Cyprus[299] does not itself compel the conclusion that the state genre constituted there is illegal. To permit the inference that the Cyprus project was *legally* flawed may set a precedent indeed more adverse to Bosnia than the actual course of events in the bi-communal island republic. To analogize, a contract may 'fail' in the sense that the parties to it breach its terms, but such failure does not mean that the contract is legally unenforceable, or void *ab initio*. The legality of a bargain at its outset is independent of future patterns of dealing between the particular parties. Of course, future conduct can rework terms of a contract. Indeed, a contractual arrangement ought to be reviewed if parties to it cannot function smoothly under it. However, failure by the parties to abide by the original terms does not preclude that a very similar set of terms might work for other parties at a later date, under somewhat different circumstances. Nor does it mean that those terms are illegal. The failure in some key aspects of the earlier "bargain" for internationally guaranteed statehood must raise questions about the suitability of the bargain for Cyprus, but that failure does not legally bar the parties in Bosnia from entering into a similar

298. *See* Eugene T. Rossides, *Cyprus and the Rule of Law*, 17 SYRACUSE J. INT'L L. & COM. 21, 32 n.48 (1991) (listing thirteen changes which the Greek community required in 1963 be made in the Cypriot constitutive order and which the Turkish community argued would radically revise that order).

299. On the degradation of the 1960 state, see Thomas Ehrlich, *supra* note 124, at 1040.

bargain. The crisis of the Cypriot constitutive order does not make the internationally guaranteed state illegal. Widespread affirmation of, or acquiescence in, claims that that bargain was illegal may, however, do just that. Crystallization of an *opinio juris* that internationally guaranteed statehood, as attempted in Cyprus, violates international law would engender a hindrance to the Bosnian constitutive project.