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## From Dayton to Sarajevo: Enforcing Election Law in Post War Bosnia and Herzegovina

Daniel J. Blessington

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# FROM DAYTON TO SARAJEVO: ENFORCING ELECTION LAW IN POST WAR BOSNIA AND HERZEGOVINA

DANIEL J. BLESSINGTON<sup>\*</sup>

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## PREFACE

In June of 1996, I was seconded by the United States Department of State to work as a member of the mission to Bosnia and Herzegovina of the Organization for Security and Cooperation in Europe ("OSCE"). From July to December of 1996, I served as Chief Prosecutor of the Election Appeals Sub-Commission, a multi-ethnic supervisory body established by the Provisional Election Commission to enforce electoral rules and regulations.

This paper describes and analyzes the OSCE's role in the elections from an enforcement perspective. I have based much of what follows on my personal observations. Where a footnote or other means of elaboration does not accompany a factual statement or opinion, the reader can safely assume it is mine. I have attempted to provide a real flavor of how the Sub-Commission accomplished its work; however, the confidential nature of my position restricts my narration. I have omitted specific facts and details that I am not permitted to disclose.

Finally, I should acknowledge the obvious: I am not a disinterested party either with respect to the elections or the Election Appeals Sub-Commission. Indeed, I wrote, co-authored, or participated in many of the reports, decisions, and advisory opinions described or cited below. I have tried to provide a balanced account of one small but important part of the international community's response to the tragedy of Bosnia and Herzegovina. A truly objective appraisal, however, will have to be left to another.

## INTRODUCTION

Since the establishment of the United Nations and the end of World War II, the international community has engaged in what has been described as peace-keeping and, more recently, peace enforcement.<sup>1</sup> Often these operations have involved ethnic conflicts in the form of either civil war or so-called "mixed conflicts."<sup>2</sup> Such international peace-keeping efforts have included post-conflict civil measures with an electoral component.<sup>3</sup> In most cases, the electoral component involved providing logistical support and technical assistance to a governmental authority,<sup>4</sup> as well as election supervision and observation.<sup>5</sup> In a few instances, the international community was responsible for administering the elections.<sup>6</sup> The United Nations supervised post-conflict elections in both Namibia and Cambodia.<sup>7</sup> In Bosnia and Herzegovina, the OSCE supervised

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1. See Shashi Tharoor, *Should UN Peacekeeping Go 'Back to Basics'?*, SURVIVAL, Winter 1995-96, at 52. Mr. Tharoor, Special Assistant to the United Nations Under-Secretary-General for Peace-Keeping Operations, distinguishes "traditional peace keeping" from what he calls "peace enforcement." He uses the former term to describe the role of the U.N. when the parties have agreed to peace and need the U.N. to help them "keep their word." *Id.* at 53. "Peace enforcement," in contrast, applies to the introduction of peacekeeping forces in situations where there is "no peace to keep." *Id.* at 58.

2. See Anthony Clark Arend, *The United Nations, Regional Organizations and Military Operations: The Past and the Present*, 7 DUKE J. COMP. & INT'L L. 3, 27 (1996) (citing John Norton Moore, *The Use of Force in International Relations: Norms Concerning the Initiation of Coercion*, in NATIONAL SECURITY LAW 85, 139-40 (John Norton Moore et al. eds., 1990) (defining "mixed conflicts" as "civil wars with external intervention").

3. See generally Jon M. Ebersole, *The United Nations' Response to Requests for Assistance in Electoral Matters*, 33 VA. J. INT'L L. 90 (1992) (setting forth the United Nations' expanded role in monitoring elections as part of the peacekeeping process).

4. See *id.* at 93 (explaining that the United Nations worked in conjunction with the government to develop and administer elections).

5. See *id.* at 93-4 (citing U.N. CHARTER arts. 75-85 setting forth the U.N.'s authority to participate in the electoral process of its members). "Supervision" means "direct involvement in establishing the mechanisms of the election," including "issuing regulations, monitoring polling stations, and establishing methods for dispute resolution." *Id.* at 94. In contrast, "observation" means less direct U.N. involvement in the electoral process. See *id.*

6. See Ebersole, *supra* note 3, at 90 (stating that in Nicaragua and Haiti the U.N. monitored elections within independent Member states for the first time).

7. See *id.* at 91 (1992) (detailing U.N. involvement in the elections). Ebersole

elections pursuant to Annex 3 of the General Framework Agreement for Peace in Bosnia and Herzegovina ("Dayton Agreement" or "Accords").<sup>8</sup>

Proper election supervision requires rules and an enforcement regime to ensure compliance with those rules. In Bosnia and Herzegovina, the Election Appeals Sub-Commission ("EASC" or "Sub-Commission") was established to adjudicate complaints and appeals arising under the rules for the September 14, 1996 election. This paper describes the context in which those elections were held and examines the role and work of the Sub-Commission.

An effective enforcement body must first establish its legitimacy. In this context, legitimacy means a reputation for fairness, independence, and impartiality. It also means having the authority to enforce the law, along with the ability and will to exercise that authority in a practical way. This paper argues that the Sub-Commission had sufficient enforcement powers to do its job and utilized them in such a way as to establish its legitimacy. For the Sub-Commission, this legitimacy involved two interrelated considerations:

First, it meant balancing the need for expedition on the one hand with procedural fairness on the other. By the time the Sub-Commission was established there were fewer than three months until the election. There was simply no time for countless investigations that might produce uncertain outcomes. At the same time, however, the Sub-Commission's decisions had to be based on credible evidence, and it had to provide at least a modicum of due process to respondents. In achieving this balance, the Sub-Commission opted for what could be referred to as "rough justice."

Second, the Sub-Commission also had to consider the delicate balance between enforcement in concrete cases and OSCE's overall goal of proceeding with the elections as scheduled. The community

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notes the U.N.'s increasingly important peace-keeping role in elections. He traces the evolution of the U.N.'s involvement from its early supervision of referenda, plebiscites, and elections in non-self-governing territories, to its role in supervising the 1989 and 1993 elections in Namibia and Cambodia, respectively.

8. Bosnia and Herzegovina-Croatia-Yugoslavia: General Framework of Peace in Bosnia and Herzegovina with Annexes, Dec. 14, 1995, 35 I.L.M. 75 (1996) [hereinafter Dayton Agreement].

perceiving its decisions as too draconian could have had the effect of boycotts or other measures curtailing the elections altogether. On the other hand, a weak approach would threaten the very integrity of the elections by encouraging violations of the rules.

This paper concludes that the Sub-Commission established its legitimacy as an enforcement body and thereby lived up to its mandate. In so doing, the Sub-Commission made a positive contribution to the elections in Bosnia and Herzegovina and serves as an enforcement model for future international election supervision.

Before examining the Sub-Commission and its work, this paper introduces some background material. The first section contains a guide to some frequently used names and acronyms. This section is followed by a brief treatment of the origins of the Yugoslav state, its disintegration, and the conflict in Bosnia and Herzegovina.<sup>9</sup> A discussion of the Dayton Agreement and a detailed account of its electoral provisions follow.<sup>10</sup>

The remainder of this paper focuses on the Election Appeals Sub-Commission. It first examines its mandate, its multiethnic and international composition, and its relationship to the OSCE Mission.<sup>11</sup> Next is the most detailed part of the paper, entitled "The Work of the EASC."<sup>12</sup> It considers the challenges faced by the Sub-Commission, its decision-making process, and how it actually functioned.<sup>13</sup> It also examines how the Sub-Commission handled cases in a variety of areas, including technical legal questions,<sup>14</sup> the linking of humanitarian assistance to voter registration,<sup>15</sup> violence and intimidation,<sup>16</sup> secessionist speech and freedom of expression,<sup>17</sup>

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9. See *infra* pt. I.B.

10. See *infra* pt. II.

11. See *infra* pts. IV.B-C.

12. See discussion, *infra* pt. V.

13. See discussion, *infra* pts. V.B-V.E..

14. See discussion, *infra* pt. V.F.1 (acknowledging problems with the Provisional Election Commission, but recognizing that even with its precarious position, the Sub-Commission upheld the PEC and its Rules and Regulations).

15. See discussion, *infra* pt. V.F.2. (describing the Sub-Commission's actions regarding the rights of displaced persons to choose a voting location).

16. See discussion, *infra* pt. V.F.3 (describing the actions the Sub-Commission took to curtail instances of violence and intimidation, especially in Una Sana Canton).

17. See discussion, *infra* pt. V.F.4 (expressing the Sub-Commission's

wrongdoing by local officials and political parties;<sup>18</sup> election-day problems;<sup>19</sup> and OSCE failures regarding the overall vote count and the allocation of seats.<sup>20</sup> This paper next assesses the performance of the Sub-Commission with respect to its mandate and concludes that it was effective in its enforcement role.<sup>21</sup> Finally, it considers the lessons the international community can learn from the experience in Bosnia and Herzegovina and concludes that a proper election supervision program must include: 1) a set of comprehensive and realistic electoral rules, including meaningful sanctions to discourage violations; and 2) a credible body that will enforce those rules.<sup>22</sup>

## GUIDE TO FREQUENTLY USED NAMES AND ACRONYMS

The author uses the following names and acronyms throughout the paper. While each is described in the following pages, this guide is intended as a convenient point of reference.

*Bosnia and Herzegovina* or *Bosnia* refers to the sovereign state of Bosnia and Herzegovina, which is comprised of two Entities. Each Entity has a defined territory making up the whole of Bosnia.<sup>23</sup>

*Federation* refers to the Federation of Bosnia and Herzegovina, one of the two Entities. Reflecting both its origins during the war and Bosnia's present reality, it is sometimes popularly referred to as the

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dedication to freedom of expression, but also recognizing that such freedom was not absolute).

18. See *infra* pt. V.F.5 (describing cases of illegal political party involvement in voter registration, obstruction of voter education efforts, and police confiscation of opposition campaign materials).

19. See *infra* pt. V.G (discussing problems with the voting list, polling and counting center irregularities, refugee voting fraud, and other voting impediments).

20. See discussion, *infra* pt. V.H (detailing how the Sub-Commission dealt with allegations that too many people voted, and complaints that the OSCE failed to apply its published formula in calculating seats under the system of proportional representation).

21. See discussion, *infra* pt. VI (evaluating the effectiveness of the Sub-Commission from the perspective of critics, participants, and peoples' adherence to Commission decisions).

22. See discussion, *infra* pt. VII (outlining the factors that contributed to the Sub-Commission's success, including enforcement powers, insulation, impartiality, and speed).

23. See Dayton Agreement, annex 4, art. I.3.



Muslim-Croat Federation.<sup>24</sup>

*Republika Srpska* is the other Entity. Its post-war population is overwhelmingly Serb.<sup>25</sup>

*HDZ* stands for the Croatian Democratic Union, one of the three major nationalist parties in Bosnia. It is the Bosnian branch of Croatia's *HDZ*.<sup>26</sup>

*SDA* stands for the Party of Democratic Action, the major nationalist party of Bosnia's Muslim population.<sup>27</sup>

*SDS* stands for the Serb Democratic Party, the major nationalist party of Bosnia's Serb population.<sup>28</sup>

*GFA* refers to the General Framework Agreement for Peace in Bosnia and Herzegovina. Along with its annexes, it is commonly known as the Dayton Agreement or Dayton Peace Accords.<sup>29</sup>

*OSCE* is the Organization for Security and Cooperation in Europe, a regional arrangement under Chapter VIII of the U.N. Charter.<sup>30</sup>

*PEC* refers to the Provisional Election Commission, established by the OSCE to supervise Bosnia's first post-war elections.<sup>31</sup>

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24. See *id.* (stating that the Federation is really two Muslim-Croat entities).

25. See generally Tracy Wilkinson, *In Push for Bosnian Vote, Problems Get Glossed Over*, L.A. TIMES, Sept. 8, 1996, at A1 (defining *Republika Srpska* as the Serbian half of Bosnia-Herzegovina).

26. See *Hardline Croats Threaten to Boycott Mostar City Council*, AGENCE FRANCE PRESSE, July 12, 1996, at 1 [hereinafter *Hardline Croats*], available in LEXIS, News Library, Curnws File (detailing the June 30, 1996, municipal polls in which Mijo Brajkovic headed the Croatian Democratic Union's list).

27. See NOEL MALCOLM, *BOSNIA: A SHORT HISTORY* 218 (1994) (explaining the establishment of Bosnia's first post-communist and non-communist Muslim party in May 1990).

28. See, e.g., *id.* (comparing the SDS, founded in Bosnia in July 1989, with another party already fighting for autonomy in the Croatian Krajina).

29. See Paul C. Szasz, *Introduction to Dayton Agreement*, *supra* note 8 (stating that the General Framework Agreement for Peace in Bosnia and Herzegovina was initiated at an Air Force base near Dayton, Ohio, on Nov. 21, 1995, and concluded on Dec. 14, 1995, in Paris).

30. See Bonnie Jenkins, *The Enhancement of Political and Military Stability in the Former Yugoslavia through the Use of International Law: Annex 1-B of the General Framework Agreement*, 19 FORDHAM INT'L L.J. 1920, 1934 n.6 (1996) (tracing the development of the OSCE from the CSCE founded on Aug. 1, 1975, in Helsinki, Finland).

31. See Report to Head of Mission, Election Appeals Sub-Comm'n Org. for Sec. and Cooperation in Eur., Mission to Bosnia & Herzegovina, Oct. 4, 1996, at

*Sub-Commission* or *EASC* refers to the Election Appeals Sub-Commission, which the PEC established to enforce election rules and regulations.<sup>32</sup>

## I. BACKGROUND

### A. ELECTION DAY

On September 14, 1996, internationally-supervised elections were held throughout Bosnia and Herzegovina for the country's three-member presidency, national legislature, and other offices.<sup>33</sup> The following day President Clinton proclaimed the election "a remarkable step forward."<sup>34</sup> Not everyone was quite as sanguine. A contributing editor at *The Nation*, for example, described them as a "farce."<sup>35</sup> These comments reflect the dichotomy of views expressed about the elections. Despite this dichotomy, however, two salient facts remain. First, despite nearly four years of civil war that had officially ended only nine months earlier, violence did not mar election day.<sup>36</sup> Second, the three "nationalist" political parties were the overwhelming victors that day.<sup>37</sup> They were the same parties that had come to power in 1990 as the former Yugoslav republic disintegrated into a series of ethnic conflicts that would both horrify and confound the international community.<sup>38</sup>

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11 [hereinafter Report to Head of Mission].

32. *See id.*

33. *See* Tracy Wilkinson, *Bosnian Elections Reaffirm Massive Ethnic Division in Balkans: Balloting Is Chaotic But Mostly Peaceful*, L.A. TIMES, Sept. 15, 1996, at A1.

34. *Id.*

35. Slavenka Drakulic, *Bosnia's Democratic Charade*, THE NATION, Sept. 23, 1996, at 14 (explaining that the election was a farce because elementary conditions for democratic elections did not exist). Drakulic further states that the election was nothing more than "a sideshow performance to President Clinton's re-election campaign." *Id.*

36. *See* Sir Kenneth Scott, 'Free and Fair' Vote in Bosnia Elections, THE TIMES, Oct. 16, 1996, at 1, available in Lexis, News Library, Cumws File.

37. *But see id.* (stating that the opposition parties not only took part in the elections, they won 57 out of 265 seats, making a noticeable dent in the monopoly of power).

38. *See* MALCOLM, *supra* note 27, at 213-33 (providing a brief history of the tactics and policies these newly formed nationalist groups adopted to gain power and deepen the rift between the groups).

## B. DISINTEGRATION OF YUGOSLAVIA

For centuries, the Austro-Hungarian and Ottoman Empires had dominated various parts of the territory that would become Yugoslavia.<sup>39</sup> One can trace the modern concept of a single Balkan state comprising the South Slavic ("Yugoslav") nationalities back to the Nineteenth Century.<sup>40</sup> The first Yugoslavia was created in 1918 as the Kingdom of the Serbs, Croats, and Slovenes.<sup>41</sup> Its composition was multiethnic and multiconfessional. Religious, ethnic, and regional conflict marked its existence.<sup>42</sup> The first Yugoslavia came to an end in World War II with occupation by the Axis powers, civil war, interethnic violence, and genocide.<sup>43</sup>

Josip Broz, the partisan fighter who came to be known simply as Tito, created the modern Yugoslav state.<sup>44</sup> As a dedicated revolutionary, he induced his multiethnic followers to put aside old feuds and hatreds to unite in common purpose against the enemy.<sup>45</sup> Socialist Yugoslavia comprised six republics and two autonomous provinces within the largest of the republics, Serbia.<sup>46</sup> In addition to Serbia, the republics constituting the former Yugoslavia were Croatia, Slovenia, Montenegro, Macedonia, and Bosnia and

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39. See *id.* at 82-92, 136-55 (discussing the various campaigns and battles over territories that came to form Yugoslavia).

40. See LENARD J. COHEN, *BROKEN BONDS: THE DISINTEGRATION OF YUGOSLAVIA* 4 (1993).

41. See MALCOLM, *supra* note 27, at 161-62 (discussing the founding of the new Slovene, Croat, and Serb State on Oct. 29, 1918).

42. See COHEN, *supra* note 40, at 13-26.

43. See MALCOLM, *supra* note 27, at 174 (noting that there were a number of "wars" within Yugoslavia from 1941-45). Germany and Italy initially waged war on Yugoslavia itself. Germany, Italy, Hungary, Bulgaria, and Italian-controlled Albania annexed portions of the country. See *id.* The Allies and Axis Powers fought over strategically important areas. See *id.* The Axis Powers fought the resistance movements. See *id.* There were two civil wars: between Croat extremists and the Serb populations of Bosnia and Croatia; and between the two main resistance movements, the Serb Cetniks and Tito's Partisans. See *id.*

44. See *id.* at 177, 193 (describing Tito as Josep Broz, a former Austro-Hungarian Army Corporal, and acknowledging his contribution to Yugoslavia's reunification after World War II).

45. See FITZROY MACLEAN, *EASTERN APPROACHES* 338 (Time-Life Books 1964) (1949); see also COHEN, *supra* note 40, at 22-23 (examining the tactical advantages of the "Yugoslav communists' emphasis on ethnic equality").

46. See ALEX N. DRAGNICH, *SERBS AND CROATS: THE STRUGGLE IN YUGOSLAVIA* 121 (1992).

Herzegovina.<sup>47</sup> Each republic had a majority ethnic group.<sup>48</sup> Most had other ethnic groups as substantial minorities.<sup>49</sup>

Tito's Yugoslavia began to disintegrate in the late 1980s and early 90s.<sup>50</sup> During his rule of Yugoslavia, Tito repressed ethnic identities in favor of the Yugoslav state.<sup>51</sup> After his death in 1980 and the subsequent upheavals in the Soviet Union and the socialist countries of Central and Eastern Europe, the long-repressed ethnic and religious identities of the population of Yugoslavia rose to the surface.<sup>52</sup> As the 1980s were drawing to a close, Serb nationalism became a dominant force in the politics of the former Yugoslavia.<sup>53</sup> Serbia was the most populous of the republics. Its capital, Belgrade, was also the capital of the Yugoslav state. During this period, Slobodan Milosevic rose to power, fanning the flames of Serb nationalism.<sup>54</sup> In Croatia, Franjo Tudjman rode a resurgent Croat nationalism to power.<sup>55</sup> In Bosnia and Herzegovina, Alija Izetbegovic, a Muslim, became President of the Republic.<sup>56</sup>

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47. *See id.*

48. *See id.* at 165.

49. *See id.* at 121 (setting forth Tito's strategy of weakening Serbia through the dispersal of Serbians in the remaining republics).

50. *See generally* LAURA SILBER & ALLAN LITTLE, *YUGOSLAVIA: DEATH OF A NATION* (rev. ed. Penguin Books 1996) (describing the complexity of the disintegration). The brief discussion here draws heavily on this detailed account of the political and military events both accompanying and driving the war in the former Yugoslavia.

51. *See id.* at 26 (stating that "[e]thnic grievances had been suppressed, not dispelled, by the centralized Communist system"); *see also* COHEN, *supra* note 40, at 27 (charting socialist strategies in managing ethno-regional diversity). The "[r]apid creation of 'all-Yugoslav' consciousness to replace group identities" characterized the early period, from 1945-1952. *Id.* State structure was top-down Bolshevik-style federalism. *See id.* In later periods, official recognition of diverse ethnic and regional interests varied and state power devolved to some extent to the republics. *See id.*

52. *See* DRAGNICH, *supra* note 46, at 137.

53. *See id.* at 204, 213 (noting the growth of Serbian nationalism as an increasingly destructive force marked by the commemoration of the Battle of Kosovo on June 28, 1989).

54. *See* MALCOLM, *supra* note 27, at 211-12 (noting Milosevic's rise to power).

55. *See id.* at 215.

56. *See id.* at 222-23 (detailing Izetbegovic's government of national unity, which was a coalition among all three major parties, and explaining other aspects of the elections).

Ultimately, these three leaders would agree to peace in Dayton, Ohio in November of 1995.<sup>57</sup>

The ethnic nationalism resulted in secession or "disassociation"<sup>58</sup> of four of the six republics, including Bosnia and Herzegovina, and the creation of a rump Yugoslavia composed of Serbia and Montenegro.<sup>59</sup> Slovenia, the most ethnically homogeneous of the six republics, was the first to secede.<sup>60</sup> There was a brief "war," but Slovenia's secession was relatively free of disruption.<sup>61</sup> Shortly thereafter, Croatia seceded.<sup>62</sup> In contrast to Slovenia, the secession of Croatia occasioned a bitter war between it and the remaining Yugoslav state, then dominated by Serbia.<sup>63</sup> Then followed the secession of Bosnia and Herzegovina, a republic dominated by its Muslim or "Bosniac" population, but with high percentages of both Croats and Serbs.<sup>64</sup>

The history of the conflict is infinitely complex and difficult to comprehend, and the author makes no attempt to recount it in any significant detail. To have some understanding of the internationally-supervised elections in Bosnia and Herzegovina, however, it is

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57. See Dayton Agreement, *supra* note 8 (noting the initial peace negotiations in Dayton, Ohio on Nov. 21, 1995).

58. See SILBER & LITTLE, *supra* note 50, at 167 n.2 (explaining that "disassociation" implies that the individual republics were free to leave the federation, since Yugoslavia was arguably structured as a voluntary union of nations).

59. See *id.*

60. See MALCOLM, *supra* note 27, at 214-15 (detailing Slovenia's move toward succession as a means to protect itself from Milosevic's constitutional coup); see also *id.* at 225 (discussing Slovenia's independence on June 25, 1991).

61. See *id.* at 225.

62. See *id.*

63. See *id.* at 215-18 (articulating Serb defiance of the Croatian government); see also *id.* at 225 (stating Croatia's declaration of independence on June 25, 1991).

64. See *id.* at 1. Besides Muslims, Croat Roman Catholics, and Orthodox Serbs also reside in Bosnia—Herzegovina. *Id.* Ethnicity in the context of Bosnia, however, can be both misleading and confusing. Malcolm notes the existence of many "bogus theories of racial-ethnic identity [that have] dominated the politics of the Balkan lands." *Id.* He concludes that by the Twelfth Century "[a]ll that one can sensibly say about the ethnic identity of the Bosnians is this: they were the Slavs who lived in Bosnia." *Id.* at 12. Nonetheless, history shows that three major identifiable groups, or subcultures, emerged in the territory of today's Bosnia. See *id.*

important to know that the road leading to those elections included: 1) the creation of self-proclaimed ethnic mini-states within Croatia and Bosnia,<sup>65</sup> 2) shifting alliances among the republics and warring factions,<sup>66</sup> 3) ethnic cleansing,<sup>67</sup> and 4) a genocidal war in Bosnia and Herzegovina.<sup>68</sup>

## II. THE DAYTON AGREEMENT

### A. INTRODUCTION

On October 31, 1995, representatives from Serbia, Croatia, and Bosnia and Herzegovina arrived in Dayton, Ohio for the so-called proximity talks that began the next day. United States Assistant Secretary of State Richard Holbrook led the negotiations, which attempted to reach a settlement on the Bosnia-Herzegovina conflict.<sup>69</sup> On November 21, 1995, Presidents Tudjman of Croatia, Milosevic of the Federal Republic of Yugoslavia, and Izetbegovic of Bosnia and Herzegovina, initialed the General Framework Agreement for Peace in Bosnia and Herzegovina.<sup>70</sup> On December 14, 1995, these same men signed the Paris Treaty that formalized the agreement they had reached in Dayton.<sup>71</sup>

It is generally believed that a number of factors led to the Dayton negotiations. Chief among them was the August 31st NATO bombing campaign that began two days after the Bosnian-Serb shelling of a marketplace in Sarajevo; the shelling left 37 dead and 80 wounded.<sup>72</sup> As the NATO attacks were about to begin, President

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65. See *id.* at 231-33 (discussing the division of Bosnia and Herzegovina).

66. See *id.*

67. See Anthony Borden, *Bosnia's Democratic Charade*, THE NATION, Sept. 23, 1996, at 14 (discussing the process of ethnic homogenization in Republika Srpska and Herzegovina).

68. See *id.*

69. See SILBER & LITTLE, *supra* note 50, at 369-70 (stating that Presidents Tudjman and Milosevic also worked out a deal involving the status of eastern Slovenia). The participants also reached an agreement with respect to the Muslim-Croat Federation. See *id.*

70. See Dayton Agreement, *supra* note 8, at 75.

71. See *id.*

72. See SILBER & LITTLE, *supra* note 50, at 365-68.

Milosevic extracted from the Bosnian-Serbs the right to represent them in any future peace negotiations.<sup>73</sup> "Operation Deliberate Force," as it was called, continued for two weeks. During that time, NATO flew 3,400 sorties, delivering a punishing blow to the Bosnian-Serb military operation.<sup>74</sup>

The Dayton negotiations did not go smoothly. On a number of occasions, it appeared that they would end poorly.<sup>75</sup> Ultimately, however, the leaders reached an agreement, setting the stage for the introduction of 60,000 NATO troops, including 20,000 Americans, and an international civilian bureaucracy to administer elections and other non-military aspects of the peace agreement.<sup>76</sup>

### B. GENERAL DESCRIPTION

The Dayton Agreement consists of a General Framework Agreement ("GFA"), and 12 annexes.<sup>77</sup> In GFA Article I, the Parties<sup>78</sup> commit themselves to "conduct their relations in accordance with the principles set forth in the United Nations Charter," and to "settle disputes by peaceful means, and refrain from any action, by threat or use of force or otherwise, against the territorial integrity or political independence of Bosnia and Herzegovina or any other State."<sup>79</sup> Articles II through VIII include commitments to the various programs and arrangements set forth in the annexes.<sup>80</sup>

Annexes I-A and I-B address military and regional stabilization measures.<sup>81</sup> Annex 2 establishes an Inter-Entity Boundary Line, which is effectively a border between the two "entities" comprising

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73. See *id.* at 366 (hypothesizing that the imminence of the NATO action may have forced the Bosnian Serbs to act).

74. See *id.*

75. See, e.g., William J. Durch & James A. Schear, *Faultlines: UN Operations in the Former Yugoslavia*, in U.N. PEACEKEEPING, AMERICAN POLICY, AND THE UNCIVIL WARS OF THE 1990S, at 193, 247-49 (William J. Durch ed., 1996).

76. See SILBER & LITTLE, *supra* note 50, at 377-78.

77. Dayton Agreement, *supra* note 8, at 75.

78. See *id.* annex 1A, at 92 (defining the "parties" to include the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, and the Republika Srpska).

79. See *id.* art. I, at 89.

80. See *id.* arts. II-VIII, at 90.

81. See *id.* annex 1A-1B, at 92, 109-11.

the sovereign state of Bosnia and Herzegovina.<sup>82</sup> Additionally, Annex 2 provides for arbitration over the disputed area of Brcko, on which the parties could not agree at Dayton.<sup>83</sup> Annex 3 is the Agreement on Elections,<sup>84</sup> which will be discussed in some detail below. Annex 4 is the Constitution of Bosnia and Herzegovina.<sup>85</sup> It basically provides for a sovereign state of Bosnia and Herzegovina, composed of two entities: the Federation of Bosnia and Herzegovina, and Republika Srpska.<sup>86</sup> Annex 5 sets forth the commitment of the Federation and Republika Srpska to submit to arbitration to resolve disputes between them.<sup>87</sup> Annex 6 is the Agreement on Human Rights.<sup>88</sup> It describes commitments to fundamental rights and freedoms and establishes human rights bodies and mechanisms.<sup>89</sup> Annex 7 is the Agreement on Refugees and Displaced Persons.<sup>90</sup> It sets forth the rights of such persons to return to their pre-war homes<sup>91</sup> and establishes a commission to decide real property claims.<sup>92</sup> Annex 8 establishes an independent commission to preserve national monuments.<sup>93</sup> Annex 9 establishes commissions to look into the possibility of establishing joint entity public corporations in the areas of utility, energy, postal, communication, and transportation facilities.<sup>94</sup> Annex 10 provides for the designation of a High Representative charged with overseeing implementation of the civilian aspects of the peace settlement.<sup>95</sup> Annex 11 calls for a United Nations International Police Task Force ("IPTF")<sup>96</sup> to provide a law enforcement monitoring and assistance program throughout the country, and further obligates the Parties to fully cooperate with

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82. Dayton Agreement, *supra* note 8, annex 2.

83. *Id.* art. V.

84. *Id.* annex 3.

85. *Id.* annex 4.

86. *Id.*

87. Dayton Agreement, *supra* note 8, annex 5.

88. *Id.* annex 6.

89. *Id.*

90. *Id.* annex 7.

91. *Id.* art. I.1.

92. Dayton Agreement, *supra* note 8, annex 7, art. VII.

93. *Id.* annex 8.

94. *Id.* annex 9.

95. *Id.* annex 10.

96. *Id.* annex 11.



IPTF.<sup>97</sup>

### C. AGREEMENT ON ELECTIONS

The purpose of Annex 3 was "to promote free, fair, and democratic elections, and to lay the foundation for representative government and ensure the progressive achievement of democratic goals throughout Bosnia and Herzegovina."<sup>98</sup> The Agreement gave the Organization for Security and Cooperation in Europe the responsibility to supervise the preparation and conduct of elections.<sup>99</sup> The OSCE is a regional arrangement under Chapter VIII of the United Nations Charter. It began its existence in the early 1970s as the Conference on Security and Cooperation in Europe ("CSCE")<sup>100</sup> and functioned as a series of meetings and conferences promoting dialogue and negotiation between the East and West in multilateral fora.<sup>101</sup> Its activities included the setting of various norms and reviewing their implementation.<sup>102</sup> The Charter of Paris for a New Europe,<sup>103</sup> signed in 1990, served as the transition of CSCE from a forum for negotiation to a formal operational structure.<sup>104</sup> At the 1994 Budapest Summit, CSCE became the OSCE.<sup>105</sup> There are 54 member states, including all of the states of the former Soviet Union, the United States, and Canada.<sup>106</sup>

Annex 3 required the elections to be held between six to nine months after the Dayton Agreement entered into force.<sup>107</sup> It required the parties to ensure the existence of suitable conditions for elections and gave OSCE the responsibility of certifying that the elections

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97. Dayton Agreement, *supra* note 8, annex 11, arts. IV-V.

98. *Id.* annex 3.

99. *See id.* art. II.2.

100. *See* Jenkins, *supra* note 30, at 1934 & n.6.

101. *See id.*

102. *See* SECRETARIAT OF THE ORG. FOR SEC. AND CO-OPERATION IN EUR., OSCE HANDBOOK (2d. ed. 1996) [hereinafter OSCE HANDBOOK]. The Secretariat is located in Vienna, Austria.

103. *See id.*

104. *See id.*

105. *See* Jenkins, *supra* note 30, at 1934 & n.6 (discussing the transition from the CSCE to the OSCE).

106. *See id.*

107. *See* Dayton Agreement, *supra* note 8, annex 3, art. II.4.

could be held under existing conditions.<sup>108</sup> Article II.3 gave OSCE the authority to establish a Provisional Election Commission ("PEC").<sup>109</sup> Article III.1 required the PEC to adopt rules and regulations on election conduct.<sup>110</sup> The PEC consisted of the OSCE Head of Mission, designated as Chairman; the High Representative or his or her designee; representatives of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and Republika Srpska; and other persons as the Chairman may decide in consultation with the Bosnian members.<sup>111</sup> Implicitly, the PEC was to operate by consensus. The Chairman, however, was empowered to make final decisions in the event of disputes.<sup>112</sup>

Under Article III.2, the PEC mandate included: supervising all aspects of the electoral process;<sup>113</sup> determining voter registration provisions;<sup>114</sup> ensuring compliance with electoral rules and regulations;<sup>115</sup> ensuring that action is taken to remedy violations of the Agreement on Elections and electoral rules and regulations, including the imposition of penalties against violators;<sup>116</sup> and accrediting election observers, as well as ensuring their unimpeded access and movement.<sup>117</sup>

Pursuant to Article IV, "Any citizen of Bosnia and Herzegovina aged 18 or older whose name appears on the 1991 census for Bosnia and Herzegovina shall be eligible, in accordance with the rules and regulations, to vote."<sup>118</sup> It also sets forth a "general rule" that citizens no longer living in their 1991 residence should nonetheless be expected to vote there.<sup>119</sup> The rule, however, allowed them to apply to the PEC to vote elsewhere.<sup>120</sup> Finally, the PEC was empowered to adopt eligibility provisions for those citizens not listed in the 1991

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108. *See id.* art. I.

109. *See id.* art. II.3.

110. *See id.* art. III.1.

111. *See id.* art. III.3.

112. Dayton Agreement, *supra* note 8, annex 3, art. III.3.

113. *See id.* art. III.2(a).

114. *See id.* art. III.2(b).

115. *See id.* art. III.2(c).

116. *See id.* at 116, annex 3, art. III.2(d).

117. Dayton Agreement, *supra* note 8, art. III.2(e).

118. *Id.* art. IV.1.

119. *See id.*

120. *See id.*

census.<sup>121</sup>

### III. IMPLEMENTATION OF ANNEX 3—OSCE'S ROLE AND THE PROVISIONAL ELECTION COMMISSION

#### A. OSCE MISSION TO BOSNIA AND HERZEGOVINA

The December 8, 1995, meeting of the OSCE Ministerial Council, held in Budapest, established the OSCE Mission to Bosnia and Herzegovina. As a modest operation with authorized personnel strength of between five and six persons, the OSCE had already been operating in the country as the OSCE Mission in Sarajevo. The Ministerial Council decision of December 8, 1995, expanded the prior mission.<sup>122</sup> By way of contrast, the expanded mission was to operate with approximately 250 authorized members. Additionally, the governments of OSCE Member States were to second the mission.

#### B. OSCE-SUPERVISED ELECTIONS

Article II.2 of Annex 3 to the General Framework Agreement describes the supervisory role of OSCE with respect to specifically enumerated elections:

The Parties request the OSCE to supervise, in a manner to be determined by the OSCE and in cooperation with other international organizations the OSCE deems necessary, the preparation and conduct of elections for the House of Representatives of Bosnia and Herzegovina; for the Presidency of Bosnia and Herzegovina; for the House of Representatives of the Federation of Bosnia and Herzegovina; for the National Assembly of the Republika Srpska; for the Presidency of the Republika Srpska; and, if feasible, for cantonal legislatures and municipal governing authorities.<sup>123</sup>

In its Rules and Regulations,<sup>124</sup> the PEC set September 14, 1996,

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121. *See id.*

122. *See* OSCE HANDBOOK, *supra* note 102, at 33.

123. Dayton Agreement, *supra* note 8, annex 3, art. II.2.

124. *Rules and Regulations: OSCE—Mission to Bosnia & Herzegovina, Provisional Election Commission*, SLUŽBENI LIST, July 24, 1996 [hereinafter *PEC*]

as the date for the higher level elections mandated by Annex 3.<sup>125</sup> It also made clear its intention to hold discretionary elections at the same time for the municipal assemblies throughout Bosnia and Herzegovina and the cantonal assemblies in the Federation.<sup>126</sup> As discussed below, the elections for municipal assemblies were not held as scheduled. They were first postponed on August 27, 1996.<sup>127</sup>

### C. PROVISIONAL ELECTION COMMISSION

United States Ambassador Robert Frowick was the Head of the OSCE Mission. Under Annex 3 to the Dayton Agreement, the Head of the Mission also served as Chairman of the Provisional Election Commission.<sup>128</sup> In conformance with Annex 3, members of the PEC included the designee of the High Commissioner and representatives of the State of Bosnia and Herzegovina (a Muslim),<sup>129</sup> the Federation of Bosnia and Herzegovina (a Croat),<sup>130</sup> and the Republika Srpska (a Serb).<sup>131</sup> Other members included the Honorable John Reid, a Canadian, and Sir Kenneth Scott, a former Ambassador to Yugoslavia from Great Britain who served as Deputy Head of Mission for Elections and as Acting Chairman of the PEC in Ambassador Frowick's absence.<sup>132</sup>

The PEC adopted the Rules and Regulations in accordance with Article II.1 of Annex 3 to the Dayton Agreement.<sup>133</sup> The Official Gazette of Bosnia and Herzegovina, *Službeni List*, compiled and

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*Rules*]. *Službeni List*, the Official Gazette of Bosnia and Herzegovina, contains the PEC Rules and Regulations, including three supplements applicable to the September 14, 1996 elections. The PEC issued supplements on August 15th, August 27th, September 13th, and October 9th. The principal volume is on file with the International and Foreign Law Collection at Georgetown University Law Center in Washington, D.C.

125. See Dayton Agreement, *supra* note 8, at 115, annex 3.

126. See PEC Rules, *supra* note 124, art. 3.

127. See John Pomfret, *U.S. Diplomat Delays Local Voting in Bosnia*, WASH. POST, Aug. 28, 1996, at A1.

128. See Dayton Agreement, *supra* note 8, at 116, annex 3, art. III.3.

129. See *id.* at 116, annex 3, art. III.3.

130. See *id.*

131. See *id.*

132. See Scott, *supra* note 36, at 1 (explaining that Ambassador Scott regularly presided over meetings of the PEC).

133. See Dayton Agreement, *supra* note 8, at 115, annex 3, art. II.1.

published them on July 24th.<sup>134</sup> The Rules and Regulations are organized as follows: Part I on the holding of municipal and higher elections on September 14, 1996; Part II on voter and candidate eligibility; Part III on the establishment of local election commissions; Part IV on the registration of political parties and independent candidates; Part V on criteria for polling stations and disruptions to the voting process; Part VI on the voting process, including rules regarding the mechanics of voting, voter education provisions, and a system of proportional representation for legislative elections; Part VII on an electoral code of conduct for political parties, candidates, and election workers; and Part VIII on provisions establishing the Election Appeals Sub-Commission and the Media Experts Commission, a description of their respective mandates, and rules and regulations for international election observers.<sup>135</sup>

#### IV. THE ELECTION APPEALS SUB-COMMISSION—ITS MANDATE AND COMPOSITION

##### A. MANDATE OF THE ELECTION APPEALS SUB-COMMISSION

The PEC established the EASC as a “juridical body whose four members are appointed by the Chairman of the Provisional Election Commission in consultation with its members.”<sup>136</sup> The PEC delegated powers to the EASC.<sup>137</sup> Once constituted, it was to “report to the head of the OSCE Mission to Bosnia and Herzegovina.”<sup>138</sup> Its function was “to ensure compliance with the electoral Rules and Regulations established by the Provisional Election Commission and adjudicate complaints with regard to the electoral process referred to it by the Provisional Election Commission, the Media Experts Commission, political parties, candidates, individuals and other entities.”<sup>139</sup> Under Article 138, Sub-Commission jurisdiction

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134. *See PEC Rules, supra* note 124.

135. *See id.*

136. *Id.* pt. III, art. 137.

137. *See id.* art. 138 (establishing that the EASC derives its authority from the PEC).

138. *Id.* pt. III, art. 137.

139. *Id.* art. 138.

specifically included the following:

- a) Violations of provisions on elections in the General Framework Agreement for Peace in Bosnia and Herzegovina; and
- b) Violations of the Rules and Regulations of the Provisional Election Commission:
  - (i) Additions, deletions or changes in the Provisional Voter's List;
  - (ii) Standards of professional conduct for members of the media;
  - (iii) Regulations concerning the obligations of governments in relation to the media in Bosnia and Herzegovina;
  - (iv) The Electoral Code of Conduct for political parties, candidates, and election workers;
  - (v) Rules for registering political parties and independent candidates;
  - (vi) Any other procedures or rules, including polling and counting procedures established by the Provisional Election Commission.<sup>140</sup>

The PEC generally authorized the Sub-Commission “to impose appropriate penalties and/or fines against any individual, candidate, party or body that violates” the rules and regulations.<sup>141</sup> Specifically, the Sub-Commission had the power to “prohibit a political party from running in the elections, decertify a party already listed on the ballot, remove a candidate from a party list or an independent candidate from the ballot when it determines a violation of the principles established by the General Framework Agreement for Peace in Bosnia and Herzegovina or [PEC Rules and Regulations] has occurred.”<sup>142</sup> The Sub-Commission was also specifically authorized to “set and apply pecuniary or other appropriate penalties for actions carried out with intent to disrupt the electoral process.”<sup>143</sup> Decisions of the Sub-Commission were to be binding and not subject to appeal.<sup>144</sup>

John Reid, a Canadian member of the Provisional Election Commission seconded to the OSCE Mission, was the principal

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140. See *PEC Rules*, *supra* note 124.

141. *Id.* art. 140.

142. *Id.* art. 141.

143. *Id.*

144. *Id.* art. 142.

author of the Rules and Regulations.<sup>145</sup> In designing the enforcement scheme, he drew upon his experience as a politician in Canada where he had been a Member of Parliament from 1969-1984.<sup>146</sup> In drafting the enforcement rules, he targeted political party leadership "because that is the only way you can control a system where voters vote for party lists." He also believed that removal of a candidate's name from a party list was one way "to strike fear into the heart of any politician." Initially, he proposed to call the enforcement body a "tribunal" in order "to associate it with active power—not necessarily a more passive, procedurally correct court system." He recalls that "tribunal" was rejected because of its association with the proceedings in the Hague and a feeling by the Head of Mission that the enforcement body should be under the political leadership of the OSCE Mission as constituted in the Provisional Election Commission. Interestingly, his original proposal called for only one international and one local judge.

#### B. COMPOSITION OF THE EASC

On June 19, 1996, Sir Kenneth Scott, Acting Chairman of the PEC,<sup>147</sup> appointed the four Members of the Election Appeals Sub-Commission.<sup>148</sup> All four served throughout the period covered by this paper.<sup>149</sup> Article 137 of the PEC Rules and Regulations mandate that the Chairman "be a distinguished international lawyer or jurist with election experience."<sup>150</sup> Scott appointed Norwegian Judge Finn

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145. Mr. Reid was one of the first members of the OSCE Mission to arrive in Sarajevo in January of 1996. The account of his role in the writing of the PEC Rules and Regulations and the establishment of the EASC is based upon conversations and e-mail correspondence between Mr. Reid and the author.

146. Mr. Reid did not base the enforcement regime on any previous model of international election supervision. Indeed, literature on the enforcement component of international election supervision is virtually non-existent.

147. See Report on the Election Monitoring in Bosnia and Herzegovina (visited Sept. 14, 1996) <<http://www.OSCEPRAG.CZ/inst/Parlamen/Bosnia.htm>> [hereinafter OSCE Report—Sept. 14, 1996].

148. See Organization for Security and Co-Operation in Europe: Mission to Bosnia and Herzegovina (visited June 28, 1996) <<http://www.OSCE.Austria.eu.net/press/pr0628e.htm>> [hereinafter PEC Sub-Commission June Appointment].

149. See Report to Head of Mission, *supra* note 31 (discussing the tenure of Sub-Commission appointees).

150. *PEC Rules*, *supra* note 124, art. 137.

Lynghjem as Chairman.<sup>151</sup> The three Bosnian appointees to the Sub-Commission were senior judges from the state of Bosnia and Herzegovina and the two Entities comprising the state.<sup>152</sup> Following the pattern of the PEC membership, each also represented one of the three major ethnic groups in Bosnia and Herzegovina: Bosniac (Muslim), Croat, and Serb. Suada Selimovic, a judge of the Supreme Court of the Federation of Bosnia and Herzegovina, represented the state of Bosnia and Herzegovina.<sup>153</sup> Venceslav Ilic, also a judge of the Supreme Court of the Federation, represented the Federation.<sup>154</sup> Gojko Dursun, Director of the Republika Srpska's Institute for the Payment of Transactions and a former judge in Sarajevo, represented Republika Srpska.<sup>155</sup>

Article 137 of the PEC Rules and Regulations also provides for the Sub-Commission to "be served by a staff of four lawyers, one from an OSCE participating state,"<sup>156</sup> and three Bosnian lawyers representing the state of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, and the Republika Srpska.<sup>157</sup> In a practice, consistent with the composition of the PEC and the Sub-Commission itself, the three Bosnian lawyers represented each of the three major ethnic groups in the country. Two of these Sub-Commission lawyers were actually judges in Sarajevo. Sadudin Kratovic, a judge on the Supreme Court of the Federation, represented Bosnia and Herzegovina,<sup>158</sup> Jasminka Putica, a judge of the Higher Court in Sarajevo, represented the Federation;<sup>159</sup> and Vitomir Peric, Secretary of the Republic Ministry of Legislature and a law professor, represented Republika Srpska.<sup>160</sup>

Although the PEC Rules and Regulations provide for only four lawyers,<sup>161</sup> it soon became apparent that additional lawyers would be

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151. See OSCE Report—Sept. 14, 1996, *supra* note 147.

152. See *PEC Rules*, *supra* note 124, art. 137.

153. See PEC Sub-Commission June Appointment, *supra* note 148.

154. See *id.*

155. See *id.*

156. *PEC Rules*, *supra* note 124, art. 137.

157. See *id.*

158. See PEC Sub-Commission June Appointment, *supra* note 148.

159. See *id.*

160. See *id.*

161. See *PEC Rules*, *supra* note 124, art. 137.



necessary for the Sub-Commission to fulfill its mandate. The international community filled this need with attorneys from Great Britain, the United States, and Canada. International lawyers included the author, designated as Chief Prosecutor, who in July succeeded W.G. Robinson, Q.C., of Canada.<sup>162</sup> From mid-August through the elections, five more international attorneys joined the Sub-Commission's legal staff.<sup>163</sup> The Sub-Commission also enlisted the services of a Special Investigator, an American International Police Task Force ("IPTF") monitor, whom IPTF Commissioner Fitzgerald assigned to the Sub-Commission.<sup>164</sup> Local Sub-Commission staff included secretaries and interpreter/translators.<sup>165</sup> At its largest point, this group numbered seven.<sup>166</sup>

### C. GETTING STARTED

The members of the Sub-Commission were sworn in on July 2, 1996. At this point, it was an exceedingly modest operation. The Chairman, special investigator, and international counsel shared a small office in Mission headquarters with a single computer. Three local staff members provided secretarial, interpretation, and translation services. There was neither a law library nor significant access to legal materials apart from the Dayton Agreement and the Rules and Regulations of the PEC. The Sub-Commission's task was made more difficult because the elections were scheduled for September 14th—just ten weeks away.

By this time, the Sub-Commission had produced its own procedural rules.<sup>167</sup> At this point, no one could have predicted what the Sub-Commission would become and how it would fulfill its mandate.

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162. See Report to Head of Mission, *supra* note 31, at 11 n.2 (noting that Mr. Robinson became a senior advisor to the Head of the Mission and was appointed to the Provisional Election Commission in October 1996).

163. See *id.* at 11 (discussing the Sub-Commission's Appointment of attorneys Sandra Coliver, Stephan Bowen, Jeffrey Buenger, Sandra Mitchell, and Marcia Waldron).

164. See *id.* (discussing the Appointment of Special Investigator Michael Ilaria).

165. See *id.* at 12 (discussing the Sub-Commission's support staff).

166. See *id.* (discussing Sub-Commission staffing assignments).

167. Sub-Commission rules restated relevant provisions of the PEC Rules and Regulations, as well as procedural guidelines for the filing and consideration of complaints. The rules are neither particularly important nor generally available.

#### D. WAS THE EASC A JUDICIAL BODY?

Article 137 of the PEC Rules and Regulations described the Sub-Commission as a “juridical body” whose four judges had authority to make legal decisions on cases that came within its jurisdiction.<sup>168</sup> Yet the Sub-Commission reported to the Head of the OSCE Mission, also designated as the Chairman of the Provisional Election Commission—a political figure with virtually complete control over the conduct of the elections.<sup>169</sup> Legally, the Sub-Commission operated under the authority of the PEC, which derived its authority from the Dayton Agreement.<sup>170</sup> In essence, it was a quasi-judicial body whose independence was circumscribed by its relationship to the PEC and the Head of the OSCE Mission.<sup>171</sup> As with any newly constituted body making legal decisions in a political environment, it would have to test the limits of its authority on a case-by-case basis.

#### V. THE WORK OF THE EASC

##### A. JULY OF 1996—A BLANK TABLET

Even more than the OSCE Mission, the Sub-Commission was writing on a blank tablet. What type of cases would be referred to it? Would individuals and political parties make use of it? How would the Sub-Commission go about its work? Would it have sufficient resources? Would its Members be able to work together, in light of the deep ethnic divisions made deeper by four years of war? Would its decisions be enforceable? Would they be timely? Could it play an effective role with only two and a half months to election day? On July 2, 1996, no one knew the answers to these questions. In the course of the next weeks and months, the Sub-Commission would have to find a way to meet the challenges it would face, adapting to the changing circumstances in a fluid election process.

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168. See *PEC Rules*, *supra* note 124, art. 137.

169. See Dayton Agreement, *supra* note 8, annex 3, art. II (explaining the PEC’s sweeping powers with respect to all aspects of the elections); *id.* art. III.3 (stating that the Chairman’s decision would be final in case of disputes within the PEC; in effect, the Chairman’s word was the law).

170. See *id.* annex 3.

171. See *id.*

## B. POLITICAL LANDSCAPE AND PRACTICAL PROBLEMS

Within just a few months in 1990, Bosnia's three principal nationalist political parties were founded.<sup>172</sup> The Muslims established the Party of Democratic Action ("SDA"),<sup>173</sup> the Serbs created the Serb Democratic Party ("SDS"),<sup>174</sup> and the Croats formed a Bosnian branch of the Croatian Democratic Union ("HDZ").<sup>175</sup> In the elections held later that year, these parties won over eighty percent of the seats in the bicameral Parliament.<sup>176</sup> They also controlled the six-member rotating presidency.<sup>177</sup> Most of the voters had voted along ethnic lines.<sup>178</sup> These same parties would maintain their hold on power through the years of war that followed<sup>179</sup> and were in power as preparations were underway to implement the electoral provisions of the Dayton Agreement.<sup>180</sup>

Many people have written about the "ethnic cleansing" that occurred during the war in Bosnia and the resultant partitions of the country into ethnically based enclaves.<sup>181</sup> "[F]reedom of

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172. See SILBER & LITTLE, *supra* note 50, at 206-13 (discussing the creation of the political parties that represented Bosnia's Muslims, Serbs, and Croats in the November 9, 1990 election).

173. See *id.* at 207 (detailing the May 26, 1990 establishment of the Party of Democratic Action as a "political alliance of Yugoslav citizens belonging to Muslim cultural and historical traditions").

174. See *id.* at 209 (outlining the rise of the Serbian Democratic Party).

175. See *id.* (discussing the creation of the Croatian Democratic Union as a response to Serbian plans to push for a new government elected on the basis of one-person, one-vote principles).

176. See *id.* at 210 (detailing how out of the 240 seats in the 1990 bicameral Parliament, the "SDA won eighty-seven seats, the SDS seventy-one, and the HDZ forty-four" seats).

177. See SILBER & LITTLE, *supra* note 50, at 211 (identifying the rotating presidency as composed of two Muslims, two Serbs, two Croats, and one Yugoslav).

178. See *id.* at 210 (discussing how the percentages of Muslims, Serbs, and Croats within the former Yugoslavia paralleled the percentage of seats won by each group in the 1990 bicameral Parliament election).

179. See *id.* at 212-17 (detailing the roles the SDS, SDA, and HDZ played in Yugoslav politics during the early 1990s).

180. See, e.g., *Serb Party Nominates Karadzic*, WASH. POST, June 21, 1996, at A30 (discussing the Serb Democratic Party's involvement in the 1996 Bosnian presidential elections).

181. See, e.g., THIS TIME WE KNEW: WESTERN RESPONSES TO GENOCIDE IN BOSNIA 363-401 (Thomas Cushman & Stuepan G. Mestrovic eds., 1996) (setting forth a series of indictments issued by the International Criminal Tribunal for the

movement,”<sup>182</sup> despite its status as a condition for democratic elections under the Dayton Agreement, was not a reality.<sup>183</sup> Making arrangements were difficult as well. Despite the short distance between Pale and Sarajevo, telephone contact was virtually impossible. An over-burdened satellite phone was used to communicate with a local OSCE office in Republika Srpska, which would convey messages from Sarajevo. It was not uncommon for a simple message and confirmation to consume the better part of a day. These communication difficulties extended to the investigative work of the Sub-Commission. Notification to both witnesses and parties to a complaint was a constant challenge.

### C. RESOURCES AND WORK ENVIRONMENT

Not surprisingly, an insufficiency of both personnel and other resources presented a continuing problem. Three international staffers were responsible for the Sub-Commission’s work during the first six weeks of its existence. These staffers included the Chairman, the international legal counsel, and the special investigator. These three individuals investigated cases, researched and analyzed the law, wrote decisions and opinions, supervised translations and distribution of rulings, coordinated efforts with the Bosnian judges and lawyers and the various OSCE offices, and dealt with the numerous

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former Yugoslavia against persons charged with war crimes).

182. Dayton Agreement, *supra* note 8, annex 3, art I.1 (stating that “[t]he Parties shall ensure that conditions exist for . . . free and fair elections . . . and shall ensure freedom of movement”).

183. See, e.g., *Muslim Sites Bombed in Key Bosnia Area*, N.Y. TIMES, Sept. 3, 1996, at A10 (discussing a pre-election Serb bombing of a disputed area of Bosnia where Serbian forces sought to prevent Muslims from returning to their homes). Examples of this lack of freedom of movement were myriad and could be observed in the everyday functioning of both the PEC and Sub-Commission. The OSCE Mission was located in Sarajevo, the capital of both Bosnia and Herzegovina and the Federation Entity. Pale, the capital of Republika Srpska, is about 20 minutes away by car. When attending meetings of PEC, an ostentatious contingent of heavily armed NATO troops from Italy escorted Slobodan Kovac, the PEC’s Serb member, from Pale to OSCE headquarters. During the meetings, they would stand guard outside the headquarters with their weapons drawn, waiting to make the return trip. While the necessity of this highly visible military escort was questionable, it reflected the difficulty of unescorted travel in areas between the two Entities. Indeed, on meeting days the Sub-Commission itself would arrange to pick up its Serb judge and lawyer in an official OSCE car and to return them to Pale after the meetings were concluded.

administrative tasks attendant to running an office.

After the issuance of its first few rulings, some members of the international community in Bosnia became aware that the Sub-Commission could play a positive role in the election process. As a result, the Sub-Commission was able to obtain the services of five additional lawyers in the month of August.<sup>184</sup> Without them, the job could not have been done.

In addition to inadequate provisions for personnel, the Sub-Commission faced continuing problems in obtaining necessary equipment. This equipment included vehicles, computers, printers, and copy machines. These problems resulted in delays and inefficiencies.

Such difficulties are all too predictable. The OSCE Mission itself was created out of nothing. There was no permanent bureaucracy in place that could move its operations to Sarajevo. Rather, an organization had to be built from the ground up under the auspices of the OSCE. This organization depended upon member states for its budget, staffing, and in-kind contributions. From an administrative standpoint, the Sub-Commission was just one of many units in the Mission competing for limited resources. At the outset, there was neither a realistic staffing plan nor a realistic projection of its budgetary or other needs. Consequently, there was a constant struggle to obtain the bare necessities.<sup>185</sup>

While hardly a unique situation, it is useful to understand some of the more mundane concerns faced by the Sub-Commission as it

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184. The interest and cooperation of the following organizations made this possible: the United States Agency for International Development, the American Bar Association Central and Eastern Europe Law Initiative, the United Nations High Commissioner for Human Rights, and the Office of the High Representative.

185. Problems of this type were certainly not unique to the OSCE Mission in Bosnia and Herzegovina and the Election Appeals Sub-Commission. An account from the 1993 elections held in Cambodia under the authority of the United Nations Transitional Authority in Cambodia ("UNTAC") sounds a similar theme. There, an official noted start-up problems with the unit established to monitor compliance with UNTAC's electoral law: "The office is hardly even set up because we have no staff. There are only two of us at the moment, and it is difficult to operate under these conditions." *Interview: Mtshana M. Ncube*, ELECTORAL COMPONENT NEWSLETTER (UNTAC), Oct. 23, 1992, at 14. At the time, Mr. Ncube was the Acting Head of the Complaints, Compliance and Enforcement Unit, UNTAC Electoral Component.

attempted to fulfill its mandate.

#### D. DECISION-MAKING PROCESS

As discussed more fully below, the Sub-Commission produced advisory opinions and written decisions on complaints and appeals. In early July, one key question was how the Sub-Commission would actually function to produce its work. The Sub-Commission initially assumed that the four lawyers<sup>186</sup> would meet in advance of the judges to discuss matters that would be considered when the judges convened as members of the Sub-Commission. Independent of the judges, the lawyers would decide on an agenda for the Sub-Commission meeting and make recommendations on specific cases. The staff attempted this plan at first, but quickly abandoned it because it was too unwieldy and time-consuming. Then, a close collaboration quickly evolved between the Chairman and the members of the international legal staff, including the Chief Prosecutor, in determining agendas and making recommendations to the Members for specific action. In advance of the meetings, when time permitted, the staff prepared draft opinions and decisions in English and in one or more variants of the local language.<sup>187</sup>

It should be noted that the Bosnian judges and lawyers all maintained their principal jobs while serving on the Sub-Commission. As a result, the investigation and preparation of specific cases fell to the full-time international component and local support staff of secretaries and interpreter/translators.

Typically, the Bosnian lawyers and judges would arrive at Sub-Commission offices in advance of a scheduled meeting to review the relevant materials for that meeting. The Sub-Commission held all meetings in Executive Session. It held most of these meetings around a large conference table in the Sub-Commission offices at the University of Sarajevo Faculty of Law. The Chairman would make opening remarks and introduce the agenda item before one of the international attorneys presented the case. On occasion, the special

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186. See *PEC Rules*, *supra* note 124, art. 137 (providing for one international lawyer and three Bosnian lawyers to serve the Sub-Commission).

187. Cf. CATHERINE SAMAY, *YUGOSLAVIA DISMEMBERED* 37-38 (1995) (discussing the pre-war breakdown of Bosnia and Herzegovina's common Serbo-Croatian language into separate Serb, Croat, and Bosnian languages).

investigator would present his findings or show a videotape as evidence. Only once did the Sub-Commission invite an outside party to address it and only then because of concerns expressed about a possible violent response to an impending decision. After the attorney's presentation, the Chairman would open the floor for discussion. Both the judges and the lawyers would have an opportunity to express themselves on the matter. A collegial and relatively informal atmosphere developed.<sup>188</sup> The Sub-Commission kept no formal record of the deliberations, although the Chairman kept a hand-written book of decisions reflecting the outcomes and any dissenting votes.

Depending on the case, there would either be an immediate consensus to go forward with a recommendation or a need for some level of discussion. Such discussion might include the expression of minor concerns involving language or an extended debate on the facts and law at issue. The result of such discussion could range from rejection of the recommendation to its acceptance with minor modifications. The Chairman would always strive for consensus, although the Sub-Commission's written decisions and opinions generally did not reflect the vote of individual members. Publicly distributed decisions and opinions reflected only the Chairman's name.<sup>189</sup> There were no concurring or dissenting opinions.

The members of the Sub-Commission decided early on that their deliberations would not be publicly disclosed, and that no public record would exist regarding their votes in specific matters.<sup>190</sup> The

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188. See Sub-Commission Rules, *supra* note 167. The Sub-Commission provided for fairly elaborate hearings. Since time and resource constraints made this level of elaborateness unrealistic, the Sub-Commission never used these procedures.

189. See, e.g., In the Matter of Complaints Filed by the Party for Democratic Action (SDA) Against Various Polling Stations in the Mostar Area, No. 96-114; 96-138, 3 Biltan 203 (1996) [hereinafter SDA Complaints] (limiting signature on judgment to Judge Finn Lynghjem).

190. See Report to Head of Mission, *supra* note 31, at 12 (stating that "the Sub-Commission decided that there would be . . . no public record of their votes in specific matters"). The Sub-Commission easily reached this decision as a practical response to the pressures its Bosnian Members endured. The rationale is analogous to that of the European Court of Justice, described as follows:

The most important protection the judges have against national pressure is the fact that there is always just one "judgment of the court" without any separate concurring or dissenting judgments. Since . . . the judges swear to uphold the secrecy of their

members deviated from this course of action twice when they decided that the matters were of such importance to the electoral process that a public declaration of their unanimity was in order.<sup>191</sup>

At the conclusion of a meeting, staff would prepare the final written decisions or advisory opinions in four languages: English, Bosnian, Serbian, and Croatian. The Sub-Commission would thereafter distribute these decisions to the PEC, OSCE staff, the press, various international organizations, and the parties to a complaint or appeal. The *Bilten*,<sup>192</sup> a publication of *Službeni List*,<sup>193</sup> which publishes laws of Bosnia and Herzegovina, including the Rules and Regulations of the PEC,<sup>194</sup> published selected decisions and advisory opinions.<sup>195</sup> The *Bilten* published three volumes covering Sub-Commission decisions and advisory opinions through September 28, 1996.<sup>196</sup>

#### E. THE SUB-COMMISSION ESTABLISHES ITSELF

On June 15, 1996, a mob attacked and injured Dr. Haris Silajdic, the President of the Party for Bosnia and Herzegovina ("SBiH") and its candidate for the Muslim seat on the three-member Presidency<sup>197</sup> of Bosnia and Herzegovina, while he was campaigning in the municipality of Cazin in the Federation.<sup>198</sup> The physical attack, from

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deliberations, it is never known how individual judges voted. Therefore it is impossible to accuse a judge of being insufficiently sensitive to national interests or of having "let his government down . . ."

TREVOR C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* 49-50 (2d ed. 1988).

191. See discussion, *infra* notes 373-75, 490 and accompanying text.

192. See, e.g., 3 *Bilten* 1 (1996) (setting forth Sub-Commission decisions).

193. See *PEC Rules*, *supra* note 124 (demonstrating containment of laws in *Službeni List*).

194. See *id.*

195. See *id.*

196. Not all decisions were published in the *Bilten*. The Chairman, in consultation with the international legal staff, would decide if the decisions were of sufficient importance to be placed in this publication.

197. See Dayton Agreement, *supra* note 8, art. V (noting in English the Constitution of Bosnia and Herzegovina's presidency provision that stated: "The Presidency shall consist of three members: one Bosniac and one Croat, each directly elected from the territory of the Federation, and one Serb directly elected from the territory of the Republika Srpska").

198. See *In the Matter of Alleged Violation of the General Framework*



which the candidate fully recovered, was the culmination of a series of violent incidents that had disrupted a number of campaign events that day.<sup>199</sup> Mr. Silajdic was a well-known public figure in the country, having served as both Foreign Minister and Prime Minister in the government headed by President Izetbegovic, and having been a participant in the Proximity Talks leading to the Dayton Agreement.<sup>200</sup> The attack received widespread attention in the press, and television news broadcasts repeatedly played a videotape of the candidate bleeding from a head wound. The candidate's party filed a complaint with the PEC.<sup>201</sup>

On June 25, 1996, the PEC referred the matter to the Sub-Commission.<sup>202</sup> Although the members of the Sub-Commission had yet to be formally sworn in, special investigator Michael Ilaria of the United States, whom the IPTF Commissioner had recently assigned to assist the Sub-Commission, immediately commenced an investigation.<sup>203</sup> In the course of the investigation, Party for Democratic Action ("SDA") representatives attempted to distance themselves from the violently pro-SDA mobs that had caused the disturbances leading to the attack on Dr. Silajdic.<sup>204</sup> On July 11th, the Sub-Commission reached its decision.<sup>205</sup> It found that the attack, and the previous incidents of campaign violence and intimidation directed against the candidate and his supporters earlier in the day, constituted a serious violation of Annex 3 to the Dayton Agreement and the Rules and Regulations of the PEC.<sup>206</sup> The decision fixed

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Agreement for Peace in Bosnia and Herzegovina and the Electoral Code of Conduct—Attack of 15th of June 1996 on the Leader of the Party for Bosnia and Herzegovina, Dr. Haris Silajdzic, in Cazin, No. 96-1B, 1 Bilten 5 (1996), Election Appeals Sub-Commission Organization for Security and Cooperation in Europe Mission to Bosnia and Herzegovina [hereinafter Case No. 96-1B] (discussing the June 15, 1996, attack on Dr. Silajdzic).

199. *See id.* at 5 (discussing events leading up to the attack on Dr. Silajdzic).

200. *See id.*

201. *See id.* (articulating the procedural posture of the Provisional Election Commission's investigation of the attack on Dr. Silajdzic).

202. *See id.*

203. *See* Case No. 96-1B, *supra* note 198, at 5.

204. *See id.* at 8 (detailing how the SDA Party's influence on the local Cazin police department hindered any investigation linking the SDA to the attack on Dr. Silajdzic).

205. *See id.* at 5.

206. *See id.* at 8.

responsibility on the political party of President Izetbegovic, the SDA, and the local police force.<sup>207</sup> The Sub-Commission exercised its powers under the Rules and Regulations by striking the first seven names from the party list of the SDA for the municipal elections in Cazin,<sup>208</sup> and formally censuring the Chief of Police of the municipality for police inaction with respect to the attack.<sup>209</sup> Both the SDA and SBiH criticized the Sub-Commission's ruling, as did the Minister of Internal Affairs who had overall authority over the police in the Federation.<sup>210</sup> Given the high profile nature of the case, people began to notice that this new and relatively obscure body had opened for business.

The *Silajdic* case was important for several reasons. *First*, it demonstrated the Sub-Commission's relevance and the OSCE's commitment to "promote conditions conducive to the conduct of a free and fair election and a climate of democratic tolerance in which political activity can take place during the election period without fear of coercion, intimidation or reprisals."<sup>211</sup> The *Silajdic* incident was a case of intolerable violence and intimidation directed against a candidate and his supporters. The fact that the violence was a Muslim-on-Muslim attack in no way diminished its potential for spawning violent incidents among the ethnic communities of Bosnia and Herzegovina, whose peace was still fragile. If there was to be any chance of a reasonably conducive atmosphere for the conduct of democratic elections, prompt and decisive action was essential. With this decision, the Sub-Commission and the OSCE announced that the parties would pay a price if its supporters engaged in political

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207. *See id.*

208. *See* Case No. 96-1B, *supra* note 198, at 8. Legislative elections, including municipal elections, were to be based on a system of proportional representation. *See PEC Rules*, *supra* note 124, art. 91. Parties competing in a particular legislative race were required to submit a list of candidates to the PEC. *See id.* art. 44. Depending upon the proportion of votes a party received in a given race, a number of its listed candidates could be elected to the particular legislative body.

209. *See* Case No. 96-1B, *supra* note 198, at 8.

210. The Minister of Internal Affairs, Avdo Hebib, is a Muslim. It is doubtful he had much actual authority over the police in Federation areas under the political control of Croats and the HDZ. While the full extent of his authority in Bosniac/SDA-controlled areas is unknown, it clearly existed. *See* discussion, *infra* note 307.

211. *PEC Rules*, *supra* note 124, art. 119.

violence.

*Second*, it demonstrated that Muslims, Croats, and Serbs on the Sub-Commission could work together in common purpose.<sup>212</sup> Given the mistrust, hurt, and enmity that had developed among these communities during the course of the war this was a significant achievement.<sup>213</sup>

*Third*, it provided the Sub-Commission with an early opportunity in a concrete and important case to test its authority in a very short campaign season. In this first major decision, the Sub-Commission fully explored the applicable law of the Dayton Agreement and the Rules and Regulations of the PEC,<sup>214</sup> establishing both the violation and the Sub-Commission's powers of enforcement. With this case, the Sub-Commission had begun to chart its course as election day drew near.

The Sub-Commission principally relied on two provisions in the Dayton Agreement that reinforced the fundamental importance of openness and fairness in democratic elections and imposed an unambiguous obligation to comply with PEC rules.

The Attachment to Annex 3 of the Dayton Agreement includes paragraphs 7 and 8 from the Document of the Second Meeting of the Conference on the Human Dimension of the Conference on Security and Cooperation in Europe, Copenhagen, 1990.<sup>215</sup> Paragraph 7 is designed "[t]o ensure that the will of the people serves as the basis of

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212. The Dayton Agreement established a number of institutions ensuring representation of each of the three major ethnic groups, and including extensive participation in those bodies by the international community. In addition to the PEC, these institutions include: the Joint Military Commission, see art. VIII, annex 1-A; the Constitutional Court, see art. VI, annex 4; the Joint Interim Commission on implementation chaired by the High Representative, see annex II to annex 4; the Commission on Human Rights, see ch. 2, annex 6; the Commission for Displaced Persons and Refugees, see ch. 2, annex 7; the Commission to Preserve National Monuments, see art. II, annex 8; and the Commission on Public Corporations, see art. I, annex 9.

213. *Cf. Toward a Balkan Deal*, WASH. POST, Aug. 27, 1995, at A20 (discussing the prospect of peace in Bosnia and Herzegovina after a period of "profound mistrust and ethnic blindness").

214. See Case No. 96-1B, *supra* note 198, at 6-8.

215. See Document of the Second Meeting of the Conference on the Human Dimension of the Conference on Security and Cooperation in Europe (June 1990), U.S. Gov. Doc. Y4.SE2:C791089-C. 1089-D (MF).

the authority of government”<sup>216</sup> Sub-paragraph 7.7 provides that participating states will:

ensure that law and public policy work to permit campaigning to be conducted in a fair and free atmosphere in which neither administrative action, violence nor intimidation bars the parties and the candidates from freely presenting their views and qualifications, or prevent the voters from learning and discussing them or from casting their vote free of fear of retribution.<sup>217</sup>

Article III.1 of Annex 3 provides, in pertinent part:

The Commission shall adopt electoral rules and regulations regarding . . . the ensuring of an open and fair electoral campaign . . . . The Parties shall comply fully with the electoral rules and regulations, any internal laws and regulations notwithstanding.<sup>218</sup>

Part VII of the PEC Rules and Regulations comprises the Electoral Code of Conduct for Political Parties, Candidates, and Election Workers (“Code”).<sup>219</sup> Each party must accept the Code before a party or candidate can be registered for the elections.<sup>220</sup> Article 119 fixes responsibility on political parties and candidates to ensure the Code’s observance:

The object of this Code is to promote conditions conducive to the conduct of a free and fair election and a climate of democratic tolerance in which political activity can take place during the election period without fear of coercion, intimidation or reprisals. The Code is binding on all political parties and candidates, who must declare their acceptance of it before being registered by the Provisional Election Commission. *It is the responsibility of political parties and candidates to ensure that the Code is strictly observed by all their representatives, campaign workers and active supporters.*<sup>221</sup>

Article 122 specifically addresses the obligations undertaken by registered parties and candidates to ensure that conditions are

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216. Dayton Agreement, *supra* note 8, annex 3.

217. *Id.*

218. *Id.* art. III.1.

219. See PEC Rules, *supra* note 124, arts. 119-24.

220. See *id.*

221. *Id.* (emphasis added).

conducive to the conduct of a free and fair election:

All registered parties and candidates will respect the right of other parties and candidates participating in the election to conduct their campaigns in a peaceful environment, to hold public meetings and to have access to all forms of public media in order to explain their policies, to canvass freely for membership and support from the voters, and to publish and distribute notices of meetings, placards, posters and other written publicity material. They will refrain from disruption of meetings held by other parties and candidates and will not use, or incite others to use, any form of violence or intimidation against other parties and candidates or their supporters . . . .<sup>222</sup>

The Sub-Commission concluded that the above provisions placed a weighty obligation on political parties to control their supporters and that violations by their supporters must be imputed to the parties.<sup>223</sup> The Sub-Commission then addressed its own powers under the PEC Rules and Regulations.<sup>224</sup> As noted above, enforcement of violations of the Code was specifically included in the Sub-Commission's jurisdiction.<sup>225</sup> The Sub-Commission had considerable enforcement powers granted to it.<sup>226</sup> Two provisions are pertinent:

*Article 140*

The Election Appeals Sub-Commission will have the right to impose appropriate penalties and/or fines against any individual, candidate, party or body that violates the Rules and Regulations established by the Provisional Election Commission. In applying penalties and/or fines the Election Appeals Sub-Commission shall take the following factors into account:

- (a) The responsibility of party leaders for their actions and those of their party members;
- (b) The responsibility of candidates on party lists for their actions and those of their supporters; and

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222. *Id.*

223. *See PEC Rules, supra* note 124, art. 122.

224. *See id.* art. 140 (stating that Sub-Commission shall consider "[t]he responsibility of Party leaders for their actions and those of their party members" when imposing sanctions).

225. *See id.* art. 138 (discussing the Sub-Commission's enforcement process).

226. *Id.*

(c) The responsibility of independent candidates for their actions and those of their supporters.<sup>227</sup>

### *Article 141*

The Election Appeals Sub-Commission may prohibit a political party from running in the elections, decertify a party already listed on the ballot, remove a candidate from a party list or an independent candidate from the ballot when it determines a violation of the principles established in the General Framework Agreement for Peace in Bosnia and Herzegovina or the Rules and Regulations established by the Provisional Election Commission has occurred. The Election Appeals Sub-Commission may set and apply pecuniary or other appropriate penalties for actions carried out with the intent to disrupt the electoral process.<sup>228</sup>

The Sub-Commission acted pursuant to these provision in removing the names of the first seven SDA party candidates from the SDA party list for the municipal elections in Cazin, for the SDA's involvement in the Silajdic attack.<sup>229</sup> It must be noted that the Sub-Commission made no findings against the seven candidates struck from the list.<sup>230</sup> The action taken was against the party itself; the seven candidates were casualties of the violation imputed to the party.<sup>231</sup> With respect to the police, Sub-Commission jurisdiction was arguable. In any case, there was no realistic enforcement power. Instead, the Sub-Commission settled for a public rebuke:

The Police of Cazin have behaved unprofessionally and disgracefully, and the Chief of Police, Mr. Kaukovic Sead, is hereby censured by the Election Appeals Sub-Commission.<sup>232</sup>

Reaction to the decision was mixed. OSCE personnel, including the PEC, were generally supportive. There were, however, some

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227. *Id.* art. 140.

228. *PEC Rules*, *supra* note 124, art. 141.

229. *See* Case No. 96-1B, *supra* note 198, at 7-9 (setting forth a jurisdictional basis in articles 140 and 141 for striking SDA members from municipal elections in Cazin).

230. *See id.* at 8-9 (discussing why election violations committed by SDA members were imputed to the SDA Party).

231. *See id.* at 8 (removing the SDA candidates because "[e]very move that occurred by the mob in Cazin can be related to the local SDA Party").

232. *Id.*

misgivings about the fairness of removing the seven candidates. As reported by *Agence France Presse*, the Chairman of SDA's executive board told the official Bosnian press agency that the decision was a "double failure that missed the point."<sup>233</sup> The SDA president in Cazin was reported to have called the decision "absurd" since none of the candidates removed was involved in the attack.<sup>234</sup>

The Minister of Internal Affairs for the Federation protested to the PEC regarding the censure of the Cazin police.<sup>235</sup> The party of Dr. Silajdic complained that the punishment was not strong enough. Nonetheless, this obscure regulatory body had taken action in a high profile case and had begun to become known.

#### F. REVIEW OF MAJOR DECISIONS

On October 4, 1996, the Sub-Commission issued a Report to Head of Mission that summarized its work both before and after the elections of September 14th.<sup>236</sup>

From July 2nd through the end of October, the Sub-Commission published 153 decisions and seven advisory opinions.<sup>237</sup> One hundred of the decisions were issued after election day, as the Sub-Commission struggled to cope with a deluge of complaints concerning problems encountered by voters at the polls and alleged irregularities with respect to the voting process and the counting of ballots. Many of the post-election decisions were summary in nature<sup>238</sup> as the Sub-Commission's resources were strained, and it consciously chose to concentrate its efforts on those cases having a

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233. *OSCE Bans Seven Candidates from Bosnia Elections*, AGENCE FRANCE PRESSE, July 12, 1996, available in LEXIS, News Library, Curnws File.

234. *See id.*

235. *See id.*

236. *See* Report to Head of Mission, *supra* note 31, at 11 (summarizing the Sub-Commission's personnel, decision-making process, decisions, advisory opinions, and recommendations to the PEC). The report was included in Volume 3 of the *Bilten*. The author was the principal author of the report, which was a joint effort of the international legal staff.

237. After October of 1996, the Sub-Commission's work with respect to the September 1996 elections effectively came to end.

238. *See, e.g.*, In the Matter of a Complaint by the People's Party of Republika Srpska that Ballots Were Intentionally Spoiled at Counting Centers, No. 96-214, 3 *Bilten* 251 (1996) [hereinafter Case No. 96-214] (finding ballot fraud occurred in the vote-counting center of Kotor Varos).

greater potential impact on the results and overall fairness of the elections. All seven advisory opinions and 53 of its decisions were issued prior to election day.<sup>239</sup>

Prior to the elections, the Sub-Commission struck candidates from party lists in three cases;<sup>240</sup> removed members of local election commissions in five cases;<sup>241</sup> required a political party, official, or candidate to broadcast an apology or clarification in five cases;<sup>242</sup> and imposed monetary penalties in five more.<sup>243</sup>

Although there is a degree of overlap, the Sub-Commission rulings can be roughly categorized according to the principle issues they addressed: 1) technical questions relating to the Dayton Agreement, the Rules and Regulations, and the powers of the PEC;<sup>244</sup> 2) the linking of humanitarian assistance to voter registration;<sup>245</sup> 3) instances of violence and intimidation;<sup>246</sup> 4) secessionism,

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239. *See, e.g.*, Election Day Environment, Advisory Opinion 7, 1 Bilten 143 (1996) [hereinafter Advisory Opinion 7] (detailing the Sub-Commission's concerns and hopes for the 1996 elections).

240. *See, e.g.*, In the Matter of the Involvement of the SDS Commission on Refugees and Displaced Persons of Doboij Municipality in the Linking of Humanitarian Assistance to the Voter Registration Process, No. 96-9B, 2 Bilten 7 (1996) [hereinafter Case No. 96-9B] (involving the striking of two SDS candidates); Case No. 96-1B, *supra* note 198, at 7 (involving the striking of seven SDA candidates).

241. *See, e.g.*, Case No. 96-214, *supra* note 238 (dismissing the Chairman of the Kotor Varos Counting Center from his position for "fail[ing] to fulfill his duties to safeguard the ballots being counted").

242. *See, e.g.*, In the Matter of the Tenor and Content of the SDS Campaign, No. 96-34B, 3 Bilten 147, 148 (1996) [hereinafter Case No. 96-34B] (publishing an apology read by Dr. Biljana Plavsic for SDS election campaign statements that violated the spirit of the Dayton Agreement).

243. *See, e.g.*, In the Matter of Complaints Against the SDS Alleging that the Party has made Statements Threatening the Sovereignty and Territorial Integrity of Bosnia and Herzegovina, No. 96-24B, 3 Bilten 119, 120 (1996) [hereinafter Case No. 24B] (fining SDS US\$50,000 for party statements made in violation of the General Framework Agreement and the Rules and Regulations of the PEC).

244. *See, e.g.*, Municipal Elections, Advisory Opinion 6, 3 Bilten 115 (1996) [hereinafter Advisory Opinion 6] (warning political parties that Article 121 of the PEC Rules and Regulations prohibits the holding of unilateral municipal elections).

245. *See, e.g.*, Voter Registration Irregularities, Advisory Opinion 1, 1 Bilten 33 [hereinafter Advisory Opinion 1] (stating that "it is illegal to condition humanitarian assistance on where a person chooses to vote").

246. *See, e.g.*, Case No. 96-1B, *supra* note 198 (detailing an SDA attack on Dr. Silajdzic).



secessionist speech, and freedom of expression;<sup>247</sup> 5) misfeasance or malfeasance on the part of local officials and parties;<sup>248</sup> 6) election-day problems;<sup>249</sup> and 7) OSCE failures—overall vote count and seat allocation.<sup>250</sup>

### *1. Technical Questions*

Complainants challenged the authority of the PEC to prescribe regulations,<sup>251</sup> questioned specific applications of the regulations,<sup>252</sup> and claimed factual errors on which the PEC made certain decisions. In one case, a complainant challenged the Dayton Agreement itself. In all these cases, the Sub-Commission effectively upheld the authority of the PEC and its Rules and Regulations. While the cases are not very significant in the larger scheme or particularly interesting to recount, they proved helpful to the functioning of the Sub-Commission. Specifically, they provided relatively non-controversial issues that helped the Sub-Commission to develop a common understanding of, and approach to, the Rules and Regulations. It was a practical approach. The Sub-Commission understood that the Rules and Regulations were imperfect and that some of the decisions of the PEC were flawed.

In considering these cases, the Sub-Commission recognized that the PEC was acting in good faith under difficult circumstances to conduct complicated elections in a short time frame. The Sub-Commission also realized that it was a part of the overall Mission effort. It was not delegated unlimited authority by the PEC to

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247. *See, e.g.*, Case No. 96-34B, *supra* note 242 (sanctioning SDS officials for speech questioning “the integrity and sovereignty of Bosnia and Herzegovina”).

248. *See, e.g.*, Case No. 96-214, *supra* note 238 (finding that “Pane Gavric failed to fulfill his duties to safeguard the ballots being counted”).

249. *See id.* (addressing voting site fraud).

250. *See, e.g.*, In the Matter of the Number of Seats Allocated to Certain Political Parties, No. 96-225, 3 Bilten 255 (1996) [hereinafter Case No. 96-225] (addressing complaints from various political parties that election results were calculated improperly).

251. *See, e.g.*, In the Matter of a Complaint Filed by the Government of the Republika Srpska, Office of the Vice-President of Internal Affairs, Regarding Application of Provisional Election Commission Rules and Regulations, No. 94-4B, 1 Bilten 29 (1996) (challenging the authority of the PEC and its application of PEC Rules and Regulations).

252. *See id.*

second-guess PEC decisions. Most of the opinions in this arbitrary category were not published in the *Bilten*. One decision in a case questioning the legality of the Rules and Regulations was published and is described below under "Secessionism, Secessionist Speech and Freedom of Expression."<sup>253</sup>

## 2. *Linking Humanitarian Assistance to Voter Registration*

The Sub-Commission issued an advisory opinion and two decisions regarding the rights of displaced persons to choose where to vote.<sup>254</sup> The war and ethnic cleansing created a multitude of refugees, as well as internally displaced persons throughout Bosnia and Herzegovina.<sup>255</sup> During voter registration in July, OSCE human rights monitors discovered that displaced persons in various parts of Republika Srpska were being coerced into registering to vote in their current domiciles in lieu of voting either in person or by absentee ballot in their pre-war homes. Specifically, there were reports that some local officials were conditioning humanitarian assistance on this decision.<sup>256</sup> In effect, the displaced persons were told that if they wanted food and shelter they would have to vote in the locales where they were receiving that food and shelter. Such an approach, of course, would only intensify and help make permanent the effective partition of the country.

Since time was running out on voter registration, the Sub-Commission decided to issue its first advisory opinion.<sup>257</sup> There simply wasn't time to conduct an investigation and reach a determination that would have a deterrent effect on the practice. The

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253. See discussion, *infra* pt. V.F.4.

254. See, e.g., Advisory Opinion 7, *supra* note 239 ("ensuring the safety of persons traveling to and from polling stations on election day").

255. See INT'L CRISIS GROUP, ELECTIONS IN BOSNIA AND HERZEGOVINA 1, 2 (1996) [hereinafter ICG REPORT] (discussing the displacement of over two million people in Bosnia and Herzegovina during the period prior to elections). Many ethnic Serbs who came from what is now the Federation Entity are living in Republika Srpska, while Croats and Muslims from Republika Srpska are living in the Federation. See *id.* Within the Federation itself, there are areas that are Muslim and Croat enclaves. See *id.* Under the Dayton Agreement, all citizens have the right to return to their pre-war homes. See Dayton Agreement, *supra* note 8, art. 2.

256. See Advisory Opinion 1, *supra* note 245 (addressing the concern that social welfare benefits were "conditioned on where individuals intend to vote").

257. See *id.*

opinion served as a warning to “all individuals, political parties, units of government and all other organizations,”<sup>258</sup> and it stated its views in easily understood terms:

1. It is illegal to condition humanitarian assistance on where a person chooses to vote.
2. It is illegal to require citizens to produce voter registration forms for any purpose that may have the effect of disadvantaging them.
3. The Sub-Commission views any such activity as extremely serious, and will deal with violations with the utmost severity.<sup>259</sup>

Subsequently, two decisions were issued in specific cases. In one of the cases, the Sub-Commission explained the use of the advisory opinion form:

Indeed it was in response to these scattered reports that the Sub-Commission issued its first advisory opinion. The Sub-Commission believes it is important to remind people that it is constituted as a juridical body. When it makes findings of fact, it must collect and evaluate evidence. In determining legal responsibility for violations of law and assessing penalties for such violations, it must first satisfy itself that there is sufficient evidence supporting its decisions. This process takes time. In the case of this “linkage” issue, the Sub-Commission realized the importance of issuing a public declaration quickly in an attempt to prevent or correct violations that it had not yet investigated.<sup>260</sup>

The Sub-Commission principally relied on Article IV of Annex 3 to the Dayton Agreement in its three rulings on the issue of voter choice:

A citizen who no longer lives in the municipality in which he or she resided in 1991 shall, *as a general rule*, be expected to vote, in person, or by absentee ballot, in that municipality . . . . A citizen may, however, apply to the Commission to cast his or her ballot elsewhere . . . .<sup>261</sup>

In implementing the above provision, the PEC created a system

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258. *Id.*

259. *Id.*

260. *See, e.g.*, Case No. 96-9B, *supra* note 240.

261. Dayton Agreement, *supra* note 8, annex 3, art. IV (emphasis added).

whereby displaced persons could register to vote in the communities where they had moved.<sup>262</sup> The general rule reflected the Dayton Agreement's goal to reintegrate Bosnian society by encouraging those displaced by the war to return home. It is complementary to Annex 7 of the General Framework Agreement, entitled "Agreement on Refugees and Displaced Persons."<sup>263</sup> Article I.1 provides, in part: "All refugees and displaced persons have the right freely to return to their homes of origin."<sup>264</sup> Exceptions to the general rule reflected the reality that many people either could not or would not return to areas from which they had been "cleansed." In any case, the exceptions were not intended as tools to consolidate the fruits of ethnic cleansing. The right to choose where to vote and where to live was that of the individual citizen.<sup>265</sup>

In dealing with this issue, the Sub-Commission looked to the Constitution of Bosnia and Herzegovina,<sup>266</sup> which is replete with human rights guarantees.<sup>267</sup> In one of its rulings, the Sub-Commission observed:

These Rules and Regulations did not in any way contemplate that PEC voter registration forms would be used to deny benefits to displaced persons in order to advance the divisive political aims of those who want to permanently divide the people of Bosnia and Herzegovina into ethnic enclaves. This subverts the letter and the spirit of the Dayton Agreement and the Rules and Regulations. It also offends even the dullest of human rights' sensibilities.<sup>268</sup>

As previously noted, the Sub-Commission issued the advisory opinion to help put an end to a serious violation of the law that had profound consequences for the election.<sup>269</sup> There is some evidence,

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262. See *PEC Rules*, *supra* note 124, arts. 5-14, 16 (discussing how displaced persons could vote in the communities where they resided during the election).

263. See *Dayton Agreement*, *supra* note 8, annex 7 (providing guidelines for the voting rights of refugees and displaced persons).

264. *Id.* art. I.1.

265. See *id.* annex 3, art. IV (discussing where a voter may cast a ballot).

266. See *id.* annex 4.

267. See *id.* art. II. Article II of the Constitution is dedicated to Human Rights and Fundamental Freedoms. Annex I of the Constitution lists 15 additional human rights agreements to be applied in Bosnia and Herzegovina.

268. Case No. 96-9B, *supra* note 240, at 8.

269. See *supra* notes 260-66 and accompanying text (explaining how the Sub-

mostly anecdotal, that the opinion had some deterrent effect. OSCE human rights monitors widely distributed the opinion throughout Bosnia and Herzegovina, and reported that the practice stopped. Unfortunately, however, the opinion came late in the registration process after much of the pressure had presumably been applied.<sup>270</sup> Indeed, overall problems with the exceptions to the general rule were cited as the principal reason why municipal elections were ultimately postponed.<sup>271</sup>

In the advisory opinion, the Sub-Commission vowed to treat violations with the utmost severity.<sup>272</sup> Subsequently, the Sub-Commission imposed penalties in two concrete cases.<sup>273</sup> One investigation found that the local Serb Democratic Party ("SDS") Commission on Refugees and Displaced Persons had made formal written proposals to the Doboj Municipal Assembly to withhold housing assistance from displaced persons who did not present proof that they intended to vote in the Doboj Municipality.<sup>274</sup> Another proposal was to direct all government and municipal bodies to condition their services on presentation of the PEC form indicating an intent to vote in the municipality.<sup>275</sup>

The Municipal Assembly adopted these proposals,<sup>276</sup> but there was no evidence that they were ever implemented.<sup>277</sup> As noted in the decision, it appears that the outcry from the international community upon discovering these actions forced local officials to abandon the policy.<sup>278</sup> Nonetheless, the Sub-Commission decided to punish the SDS for this activity. The Sub-Commission imposed a civil penalty withholding the SDS's entitlement to campaign funds financed and administered by the OSCE.<sup>279</sup> Local SDS officials were also required to make a public apology, written by the Sub-Commission, which

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Commission intended the opinion to halt violation of the law).

270. Voter registration ended on July 31, 1996.

271. See Pomfret, *supra* note 127, at A1 (discussing the delay in voting due to "widespread electoral fraud").

272. See Advisory Opinion 1, *supra* note 245.

273. See, e.g., Case No. 96-9B, *supra* note 240.

274. See *id.*

275. See *id.*

276. See *id.*

277. See *id.*

278. See Case No. 96-9B, *supra* note 240.

279. See *id.*

was to be broadcast on radio and television by a certain date.<sup>280</sup> In the event that the apology was not made by the deadline, the Sub-Commission would begin removing the names of two candidates per day from the SDS party list for municipal elections in Doboj until the SDS made the apology.<sup>281</sup> The threat of removal of candidate names from the party list proved a sufficient inducement.<sup>282</sup> The SDS made the apology by the deadline.<sup>283</sup>

This case received considerable attention in the local and international press. One report noted that "[t]he public apology, prompted by the OSCE ruling, was an extraordinary departure from the party's customary bombast and isolationist rhetoric."<sup>284</sup> A newspaper reported that Momcilo Krajisnik, who would be elected to the Serb seat on the three-member Presidency on September 14th, called the Sub-Commission's decision "blackmail."<sup>285</sup>

In a related case in the nearby municipality of Modrica,<sup>286</sup> the Sub-Commission found that the local election commission violated PEC rules by denying 59 displaced persons the right to freely choose where to vote.<sup>287</sup> The investigation disclosed that local election commission officials simply filled out the pertinent forms, precluding the displaced persons from voting in their former homes.<sup>288</sup> The Sub-Commission ordered the immediate removal of the Chairman of the local commission.<sup>289</sup> Since specific victims were identified, the Sub-Commission recommended to the PEC that the victims be given the opportunity to re-register to vote by absentee ballot in their former domiciles.<sup>290</sup> The PEC agreed; all but a handful

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280. *See id.*

281. *See id.*

282. *See* Dan DeLuce, *Bosnian Serbs Apologise for Voter Manipulation*, REUTERS WORLD SERVICE, Aug. 17, 1996, *available in* LEXIS, News Library, Curnws File.

283. *See* Case No. 96-9B, *supra* note 240.

284. DeLuce, *supra* note 282.

285. *See* *Krajisnik Protests OSCE Fine for SDS*, AGENCE FRANCE PRESSE, Aug. 16, 1996, *available in* LEXIS, News Library, Curnws File.

286. *See* *Actions of the Local Election Commission of the Municipality of Modrica*, Case No. 96-11D, 2 Bilten 43 (1996) [hereinafter Case No. 96-11D]

287. *See id.*

288. *See id.*

289. *See id.* at 44.

290. *See id.*

took advantage of this choice—a choice that they should have been given in the first instance.

The Sub-Commission also recommended that the PEC consider a general remedy for all displaced persons who could prove they were denied the choice of where to vote despite the fact that voter registration was over.<sup>291</sup> The PEC declined to act on this recommendation.

### *3. Instances of Violence and Intimidation*

The Sub-Commission's punishment in the Silajdic case did not put an end to all campaign violence. In response to reports of violent acts committed in Una Sana Canton, where the Silajdic attack had occurred in June,<sup>292</sup> the Sub-Commission issued an advisory opinion.<sup>293</sup> This area was considered one of the "hot spots" within the Federation.<sup>294</sup> During the war, a local Muslim and his supporters had sided with ethnic Serbs in the fighting, and the bitterness ran deep. The violence here was Muslim-on-Muslim. In August, members of the international community had visited the area in an effort to calm the situation.<sup>295</sup> OSCE's Deputy Director for Human Rights and the Sub-Commission's Chairman were among those visitors.<sup>296</sup> Also in attendance were the High Representative for Civilian Implementation under Dayton, Carl Bildt, and Commissioner Fitzgerald of the IPTF.<sup>297</sup>

The Sub-Commission's mandate was to enforce electoral laws.<sup>298</sup> In order to do this, the Sub-Commission was given limited enforcement tools to use on candidates and political parties.<sup>299</sup> It could not, however, police every instance of violence—even if that

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291. See Case No. 96-11D, *supra* note 286, at 44.

292. See In the Matter of Complaints Against the Party of Democratic Action in the Una Sana Canton, Case No. 96-20B, 2 Bilten 63 (1996) [hereinafter Case No. 96-20B].

293. See Advisory Opinion 3 (Violence and Intimidation), Aug. 27, 1996, 2 Bilten 67 [hereinafter Advisory Opinion 3].

294. See Case No. 96-20B, *supra* note 292, at 63-64.

295. See *id.* at 64.

296. See *id.*

297. See *id.*

298. See *PEC Rules*, *supra* note 124, pt. VIII, art. 138.

299. See *id.* arts. 140-41.

violence was politically motivated. It had neither the authority nor the resources needed for such a job. Even IFOR, with 60,000 troops and enormous firepower, was not expected to stop this type of violence. Nonetheless the Sub-Commission was persuaded to act.<sup>300</sup> It first issued an advisory opinion that reminded political parties and candidates of their responsibilities under the Electoral Code of Conduct for the violent activities of their supporters.<sup>301</sup> In so doing, the Sub-Commission distinguished its role from that of the criminal justice system:

The Sub-Commission wishes to make clear that it has neither the authority nor the ability to determine criminal responsibility for acts of violence and intimidation. The workings of the Sub-Commission are entirely separate and distinct from those of the criminal justice system: the standards of proof are different, the range of available penalties are different, and indeed the purposes are different. Whereas the criminal justice system is charged with, among other matters, the identification, punishment and rehabilitation of individual culprits, the Sub-Commission aims, through fair and impartial enforcement of the electoral laws, rules and regulations, to promote the conditions necessary for the conduct of free and fair elections.<sup>302</sup>

The opinion noted that a political party would be punished where there was credible evidence of direct involvement in acts of intimidation or violence.<sup>303</sup> It also placed an affirmative burden on political parties to take steps to limit acts of violence and intimidation undertaken by its supporters.<sup>304</sup> The advisory opinion informed political parties of the following obligations:

- i) to instruct . . . members and supporters, including [their] youth wing and other affiliated bodies, that such actions will not be tolerated;
- ii) to instruct . . . members that they must, under pain of party discipline, come forward with any information in their possession that could help identify the perpetrators; and
- iii) to remove from any position of party influence any person found to

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300. See Advisory Opinion 3, *supra* note 293, at 67.

301. See *id.*

302. *Id.*

303. See *id.* at 68.

304. See *id.*



have participated in, approved or acquiesced in such acts.<sup>305</sup>

The week following the issuance of the advisory opinion, the Sub-Commission decided to take specific action against the ruling party with respect to violence in Una Sana Canton.<sup>306</sup> It noted that there had been 25 reports of violence, intimidation, and harassment in this area between July 1st and August 20th, including ten bombings, three shootings, and nine beatings by the local police.<sup>307</sup> It also noted that the SDA controlled the authorities responsible for keeping the peace and investigating the criminal acts.<sup>308</sup> In ruling that these politically motivated acts violated the Dayton Agreement and the Electoral Code of Conduct, the Sub-Commission found that the SDA was in a position to have prevented much of the violence.<sup>309</sup> As a result, the SDA was required to pay a civil penalty of \$25,000, which was to be withheld from its entitlement to campaign funds, and to make a public statement, written by the Sub-Commission, on television and radio within the week. The public statement included the following points: (a) condemning the actions; (b) cautioning SDA workers and supporters from engaging in criminal acts of violence, intimidation, and harassment; (c) calling upon local police to conduct vigorous investigations; (d) pledging to assist the police in their investigations; (e) announcing the recent replacement of the Police Chief in Cazin;<sup>310</sup> (f) informing voters that their votes would be secret; and (g) pledging that the SDA would cooperate fully in assuring that the elections are free and fair.<sup>311</sup>

The decision warned that the failure to make the public statement

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305. Advisory Opinion 3, *supra* note 293, at 68.

306. See Complaints Against SDA in Una Sana Canton for Acts of Violence and Intimidation, Case No. 96-20B, 3 Biltén 63 (1996) [hereinafter Case No. 96-20B].

307. See *id.* at 63-64. No deaths were reported. The decision also noted that since August 20th, the violence in the area had subsided, citing efforts of the international community and the Minister of the Interior of the Federation, Avdo Hebib. See *id.* Minister Hebib demonstrated a commitment to working for free and fair elections, cooperated with the Sub-Commission in conducting investigations, and used his influence to make the police forces within the Federation professional and responsive. See *id.*

308. See *id.* at 64.

309. See *id.*

310. Minister Hebib had forced the removal of the police chief in the municipality where much of the violence had occurred. See *id.* at 65.

311. See *id.*

as directed would result in the removal of one name per day from the party list of SDA candidates for the cantonal elections in Una Sana for each day of non-compliance.<sup>312</sup> The SDA complied.

In considering this case, the Sub-Commission had a choice. It could either wring its hands and declare its inability to “prove” the facts of each instance of violence, or it could place responsibility on the governing party of the canton that has an affirmative obligation to prevent the violence directed at the political opposition. It chose the latter, seeing a need to take action against the climate of fear and violence that had taken hold of this part of the Federation.<sup>313</sup>

On the same day, the Sub-Commission issued a decision involving the disruption of political rallies held by the Joint List, a multi-ethnic coalition active in elections throughout both entities.<sup>314</sup> The disruptions occurred in the municipalities of Gradacac and Srebrenik, located in the Federation. SDA supporters caused the disruptions.<sup>315</sup> The Gradacac rally took place on August 13th.<sup>316</sup> Local police, who later aided the Sub-Commission’s investigation, arrested a number of individuals involved in the disruption.<sup>317</sup> According to witnesses, fifteen or twenty young men wearing SDA T-shirts positioned themselves in front of the podium and prevented the speakers from giving their speeches.<sup>318</sup> Eventually, the men took over the stage and the microphones and played music.<sup>319</sup> What had begun as a rally for an opposition political group turned into an impromptu street party for supporters of the ruling political party.<sup>320</sup> Several of those detained by police gave statements that shed some light on their democratic sensibilities and illustrated precisely the type of conduct proscribed by the Electoral Code of Conduct.<sup>321</sup> The following

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312. *See id.*

313. *See* Advisory Opinion 3, *supra* note 293, at 67-68.

314. *See* Disruption by SDA Supporters of Rallies Held by the Joint List in Gradacac and Srebrenik, Case Nos. 96-13D/96-15D, 3 Bilten 87 (1996) [hereinafter Case Nos. 96-13D/96-15D].

315. *See id.* at 87-88.

316. *See id.* at 87.

317. *See id.* at 88.

318. *See id.* at 87.

319. *See* Case Nos. 96-13D/96-15D, *supra* note 314, at 88.

320. *See id.*

321. *See* PEC Rules, *supra* note 124, pt. VII, art. 122 (specifically prohibiting the disruption of public political meetings).

passage from the decision describes the self-incriminating statements made by two of the individuals detained by police:

Omer Hecimovic, President of MOS<sup>322</sup> Gradacac and a candidate in the municipal elections, attended the rally. He claims to have been irritated by the contents of the speeches, and reports joining in shouting down the Joint List speakers. He also reports that the crowd shouted: "Alija, Alija," "Alah Ekber,"<sup>323</sup> and "SDA, SDA." Despite his position of leadership within the MOS, he made no effort to quiet the hecklers or stop the disruptions. Disturbingly, he also admits that he and a group of associates "followed" a few paces behind the rally speakers and organizers as they departed the rally site.

Elmir Tukic is President of the Pozarike local branch of MOS Gradacac. He admits to arriving at the meeting attired in an SDA T-shirt and carrying a megaphone. He claims that he and a group of his associates did not like the contents of the speeches, so [they] "whistled" each of the speakers off the stage. After the rally was broken-up as a result of the rowdiness, he went with a group to the local SDA headquarters, where they obtained SDA flags and pictures of President Izetbegovic. They then paraded back to the rally site where they chanted slogans such as "Alija, Alija," "Alah Ekber," and "SDA, SDA."<sup>324</sup>

One of the young men participating in the rally turned out to be a candidate on the SDA's list for municipal elections in Gradacac.<sup>325</sup> The Sub-Commission ordered the removal of his name from the list and terminated his candidacy.<sup>326</sup>

On the day following the Gradacac incident, SDA supporters attempted a similar disruption of a rally in Srebrenik.<sup>327</sup> This time the police were prepared for the disturbance. They promptly removed the troublemakers from the rally site.<sup>328</sup> In contrast to Gradacac, the rally was not cut short.<sup>329</sup> After its conclusion, police changed the bus route for Joint List candidates and officials, thus heading off any

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322. Muslim Youth Council ("MOS") is the youth wing of the SDA.

323. "Alija" is a reference to President Izetbegovic. "Alah Ekber" means "God is Great."

324. Case Nos. 96-13D/96-15D, *supra* note 314, at 88.

325. *See id.*

326. *See id.* at 90.

327. *See id.* at 89.

328. *See id.*

329. *See* Case Nos. 96-13D/96-15D, *supra* note 314, at 89.

planned violence.<sup>330</sup> In the decision, the Sub-Commission praised the actions of the police in Srebrenik.<sup>331</sup> The decision also reported the public reaction of President Alija Izetbegovic and the subsequent actions of the Gradacac police:

On 16 August, Alija Izetbegovic, President of Bosnia and Herzegovina and also of the SDA, issued a statement in which he deplored the disruptions of the Joint List rallies and expressed his "deepest disapprobation". He stated that he had "fought for a Bosnia in which people could think and speak freely" and called upon his supporters not to attach his name to similar incidents.

A few days thereafter, the Police Chief of Gradacac told OSCE staff that the Ministry of the Interior had instructed him to make full security plans for all political rallies in the future, which the Ministry would have to review and approve in advance. He repeated several times that he alone bore responsibility for the disruption of the Gradacac rally, and that he had not ordered his officers to break up the hecklers because they did not have riot control gear or correct training. He stated that President Izetbegovic's condemnation of the disturbances "meant a lot" to him.<sup>332</sup>

For the most part, campaign activity throughout Bosnia and Herzegovina was robust.<sup>333</sup> Disruptions of rallies were the exception to the rule.<sup>334</sup> While it is difficult to evaluate, it can be argued that the Sub-Commission played a positive role in this state of relative openness.<sup>335</sup>

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330. *See id.*

331. *See id.*

332. *Id.*

333. *See* Sir Kenneth Scott, 'Free and Fair' Vote in Bosnia Elections, THE TIMES, Oct. 16, 1996, available in LEXIS, News Library, Curnws File.

334. *See id.*

335. The relatively low levels of violence throughout the country must be viewed in the context that the country had effectively been partitioned during the war. Therefore, major populations of rival ethnic groups were not in the type of close contact that could have led to worse conflict. *See* discussion, *supra* pt. V.B. Clearly the presence of IFOR and the IPTF helped immensely in reducing the potential for violence. Given the savagery of the war, however, it is notable that the violence was not more pronounced. This stands in contrast to the significant violence in Cambodia in the 1993 elections held under the authority of the United Nations Transitional Authority in Cambodia ("UNTAC") where even UNTAC electoral personnel were killed. *See Two UNTAC Electoral Workers Die in Attack*, ELECTORAL COMPONENT NEWSLETTER (UNTAC), Jan. 15, 1993, at 17. Nothing

The Sub-Commission also took some tentative steps with respect to politically motivated job dismissals and other forms of employment-related intimidation.<sup>336</sup> It had received complaints from an opposition party in Republika Srpska that municipal authorities dominated by the ruling SDS had removed individuals from jobs because of their political activity. In this area, the Sub-Commission's positive influence is questionable.

*First.* It was clear that it lacked the resources necessary to conduct the type of investigation necessary to make credible findings in such multifaceted and complex cases.

*Second.* The court system of Republika Srpska already was reviewing a number of these dismissals. These cases involved issues quite apart from electoral rules.

*Third.* The Sub-Commission's jurisdiction extended only through the elections. Once they were held, any rulings would lack force. Thus, an individual might be able to avoid a politically-motivated dismissal until the election was over.

Nonetheless, the Sub-Commission issued an advisory opinion on August 23rd putting "all parties, candidates and their supporters on notice that we take very seriously allegations of politically motivated dismissals and other job-related harassment committed during or shortly proceeding the campaign period."<sup>337</sup> Copies of the opinion were sent to the municipalities charged in the complaints. On September 2nd, the Sub-Commission was informed that two of the individuals named in the complaints had been reinstated by the government, which had finally decided to comply with a ruling to that effect by the Supreme Court of Republika Srpska. The Sub-Commission's investigations were "continued." It is fair to say that the Sub-Commission's influence in this area has been negligible at best. It is possible to conceive, however, of a straightforward case that would violate the Dayton Agreement and the Electoral Code of Conduct. For the elections of September 14th, no such case was presented.

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comparable occurred in Bosnia.

336. See Advisory Opinion 2, Job Dismissals and Other Forms of Employment-Related Intimidation, 2 Bilten 59 [hereinafter Advisory Opinion 2].

337. *Id.*

#### 4. Secessionism, Secessionist Speech, and Freedom of Expression

One of the most interesting questions addressed by the Sub-Commission involved secessionism and ethnic nationalism. Indeed, the disintegration of the former Yugoslavia and the bloody conflicts that followed were the fruits of this phenomenon.<sup>338</sup> The resurgence of secessionism and ethnic nationalism during the campaign placed the Sub-Commission in the position of balancing the value of freedom of expression with the commitment to the sovereignty of Bosnia and Herzegovina required by the Dayton Agreement.

Three rulings late in the campaign addressed this balance. Early on, however, the question of secessionism had arisen in the context of political parties' rights to field candidates in both Entities. In July, the government of Republika Srpska filed a complaint challenging the application of the PEC's Rules and Regulations which permitted parties based in the Federation Entity to present candidates for election to political office within the Republika Srpska Entity.<sup>339</sup> The new Constitution of Bosnia and Herzegovina<sup>340</sup> allocated various responsibilities between the Entities and the country as a whole.<sup>341</sup> It was inevitable that the ambiguous nature of this allocation would present problems down the road. The government of Republika Srpska essentially took the position that only it had the competence to determine political party and candidate eligibility for elective positions to be filled from within the Entity. It cited Republika Srpska law as precluding Federation political parties from participating in elections within the Entity.<sup>342</sup> PEC rules were not extensive on candidate qualifications.<sup>343</sup> Articles 15 and 56 of the PEC Rules simply repeated Article IX of the Constitution in precluding persons either indicted or convicted of war crimes from holding elective office:

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338. See SILBER & LITTLE, *supra* note 50.

339. See Complaint by the Government of Republika Srpska Regarding Application of PEC Rules and Regulations, Case No. 96-4B, 1 Bilten 29 (July 26, 1996) [hereinafter Case No. 96-4B].

340. See Dayton Agreement, *supra* note 8, annex 4

341. See *id.* art. III (explaining "Responsibilities of and Relations Between the Institutions of Bosnia and Herzegovina and the Entities").

342. See Case No. 96-4B, *supra* note 339.

343. See PEC Rules, *supra* note 124, arts. 15, 56.

No person who is serving a sentence imposed by the International Tribunal for the Former Yugoslavia, and no person who is under indictment by the Tribunal and who has failed to comply with an order to appear before the Tribunal, may stand as a candidate or hold any appointive, elective or other public office in the territory of Bosnia and Herzegovina.<sup>344</sup>

Beyond this proscription, PEC Rules and Regulations on candidate eligibility were largely technical in nature. None, however, limited party or candidate participation across Entity boundaries.<sup>345</sup> The Sub-Commission concluded that there was no basis in law to limit participation across Entity borders by analogizing voter eligibility provisions in both the Dayton Agreement and the Rules and Regulations to candidate eligibility.<sup>346</sup> The decision cited Article III of Annex 3 to the Dayton Agreement, which required compliance with any rules and regulations to be adopted by the PEC, notwithstanding any internal laws or regulations,<sup>347</sup> and reasoned that "PEC Rules and Regulations occupy the field" on such issues.<sup>348</sup> In its dismissal, the Sub-Commission specifically rejected the complaint's implicit argument in favor of "total ethnic separation in the electoral context among Bosniacs, Croats and Serbs."<sup>349</sup>

This dry and technical decision was followed by three rulings made in a crisis atmosphere late in the campaign.<sup>350</sup> In these rulings, the Sub-Commission noted that the right to freedom of expression was fundamental, but not absolute.<sup>351</sup> Previously, the Sub-Commission had considered two complaints concerning highly offensive statements made about two candidates.<sup>352</sup> In both cases, the complaints were dismissed on the grounds that the speech was protected.<sup>353</sup> In Advisory Opinion No. 5, the Sub-Commission attempted to blunt the negative effect of increasingly strident rhetoric

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344. *Id.* art. 15.

345. *See id.* arts. 54-56.

346. *See* Case No.96-4B, *supra* note 339.

347. *See id.*

348. *Id.*

349. Case No. 96-4B, *supra* note 339.

350. *See* Report to Head of Mission, *supra* note 31, at 15.

351. *See id.*

352. *See id.*

353. *See id.*

by major candidates calling "for independence and territorial separation of part of the country, or [referring] to part of the country as a sovereign territory."<sup>354</sup>

The Sub-Commission designed the opinion as a warning to all candidates and party officials, but it was primarily a response to speeches made by SDS candidates in Republika Srpska.<sup>355</sup> It did not directly address specific statements alleged to have been made, nor did it single out any individual party, ethnic group, or individual.<sup>356</sup> At this point in the process, the Sub-Commission had become better known and generally respected due to the dissemination of its decisions. The Sub-Commission hoped that the opinion would persuade people to tone down their rhetoric, as the time drew nearer for the vote. Given the history of the past few years, there was concern that such rhetoric could lead to substantial violence on the eve of the elections.<sup>357</sup> The opinion can be divided into three parts: (1) the sovereignty and territorial integrity of Bosnia and Herzegovina as set forth in the General Framework Agreement and in the Constitution at Annex 4;<sup>358</sup> (2) the obligations undertaken by political parties and candidates to abide by the Dayton Agreement as set forth in Annex 3 and in PEC Rules and Regulations;<sup>359</sup> and (3) freedom of expression as a core democratic value that is subject to limitations.<sup>360</sup>

The opinion first pointed to Article I of the General Framework Agreement itself, which committed the Parties "to conduct their relations in accordance with the principles set forth in the United Nations Charter."<sup>361</sup> It specifically drew attention to the commitment to "fully respect the sovereign equality of one another . . . and [to] refrain from any action, by threat or use of force or otherwise, against the territorial integrity or political independence of Bosnia and

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354. Advisory Opinion 5, *Statements that Advocate Sovereignty for a Part of the Country or that Otherwise Threaten its Territorial Integrity*, 3 *Bilten* 103 [hereinafter *Advisory Opinion 5*].

355. *See id.*

356. *See id.* at 104-05.

357. *See id.* at 104.

358. *See id.*

359. *See Advisory Opinion 5, supra* note 354, at 103.

360. *See id.* at 104.

361. Dayton Agreement, *supra* note 8, art.1.



Herzegovina or any other State.”<sup>362</sup> Next, the opinion considered Article I.1 of the Constitution, providing that Bosnia and Herzegovina “shall continue its legal existence as a state, with its internal structure modified as provided herein and with its present internationally recognized borders.”<sup>363</sup> Article I.3 details the modifications to the state’s internal structure, providing that Bosnia and Herzegovina would consist of two Entities.<sup>364</sup> In this part of the decision, the opinion concluded:

It is thus not open to doubt that Bosnia and Herzegovina exists as a sovereign state within its recognized international boundaries, and that Republika Srpska and the Federation of Bosnia and Herzegovina are the constituent entities of that sovereign state, having no separate existence under international law. Indeed, the express right of each of the entities to establish special parallel relationships with neighboring states is subject to the condition that such arrangements be “consistent with the sovereign and territorial integrity of Bosnia and Herzegovina” (Constitution, Article III, 2(a)). The Constitutional Court of Bosnia and Herzegovina is specifically empowered to decide questions as to whether any such special relationships violate the sovereignty and territorial integrity of the state (Constitution, Article VI, 3(a)).<sup>365</sup>

The second part of the opinion noted that Article 46 of the PEC Rules and Regulations conditioned political party and candidate participation in the elections on their agreement to “abide by the General Framework Agreement for Peace in Bosnia and Herzegovina, the Code of Conduct for Political Parties and Candidates, and the Rules and Regulations approved by the Provisional Election Commission.”<sup>366</sup>

In the third part of the opinion, the Sub-Commission tackled its most difficult legal issue, freedom of expression and its limits. It noted the following provision in the Constitution:

*International Standards.* The rights and freedoms set forth in the

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362. *Id.*

363. Advisory Opinion 5, *supra* note 354, at 103.

364. *See id.*

365. *Id.*

366. *Id.* Consistent with this provision, the President or Vice President of each party participating in the elections filed a statement agreeing to these terms when it applied for registration to the Provisional Election Commission. *See id.*

European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law.<sup>367</sup>

The opinion placed particular emphasis on Article 10 of the Convention dealing with freedom of expression.<sup>368</sup> Article 10 (1) provides: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference. . . ." <sup>369</sup> The Sub-Commission noted, however, that this right is subject to limits:

While the right to freedom of expression is fundamental, it is not absolute. Article 10 (2) of the European Convention permits restrictions on the right, but only such as "are prescribed by law and are necessary in a democratic society" to protect various enumerated interests, including "national security, territorial integrity or public safety, and the prevention of disorder or crime."<sup>370</sup>

The opinion noted that the balancing of these complementary provisions must be accomplished in a real-world context:

Not all statements which call for a re-examination of territorial borders fall outside the protection of freedom of expression. Each statement must be examined within the context in which it is made to evaluate whether it poses a genuine and imminent threat to national security, territorial integrity or public order. A statement made in an academic journal or to an audience in a stable democracy, however offensive, may pose little likelihood of motivating unlawful action, whereas the same statement made in the context of the first election campaign following a war characterized by ethnic cleansing may well pose a genuine and imminent threat to territorial integrity as well as to public order.<sup>371</sup>

Finally, the opinion balanced these provisions in the context of Bosnia and Herzegovina in the waning days of the campaign:

The Sub-Commission views very seriously statements made by candidates, party leaders or public officials that call into question the

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367. *Id.* at 104.

368. *See* Advisory Opinion 5, *supra* note 354, at 103.

369. *Id.*

370. *Id.*

371. *Id.*

territorial integrity of Bosnia and Herzegovina, as agreed at Dayton. Statements of personal preference are tolerable, but where candidates or party officials appeal to voters to reject the basic principles of the entire peace process, their words could well lead to violence or other unlawful action. It is not possible to vote changes to the territorial integrity of Bosnia and Herzegovina. The international community is committed to preserving the country's territorial integrity. Many of the people to whom these inflammatory statements are directed have weapons; many have fought for territorial separation in the past. In this context, statements rejecting the country's integration made by candidates and high ranking party officials could well pose a genuine threat to the country's territorial integrity or to public order.

Various circumstances may increase the seriousness of a statement's threat: whether the language appeals to emotion or reflexive nationalism, rather than reason; whether the statement is made on television or radio, particularly if state-run, or to a large public audience, rather than in print; whether the person making the statements is armed or flanked by symbols or other paraphernalia suggesting the willingness to use violence; or whether the speaker is a high-ranking official. If any of these circumstances is present, the Sub-Commission will devote particular attention to the statement.<sup>372</sup>

In an extraordinary departure from its normal practice,<sup>373</sup> the Sub-Commission called a press conference in Pale, the capital of Republika Srpska, to deliver the opinion eight days prior to the elections.<sup>374</sup> The Chairman, flanked by his Bosniac, Croat, and Serb colleagues, read the opinion aloud in its entirety. The Sub-Commission hoped that this public display of unity would put an end to the offending rhetoric.<sup>375</sup> It did not.

Four days before the election, the Sub-Commission issued a decision based on several complaints involving the SDS. From its review, the Sub-Commission concluded that the "tenor and content of the SDS campaign is in breach of the General Framework Agreement and the Rules and Regulations of the PEC."<sup>376</sup> The decision required the SDS to pay a civil penalty of \$50,000 and

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372. *Id.*

373. See discussion, *supra* pt. V.D. The Sub-Commission had never before indicated the votes of particular members and had issued its decisions and opinions with the name of its international chairman only.

374. See Wilkinson, *supra* note 25, at A1.

375. See *id.*

376. *Id.* at 120.

ordered SDS candidates and officials to "refrain from any further statements which challenge in any way the integrity of Bosnia and Herzegovina or which assert the independence of Republika Srpska."<sup>377</sup> The Sub-Commission warned that it would continue to review statements and that offending candidates could be removed from party lists.<sup>378</sup> Fundamental to the decision were SDS control of Radio and Television Srpska<sup>379</sup> and the lack of independent media in Republika Srpska to provide opposing views.<sup>380</sup> The decision noted that Srpska Television, despite its presence there, had failed to report on the Sub-Commission's press conference in Republika Srpska in which it first published its advisory opinion on secessionist speech.<sup>381</sup>

In the days following the issuance of this decision, the Sub-Commission continued to monitor the situation.<sup>382</sup> It reviewed videotapes and written materials and concluded that it would have to revisit the issue one last time.<sup>383</sup> It did so on September 13th, the day before the election, finding that "the tone and tenor of the SDS campaign continue to violate the General Framework Agreement and the Rules and Regulations of the Provisional Election Commission."<sup>384</sup>

The pressure on the Sub-Commission was intense. In the advisory opinion, it had hoped to persuade the SDS from continuing its secessionist rhetoric, but it had come up short.<sup>385</sup> In the subsequent decision, the Sub-Commission utilized a civil penalty and warning so as not to risk a backlash by immediately terminating the candidacies of major SDS figures with only a few days until the election.<sup>386</sup> This did not work.

Biljana Plavsic, the successor to Radovan Karadzic as President of Republika Srpska and the SDS candidate for that position in the

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377. *Id.*

378. *See id.*

379. *See id.*

380. *See id.*

381. *See id.*

382. *See* Tenor and Content of the SDS Campaign, Case No. 96-34B, 3 Bilten 147 (Sept. 13, 1996) [hereinafter Case No. 96-34B].

383. *See id.*

384. *Id.*

385. *See* Advisory Opinion 5, *supra* note 354, at 103.

386. *See* Case No. 96-34B, *supra* note 382, at 147.

election, was arguably the greatest offender.<sup>387</sup> Karadzic, indicted by the International Tribunal for the former Yugoslavia,<sup>388</sup> was forced by the international community to leave the Presidency in favor of Madame Plavsic and ultimately was forced to resign from the leadership of the SDS.<sup>389</sup> He had become a martyr in much of Republika Srpska, a symbol of resistance to the international community's "bias" against Bosnian Serbs.<sup>390</sup> Madame Plavsic continued her secessionist speech after the issuance of both the advisory opinion and the first decision regarding the SDS.<sup>391</sup> What would the effect be if her candidacy for President of Republika Srpska were terminated just hours before the election? Would SDS supporters be disenfranchised with respect to that office? Would there be a boycott of the elections? Would there be violence? Would the Provisional Election Commission reverse the Sub-Commission? In short, would the decision bring chaos to an election day that had been in planning for nine months? In fashioning an appropriate

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387. See *id.* at 147-48.

388. See Complaint Against the SDS, Case No. 96-2B, 1 Bilten 25 (1996) [hereinafter Case No 96-2B].

389. On July 2nd, a complaint was filed with the Sub-Commission arguing that the Dayton Agreement precluded Karadzic from holding political party office. (He had previously stepped down from the Presidency of Republika Srpska, at least officially). The complaint sought to ban the SDS from the elections on the basis of Karadzic's continued political involvement. During this same period, the Head of the OSCE Mission had taken the position that the SDS could not participate in the elections if Karadzic remained its President. It was an extraordinarily difficult legal question with enormous consequences for the effective functioning of the Sub-Commission whose members were just beginning to form a collegial working relationship. The Sub-Commission was scheduled to consider the matter at a meeting on July 19th. Before the meeting, it was announced that Richard Holbrook had brokered an agreement with President Milosevic for Karadzic to resign his party office and to unequivocally relinquish all political activity. See Steven Erlanger, *The World; A Bosnian Sort of Victory*, N.Y. TIMES, July 21, 1996, at 4, available in LEXIS, News Library, Curnws File. Given the supervening events, the Sub-Commission was able to dismiss the matter without prejudice. See Case No. 96-2B, *supra* note 388, at 25.

390. One manifestation of that resistance was the display of Karadzic posters at SDS rallies and on public buildings throughout Republika Srpska during the campaign. The posters had become a huge issue in the waning days of the campaign. See Karadzic Posters, Case No. 96-29B, 3 Bilten 127 [hereinafter 96-29B]; Christine Spolar, *Election Panel Fines Bosnian Serb Ruling Party*, WASH. POST, Sept. 11, 1996, at A17.

391. See Case 96-34B, *supra* note 382, at 147.

response, the Sub-Commission and its staff had to take into account all these considerations.

Drawing lines between permissible and impermissible speech in an electoral context is a difficult legal challenge. The Sub-Commission faced an even greater challenge in deciding what it could do about the continuing violations.<sup>392</sup> As noted earlier, the Sub-Commission had made its decisions with an eye toward political reality and with the OSCE objective that the elections go forward. Up until now, it had been relatively successful in achieving the balance required. Less than 24 hours remained before the polls would open. The Sub-Commission decision read, in part, as follows:

Freedom of expression is one of the essential foundations of a democratic society. The Sub-Commission does not take lightly its responsibility to determine when political speech which is entitled to protection crosses the line and becomes advocacy of lawless action which threatens the constitutional order. After having completed its review of the video recordings and other statements at its meeting this morning, the Sub-Commission has no doubt that statements made at the SDS rally in Banja Luka crossed that line. These statements clearly represent an immediate threat to the sovereignty and territorial integrity of Bosnia and Herzegovina. Many of the people at the Banja Luka rally have fought for territorial separation in the past and many have lost loved ones in that fight. It is hardly idle speculation to suppose that the oratory of today, which flouts the international community as dangerously as it challenges the constitutional foundation of Bosnia and Herzegovina, could lead to violence in the near future. If the SDS is allowed to make these statements with impunity, after having received such a clear warning of the consequences, the unmistakable message that is sent to SDS supporters throughout Republika Srpska, is that they can act in accordance with these statements, with equal impunity.<sup>393</sup>

The decision required Dr. Plavsic to make an apology on Srpska Television during the evening news and to have the statement repeated twice more before 11:00 p.m.<sup>394</sup> The Sub-Commission wrote the statement and warned Dr. Plavsic not to deviate from it in any way.<sup>395</sup> It further prohibited Dr. Plavsic, or any SDS official, from

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392. *See id.*

393. *Id.*

394. *See id.*

395. *See id.* at 148.

making any statements before or after the apology. The Sub-Commission tried to ensure her compliance by stating:

If there is delay in making the statement, or if the presentation of the statement in any way seeks to change or disown its content, three of the first five candidates will be removed from the SDS Party list for the elections to the National Assembly of the Republika Srpska, and their candidacies for public office terminated.<sup>396</sup>

This group of five candidates included some powerful members of the SDS leadership. The decision and apology were hand-delivered to Dr. Plavsic's secretary in Pale on Friday afternoon. She complied with the terms of the decision by delivering the following message that evening in Serbian:

The SDS sincerely apologizes for statements made during the election campaign, including my own statements, which appear to question the territorial integrity and sovereignty of Bosnia and Herzegovina. The SDS deeply regrets any statements which have suggested that Republika Srpska is an independent state. The SDS wishes to make clear to its supporters and the people of Republika Srpska that it is fully committed to implementing the Dayton Agreement. It is not the aim of the SDS, now or in the future, to unify all Serbs in the Balkans into one joint state. SDS candidates from Republika Srpska, if elected, are committed to joining and working with elected officials from the Federation of Bosnia and Herzegovina in the common institutions of Bosnia and Herzegovina. The future of Republika Srpska is within the state of Bosnia and Herzegovina. All SDS candidates, if elected, will work to preserve the unity of Bosnia and Herzegovina as an independent state and as a society dedicated to peace, justice, tolerance and reconciliation. The SDS will work for a Bosnia and Herzegovina in which Serbs, Croats and Muslims can live together in peace and dignity.<sup>397</sup>

It is difficult to gauge the impact of this statement on the election and the peace process. Certainly few could believe that Dr. Plavsic and the SDS had suddenly abandoned Serb nationalism. Nonetheless, a high ranking and popular public official from Republika Srpska made a very public apology for the secessionist speech that had overtaken the SDS campaign and publicly acknowledged the sovereignty and territorial integrity of Bosnia and Herzegovina and

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396. Case 96-34B, *supra* note 382, at 148.

397. *Id.*

the authority of the OSCE.<sup>398</sup> The statement brought a peaceful closure to a situation threatening to spin out of control in the final days of the campaign.<sup>399</sup> The following day, Dr. Plavsic was elected President of Republika Srpska.

It is significant that the Sub-Commission, in neither the advisory opinion nor in the related decisions that followed, did not find that specific words were in violation of the Dayton Agreement or the PEC Rules and Regulations. Instead, it took the position that the "general tenor and content" of the SDS campaign constituted the violation.<sup>400</sup> It is also significant that the Sub-Commission's rulings were delivered in the rough and tumble of real life with real consequences. Whatever their long-term impact on ethnic nationalism and the preservation of the state of Bosnia and Herzegovina, the rulings demonstrated that international commitments cannot be conveniently discarded and that words have meaning.

#### *5. Misfeasance or Malfeasance on the Part of Local Officials, Police, and Parties*

In addition to some of the matters described above, the Sub-Commission addressed other violations by local officials and party members prior to the elections. These included the illegal involvement of a political party in voter registration,<sup>401</sup> voter registration fraud,<sup>402</sup> the obstruction of OSCE voter education efforts,<sup>403</sup> and the confiscation of opposition campaign materials by police.<sup>404</sup> Four of these cases are described below. In the first three,

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398. *See id.* (noting that Dr. Plavsic read the apology on Srpska television three times in compliance with the Election Appeals Sub-Commission ruling).

399. *See* Wilkinson, *supra* note 33, at A1.

400. *See* Case No. 96-34B, *supra* note 382, at 147.

401. *See* In the Matter of Taking of Completed Voter Registration Forms From the Voter Registration Center in Jasenica by the HDZ, Case No. 96-11C, 2 Bilten 27 (Aug. 15, 1996) [hereinafter Case No. 96-11C].

402. *See* Fraudulent Voter Registration, Case No. 96-18D, 3 Bilten 47 (Aug. 30, 1996) [hereinafter Case No. 96-18D].

403. *See* In the Matter of Complaint Against the Mayor of the Municipality of Bugojno and Certain Members of the Bugojno LEC for Inhibiting Voter Education, Case No. 96-26D, 3 Bilten 135 (Sept. 10, 1996) [hereinafter Case No. 96-26D].

404. *See* In the Matter of Complaint by the Joint List Bilt Concerning the



the Sub-Commission imposed appropriate penalties in partial resolution of the violations.<sup>405</sup> In the fourth, involving the police, the circumstances demanded that less formal methods be utilized.<sup>406</sup>

Shortly after the completion of voter registration on July 31st, the Sub-Commission received a complaint from the OSCE field office in Mostar.<sup>407</sup> The complaint alleged that the local branch of the Croatian Democratic Union ("HDZ") had removed completed voter registration forms from one of the registration centers in the municipality and had taken them to its headquarters.<sup>408</sup> Alerted to this, OSCE's Regional Director ordered his staff to collect all voter registration forms from registration centers within Croat-controlled Mostar.<sup>409</sup> At one registration center, a worker initially refused to provide the forms to OSCE without the written permission of HDZ.<sup>410</sup>

Under its Rules and Regulations, the PEC set up a system of local

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Confiscation of Posters and Leaflets by the Police of Bihac Municipality, Case No. 96-17B, 2 Bilten 51 (Aug. 23, 1996) [hereinafter Case No. 96-17B].

405. See Case No. 96-18D, *supra* note 402 (ordering the removal of two members of the local election commission and a public apology by the mayor); Case No. 96-11C, *supra* note 401 (ordering the removal of the President of the local election commission); and Case No. 96-26D, *supra* note 403 (removing another local election commissioner for her role in impeding OSCE voter education).

406. See Case No. 96-17B, *supra* note 404 (noting that the violation committed in this instance was at the hands of local police and not politicians or political parties).

407. Mostar was a particularly unstable area. During the war there was fierce fighting between its Muslim and Croat populations, and much of the Muslim sector of the central city had been destroyed. In July of 1994, the European Union ("EU") and the Federation signed a Memorandum of Understanding ("MOU") providing for EU administration of the municipality for a period of two years. See Szasz, *supra* note 29. In June of 1996, municipal elections were held in Mostar under the authority of the EU. See *Decree on Conduct of Elections for the City Council and the Councils of the City Municipalities of the City of Mostar*, OFFICIAL GAZETTE OF THE CITY OF MOSTAR (published by the EU Administrator of Mostar), Feb. 20, 1996; *Amendments*, OFFICIAL GAZETTE, June 7, 1996; *Decree on the Results of the Election*, OFFICIAL GAZETTE, July 11, 1996. Both the EU administration of the municipality and the elections themselves were contentious and controversial, and the conflict between the Muslim and Croat populations was continuous and intense. See, e.g., *Hardline Croats*, *supra* note 26.

408. See Case No. 96-11C, *supra* note 401.

409. See *id.*

410. See *id.*

election commissions that were responsible for administering the elections under PEC supervision.<sup>411</sup> The competent governmental authorities were to appoint election commission members,<sup>412</sup> subject to PEC approval.<sup>413</sup> Article 21 prohibited political party members from being appointed to the local election commission,<sup>414</sup> as well as those who lacked impartiality.<sup>415</sup> Local election commission responsibilities included managing voter registration and the conducting the voting process.<sup>416</sup> The thrust of these provisions provided for local involvement in administering the elections, while limiting partisan participation in what should be a politically neutral activity.

The removal of completed voter registration forms by a political party constituted a threat to the "politically neutral environment"<sup>417</sup> necessary for free and fair elections.<sup>418</sup> It also cast doubt on the ability of the local election commission in Mostar to impartially supervise the elections.<sup>419</sup> Even though it appeared that HDZ had taken the forms,<sup>420</sup> its top official for the area cavalierly denied the party's involvement upon inquiry by the Sub-Commission.<sup>421</sup> Not only did HDZ's reach extend to the supposedly non-partisan election commissions in Croat-controlled Mostar, the party's leadership apparently believed that it was an authority unto itself.<sup>422</sup> Regardless, the situation could not be tolerated if the rules were to have any meaning.

The Sub-Commission issued a decision in this case ordering the

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411. See *PEC Rules*, *supra* note 124, pt. III, arts. 18-35.

412. See *id.*

413. See *id.* art. 22.

414. See *id.* art. 21(c), 21(d).

415. See *id.* art. 21(e).

416. See *PEC Rules*, *supra* note 124, arts. 28-35 (setting forth the responsibilities of the local election commission).

417. See Dayton Agreement, *supra* note 8, annex 3, art. I.1.

418. See Case 96-11C, *supra* note 401, at 27; see also *PEC Rules*, *supra* note 124, art. 31 (providing that the election commission shall provide transport and security for the "voting materials").

419. See *id.* at 30 (finding the President of the local election commission accountable for the malfeasance and removing him from office).

420. See *id.* at 27-28 (stating that the forms were recovered in HDZ folders).

421. See *id.*

422. See *id.* (quoting an HDZ official as stating that party members had no intention of "justifying [them]selves").

immediate removal of the President of the local election commission, assessing a civil penalty of \$15,000 against HDZ, and ordering the removal of the name from HDZ's list for cantonal elections of the official who had refused to cooperate with the Sub-Commission's investigation.<sup>423</sup>

The Sub-Commission issued another decision regarding the voter registration process after investigating allegations of fraud in a Croat-controlled section of Gornji Vakuf that involved both the self-styled mayor and Croat members of the local election commission.<sup>424</sup> The Sub-Commission found that over 900 completed registration forms were fraudulent. It ordered the removal of two members of the local election commission and required the mayor to issue a public apology that was broadcast on local television and radio.<sup>425</sup>

Under the Rules and Regulations, local election commissions were required to assist in the distribution of election and voter education materials.<sup>426</sup> The International Foundation for Election Systems ("IFES")<sup>427</sup> had been conducting voter education in 22 municipalities at the invitation of OSCE.<sup>428</sup> In all but one, Bugojno in the Federation, IFES had received the support of the local election commission and other officials.<sup>429</sup> IFES filed a complaint against the mayor of Bugojno and members of the local election commission alleging that they had obstructed the organization's efforts within Bugojno.<sup>430</sup> One of the members of the Bugojno commission was an

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423. See Case No. 96-11C, *supra* note 401, at 30.

424. See *In the Matter of Fraudulent Voter Registration Conducted by Certain Members of the Gornji Vakuf Local Election Commission*, Case No. 96-16D, 3 Bilten 47 (Aug. 30, 1996). The municipality of Gornji Vakuf was divided into Croat and Muslim areas, although the separation was not legally recognized by the Federation. The local election commission effectively functioned as two separate units, and the legal status of the "mayor" was questionable. See *id.*

425. See Case No. 96-18D, *supra* note 402, at 50 (holding that the Mayor must make clear his commitment to free and fair elections).

426. See *PEC Rules*, *supra* note 124, art. 35.

427. See Case No. 96-26D, *supra* note 403, at 135 (stating that the IFES, a non-governmental organization ("NGO"), is funded by the United States Agency for International Development ("USAID")).

428. See *id.*

429. See *id.*

430. See *id.* (stating that because of a certain "atmosphere," IFES could not perform voter education informally and that a Mayor's assistant told IFES that groups in Bugojno needed no voter education).

assistant to the mayor. The Sub-Commission found that voter education efforts were indeed obstructed, and ordered the removal of the mayor's assistant from the local election commission.<sup>431</sup>

On August 18, the Sub-Commission received a complaint from the Joint List<sup>432</sup> of Bosnia and Herzegovina, alleging that police in the Municipality of Bihac in the Federation had confiscated campaign posters and leaflets.<sup>433</sup> The content of the materials was satirical in nature, but innocuous.<sup>434</sup> Realizing that Sub-Commission authority over local police was minimal at best, and hoping to have the materials returned forthwith, the Sub-Commission's Chief Prosecutor contacted the Federation's Minister of the Interior that day to enlist his aid in resolving the matter.<sup>435</sup>

The Minister proved cooperative, ordering the campaign materials to be returned immediately, requesting a police report of the incident, and instructing the officers in question to refrain from confiscating such materials in the future.<sup>436</sup> The day following the filing of the complaint, the remaining materials were returned to the Joint List.<sup>437</sup> Shortly thereafter, the Minister of the Interior issued a directive to all police within the Federation, instructing them to permit candidates and political parties to freely publish and distribute campaign materials.<sup>438</sup>

The decision in this case described the informal resolution of the matter,<sup>439</sup> explained the right to freedom of expression guaranteed to

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431. *See id.*

432. Joint List is a multiethnic coalition of political parties.

433. *See* Case No. 96-17B, *supra* note 404, at 51.

434. *See id.* (explaining that the posters, for instance, contained slogans such as "The Choice Exists. The Choice is The Joint List" and "Peace is Searching for New People").

435. *See id.* (noting that the author was the Chief Prosecutor).

436. *See id.*

437. The police had destroyed most of the materials before the involvement of the Federation's Interior Minister. *See id.*

438. *See* Case No. 96-17B, *supra* note 404, at 52 (stating that the directive was issued on Aug. 22, 1996, just days after the original complaint). The directive also noted the importance of democratic elections and instructed the police to undertake "energetic measures" to prevent disruptions of political party meetings. *See id.*

439. This is just one example of the "informal" resolution of problems employed by the Sub-Commission. Necessity demanded it, and the legitimacy that the Sub-Commission had established after its first few cases permitted it.

candidates and political parties, noted that it was illegal for police to seize legitimate campaign materials, censured the police in question, and commended the Minister of the Interior for his prompt response to the problem.<sup>440</sup>

### G. ELECTION DAY PROBLEMS

Election day problems included an OSCE administrative fiasco that prevented numerous individuals from exercising their franchise,<sup>441</sup> polling and counting station irregularities,<sup>442</sup> allegations of fraud in refugee voting,<sup>443</sup> and impediments to voting by displaced persons.<sup>444</sup> Looming over all of this were serious allegations that there were more votes than voters. This latter problem is considered in the next section, which addresses two highly significant failures of the OSCE.

The Rules and Regulations placed time limits on both the filing and consideration of complaints,<sup>445</sup> which were intended to permit certification of the results shortly after the official vote count.<sup>446</sup> Inartfully drafted, the Rules and Regulations were a source of deep confusion in the days following the election.<sup>447</sup> Nonetheless, both

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440. *See id.* at 51.

441. *See, e.g.,* In the Matter of Alleged Disenfranchisement of Voters in Fojnica Due to a Lack of Absentee Ballots, Case No. 96-182, 3 Bilten 219 (Sept. 22, 1996) [hereinafter Case No. 96-182] (finding that 35 people were disenfranchised).

442. *See, e.g.,* In the Matter of Allegations of Voter Irregularities in Polling Station 18 in Poplati, Case No. 96-141, 3 Bilten 211 (Sept. 22, 1996) [hereinafter Case No. 96-182].

443. *See* In the Matter of Allegations of Irregularities Regarding Refugee Voting from Serbia to Croatia, Case No. 96-137, 3 Bilten 191 (Sept. 22, 1996) [hereinafter Case No. 96-137] (stating irregularities such as flooding certain districts with refugees and permitting double voting by refugees from neighboring countries).

444. *See* In re Several Complaints that the Bosniak Displaced Persons (DPs) Who Wanted to Vote Where They Resided in 1991 in Territory that Is Now Part of Republika Srpska Were Prevented or Discouraged From Doing So, Case Nos. 96-103, 96-130, 96-152, and 96-160, 3 Bilten 167 (Sept. 20, 1996) [hereinafter Case Nos. 96-103, 96-130, 96-152, and 96-160] (citing inadequacies of the system for displaced persons).

445. *See PEC Rules, supra* note 124, art. 137 (empowering the PEC to include a procedure to lodge complaints).

446. *See* Report to Head of Mission, *supra* note 31, at 11, 16, 18 (noting the period between election day, Sept. 14, and the date of the final decision, Sept. 28).

447. Three supplements to the Rules and Regulations were issued prior to

political reality and a reasonable interpretation of the Rules led to a September 28th deadline by which the Sub-Commission was to dispose of all pending cases.<sup>448</sup> Before certifying the results of the elections, the Provisional Election Commission was required to satisfy itself that all significant complaints had been resolved.<sup>449</sup>

### *1. Problems with the Voter List*

On election day, numerous appeals were filed by voters who were unable to vote because their names could not be found on the voters' lists at polling stations throughout the country.<sup>450</sup> A total count proved impossible.<sup>451</sup> In considering this matter, the Sub-Commission found that the problem was occasioned by a change in the format from the provisional voters' lists used during the registration period and the final voters lists used on election day. As a result, the names were organized differently, greatly confusing poll-workers and resulting in an indeterminate number of citizens who were disenfranchised.<sup>452</sup>

The Sub-Commission found that the number of individuals affected was "not sufficient to call into question the integrity of the elections."<sup>453</sup> It recommended, however, that the Provisional Election Commission review the problems "as a matter of the utmost

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election day. Two of the supplements contained provisions addressing time limits, although they did not provide the desired clarity. Since the matter was ultimately resolved, there is little value in providing an exegesis of the applicable provisions here.

448. Between September 14th and September 28th, the Sub-Commission issued 98 decisions.

449. See *PEC Rules*, *supra* note 124, art. 235.4 (stating that "[t]he Provisional Election Commission shall issue its certification of each election when it is satisfied that all complaints which could affect significantly the election results have been dealt with").

450. See Report to Head of Mission, *supra* note 31, at 16. The Sub-Commission received over 300 appeals filed in person on election day at its offices in Sarajevo. Many others were filed by individuals and political parties at OSCE offices. See *id.*

451. See *In the Matter of Allegations of Names Not Being on the Final Voter's List on Election Day*, Case No. 96-123, 3 Bilten 159 (Sept. 18, 1996) [hereinafter Case No. 96-123] (finding it difficult to estimate the number, but rejecting the "exaggerated allegations" that appeared in the press).

452. See ICG REPORT, *supra* note 255, at 25 (noting reports of election observers estimating that 5% of the potential electorate was a reasonable estimate).

453. *Id.*

urgency” in view of the upcoming municipal elections.<sup>454</sup> As a practical matter, there was little the Sub-Commission could do in this situation.<sup>455</sup> It was satisfied that the problems were inadvertent and that they did not constitute a violation of the Rules and Regulations. The elections had taken place, the counting had begun, and it was simply not feasible to reopen the polls so that these people could vote.

## 2. Polling and Counting Center Irregularities

The Provisional Election Commission Rules and Regulations set forth a number of provisions with respect to both the conduct of voting and the counting of ballots, including requirements for polling and counting station personnel.<sup>456</sup> There were numerous problems reported by OSCE election supervisors, international monitors, and others.<sup>457</sup> Working very quickly, Sub-Commission staff reviewed reports from the field and contacted OSCE staff in the various locations. The Sub-Commission made a number of specific findings in these areas and removed a number of officials from their positions. In one decision, it recommended to the Provisional Election Commission that the results from a particular polling station be nullified.<sup>458</sup>

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454. *Id.* at 19 (suggesting that the PEC revert to the format of the provisional voters list rather than the final voters list).

455. *See id.* (calling the problems merely an administrative mishap).

456. *See PEC Rules, supra* note 124, supp. 1-3.

457. *See* Report to Head of Mission, *supra* note 31, at 16-17. Polling station problems included the acceptance of false voter identifications, the failure to “ink” voters, the presence of candidates and campaign materials in polling stations, the failure to complete required OSCE paperwork, the provision of unnecessary “assistance” to voters, and the failure to permit opposition representatives from officially noting their objections in the polling station log books. Counting-related irregularities included breaches in safeguarding ballot boxes, the intentional spoiling of ballots during the count, defective procedures in the chain of custody of the ballots, and the lack of required paperwork to accompany the ballots to the counting centers.

458. *See* Integrity of the Vote at Polling Station 28, Case No. 96-140, 3 Bilten 163 (1996) [hereinafter Case No. 96-140]. The power to annul results was in the “only and exclusive competence of the [PEC].” *PEC Rules, supra* note 124, art. 226. The PEC was unable to implement this recommendation because the ballots from the polling station in question had been mixed with other ballots at a central counting site.

### 3. *Alleged Fraud in Refugee Voting*

In one decision, the Sub-Commission responded to a number of complaints filed by the SDA alleging irregularities with respect to refugee voting, including double-voting by refugees living in Croatia and Serbia.<sup>459</sup> OSCE had provided for an ambitious program of refugee voting that extended to 58 countries.<sup>460</sup> There were registration and voting components to the program in each country. Each country's procedures for refugee voting, however, were outside the administrative control of the OSCE and the PEC. With one exception, all refugee voting took place in advance of election day in Bosnia and Herzegovina.<sup>461</sup> While there was a great deal of criticism regarding the effectiveness of the refugee voting program, it generally fell outside the enforcement jurisdiction of the Sub-Commission.<sup>462</sup> In this case, however, refugee voting irregularities involved actual balloting within Bosnia and Herzegovina on election day.<sup>463</sup>

Specifically, the complaints alleged that authorities in the Federal Republic of Yugoslavia ("FRY")<sup>464</sup> had coerced refugees from the Federation to vote in certain areas. It also alleged that some of the refugees had voted twice: first they voted in the country in which they were living, and later they crossed the border in Bosnia and Herzegovina to vote again on election day. On the basis of a number of reports, the Sub-Commission found that Serb refugees in FRY had been coerced into voting in specific areas of Republika Srpska in order to receive refugee benefits.<sup>465</sup> FRY authorities, however, were

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459. See Case No. 96-137, *supra* note 443, at 191-92.

460. See RESG Final Report on Bosnia and Herzegovina National and Cantonal Elections Abroad, Oct. 11, 1996 [hereinafter RESG Final Report]. According to the Refugee Elections Steering Group ("RESG") in Vienna, established under the auspices of the OSCE Mission to Bosnia and Herzegovina, over 630,00 refugees living in 58 countries registered to vote; 80% voted in the elections of September 14th. See *id.*

461. See RESG Final Report, *supra* note 460, pt. VII.2 (noting that to correct an administrative error, in-person voting in Dubrovnik in the Republic of Croatia was repeated on election day).

462. See Case No. 96-137, *supra* note 443, at 191.

463. See *id.* at 192.

464. The Federal Republic of Yugoslavia consists of the former socialist Yugoslav Republics of Serbia and Montenegro.

465. See *id.*



outside the Sub-Commission's jurisdiction.<sup>466</sup>

The Sub-Commission also considered reports of alleged double voting and discovered that there was no mechanism in place to prevent such an occurrence.<sup>467</sup> While voters from within Bosnia and Herzegovina had to have their fingers marked with invisible ink to prevent double voting,<sup>468</sup> there was no such requirement for refugees.<sup>469</sup> Therefore, it would have been possible to vote in either Serbia or Croatia and to vote again in Bosnia and Herzegovina. The Sub-Commission expressed its "grave concern" with this loophole, but was not presented with specific evidence that this had occurred.<sup>470</sup> Therefore, it could only recommend that the PEC fix the problem in advance of the municipal elections.<sup>471</sup>

#### *4. Impediments to Voting*

Given the recent history of horrific violence in Bosnia and Herzegovina, there were fears that election day would be marred by major incidents of violence.<sup>472</sup> That fear was not realized, as election day was largely peaceful. The failures in implementing key provisions of the Dayton Agreement, however, had an effect on the ability of many displaced persons to vote in their pre-war homes.<sup>473</sup> This problem was addressed by the Sub-Commission in a decision issued in response to numerous complaints.<sup>474</sup> In its decision, the Sub-Commission estimated that up to 30,000 Bosniacs, then living in

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466. *See id.* at 191.

467. *See id.* (finding it possible for a refugee to vote first by absentee ballot outside of Bosnia and, later, cast his or her vote in person within Bosnia).

468. *See PEC Rules, supra* note 124, art. 98 (explaining that "[t]o prevent voters from voting more than once, invisible ink detectable with an ultraviolet light will be used. Each voter will be checked for invisible ink stain with the ultraviolet light prior to being processed to receive their ballot.").

469. *See id.* art. 113.

470. *See* Case No. 96-137, *supra* note 443, at 191-92.

471. *See* Report to Head of Mission, *supra* note 31, at 19.

472. Citing the obligation to protect "freedom of movement," the Election Appeals Sub-Commission required local authorities to ensure that the voters would not suffer "violence of any kind" on election day. *See* Advisory Opinion 7, *supra* note 239, at 143.

473. *See* Case Nos. 96-103, 96-130, 96-152, and 96-160, *supra* note 444, at 167 (stating that the Dayton Agreement held out a promise to "weary and war-battered citizens" of Bosnia to vote where they lived in 1991).

474. *See id.*

the Federation, were discouraged from voting in their former homes in Republika Srpska.<sup>475</sup> The decision noted that a major objective of the Dayton Agreement was to facilitate the return of citizens to their 1991 homes and to provide them an opportunity to vote there in the OSCE-supervised elections.<sup>476</sup> The Sub-Commission found, however, that security arrangements in place on election day were inadequate to fulfill that objective.<sup>477</sup>

The decision examined a number of factors that contributed to this state of affairs, but ultimately concluded that the problems were not of a scale to have affected the outcome of the elections.<sup>478</sup> The Sub-Commission noted, however, that the problems identified could have an impact on municipal elections and recommended to the PEC that steps be taken to resolve the problems in advance of those elections.<sup>479</sup>

#### H. OSCE FAILURES—OVERALL VOTE COUNT AND ALLOCATION OF SEATS

Two controversial decisions demonstrate the Sub-Commission's role as an independent voice within the OSCE Mission. One involved allegations that too many people voted in the elections.<sup>480</sup> The other, which came long after the certification of the elections, found that the PEC had failed to apply the proportional representation formula in the Rules and Regulations to the detriment

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475. See *id.* at 170 (finding a wide range in the estimate: 6,000 to 30,000). According to IFOR, approximately 12,000 Bosniacs had in fact crossed into Republika Srpska to vote on election day. See *id.* at 171.

476. See *id.* at 167; see also Dayton Agreement, *supra* note 8, annex 4, art. II.5 (explaining that "[a]ll refugees and displaced persons have the right to freely return to their homes of origin"); *id.* annex 3, art. IV.1 (explaining that "[a] citizen who no longer lives in the municipality in which he or she resided in 1991 shall, as a general rule, be expected to vote, in person or by absentee ballot, in that municipality"). PEC Rules and Regulations follow this objective. See *PEC Rules*, *supra* note 124, art. 8 (stating that "[e]very effort will be made by OSCE and other international organizations concerned to facilitate the return of citizens to the municipality where they were registered in 1991 to vote in person").

477. See Case Nos. 96-103, 96-130, 96-152, 96-160, *supra* note 444, at 170-72.

478. See *id.* at 171.

479. See *id.*

480. See Interim Judgment—Allegations Regarding the Number of Votes Cast, Case Nos. 96-195, 96-193, 96-183, 3 Bilten 223 (Sept. 25, 1996) [hereinafter Case Nos. 96-195, 96-193, 96-183].

of opposition candidates.<sup>481</sup>

### *1. Overall Vote Count*

After the election, the Sub-Commission received complaints by the SDA and the International Crisis Group ("ICG")<sup>482</sup> alleging that the voter turn-out was too high.<sup>483</sup> ICG's analysis of the data concluded that the turn-out as a proportion of the maximum electorate could have been as high as 103.9 percent.<sup>484</sup> In arriving at this figure, ICG used an estimate of 2.9 million potential voters as its starting point.<sup>485</sup> This number had been used by a number of international organizations for planning purposes and had been adopted by the OSCE.<sup>486</sup>

The Sub-Commission's analysis of the data lead to a "conservative estimate" that the maximum number of eligible voters was closer to 3.2 million.<sup>487</sup> This put the turn-out percentage, conservatively, at seventy-seven percent, although the Sub-Commission noted that it had not taken into consideration a number of factors "known to have placed obstacles in the way of certain voters or groups of voters."<sup>488</sup> The Sub-Commission concluded that the seventy-seven percent figure was sufficiently high to cast doubt on the legitimacy of the vote, particularly in light of the "cumulative effect of the problems

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481. See Supplemental Judgment—Number of Seats Allocated to Political Parties Case No. 96-225-S, Oct. 23, 1996 [hereinafter Case No. 96-225-S]. By the time this decision was issued, Volume 3 of the *Bilten* had already gone to press. It remains unpublished in an official source.

482. ICG is an international non-governmental organization monitoring the implementation of the Dayton Agreement. Prior to filing the complaint, it had been a major critic of the OSCE, including the Sub-Commission. See discussion, *infra* pt. VI.A.

483. See Case Nos. 96-195, 96-193, 96-183, *supra* note 480.

484. See ICG REPORT, *supra* note 255, at 30-32.

485. See *id.* at 30.

486. Jeff Fischer, OSCE Director-General of Elections, acknowledged that the OSCE had been inconsistent in its estimates of the voting population and had used the 2.9 million figure for some purposes, but not others. See Jeff Fischer, *Responses*, Transcript of IFOR Press Briefing 7-8, 13, Sept. 28, 1996 [hereinafter IFOR Press Briefing], available at <<http://www.nato.int/ifor/afsouth/t960928a.htm>>.

487. See Case Nos. 96-195, 96-193, 96-183, *supra* note 480, at 224.

488. *Id.*

identified in previous decisions,<sup>489</sup> such as disenfranchisement due to problems with the voters list, the possibility of double voting by refugees, impediments to voting by displaced persons, and various instances of fraud in particular polling places. The Sub-Commission recommended that the PEC order a complete recount to determine if the high turnout was due simply to miscalculations or fraud. In reaching the decision, the members of the Sub-Commission publicly declared their unanimity for only the second time.<sup>490</sup>

It is difficult to overstate the pressures on the Sub-Commission as it considered this matter. Its recommendation, in turn, placed enormous pressure on the PEC. In the days following the election, there had been a feeding frenzy among the international press over this issue.<sup>491</sup> The PEC, which alone had competence to order a recount, declined to follow the recommendation and ultimately weathered the storm.

## 2. Allocation of Seats

On September 28th, the Sub-Commission disposed of all its pending cases, setting the stage for PEC certification of the election results the following day.<sup>492</sup> One of the decisions issued that day was in response to complaints filed by several opposition parties. In each complaint, the party alleged that it was not allocated the proper number of seats required by the proportional representation formula set forth in the Rules and Regulations.<sup>493</sup> After staff had briefly discussed the matter with the OSCE Mission officials, the Sub-Commission issued a one-page decision.<sup>494</sup> It acknowledged that the

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489. *Id.*

490. *See id.*

491. An example of the press interest in this matter can be seen in the Press Briefing attended by Ambassador Frowick and other high ranking OSCE officials on September 28, 1996. *See* IFOR Press Briefing, *supra* note 486, at 5-18.

492. *See* Cases Pending Before the Election Appeals Sub-Commission Case No. 96-240, 3 Bilten 259 (Sept. 28, 1996) [hereinafter Case No. 96-240] (ruling that there were no cases pending before the Sub-Commission that required a determination).

493. *See* Case No. 96-225, *supra* note 250, at 255 (maintaining that the formula set out in Article 115 of the PEC Rules and Regulations leads to a different allocation of electoral seats).

494. *See id.* (acknowledging the parties' allegations and ordering further review).

formula could be confusing and referred the matter to the PEC with a recommendation to check the calculations and inform the complainants as to how the calculations were made.<sup>495</sup> It also requested that it be provided with a copy of any redetermination.<sup>496</sup> At this point, the Sub-Commission believed it had completed its decision-making with respect to the elections of September 14th. This was not the case.

On October 14th, one of the original complainants once again asked the Sub-Commission to investigate the matter.<sup>497</sup> The Sub-Commission forwarded a copy of the new complaint to the PEC, urgently requesting that a copy of any redetermination and method of calculation be provided.<sup>498</sup> As the Sub-Commission attempted to resolve the matter, a number of conversations between OSCE officials and Sub-Commission staff ensued. On October 22nd, the PEC responded to the Sub-Commission.<sup>499</sup> On the following day, the Sub-Commission issued its decision.<sup>500</sup>

Before reaching the decision, however, the Sub-Commission staff conducted an internal review of what had happened.<sup>501</sup> It was not an easy task, as many members of the Mission had already left Sarajevo and others cooperated with the Sub-Commission only reluctantly. Nonetheless, the Sub-Commission staff was able to determine that the formula published in the Rules and Regulations was not the formula that had been used in allocating seats after the voting.<sup>502</sup>

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495. *See id.*

496. *See id.* (stating "[a] copy of this re-determination should be provided to the Election Appeals Sub-Commission").

497. The complaint referred to a statement attributed to OSCE Spokesman David Foley. The ONASA News Agency in Sarajevo had reported that Mr. Foley had indicated that "the original formula . . . for calculating the votes 'did not work' . . . . Due to the 'rush of events' preceding the elections, Foley said the OSCE quickly employed the new formula but did not publicize the change . . . Foley apologized for the confusion, but added that the [PEC] . . . unanimously verified the election results." *OSCE Apologizes for Not Disclosing Election Formula Switch*, ONASA, Oct. 10, 1996 [hereinafter *OSCE Apologizes*].

498. *See* Case No. 96-225-S, *supra* note 481.

499. *See id.*

500. *See id.*

501. *See id.* (discussing the Sub-Commission's review of the Article 91 formula, its applicability, and the changes that the OSCE made).

502. *See OSCE Rule Change Favours Ruling Parties*, AGENCE FRANCE-PRESSE, Oct. 9, 1996, available in LEXIS, News library, Curnws File [hereinafter *OSCE*].

The formula set forth in the Rules and Regulations was designed to be used in the various legislative elections to be held on September 14th.<sup>503</sup> After the postponement of the elections for municipal assemblies, fourteen elections were left to which a proportional representation formula was to be applied.<sup>504</sup> The Rules and Regulations provided a fairly straightforward system to allocate the votes (the "Article 91 formula"), and included a hypothetical to illustrate how that system would work.<sup>505</sup> In its decision, the Sub-Commission explained it as follows:

The operation of the Article 91 formula is thus a two stage process. An initial allocation is made on the basis of simple proportionality. Those parties which receive at least one seat in the initial allocation then qualify to receive further, unallocated seats, on the basis of their remainder value. The Article 91 formula is simple to understand and operate.<sup>506</sup>

There was only one problem with the formula. In certain hypothetical situations, the simple application of the formula might fail to allocate all the seats.<sup>507</sup> After the publication of the formula in the Rules and Regulation, tests were conducted at the operational level within OSCE to see how the formula would work in practice. Ultimately, the testing gave way to the introduction of what

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*Rule Change Favours Ruling Parties*] (finding that the original formula that all parties agreed to was not the one used in the September 14 elections).

503. See *PEC Rules*, *supra* note 124, art. 3.

504. The fourteen elections included ten cantonal assemblies in the Federation, the National Assembly of Republika Srpska, the House of Representatives of the Federation, and two elections (one in each Entity) to the House of Representatives of Bosnia and Herzegovina. See *id.* art. 3.

505. *PEC Rules*, *supra* note 124, art. 91. The full text provides:

The system of Proportional Representation to be used will be a simple quota system in which the initial allocation of seats will be made by dividing the total number of votes cast in the election by the number of seats, and then dividing the number of votes cast for each party by the resulting figure. Any remaining seats are then allocated to the parties with the largest remainder, provided that that party has already won at least one seat in the initial allocation. A chart showing how this system will work is attached.

*Id.* art. 115.

506. Case No. 96-225-S, *supra* note 481.

507. See *id.* (providing that "[t]his may occur when independent candidates receive enough votes to qualify for more than one seat; where parties receive enough votes to qualify for more seats than they have candidates on their party list; and where the number of seats to be allocated by the remainder procedure exceeds the number of parties qualified to receive them").

amounted to a new formula.<sup>508</sup> The full PEC, however, was not informed about the changes until after the election.<sup>509</sup> The Sub-Commission applied both the Article 91 formula and the new formula to the votes cast in the fourteen different elections.<sup>510</sup> It found that in twelve of the fourteen elections, the Article 91 formula would have worked perfectly.<sup>511</sup> In the other two, its failure to allocate all the seats could have been easily resolved by an interpretation in the spirit of the regulation.

In contrast, the Sub-Commission found that the actual application of the new formula "worked," in the sense that it allocated all of the seats. However, it also determined that the new formula had a negative effect on the political opposition.<sup>512</sup> In nine of the elections that would have worked perfectly under the Article 91 formula, opposition candidates lost ten seats to the majority parties as a result of application of the new formula.<sup>513</sup>

The Sub-Commission noted that the PEC's actions had been ambiguous and characterized an OSCE press statement of October 10th as "inaccurate and misleading"<sup>514</sup> in asserting that the formula had been the subject of extensive consultation within the PEC before the election.<sup>515</sup> The PEC first discussed the question of seat allocations at a formal meeting several days after the election, but was apparently advised that the actual formula had not changed.<sup>516</sup> The decision included the following observation with respect to the new formula's legal status, in light of the PEC's communication to

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508. See Giles Elgood, *Group Says Bosnian Elections Mishandled*, REUTERS WORLD SERVICE, Oct. 9, 1996, available in LEXIS, News Library, Curnws File (stating that when the OSCE realized that the formula would not work in all situations, it came up with a more complex formula to get around the problem).

509. See Case No. 96-225-S, *supra* note 481 (noting that the OSCE adjusted the formula without consulting the PEC).

510. See *OSCE Change Favours Ruling Party*, *supra* note 502.

511. See Case No. 96-225-S, *supra* note 481; see also Elgood, *supra* note 508 (stating that OSCE apologized for the change in formulas because it knew two parties were affected).

512. See *id.* (noting that the opposing parties complained that they have lost out under the new system).

513. See *id.* (stating that the new formula affected approximately ten seats across eight different ruling bodies).

514. See Case No. 96-225-S, *supra* note 481.

515. See *id.*

516. See *id.* The meeting took place on Sept. 20, 1996. See *id.*

the Sub-Commission of October 22nd:

[T]he PEC acquiesced in the adoption of a method of calculation which was different from the provisions of Article 91. In as much as the new method of calculation departs from Article 91, the PEC must be presumed to have acquiesced also in making the necessary amendments to Article 91.

This is, in the view of the Sub-Commission, a very unsatisfactory situation. The Rules and Regulations of the Provisional Election Commission form part of the domestic law of Bosnia and Herzegovina. It is a matter of grave concern that these Rules and Regulations can be changed in such an arbitrary and casual fashion.<sup>517</sup>

The decision also expressed the Sub-Commission's "dissatisfaction" with the manner in which the seat allocation formula had been addressed by the PEC and its "serious reservations about the validity of retroactive amendments."<sup>518</sup> Ultimately, however, the Sub-Commission was compelled to relinquish jurisdiction.<sup>519</sup> The election results had been certified; many of those elected had already taken their seats in the various legislative bodies; and the PEC had, however belatedly and inadequately, ratified its previous actions.<sup>520</sup>

It is important to understand that the very purpose of any proportional representation system is to provide a voice to the political opposition. The PEC's actions in changing the formula effectively took ten seats from the political opposition and gave them to the three majority parties.<sup>521</sup> The significance of this decision is that an OSCE body finally provided a full and accurate accounting of what had occurred in the seat allocation controversy. Anyone with a pocket calculator and a modicum of patience could have tested the Article 91 formula against the official results in nine elections and found that it had not been properly applied. The complainants, and the public, deserved an explanation. Within 48 hours of the issuance

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517. *Id.*

518. *Id.*

519. See Case No. 96-225-S, *supra* note 481; see also NATO-IFOR Press Briefing, Oct. 29, 1996, available in LEXIS, News Library, Curnws File [hereinafter NATO-IFOR Press Briefing] (noting that after the PEC's response to the actions of the OSCE, the Sub-Commission relinquished jurisdiction).

520. See NATO-IFOR Press Briefing, *supra* note 519.

521. See *id.*



of this decision, there were efforts within OSCE to immediately dissolve the Sub-Commission. These efforts were not successful, and no formal proposal to dissolve the Sub-Commission was ever made to the PEC.

## VI. JUDGING THE JUDGES: WAS THE ELECTION APPEALS SUB-COMMISSION EFFECTIVE?

There are challenges in attempting to assess the effectiveness of an enforcement body such as the Sub-Commission, particularly for someone so closely associated with it. How is effectiveness defined and measured? To what extent does it depend on expectations? A useful comparison could be made to the overall efforts of the international community, both civil and military, in implementing key provisions of the Dayton Agreement, i.e., can the implementation be considered a success? Dropping down a level, it may be useful to measure the effectiveness with reference to the OSCE supervision of the elections, i.e., to what extent did the OSCE fulfill its mandate under Annex 3 to the Dayton Agreement? Ultimately, however, the Sub-Commission's relative effectiveness must be viewed within its own limited sphere. The true test in evaluating the Sub-Commission is how it fulfilled its own mandate to enforce the Rules and Regulations of the Provisional Election Commission.<sup>522</sup> Such an evaluation is highly subjective. In attempting to draw a reasoned conclusion, however, it is useful to look to the following: the assessment of the Sub-Commission's performance by critics and others, the extent to which participants in the elections exhibited confidence in the Sub-Commission as an institution, and compliance with Sub-Commission decisions.

### A. ASSESSMENT OF OTHERS

To date, only the ICG<sup>523</sup> has thoroughly and formally examined the performance of the Sub-Commission. The ICG has been a persistent critic of the OSCE. In August 1996, the watchdog organization called for a "postponement of the elections in Bosnia and

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522. See *PEC Rules*, *supra* note 124, art. 137-44 (establishing the Election Appeals Sub-Commission and its role as enforcer of the PEC Rules and Regulations).

523. See ICG REPORT, *supra* note 255 (describing the ICG).

Herzegovina on the grounds that the minimum conditions for a free and fair poll did not exist.”<sup>524</sup> After the elections, it concluded: “On the basis of [the] failure to achieve the required conditions for holding the elections, disenfranchisement, electoral engineering, and the preliminary vote count results, the September 14th elections in Bosnia and Herzegovina cannot be considered free and fair as required by the [Dayton Agreement].”<sup>525</sup> In this same report, the ICG described the Sub-Commission as “the one organ within the OSCE which could effectively ensure compliance with the [Dayton Agreement] and the PEC Rules and Regulations.”<sup>526</sup> In its analysis of the decisions prior to the elections, it criticized the Sub-Commission’s reluctance “to resort to serious sanctions despite the considerable powers available to it.”<sup>527</sup> The report was particularly harsh in its assessment of the Sub-Commission’s handling of the secessionist speech issue late in the campaign.<sup>528</sup>

[B]y not using its mandate to sanction offenders more resolutely, even in cases when the violations could lead to serious conflict and threaten the whole fabric of the [Dayton Agreement], the EASC has encouraged some of the Parties to escalate the extreme nationalist rhetoric and to flaunt their immunity. Furthermore, the OSCE’s failure to follow up on its own warnings that candidates will be removed from party lists if serious breaches of the [Dayton Agreement] and the Rules and Regulations were repeated, makes a mockery of the international community’s effort in Bosnia and Herzegovina.<sup>529</sup>

In an addendum to its report issued on October 30, 1996, ICG revisited the question of the Sub-Commission’s performance.<sup>530</sup> The addendum focused primarily on the two decisions involving the OSCE failures with respect to the vote count and seat allocation controversies.<sup>531</sup> It noted, generally, that the Sub-Commission

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524. *See id.* at 1.

525. *Id.*

526. *Id.*

527. *Id.* at 16.

528. *See* discussion, *supra* pt. V.F.4 (discussing issues in secessionism, secessionist speech, and freedom of expression and the problems involved in freedom of expression and ethnic nationalism).

529. ICG REPORT, *supra* note 255, pt. II, at 17.

530. Addendum to ICG REPORT, Oct. 30, 1996 [hereinafter Addendum to ICG REPORT].

531. *See* discussion, *supra* pts. V.H.1-V.H.2. ICG was one of the complainants

“functioned under difficult political conditions and with severe limitations [in terms of resources].”<sup>532</sup> The examination concluded with the following reappraisal:

[T]he EASC contributed significantly to the electoral process in Bosnia and Herzegovina, especially in view of the shortcomings of the OSCE's other elections supervisory and monitoring bodies. . . . In the final analysis, the EASC was the only body within the OSCE which undertook to ensure that international standards for a free, fair and democratic election were upheld.<sup>533</sup>

Ed Van Thijn, the Coordinator of International Monitoring (“CIM”) for the September 14th elections, issued a statement addressing the appeals process indicating his “overall” support for the Sub-Commission’s judgments and noting that its rulings on campaign violence and voter registration problems confirmed his own “critical analysis” of these issues.<sup>534</sup> He concluded his brief commentary as follows:

The CIM evaluates positively the transparent and relatively simple EASC procedures for lodging complaints, and recommends greater voter education regarding these procedures for the municipal elections.

The CIM considers the Appeals Mechanism to be installed for future elections in Bosnia and Herzegovina could gain further credibility by strengthening its activities in terms of scope and effectiveness in ensuring the respect of electoral rules and regulations, and by ensuring a larger degree of autonomy from other bodies responsible for the organization of the elections, including the [PEC].<sup>535</sup>

Other than the thorough and direct examination by the ICG and the bland and careful assessment by the CIM, there has been little analysis of the Sub-Commission’s performance and effectiveness.

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in the Vote Count Case. *See* Case No. 96-214, *supra* note 238.

532. Addendum to ICG REPORT 9, *supra* note 530.

533. *Id.*

534. *See* Second Statement of the Coordinator for International Monitoring 4, Sept. 24, 1996 [hereinafter Second Statement]. The Chairman-in-Office of the OSCE had appointed Mr. Van Thijn as CIM in March of 1996. It was his responsibility to make an assessment of the entire electoral process to see if various objectives under the Dayton Agreement had been met. *See* Preliminary Statement of the CIM 1, Sept. 14, 1996.

535. Second Statement, *supra* note 534, at 4.

There were news articles prior to the elections highly critical of the overall OSCE effort that implicated the Sub-Commission.<sup>536</sup> None, however, analyzed the Sub-Commission's work in a detailed way.<sup>537</sup> In the United States, there was some congressional testimony. After the elections, a representative from the Human Rights Watch group addressed the Sub-Commission's role:

We call on the OSCE's Election Appeals Subcommittee to strike from the ballot those candidates for municipal positions who have participated in attacks on opposition members, engaged in serious violations or manipulation of other elections rules and regulations, or who have participated in restricting freedom of movement.

The rules and regulations of the [PEC] permit them to take such action. While they did exercise this mandate during the general elections, it was to a very limited extent, and we would like to see a concentrated effort to apply penalties where appropriate.<sup>538</sup>

Within the OSCE Mission, there was a general view that the Sub-Commission had performed its job well. In a written response to ICG's criticism of the elections, the former Acting Chairman of the PEC noted favorably: "The [EASC], consisting of Muslim, Croat and Serb judges with a Norwegian chairman, imposed a number of penalties for breaches of the electoral rules (mostly by the three ruling parties). These included fines, disqualification of candidates and dismissal of corrupt election officials."<sup>539</sup> This reflected Sir Kenneth's oft-stated views as to the value of the Sub-Commission. At a formal dinner of the Sub-Commission and the PEC held in Pale on September 8th, for instance, he referred to the Sub-Commission as the PEC's "muscle." While this can be viewed as the type of self-congratulatory rhetoric that often characterizes remarks at such

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536. See, e.g., Wilkinson, *supra* note 25, at A1 (stating that the Sub-Commission had too many cases, too few resources, and insufficient time and information to obtain evidence for prosecution); Spolar, *supra* note 390, at A17 (noting the Sub-Commission's insufficient resources, suggesting that it was not doing enough).

537. See, e.g., Wilkinson, *supra* note 25, at A1. The Wilkinson piece contains some inaccuracies.

538. *Bosnia Peace Process: Hearings Before the Subcomm. on European Affairs of the Senate Comm. on Foreign Relations*, 104th Cong. 127 (Oct. 1, 1996) (statement of Diane Paul, Helsinki Researcher, Human Rights Watch).

539. Scott, *supra* note 333.

events, it fairly represented the informal comments of many within the OSCE Mission that the Sub-Commission's efforts had been helpful.

Additional evidence that the Sub-Commission was viewed positively was demonstrated in the two weeks between election day and PEC certification of the results. During that time, high-ranking officials of the OSCE from outside the Mission and interested foreign governments visited Sub-Commission offices to be briefed on significant issues that had arisen.

Finally, there was a great amount of both international and local press coverage of major Sub-Commission rulings, which indicates that the rulings were significant. Indeed the reported criticisms of the Sub-Commission by some of the participants show that the rulings had some effect.<sup>540</sup>

#### B. MAKING USE OF THE SUB-COMMISSION

Another measure of an enforcement body's effectiveness is the extent to which it is utilized. The PEC had referred the *Silajdzic* case to the Sub-Commission even before it was officially constituted.<sup>541</sup> Its decisive action in that case no doubt persuaded the PEC to turn to the Sub-Commission when faced with difficult problems during the campaign. The PEC saw the value in referring controversial matters to the Sub-Commission and in being able to announce that the Sub-Commission was considering cases so that it could deflect criticism. This suggests that there was sufficient local confidence in the workings of the Sub-Commission to provide the OSCE with this type of political cover.

In addition to the PEC, as the campaign progressed, the actual participants in the process increasingly made use of the complaint process. In its first month, the Sub-Commission issued only a handful of rulings. By election day, it had issued 53 decisions and seven advisory opinions. After election day, it issued 100 additional decisions. Those who were respondents in early Sub-Commission proceedings apparently decided it was advantageous for them to

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540. See, e.g., *Krajisnik Protests OSCE Fine for SDS*, *supra* note 285.

541. See discussion, *supra* pt. V.E. (discussing the establishment of the Sub-Commission and the importance of the *Silajdzic* case).

become complainants.<sup>542</sup> Even the IGC, so critical of the Sub-Commission, decided to file a complaint in the *Vote Count Case*.<sup>543</sup> The obvious conclusion is that the various complainants, whatever their particular motivation, found it worthwhile to bring cases before the Sub-Commission.

### C. COMPLIANCE WITH SUB-COMMISSION RULINGS

There was a high degree of compliance with Sub-Commission rulings. This is particularly evident in the various public apologies made by respondents prior to the elections. True, the record is not perfect. At one point, SDS candidates and Republika Srpska government officials ignored a Sub-Commission advisory opinion and even continued to defy the Sub-Commission after it had assessed penalties in a subsequent case.<sup>544</sup> Even in that case, however, Biljana Plavsic was finally persuaded to capitulate and delivered a public apology on the eve of the elections that had been written by the Sub-Commission.<sup>545</sup>

Respect for Sub-Commission decisions was also seen through informal contacts with individuals who had been penalized. One HDZ candidate who had been removed from the party list for cantonal elections contacted the Sub-Commission to ascertain if it was permissible for him to otherwise stay involved in the elections as a party official. He was told that he could. An angry mayor who had been ordered to make a public apology in a fraudulent voter registration case contacted the Sub-Commission to complain and to try to negotiate details. When told the matter was non-negotiable, he reluctantly made himself available for the taping of the apology by OSCE officials.

Finally, the Sub-Commission was able to resolve a number of matters informally, even where its actual jurisdiction was questionable. The Sub-Commission engineered an agreement with the SDS on the use of Karadzic posters late in the campaign,<sup>546</sup> and

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542. The SDA, for instance, was penalized early on the *Silajdzic* and other cases. At the end, SDA had itself become one of the more prolific complainants.

543. See Case No. No. 96-214, *supra* note 238.

544. See discussion, *supra* pt. V.F.4.

545. See discussion, *supra* notes 394-99 and accompanying text.

546. See discussion, *supra* note 390 and accompanying text.

was able to establish a fruitful relationship with the Federation Minister of the Interior to curb police abuses and to provide at least minimal protections for opposition parties and candidates in their campaigns.<sup>547</sup>

#### D. CONCLUSIONS

Based on the above considerations, the Sub-Commission can be seen as having been reasonably effective in its enforcement role. Its decisions were generally respected, and the individuals and entities for which it was designed had sufficient confidence in it to make use of the complaint process. Indeed, the essence of the published criticism of the Sub-Commission's performance was that it did not do enough. This is considered below.

### VII. LESSONS LEARNED

#### A. WHY THE SUB-COMMISSION WAS EFFECTIVE

If there is a common theme on how the Sub-Commission conducted itself, it is the sense of balance it exhibited in carrying out its responsibilities. *First*, it had to balance its notional independence with the reality that its authority derived from the Provisional Election Commission.<sup>548</sup> It was truly a *sub*-commission. *Second*, despite the fact that it was described as and acted as a "juridical body,"<sup>549</sup> it had to weigh legal considerations against political reality. Without the political support of the PEC and the Head of the OSCE Mission, it could not have been effective. From the beginning, the Sub-Commission had a good sense of how far it could go. Moreover, the Sub-Commission had to balance the need to punish and deter violations with its overall goal that the elections go forward as mandated by the Dayton Agreement. In this connection, it was essential that the Bosnians themselves, particularly the political parties, support Sub-Commission decisions. The Sub-Commission had to establish that its decisions were fair and well-reasoned, even if

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547. See discussion, *supra* notes 436-38 and accompanying text.

548. See *PEC Rules*, *supra* note 124, art. 137 (establishing the Election Appeals Sub-Commission and noting that the powers are delegated by the PEC).

549. *Id.*

particular ones were unwelcome by some. *Third*, the Sub-Commission had to balance fundamental notions of due process with the need to resolve cases quickly. There were insufficient time and resources to conduct the type of proceedings that would pass muster in established Western democracies.

There are a number of specific factors that underlie the Sub-Commission's effectiveness as an enforcement body. They include the following: real enforcement powers, personnel, insulation from nationalist pressures, impartiality, and speed of decisions.

### B. ENFORCEMENT POWERS

Without meaningful enforcement powers, the Sub-Commission would have been irrelevant. Under PEC Rules and Regulations, the Sub-Commission could generally impose "appropriate penalties and/or fines."<sup>550</sup> As a practical matter, this general authority would not have been worth very much if the Sub-Commission had to go outside the OSCE Mission to enforce its decisions. Fortunately, the PEC gave the Sub-Commission the specific power to terminate candidacies by ordering the removal of candidates' names from ballots or party lists.<sup>551</sup> The PEC controlled party and individual candidate registration as well as party lists, so the Sub-Commission could readily implement a ruling to terminate candidacies. This was the Sub-Commission's single most important enforcement tool, and it was used sparingly. Indeed, after the names of seven candidates were struck from the SDA's list for municipal elections in July for the attack on Dr. Silajdzic, only two others had their candidacies terminated. In other cases, however, the Sub-Commission threatened the sanction if respondents did not comply promptly with Sub-Commission decisions. This threat induced several respondents to comply with Sub-Commission orders to issue public apologies and to take other steps to remedy violations. Without it, there would have been no public apologies or other meaningful compliance with Sub-Commission decisions.

The Sub-Commission was able to assess monetary penalties

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550. *PEC Rules*, *supra* note 124, art. 140.

551. *See id.* art. 141. The rules also permitted the Sub-Commission to decertify a political party, a very tough sanction. As a practical matter, it could only have been used in the most extreme situation.



against political parties, but only to the extent of their entitlement to a form of public financing administered by the OSCE Mission. These were useful in the sense that they were widely reported in the press. In its own right, the withholding of campaign funds from the major parties was not a significant deterrent. Since they all controlled the organs of government, the money itself was not all that important to them.

Finally, under its general authority, the Sub-Commission was able to remove individuals from positions of authority in the system of local election commissions that had been set up by the OSCE Mission. Since these individuals could lose payment for their service on the commissions, it was a legitimate enforcement tool.

### C. PERSONNEL

The enforcement powers themselves were important, but so was the willingness and ability of the Sub-Commission to use these powers in creative and meaningful ways. This resulted from the quality of individuals who made up the Sub-Commission. The Bosnian judges on the Sub-Commission were people of uncommon integrity, who brought vast experience and dedication to their jobs. Under the skilled leadership of the Chairman, Finn Lynghjem of Norway, they developed a rapport with one another that permitted the Sub-Commission to become the juridical body envisioned in the PEC Rules and Regulations. A Muslim, a Croat, and a Serb genuinely liked and respected one another. The atmosphere at Sub-Commission meetings was cordial. While not unmindful of practical and political realities, they were all judges who saw their role on the Sub-Commission to make legal judgments in concrete cases. The Bosnian members were fully engaged in the decision-making. The Bosnian lawyers, two of whom were judges themselves, also made great contributions to the effective functioning of the Sub-Commission.

The international legal staff included individuals with experience and expertise in elections, the workings of enforcement agencies, investigations, litigation, the laws and institutions of Bosnia and Herzegovina, and freedom of expression. The Sub-Commission's Special Investigator had 25 years of experience as a policeman in the United States. It is hard to conceive how the job would have been

done without the talents of these individuals, supported by a local staff of translators and interpreters.

#### D. INSULATION FROM NATIONALIST PRESSURES

As noted earlier,<sup>552</sup> the Bosnian members of the Sub-Commission were largely insulated from nationalist pressures by the secrecy of the proceedings. Sub-Commission meetings were held in executive session. The votes of individual members were not disclosed, and there were no separate or concurring opinions. This permitted the Bosnian judges and lawyers to speak freely at Sub-Commission meetings, take principled positions, and make meaningful contributions to the Sub-Commission's work without fear of retribution or meddling from their sponsors. It was an extremely important feature in the work of the Sub-Commission.

#### E. IMPARTIALITY

The fact that the three major ethnic groups in Bosnia were represented on the Sub-Commission was an effective buffer to any challenges of partiality. Nonetheless, there were concerns within the Sub-Commission that it might be perceived as being too tough on the Muslims, particularly the SDA. Its first few major decisions imposed the most severe penalties on the SDA. This was largely unavoidable inasmuch as the Sub-Commission had to respond to charges leveled against the party. Eventually, however, the SDS and the HDZ received their fair share of sanctions. It was important that all sides could be reasonably confident that the Sub-Commission would act against any of the nationalist parties that violated the law.

#### F. SPEED OF DECISIONS

Enforcement powers, dedicated personnel, and integrity mean nothing to an enforcement body unless it can reach decisions that have an impact on the process. The conditions under which the Sub-Commission had to work were difficult. The Sub-Commission's geographical jurisdiction encompassed the entirety of Bosnia and Herzegovina. Travel was arduous; there was only one investigator; postal service and telephones were unreliable; and there was virtually

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552. See discussion, *supra* notes 188-89 and accompanying text.

no communication possible between the two Entities.<sup>553</sup> After the Sub-Commission first convened in early July, only ten weeks remained until the election. Time was of the essence. The Sub-Commission did not have the luxury of leisurely considering a case, fully investigating it, and providing respondents with the opportunities to be heard that are common in Western democracies.

Quite simply, it did the best that it could within the time allowed. This approach might best be described as "rough justice," a term used by both Chairman Lynghjem and PEC member John Reid to refer to the practical response of the Sub-Commission to the necessities of the situation. The Sub-Commission cobbled together investigations by sending out its own investigator to interview witnesses when feasible. It relied on information from OSCE staff in regional and field offices; it sought the cooperation of other international organizations, such as the IPTF; and it worked with Federation officials to gain the cooperation of local police. Respondents were informed of complaints against them and given a limited opportunity to present their case. Sometimes this would take the form of an exchange of telephone calls or fax messages. In short, the Sub-Commission did what was necessary to keep the cases moving. This is one reason why there was a relatively high number of dismissals. Of the 53 decisions issued before election day, thirty-three were dismissals. Some were dismissed on their obvious lack of merit. Others were dismissed because of the Sub-Commission's judgment that other cases were more important to the process and more likely to lead to conclusive results. The average case was resolved within two weeks, some within a few days. The Sub-Commission was determined not to become hamstrung by trying to do more than was possible and thus ending up with no meaningful decisions to show for it.

#### G. A MODEL FOR THE FUTURE

In recent years, the international community has supervised elections in a post-conflict setting on at least five occasions.<sup>554</sup> Only

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553. See discussion, *supra* pt. V.B.

554. The U.N. supervised elections in Namibia in 1989 and Cambodia in 1993. It also had a more limited supervisory role with respect to elections held in 1997 in Eastern Slovenia (Croatia). The European Union supervised elections in Mostar in

in Bosnia and Herzegovina was there a significant focus on creating a mechanism to enforce the electoral laws. Based on the experience of the Sub-Commission in Bosnia and Herzegovina, it would behoove the international community to give serious consideration to election law enforcement when it supervises elections.

In order to run an election, the election authority must establish rules. If the rules are to be respected, they must be enforced. How those rules are enforced should be a significant consideration in any such effort. In essence there are two choices: 1) the political authority itself, i.e. the OSCE or the U.N., can enforce the rules on an ad hoc basis, or 2) it can create an enforcement body whose mandate is to enforce the political authority's rules. In Bosnia and Herzegovina, the PEC saw the wisdom of creating a separate enforcement body. In so doing, it was able to concentrate its efforts on the administrative and political questions for which it was the ultimate authority. By establishing the Sub-Commission as a quasi-judicial body with real enforcement powers, it gave the process credibility.

At its most basic level, the quasi-judicial model of enforcement was only able to work in Bosnia and Herzegovina because the Dayton Agreement was unambiguous in its grant of authority to the OSCE to "supervise [the elections] in a manner to be determined by the OSCE."<sup>555</sup> It even mandated the PEC to "[ensure] that action is taken to remedy any violation or any provision of this Agreement or of the electoral rules and regulations . . . including imposing penalties against any person or body that violates such provisions."<sup>556</sup> There was no question as to the authority of the OSCE and PEC to establish a body to enforce its rules. As a preliminary matter, then, the international or regional organization supervising elections must have clear and unambiguous authority to administer the elections in the manner it sees fit. In the absence of such authority, the supervision will likely be compromised.

If, however, the international or regional body has real supervisory powers, it must write an election law with a workable enforcement regime. The Sub-Commission model has certain advantages that

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Bosnia and Herzegovina three months in advance of the OSCE-supervised elections in September of 1996.

555. Dayton Agreement, *supra* note 8, art. II.2.

556. *Id.*

could work in similar post-conflict situations. *First*, as a quasi-judicial body, its decisions were widely viewed as legal determinations that were above the political fray. *Second*, its membership included representatives of the major political factions contesting the elections, effectively blunting serious criticisms of partiality. *Third*, its leadership was international, insulating its local members from factional pressures and preventing it from succumbing to bickering and inaction. *Fourth*, while it was under the direct authority of the PEC and Head of the OSCE Mission, it had sufficient independence to be perceived as a separate source of authority. *Fifth*, its enforcement powers were real, making it possible to both punish and deter violations.

It is time for the international community to see election law enforcement as an integral part of election supervision. The experience of the Election Appeals Sub-Commission in Bosnia and Herzegovina provides a valuable lesson to those members of the international community who are responsible for and committed to free and fair elections.

## EPILOGUE\*\*

The previously postponed municipal elections were held in Bosnia and Herzegovina on September 13 and 14, 1997, under the supervision of the OSCE.<sup>557</sup> On November 22 and 23, 1997, elections for the National Assembly of the Republika Srpska were held, again under the supervision of the OSCE.<sup>558</sup> In both cases, the Election Appeals Sub-Commission played the same role as it had in the 1996 elections. Judge Lynghjem of Norway continued to serve as Chairman and Chief Judge. The same Bosnian judges and lawyers also served in their same capacities. According to Judge Lynghjem, the Sub-Commission exercised the same powers that it had exercised

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\*\* The following account is based upon conversations and e-mail correspondence between the author and Chairman and Chief Judge Finn Lynghjem in late 1997 and early 1998.

557. See Report to Head of Mission, Election Appeals Sub-Comm'n Org. for Sec. and Cooperation in Eur., Mission to Bosnia and Herzegovina, Oct. 27, 1997.

558. See Report to Head of Mission, Election Appeals Sub-Comm'n Org. for Sec. and Cooperation in Eur., Mission to Bosnia and Herzegovina, February 3, 1998.

in 1996 with only minor changes to the Rules and Regulations of the PEC. In Judge Lynghjem's opinion, the Sub-Commission's role in the 1997 elections was even stronger than in 1996, since the national factions and parties "had learned from 1996" that the Sub-Commission was able to enforce the law. Indeed the PEC delegated additional authority to the Sub-Commission in September and October of 1997 to strike elected officials who obstructed the implementation of the municipal elections. As of this writing, the Election Appeals Sub-Commission remains in existence and is one of the success stories of the civilian implementation of the Dayton Agreement.