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BOSNIA AND THE LIMITATIONS OF INTERNATIONAL LAW

I. INTRODUCTION

The demise of Soviet hegemony in Eastern Europe¹ has proven as troublesome as it has fruitful.² With the relaxation of control has come the rise of ethnic conflicts.³ Yugoslavia

1. See Francis X. Clines, *The End of the Soviet Union*, N.Y. TIMES, Dec. 23, 1991, at A1.

2. See generally Anthony Clark Arend, *The United Nations and the New World Order*, 81 GEO. L.J. 491 (1993) (assessing UN's role in the new world order); Jane Hall, *Q & A with Christiane Amanpour*, L.A. TIMES, July 14, 1993, at F1 (CNN's ongoing correspondent in Bosnia, Christiane Amanpour, reflecting on the confusion in Europe after the fall of the Soviet Union); Roma Inhatowycz, *Ukraine Has Stake in Russia Victory over Parliament*, UPI, Oct. 5, 1993, available in LEXIS, Nexis Library, Currnt File (Ukrainian Foreign Ministry hopes that "Western leaders [will] see the necessity of filling the security vacuum that was left in Eastern Europe after the fall of the Soviet Union"); Howard LaFranchi, *Heady Talk of European Unity Subsides in Era of Bosnia*, CHRISTIAN SCI. MONITOR, Aug. 30, 1993, at 1 (stating that the fall of Soviet Union and war in Bosnia essentially puts an end to hopes of European union); National Public Radio Broadcast (Mar. 6, 1993) (reporting that the fall of Soviet Union has resulted in ethnic splintering, including a war in Georgia, an ex-Soviet Union republic).

3. See *supra* note 2; see also Peter S. Green, UPI, Feb. 24, 1992, available in LEXIS, Nexis Library, Currnt File (reporting ethnic tensions in Czechoslovakia); Jane Perlez, *The World: Visions of the Past Are Competing for Votes in Poland*, N.Y. TIMES, Sept. 12, 1993, § 4, at 5 (Vaclav Havel, the Czech President, recently observed that "the removal of Communism's 'vast shroud of uniformity' was bringing an 'eruption of so many different kinds of old-fashioned patriotism, revivalist messianism, conservatism, and expressions of hatred' in Eastern Europe"); *Hungarian's Attack on Opponents Sets off Storm*, N.Y. TIMES, Sept. 20, 1992, § 1, at 8 (center-right ruling party leader in Hungary cites "genetic reasons for deterioration" of Hungary); Adam Lebor, *Hungary: Political and Ethnic Differences Creating Social Unrest*, Inter Press, Feb. 1, 1992, available in LEXIS, Nexis Library, Currnt File (Hungarian member of parliament indicates that "[s]erious ethnic conflicts are likely because of Hungary's growing economic problems and the increase in racism"); *Romanian Leader Says Hungary Foments Ethnic Strife*, Reuters, Oct. 10, 1992, available in LEXIS, Nexis Library, Currnt File (President of Romania, Ion Iliescu, states that transition from Communism has resulted in ethnic strife both within Romania and between Romania and Hungary); Peter Humphrey, *50,000 Romanians Join Opposition Election Rally*, Reuters, Sept. 23, 1992, available in LEXIS, Nexis Library, Currnt File (fearing that ethnic Hungarians may attempt to sever Transylvania from Romania); Vladimir Zhelyazkov, *Ethnic Strife Could Endanger Democracy in Bulgaria, President Says*, UPI, Nov. 3, 1991, available in LEXIS, Nexis Library, Currnt File (president of Bulgaria warning that

has suffered tremendously from the civil war that began when the Yugoslav army, under Serbian control, attacked the Slovenian militia in June of 1991.⁴ In its course, the conflict has sharply divided the diverse population of the republic of Bosnia-Herzegovina.⁵ Muslims, Serbs, and Croats have struggled to invest themselves with their own ethnically defined autonomy.⁶ The Bosnian Serbs, backed by the inheritors of the Yugoslav army, Serbia, have grabbed most of the embattled republic, if not the sympathy of the world.⁷ The resolution of the conflict, although closely managed by the International Conference on the Former Yugoslavia (ICFY), may be guided by the inescapable fact that the Serbs have been the victors of the war.⁸ Principles of international law must be set aside in order to stop the fighting as soon as possible.⁹ Bosnia will be fortunate to survive intact.

II. BACKGROUND

A. *The Present Status of Yugoslavia*

Yugoslavia¹⁰ was a leading non-aligned Communist state¹¹ when the Communist regimes of Europe began to top-

"[e]thnic egoism and the nationalistic political propaganda of certain parties are creating a real threat of an ethnic crisis which would endanger our country and its fragile democracy"; Tony Barber, *Row Over Albania's Greek Minority Fuels Balkan Flames*, THE INDEPENDENT (London), July 12, 1993, at 10 (describing ethnic unrest in Albania, as Greek separatists clamor to be united with Greece); Judy Dempsey, *Communists Stumble on the Road to Reform*, FIN. TIMES (London), Jan. 3, 1991, at 2 (describing post-Communism ethnic unrest in Romania, Bulgaria, Albania, and Yugoslavia).

4. See MISHA GLENNY, THE FALL OF YUGOSLAVIA 89-90 (1992); see also discussion *infra* part II.A.

5. See discussion *infra* part II.A.

6. See discussion *infra* part II.A.

7. See *infra* text accompanying note 105 and discussion *infra* part II.A.3.

8. See discussion *infra* parts II.A.3, III.A., and IV.

9. See discussion *infra* part III.A.

10. The Socialist Federal Republic of Yugoslavia (SFRY) had six provinces (Bosnia-Herzegovina, Croatia, Macedonia, Montenegro, Serbia, and Slovenia) as well as two Socialist Autonomous Provinces (Kosovo and Vojvodina). BRANKA MAGAS, THE DESTRUCTION OF YUGOSLAVIA 16-17 (1993). Kosovo and Vojvodina are now part of Serbia. *Id.* See also *infra* text accompanying note 83.

11. GORDON C. McDONALD ET AL., AREA HANDBOOK FOR YUGOSLAVIA 282-83 (1973). Tito, having developed the non-alignment concept, convened the first Conference of Non-Aligned States in Yugoslavia's capital of Belgrade in 1960. *Id.* at 282. See also ALVIN Z. RUBINSTEIN, YUGOSLAVIA AND THE NONALIGNED WORLD (1970) (providing an overview of the development and practice of non-alignment by Yugoslavia).

ple one by one in 1989.¹² Created as a single nation for the first time after the First World War,¹³ Yugoslavia was held together following the Second World War by the single persona of Tito.¹⁴ After his death in 1980, the ethnic divisions within Yugoslavia that Tito had managed so well began to destabilize the country.¹⁵ Serbia, the dominant republic in Yugoslavia, sought to force the maintenance of the federal system,¹⁶ and with this final squeeze of federal power, Slovenia and Croatia slipped away.¹⁷ Macedonia also became more or less autonomous.¹⁸ Bosnia-Herzegovina, on the other hand, did not have a clear ethnic majority like the other republics, and its future became somewhat uncertain.¹⁹ Only forty-four percent of the population are Muslims, whereas thirty-one percent are Serbs and nineteen percent are Croats.²⁰ Thus, Bosnia does not represent a single ethnicity, as do the other republics. The ethnic Serbs and Croats in Bosnia decided that they wanted to either join their regions of Bosnia to Serbia and Croatia, respectively, or to obtain almost complete ethnic autonomy within Bosnia.²¹ Bosnian

12. See GLENNY, *supra* note 4, at 177; see also generally Meriel Beattie, *Bulgaria's Leaders Promise Free Elections, No Party Monopoly*, Reuters, Dec. 12, 1989, available in LEXIS, Nexis Library, Archiv File (fall of Communism in Bulgaria); Michael Wise, *Once-Dissident Havel Inaugurated as Czechoslovak President*, Reuters, Dec. 29, 1989, available in LEXIS, Nexis Library, Archiv File (fall of Communism in Czechoslovakia); Mark Heinrich, *E. German Communist Hierarchy Quits; Honecker Ousted from Party*, Reuters, Dec. 3, 1989, available in LEXIS, Nexis Library, Archiv File (fall of Communism in East Germany); David Lewis, *Hungarian Prime Minister Presides over Quiet Revolution*, Reuters, Nov. 23, 1989, available in LEXIS, Nexis Library, Archiv File (fall of Communism in Hungary); Andrew Tarnowski, *Poland Becomes Democracy, Strips Communists of Leading Role*, Reuters, Dec. 30, 1989, available in LEXIS, Nexis Library, Archiv File (fall of Communism in Poland); *Ceausescu Overthrown, Flees by Helicopter*, Reuters, Dec. 22, 1989, available in LEXIS, Nexis Library, Archiv File (demonstrating the fall of Communism in Romania).

13. See discussion *infra* part II.A.1.

14. MAGAS, *supra* note 10, at 26-27. Tito led the partisans to victory in Yugoslavia during World War II, simultaneously achieving independence and a socialist state. *Id.* at 79. He ruled Yugoslavia continuously until his death in 1980. *Id.* at 77.

15. *Id.* at xii-xiii.

16. GLENNY, *supra* note 4, at 42.

17. *Id.* at 96-97.

18. *300 U.S. Troops in Macedonia to Try to Contain Balkan War*, N.Y. TIMES, July 13, 1993, at A10.

19. MAGAS, *supra* note 10, at 18.

20. *365 Days in Yugoslavia*, CHRISTIAN SCI. MONITOR, Mar. 10, 1992, at 20.

21. *Peace in the Hands of Unpeaceful Serbs*, THE ECONOMIST, Jan. 9, 1993, at 41, 41-42. Bosnian Croat forces are managed by the Croatian Defense Coun-

Serbs and Croats did not wish to be ruled by the Muslim plurality.²² Indeed, Serb and Muslim antagonism dates back at least to the fourteenth century.²³

Unfortunately, the three ethnic groups in Bosnia were intermingled throughout the republic.²⁴ Hence, no clear lines could be drawn. Serbs sought to connect their areas by force, and the Croats followed suit.²⁵ The Muslims were placed in a primarily defensive position, and the Serbs never lost their momentum.²⁶ In an effort to legitimize and support the besieged Bosnian government in Sarajevo, Bosnia was officially recognized as an independent state and was admitted as a member of the United Nations (UN).²⁷ This diplomatic effort and the presence of UN troops,²⁸ however, have contributed very little to a definitive solution to the problem.

Since the war began in 1991, no republic in Yugoslavia suffered more greatly than Bosnia-Herzegovina.²⁹ While the war developed into an uneasy *détente* in the rest of what was once Yugoslavia, the fighting in Bosnia continued as fiercely as ever.³⁰ There have been a variety of cease-fires, plans, and

cil, which in turn is controlled by the Croatian government in Zagreb. GLENNY, *supra* note 4, at 159. Radovan Karadzic, the leader of the Bosnian Serbs, has directed Bosnian Serb forces throughout the conflict. *Id.* at 154, 167-68.

22. GLENNY, *supra* note 4, at 154-55, 163.

23. See discussion *infra* part II.A.1.

24. GLENNY, *supra* note 4, at 146-47.

25. *Id.* at 163, 167. The Bosnian Serbs launched their offensive after the referendum for Bosnian independence was passed on March 1, 1992. *Id.* at 162-68. In the referendum, although only 64.8% of the Bosnian population voted, 99% voted in favor of independence. *365 Days in Yugoslavia*, *supra* note 20, at 20. The Croats in Bosnia, especially those in the West, fought a vicious battle for territory against the Serbs, often aided by Muslim forces. GLENNY, *supra* note 4, at 164.

26. *Bosnia's Dismal Endgame*, THE ECONOMIST, Aug. 7, 1993, at 45.

27. See discussion *infra* part II.A.2.

28. See Nikola Gurovic, *UN Troops Arrive to Protect Sarajevo Airport*, UPI, July 2, 1992, available in LEXIS, Nexis Library, Currnt File.

29. Kurt Schork, *Bosnian President Gives Vance-Owen Plan High Marks*, Reuters, May 9, 1993, available in LEXIS, Nexis Library, Currnt File. As of July 5, 1993, the British Broadcasting Corporation reported that 139,000 Bosnians were either dead or missing since the war began. *Croatian Radio: Latest Casualty Figures for Bosnia-Herzegovina* (BBC World Broadcasts, July 5, 1993), available in LEXIS, Nexis Library, Currnt File.

30. See *Ex-Yugoslavia: The Fight Goes on*, THE ECONOMIST, Sept. 26, 1992, at 54; Paul Holmes, *Bosnia Leaders Agree Constitutional, Truce Accords*, Reuters, July 30, 1993, available in LEXIS, Nexis Library, Currnt File; Paul Holmes, *Muslim, Serb Offensives Threaten Peace Talks*, Reuters, Aug. 2, 1993, available in LEXIS, Nexis Library, Currnt File.

promises, but a resolution of the conflict remains beyond the horizon.³¹

1. *The Origin of Bosnia*

After Roman influence in the Balkans waned in the fifth century, many different groups controlled Yugoslavia. In the sixth century, however, the Slavs settled the region.³² Apparently forced to flee from Eastern Europe, they acquired what was then known as Illyria by 650 AD.³³ The Slav settlers, even then, were divided into three distinct groups: Croats, Serbs, and Slovenes.³⁴ The Slovenes and Croats became Roman Catholic, while the Serbs became Orthodox.³⁵ Serbo-Croat is spoken by the Serbs and Croats, but the two groups use different alphabets.³⁶ The Slovenes have their own language.³⁷

Settled by Croats and Serbs, Bosnia did not have a strong identity until the end of the twelfth century.³⁸ The conflict between the members of the Roman Catholic Church and those of the Eastern Orthodox Church was later compounded by the addition of a third group, the Bogomils, who splintered off from the Roman Catholic Croats.³⁹ A peculiar Christian sect, the Bogomils completely shunned the mate-

31. See Eduardo Cue, *Decision on Bosnia Could Mark Turning Point for NATO, EC*, CHRISTIAN SCI. MONITOR, Aug. 9, 1993, at 3; *Morning Edition: Bosnian Airstrike Idea "Painted" by International Bureaucracies* (National Public Radio broadcast, Aug. 13, 1993), available in LEXIS, Nexis Library, Currnt File.

32. H.C. Darby, *Historical Origins*, in A SHORT HISTORY OF YUGOSLAVIA 8, 8-11 (Stephen Clissold ed., 1968).

33. *Id.* at 11. Nearly all but the far eastern portions of Yugoslavia, as well as Albania, constitute ancient Illyria. *Id.* See also McDONALD ET AL., *supra* note 11, at 26-27.

34. Darby, *supra* note 32, at 11.

35. *Id.* Religion has been an essential factor in the history of Yugoslavia, and of Bosnia in particular; lines were drawn on the basis of religion resulting in the present seemingly unresolvable schisms between Muslims, Orthodox Serbs, and Catholic Croats. See *infra* text accompanying notes 39-59.

36. Darby, *supra* note 32, at 11. The Serbs use the Cyrillic alphabet, whereas the Croats use the Latin alphabet. *Id.*

37. *Id.* Slovene is quite distinct from Serbo-Croat, and is probably most similar to Slovak. E. GARRISON WALTERS, *The Other Europe: Eastern Europe to 1945*, at 19 (1988).

38. H.C. Darby, *Bosnia and Hercegovina*, in A SHORT HISTORY OF YUGOSLAVIA: FROM EARLY TIMES TO 1966, *supra* note 32, at 58 [hereinafter Darby, *Bosnia and Hercegovina*].

39. *Id.* at 58-59. This heretical Christian cult arose in the twelfth century. *Id.*

rial world.⁴⁰ Surprisingly, this religion became widespread at all social levels.⁴¹ Strong Bosnian leaders, interspersed with foreign domination by Serbia, Croatia, and Hungary, characterized Bosnia in the Middle Ages.⁴² King Tvrtko of Bosnia (1353-1391), backed by Hungary, eventually became King of Serbia and Croatia as well, bringing Bosnia to the peak of its power.⁴³ He defeated Turkish invasion attempts in both 1386 and 1388.⁴⁴ But in 1389, the Turks were better prepared, and they defeated the combined forces of the Bosnians and Serbs in the Battle of Kosovo.⁴⁵ Bosnia slipped into chaos until Turkish rule was finally assured when the last Bosnian king, Stefan Tomasevic, was captured and executed by the Turks in 1463.⁴⁶ One of the most enduring effects of the Turkish capture of Bosnia was the conversion of the Bogomils to Islam.⁴⁷ Apparently, the converts were some of the more zealous members of the Islamic faith, outdoing the religious fervor of their converters.⁴⁸ Thus the three groups present today in Bosnia—Croats, Serbs, and Muslims—were in place by the fifteenth century.⁴⁹ The Turks primarily used the converted Bogomils in local administrative posts, embedding the Muslims in the governance of the province.⁵⁰ As a result, Catholicism nearly died out under Turkish rule, leav-

40. *Id.*

41. *Id.* at 59.

42. *Id.* at 59-60.

43. *Id.* at 60-62.

44. Ivan Bozic, *The Balkan World During the Turkish Conquests*, in HISTORY OF YUGOSLAVIA 113, 115-16 (Marie Longyear ed. & Kordija Kveder trans., 1974).

45. *Id.* at 116. The battle remains an ethnic rallying point for present-day Serbs. GLENNY, *supra* note 4, at 34.

46. Bozic, *supra* note 44, at 118-19; Ivan Bozic, *The Establishment of Turkish Power*, in HISTORY OF YUGOSLAVIA, *supra* note 44, at 127, 131-32; Darby, *Bosnia and Hercegovinia*, *supra* note 38, at 62-63.

47. Darby, *Bosnia and Hercegovinia*, *supra* note 38, at 63.

48. Darby offers the following description of the converts:

While keeping their own language, they imitated the dress, the titles and many of the customs of the Turkish court; "they displayed the customary zeal of converts and out-Ottomaned the Ottomans in their religious fanaticism," and indeed they became, at times, "keener in the cause of Islam than the Commander of the Faithful himself."

Id. at 64 (quoting W. MILLER, ESSAYS ON THE LATIN ORIENT 494-95 (1921)).

49. See *supra* text accompanying notes 38-39, 47.

50. FRED SINGLETON, TWENTIETH-CENTURY YUGOSLAVIA 37 (1976). Consequently, the period of Turkish domination does not have exclusively negative connotations in Bosnia as it does in the rest of Yugoslavia. *Id.*

ing Muslims and Serbs as the primary occupants of the country.⁵¹

Turkey ruled Bosnia for nearly 500 years, but after Turkey lost a number of wars to Austria, Bosnia became an independent state in 1878.⁵² The control of Bosnia, however, was merely transferred from the Ottoman Empire to the Austro-Hungarian Empire.⁵³ Under the Catholic Austrian administrators, the Orthodox Serbs were continually persecuted, resulting in the migration of Bosnian Serbs to Serbia.⁵⁴ Thus, as the Croats had been forced out by the Turks, and the Serbs by the Austrians, the Muslims constituted an increasingly large proportion of the Bosnian population.⁵⁵ By 1910, the Serbs accounted for forty-four percent of Bosnia, the Muslims thirty-two percent, and the Croats twenty-three percent.⁵⁶ The Muslims overtook the Serbs as the plurality in the 1971 census, with forty percent of the total population, as opposed to thirty-seven percent for the Serbs and twenty-one percent for the Croats.⁵⁷ In 1908, Austria officially annexed Bosnia, angering all three groups in

51. Darby, *Bosnia and Hercegovina*, *supra* note 38, at 65.

52. *Id.* at 66.

53. *Id.* at 68-69. When Serbs and Croats in Bosnia began to rebel against the Turks in 1875, other Balkan Slavs under Turkish domination followed suit. WALTERS, *supra* note 37, at 73. As Russia, the self-styled protector of the Slavs in the Balkans, edged nearer to waging a war against the Turks, Austria-Hungary understandably became nervous. *Id.* If Russia were to unify the Slavs in the region and push the Turks out of Europe, the balance of power would shift against the Austro-Hungarians. *Id.* Therefore, the Dual Monarchy of Austria-Hungary persuaded Russia to agree not to create a new large Slavic state in the Balkans (namely a gigantic Bulgaria) and to hand Bosnia-Hercegovina over to Austria-Hungary. *Id.*

Russia won the 1877-1878 war and was so enthusiastic that, in the Russo-Turkish Treaty of San Stefano (1878), Russia declared that there would be a new large Slavic state and that Bosnia would become independent. *Id.* at 74; SINGLETON, *supra* note 50, at 38. This action was unacceptable to the Austrians as well as to the British. WALTERS, *supra* note 37, at 74. Ultimately, Germany convened a conference six months later in 1878 to revise the treaty, resulting in a restoration of the original agreement between Austria-Hungary and Russia. SINGLETON, *supra* note 50, at 38. Bulgaria was scaled back in size, and Bosnia was occupied by the Austrians. WALTERS, *supra* note 37, at 74. Thus, instead of becoming autonomous, Bosnia continued to be the property of an empire, albeit a different one.

54. Darby, *Bosnia and Hercegovina*, *supra* note 38, at 69-72. Additionally, many Serbs left Bosnia to fight for Serbia and Montenegro during the Balkan Wars of 1912-13. SINGLETON, *supra* note 50, at 58.

55. See *supra* text accompanying notes 51, 54.

56. SINGLETON, *supra* note 50, at 58 n.73.

57. *Id.* at 236-37.

the process.⁵⁸ In 1914, amid the confusion arising from the Serbs wanting to join Serbia, the Croats wanting to join Croatia, and the Muslims fearing both, a Bosnian revolutionary assassinated the heir to the Austrian throne, and the First World War became inevitable.⁵⁹

After the war and the demise of Austria-Hungary, the status of Yugoslavia became an open question—one that was resolved in favor of independence.⁶⁰ The Kingdom of Yugoslavia was formed in 1918 and at first was considered the successor to the State of Serbia.⁶¹ During the Second World War, Germany conquered Yugoslavia and divided it among Italy, Hungary, Bulgaria, and Germany.⁶² The occupiers joined Bosnia with parts of Croatia to form the theoretically autonomous "Independent State of Croatia," which in effect was under Axis control.⁶³ Since World War II, Yugoslavia

58. *Id.* at 58. Bosnian Serbs considered the official annexation to be nothing less than an act of aggression against Serbia; the rejection of Turkish claims to Bosnia outraged the Bosnian Muslims; and the Catholic Croats did not desire further Germanic influences in the region. *Id.*

59. Darby, *Bosnia and Hercegovina*, *supra* note 38, at 72; McDONALD ET AL., *supra* note 11, at 38-39. Although the complex origins of the First World War are beyond the scope of this comment, the assassination was the pretext that Austria had been waiting for to declare war on Serbia. MARC FERRO, *THE GREAT WAR 39-40* (Ark Paperbacks 1987) (1969). Austria sent Serbia an ultimatum phrased in such a way that no government could accept it. *Id.* at 40. Nonetheless, Serbia agreed to all the terms except one—placing the administration of Serbia under Austrian control. *Id.* at 41-42. Upon receipt of this refusal, Austria promptly declared war on Serbia. *Id.* at 42. Consequently, Russia began to mobilize to protect Serbia, and soon all of Europe was at war. *Id.* at 43-45.

60. H.C. Darby & R.W. Seton-Watson, *The Formation of the Yugoslav State*, in *A SHORT HISTORY OF YUGOSLAVIA: FROM EARLY TIMES TO 1966*, *supra* note 32, at 154, 162-69. Alexander Karadjordjevic, in the capacity of regent for his father, King Peter of Serbia, declared Yugoslavian independence on December 1, 1918. SINGLETON, *supra* note 50, at 66. The Allies at Versailles ensured the formation of the new state. *Id.* A multitude of border disputes were resolved by 1924. *Id.*

61. 2 D.P. O'CONNELL, *STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW: INTERNATIONAL RELATIONS 378-79* (C.J. Hamson & R.Y. Jennings eds., 1967). Only Serbia had been an independent state before World World I; the remainder of Yugoslavia had been controlled by Austria-Hungary to varying extents. H.C. Darby, *Serbia*, in *A SHORT HISTORY OF YUGOSLAVIA: FROM EARLY TIMES TO 1966*, *supra* note 32, at 87, 124-25; SINGLETON, *supra* note 50, at 66-67. Furthermore, a Serbian King ruled all of Yugoslavia upon independence. McDONALD ET AL., *supra* note 11, at 43.

62. 1 O'CONNELL, *supra* note 61, at 214. For a map of the division, see SINGLETON, *supra* note 50, at 87.

63. Stephen Clissold, *Occupation and Resistance*, in *A SHORT HISTORY OF YUGOSLAVIA*, *supra* note 32, at 208-11.

has remained independent, and its borders have been respected.⁶⁴ The republics are so eager to secure their independence at last that they will do nearly anything to grab as much territory as possible while borders remain somewhat vague.⁶⁵

2. *Simmering Ethnic Tensions: The New States*

As the world's relations become more interwoven and the world's economies grow even more mutually dependent, organizations such as the United Nations gain tremendously in significance.⁶⁶ Accordingly, international law has assumed greater authority and responsibility, and an international order is growing in significance.⁶⁷ With the end of the U.S.-

64. *Black History*, THE ECONOMIST, Aug. 22, 1992, at 36.

65. See *Peace in the Hands of Unpeaceful Serbs*, *supra* note 21, at 41; see also discussion *infra* part II.A.2. Since the breakdown of the federal system in Yugoslavia, the boundaries between the republics have not been respected. See *supra* text accompanying notes 21-25. Under the guise of self-determination, Serbs and Croats especially have attempted to alter the borders of Serbia and Croatia, depending upon where Serbs and Croats happen to live. *Id.*; see also discussion *infra* part III.B.

66. *The Economist* has reported that:

Today's economies are interdependent. Flows of trade and capital tie countries more closely together than at any time since the 19th century. A recession in one country slows growth elsewhere; one government's budget deficit draws resources not just from domestic savings but from a global pool of capital that all have to share.

The Perils of Togetherness, THE ECONOMIST, Oct. 12, 1991, at 15; see also David Wessel, *World's Economies, Now Interdependent, All Suffer Together*, WALL ST. J., Sept. 17, 1992, at A1 (stating that interdependence of global economy results in concurrent slumps); Michael Kranish, *Clinton Sees Broad Steps but No Pacts at Summit*, BOSTON GLOBE, July 6, 1993, at 1 (quoting President Clinton: "This new global economy is here to stay . . . We can't wish it away. We can't run from it. We can't build walls around our nation."); Amy Kaslow, *U.S.-French Squabble Threatens to Derail World Trade Deal*, CHRISTIAN SCI. MONITOR, Sept. 30, 1993, at 9 (statement by EC Trade Commissioner Leon Britton) (cautioning Europe not to ignore the "increasingly interdependent world economy"); *Order in Own House Best Basis for Cooperation*, Reuters, Apr. 28, 1993, available in LEXIS, Nexis Library, Currnt File (statement by German Bundesbank president Helmut Schlesinger) (reporting: "[i]t is a fact that Germany and the European Community are acting under complex national and regional conditions, . . . [b]ut they are at the same time tied into an increasingly interdependent global economy"); Peter Norman, *Getting Their Breath Back*, FIN. TIMES (London), May 26, 1993, at 1 (noting that global foreign exchange turnover has tripled in the three largest markets in the last six years). See also generally Arend, *supra* note 2 (exploring the UN's possible roles in an era of multilateralism).

67. See John H. Barton & Barry E. Carter, *International Law and Institutions for a New Age*, 81 GEO. L.J. 535, 535 (1993). "The United Nations . . . may now be taking on new roles of unparalleled significance, as illustrated by its

Soviet conflict, which previously colored all international relations, countries are more willing to place their troubles and conflicts within the powers of the UN, the European Community (EC), and other international bodies, such as the International Conference on the Former Yugoslavia.⁶⁸ The international authority overseeing the negotiations, the

activities in the Persian Gulf, Cambodia, Somalia, and the former Yugoslavia.”
Id. The authors also evaluate the growing power of international law itself:

There is now a complex mix of international and domestic law, administered and enforced by a variety of entities and often invoked by individuals. This new law builds on a variety of shared interests, well beyond traditional international reciprocity. It forms an international legal network complementing other networks—economic, communications, and family—that are increasingly integrating the world.

Id. at 549.

68. The European Community established the International Conference on the Former Yugoslavia, including an Arbitration Commission, by a declaration on August 27, 1991:

“The [European] Community and its member States cannot stand idly by as the bloodshed in Croatia increases day by day. An agreement on the monitoring of the cease-fire and its maintenance should allow the Community and its member States to convene a peace conference and establish an arbitration procedure.”

. . . .

“The arbitration procedure in the framework of this peace conference will be established as follows. The relevant authorities will submit their differences to an Arbitration Commission of five members chosen from the Presidents of the Constitutional Courts existing in the Community countries. The composition of the Arbitration Commission will be:

two members appointed unanimously by the Federal Presidency [of Yugoslavia]

three members appointed by the community and its member States

In the absence of agreement on the members to be appointed by the Federal Presidency, they will be appointed by the three members appointed by the Community.

This Arbitration Commission will give its decision in two months.”

Memorandum from the Steering Committee of the International Conference on the Former Yugoslavia app. I at 1 (Oct. 27, 1992) (alterations in original) (citations omitted) (quoting European Political Co-Operation Extraordinary Ministerial Meeting Declaration, Aug. 27, 1991) (on file with author).

The Arbitration Commission was given even broader power over the conflict in Yugoslavia by a subsequent European Community Declaration:

“[T]he Community and its member States will convene under their aegis a Conference on Yugoslavia in the Peace Palace in the Hague, on 7 September 1991, and at the same time set up an arbitration procedure.

. . . .

In the framework of the Conference, the Chairman will transmit to the Arbitration Commission the issues submitted for arbitration, and the results of the Commission’s deliberations will be put back to the Conference through the Chairman. The rules of procedure for the arbi-

Conference, which includes its own Arbitration Commission, has attempted to restore peace to war-torn Yugoslavia.⁶⁹ The Conference is a true breakthrough in international law because of its step-by-step conflict resolution process.⁷⁰ The Conference has been unable to put a definitive end to the hostilities in Yugoslavia, but the scope of its objectives suggests a potentially broader significance.⁷¹ The European resolution of conflicts by the initially EC-sponsored conference is akin to a jury trial on an international level, with a jury composed of one's regional peers.⁷² Within this context, the obligations of international law have become ever more meaningful.⁷³ Although many violations of the rules of war have occurred in

tration will be established by the Arbitrators, taking into account existing organisations in that field."

Id. at 2 (citations omitted) (quoting European Political Co-Operation Extraordinary Ministerial Meeting Declaration, Sept. 3, 1991). Although the Arbitration Commission may explicitly establish its own procedural rules, there is no mention of what substantive law should be applied. Presumably, then, the Arbitration Commission is expected to apply "principles of public international law." Arbitration Commission Conference on Yugoslavia, Opinion No. 1, ¶ 1 (Nov. 29, 1991) (on file with author) [hereinafter Opinion No. 1]. For a discussion of the sources of international law, see discussion *infra* part II.B.2.

The Conference was initially chaired by Lord Carrington. Sarah Helm, *Lord Carrington's Appointment Wins Swift Backing*, THE INDEPENDENT (London), Sept. 4, 1991, at 8. On October 8, 1991, the Secretary-General of the United Nations involved the UN in the peace process by naming former U.S. Secretary of State Cyrus Vance as a special envoy. *UN Chief Names Cyrus Vance Personal Envoy for Yugoslavia*, Reuters, Oct. 8, 1991, available in LEXIS, Nexis Library, Currnt File. On August 26, 1992, Lord Carrington resigned as Chairman of the Conference. Judy Dempsey & Ivo Dawney, *Carrington Resigns as EC Peace Envoy to Yugoslavia*, FIN. TIMES (London), Aug. 26, 1992, available in LEXIS, Nexis Library, Currnt File. The following day, the UN and the EC decided to jointly sponsor the continuing Conference, and to establish a co-chairmanship. Alan Philips, *Owen Takes Over as Peacemaker*, DAILY TELEGRAPH (London), Aug. 28, 1992, at 1. The EC would be represented by Lord Carrington's replacement, Lord David Owen, and the UN would be represented by Cyrus Vance. *Id.* See also Marc Weller, *Current Developments: The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 AM. J. INT'L L. 569, 576 (1992) (discussing the formation of the Conference and the Arbitration Commission).

69. Weller, *supra* note 68, at 576-77.

70. See discussion *infra* part II.A.3.

71. See discussion *infra* part II.A.3.

72. International law at the regional level has emerged as a major source of new rights and obligations for states; the European Community system of regional rule-making is one of the best examples. See generally T.C. HARTLEY, THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW (Tony Honore & Joseph Raz eds., 2d ed. 1988).

73. See *supra* note 67.

the fighting in Yugoslavia,⁷⁴ the leaders of the republics have at least recognized international law and have been responsive to the Conference.⁷⁵

Given the simmering ethnic tensions in Yugoslavia, in hindsight it seems almost obvious that the republics would boil over upon the disintegration of Eastern European and Balkan central authority.⁷⁶ These republics have been waiting in the wings for the opportunity to break free.⁷⁷ The process of disintegration has led to the end of Yugoslavia⁷⁸ and the creation of at least five new states: Serbia (often acting in ex-Yugoslavia's stead), Slovenia,⁷⁹ Croatia,⁸⁰ Macedonia,⁸¹

74. The Security Council of the United Nations requested that the Secretary-General submit a proposal for an international tribunal that would prosecute those suspected of war crimes. UNITED NATIONS, REPORT SUBMITTED BY THE SECRETARY-GENERAL ON ASPECTS OF ESTABLISHING AN INTERNATIONAL TRIBUNAL FOR THE PROSECUTION OF PERSONS RESPONSIBLE FOR SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW COMMITTED IN THE TERRITORY OF THE FORMER YUGOSLAVIA ¶ 2, U.N. Doc. S/25704 (1993). The report outlines the basis of the Security Council's concern:

In resolution 771 (1992) of 13 August 1992, the Security Council expresses grave alarm at continuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia and especially in Bosnia and Hercegovina, including reports of mass forcible expulsion and deportation of civilians, imprisonment and abuse of civilians in detention centres, deliberate attacks on non-combatants, hospitals and ambulances, impeding the delivery of food and medical supplies to the civilian population, and wanton devastation and destruction of property. The [Security] Council strongly condemned any violations of international humanitarian law, including those involved in the practice of "ethnic cleansing," and demanded that all parties to the conflict in the former Yugoslavia cease and desist from all breaches of international humanitarian law.

Id. ¶ 6. The Security Council adopted the Secretary-General's proposal in issuing Resolution 827. S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993).

A UN refugee official noted that: "The difference from other conflicts I have seen is that in Bosnia the creation of a legion of displaced persons is not the consequence of military action but the aim of it. There are militia groups everywhere who respect no conventions. Violations of the rules of war are systematic." Tony Barber, *Dirty War Savages Any Hopes of Peace*, THE INDEPENDENT (London), May 17, 1992, at 12 (citation omitted).

75. *Bosnia's Dismal Endgame*, *supra* note 26, at 45 (reporting that Bosnia's Muslim President, Izetbegovic, accepts partition of his country and that Bosnian Serb leader, Karadzic, senses that Serbs have more to gain by talking).

76. See generally discussion *infra* part II.A.1; Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 55 (1992).

77. See discussion *supra* part II.A.1.

78. See generally Opinion No. 1, *supra* note 68, ¶ 3.

79. Arbitration Commission Conference on Yugoslavia, Opinion No.7 (Jan. 11, 1992) (on file with author) [hereinafter Opinion No. 7].

and Bosnia.⁸² Although the Arbitration Commission ruled on July 4, 1992 that the State of Yugoslavia was extinct, the self-styled "Federal Republic of Yugoslavia" (composed of Serbia along with Kosovo, Vojvodina, and Montenegro) has attempted to step into the shoes of the former state.⁸³ The Commission did not cite international law, but the simple fact that the state no longer exists as an entity due to the recognized sovereignty of its constituent provinces, the total failure of its government, and the inability of the old Yugoslavia to bring order to the region.⁸⁴ Serbia has been denied the right to continue as the former Yugoslavia's UN representative,⁸⁵ in part because of alleged human rights abuses and possible war crimes.⁸⁶ Bosnia, Croatia, and Slovenia were admitted as UN Members on May 22, 1992.⁸⁷ Macedonia was admitted on April 8, 1993.⁸⁸

Even though Bosnia has been recognized as an independent nation, there remains a possibility that it might be carved up and divided among the warring factions.⁸⁹ All three

80. Arbitration Commission on Conference on Yugoslavia, Opinion No. 5 (Jan. 11, 1992) (on file with author) [hereinafter Opinion No. 5].

81. Greece has consistently blocked the recognition of Macedonia as an independent state because Greece claims that the name "Macedonia" is inherently Greek, and thus the use of it by Macedonia would justify potential territorial claims against Greece. Leonard Doyle, *Community Split Over Macedonia UN Move*, THE INDEPENDENT (London), Jan. 15, 1993, at 12; *Macedonia Presses for UN Membership*, Reuters, Jan. 7, 1993, available in LEXIS, Nexis Library, Currnt File. Even though Macedonia has renounced any possible territorial claims, Greece continues to oppose recognition. Arbitration Commission Conference on Yugoslavia, Opinion No. 6 (Jan. 11, 1992) (on file with author) (stating that Macedonia's assembly has agreed to inviolability of borders) [hereinafter Opinion No. 6]. Greece has managed to divide the EC on the question, but Macedonia eventually was admitted to the UN with the provisional name of the Former Yugoslav Republic of Macedonia. Vance, *Owen Propose Plan for Macedonia*, Agence France Presse, May 29, 1993, available in LEXIS, Nexis Library, Currnt File. Negotiations between Greece and Macedonia continue. *Id.*

82. The Bosnian Parliament declared its independence from Yugoslavia on October 14, 1991. Opinion No. 1, *supra* note 68, ¶ 2.

83. Arbitration Commission Conference on Yugoslavia, Opinion No. 8 (July 4, 1992) (on file with author) [hereinafter Opinion No. 8].

84. *Id.*

85. The Commission referred to UN General Assembly Resolution 757. *Id.* ¶ 3. See also 2 O'CONNELL, *supra* note 61, at 183 (articulating the general rule that memberships in international organizations do not carry over to new states).

86. See generally *supra* note 74 and accompanying text.

87. Opinion No. 8, *supra* note 83, ¶ 3.

88. Vance, *Owen Propose Plan for Macedonia*, *supra* note 81.

89. *Bosnia's Dismal Endgame*, *supra* note 26, at 45.

groups—Serbs, Muslims, and Croats—seem intractable at the bargaining table.⁹⁰ Serbs and Croats do not want a central government to have any authority over the areas that they control,⁹¹ and Muslims want not only their villages back, but also at least some form of central government.⁹² Bosnia is in a precarious position. The difference between autonomous provinces and seceding states is small indeed.⁹³

3. *The Division of Bosnia*

The fate of Bosnia is the most prominent unresolved question that has arisen from the war in Yugoslavia. Muslims, Serbs, and Croats have fought for every inch of territory that they have gained.⁹⁴ Two major proposals for ending the conflict have been advanced by the international mediators. The first, aiming to divide Bosnia into ten semi-autonomous provinces, failed in the spring of 1993.⁹⁵ The second plan, which would divide Bosnia into three nearly independent states,⁹⁶ is much more favorable to the victorious Serbs. Be-

90. For example, when the Bosnian Muslims felt that air strikes against the Serbs were imminent in August 1993, the Muslims became more demanding at the bargaining table. *Id.* When his escalating demands were not accepted, the Muslim leader Izetbegovic broke off talks, after which the Croat and Serb negotiators went home. *Id.*; see also discussion *infra* part II.A.3.

91. *Bosnia's Dismal Endgame*, *supra* note 26, at 45.

92. Holmes, *Bosnian Leaders Agree Constitutional, Truce Accords*, *supra* note 30.

93. In other words, there is hardly a distinction between fully autonomous provinces within a single nation of Bosnia, and completely separate and independent countries within what used to be Bosnia.

94. *Bosnian Serbs Report Capture of Muslim-Held Rogoj Pass and Town of Trnovo* (BBC World Broadcasts, July 13, 1993), available in LEXIS, Nexis Library, Currnt File; Tim Butcher, *Croats' Ethnic Cleansing in Mostar*, DAILY TELEGRAPH (London), July 14, 1993, at 14; Alexandra Stiglmyer, *Bosnia-Herzegovina: Croat and Serb Alliance Against Muslims*, Inter Press, June 10, 1993, available in LEXIS, Nexis Library, Currnt File.

95. Both the intransigence of the parties and the fact that the Serbs had overrun many of the areas slated to be given to the Muslims doomed the ten-province plan to failure. *The Forlorn Hope*, THE ECONOMIST, Aug. 7, 1993, at 17; *Inside Srebrenica: City of the Damned*, NEWSWEEK, Apr. 12, 1993, at 40. Frustrated over this development, UN envoy Cyrus Vance resigned. *Id.* at 40. He was replaced by Thorvald Stoltenberg, the Foreign Minister of Norway. *Id.*

96. The Serbs have clearly been the victors of the war: they control about three-quarters of Bosnia, whereas the Muslim plurality holds only about 10%. *Bosnia's Dismal Endgame*, *supra* note 26, at 45; *Peace in the Hands of Unpeaceful Serbs*, *supra* note 21, at 41. The second plan acknowledges the Serbs' military success, granting them more land and, very importantly, a single contiguous province. *Bosnia's Dismal Endgame*, *supra* note 26, at 45; see also *infra* text accompanying notes 106, 113.

cause of the strength of the Serb position in winning the war thus far,⁹⁷ it is likely that something akin to the latter proposal ultimately will be adopted.

The Geneva Conference, which began on January 2, 1993, essentially resolved that Bosnia should retain its sovereign government.⁹⁸ Similar to a confederation, the plan sought to divide Bosnia into ten provinces, each with its own government, police, judiciary, and schools.⁹⁹ Serbs, Muslims, and Croats would each receive three provinces, while Sarajevo would remain a neutral city.¹⁰⁰ The provinces were not to have separate international legal personality, dashing the hopes of Bosnian Serbs seeking a single, unified "Greater Serbia."¹⁰¹ The Muslim leader and current President of Bosnia, Alija Izetbegovic, was just as apprehensive about the proposal as the Bosnian Serbs.¹⁰² Izetbegovic did not want any recognition of ethnic conquest by the Serbs¹⁰³ or any reduction in the central authority of the essentially Muslim government.¹⁰⁴

The Serbs stood to lose the most: although they then controlled nearly three-quarters of Bosnia, the plan permitted them to retain only about half.¹⁰⁵ Bosnian Serbs are especially adamant about making their provinces contiguous,

97. *Bosnia's Dismal Endgame*, *supra* note 26, at 45.

98. *Peace in the Hands of Unpeaceful Serbs*, *supra* note 21, at 41. Since Bosnia already had been admitted as a member of the United Nations, the Conference could hardly begin with the premise that Bosnia was not a state. Opinion No. 8, *supra* note 83, ¶ 3.

99. *Peace in the Hands of Unpeaceful Serbs*, *supra* note 21, at 41.

100. *Id.* This power vacuum might open up Sarajevo to further hostilities, and eventual conquest by whoever can do so, as was the fate of Jerusalem. Although the issue is by no means settled, the UN General Assembly clearly intended for Jerusalem to be a neutral city (i.e., to have a separate international status) and to be administered by the UN. See W. THOMAS MALLISON & SALLY V. MALLISON, *THE PALESTINE PROBLEM* 229-301 (1986). But armed conflict broke out in 1947, and in 1948 Jerusalem was divided: Israel controlled West Jerusalem and Jordan controlled East Jerusalem. *Id.* at 210-14. Israel declared West Jerusalem its capital in 1950. *Id.* at 214. After the 1967 war, the Israelis acquired the eastern portion of the city as well. *Id.* at 215. Israel has subsequently declared the united Jerusalem its capital. *Id.* at 217.

101. *Peace in the Hands of Unpeaceful Serbs*, *supra* note 21, at 41.

102. Sid Balman Jr., *Bosnian-Muslim Leader Favors Peace Plan But Serbs Do Not*, UPI, Jan. 8, 1993, available in LEXIS, Nexis Library, Currnt File.

103. *Id.*

104. *Bosnia-Hercegovina* (BBC World Broadcasts, Jan. 18, 1993), available in LEXIS, Nexis Library, Currnt File.

105. *Peace in the Hands of Unpeaceful Serbs*, *supra* note 21, at 41.

with a corridor allowing them access to Serbia.¹⁰⁶ Izetbegovic rejected any corridor scheme as offensive to Bosnian sovereignty.¹⁰⁷ According to the *New York Times*, the Bosnian Serb leader Radovan Karadzic promised delegates of the Bosnian Serb assembly that ratified his signature of the plan "that they could endorse the mediators' proposal without abandoning their goal in the war, a separate Serbian state in Bosnia that could later be annexed to Serbia."¹⁰⁸ The Serbs were simply unwilling to compromise given their strong military position in Bosnia; they attempted to achieve their goals regardless of what they were forced to sign.¹⁰⁹ Even if Karadzic truly meant to accede to the plan's terms, it is unlikely that the Bosnian Serbs in general would have allowed the opportunity of obtaining better terms through military offensives to slip away.¹¹⁰ In any case, Karadzic clearly did not mean to accede to the plan's terms, because he continued to assert Bosnian Serb claims to more territory as well as to corridors even *after* signing the agreement.¹¹¹ Furthermore, Karadzic indicated that he did not believe that the EC would permit the Conference to fail simply because the Bosnian Serbs disagreed about how the provinces' boundaries should be drawn.¹¹² And most significantly, he said that, "we will achieve a factual situation that will make it possible for us to have an integrated and linked territory."¹¹³ Indicating an adherence to the self-determination principles of Bosnian Serbs, while ignoring the principles of continuity and the prevention of aggression, Karadzic argued that the provinces should be

106. *Bosnia-Hercegovina*, *supra* note 104. Karadzic wanted corridors to link Serb possessions in Bosnia and to consolidate the Bosnian Serb strategic position. *Reaction to Geneva Conference* (BBC World Broadcasts, Jan. 16, 1993), available in LEXIS, Nexis Library, Currnt File.

107. *Bosnia-Hercegovina*, *supra* note 104.

108. John F. Burns, *Dim Hope for Bosnia*, N.Y. TIMES, Jan. 23, 1993, § 1, at 5.

109. *Reaction to Geneva Conference*, *supra* note 106.

110. For example, *The Economist* reported that "[t]he peace map proposed by the mediators in Geneva, Lord Owen and Cyrus Vance, returns Brcko and the corridor to the people who used to live there. But the Serbs say that, whatever happens in Geneva, the corridor will be theirs." *Hard Men Take the Long View*, THE ECONOMIST, Jan. 16, 1993, at 48.

111. *Reaction to Geneva Conference*, *supra* note 106.

112. *Id.*

113. *Id.*

drawn on population zones rather than antiquated boundaries that no longer apply.¹¹⁴

Bosnian Serbs were given an ultimatum by the European Community to accept the proposal without reservation.¹¹⁵ Although outraged by this demand,¹¹⁶ the Bosnian Serbs signed it—they just did not pay any attention to it.¹¹⁷

The present plan to divide Bosnia into three separate provinces under the very loose confederation of the “Union of Republics of Bosnia and Hercegovina” would even prevent Bosnia from having a national legislature or an army.¹¹⁸ The size of these provinces, of course, is the source of the debate. The Serbs want sixty percent of Bosnia, leaving twenty-five percent for the Muslims and fifteen percent for the Croats.¹¹⁹ The Croats want twenty percent for themselves, forty-five percent for the Serbs, and thirty-five percent for the Muslims.¹²⁰ Thus, if the Serbs and Croats were to have their way, the Muslims would be left with only twenty percent of Bosnia even though they represent forty-four percent of its population.¹²¹ Yet since the Muslims only control about ten percent of the country, they are unlikely to obtain much more than twenty percent.¹²² The “map game” has continued as fiercely as when it began in March of 1992.¹²³ Only the close of hostilities will bring a truly firm set of borders to Bosnia.

114. *Id.* Under international law, the sanctity of borders and the illegality of territorial acquisition through aggression may supersede the right of self-determination. See discussion *infra* parts III.B.2-3.

115. *Reaction to Geneva Conference*, *supra* note 106.

116. *Id.*

117. *All Things Considered: Bosnian President Appears to Be Losing Power* (National Public Radio broadcast, June 22, 1993), available in LEXIS, Nexis Library, NPR File.

118. *Bosnia's Dismal Endgame*, *supra* note 26, at 45.

119. *Id.*

120. *Id.*

121. The Muslims did not, however, occupy 44% of Bosnia even before the war began, because many of them live in concentrated, urban areas such as Sarajevo. See *id.*

122. *Id.*

123. Glenny describes the outbreak of this dilemma: “The Serbs demanded 65% of [Bosnia’s] territory while the Croats wanted 35%. This left the Moslems (who made up 44% of the population) precisely nothing. . . . [T]he Croats and Serbs agreed on one formula which left the Moslems with 5% of the republic’s territory.” GLENNY, *supra* note 4, at 163.

B. *The International Law of State Succession*

The questions that arise as a consequence of the emergence of a new state present clear examples of the need for international law.¹²⁴ What treaties and obligations are binding on new states? What portion of international law must be adhered to by all states? The rules of state succession address these questions, but they by no means resolve them.

1. *UN Treaties*

The Vienna Convention on Succession of States in Respect of Treaties of 1978¹²⁵ is the primary international agreement of state succession, although it is not in force. Article 16, the most controversial component of the treaty, permits newly independent states to opt out of treaties to which their territory was formally subject:

A newly independent state is not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that at the date of the succession of States the treaty was in force in respect of the territory to which the succession of States relates.¹²⁶

This "clean slate" rule, which permits a new state to disregard all treaties signed by the state that used to possess its territory, is especially controversial. Although supported in theory, it has yet to command the respect of state practice.¹²⁷ The other UN treaty, entitled the Vienna Convention on Succession of States in Respect of State Property, Archives, and Debts (1983),¹²⁸ has also garnered few ratifications.¹²⁹ The

124. "State succession arises when there is a definitive replacement of one state by another in respect of sovereignty over a given territory in conformance with international law." IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 651 (3d ed. 1979). Bosnia seems to fit comfortably within the definition.

125. Vienna Convention on Succession of States in Respect of Treaties, Aug. 23, 1978, U.N. Sales No. F.79.U.10 (1979) (not in force).

126. *Id.* art. 16.

127. Rein Mullerson, *The Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia*, 42 *INT'L & COMP. L.Q.* 473, 474 (1993).

The treaty requires that fifteen states ratify it, but only eight have actually done so. The United States, Russia, and all the former colonial powers refused to ratify. D. J. HARRIS, *CASES AND MATERIALS ON INTERNATIONAL LAW* 813 n.69 (4th ed. 1991). Clearly, new states favor the "clean slate" rule because it allows them to choose whether or not to maintain existing treaties in force. *Id.* at 816. The older and more powerful states, on the other hand, seek continuity of law so that their interests may be preserved. *Id.*

128. Vienna Convention on Succession of States in Respect of State Property, Archives, and Debts, Apr. 7, 1983, U.N. Doc. A/CONF.117/14 (1983) (not in

1983 Convention does not substantially affect the rights and duties of states with respect to the resolution of the war in Bosnia and is purposefully limited in scope by Article 5.¹³⁰ When treaties are not widely accepted, it raises doubts as to whether any single rule applies to the situation at all, at least on the international level.¹³¹

2. *Sources of International Law*

Article 38 of the Statute of the International Court of Justice enumerates the sources of international law:

- a. international conventions, whether general or particular, establishing rules expressly recognised by contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilised nations;
- d. subject to the provisions of Article 59 [that the decisions of the court are not binding on non-parties], judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.¹³²

Because there is no definitive state succession treaty, international customary law must be examined.¹³³ Unfortunately, there is no consensus in customary law regarding state succession; thus, public policy may fill the vacuum—at least for the actions of states, if not the judgments of courts.¹³⁴ A new state will almost always find that although the law of state succession might permit it to argue the “clean slate” rule, re-

force) [hereinafter Convention on Succession of States in Respect of State Property].

129. See B. Graefrath, *The International Law Commission Tomorrow: Improving Its Organization and Methods of Work*, 85 AM. J. INT'L L. 595, 600-01 (1991) (stating that both Vienna Conventions on state succession do not have support of the international community).

130. Convention on Succession of States in Respect of State Property, *supra* note 128, art. 5.

131. The absence of a treaty presently in force regarding state succession, coupled with a lack of consistent state practice, suggests that there may be no rule of law governing state succession. See discussion *infra* part II.B.2.

132. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 38, ¶ 1.

133. See J.L. BRIERLY, *THE LAW OF NATIONS* 57-59 (6th ed. 1963).

134. See GEORG SCHWARZENBERGER & E.D. BROWN, *A MANUAL OF INTERNATIONAL LAW* 69-71 (6th ed. 1976).

lations with other states necessitate the continuance of obligations.¹³⁵

Customary international law on state succession is very much unresolved, as Brownlie notes:

State succession is an area of great uncertainty and controversy. This is due partly to the fact that much of the state practice is equivocal and could be explained on the basis of special agreement and various rules distinct from the category of state succession. Indeed, it is perfectly possible to take the view that not many settled legal rules have emerged as yet.¹³⁶

More recent commentators have suggested that portions of the law of state succession are "clear;"¹³⁷ but although it may be clear *what* most states recognize, it is far less certain *why* they recognize it.¹³⁸ In other words, what is the source of this practice? Perhaps practical considerations have funneled the disparate aims and goals of nations into the same conclusion.¹³⁹ States may act uniformly, but such consensus does not necessarily amount to custom.¹⁴⁰ If states do not feel that they are obligated by law to act in a particular manner, then no custom exists.¹⁴¹

135. See BROWNLIE, *supra* note 124, at 652. Czechoslovakia discovered the consequences of adherence to the "clean slate" rule after the First World War. See *infra* note 184 and accompanying text.

136. BROWNLIE, *supra* note 124, at 652 (footnote omitted).

137. See, e.g., Note, *Taking Reichs Seriously: German Unification and the Law of State Succession*, 104 HARV. L. REV. 588, 588-89 (1990) ("clear rules govern both the merger of two states into a new state and the absorption of part of one state's territory by another state" (emphasis added)) [hereinafter *Taking Reichs Seriously*].

138. See discussion *infra* part II.B.3.

139. See discussion *infra* part II.B.3.

140. See *infra* note 141.

141. State practice may eventually become customary law, but only if states conform to a practice on the basis of *legal* obligation.

Custom in its legal sense means something more than mere habit or usage; it is usage felt by those who follow it to be an obligatory one. There must be present a feeling that, if the usage is departed from, some form of sanction will probably, or at any rate ought to, fall on the transgressor.

BRIERLY, *supra* note 133, at 59. The practice of states with respect to state succession has probably not yet reached such a stage in its development. BROWNLIE, *supra* note 124, at 652.

3. *The Nature of State Practice*

With respect to the law of state succession, state practice appears generally to reflect policy considerations, especially since the area is at least legally unsettled.¹⁴² As a result, the facts of the particular situation may be outcome-determinative.¹⁴³ "The international community has an interest in preventing states from disrupting treaty obligations with every change of circumstance or every change of sovereignty. However, the international community also has an interest in allowing states to define their own legal identities."¹⁴⁴ In the absence of any clearly defined law of state succession, this tension further suggests that policy will guide the practice of states. Each time state succession issues are implicated, the facts of the situation will determine the outcome until the law is more clearly defined.¹⁴⁵

4. *Bosnia's Approach to International Obligations*

In Yugoslavia, the problems are even more confounding because one state is being replaced by a multitude of new states.¹⁴⁶ The dissolution of Yugoslavia into its component republics and the further potential breakup of some of the republics themselves (e.g., Bosnia-Herzegovina)¹⁴⁷ present difficult problems for international law. Bosnia is the most pertinent republic to deal with because its borders, and in fact its existence, remain uncertain.¹⁴⁸ The Minister of Foreign Af-

142. See generally SCHWARZENBERGER & BROWN, *supra* note 134, at 68-71. States usually resolve problems of state succession by way of an agreement and not by reliance on international law:

It would be unsafe to attempt to abstract from rather scanty evidence a general rule of subrogation or State succession. . . . [W]hat cannot be attained on the level of customary international law can always be achieved by way of consent. This is the safe road which, more often than not, the practice of States has chosen.

Id. at 71.

143. Because there is no law to apply, states will act based upon their policy interests on issues of state succession. *Id.* These policy interests, in turn, may be determined by the facts of each situation. Hence, the facts of each case—including the relative power of the states involved, the nature and importance of the controversy, and the existence of an ongoing relationship—determine the outcome. See, e.g., discussion *infra* part II.B.4.

144. *Taking Reichs Seriously*, *supra* note 137, at 599.

145. See *supra* notes 142-143 and accompanying text.

146. See *supra* text accompanying notes 78-83; see also generally Alan Riding, *Europe Nods to Bosnia, Not Macedonia*, N.Y. TIMES, Apr. 7, 1992, at A3.

147. See discussion *supra* part II.A.3.

148. See *Peace in the Hands of Unpeaceful Serbs*, *supra* note 21, at 41.

fairs of Bosnia wrote to the President of the European Community Council to request recognition¹⁴⁹ on December 20, 1991.¹⁵⁰ Based on an opinion issued by the Arbitration Commission, the request was denied.¹⁵¹ The Commission noted that the President and the Government of Bosnia had agreed to abide by the Commission's guidelines and the draft Convention by the Hague Conference of November 4, 1991, guaranteeing human rights.¹⁵² Furthermore, on January 8, 1992, the Bosnian Government agreed to be bound by the UN Charter, the Helsinki Final Act, the Charter of Paris, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and all other international instruments guaranteeing human rights and freedoms, and to conform to the agreements binding upon the old state of Yugoslavia on disarmament and arms control.¹⁵³

The scope of these obligations is great and demonstrates both the broad powers of the Arbitration Commission and the increasingly vigorous force of international legal obligations.¹⁵⁴ The vast number of responsibilities generated by the adoption of these agreements is compounded by the fact that, among them, only the UN charter and the Covenant on Civil and Political Rights are actually treaties.¹⁵⁵ The remainder are merely agreements that are not usually consid-

149. Bosnia, as well as the other former Yugoslav republics that have sought recognition, appears to have revived the constitutive theory of recognition.

The legal significance of recognition is controversial. According to one view it has a "constitutive" effect; through recognition only and exclusively a state becomes an international person and a subject of international law

The better view is that the granting of recognition to a new state is not a "constitutive" but a "declaratory" act; it does not bring into legal existence a state which did not exist before. A state may exist without being recognized, and if it does in fact, then, whether or not it has been formally recognized by other states, it has a right to be treated by them as a state.

BRIERLY, *supra* note 133, at 138-39 (citation omitted).

150. Arbitration Commission Conference on Yugoslavia, Opinion No. 4, at 1 (Jan. 11, 1992) (on file with author) [hereinafter Opinion No. 4].

151. *Id.*

152. *Id.* ¶ 1.

153. *Id.*

154. For a discussion of the increasing power of international legal obligations, see *supra* note 67 and accompanying text. For a discussion of the powers of the Arbitration Commission, see *supra* note 68 and accompanying text.

155. U.N. CHARTER; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter Covenant on Civil and Political Rights].

ered mandatory rules of international law binding on all civilized nations.¹⁵⁶ Furthermore, the newly proposed Bosnian Constitution provides human rights for all the inhabitants of Bosnia.¹⁵⁷ The Commission noted that the Amendment to the Constitution of July 31, 1990, Amendment LX, does not alter Bosnian law, much to the disappointment of the Bosnian Government, which had relied upon this Amendment heavily in its initial bid for recognition as an independent state.¹⁵⁸ Amendment LX¹⁵⁹ was not a sufficient alteration of Bosnian law for Bosnia to receive recognition, yet it is difficult to conceive of more egalitarian language than that of the amendment. The Commission concluded that "the will of the peoples of Bosnia-Herzegovina to constitute the SRBH [Socialist Republic of Bosnia-Herzegovina] as a sovereign and independent State cannot be held to have been fully established."¹⁶⁰ The Bosnian government established the will of the people of Bosnia by holding a referendum on March 1, 1992: *ninety-nine percent* of the votes favored independence.¹⁶¹

On December 21, 1991, the Serbs formed a legislative body, the "Assembly of the Serbian People of Bosnia-Herzegovina," in response to Bosnia's bid to depart fully from the Serbian-dominated Yugoslavia.¹⁶² That body declared an

156. See Final Act of the Conference on Security and Cooperation in Europe, Aug. 1, 1975, 14 I.L.M. 1292; Charter of Paris for a New Europe, Nov. 21, 1990, 30 I.L.M. 190; *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948); see also generally Joseph Gold, *Strengthening the Soft International Law of Exchange Arrangements*, 77 AM. J. INT'L L. 443 (1983) (discussing the status of such non-binding "soft law").

157. Opinion No. 4, *supra* note 150, ¶ 1. The Arbitration Commission noted:

The current Constitution of the SRBH [Socialist Republic of Bosnia-Herzegovina] guarantees respect for human rights, and the authorities of Bosnia-Herzegovina have sent the Commission a list of the laws in force giving effect to those principles; they also gave the Commission assurances that the new Constitution now being framed would provide full guarantees for individual human rights and freedoms.

Id.

158. *Id.* ¶ 3.

159. According to the Commission, Amendment LX "states that the Republic of Bosnia-Herzegovina is a 'sovereign democratic State of equal citizens, comprising the peoples of Bosnia-Herzegovina—Muslims, Serbs and Croats—and members of other peoples and nationalities living on its territory.'" *Id.*

160. *Id.* ¶ 4.

161. See *supra* note 25.

162. Opinion No. 4, *supra* note 150, ¶ 3.

independent Serbian state in Bosnia on January 9, 1992.¹⁶³ Due to the uncertainty of the situation at the time, the Commission did not grant recognition to the Serbs in Bosnia, either.¹⁶⁴

The Arbitration Commission ruled on July 4, 1992, that since Yugoslavia had ceased to exist and Serbia's bid to succeed it was not acceptable, the property, assets, and debts of the former state were to be divided equitably among the republics.¹⁶⁵ Serbia was declared a new state, but the Commission left it to other nations to officially recognize it as such, while adding that the act of recognition was declarative and not constitutive in effect.¹⁶⁶ The Commission also concluded that Serbia could not automatically succeed to the now-extinct Yugoslavia, because the rights of that state belong to all the former republics and not to Serbia alone.¹⁶⁷

Many other federations have undergone a far smoother transition.¹⁶⁸ The general rule upon the dissolution of a federation or union is that federal laws or treaties that are applicable to a successor state are binding upon that successor state.¹⁶⁹ For example, upon the dissolution of Rwanda-Urundi in 1962, the Belgians who managed the transition en-

163. *Id.*

164. *See id.* ¶ 4. Since the Commission denied independence to the Republic of Bosnia as a whole, it is hardly surprising that the Bosnian Serbs were not granted independence by the Commission. *Id.* The Commission was probably awaiting the outcome of a referendum encompassing all of Yugoslavia. Weller, *supra* note 68, at 593.

165. Arbitration Commission Conference on Yugoslavia, Opinion No. 9, ¶ 4 (July 4, 1992) (on file with author) [hereinafter Opinion No. 9]. This decision is in conformance with Article 41 of the Convention on Succession of States in Respect of State Property, *supra* note 128.

166. Arbitration Commission Conference on Yugoslavia, Opinion No. 10, ¶ 4 (July 4, 1992) (on file with author) [hereinafter Opinion No. 10]. For the distinction between declarative and constitutive recognition, *see supra* note 149.

167. Opinion No. 10, *supra* note 166, ¶ 4.

168. *See generally*, 1 O'CONNELL, *supra* note 61, at 114-18 (discussing the effects of state succession on municipal law); 2 *id.* at 164-82 (discussing the effects of state succession on international law); *see also infra* text accompanying notes 169-175.

169. 2 O'CONNELL, *supra* note 61, at 164-65. "[T]reaties which are compatible with the transformation of the respective legal orders survive the change, and that each of the successor States remains a party thereto." 2 *id.* at 165.

If, for example, a federal treaty of the Kingdom of Sweden and Norway dealt only with reciprocal fishing rights between Danish and Norwegian territory, the treaty would *not* apply to Sweden upon dissolution of the Kingdom of Sweden and Norway. *See infra* note 176 and accompanying text.

sured the continuity of law and contracts.¹⁷⁰ The Federation of the West Indies was also dissolved in the same year with similar grace.¹⁷¹ The division of the Federation of Rhodesia and Nyasaland (1953-63), however, was fraught with legal difficulties because Southern Rhodesia quickly moved to declare many federal laws void, which laws were theoretically the law of the new states.¹⁷² Upon the partition of India in 1947, Pakistan and India were to continue to apply the law of India until altered by legislation.¹⁷³ Pakistan attempted to extract itself from some of the obligations that the law imposed, but broader problems were avoided.¹⁷⁴ Singapore was separated from Malaysia in 1965, after which the old law continued to apply to both states.¹⁷⁵

Cases involving the dissolution of a union of autonomous divisions are exemplified by the breakup of the Kingdom of Sweden and Norway in 1905¹⁷⁶ and that of Columbia in 1829-31.¹⁷⁷ Such dissolutions pose similar questions as those of republics of previously independent states, such as the United Arab Republic¹⁷⁸ and the Federation of Mali.¹⁷⁹ The German Confederation (1815-66), terminated by the Final Act of Vienna, also raised questions of the applicability of federal law to newly independent states.¹⁸⁰

When a state divides not merely on the lines of its republics, but also undergoes further intra-republic fragmentation,

170. 1 O'CONNELL, *supra* note 61, at 114.

171. 1 *id.*

172. 1 *id.* at 50-51, 114-15. Southern Rhodesia unilaterally voided 148 federal acts (inclusive of laws relating to federal loans) and modified 79 others. 1 *id.* at 115.

173. 1 *id.* at 116.

174. 1 *id.* at 116-17. The principal conflict occurred when the Supreme Court of Pakistan held that the Convention of Arbitral Awards was inapplicable to Pakistan. 1 *id.* at 57 & n.7, 116 (citing *Barlas Bros. v. Yangtze Ltd.*, 11 Pak. Legal Decisions 573 (1961)).

175. 1 O'CONNELL, *supra* note 61, at 118.

176. Upon the dissolution, the British took the novel approach of suggesting that since the Kingdom had terminated, the slate was clean for the two countries to create treaty obligations and duties. Sweden and Norway, however, decided to apply territory-specific treaties only to the applicable state, and all other treaties were to be applied to both. 2 *id.* at 164, 168-69.

177. 2 *id.* at 164.

178. Even after the dissolution of the Union, Syria affirmed that it was still bound by treaties that it signed while a member of the Union. 2 *id.* at 164, 169-70.

179. 2 *id.* at 164.

180. 2 *id.* at 167.

the legal repercussions are more perplexing. When the Dual Monarchy of Austria-Hungary was severed in 1919, the country was divided into not just the two nations, but also into further subdivisions, creating states such as Czechoslovakia.¹⁸¹ The new states carved out of parts of the halves of the Dual Monarchy were not considered bound by the Empire's Treaties, and started with a clean slate.¹⁸² Yet the efforts by the Czech courts to extricate themselves from treaty obligations resulted in reprisals by foreign courts and governments,¹⁸³ suggesting that international pressures may deprive the "clean slate" rule of any operational significance. Czechoslovakia would have fared much better in the world community after its formation had it acceded to the Dual Monarchy's treaties, especially considering that many of them would have conferred benefits upon the new state.¹⁸⁴

The formation of Poland posed a far more vexing problem, as it inherited the legal systems of Prussia, Austria, and Russia.¹⁸⁵ Poland refused to adopt several treaties, which angered its far more powerful European neighbors.¹⁸⁶ Since three legal systems potentially imposing contradictory obligations were involved, however, it seems unlikely that anything other than circumstance was to guide the Poles in defining their international responsibilities.¹⁸⁷ In the present case, Yugoslavia has been divided into its constituent republics, but wars of ethnic cleansing have called into question the in-

181. 2 *id.* at 179-80.

182. 2 *id.* at 179.

183. 2 *id.* at 180.

184. 2 *id.* O'Connell describes Czechoslovakia's self-induced predicament:

[T]he negative attitude taken by other States towards Czechoslovakia's succession to the treaties of Austria-Hungary, was prompted by Czechoslovakia's own negative attitude. Many of the treaties in question were reciprocal in character, and when the Czech courts refused to apply them, foreign courts retaliated in kind. It is clear from the various judgments that, had the Czech courts taken a positive attitude, the foreign courts could have reciprocated. It was pointed out at the time that the Czech policy was not entirely to Czechoslovakia's own advantage, and that therefore it was not as politically defensible as might at first appear.

2 *id.* For example, when the Czech Supreme Court ruled that the 1905 Hague Convention on Civil Procedure was not applicable to Czechoslovakia, even though it had been applicable to Austria-Hungary, both Swiss and Dutch courts later denied recovery by Czech citizens under the treaty. 2 *id.*

185. 2 *id.*

186. 2 *id.* at 180-81.

187. 2 *id.* at 181-82.

tegrity of the boundaries between these republics.¹⁸⁸ As a consequence, the simpler state succession issues posed in the cases of the Kingdom of Sweden and Norway,¹⁸⁹ Mali,¹⁹⁰ and the United Arab Republic¹⁹¹ may not be so easily applied.¹⁹²

C. *Self-Determination*

Perhaps the single greatest driving force behind the conflict in the former Yugoslavia is self-determination.¹⁹³ As local governments became active after the withdrawal of the Soviet Union from Eastern Europe, entrenched ethnic tensions have been exposed.¹⁹⁴ The trigger behind the issues of state succession and civil war may lie at the door of rabid ethnic activity. And since it appears that ethnic radicalism has propelled these issues to the forefront of present East European politics,¹⁹⁵ the question arises as to what limitations international law could and should place on these drives. The international law of self-determination is inextricably linked to the present problem.¹⁹⁶

1. *The 1960 Declaration*

The United Nations established self-determination as part of international law by including it among the goals set forth in the Charter.¹⁹⁷ Article 1 lists among the purposes of the UN, "[t]o develop friendly relations among nations based on respect for the *principles* of equal rights and self-determi-

188. In other words, although Yugoslavia certainly no longer exists, the boundaries between the states that will replace Yugoslavia remain unresolved. See discussion *supra* part II.A.3.

189. See *supra* note 176 and accompanying text.

190. See *supra* text accompanying note 179.

191. See *supra* text accompanying note 178.

192. Furthermore, although presumably federal laws and treaties that apply to each of the new republics would be binding on them, it may not be possible to apply this principle to Bosnia simply because its continued existence has yet to be assured. See *supra* notes 148, 169 and accompanying text.

193. Weller, *supra* note 68, at 607.

194. GLENNY, *supra* note 4, at 32-33.

195. See *generally supra* note 3.

196. The international law of self-determination, which outlines the rights of ethnic groups, is obviously an essential tool in examining the ethnically driven conflict in Bosnia. See discussion *infra* parts II.C.1-5.

197. Although at first seen to be nothing more than a faint objective, the principle has been vigorously pursued by the UN through the course of decolonization, and has become customary international law. BROWNLIE, *supra* note 124, at 594.

nation of peoples"¹⁹⁸ In further reference to these goals, Article 55 indicates that "stability and well-being" are also required.¹⁹⁹ But since governments do not wish to diminish the size of their states, the principle of territorial sovereignty places a limit on the right of self-determination.²⁰⁰ States define themselves by their frontiers,²⁰¹ and any loss is a defeat: "At the basis of international law lies the notion that a state occupies a definite part of the surface of the earth, within which it normally exercises, subject to the limitations imposed by international law, jurisdiction over persons and

198. U.N. CHARTER art. 1, ¶ 2 (emphasis added). The use of the term "principle" rather than "right" in the Charter suggests that the Charter does not itself create a right of self-determination. D.P. O'CONNELL, 1 INTERNATIONAL LAW 337 (1965) ("A fundamental difficulty with the argument that the Charter has created a right of self-determination in subject peoples is that it speaks only of a 'principle' and not of a right."); SCHWARZENBERGER & BROWN, *supra* note 134, at 59 ("The principle of national self-determination is a formative principle of great potency, but not part and parcel of international customary law."). *But see* MALLISON & MALLISON, *supra* note 100, at 193 (equally authentic French text of UN Charter uses "*droit*," meaning "right," when referring to self-determination). Harris argues that, although the UN Charter itself may not have made self-determination a right, it has become one:

The principle of self-determination is a controversial one. It has a long history in international relations as a reason for cession of territory from one state to another and for the use of plebiscites to establish the wishes of the inhabitants in this connection. Under the United Nations Charter, it became the General Assembly's decolonisation policy of the 1960s and 1970s. . . . The evidence . . . suggests that the point has been reached where *the principle has generated a rule of international law* by which the political future of a colonial or similar non-independent territory should be determined in accordance with the wishes of its inhabitants.

HARRIS, *supra* note 127, at 116 (emphasis added) (citations omitted). This comment proceeds from the assumption that Harris is correct in viewing self-determination as having developed into a right. The remaining question, of course, is the exact nature of the right. *See* discussion *infra* part II.C.5.

199. U.N. CHARTER art. 55.

200. Generally the satisfaction of one principle is at the expense of another; if a state's territory is to remain fixed, it follows that the desire of peoples for independence within its borders will not be fulfilled.

201. Brownlie notes that although the Montevideo Convention on Rights and Duties of States outlines the four basic qualifications for statehood, these qualifications need not be absolute, noting that Albania was recognized as a state even though its frontiers had yet to be firmly established. BROWNLIE, *supra* note 124, at 74.

Article 1 of the Montevideo Convention states: "The State as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with other States." Montevideo Convention on Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19. The choice of language ("should" instead of "must") infuses flexibility into the doctrine.

things to the exclusion of the jurisdiction of other states."²⁰² Thus, a conflict exists between the rights of a people to create their own sovereign state and territorial integrity. The conflict has almost always been resolved in favor of territorial integrity.²⁰³

Because the Charter alone does not bring depth to this tension, the UN General Assembly Declaration on the Granting of Independence to Colonial Territories and Peoples of 1960 details the general reference to self-determination in the Charter:

2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development;

....

6. Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the Purposes and Principles of the Charter of the United Nations.²⁰⁴

These two sections vividly reflect the conflict between the right of self-determination and the right of territorial integrity. Although the breakup of Yugoslavia may by some interpretations violate paragraph 6, it is perfectly in keeping with the letter and spirit of paragraph 2.²⁰⁵ Furthermore, the in-

202. BRIERLY, *supra* note 133, at 162.

203. See generally Jost Delbruck, *A Fresh Look at Humanitarian Intervention Under the Authority of the United Nations*, 67 IND. L.J. 887, 900 (1992); Lloyd N. Cutler, *The Internationalization of Human Rights*, 1990 U. ILL. L. REV. 575, 589. Harris notes:

On the question of political self-determination for *minorities* such as the Scots, the French Canadians, the Kurds (in Iran, Iraq, Turkey), the Nagas (in India), and the Somalis (in Kenya) in existing states . . . , there is little evidence in United Nations or other state practice to suggest that the right to self-determination applies outside of the colonial or similar context as a matter of customary international law.

HARRIS, *supra* note 127, at 124-25. Thus, the right of self-determination may apply only to "peoples," and not to minorities. *Id.*

204. *Declaration on the Granting of Independence to Colonial Territories and Peoples*, G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1960).

205. Clearly, the dissolution of Yugoslavia is a total disruption of national unity, but certainly the goal of self-determination was furthered by the disruption. See *supra* note 83 and accompanying text. Thus, these two principles of the Declaration seem fundamentally incompatible.

tended application of this Declaration was decolonization,²⁰⁶ which is not precisely identical to the problems currently posed in Yugoslavia.²⁰⁷ Instead of one state being granted independence by another, a federation of states has been dissolved.²⁰⁸ Thus the language of the Declaration alone does not truly resolve the problem at hand.

The Arbitration Commission has declared that although the scope of the right of self-determination is unclear, it does not permit the redrawing of boundaries.²⁰⁹ There is significant historical precedent²¹⁰ for its assertion that territorial integrity is paramount: "[I]t is well established that, whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence . . . except where the States concerned agree otherwise."²¹¹ Yet the Commission went on to state that the rights of minorities must be protected in accordance with Article 1 of the two 1966 International Covenants on Human Rights.²¹² The text of Article 1 is identical for both Covenants: "All people have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."²¹³ The Commission called upon the former Yugoslav republics to respect the rights of minorities within their borders and to allow them to choose their nationality "where appropriate."²¹⁴ It is difficult to assess the meaning of this choice if the borders are to remain fixed—perhaps it simply guarantees a right to emigrate to one's republic of choice. In

206. See LOUIS B. SOHN & THOMAS BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 415 (1973) (quoting G.A. Res. 1568, U.N. GAOR, 15th Sess., Supp. No. 16, at 33, U.N. Doc. A/4684 (1960)).

207. See *supra* note 203 and accompanying text; see discussion *supra* part II.A.

208. Weller, *supra* note 68, at 569.

209. Arbitration Commission Conference on Yugoslavia, Opinion No. 2, ¶ 1 (Jan. 11, 1992) (on file with author) [hereinafter Opinion No. 2].

210. Examples include Texan independence in 1840; the border between Hannover and the Netherlands, when Prussia annexed Hannover in 1866; and the acquisition by Germany of Alsace-Lorraine in 1891. 2 O'CONNELL, *supra* note 61, at 273.

211. Opinion No. 2, *supra* note 209, ¶ 1.

212. *Id.* ¶ 3.

213. International Covenant on Civil and Political Rights, *supra* note 155; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

214. Opinion No. 2, *supra* note 209, ¶ 4.

any case, the Commission has provided firm language that although the rights of minorities must be respected in accordance with international law, the territorial integrity of the new states must be secure: "The boundaries between . . . Bosnia-Herzegovina and Serbia . . . may not be altered except by agreement freely arrived at."²¹⁵ The Commission buttressed its position by mentioning that Article 5 of the Yugoslav Constitution declared that the borders of the republics could not be altered without their consent.²¹⁶ Bosnia has assured the Commission that it has no territorial ambitions and that it desires that the existing borders remain unchanged.²¹⁷

2. *South Africa's Bantustans: Independence or Enclosure?*

After the First World War, the mandate system was established by the League of Nations, through which powerful states would seek to grant independence to territories entrusted to them.²¹⁸ The 1960 Declaration articulates the following rule for mandates:

5. Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.²¹⁹

South Africa has been a consistent violator of this provision,²²⁰ and the UN's treatment of that noncompliance grants depth and reality to the Declaration.²²¹ South Africa had acquired South West Africa (now Namibia) from Germany in 1915, and had attempted to divide the country on the basis of race with respect to territory, but with all real power vested

215. Arbitration Commission Conference on Yugoslavia, Opinion No.3, ¶ 2 (Jan. 11, 1992) (on file with author) [hereinafter Opinion No. 3].

216. *Id.*

217. Opinion No. 4, *supra* note 150, ¶ 1.

218. SCHWARZENBERGER & BROWN, *supra* note 134, at 49.

219. *Declaration on the Granting of Independence to Colonial Territories and Peoples*, *supra* note 204, at 67.

220. Specifically, the policy of apartheid employed by South Africa in the mandate was the chief source of the UN's agitation. SCHWARZENBERGER & BROWN, *supra* note 134, at 50.

221. *See infra* text accompanying notes 222-233.

in the whites.²²² Seeking to draw borders based on race, South African whites reserved the best territory for themselves.²²³ This pretense of granting "freedom" to the indigenous peoples was wholly unsatisfactory to the UN.²²⁴ Negotiations continued until 1988, when South Africa finally agreed to grant South West Africa independence.²²⁵ UN-supervised elections were held in 1989, and Namibia is well on its way to becoming a free, democratic state.²²⁶

The inhabitants of South Africa itself, however, have not been quite so fortunate. The internationally condemned creation of bantustans²²⁷ or homelands has resulted in the creation of "autonomous" states inside South Africa.²²⁸ The Transkei, the first to be granted "independence" in 1976, remains subject to South Africa's control over defense, external affairs, internal security, postal services, immigration, railways, currency, banking, customs, and excise.²²⁹ The UN quickly moved to condemn the creation of the Transkei as a perpetuation of apartheid.²³⁰ South Africa's attempt to make

222. Christopher S. Wren, *Namibia Achieves Independence After 75 Years of Pretoria's Rule*, N.Y. TIMES, Mar. 21, 1990, at A1.

223. D'Amato points out that:

[T]he inequities are striking. It may be seen that more than half of the black population is assigned a per capita land area of 0.23 square kilometers, with the average being 0.74. In contrast, the whites have a per capita land allocation varying from 21 to 29 times the median black allocation and 7 to 9 times the mean.

ANTHONY D'AMATO, INTERNATIONAL LAW: PROCESS AND PROSPECT 167 (1987).

224. In a General Assembly resolution, the UN decided to terminate South Africa's mandate over the territory in 1966. *Question of South West Africa*, G.A. Res. 2145, U.N. GAOR, 21st Sess., Supp. No. 16, at 2, U.N. Doc. A/6316 (1966).

225. Wren, *supra* note 222, at A1.

226. *Id.*

227. The Bantu are the native tribes of the region; hence, the South African government has named their homelands "bantustans." OZDEMIR A. OZGUR, APARTHEID: THE UNITED NATIONS & PEACEFUL CHANGE IN SOUTH AFRICA 34 (1982).

228. *Id.* at 34-36.

229. *Id.* at 34.

230. See *Policies of Apartheid of the Government of South Africa*, G.A. Res. 31/6A, U.N. GAOR, 31st Sess., Supp. No. 39, at 10, U.N. Doc. A/31/22 (1976) [hereinafter G.A. Res. 31/6A]. In addition, the General Assembly called for South Africa to respect its own territorial integrity:

[The General Assembly s]trongly condemns the establishment of bantustans as designed to consolidate the inhuman policies of apartheid, to destroy the territorial integrity of the country [of South Africa], to perpetuate white minority domination and to dispossess the African people of South Africa of their inalienable rights

Id.

the appearance of responding to the 1960 Declaration and Articles 1 and 55 of the Charter has not been successful in convincing the world community that anything other than imaginary lines have been drawn within South Africa, and that the self-determination problem has been resolved.²³¹ Only South Africa has recognized the Transkei as an independent state.²³² The UN has taken the position that the creation of bantustans solidifies white minority rule over the vast majority of South Africa's territory.²³³ By creating such reservations, South Africa can keep the indigenous population in closely circumscribed boundaries.

The practice of South Africa in creating the bantustans is instructive in two ways. First, the principle of territorial integrity has not been questioned.²³⁴ Second, equality of treatment and respect for human rights have taken precedence over the right to independence.²³⁵ These elements aid the Bosnian government in arguing that its borders should remain fixed and that the equal rights protections guaranteed in the Bosnian Constitution²³⁶ satisfy international legal requirements for states with ethnic minorities such as the Serbs.²³⁷

3. *Palestine and Claims of Self-Determination*

Another dispute instructive in the resolution of the conflict in Yugoslavia is the status of the Palestinian Arabs in

231. See, e.g., *Policies of Apartheid of the Government of South Africa*, G.A. Res. 2671F, U.N. GAOR, 25th Sess., Supp. No. 28, at 31, U.N. Doc. A/8028 (1970) [hereinafter G.A. Res. 2671F].

232. OZGUR, *supra* note 227, at 34.

233. See, e.g., G.A. Res. 2671F, *supra* note 231, at 31.

234. The United Nations did not suggest that the bantustans should receive actual independence, but that their inhabitants should be granted equal rights *within* the present borders of South Africa. See *supra* note 230 and accompanying text.

235. See *supra* note 230 and accompanying text.

236. Opinion No. 4, *supra* note 150, ¶ 1.

237. The United Nations' primary objection to South Africa's creation of the bantustans in Resolution 31/6A was South Africa's attempt to avoid granting equal rights to all of its citizens. See G.A. Res. 31/6A, *supra* note 230. Thus, if the Bosnian government grants equal rights to all of its citizens, the UN could raise no objection to Bosnia's treatment of its minorities under the principles of resolution 31/6A. *Id.*

The Arbitration Commission, however, did not find the granting of equal rights conclusive with respect to Bosnia's bid for independence: they denied recognition of Bosnia's independence until a referendum was held. See *supra* text accompanying notes 157-161.

Israel. Resolution 242 of the UN Security Council²³⁸ calls for the Arab states to recognize Israel and for Israel to withdraw from the territories that it has occupied since the 1967 war.²³⁹ Israel has shown no intention of withdrawing from the Gaza Strip, the Golan Heights, Jerusalem, and the West Bank.²⁴⁰ The claim of the Palestinians that the principle of self-determination in the UN Charter and the Declaration of 1960 mandates the return of these territories has been hotly contested.²⁴¹ Although it has been suggested that there is no right of self-determination in international law,²⁴² decolonization, for example, cannot be explained fully without it.²⁴³ The Declaration and the Charter clearly indicate that self-determination is at least a rule of international law articulated by the General Assembly of the UN.²⁴⁴ It may not grant independent states to every group, but that should not be taken to mean that the rule does not exist.

Competing with the right of self-determination, the right of a state to be secure in its territory and internal politics must not be discounted.²⁴⁵ Furthermore, when a minority group seeks independence or secession, the self-determination rights of the majority and other minority groups must also be considered.²⁴⁶ When two groups both seeking to invoke rights of self-determination come into conflict, a gain for one is a loss for the other. While both the Palestinian Arabs and the Israelis have claims to the land, there is little basis

238. U.N. SCOR, 22d Sess., 1382d mtg. at 8, U.N. Doc. S/8247 (1967).

239. Michael Akehurst, *The Arab-Israeli Conflict and International Law*, 5 N.Z.U. L. REV. 231, 242-43 (1973).

240. Robert Pear, *Mideast Talks Get Promising Reviews*, N.Y. TIMES, Oct. 30, 1992, at A6.

241. For an advocacy of the Israeli viewpoint on these issues, see Malvina Halberstam, *Self-Determination in the Arab-Israeli Conflict*, 21 N.Y.U. J. INT'L L. & POL. 465 (1989).

242. See *supra* note 198 and accompanying text.

243. See Nathaniel Berman, "But the Alternative Is Despair": *European Nationalism and the Modernist Renewal of International Law*, 106 HARV. L. REV. 1792, 1901 (1993).

244. See discussion *supra* part II.C.1.

245. See *supra* text accompanying note 200.

246. Since territorial integrity demands that states be kept whole, the will of the people of the entire country must be considered rather than the will of a minority group. Thus, although self-determination grants independence in the colonial context (because border changes are not implicated), it may not allow minority groups to secede from an existing state. See *supra* note 203 and accompanying text.

for arguing that the Palestinians have no claim at all.²⁴⁷ In Bosnia, the Croats, Muslims, and Serbs must understand that although they have rights to self-determination,²⁴⁸ this goal must be balanced with the right of Bosnia to remain intact. The free election principle in *Western Sahara*²⁴⁹ may not be applied. In that case, the people of Western Sahara were to vote as a whole;²⁵⁰ in Bosnia, the issue would be pre-determined depending on whether Bosnia voted as a whole or the vote was divided in some manner. In other words, the manner of the division would dictate the outcome. If Bosnia voted as a whole, the Muslims would clearly win.²⁵¹ But since the Serbs now control the majority of Bosnia, it appears that this fact will be taken into account.²⁵² Even though the right of Bosnia to exist as a whole may be stronger than the rights of the components of Bosnia to go their separate ways,²⁵³ a compromise will probably be the ultimate outcome. The solution proposed by the Vance-Owen Plan did not purport to divide Bosnia,²⁵⁴ but that may still be the result.²⁵⁵

4. *Title by Conquest*

The law of conquest is also instructive in both Israel and Bosnia. The Israelis have conquered land and have sought to retain it.²⁵⁶ The Bosnian Serbs are attempting to accomplish a similar result,²⁵⁷ and both the Israelis and the Bosnian Serbs explicitly state that they have the authoritative claim to the land that they have "reconquered."²⁵⁸ This sort of claim may fall prey to the simple fact that acquisition of terri-

247. Halberstam, *supra* note 241, at 471-74.

248. Everyone has the right of self-determination, but minorities are not generally entitled to exercise that right because of the rule of territorial integrity. See *supra* text accompanying notes 200-203.

249. 1975 I.C.J. 12 (Oct. 16).

250. *Id.* ¶ 57.

251. See *supra* text accompanying notes 56-57.

252. *All Things Considered* (National Public Radio broadcast, June 22, 1993).

253. See discussion *supra* part II.C.1.

254. Balman, *supra* note 102.

255. *Hard Men Take the Long View*, *supra* note 110, at 48.

256. Pear, *supra* note 240, at A6. Israel captured the Gaza Strip, the Golan Heights, East Jerusalem, and the West Bank in the Six Days' War of 1967. Akehurst, *supra* note 239, at 241.

257. *Hard Men Take the Long View*, *supra* note 110, at 48.

258. Pear, *supra* note 240, at A6; *Reaction to Geneva Conference*, *supra* note 106.

tory by conquest is invalid per se in international law,²⁵⁹ unless of course the conqueror has the ability to retain the land (usually accompanied by some justification, valid or not).²⁶⁰

The 1970 Declaration on Principles of International Law provides that:

The territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter. The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognised as legal.²⁶¹

In application to the use of force by the Bosnian Serbs, the crucial passage of the declaration is the final sentence of the quotation.²⁶² The Bosnian Serbs, although not a state, still fall within that definition, because the sentence applies to any acquisition resulting from the use of force.²⁶³ As the Serbs have conquered nearly all of Bosnia by force,²⁶⁴ their acquisitions would appear to be invalid under the 1970 Declaration.

Bosnia's President Izetbegovic has complained that the proposed division of Bosnia grants the Serbs land taken by force.²⁶⁵ Such a grant is not, however, without precedent; Portugal recognized the impossibility of recovering the territory that it lost to India in the dispute over Goa in 1961.²⁶⁶

259. Originating from the prohibition of force by UN members in Article 2(4) of the Charter, the maxim has developed into customary international law binding on all states. See HARRIS, *supra* note 127, at 201. Article 2(4) states that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." U.N. CHARTER art. 2, ¶ 4.

260. BRIERLY, *supra* note 133, at 172-73.

261. *Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970).

262. The Bosnian Serbs have clearly violated this passage by their use of force in acquiring territory in Bosnia. See discussion *supra* part II.A.3.

263. The second sentence of the Declaration expressly prohibits *states* from acquiring territory by force; the third sentence prohibits *anyone* from acquiring territory by force. See *supra* text accompanying note 261.

264. See *supra* note 96 and accompanying text.

265. *All Things Considered*, *supra* note 252.

266. See U.N. SCOR, 16th Sess., 987th mtg. at 10, U.N. Doc. S/PV.987 (1961). India assembled an invasion force of 30,000 troops, supported by tanks,

Although the UN condemned the use of force by India in acquiring Goa, no action was taken to reinstall Portuguese authority, and Portugal recognized India's ownership of the territory in 1974.²⁶⁷ Although occurring before the 1970 Declaration, India's action is nonetheless a clear violation of Article 2(4) of the UN Charter, which at least prohibits the use of force by Members of the UN.²⁶⁸ Thus, the ability of states to acquire title to territory by conquest may depend on their ability to do so, or on the ability and willingness of someone else to prevent them.

Britain recovered the Falkland Islands from Argentina, partially on the basis of a legal claim to the territory and partially on the principle of self-determination.²⁶⁹ In that case, Britain had the ability to prevent the conquest of its territory, just as in the recent Gulf War of 1991, when other states had the ability to prevent Iraq from acquiring Kuwait through the use of force.²⁷⁰ In that conflict, apparently, no members of the Security Council accepted Iraq's claim that Kuwait was a historical province of Iraq.²⁷¹ Title by conquest, however, may still be successful. As Brierly indicates, "so long as war

aircraft, and warships. R.A.H. ROBINSON, *CONTEMPORARY PORTUGAL* 104 (1979). The Portuguese forces in Goa, however, amounted to perhaps 3,000 poorly-equipped troops, with neither tanks nor aircraft. *Id.*; Quincy Wright, *The Goa Incident*, 56 AM. J. INT'L L. 617, 622 (1962). India quickly defeated the Portuguese, who were powerless to stop the Indian forces. ROBINSON, *supra*, at 104. Portuguese reliance on international assistance was eliminated when the Soviet Union vetoed a Security Council resolution demanding the withdrawal of the Indian invasion force. *Id.*

267. Oscar Schachter, *United Nations Law in the Gulf Conflict*, 85 AM. J. INT'L L. 452, 453 (1991).

268. See *supra* note 259 and accompanying text.

269. See Thomas M. Franck, *Dulce et Decorum Est: The Strategic Role of Legal Principles in the Falklands War*, 77 AM. J. INT'L L. 109, 116 (1983).

270. See generally Schachter, *supra* note 267, at 453. British military power, exercised through the well-equipped Royal Navy, resoundingly defeated the Argentine forces. MAX HASTINGS & SIMON JENKINS, *THE BATTLE FOR THE FALKLANDS* 315-19 (1983). Thus, although the situation in the Falklands was relatively similar to that in Goa, the key distinction is that the British had the capacity to dislodge the Argentine forces, whereas the Portuguese simply did not have the capacity to reclaim Goa. *Id.*; see also *supra* note 266 and accompanying text.

Another distinction between the Falklands and Goa is that although Goa was inhabited predominately by Indians rather than by Portuguese (out of a population of 650,000, only 800 were Europeans), the Falklands clearly desired to remain British. HARRIS, *supra* note 127, at 204 n.68; HASTINGS & JENKINS, *supra*, at 12-13 (quoting that Falklands and Gibraltar are "British colonies and proud of it").

271. See Schachter, *supra* note 267, at 453.

continues to be used as an instrument of national policy, it will continue to produce the same results as it has in the past, and one of those will be the annexation of territory."²⁷² Law alone cannot always guide events on the international plane.

5. *Self-Determination and Yugoslavia*

The present state of self-determination law indicates that a right to self-determination exists,²⁷³ but the scope of that right has three principal hurdles that it must clear before those who seek independence will receive it.²⁷⁴ First, the individuals at issue must constitute a "people."²⁷⁵ It may not be possible to satisfy this definition outside of the colonial context.²⁷⁶ Second, the rights of a people to independence must be balanced with the rights of the state that they currently inhabit as well as the rights of other minority groups in the area.²⁷⁷ Third, the state in which the people currently reside is sovereign and is thus granted great autonomy in its internal affairs.²⁷⁸ Moreover, most of the UN activity on self-determination applies to colonies and mandates,²⁷⁹ not to peoples within existing, independent states. The resolution of any self-determination controversy must deal with all of these elements.

272. BRIERLY, *supra* note 133, at 172.

273. *See supra* note 198 and accompanying text.

274. *See infra* text accompanying notes 275-279.

275. *See* U.N. CHARTER art. 1, ¶ 2; *see also supra* note 198. Harris argues that *minorities* do not possess the right, limiting the application of self-determination to the colonial context. *See supra* note 203 and accompanying text. The Bosnian Serbs may constitute a minority only because they do not have a separate colonial state. *See supra* notes 203, 246 and accompanying text. Thus, the right of self-determination may not be available to the Bosnian Serbs.

276. *See supra* note 203 and accompanying text.

277. *See supra* text accompanying notes 245-246

278. The principle of state sovereignty is always difficult to reconcile with international law:

To the extent that sovereignty has come to imply that there is something inherent in the nature of states that makes it impossible for them to be subjected to law, it is a false doctrine which the facts of international relations do not support. But to the extent that it reminds us that the subjection of states to law is an aim as yet only very imperfectly realized, and one which presents the most formidable difficulties, it is a doctrine which we cannot afford to disregard.

BRIERLY, *supra* note 133, at 47-48.

279. *See discussion supra* parts II.C.1-2.

III. ANALYSIS

A. *The Rights of the New State of Bosnia v. The Rights of Bosnian Serbs to Secede*

Upon the dissolution of Yugoslavia, the republics of Bosnia, Slovenia, Croatia, and Macedonia have become independent nations, and Vojvodina, Montenegro, and Kosovo have remained part of Serbia.²⁸⁰ Although Serbia has not yet been recognized as an independent state, it functions as an independent state, so that the absence of formal recognition amounts to nothing more than sanctions.²⁸¹ The recognition of Bosnia on April 6, 1992 by the EC, in an effort to avoid the carnage that has in fact occurred,²⁸² has allowed Bosnian leaders to retain the high ground.²⁸³ Although they have been overpowered by the military might of the Serbs in Bosnia,²⁸⁴ they are a separate country, with all the rights that flow from that status.²⁸⁵

The Bosnian Serbs, although militarily dominant in Bosnia, only constitute a third of its population.²⁸⁶ Since Bosnia has become a single entity,²⁸⁷ its fate should be decided by its population as a whole. Although its fate will instead be dictated to it by the International Conference on the Former Yugoslavia,²⁸⁸ legally it need not be so. Bosnia has every right to deal with its population as it wishes within the rules of international law.²⁸⁹ Yet the simple fact that the Muslim plurality is at the whim of the ethnic-cleansing Serb minority makes all the difference.²⁹⁰ The Conference is correct in striking the balance between Bosnia's rights as a state and

280. See *supra* text accompanying notes 78-83.

281. See *supra* text accompanying notes 165-166.

282. Riding, *supra* note 146, at A3.

283. *Id.*

284. Marcus Tanner, *Owen Hits at Serbian Expansion*, THE INDEPENDENT (London), Nov. 5, 1992, at 17.

285. The UN Charter states: "The Organization [the UN] is based on the principle of the sovereign equality of all its Members." U.N. CHARTER art 2, ¶ 1. For a discussion of state sovereignty, see BRIERLY, *supra* note 133, at 7-16, 45-56; see also *supra* note 278 and accompanying text.

286. See *supra* text accompanying notes 20, 284.

287. See *supra* note 82 and accompanying text; see also *supra* text accompanying note 87.

288. See *supra* note 68.

289. See discussion *supra* part II.C.1.

290. Burns, *supra* note 108, § 1, at 5.

Serbia's ability to fight indefinitely.²⁹¹ Unless the Bosnian Serbs are appeased, Bosnia may not last very long. Although its existence may be tenuous in any case, there is no need to hasten the date of its demise.

Bosnia's government has two choices, and it appears that it is pursuing the more pragmatic course. It could reject the division of Bosnia in any way, refusing to acknowledge Serbian conquest; or it could recognize the strength of the Serbian position (i.e., actually holding the territory in question—three-quarters of the country, and threatening the rest), and accept a compromise agreement that would at least ensure the continued existence of the Bosnian state.²⁹² Bosnia's President has wisely accepted the latter alternative.²⁹³

1. *Obligations of Bosnia to the Serbian Minority*

Every state has obligations to its population.²⁹⁴ Usually inclusive of the right to vote and the protection of human rights, the Serbs will have to stretch these traditional definitions dramatically. Certainly, Bosnia must not seek to disenfranchise or exterminate its Serbian population, but beyond that, it will be difficult for the Bosnian Serbs to argue that they should be permitted to secede from Bosnia. The greatest asset of the Serbs is that Bosnia is in a state of flux at the moment²⁹⁵ (almost entirely due to Serb hostilities), and thus its borders, and perhaps its very existence, are rather ill-defined. Yet even though the Muslims, acting alone, are unlikely to be able to defeat the Serbs on the battlefield, Bosnia has no legal duty to cave in to the Serbian demands, despite whatever the proposals of the Conference indicate to the contrary.²⁹⁶ But regardless of what the Muslims agree to, it seems unlikely that Bosnia's continued existence is assured.

The legal rights of Bosnian Serbs against Bosnia do not include the right to secede or to dictate terms.²⁹⁷ Although

291. *Peace in the Hands of Unpeaceful Serbs*, *supra* note 21, at 41.

292. *Id.*

293. *See Bosnia's Dismal Endgame*, *supra* note 26, at 45.

294. The Arbitration Commission has noted Bosnia's adoption of all relevant human rights treaties. *See discussion supra* part II.B.4.

295. *See discussion supra* part II.A.3.

296. At least theoretically, the weaknesses of the Muslims in fighting the Serbs do not undermine Bosnian sovereignty, yet that may very well be the result. *See supra* text accompanying notes 278, 284-285.

297. *See discussion supra* part II.C.1.

neither of these has occurred, they certainly lurk behind the Conference's proposals. The rights of minority groups within a state should never be taken so far as to dominate the majority.²⁹⁸ Tyranny of the minority is even more repressive than tyranny by the majority, because fewer people are in control.²⁹⁹ The 1966 UN Covenant on Civil and Political Rights includes in Article 27: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."³⁰⁰ During the drafting of Article 27, it was very clear in the committee reports that the article was not intended to undermine the sovereignty of the nations in which these minorities resided, and that minority domination should not be tolerated.³⁰¹ Although the Bosnian Serbs must not be discriminated against, they have no right of independence under international law.³⁰² Thus, the only right that the Bosnian Serbs have to rely on is their might.

2. *State Succession and the New State of Bosnia—Its Rights*

The creation and recognition of Bosnia as an independent state is best interpreted as an example of state succession rather than a change in government.³⁰³ The borders of Bosnia have not, at least theoretically, been changed since it was a republic of Yugoslavia,³⁰⁴ but it certainly is a new state. As such, it can legally choose to adopt the treaties of the former Yugoslavia that apply to its territory,³⁰⁵ but its choice is not as important as it might appear for two reasons. First, the problems faced by Bosnia have more to do with practical considerations than with international law.³⁰⁶ Second, the ap-

298. See discussion *supra* part II.C.1.

299. Cf. THE FEDERALIST No. 10 (James Madison) (arguing that a larger union would ensure a greater number of interests, balancing one another out).

300. Covenant on Civil and Political Rights, *supra* note 155, art. 27.

301. See SOHN & BUERGENTHAL, *supra* note 206, at 317-19.

302. Again, self-determination is probably inapplicable outside of the colonial context. See *supra* note 275 and accompanying text.

303. See *supra* note 124.

304. Opinion No. 3, *supra* note 215, ¶ 2.

305. See discussion *supra* parts II.B.1-4.

306. Bosnia's approach to the international law of state succession has been dictated by its desire to have the backing of the international community in

proach that a new state will have to its rights and duties will be driven by facts, not law, primarily because the law of state succession remains unclear.³⁰⁷ Because only an intervening military force from abroad will ever be able to restrain the Serbs, Bosnia must weigh the competing forces of its sovereignty against its desire to befriend other states. So long as Bosnia's leaders manage to portray themselves as the victims of Serb aggression, they will probably manage to keep world opinion firmly on their side.³⁰⁸ Bosnia must restrain itself from pushing its case too far, for it might risk losing everything.

Thus circumscribed, Bosnia cannot risk offending. The international law of state succession does allow it some latitude, but the UN and the EC may be fundamentally unwilling to fight a protracted war against the Serbs for Bosnia.³⁰⁹ They appear willing to secure a peace but unwilling to use military force to assert absolute control over Bosnia for its Muslim plurality.³¹⁰ In any case, Bosnia must be careful in exercising its new-found rights in a world order that gives less and less credence to the theory of unchartered national sovereignty,³¹¹ especially when the step required to secure that absolute sovereignty includes the loss of life by other nations.

3. *A New State?*

Title by conquest is unlikely to grant the Serbs any favors. Although they do have the right to occupy their own property, they do not have the right to take the property of others in Bosnia, or anywhere else. Although the Serbs have largely been successful in making their desired territorial advances, they risk complete isolation by the world commu-

contending with the Bosnian Serbs. See discussion *supra* parts II.B.1-4. Thus, Bosnia has agreed to subject itself to a multitude of treaties. See *supra* text accompanying notes 152-156.

307. See discussion *supra* part II.B.2.

308. *Peace in the Hands of Unpeaceful Serbs*, *supra* note 21, at 41.

309. See *EC: Bosnian Serbs Face Total Isolation If They Do Not Accept the Geneva Plan Unconditionally*, Reuters, Jan. 15, 1993, available in LEXIS, World Library, Ttxnws File (suggesting that sanctions may be the chief tool employed by the UN and EC against the Serbs) [hereinafter *Total Isolation*].

310. *Id.*

311. The prerequisites placed by the Arbitration Commission on Bosnia's recognition as an independent state point to further limitations on state sovereignty. See *supra* text accompanying notes 149-161.

nity.³¹² The more they push, the more difficult it will be for the world to permit them to retain their spoils. Yet the question remains how to unseat the Serbs from what they have fought so hard to gain. The Croats and Muslims in Serbia have been fighting a losing battle, albeit on the right side. The fact that the Serbs have gained so much territory was reflected in the division of Bosnia into the ten semi-autonomous provinces in the Vance-Owen Plan, and in the more recent effort to divide Bosnia into three fully autonomous provinces.³¹³ The actual boundaries of the provinces have always been a matter of great dispute.³¹⁴ The Serbs have demonstrated their willingness to sign an agreement and then to continue fighting in an attempt to connect their provinces and then to join them with Serbia.³¹⁵ Although there is no legal basis for such activity,³¹⁶ another state, or group of states, would have to be firmly resolved to prevent such an outcome. The Serbs have proven themselves the most effective combatants in the remnants of Yugoslavia, and despite the embargo, the Bosnian Serbs have had access to Serbia's extensive military hardware.³¹⁷

Even if Bosnian Serb leaders are beginning to see that the UN simply will not permit Bosnia to be stripped of approximately half of its territory, the Serbs with the guns may not be quite so far-sighted.³¹⁸ Having the upper hand,³¹⁹ and with a unified Greater Serbia in sight,³²⁰ it is hard to imagine that they will simply stop fighting. They have no reason to do so. Whatever plans, proposals, and treaties are signed, it is difficult to imagine anything other than continued ethnic strife until everyone manages to take the territory they want, to link it to their country of choice, and to stay within the lines.

312. See *Total Isolation*, *supra* note 309.

313. See discussion *supra* part II.A.3.

314. See generally discussion *supra* part II.A.3.

315. See *supra* text accompanying notes 105-114.

316. See discussion *supra* part II.C.4.

317. Paul Lewis, *U.N. Votes 13-0 for Embargo on Trade with Yugoslavia*, N.Y. TIMES, May 31, 1992, § 1, at 1; *Peace in the Hands of Unpeaceful Serbs*, *supra* note 21, at 41.

318. Tanner, *supra* note 284, at 17.

319. See *supra* text accompanying note 97.

320. See *supra* text accompanying note 108.

B. *Placing Limits on Claims of Self-Determination*

Serbs in the former Yugoslavia have identified themselves as a group that wishes to join themselves together in one single nation, based on race or ethnicity.³²¹ This trend,³²² disturbing in its exclusionary and divisive undertones, is becoming ever more common. Countries once unified by a central authority are now disintegrating in a visceral ethnic urge to create a separate nation for themselves where there is no need for compromise between different ethnic groups.³²³ Czechoslovakia, another historical construct, has also fallen prey to this mania, despite the best efforts of its President, Vaclav Havel.³²⁴ Yugoslavia has taken a similar route, although a much more violent one.³²⁵ Serbs wish to create a Serbian state based not on Serbia's borders, but on where Serbs happen to live, and now based on what Serbs have managed to conquer.³²⁶

The Serbs have expanded the basic doctrine of self-determination beyond its practical limits. When Hitler attempted to unify Aryans and "ethnic Germans," regardless of whether or not they actually lived in Germany, self-determination was also being employed.³²⁷ At one level, peoples subjected to domination by colonial powers should be able to use self-determination in order to choose to rule themselves, yet when one people use the principle to take territory from neighboring independent states, self-determination merges into conquest. The Serbs in Bosnia do have rights, but those rights must be balanced with the right of Bosnia to be secure in its borders.

321. See generally discussion *supra* part II.A.

322. See *supra* note 3 and accompanying text.

323. See *supra* note 3 and accompanying text.

324. *Havel Quits as Slovakia Fulfills 1,000-Year Dream*, THE INDEPENDENT (London), July 18, 1992, at 10. Both Yugoslavia and Czechoslovakia were created out of the remnants of various empires after the First World War; both contained a variety of ethnic groups. See *supra* text accompanying note 181.

325. See discussion *supra* part II.A.

326. See discussion *supra* part II.A.3.

327. See generally PAUL JOHNSON, MODERN TIMES 342-43 (1983) (describing the basis of Hitler's racist designs on Europe).

1. *The Serbs as a People*

In order for the Bosnian Serbs to be able to exercise the right of self-determination, they must constitute a people.³²⁸ As the 1960 Declaration indicates, a right of self-determination does exist, even though it has not always granted indigenous and dominated peoples their freedom.³²⁹ In any case, the right of self-determination is probably not available to the Bosnian Serbs because they are probably best described as a minority rather than a people.³³⁰ Peoples possess the right of self-determination, whereas minorities do not.³³¹ Generally, the term "people" has been applied only in the colonial context.³³² Although members of a minority are entitled to certain basic rights from their country, they have no legal basis for tearing it asunder.³³³ The Serbs must not be permitted to expand Serbia's borders, greatly diminishing the size of Bosnia.

2. *When Rights Collide*

The second limitation on self-determination is the rights of other groups. A minority must not be permitted to dominate other groups, including the majority.³³⁴ In the case of Bosnia, the Serbs have become increasingly dominant in the present conflict.³³⁵ The rights of the Croats and Muslims who also inhabit the country must be weighed against the rights of the Serbs to be autonomous or to join with Serbia. Unfortunately, the Serbs in Bosnia are dispersed,³³⁶ and as a matter of geography, they could not unite with Serbia without the displacement of other groups, although this displacement may have occurred already in any case.³³⁷ Again, the right of the Serbs to unite with Serbia—to secede—is not a right normally associated with self-determination.³³⁸ Generally, self-determination grants independence only to op-

328. See *supra* text accompanying note 275.

329. See discussion *supra* part II.C.1.

330. See *supra* note 275 and accompanying text.

331. See *supra* note 275 and accompanying text.

332. See *supra* note 275 and accompanying text.

333. See discussion *supra* part II.C.1.

334. See discussion *supra* part II.C.3.

335. See *supra* note 97 and accompanying text.

336. See *supra* note 24 and accompanying text.

337. See discussion *supra* part II.A.3.

338. See discussion *supra* part II.C.3.

pressed colonial nations and not to minority groups.³³⁹ The focus of self-determination with respect to minority groups has been equal rights, not independence.³⁴⁰

The cost of permitting the Serbs to secede would be to sanction the uprooting of many indigenous groups in order to connect the Bosnian Serbs with Serbia.³⁴¹ Furthermore, it might only encourage the Serbs to acquire more territory so that they might take it with them when seceding to Serbia. Also, the rights of Bosnia to maintain its existing territory are strong indeed.³⁴² It has long been considered obvious that the granting of equal rights to minority groups should never be escalated to the granting of independence for such groups.³⁴³ Interestingly, Serbian leaders took this position when Croatia and Slovenia seceded from Yugoslavia.³⁴⁴ Yugoslavia (then dominated by Serbia) declared that it had a right to compel these provinces to remain as part of Yugoslavia, and were permitted to use force in doing so.³⁴⁵ In the case of Bosnia, the only real difference between its secession from Yugoslavia and the Serbian parts of Bosnia from Bosnia is that the borders had already been drawn in the former case.³⁴⁶ This distinction is much more significant than it might at first appear: as soon as borders become flexible, the limits of that flexibility are usually tested.³⁴⁷ Thus, it is vitally important to attempt to retain existing boundaries. Unless the Serbs become truly intransigent, Bosnia's government has nothing to gain by sanctioning their independence.³⁴⁸

339. See *supra* note 275 and accompanying text.

340. See discussion *supra* parts I.C.1-2.

341. See *supra* text accompanying note 24.

342. See discussion *supra* part II.C.1.

343. See discussion *supra* parts II.C.1-2.

344. See Weller, *supra* note 68, at 582.

345. See *id.*

346. Opinion No. 3, *supra* note 215, ¶ 2.

347. See discussion *supra* part II.A.

348. Although Bosnia may lose much of its territory to the Bosnian Serbs, Bosnia has nothing to gain by acquiescing to Bosnian Serb demands for independence because such an action would deprive the Bosnian government of the little bargaining strength that it has retained. See discussion *supra* part II.A.3.

3. *Bosnian Sovereignty and the Limits of Self-Determination*

Bosnia is a sovereign state and therefore possesses a strong presumption of territorial integrity.³⁴⁹ If a state is not secure in its borders, it cannot be secure in very much at all. Bosnia stands to lose half or more of its country by agreeing to a settlement drafted by the International Conference on the Former Yugoslavia.³⁵⁰ By agreeing to such a plan, however, it may at least put a limit on the territory that will be under Serb control.³⁵¹ On the other hand, even if the Serbs do abide by the terms of the agreement, and end up with their autonomous province within Bosnia, the sovereignty of Bosnia will already have taken a beating.³⁵² When weighed against the right of Bosnia to maintain its borders, Serbs have little to the contrary that they may argue under international law.³⁵³ The risk is that they will not argue, but they will merely take the land in question, regardless of what any agreement stipulates. Serb rights to self-determination cannot trump the right of Bosnia to maintain its sovereignty, but it is as yet unclear whether the UN and EC will be willing to fight to prove that fact.³⁵⁴

The extension of the self-determination principle to grant Serbia a loose confederation in Bosnia may misconstrue the situation. A legal analysis may not be applicable. The sole reason for the division of Bosnia may well be pragmatism. Law can be used to describe the deal, but not to explain it. The strength of the Serbs' position has been reflected in the negotiations,³⁵⁵ although not in international law.³⁵⁶ Thus, the success of the Serbs may lie in the strategic strength of their position and not in their legal rights.

349. See discussion *supra* part II.C.1.

350. See discussion *supra* part II.A.3.

351. See discussion *supra* part II.A.3.

352. See discussion *supra* part II.A.3; see also *supra* note 278.

353. See discussion *supra* parts II.C.1-5.

354. Although Bosnia clearly has international law on its side, it may need foreign intervention to assert its rights. See generally Cue, *supra* note 31, at 3; see also discussion *supra* parts II.C.1-5.

355. See discussion *supra* part II.A.3.

356. See discussion *supra* parts II.C.1-5.

IV. PROPOSAL

The strength of the Serbs' position³⁵⁷ and the unwillingness of the world community to become far more actively involved in the conflict in Yugoslavia³⁵⁸ suggest that Bosnia should compromise. As Bosnia is an independent nation, the UN must grant Bosnia all assurances that its borders are secure. Although Bosnia must respect the right of the Serbs as a minority group within its territory,³⁵⁹ the UN must assure Bosnia that the appeasement of the Serbs will not grant the Serbs an opportunity that they cannot refuse—the creation of a larger Serbian state. If the Serbian army becomes deeply involved in the conflict again as a result of concessions to Bosnian Serbs that strengthen their position, the UN will have made the gravest mistake. For as long as the Bosnian Serbs are separated, albeit artificially, from Serbia, Bosnia has a chance of survival in something akin to its present dimensions. But if the ICFY eventually gives in to Serbia's absolutely inflexible demand to have a single, autonomous province bordering Serbia,³⁶⁰ it seems more than likely that the Serbs will attempt to secede.

Since this resolution would set the dangerous precedent of factually justifying title to territory by conquest, the window of opportunity for secession must not be opened. Although the Serbs will not be happy without being given the opportunity to secede, there is at least the possibility that the conflict might end if the opportunity is not given. The Muslims appear to be willing to continue fighting should the Serbs attempt to make off with part of their country.³⁶¹ In any case, the rule that title by conquest is no longer valid in international law,³⁶² recently enforced in the Gulf War,³⁶³ would be undermined significantly if the Serbs were to have their way in Bosnia. The borders must remain fixed, for the conflict will never cease so long as the dividing lines are flexible. Once the borders are no longer a bargaining chip, the reasons for continued fighting will slowly subside. If the EC

357. See *supra* text accompanying note 97.

358. Cue, *supra* note 31, at 3.

359. See *supra* text accompanying notes 234-237.

360. See discussion *supra* part II.A.3.

361. See discussion *supra* part II.A.3.

362. See discussion *supra* part II.C.4.

363. See Schachter, *supra* note 267, at 454.

and the UN appear to be yielding on the issue, the conflict will continue. All sides appear quite willing to fight indefinitely to reclaim their desired territory; a war that has no end in sight must be prevented.

V. CONCLUSION

International law is helpful insofar as it guides the practice of states. But when ethnic wars begin, international law can do little more than interpret the process and contemplate the aftermath. Bosnia can demand adherence to the principle of territorial integrity and the prohibition against the use of force, but it remains doubtful that Serbia will suddenly cave in to the besieged government's desires. The Vance-Owen Plan left Bosnia open to further strife.³⁶⁴ Dividing the country into autonomous enclaves is sure to please no one, and as long as the Bosnian Serbs believe that they will not be fighting someone other than Muslims or Croats, they are unlikely to be swayed. International military action may once again prove to be the only escape route, placing the region under a new order's control.

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364. See discussion *supra* part II.A.

