

# Contemplating Failure and Creating Alternatives in the Balkans: Bosnia's Peoples, Democracy, and the Shape of Self-Determination

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The wars of Yugoslav dissolution have brought into the open the unresolved conflict between self-determination and the sanctity of state borders.<sup>1</sup>

It is not sufficient for the world community to say that Bosnia-Herzegovina *should* be a state . . . . [I]t is not clear how the world community can pretend to insist on Bosnia-Herzegovina continuing as a single state against the wishes of many of its citizens, unless the world community is willing to force them to live together, as did the previous rulers of Yugoslavia and the Balkans.<sup>2</sup>

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1. LEO TINDEMANS ET AL., UNFINISHED PEACE: REPORT OF THE INTERNATIONAL COMMISSION ON THE BALKANS 35 (1996).

2. Paul C. Szasz, *The Rise of Nationalism and the Breakup of States: Discussion*, 88 AM. SOC. INT'L L. PROC. 46, 50 (1994).

## I. INSISTING ON SUCCESS: BRITTLE BOSNIA

I think it obvious that while we may owe Bosnians a great deal, we owe Bosnia nothing. In the quotidian bustle of politics, we seldom pose ultimate questions about the existing order—we tend to assume France or Japan as a kind of given—but such heuristics hardly should, and barely can, apply to a shadow like Bosnia. Almost everyone agrees that Bosnia today is dysfunctional, its existence too contingent to take for granted, and so we reasonably may and properly should ask fundamental constitutional questions about its future, its people, and their state.

And yet: Bosnia. The name conjures a moral vision more than an actual state. A moral vision and a political commitment: to “no peace without justice,” to “never again,” to not rewarding aggression, to multiculturalism and the political irrelevance of ethnicity, to cosmopolitanism over post-modern neo-tribalism. We have come to believe in a commitment to preserve, to restore, to redeem the state of Bosnia.

It is also, of course, the physical repository of some four million people in a region of millions more—a “they” not always included in “our” discussion.<sup>3</sup> There, in that place, people also have moral and political commitments, and the pressing imperatives of life lived: economies, infrastructures, rules, families, aspirations, fears—and borders. It has been more than eight years since the cessation of hostilities in Bosnia and Herzegovina. The 1995 Dayton Accords<sup>4</sup> ended the military conflict, but their political and civilian provisions have been only imperfectly implemented. Bosnia is internationally recognized and at peace, but in important ways remains effectively partitioned into ethnicized quasi-statelets, its weak confederal structure propped up by direct, active international intervention.<sup>5</sup>

3. The “we” I refer to in this Article is, first, those who read it, but more broadly, the interested policy community, including governments, international institutions, and the legal academy—principally, though not exclusively, composed of non-Bosnian actors. I do not mean to suggest a unity of views or interests among these outsiders—I, for instance, disagree almost completely with the main lines of international policy—although I will be arguing that there has been a dominant political commitment about which we may speak meaningfully. “They”—one of the logical corollaries of “us”—refers to the peoples of Bosnia, some of whom, of course, agree with and participate in the mainstream of international discourse about their country, and some of whom do not. But it is unquestionably *their* country; “they” are the peoples who represent the “self” in self-determination—or would, if “we” were not presently interposed into the debate.

4. General Framework Agreement for Peace in Bosnia and Herzegovina with Annexes, Dec. 14, 1995, 35 I.L.M. 75 (1996) [hereinafter Dayton Accords].

5. This is a view widely shared by international and local officials, NGOs, journalists, supporters and opponents of further integration, and private citizens. See, e.g., General Affairs Council, *2002 Annual Council Review of the Stabilisation and Association Process for South Eastern Europe*, 34 CEPS EUROPA SOUTH-EAST MONITOR (2002) (noting that Bosnia is still not a self-sustaining state, lacks a single economic market, has weak state institutions, and suffers from insufficient refugee return); Robert B. Hitchner, *How To Leave a Democratic Bosnia*, WALL ST. J. EUR., Aug. 29, 2003, at A7 (describing continuing political instability, social fragility, and economic weakness in Bosnia, which requires ongoing administration by the international community); William Pfaff, *Time To Concede Defeat in Bosnia-Herzegovina*, *The Dayton Accords*, INT’L HERALD TRIB., Oct. 10, 2002, at 9; Tihomir Loza, *Cheerleading Bosnia*, TRANSLATIONS ONLINE’S BALKANS RECONSTRUCTION REP., Mar. 14, 2003, at <http://www.reliefweb.int/w/rwb.nsf/o/a5b650a284d29053c1256cf3004607ac?opendocument>; Patrick Moore, *Bosnia To Be Ready for EU Membership by 2009?*, RFE/RL NEWSLINE, May 2, 2003, <http://www.rferl.org/newsline/2003/05/4-SEE/see-020503.asp> (quoting the President of the Council of Ministers, Adnan Terzić, as saying that Bosnia still has much to do to become a “self-sustaining state”

Although the international protectorate—managed through the North Atlantic Treaty Organization (NATO) and the Office of the High Representative (OHR)<sup>6</sup>—has made considerable progress in stabilizing and even integrating the territory,<sup>7</sup> much of the integrationist agenda has not been successful yet.<sup>8</sup>

and that “[t]here needs to be a thread from the central government down to [each] municipality in order for the country to function properly, [but] that thread is currently cut at several places”) (alteration in original); Patrick Moore, *What To Do About Bosnia?*, RFE/RL BALKAN REP., Sept. 8, 2003, <http://www.rferl.org/reports/balkan-report/2003/09/29-050903.asp>; Wolfgang Petritsch, *How To Resuscitate a Failed State*, INT’L HERALD TRIB. ONLINE, July 3, 2002, at <http://www.iht.com/search/ihtsearch.php?id=63265&owner=&date=20020704160227> (listing goals of former High Representative Petritsch as “acceleration of the return of refugees to establish the rule of law; institution-building to turn the country into a functioning state; and economic reform to enable this state to be self-sufficient, at least in the medium term”).

6. In late 1997, the intergovernmental Peace Implementation Council overseeing the international community’s efforts in Bosnia accorded the expanded “Bonn Powers” to the Office of the High Representative. See EUROPEAN STABILITY INITIATIVE, RESHAPING INTERNATIONAL PRIORITIES IN BOSNIA AND HERZEGOVINA, PART II: INTERNATIONAL POWER IN BOSNIA, Mar. 20, 2003, at [http://www.esiweb.org/reports/bosnia/showdocument.php?document\\_id=8](http://www.esiweb.org/reports/bosnia/showdocument.php?document_id=8); Gerald Knaus & Felix Martin, *Lessons from Bosnia and Herzegovina: Travails of the European Raj*, J. DEMOCRACY, July 2003, at 60, 63-64. The High Representative has used these expanded powers to enact sweeping policy reforms. See Petritsch, *supra* note 5; Dragan Stanimirovic, *Ashdown Strikes Again*, TRANSITIONS ONLINE, Dec. 10, 2002, at <http://www.tol.cz>. The protectorate has been the subject of recent controversy about whether or not Bosnians should determine their own future. See generally Hitchner, *supra* note 5; Knaus & Martin, *supra*.

7. Progress towards integration has been considerable. Developments include: creation of a state-level defense ministry; a unified license plate system; a common currency; a statewide phone service; some educational reform; establishment of a state court and state-wide criminal code; some cross-ethnic refugee returns; acknowledgement of state-wide citizenship for members of all ethnic groups; development of considerable trade links and protection of the freedom of movement; and a general relaxation of ethnic tensions. See INT’L CRISIS GROUP, THE CONTINUING CHALLENGE OF REFUGEE RETURN IN BOSNIA & HERZEGOVINA (2002), [http://crisisweb.org/library/documents/report\\_archive/A400847\\_13122002.pdf](http://crisisweb.org/library/documents/report_archive/A400847_13122002.pdf); Anna Morawiec Mansfield, Note, *Ethnic but Equal: The Quest for a New Democratic Order in Bosnia and Herzegovina*, 103 COLUM. L. REV. 2052, 2066-73 (2003) (discussing the “Constituent Peoples Decision” by the Constitutional Court of Bosnia and Herzegovina that makes the three nations constituent peoples of the whole of Bosnia, not merely of their respective entities); Colin Woodard, *In Rebuilt Bosnia, No Terror Toehold*, CHRISTIAN SCI. MONITOR, Mar. 24, 2004, at 1, <http://www.csmonitor.com/2004/0324/p01s01-woeu.html> (describing a reduction in the physical reminders of the 1992-95 war and the success of the international reconstruction effort to reestablish Bosnia’s infrastructure, border patrol services, and national governing institutions); Loza, *supra* note 5; Patrick Moore, *High Representative Hails Progress in Bosnia...*, RFE/RL NEWSLINE, Oct. 9, 2003, <http://www.rferl.org/newsline/2003/10/4-see/see-091003.asp> (noting increased inter-ethnic cooperation, steps towards a statewide tax administration, unified armed forces, and joint governance of Mostar, and quoting High Representative Paddy Ashdown as saying that the Dayton Accords are “being used not as in the past to block reform but to [promote] it” and that “[t]he constitution of the country has now become the property of its people, not of the international community”). But see Moore, *supra* (noting Ashdown’s comment that Bosnia remains in a period of “lawless rule”).

8. The project might yet succeed. However, continued failures of the integrative project include: no unified tax structure; no common economic regulatory zone; the continued existence of separate military establishments; large populations of refugees and internally displaced persons; continued near total ethnic segregation; and continued dependence on foreign assistance for macroeconomic, political, and military stability. See Stanimirovic, *supra* note 6. See also HUMAN RIGHTS WATCH, WORLD REPORT 2002, at 297 (noting refugee returns occurring at “a rate which would take two decades to clear the backlog,” and that even those returns were not “self-sustaining . . . as returnees continued to face scant employment opportunities and great obstacles to education for minority children”); Bogdan Ivanisevic, *Legacy of War: Minority Returns in the Balkans*, in HUMAN RIGHTS WATCH, WORLD REPORT 2004, [http://hrw.org/wr2k4/16.htm#\\_Toc58744965](http://hrw.org/wr2k4/16.htm#_Toc58744965) (noting, inter alia, that roughly one-half of returnees have gone back to areas in which they were not the ethnic majority, but also that despite there being one million people still displaced, there is a declining pool of refugees wishing to return). Many official returns are in fact property swaps, while violence and intimidation continue to confront the few genuine returnees. See Anes Alic, *Better Late than Never*, TRANSITIONS ONLINE, Mar. 4, 2003, at <http://www.tol.cz> (describing the obstacles to refugee returns in Muslim-

Received opinion views Bosnia as fundamentally unstable: susceptible to shocks from other regional disputes<sup>9</sup> and sustainable only as long as foreign power intervenes.<sup>10</sup> Perhaps most critically, the international effort has largely failed to create a real popular commitment to the project of integration among Bosnia's people,<sup>11</sup> instead making the limited progress it has by imposing

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controlled Donji Vakuf); Dragan Stanimirovic, *War on a Different Front*, TRANSITIONS ONLINE, Mar. 4, 2003, at <http://www.tol.cz> (describing attacks on Muslims returning to the Republika Srpska and attempts to prevent the rebuilding of mosques). For examples of the debilitating effects of Dayton Bosnia's dysfunction, see Nicholas Wood, *Mostar Journal: An Effort To Unify a Bosnian City Multiplies Frictions*, N.Y. TIMES, Mar. 15, 2004, at A4 (noting the near-total separation and duplication of institutions in Croat West Mostar and Muslim East Mostar and efforts to unify the two areas); Anes Alic, *Bridge of Despair in Disrepair*, TRANSITIONS ONLINE, Sept. 17, 2003, at <http://www.tol.cz> (describing how political divisions and funding shortfalls prevent repair of the historic Sokovolić Bridge, calling it a "victim [of] Bosnia's brittle peace"). See also INT'L CRISIS GROUP, *supra* note 7 (describing period through 1999); Timothy William Waters, *The Naked Land: The Dayton Accords, Property Disputes, and the Bosnia's Real Constitution*, 40 HARV. INT'L L.J. 517 (1999) (same). High unemployment, a moribund economy, and corruption might also be noted. See BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP'T OF STATE, 2003 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: BOSNIA AND HERZEGOVINA (2004), <http://www.state.gov/g/drl/rls/hrrpt/2003/27829.htm>; Loza, *supra* note 5. Some of these failings are embedded in the constitutional structure. See Waters, *supra*.

9. Several OHR and OSCE officials noted that many Serb politicians see an eventual settlement in Kosovo as their opportunity to press for the separation of the Republika Srpska—which implies that the sentiment for separation still exists—or at least brake further integration. Interview with anonymous Organization for Security and Cooperation in Europe (OSCE) official in Banja Luka, Bosn. & Herz. (Mar. 12-13, 2004); Interview with anonymous OSCE official in Banja Luka, Bosn. & Herz. (Mar. 12, 2004); Interview with anonymous OHR official, in Banja Luka, Bosn. & Herz. (Mar. 13, 2004); Interviews with two anonymous OHR officials, in Sarajevo, Bosn. & Herz. (Mar. 15, 2004).

10. In the early post-Dayton period, observers believed that withdrawal might lead to immediate war; now most believe it might lead to war only if the Muslims refuse to accept a Serb or Croat secession. Moore, *What To Do About Bosnia?*, *supra* note 5. Cf. Patrick Moore, *The Mixed Record of Balkan Protectorates*, RFE/RL BALKAN REP., May 2, 2003, <http://www.rferl.org/reports/balkan-report/2003/05/13-020503.asp> ("In Bosnia . . . foreign experts and local opinion polls generally agree that the departure of the foreigners would sooner or later result in a resumption of conflict."). Interview with anonymous Office for Security and Cooperation in Europe (OSCE) official, in Sarajevo (Mar. 12, 2004) Even those who reject this view because they think Bosnia is now not only militarily but politically stable should see Part V, *infra*, concerning the doctrinal consequences of stability.

11. Real popular support for the integrationist project is neither totally absent nor impossible in the future, but even advocates of integration acknowledge that it is very weak at present. See, e.g., Midhat Izmirlija & Leila Balić, *Situations, Perspectives and Possibilities for Amendment of the Dayton Constitution*, in EIGHT YEARS OF DAYTON BIH: NEW VISIONS FOR BOSNIA AND HERZEGOVINA? ALTERNATIVE CONFERENCE 120, 136 & n.63 (noting that "the basic problem of the structure of Bosnia and Herzegovina as a normal European state are [sic] not complicated amendment procedure regulated by the Constitution, but the fact that many citizens of Bosnia and Herzegovina do not consider it their homeland"); Interview with anonymous OHR official, Banja Luka, Bosn. & Herz. (Mar. 13, 2004) (noting that in the entire period since the war ended, "I have not seen a single genuine act of reconciliation"). But see Interview with Republika Srpska lawyer, Banja Luka, Bosn. & Herz. (Mar. 13, 2004) ("It has gotten better. Three years ago, Serb sportsmen who played for BiH teams were called traitors; now, no one cares.").

Izmirlija and Balić also note that in a survey administered to elementary school students in Sarajevo, Banja Luka and Žepče, the question "what is your state?" received completely different responses: "In Sarajevo the answer was Bosnia and Herzegovina, in Banja Luka, Serbia and Montenegro and in Žepče, Croatia." (internal citation omitted). See also Wood, *supra* note 8 ("[L]ocal analysts and politicians concede that many Bosnians, particularly Serbs and Croats, are far from identifying with the state that the international officials are trying to build for them."). According to some reports, most Bosnian Serbs and Bosnian Croats feel no loyalty to Bosnia. *Id.* (noting the statements of a Bosnian journalist: "They do not have the feeling that they belong to this state. Serbs look over the Drina to Belgrade, and Croats to Zagreb; foreigners don't understand that."). See also Julian Braithwaite, *Can the Nationalists Deliver?*, BALKAN CRISIS REP., Mar. 11, 2003, [http://www.iwpr.net/index.pl?archive/bcr3/bcr3\\_200303\\_413\\_3\\_eng.txt](http://www.iwpr.net/index.pl?archive/bcr3/bcr3_200303_413_3_eng.txt) ("It is still the case today that most Bosnian Serbs and probably a majority

reforms and relying on the acquiescence that the weak show before the strong.<sup>12</sup> Bosnia remains at best an inchoate, not-yet success: a fragile, fictive, even failed state,<sup>13</sup> held together by outsiders' weapons, outsiders' gold, and

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of Bosnian Croats do not believe in Bosnia-Herzegovina, and vote accordingly. Yet no state can succeed in the long-term if the majority of its citizens do not support it.”); Nerma Jelacic & Gordana Katana, *Bosnia: Greater Serbia Dream Lives On*, BALKAN CRISIS REP., Aug. 29, 2003, [http://www.iwpr.net/index.pl?archive/bcr3/bcr3\\_200308\\_456\\_2\\_eng.txt](http://www.iwpr.net/index.pl?archive/bcr3/bcr3_200308_456_2_eng.txt) (“[T]he opinions held by the citizens and politicians of RS [Republika Srpska] are a stark reminder that the international community has a long and difficult road ahead if it pursues a unified Bosnia.”).

In all elections since the war, the wartime nationalist parties have received either majorities or pluralities, and it is widely supposed that the international community actively intervened to cobble together the one non-nationalist postwar government, the Alliance for Change. See, e.g., Braithwaite, *supra*; Jelacic & Katana, *supra*; Knaus & Martin, *supra* note 6, at 67 (noting Richard Holbrooke’s threats that the United States would withhold aid from nationalist governments and the OSCE’s funding of election posters asking Bosnians to “Vote for Change”); Loza, *supra* note 5 (discussing the coalition formed after “months of Western-sponsored post-electoral engineering in the aftermath of the November 2000 elections”); Senad Slatina, *Bosnia: Ethnic Divide Widens as Elections Loom*, BALKAN CRISIS REP., Aug. 9, 2002, [http://www.iwpr.net/index.pl?archive/bcr2/bcr2\\_20020809\\_4\\_eng.txt](http://www.iwpr.net/index.pl?archive/bcr2/bcr2_20020809_4_eng.txt). The October 2002 elections returned nationalists to power, which was seen as a defeat for the international community’s policy of supporting integrationist parties. See Patrick Moore, *Final Tally Confirms Nationalist Win in Bosnia*, RFE/RL REPORT, Oct. 21, 2002, <http://www.rferl.org/newsline/2002/10/4-SEE/see-211002.asp>; Sead Numanovic & Gordana Katana, *Bosnia: Nationalists Alarm West*, BALKAN CRISIS REP., Jan. 9, 2003, [http://www.iwpr.net/index.pl?archive/bcr3/bcr3\\_200301\\_396\\_3\\_eng.txt](http://www.iwpr.net/index.pl?archive/bcr3/bcr3_200301_396_3_eng.txt) (discussing negotiations leading to the nationalist parties’ return to power, and noting the absolute majorities held by those parties or their allies in all cantons); Dimitrios Triantaphyllou, *Deciphering the Bosnian Elections*, Oct. 2002, CTR. FOR EUR. POLICY STUDIES, at [http://www.ceps.be/Article.php?article\\_id=194](http://www.ceps.be/Article.php?article_id=194). But see Nicholas Wood, *Nationalists Take Lead in Bosnian Elections: U.S., Others Pushed for Moderate Parties*, WASH. POST, Oct. 8, 2002, at A17 (noting voters did not necessarily favor return to wartime policies). Nothing I argue means to suggest that the international community ought to support or impose non-integrative policies against the wishes of the Bosnian people; on the contrary, I argue only that we ought to discern what their wishes are, and respect them.

12. See, e.g., Anes Alic, *A Tax Reform for Bosnia*, TRANSITIONS ONLINE, Jan. 5, 2004, at <http://www.tol.cz> (discussing how the “chronology of the making of the [new tax] law shows that it took immense pressure and financial threats from the international community for the reforms to see the light of day”); Jelacic & Katana, *supra* note 11 (“The only steps towards integration, such as common passports and car license plates, have been made at the insistence of the international community.”). I do not suggest that all parties oppose OHR policy—that is not true. I only suggest that acquiescence under pressure tells us little about Bosnians’ preferences one way or the other.

13. There is a rich literature on failed states. See, e.g., Walter Clarke & Jeffrey Herbst, *Somalia and the Future of Humanitarian Intervention*, FOREIGN AFF., Mar./Apr. 1996, at 84 (describing the need for a new term “to express the idea that a state’s fundamental institutions have so deteriorated that it needs long-term external help, not to institutionalize foreign control but to create stronger domestic institutions capable of self-government” and a “clear procedure for handling a failed state” and its relationship to the international community); Andrew J. Harris, *Facing the Challenges of Military-Civil Cooperation in Complex Emergencies*, DEFENSE & FOREIGN AFF. STRATEGIC POL’Y, Oct. 2000, at 11 (“[T]he rise of ‘failed’ states is a recent phenomenon. ‘Failed’ states are characterized by a progressive breakdown of state mechanisms, multiple armed factions exercising control over parts of the formerly national territory, and a breakdown of control within military factions.”). Certainly Bosnia does not exhibit the kind of chaos that characterizes classic failed states like Somalia. Cf. Gerry J. Simpson, *The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age*, 32 STAN. J. INT’L L. 255, 256 (1996) (defining a failed state as “a state in which sovereignty has been radically fragmented by revolutionary chaos such that not even the most skeletal civil administration remains”—a definition which would exclude both Bosnia today and Bosnia during the period of its war, when three separate civil-military authorities exercised control on various parts of its territory); Robert I. Rotberg, *Failed States in a World of Terror*, FOREIGN AFF., Jul./Aug. 2002, at 127 (not considering Bosnia presently a failed state but calling it an example of a state that had “lapse[d] and then [was] restored to various degrees of health”); Kenneth M. Pollack, *After Saddam: Assessing the Reconstruction of Iraq*, Jan. 12, 2004, <http://www.foreignaffairs.org/20040109faupdate83175/kenneth-m-pollack/after-saddam-assessing-the-reconstruction-of-iraq.html> (arguing that “Bosnia is no one’s idea of a success story, and it is unclear when it ever will be, but it is also unquestionably better off today than it was prior to the international intervention” and calling Bosnia “a country not capable of surviving on its own but not tom

outsiders' will.<sup>14</sup> As has been evident to all, the will is weakening, and the gold is running out.<sup>15</sup> Soon, perhaps, only the weapons will remain.<sup>16</sup>

Few would argue that this can continue. In the past year, numerous observers have acknowledged the failings of the current dispensation.<sup>17</sup> In this

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apart by violence" in contradistinction to 1970s and 1980s Lebanon). However, it seems reasonable to say that any state, in the entire period following the complete collapse of central control during a fractious and protracted conflict, that is unable to maintain its own territorial integrity or institutions without continuous external pressure and support, and lacks legitimacy with its own population, may reasonably be called a "failed" or "failing" state—at least in the narrow sense that it is not (yet) succeeding. Cf. Sebastian Mallaby, *The Reluctant Imperialist: Terrorism, Failed States, and the Case for American Empire*, FOREIGN AFF., Mar./Apr. 2002, at 2 (including Bosnia in a discussion of failed states, and noting that "nation builders are making some headway but are not yet successful enough to withdraw"). Unless we limit the category of "failed states" to these entities in which warfare is currently ongoing, Bosnia seems a reasonable candidate for the description. Indeed, as noted already, the international community's own chief administrator in Bosnia, Wolfgang Petritsch, wrote an editorial concerning Bosnia entitled *How to Resuscitate a Failed State*. See Petritsch, *supra* note 5. What separates Bosnia today from classic "failed state" status is our intervention; absent that intervention, which both creates and sustains the few functioning institutions of statehood, Bosnia would be a failure. That begs the question: is continuing intervention justified—and if so, what kind of intervention?

14. See Jelacic & Katana, *supra* note 11 (quoting twenty-three-year-old electrician Sasa Borjanovic as saying that "[i]t should be clear to everyone that [Bosnia-Herzegovina] is a fake country created by the international community").

15. See Knaus & Martin, *supra* note 6, at 63 (noting that "[t]he predicament of Bosnia, as Lord Ashdown explained in his Christmas speech, is that it is 'a country running out of time,' a country that 'has been on economic life-support systems for years, and those life-support systems are being switched off one by one . . . .'" ); Patrick Moore, *International Mediator Calls for Self-Help in Bosnia*, RFE/RL NEWSLINE, Oct. 27, 2003, <http://www.rferl.org/newsline/2003/10/4-see/see-271003.asp> (noting continued dependency on the international community and the decline in international funding commitments). Whatever the future of American and other international assistance, however, it is unlikely that the European Union would entirely withdraw support. Bosnia will likely continue to receive—and to require—significant economic support for years to come.

16. These weapons are increasingly Europe's, not America's. See, e.g., Patrick Moore, *Despite Possible Political Ramifications?*, RFE/RL NEWSLINE, Sept. 17, 2003, <http://www.rferl.org/newsline/2003/09/4-sec/sec-170903.asp> (noting U.S. State Department concerns about the implications of a U.S. withdrawal, including the EU's inability to ensure military security); Patrick Moore, *EU Agrees to NATO Role in Bosnian Peacekeeping*, RFE/RL NEWSLINE, Apr. 7, 2004, <http://www.rferl.org/newsline/2004/04/4-see/see-070404.asp> (noting that a 7,000-strong EU force will replace the current NATO mission, but that NATO will retain some authority for pursuing war criminals, fighting terrorism, and training, and that NATO or the United States will maintain a force numbering "in the hundreds"); Patrick Moore, *Is the U.S. Planning To Pull Its Troops out of the Balkans*, RFE/RL NEWSLINE, Sep. 17, 2003, <http://www.rferl.org/newsline/2003/09/4-see/see-170903.asp> (reporting that senior U.S. Army officers are pressing for full withdrawal of U.S. troops, including those in Bosnia and Kosovo, while current foreign military strength in Bosnia remains at about 12,000). See also Patrick Moore, *Bosnian Serbs Take Step Toward Military Reform*, RFE/RL NEWSLINE, Dec. 1, 2003, <http://www.rferl.org/newsline/2003/12/4-SEE/see-011203.asp> (noting that "[c]ritics [of plans for a joint military force] charge that the changes are cosmetic and will not substantially alter the fact that Muslim, Croatian, and Serbian leaders retain effective control of what remain in practice three separate, ethnically based armies . . . [and] that each of the three members of the presidency may block any decision by that body"). But some international officials suggest that the new joint defense mechanisms do represent a significant integrative step, and that the planned EU presence would not seriously jeopardize the military stability of the territory. Interview with anonymous OHR official, in Sarajevo, Bosn. & Herz. (Mar. 15, 2004), *supra* note 9; Interview with anonymous OHR official, in Banja Luka, Bosn. & Herz. (Mar. 13, 2004), *supra* note 9; Interview with anonymous OSCE official, in Sarajevo (Mar. 12, 2004), *supra* note 10.

17. See, e.g., INT'L CRISIS GROUP, *BOSNIA'S NATIONALIST GOVERNMENTS: PADDY ASHDOWN AND THE PARADOXES OF STATE BUILDING* (2003), <http://www.crisisweb.org/home/index.cfm?id+1474&=1>; Knaus & Martin, *supra* note 6, at 63; Moore, *What To Do About Bosnia?*, *supra* note 5. One recent report noted:

In Bosnia and Herzegovina, the picture is . . . grim. There is urgent need for a new constitution. The existing constitutional order was imposed by the U.S.-brokered Dayton agreement . . . [but] sanctioned a divided state hamstrung by layers of overlapping and

tenuous context, the rights of the former combatant parties—the Muslims (or Bosniaks), Serbs, and Croats of Bosnia<sup>18</sup>—to determine their own political destinies are highly contested; to paraphrase Clausewitz, politics in Bosnia remain a continuation of war by other means, even as Bosnia exhibits the contours of a functioning democracy.<sup>19</sup> The legal and political commitments of members of these groups and the international community (especially the United States, the United Nations, NATO, and the European Union) center on tensions between a preference for unity and integration on one hand, and for separateness or resistance to further integration on the other. Though agreeing on little else, almost all sides view the conflicting separatist and integrationist imperatives of the current constitutional dispensation as dysfunctional, and many expect thorough change, though in radically different directions.<sup>20</sup> Yet because of the opaque and unaccountable political structure imposed and policed by the OHR, internal debate on opposition to integration or support for separation is marginalized<sup>21</sup> and (probably) radically constrained.<sup>22</sup> In turn,

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contradictory constitutions, laws and administrations. The current dysfunction is dangerous and expensive. And no sober mind would pull NATO troops out until it is fixed.

Laura Silber, *Bush Has Neglected the Balkans For Too Long: A Ticking Time Bomb*, INT'L HERALD TRIB., Jan. 13, 2004, at 7.

18. Not everyone in Bosnia belongs to these groups: there are also Albanians, Czechs, Gypsies, Jews, Macedonians, Montenegrins, Ruthenians, Vlachs, Ukrainians, and many other groups, as well as those who identify themselves as Yugoslavs, Bosnians, or of mixed heritage or no ethnicity. Whatever the complications and multiplicities, however, the great majority of the state's citizens embrace or accept a principal ethnic identity located within one of the three main groups. These group identities, regardless of their provenance and historical contingency, have been and seem set to remain highly salient in contemporary Bosnian society and politics.

19. The October 2002 elections were declared "free and fair" and Bosnia was admitted to the Council of Europe that same month. Knaus & Martin, *supra* note 6, at 72.

20. See, e.g., Woodard, *supra* note 7, at 1 ("The problem is that we're all still not pulling in the same direction," says [Jakob] Finci, [head of Bosnia's Jewish community and] director of the country's new civil service agency. 'I don't think that everybody has given up on the idea of splitting Bosnia into two or three parts.');" Moore, *What To Do About Bosnia?*, *supra* note 5 (describing four different approaches to reform—increased powers for the OHR, reduced powers for the OHR, a constitutional convention to replace Dayton, and partition—and noting that "[w]hat the models have in common is the assumption that Dayton has turned into a straightjacket"); Sead Numanovic & Gordana Katana, *supra* note 11 (noting that "[t]he SDA [The Party of Democratic Action] advocates a much more centralized state," the SDS [Serbian Democratic Party] seeks "to preserve [the Republika Srpska] as a separate, Serb-dominated entity linked as closely as possible to Serbia proper," and "the HDZ [Croatian Democratic Union] still dreams about an exclusive, ethnically pure Croat region in [Bosnia]"). The diversity of viewpoints and "comprehensive distrust of political institutions" among Bosnia's different ethnic groups was borne out in a United Nations Development Programme:

Bosniaks most frequently saw Bosnia as a state of citizens and nationalities with equal rights, the way it was before the war. The majority of Croats still regard their main political interests the creation of a third, separate Bosnian Croat entity. Serbs, meanwhile, either back independence for Republika Srpska or want it to be annexed to Serbia.

Senad Slatina, *Bosnia: Ethnic Divide Widens as Elections Loom*, BALKAN CRISIS REP., Aug. 9, 2002, [http://www.iwpr.net/index.pl?archive/bcr2/bcr2\\_20020809\\_4\\_eng.txt](http://www.iwpr.net/index.pl?archive/bcr2/bcr2_20020809_4_eng.txt). Other survey results have indicated that, in the Republika Srpska, indicted war criminals Ratko Mladić and Radovan Karadžić head the list of "most trusted personalities," the SDS "remains far and away the most popular party, with twice the support of its nearest rival," and that thirty-seven percent "think the [Federation] presents a threat" compared to nineteen percent of respondents in the Federation thinking the same about the Republika Srpska. MARK THOMPSON, INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, SOUTH EASTERN EUROPE: NEW MEANS FOR REGIONAL ANALYSIS 6 (2002), [http://www.idea.int/balkans/policy\\_brief\\_balkans\\_2.pdf](http://www.idea.int/balkans/policy_brief_balkans_2.pdf).

21. See Anes Alic, *Living in a Paradox*, TRANSITIONS ONLINE, Sept. 17, 2003, at <http://www.tol.cz> ("Until very recently . . . ordinary Bosnians were almost entirely absent from the

the interests and wishes of the people living in Bosnia are difficult to discern—all as a consequence of the international community's own preferential policies.

How then can we understand, predict, or advocate for systemic change in this highly contested terrain? Indeed, for what *should* we advocate? In Bosnia's recent history, the accepted models for assessing claims to form new states—especially self-determination doctrines—proved ineffective in mediating that process, and different (if also imperfect) models were developed on the fly. Because of those changes, present claims, seen as weak within a self-determination framework, may prove more persuasive from other legal and political perspectives.

This Article is a political and moral analysis of legal doctrine: it asks which policies on Bosnia are somehow incumbent upon us for legal reasons, and which are more a matter of our moral sense and our political preferences. By considering not what we should have done, but what the implications of the war, the peace, and our changing commitments have been, it asks if one set of claims about Bosnia's future has an arguably stronger legal case, or ought to. By focusing the surface analysis on doctrine, I do not intend to exclude from consideration the real, the contingent, and the political. On the contrary, I assume that these factors, not formal doctrinal postulates, most directly govern the processes of territorial change, and I address moral or political considerations that materially affect the possible outcome in law. To this end, I examine the real limitations and possibilities defined by the historically created political situation—the changes wrought by war and peace—not only to see how they alter the doctrines, but also to ask how our doctrinal commitments in turn delimit contemporary political choices. In other

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debate.”); Roberto Belloni, *Dubious Democracy by Fiat*, TRANSITIONS ONLINE, Aug. 20, 2003, at <http://www.tol.cz> (“Conspicuously absent [from reform debates] are Bosnians themselves, and there is little discussion about the reactions of local politicians, intellectuals, and civil society activists. Most of the talk is centered on well-intentioned foreign observers.”).

22. The OHR regularly removes elected and appointed officials from office for a variety of reasons, usually centering on an ill-defined opposition to commitments under the Dayton Accords; over 100 officials had been removed from office by the end of 2002. Knaus & Martin, *supra* note 6, at 63-69. The OHR is also empowered to impose legislation and administrative regulations by fiat, and is not accountable to any domestic body for its decisions. *See id.* at 61 (“In Bosnia and Herzegovina, outsiders do more than participate in shaping the political agenda . . . [O]utsiders actually *set* that agenda, *impose* it, and *punish with sanctions* those who refuse to implement it.”). *See also* Patrick Moore, *High Representative Cuts Off Funds to Bosnian Serb Party*, RFE/RL NEWSLINE, Apr. 5, 2004, <http://www.rferl.org/newsline/2004/04/050404.asp> (noting recent decisions by the OHR to cut off funds to the main Croat and Serb nationalist parties, the latter for allegedly providing financial support to Radovan Karadžić). Though difficult to demonstrate, it also is widely supposed that the United States, the European Union, and other international actors have exercised considerable pressure on Bosnian political parties after each election cycle in an effort to ensure particular government coalitions—and that the OHR's policies on removing officials are consonant with those efforts. *See, e.g.*, Knaus & Martin, *supra* note 6, at 67. One international official noted that “no [local] politician would be so unsubtle as to directly oppose Partnership for Peace [and the accompanying military integration].” Interview with anonymous OHR official, in Sarajevo, Bosn. & Herz. (Mar. 15, 2004), *supra* note 9. The international community also exercises considerable oversight of the media, and has on occasion actively intervened, even taking control of broadcast facilities. *See, e.g.*, THOMPSON, *supra* note 20, at 11 (noting “comprehensive international attempts to reorganize their media sectors along democratic lines”). I do not mean to suggest, however, that media outlets are as explicitly constrained as politicians in their expressions of opposition to international policy. There is lively debate in the Bosnian media—including, as shown above, much evidence of the extremely weak popular commitment to Bosnian state institutions.



words, I ask how what we may call law-in-politics defines and sometimes displaces the seemingly compelling claims of moral justice. Existing self-determination doctrine is unable to explain or guide our policy choices, in Bosnia or more broadly, but exploring its political and moral limits gives us a hint of the alternative, however unpalatable.

The argument runs as follows: Part II sketches the historical and contemporary doctrinal structures, showing that Bosnia's constituent nations had and have few grounds for a conventional self-determination claim. Part III examines how Bosnia itself came to be recognized as a claimant to statehood during Yugoslavia's dissolution, noting features of that process that bear on potential claims today. Part IV outlines how demographic shifts and new internal boundaries created by the war make potential secessionist claims today more comprehensible under the conventional doctrines, and it also considers some obvious moral objections. Extending this argument, Part V revises the theory of self-determination, examining how its traditionally conservative privileging of the status quo plays out in surprising ways in stabilized post-conflict societies. Part VI then revisits the process of Bosnia's recognition in light of this theoretical and doctrinal revision, and concludes by suggesting a plausible, even preferable, alternative given the international community's increasing doctrinal commitment to democracy. In doing so, the Article also identifies the rhetorical and doctrinal luster that policy would likely take on—not a right of self-determination, but a public logic of state failure, territorial succession, democratic legitimacy, and recognition for novel claimants to statehood that will inevitably have implications for the re-conceptualization of claims to state formation elsewhere.

## II. DEFINITIONS, DEFORMATIONS, AND LIMITS OF SELF-DETERMINATION

Before examining the specific claims that have been or might now be made in the Bosnian context, let us look briefly at the basic doctrinal structure to see how it conceives the shape of self-determination. This conception should have or could have guided the choices of the international community in its policies towards Yugoslavia in the early 1990s. This cursory overview aims simply to show that contemporary doctrines provide little room for finding a right of self-determination in the nations of Bosnia, before turning to the alternative ways the problem has been—and can be—viewed.<sup>23</sup>

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23. For thorough reviews of self-determination in law and politics, see ANTONIO CASSESE, *SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL* (1995); HURST HANNUM, *AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS*, chs. 3-4 (1996); MODERN LAW OF SELF-DETERMINATION (Christian Tomuschat ed., 1993); SELF-DETERMINATION IN INTERNATIONAL LAW (Robert McCorquodale ed., 2000); THE SELF-DETERMINATION OF PEOPLES: COMMUNITY, NATION AND STATE IN AN INTERDEPENDENT WORLD (Wolfgang Danspeckgruber ed., 2002). See also Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT'L L. 177 (1991) (laying out the orthodox view of self-determination law with an eye to critiquing its basic assumption of a conflict between self-determination and territorial integrity); Diane F. Orentlicher, *Separation Anxiety: International Responses to Ethno-Separatist Claims*, 23 YALE J. INT'L L. 1 (1998); Steven Ratner, *Drawing a Better Line: Uti Possidetis and the Borders of New States*, 90 AM. J. INT'L L. 590 (1996); Patrick Thornberry, *Self-Determination, Minorities, Human Rights: A Review of International Instruments*, 38 INT'L & COMP. L.Q. 867 (1989) (reviewing the state of the law just prior to the outbreak of the Yugoslav conflict).

*Wilsonian Origins.* Rooted in the Enlightenment, Romanticism, and nineteenth century nationalism,<sup>24</sup> self-determination's first major modern incarnation appeared in Woodrow Wilson's proposals for reorganizing the defeated Central Powers following the First World War.<sup>25</sup> Wilson's formulation recognized the right of ethnic groups to form states on the territories they inhabited, without relying on existing borders, and explicitly rejected subordination of people's interests to territorial concerns.<sup>26</sup> Wilsonian self-determination gave identifiable ethnic groups the right to form states, ensured minority rights for members of those groups not included in new states, and used plebiscites to decide difficult border disputes.<sup>27</sup>

Yet, a Wilsonian system poses serious problems of arbitrariness<sup>28</sup>—and though ostensibly based on a given people's ethnic or affinitive qualities, it arguably makes ultimate decisions concerning self-determination on an implicitly territorial basis.<sup>29</sup> The Wilsonian system does not solve the formal problem of distinguishing minorities from peoples; arguably, it defines the problem into existence in the first place. Moreover, in so doing, Wilsonianism radically threatens the status quo of state borders.

*Classical Decolonial Orthodoxy.* The Wilsonian conception of ethnic self-determination was eclipsed in the post-World War II era by a variant influenced by Leninism,<sup>30</sup> namely decolonization. Though self-determination had become a foundational principle of the world legal-political order, and was cited in Article 1(2) of the Charter of the United Nations (U.N. Charter) as one of the purposes of the United Nations, the Wilsonian model was superseded by a commitment to decolonization that defined self-determination territorially.<sup>31</sup>

In the new model, developed in the U.N. Charter, a series of U.N. General Assembly resolutions, and treaties (such as the human rights covenants<sup>32</sup> and the Helsinki Accords<sup>33</sup>), "peoples" determined their political

24. See THOMAS D. MUSGRAVE, *SELF-DETERMINATION AND NATIONAL MINORITIES* 2-14 (1997).

25. CASSESE, *supra* note 23, at 19-26; Anthony Whelan, *Wilsonian Self-Determination and the Versailles Settlement*, 43 INT'L & COMP. L.Q. 99 (1994).

26. See HANNUM, *supra* note 23, at 27-28. See generally Whelan, *supra* note 25.

27. Whelan, *supra* note 25, at 100-01.

28. See IVOR JENNINGS, *THE APPROACH TO SELF-GOVERNMENT* 55-56 (1956) ("Nearly forty years ago, a Professor of Political Science, who was also President of the United States, President Wilson, enunciated a doctrine which was ridiculous, but which was widely accepted as a sensible proposition, the doctrine of self-determination. On the surface, it seemed reasonable: let the people decide. It was in fact ridiculous, because the people cannot decide until someone decides who are the people.")

29. Inherent difficulties with the Wilsonian approach have been identified:

[T]he problem of identifying peoples under the Wilsonian principle is . . . a simple question of line-drawing. Depending on where the dividing line is drawn, an ethnic, religious or other community aspiring to nationhood can become either a 'people', entitled to full self-government, or a minority, with only the minimal rights accorded to members of what was, in the Versailles scheme, a residual category

Whelan, *supra* note 25, at 102-03.

30. See CASSESE, *supra* note 23, at 14-19.

31. U.N. CHARTER, art. 1(2). See also Donald L. Horowitz, *The Cracked Foundations of the Right To Secede*, J. DEMOCRACY, Apr. 2003, at 5, 6.

32. The 1966 human rights covenants declare a right to self-determination for all peoples. International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 1, S. EXEC. DOC. E, 95-2, at 23,

status, but within pre-defined borders. The so-called “salt-water thesis” of Resolution 1541 (XV) limits states’ obligations under the Charter to “territory[ies] which [are] geographically separate and . . . distinct ethnically and/or culturally from the country administering [them].”<sup>34</sup> In practice, this enabled colonies<sup>35</sup> to head off any threat to their existing territorial integrity. Once a colony achieved independence, no further exercise of the right was needed, or possible.<sup>36</sup> The ancient doctrine of *uti possidetis*<sup>37</sup> was invoked

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23 (1978), 999 U.N.T.S. 171, 174 [hereinafter ICCPR]; International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, art. 1, S. EXEC. DOC. D, 95-2, at 13, 13 (1978), 993 U.N.T.S. 3, 5 [hereinafter ICESCR]. However, the ICCPR addresses minority rights separately and does *not* grant them a right to self-determination. ICCPR, *supra*, art. 27, S. EXEC. DOC. E, 95-2, at 31, 999 U.N.T.S. at 179. The situation has been described as follows:

The right of self-determination in the Covenants is universal. The text and *travaux* support the view that the Covenants reach beyond the colonial situation . . . [but] [s]ections of the people—minorities—enjoy more limited rights than the people itself . . . . The essence [of self-determination] is political control . . . . The rights of minorities are enumerated and finite, and do not include political control.

Thornberry, *supra* note 23, at 878, 880. A right of self-determination could only be found as a remedy when states fail to observe even the minimum duty of tolerance and non-interference necessary to allow a group’s continued existence. *Id.* at 881. See also CASSESE, *supra* note 23, at 61-62.

33. See Conference on Security and Cooperation in Europe: Final Act, Aug. 1, 1975, princ. VIII, 73 DEP’T STATE BULL. 323, 326 (1975) [hereinafter Helsinki Accords] (“By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political . . . development.”). However, this right does not extend to minorities:

[P]articipating States on whose territory national minorities exist will respect the right of persons belonging to such minorities to equality before the law, will afford them the full opportunity for the actual enjoyment of human rights and fundamental freedoms and will, in this manner, protect their legitimate interests in this sphere.

*Id.* princ. VII, 325. See also J.A. Laponce, *National Self-Determination and Referendums: The Case for Territorial Revisionism*, 7 NATIONALISM & ETHNIC POL. 33, 36-37 (2001) (arguing that the Helsinki Act favors territorial integrity to the detriment of group-based claims for territorial reformation).

34. *Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1541 (XV), U.N. GAOR, 15th Sess., Supp. No. 16, princ. IV, at 29, U.N. Doc. A/4684 (1960). States have a “reporting obligation” to provide information to the United Nations on territories possessed of self-determining peoples. They do not have any such obligation regarding populations of territories not meeting the “salt-water test.”

35. See Brilmayer, *supra* note 23, at 182-83 (“[I]nternational law currently supports the position that anti-colonial movements can invoke the right of self-determination, but not groups seeking to secede from established states.”).

36. Territorial alterations are still possible, but only *consensually*: the will of the whole people of a pre-defined territory would have to consent to a change in the territory, not just a territorially discrete segment of the people.

37. The doctrine of *uti possidetis juris*, from the Latin maxim *uti possidetis ita possidetis* (“have what you have had”) first appeared as a means to limit border disputes arising out of the wave of independence movements in Latin America. *Uti possidetis* provided that the provincial and administrative borders of Spain’s possessions would be respected as the new states’ frontiers. Later, the principle was adopted for African decolonization. See generally SUZANNE LALONDE, DETERMINING BOUNDARIES IN A CONFLICTED WORLD: THE ROLE OF UTI POSSIDETIS 10-137 (2002); Ratner, *supra* note 23, at 592-601. The International Court of Justice has suggested that *uti possidetis* is of general applicability when new states are formed, at least out of colonies. Frontier Dispute (Burk. Faso v. Mali), 1986 I.C.J. 554, 565 (Dec. 22) [hereinafter *Frontier Dispute*]. Application of *uti possidetis*, even in the African and Latin American contexts, has been inconsistent. See Robert McCorquodale, *Self-Determination: A Human Rights Approach*, 43 INT’L & COMP. L.Q. 857, 881-82 (1994) (citing the incorporation of British Togo into Ghana, the merging of British and Italian Somaliland, the recognition of Belize’s independence vis-à-vis Guatemala, and the incorporation of Goa into India). Nonetheless, *uti possidetis* is also a “limitation on the right of self-determination. However, it is relevant only in those very few situations when the claimed exercise of the right is for secession and that secession has an effect on a colonial boundary.” *Id.* See also Robert McCorquodale & Raul Pangalangan, *Pushing Back*

both to convert former colonial boundaries into international frontiers and to forestall any further secession from newly independent territories.<sup>38</sup> Self-determination had become a legal principle, but stripped of its substantive, Wilsonian focus on ethnicity; it left a right for colonies to become states, but nothing more.<sup>39</sup>

*Secession.* Because of this history, self-determination is often thought of as the right of colonial territories to independence. Though the relevant legal instruments allow various levels of association between a self-determining people and their present ruler, including integration or autonomy,<sup>40</sup> the self-determining group decides what level of association it desires, if any. This discretion is limited to the whole population of a given territory, defined as a self-determining people. For other groups, the doctrinal consensus holds that there is no right to self-determination, except in narrow circumstances that adhere, not to the nature of the group, but to its contingent situation vis-à-vis an oppressive ruler. Only peoples under colonial or alien rule, or subjected to extreme persecution such as genocide, may make a claim of secession by right;<sup>41</sup> in all other cases, secession is considered a political matter, neither required nor forbidden. Nonetheless, the strong priority given to territorial integrity in the international system means that *involuntary* division of a state is effectively barred and almost never recognized.

*Nations and Self-Determination.* In recent decades and especially since the end of the Cold War, various groups have attempted to expand the concept of “peoples endowed with self-determination” to include nations, ethnicities, and national minorities—in effect, to return to a more Wilsonian idea of self-determination.<sup>42</sup> Claims outside the colonial context, however, brunt directly

*the Limitations of Territorial Boundaries*, 12 EUR. J. INT'L L. 867, 887-88 (2001).

38. See, e.g., Ratner, *supra* note 23, at 595-96.

39. Cf. *id.* at 605-07 (discussing the inappropriateness of domestic administrative borders for international demarcation); *id.* at 624 (arguing that not engaging the territorial question may perpetuate “a formalized self-determination that enables a new state to form along the administrative lines of the old territorial unit but neglects the underlying territorial issues that prompted the dissatisfaction in the first place, and perhaps lays the groundwork for a new round of interstate conflicts and attempted secessions”).

40. See G.A. Res. 1541 (XV), *supra* note 34, princ. VI, at 29 (“A Non-Self-Governing Territory can be said to have reached a full measure of self-government by: (a) Emergence as a sovereign independent State; (b) Free association with an independent State; or (c) Integration with an independent State.”); *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 (XXV), U.N. GAOR, 25th Sess., Supp. No. 8, at 124, U.N. Doc. A/8028 (1970) [hereinafter *Declaration on Friendly Relations*] (“The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right to self-determination by that people.”).

41. A right of self-determination could only be found as a remedy when states fail to observe even the minimum duty of tolerance and non-interference necessary to allow a group's continued existence. Thornberry, *supra* note 23, at 881. See also Derege Demissie, Note, *Self-Determination Including Secession vs. the Territorial Integrity of Nation-States: A Prima Facie Case for Secession*, 20 SUFFOLK TRANSNAT'L L. REV. 165, 169-70 & n.24 (1996) (“To invoke the right to secession from an existing state is a misapplication of the right to self-determination. However, where the territorial integrity is a legal fiction that disguises colonial and alien domination, the subjected people are entitled to exercise their right to self-determination with all its consequences.”). But see Gaetano Pentassuglia, *State Sovereignty, Minorities and Self-Determination: A Comprehensive Legal View*, 9 INT'L J. MINORITY & GROUP RTS. 303, 310-12 (2002) (interpreting secession from an oppressive state as not implicating the right of self-determination).

42. See generally HANNUM, *supra* note 23. Cf. Laurence S. Hanauer, *The Irrelevance of Self-*

up against the restrictively defined conception of self-determination, which does not elaborate the same strong right of self-determination for sub-populations of states as it does for state populations as a whole.<sup>43</sup> Moreover, contemporary claims have been advanced in a radically different and less opportune political context: whereas colonial self-determination forced distant overlords to withdraw from overseas empires, claims by nations require integral states to be divided.<sup>44</sup> Efforts to claim a right of self-determination for nations have therefore been singularly unsuccessful.

*A Democratic Right?* A recent trend with greater traction has been the re-expression of self-determination as a right to internal democracy.<sup>45</sup> Self-determination's commitment to ending alien, imposed rule seems logically consistent with giving full and free expression to the population's will in organizing the state. This logic in turn found reinforcement in U.N. General Assembly Resolution 2625, which, in reaffirming states' territorial integrity, adds this saving limitation:

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States *conducting themselves in compliance with the principle of . . . self-determination of peoples . . . and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.*<sup>46</sup>

This arguably allows the exercise of self-determination by a sub-population when the state fails to provide equal rights of political participation to ethnic and religious minorities; "[t]he guarantee of integrity is contingent upon the existence of representative government."<sup>47</sup> Yet, many scholars believe this exception is very narrow and limited to the most repressive and racist regimes.<sup>48</sup> Certainly state practice, even with the recrudescence of democratic regimes since the late 1970s, would not support a broad reading.<sup>49</sup> This

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*Determination Law to Ethno-National Conflict: A New Look at the Western Sahara Case*, 9 EMORY INT'L L. REV. 133, 175 (1995) (discussing the "Wilsonian" nature of claims in the Soviet and Yugoslav collapses).

43. As Thornberry explains:

The restrictive view of the non-applicability of self-determination to minority groups is strengthened by a consideration of General Assembly Resolution 1514—the Colonial declaration. The holder of the right of self-determination is, once more, declared to be the people. The meaning of the term 'people' is conditioned by repeated references to colonialism . . . . The effect is that colonial boundaries function as the boundaries of the emerging States. Minorities, therefore, may not secede from States—at least, international law gives them no *right* to do so. The logic of the resolution is relatively simple: peoples hold the right of self-determination; a people is the whole people of a territory; a people exercises its right through the achievement of independence.

Thornberry, *supra* note 23, at 874-75. See also G.A. Res. 1514 (XV), *supra* note 34, at 66.

44. See Demissie, *supra* note 41, at 170.

45. See Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992).

46. *Declaration on Friendly Relations*, *supra* note 40, at 124 (emphasis added).

47. Thornberry, *supra* note 23, at 876.

48. See, e.g., CASSESE, *supra* note 23, at 109-15; Thornberry, *supra* note 23, at 876 (attributing this view to Antonio Casse and Michala Pomerance).

49. The Canadian Supreme Court's extraordinary judgment in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, relied explicitly on the pre-existing democratic foundations of Canada in allowing the possibility that the rest of the federation might have to negotiate in good faith with Quebec if the province expressed a clear commitment to secession. State practice elsewhere hardly supports

emerging right may validate a claim for democracy by the whole population of a state, but not necessarily a sub-group.

*Bosnia in the Contemporary Doctrinal Field.* In the present Bosnian context, a claim to self-determination on the basis of national or ethnic status seems highly implausible. There is simply too much weight of opinion and practice against the proposition that anything other than the whole population of Bosnia's territory is a "people," although the highly autonomous, ethnically segregated political structures created by the war and the Dayton Accords militate against a claim of present persecution. It seems, then, that classical self-determination doctrines—too narrow to apply to ethnic sub-populations of a territorially contiguous, independent, European state—do not offer much hope to the would-be Muslim, Serb, or Croat secessionists in post-Dayton Bosnia.

Indeed, given the doctrine's emphasis on territorial integrity, it is unclear just how Bosnia itself was able to leave the internationally recognized Socialist Federal Republic of Yugoslavia in 1992. Yet, Bosnia *was* able to secede—or rather, its status as a sovereign and independent state was universally recognized. This is not, in doctrine and rhetoric, the same thing. To see how Bosnia became independent, and to see what options this event may have created for parties that might wish to secede from Bosnia in the future, we turn first to the closing days of Yugoslavia, as it began to dissolve.

### III. "A DESTRUCTION IN PROGRESS": DISSOLUTION, CREATION, AND CONTROL IN YUGOSLAVIA

By 1990, Yugoslavia was in crisis, its economy in collapse, and its central authorities increasingly paralyzed, unable or unwilling to cooperate in a constitutional and political structure that had devolved power to six republics and two provinces after Tito's death in 1981.<sup>50</sup> That structure also encouraged the process by which individual republican and provincial elites became increasingly identified as political proxies for nascent or resurgent national communities.<sup>51</sup> Central control of security began to break down. By the middle of 1991, armed conflict began, first in Slovenia, then in Croatia.<sup>52</sup>

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even this formulation. See LALONDE, *supra* note 37, at 223-29.

50. Bosnia, Croatia, Macedonia, Montenegro, Serbia, Slovenia, and Serbia's two autonomous provinces of Vojvodina and Kosovo each had a vote on the collective presidency established by the 1974 Yugoslav constitution.

51. As one scholar from the region notes:

The deteriorating economic situation resulting from communist mismanagement exacerbated ethnic tensions . . .

The principal [sic] of limited sovereignty—by which some national sovereign rights were surrendered to the federal state so that . . . economic, financial, and foreign policy as well as the military were within the competence of the federation—was replaced by the principle of complete sovereignty, with each nation bearing exclusive responsibility for its own fate.

Dušan Nečak, *Historical Elements for Understanding the "Yugoslav Question,"* in YUGOSLAVIA, THE FORMER AND FUTURE: REFLECTIONS BY SCHOLARS FROM THE REGION 13, 27 (Payam Akhavan & Robert Howse eds., 1995) [hereinafter YUGOSLAVIA, THE FORMER AND FUTURE].

52. My argument does not rely on any particular history about the origins of the various groups in Bosnia, any particular belief about how harmoniously or fractiously those peoples co-existed prior to the war, or any particular theory as to why the conflict broke out. It is grounded on an estimate of the present consequences of the war and the peace for people's political valuations; as I argued in an

earlier article, "it relies on a recognition that the presently realized ethnic division is highly salient and unlikely to recede to any meaningful degree." Waters, *supra* note 8, at 523 n.15.

Bosnia and Herzegovina have long been identifiable geographical and political regions, though with various borders. An independent Bosnian kingdom existed in the Middle Ages, and following their conquest by the Ottomans, Bosnia and Herzegovina figured as internal units in that empire; most of their present borders date from the late Ottoman period. The Austro-Hungarian Empire ruled Bosnia and Herzegovina from 1878 until the end of the First World War. In independent royal Yugoslavia, Bosnia and Herzegovina had no separate political identity, but following the Second World War, Tito's Communist Yugoslavia included a separate Socialist Republic of Bosnia and Herzegovina as one of six constituent federal republics.

Most of Bosnia's population has adhered to one of three religions since the Ottoman conquest: Orthodoxy, Catholicism, or Sunni Islam. From the nineteenth century, the Orthodox and Catholic populations increasingly identified themselves as Serbs and Croats, respectively; a specifically Bosnian Muslim national identity developed somewhat later. The relative proportions of nominal Orthodox Christians, Catholics, and Muslims have changed considerably over the centuries; in the late Communist era, the proportions were roughly forty-four percent Muslim, thirty-four percent Serb, and seventeen percent Croat. Although there are small regional variations, all the principal groups in Bosnia speak mutually intelligible dialects of Serbo-Croatian, with no correspondence between language variation and confession. Historically, relations between the groups were not particularly strained, with the notable exception of extreme inter-ethnic violence during the Second World War that probably accounted for most of the deaths there during that period. Post-war Bosnia had relatively high rates of intermarriage, Communist party membership, and persons identifying themselves as "Yugoslav" during the Communist period. National identity and culture were promoted, but expression of nationalist political sentiment was restricted.

By the late Communist period, especially following the death of Tito in 1981, the republics of Yugoslavia had increasing economic and political autonomy, while at the same time the formerly prosperous country descended into economic paralysis. In the 1980s, some Serbs in particular became increasingly dissatisfied with what they saw as their marginalization in areas outside Serbia, especially Kosovo. By the late 1980s, nationalists had become increasingly prominent within the Communist Party elites in Serbia, Croatia, and Slovenia in particular. Serb nationalists, led by Slobodan Milošević, took control of Serbia, Montenegro, and Serbia's two autonomous provinces. Nationalists in Slovenia and Croatia reacted by demanding political confederation and then moving towards independence, which was declared for both states in 1991. Slovenia became independent after a short war, while in Croatia the Yugoslav National Army, siding with Serb nationalists, occupied large, predominantly ethnically Serb areas.

In Bosnia, nationalist parties representing the three main groups shared political power following multi-party elections, but Croats and Muslims increasingly moved towards independence while Serbs moved to create autonomous governments affiliated with Belgrade. Armed conflict broke out in April 1992. Serbs, backed by Belgrade, quickly occupied large areas of the country, and committed numerous atrocities and war crimes in the process. Muslims and Croats began fighting in 1993, and Muslim areas were reduced to a few small enclaves. Croats and Muslims committed atrocities as well, although in smaller numbers than the militarily more successful Serbs. In all areas, however, the population became increasingly homogenous, with members of other ethnic groups being driven out or leaving. Only some of the larger Muslim cities retained any significant ethnic diversity.

There were various efforts at international diplomatic mediation during the war, especially by the European Union and the United Nations, which imposed an arms embargo (that effectively maintained the military advantage enjoyed by the Serbs) and created so-called "safe zones" around several besieged Muslim communities. In 1994, the United States and NATO became increasingly involved, brokering an agreement between the Muslims and the Croats and intervening militarily against the Serbs. In 1995, the Serbs lost most of the territory they had held in Croatia and western Bosnia, while two Muslim "safe zones" in eastern Bosnia, Srebrenica and Žepa, fell to the Serbs. In November 1995, the three sides negotiated a peace agreement under American auspices at Dayton, Ohio. Dayton Accords, *supra* note 4.

See generally WAYNE BERT, *THE RELUCTANT SUPERPOWER: UNITED STATES' POLICY IN BOSNIA, 1991-95* (1997); ANTE ČUVALO, *HISTORICAL DICTIONARY OF BOSNIA AND HERZEGOVINA* (1997); ROBERT J. DONIA & JOHN V.A. FINE, *BOSNIA & HERZEGOVINA: A TRADITION BETRAYED* (1994); ROBERT D. KAPLAN, *BALKAN GHOSTS: A JOURNEY THROUGH HISTORY* (1996); NOEL MALCOLM, *BOSNIA: A SHORT HISTORY* (1996); DAVID RIEFF, *SLAUGHTERHOUSE: BOSNIA AND THE FAILURE OF THE WEST* (1996); PETER F. SUGAR, *SOUTHEASTERN EUROPE UNDER OTTOMAN RULE, 1354-1804* (1977); SUSAN WOODWARD, *BALKAN TRAGEDY* (1995); *THIS TIME WE KNEW: WESTERN RESPONSE TO GENOCIDE IN BOSNIA* (Thomas Cushman & Stjepan G. Mestrovic eds., 1996); *WHY BOSNIA? WRITINGS ON THE BALKAN WAR* (Rabia Ali & Lawrence Lifschultz eds., 1993). See also SAMANTHA POWER, "A PROBLEM FROM HELL": AMERICA AND THE AGE OF GENOCIDE 247-327 (2002); SAMANTHA POWER,

War did not begin in Bosnia until early 1992, but the crisis there had already advanced by late 1991, with the Sarajevo government moving towards independence and Bosnian Serbs preparing to secede to remain affiliated with Yugoslavia.<sup>53</sup> The European Union extended recognition to Bosnia as a state on April 6, 1992, as did the United States on the following day.<sup>54</sup> What had been isolated skirmishes quickly developed into full-scale warfare throughout Bosnia with the open involvement of forces from the remainder of Yugoslavia.

This process of recognition was not purely political, however. The European Union made two crucial interventions that gave the process a quasi-judicial and popular basis. First, in addition to issuing a set of guidelines on recognizing new states,<sup>55</sup> the European Community established the so-called Badinter Arbitration Commission in late 1991 to deliberate on appropriate responses to the crisis.<sup>56</sup> In January 1992, in its first opinion, the Commission determined that Yugoslavia had ceased to operate as an effective state and was in a process of dissolution.<sup>57</sup> In subsequent opinions, the Commission also found that the Serb population of Bosnia had broad minority rights,<sup>58</sup> but no right to secession, and that the republican boundaries of the former Yugoslavia had the status of international borders.<sup>59</sup>

The European Union did not approve Bosnia's application for recognition outright. When the Bosnian government requested recognition, the Badinter Commission recommended that it hold a referendum on independence, noting that "the will of the peoples of Bosnia-Herzegovina to constitute the SRBH as a sovereign and independent State cannot be held to have been fully established."<sup>60</sup> When the referendum was held in late

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BREAKDOWN IN THE BALKANS: A CHRONICLE OF EVENTS, JANUARY, 1989 TO MAY, 1993 (1993) [hereinafter POWER, BREAKDOWN IN THE BALKANS]; TINDEMANS ET AL., *supra* note 1, at 1-68;

53. Bosnia declared sovereignty on October 15, 1991. POWER, BREAKDOWN IN THE BALKANS, *supra* note 52, at 24. On October 25, 1991, Bosnian Serbs formed their own parliament. LAURA SILBER & ALLAN LITTLE, YUGOSLAVIA: DEATH OF A NATION 216 (1996). On January 9, 1992, Bosnian Serb leaders declared their autonomy within Bosnia; on January 11, their Krajina Serb Assembly declared that the Bosnian Republic had ceased to exist, and later declared a Serb Republic on Bosnian territory. POWER, BREAKDOWN IN THE BALKANS, *supra* note 52, at 24, 36.

54. POWER, BREAKDOWN IN THE BALKANS, *supra* note 52, at 37, 40.

55. Council of the European Community, Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, Dec. 17, 1991, 31 I.L.M. 1485 (1992) [hereinafter EC Guidelines].

56. LALONDE, *supra* note 37, at 176-78. See also STEVE TERRETT, THE DISSOLUTION OF YUGOSLAVIA AND THE BADINTER ARBITRATION COMMISSION: A CONTEXTUAL STUDY OF PEACE-MAKING EFFORTS IN THE POST-COLD WAR WORLD (2000); Maurizio Ragazzi, Introductory Note, 31 I.L.M. 1488, 1488-90 (outlining the formation, procedures, and work of the Commission).

57. Conference on Yugoslavia Arbitration Commission, Opinion No. 1, Jan. 11, 1992, 31 I.L.M. 1488, 1494 (1992). See also Paul C. Szasz, *The Fragmentation of Yugoslavia*, 88 AM. SOC. INT'L L. PROC. 33, 34-35 (1994).

58. Conference on Yugoslavia Arbitration Commission, Opinion No. 2, Jan. 11, 1992, 31 I.L.M. 1488, 1497 (1992). See also Hurst Hannum, *Self-Determination, Yugoslavia, and Europe: Old Wine in New Bottles?*, 3 TRANS. L. & CONTEMP. PROBLEMS 57, 65 (1993) (observing that the opinion "can be charitably described as unclear").

59. Conference on Yugoslavia Arbitration Commission, Opinion No. 3, Jan. 11, 1992, 31 I.L.M. 1488, 1499 (1992).

60. Conference on Yugoslavia Arbitration Commission, Opinion No. 4, Jan. 11, 1992, 31 I.L.M. 1488, 1501-03. The SRBH referred to the Socialist Republic of Bosnia and Herzegovina until 1992. Independent wartime Bosnia was called the Republic of Bosnia and Herzegovina; the Dayton Accords changed its name simply to Bosnia and Herzegovina.



February 1992, over two-thirds of the voting-age population voted for independence; however, the Serbian members of the population, (who represent thirty-two percent of the total) boycotted the vote.<sup>61</sup> In effect, the referendum functioned as an ethnic census: almost all Muslims and Croats supported independence, almost all Serbs opposed it.<sup>62</sup>

The Badinter Commission grounded its decisions in part on domestic Yugoslav law, especially the country's federal structure, and in part on international legal principles. The Commission's interpretation of domestic constitutional provisions (besides giving rise to a flurry of academic speculation about the international legal consequences of federalism<sup>63</sup>) was controversial in the Yugoslav context. Domestic interpretations of the provisions on self-determination in the 1974 Constitution had been heatedly contested,<sup>64</sup> and there had been no clear consensus on a right of secession.<sup>65</sup> In any event, there were two caveats to the relevance of the constitutional structure—namely, the evident “disdain of laws and legality,”<sup>66</sup> which marked much of Tito's Yugoslavia, and the delegitimization and collapse of the Yugoslav state. The latter was emphasized by the Commission's declaration

61. POWER, BREAKDOWN IN THE BALKANS, *supra* note 52, at 36.

62. Bosnian Muslim and Croat political groupings agreed on independence from Serb-dominated Yugoslavia, but little else. Their mistrustful relationship devolved into war in 1993, with the Croats forming Herceg-Bosna as a client of Croatia. At various points in the war, there was also intra-group fighting, and some cross-ethnic cooperation.

63. See, e.g., Otto Kimminich, A “Federal” Right of Self-Determination?, in MODERN LAW OF SELF-DETERMINATION, *supra* note 23, at 83; Hannum, *supra* note 58, at 64-65, 69; Patrick Thornberry, *The Democratic or Internal Aspect of Self-Determination with Some Remarks on Federalism*, in MODERN LAW OF SELF-DETERMINATION, *supra* note 23, at 101.

64. See Vojin Dimitrijević, *The 1974 Constitution and Constitutional Process as a Factor in the Collapse of Yugoslavia*, in YUGOSLAVIA, THE FORMER AND FUTURE, *supra* note 51, at 45 (discussing varying interpretations of the Constitution). The 1974 Constitution mentions self-determination in the following context:

The nations of Yugoslavia, proceeding from the right of every nation to self-determination, including the right to secession, on the basis of their will freely expressed in the common struggle of all nations and nationalities in the National Liberation War and Socialist Revolution, and in conformity with their historic aspirations, aware that further consolidation of their brotherhood and unity is in the common interest, have, together with the nationalities with which they live, united in a federal republic of free and equal nations and nationalities and founded a socialist federal community of working people—the Socialist Federal Republic of Yugoslavia.

USTAV SOCIJALISTIČKE FEDERATIVNE REPUBLIKE JUHOSLAVIJE [Constitution of the Socialist Federal Republic of Yugoslavia] (1974) art. 3. The Constitution also defined Yugoslavia as:

a federal state having the form of a state community of voluntarily united nations and their Socialist Republics, and of the Socialist Autonomous Provinces of Vojvodina and Kosovo, which are constituent parts of the Socialist Republic of Serbia, based on the power of and self-management by the working class and all working people; it is at the same time a socialist self-management democratic community of working people and citizens and of nations and nationalities, having equal rights.

*Id.* art. 1.

65. Ben Bagwell, *Yugoslavian Constitutional Questions: Self-Determination and Secession of Member Republics*, 21 GA. J. INT'L & COMP. L. 489, 516 (1991) (noting that “[a]n explicit textual provision outlining secession under the Yugoslav constitution of 1974 is nonexistent”).

66. Dimitrijević, *supra* note 64. I do not mean to suggest that the Yugoslav constitutional order was always without effect during the post-1974 period merely because it was sometimes circumvented; certainly it was often respected and provided a protective legal framework. I wish only to suggest, with Dimitrijević, that subsequent analyses ought not simply assume the democratic legitimacy of Yugoslavia's constitutional system, especially those parts, such as the republican borders, originating in the early Titoist period.

of Yugoslavia's dissolution. This brings into question the wisdom of relying on a (failed) paper constitutional structure to make a determination with real political consequences on the shape or capacities of its successors.

The international principles on which the Commission relied, including the principle of *uti possidetis* (by which it found a right of succession in the republics, but not the provinces or the nations), imported significant parts of self-determination doctrine into a non-colonial context. Yet this seemingly Wilsonian turn, not taken by the doctrine since Versailles,<sup>67</sup> was curiously limited. The Commission's amalgam of domestic and international borrowings vested this novel right only in existing territorial units—the republics—rather than ethnic groups, as Wilson's self-determination would have done. While under decolonization a self-determining people had an immediate right to independence, in the Commission's view the pre-existing state had to be in dissolution before its sub-units could exercise an international right to statehood. Because this new right only operated if an existing state was in dissolution, the Commission's rule inevitably vested this right in units whose independence, powers, and shape were, for the most part, already the object of violent contestation.<sup>68</sup>

It was a competition to create wholly new nation-states—citizens and loyalties, strategic assets, and borders defined by the perceived right to national self-determination within the territory of a former state. Defined by the economic and political conditions of the collapse of a state and its ability to provide security and civil order, the contests were a series of wars . . . in which the projects of radical nationalists willing to use force to claim territorial sovereignty and the spontaneous behaviors of people facing this collapse interacted.<sup>69</sup>

The intensity and locus of the dispute constituted a powerful objection to relying on *uti possidetis*. In the past, *uti possidetis* had been employed in an atmosphere of comity to achieve minor border corrections, with the aim of preventing conflict. To be sure, the various post-colonial states involved had disputes between them—otherwise there would have been no need to invoke the principle—but they were in general prepared to accept the application of *uti possidetis* to prevent conflict, instability, and uncertainty. These were truly "border" disputes. In the Bosnian context, at the beginning of the war, it was difficult to characterize the parties' relations in the same mode. There was no

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67. The Commission was of the view that the International Court of Justice had earlier suggested the universal application of *uti possidetis*, see *Frontier Dispute*, *supra* note 37, at 565, albeit still in a colonial context. See also LALONDE, *supra* note 37, at 190-93; Rein Müllerson, *Law and Politics in Succession of States: International Law on Succession of States*, in DISSOLUTION, CONTINUATION AND SUCCESSION IN EASTERN EUROPE 5, 19-21 (Brigitte Stern ed., 1998).

68. Treating the referendum as a solution to the crisis has been described as "naïve":

The constitutional logic of the Arbitration Commission set up by the EC under the chairmanship of Robert Badinter seemed impeccable: Bosnia and Herzegovina is a republic, therefore a people in whose hands sovereignty rests; if the majority of the people democratically endorses independence, then the conditions are met for accepting a new state into the community of nations. As the outcome demonstrated, majoritarian democracy in a setting of three ethnic groups . . . does not provide a solution; it only highlights the conflict.

See, e.g., TINDEMANS ET AL., *supra* note 1, at 34.

69. Woodward, *supra* note 52, at 222.

comity, nor any sense that conflict or instability could be avoided by invocation of *uti possidetis*, and—most fatal—the issue in Bosnia was not one of border adjustment, but of the very existence (or not) of an integral state or separate states.<sup>70</sup> The use of *uti possidetis* analysis in the Bosnian context, therefore, mostly demonstrates the unprincipled operation of the doctrines—but it was used, and a precedent was set.

Thus, we might debate the wisdom of the Badinter Commission's much criticized decisions,<sup>71</sup> but the fact is that it made them, and they were largely relied upon by the European Union and the United States.<sup>72</sup> It is a historical fact that Yugoslavia did break apart. The European Union and the United States took the position that the republics were the logical successors of the dissolved state but that the citizens and nations themselves did not have any such right. The fixity of this determination seems unshakable, unquestioned, and unquestionable. The issue of Bosnia's continuation as a recognized state is not viewed as a legally interesting question.<sup>73</sup>

However, that determination remained a policy preference, rather than a recognition of reality, so long as the military and political outcome was contested. It did not follow that the republics actually invested themselves with full state power over their territory. State control is not merely a function of some abstract right or Commission finding. It is grounded in practical, realizable, and realized capacities to act and to control.<sup>74</sup> Indeed, how else could Yugoslavia itself have been found to dissolve, if not through its loss of capacity to act and control?

70. See Ratner, *supra* note 23, at 596-98.

71. See, e.g., Horowitz, *supra* note 31, at 7; Szasz, *supra* note 57, at 35 ("Brief, cursory, and not always convincingly reasoned, they deal with many complex issues of international law in a few pages. Nevertheless, they constitute nearly all the judicial decisions we have on the subject of state dissolution; therefore, one must pay attention to them.").

72. Szasz, *supra* note 57, at 35 ("Though not binding on the states and entities concerned . . . these opinions have generally guided the [EC] Conference, as well as its successor [the International Conference on the Former Yugoslavia], and even the world community at large . . ."). In acknowledging a quasi-judicial aspect to the recognition process for Bosnia and the other republics, I do not mean to suggest that process was not principally defined by broader political interests. The international community was motivated by a desire to avoid precedential effects for the Soviet Union and other countries, to manage the spreading conflict, and later, once Slovenia's and Croatia's independence had been effectively conceded, to characterize the conflict as international, rather than internal, and thus give the international community's involvement a clearer legitimacy by overcoming the doctrinal and political resistance to intervention in states' internal affairs. Indeed, it is reasonable to see these as reasons for why the international community at first resisted but ultimately recognized what was *in effect* a series of secessions. The point is that self-determination doctrine neither supported the parties' decisions nor guided them; something else did, and that something was expressed in legal terms that logically continue to define the parameters, and the possibilities, of debate today.

73. Consider this exchange:

Professor Ratner: I do not think . . . that there is much of a legal question in the debate over whether Bosnia should continue to exist as a state.

Professor Szasz: I certainly agree with the last part of the previous statement.

Szasz, *supra* note 2.

74. This has been clear at least since the Åland Islands dispute following World War I, when the issue of the Finnish state's control over the Åland archipelago turned on questions about when Finland had actually exercised authority over itself following Russia's disintegration and Finland's declaration of independence. See HANNUM, *supra* note 23, at 371. See R.H. JACKSON, *QUASI-STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS AND THE THIRD WORLD* (1990) (describing recognized but factually non-existent "quasi-states"); M.J. PETERSON, *RECOGNITION OF GOVERNMENTS: LEGAL DOCTRINE AND STATE PRACTICE, 1815-1995*, at 51-85 (1997) (discussing criteria for recognition).

Yugoslavia did break apart, and something succeeded it. In some cases, such as Slovenia, it was relatively easy for the group controlling the republic to accede to state authority. For Bosnia, with several groups vying for state power on different parts of its territory, it was much more difficult.<sup>75</sup> Certainly the actors involved thought it was less than clear that the republics were the inheritors of state authority, even if they conceded that Yugoslav authority had collapsed. Indeed, this was the very question being contested.

The Commission, the European Union, and the United States declared Yugoslavia dissolved because it no longer performed the functions of a state,<sup>76</sup> except on one portion of its territory,<sup>77</sup> and therefore ceased to warrant recognition. Necessarily, this was also the rationale by which they judged and presumably could still judge the republics. Bosnia, one of Yugoslavia's putative successors, never did—and arguably never fully has—performed the classic functions of a state except on one portion of its territory. The majority of its territory continues to be governed in practice by separate parties with their own institutions, economies, and armies. The end of Yugoslavia was “a destruction in progress.”<sup>78</sup> The creation of its successors was, and continues to be, a very halting progress of its own.<sup>79</sup>

There was, on the Badinter Commission's own reckoning, a gap of several months between the dissolution of Yugoslavia and Bosnia's effective

75. Danilo Türk, *Remarks Concerning the Breakup of the Former Yugoslavia*, 3 *TRANSNAT'L L. & CONTEMP. PROBS.* 50, 54 (1993) (“In Bosnia-Herzegovina the situation was much more difficult [than in Croatia or Slovenia] and every reader of newspapers knew that the government in Sarajevo did not have effective control over the territory of the country.”).

76. Under the 1933 Montevideo Convention, which includes a standard definition of statehood, Bosnia probably did not have the traditional qualifications for statehood when it was recognized—or at least, did not possess those qualifications any more than the other two principal contestants. The Montevideo Convention provides that a state only exists when: (1) a government, (2) with the capacity to enter into relations with other governments, (3) is in control of a permanent population, and (4) living within a defined territory. Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19 [hereinafter *Montevideo Convention*]. See also ROSALYN HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 38-39 (1994); William A. Schroeder, *Nationalism, Boundaries, and the Bosnian War: Another Perspective*, 19 *S. ILL. U. L.J.* 155 (1994).

77. That is, on Serb-held territories, the interests of the federal government and the Serb leadership were nearly identical by 1991-92. During the war, the Bosnian government controlled a limited territory, and its interests, in practice, were identical to those of the Muslim area's leadership; although the Bosnian state leadership now thoroughly incorporates all three groups, in the most critical sense, that parallel persists.

78. Szasz, *supra* note 2, at 33.

79. One scholar argues as follows:

[T]he necessary condition for a state to exist is that it supplies security to its citizens . . . . That was the approach taken by the so-called Badinter's commission set up by the European Community to judge the viability of the respective ex-Yugoslav states looking for international recognition. In that sense, former Yugoslavia was a state, Bosnia and Herzegovina is not.

VLADIMIR GLIGOROV, *WHY DO COUNTRIES BREAK UP? THE CASE OF YUGOSLAVIA* 101 (1994). This judgment was certainly accurate during the war when Gligorov was writing. However, one important difference in the post-war period is that in late Yugoslavia, state institutions were collapsing, whereas in Dayton Bosnia, the state's extremely limited competences are being haltingly expanded and are a function of its constitutional structure, rather than a constitutional collapse. (Thanks to Marcus Cox for this point.) To the degree dissolution reflects lack of political or popular commitment to a state, this difference is perhaps less important.

succession (and recognition).<sup>80</sup> Thus, it seems there was a period during which, logically, there was no state at all. This period, like the war that followed it, was a time of maximum contestation and positioning among the parties, and this is exactly what we would expect dissolution to entail.<sup>81</sup> It could have been, as well, an open period for the establishment of claims to statehood. Relatively orderly procedures and principles could have been established for recognizing those claims. The same strictures contained in the European Union's recognition guidelines (issued for republics only) could have been impressed upon any claimant. The result would hardly have been any worse than what actually occurred.<sup>82</sup>

Yet, the Badinter Commission left Yugoslavia's new dispensation "up to the republics."<sup>83</sup> It not only limited succession to pre-existing categories of questionable relevance, but in so doing it posited a rule that "it is sufficient for a constituent republic . . . to cease participating in the federal government in order to deprive the state as a whole of recognition as a state by the international community."<sup>84</sup> The rule seems transparently ineffectual in its overreaching. If it were good law, it would give the Republika Srpska (or, for that matter, South Carolina) an ability to opt out through simple non-cooperation, something that the international community (and, some time ago, the United States) has already made clear that it does not intend to allow.<sup>85</sup> Still, it is a rule, inescapable in the Commission's logic and implicit in states' responses to the Yugoslav crisis: dissolution is measured by the real actions and capacities of political entities; subsequent state formation is influenced by the municipal political divisions that those failed states put in place. It is important to realize that the Commission did *not* rely on any supposed right of the republics to secede. Instead, it relied on the following three factors: the fact of Yugoslavia's dissolution; the assertion of democratic legitimacy for new state claims; and the position that existing borders were the relevant units for measuring democratic intent. Bosnia never seceded: its people formed a state out of Yugoslavia's dissolution and their own democratic will.<sup>86</sup>

80. Conference on Yugoslavia Arbitration Commission, Opinion No. 11, 31 I.L.M. 1488 (1992).

81. See SCOTT PEGG, *INTERNATIONAL SOCIETY AND THE DE FACTO STATE* 161-64 (1998) (defining state collapse and distinguishing it from secession).

82. Any period of claims would have encouraged maximum efforts to gain territory in advance of the division. In the actual event, that is precisely what happened. Only a resolute refusal to allow an ethnically oriented solution could have avoided such a land grab. It is doubtful that such an approach would have been respected by the parties, and the land grab would have proceeded without legal cover. In short, it is possible that the worst effects of such a plan would have been no worse than what in fact occurred.

83. Hannum, *supra* note 58, at 64 ("[T]he Commission concluded 'that the Socialist Federal Republic of Yugoslavia is engaged in a process of dissolution' and that it was up to the republics to resolve any problems of state succession which might result from this process . . .").

84. Hannum, *supra* note 58, at 64.

85. See Hannum, *supra* note 58, at 64-65 ("Such a rule would no doubt astonish the government of the United States, Canada, Germany and other federal states, and it could lead to immediate recognition of secessionist movements in federal states . . .").

86. When Bosnia and Hercegovina, Croatia, and Slovenia achieved international recognition, the situation was not described in the language of "secession." HANNUM, *supra* note 23, at 498 ("[T]he term 'secession' was never used by the United Nations or individual states. Rather the international community claimed to be simply responding to the fact of the dissolution of Yugoslavia and purported

None of this militates against the existence or continued recognition of a Bosnian state, if that is our, or the Bosnians', preferred policy. But it does bring some of the bases for that preference into question, and into tension with concerns about precedent and consistency. It reveals, for example, that the doctrinal structure might allow alternative policies and outcomes. Because dissolution is a generic conclusion assessed on the facts, it occurs as often as the facts warrant. And because recognition evidently may be extended even to entities that only partly fulfill the criteria for statehood after dissolution of a larger unit (as was the case for Bosnia), such a process of recognition might be replicated within the resulting sub-units, even if they did not yet exercise the functions of a state on all or part of their territories. This is the inescapable logic of the Badinter Commission.

Still, recognizing the generative potential of dissolution does not tell us what might or should happen in Bosnia. As we have seen, the international legal doctrines do not favor claims by mere groups. Despite the ultimately political nature of recognition, states have seldom recognized a group-based claim. But the Badinter Commission's own findings and the international community's own actions may have created new and surprising options based on its triad of dissolution, democracy, and borders. Since we have just considered what dissolution might mean, let us look more closely at how the two affirmative elements needed to claim statehood—democracy and borders—shape claims about Bosnia's future. How do they sound in the traditional legal doctrines? How do they appear after war's end?

#### IV. ALTERNATIVES TO THE CLASSICAL MODEL

Self-determination should logically focus on people. Yet, as we have seen, except for the initial Wilsonian venture, it has been realized through pre-existing territorial boundaries. Such a model hardly seems to hold much promise for ethnic secessionists in Bosnia hoping to harvest the fruits of state dissolution, given that, prior to the war, none of the three groups had a clearly delineated exclusive territory of its own. A large portion of each ethnic population lived in mixed areas or areas where it constituted a minority.

But the "existing borders" model for self-determination may not be such barren ground for state reformation as it seems at first. Bosnia may prove to be an extraordinarily potent test case for change in the doctrine. The effects of the war and the American-brokered Dayton Accords have created the political and legal basis for the three ethnic groups to press territorial arguments for the right to self-determination, or its equivalent. Two events have occurred since the outbreak of the war to change the picture: radical demographic shifts, and the creation of new, internationally sanctioned boundaries.

##### A. *Population Shifts*

The war radically transformed the demographic map of Bosnia and effectively separated three peoples into ethnically exclusive territories. While

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to recognize the new states only after that dissolution had occurred.").

some Croats and Muslims remain in or have returned to the Republika Srpska, the territory as a whole is extremely homogeneous. The picture in the Croat and Muslim areas, while more complicated, is in its essentials equally dramatically altered when compared with the pre-war situation.<sup>87</sup> Refugee returns in the eight years since the war—especially as they are probably considerably fewer in number and have produced far less actual re-integration than even the relatively small amount commonly supposed—have not changed the hard fact of this new demographic dispensation.<sup>88</sup>

87. Neither Muslims nor Croats have entirely contiguous territories: the Muslims have the bulk of their land and population in central Bosnia, but also a pocket around Bihac in the northwest; the Croats control the southwest, but also have numerous small pockets within Muslim-held central Bosnia. All of these territories are well-defined and their populations are highly homogeneous. Some Croats and Serbs continue to live in overwhelmingly Muslim Sarajevo and Tuzla; however, these much touted multi-ethnic populations are more proverbial than substantial.

88. Undoubtedly, the degree to which people have returned to or reintegrated their communities affects the potential significance of the wartime demographic shift: if few have returned, separation is greater; if more have returned, separation is lesser, and consequently the effect in doctrine should be less as well. So what is the true level of ethnic reintegration?

Statistics on refugee returns are readily available. See, e.g., Norwegian Refugee Council, *Bosnia and Herzegovina: 330,000 People Still Displaced Eight Years After the Peace Agreement*, Jan. 30, 2004, <http://www.reliefweb.int/w/rwb.nsf/0/228f4e9c0261ec43c1256e2b0053d904?OpenDocument> (summarizing various sources on returns); United Nations High Commissioner for Refugees, *Representation in Bosnia and Herzegovina*, <http://www.unhcr.ba/return/index.htm>. This information is, however, not necessarily particularly probative. I know of no comprehensive study of refugee return, but some tentative conclusions are possible: first, total cross-ethnic or “minority” returns are probably no more than 435,347—a considerable number constituting some ten percent of the pre-war population. United Nations High Commissioner for Refugees, *Minority Returns 2004*, <http://www.unhcr.ba/return/T5-0104.pdf> (last updated Jan. 31, 2004). “Minority” returns designate returns to areas with a different local ethnic majority. *Id.* Second, this number includes “returnees” who have in fact simply returned to sell property or have subsequently left again. The definition of “return” that the United Nations High Commissioner for Refugees (UNHCR) employed after the war considered a refugee or displaced person a “returnee” if he stayed one night in his former home; no records are kept on the duration of returns. One cause for the spike in returns in 2001-2002 was apparently a change in rules governing the return of property, raising the distinct possibility that many of these “returnees” were simply extracting the value of their property rather than permanently relocating. See, e.g., Press Release, U.S. Dep’t of State, U.N. Refugee Agency To Help Bosnia Set Up Asylum System (Feb. 11, 2004), <http://usinfo.state.gov/regional/eur/balkans/040211-bosnia-refugees.htm>; *BiH DPRE Union Press Conference in Tuzla: False Returnees, Houses Reconstructed*, May 20, 2003, [http://www.tfeagle.army.mil/tfeno/Feature\\_Story.asp?Article=60567](http://www.tfeagle.army.mil/tfeno/Feature_Story.asp?Article=60567) [hereinafter *BiH DPRE Union Press Conference*] (“[T]he number of true returnees is alarmingly small . . . Houses were rebuilt for false returnees, who later sold or exchanged them. There are places with 80% of cases like those, like Rogatica. This is why true returnees still live in shacks.”); Alic, *Better Late Than Never*, *supra* note 8 (“During a 7-year period, local authorities have managed to process only 300 out of 11,000 appeals for property restitution made by their ethnic Croat and Serb citizens. . . . [T]he number of actual returns was 10 times smaller because refugees have simply been afraid to reclaim their property, restitution or no.”).

In addition, there are qualitative concerns with return statistics as a measure of re-integration: many genuine returnees are in fact living in largely homogenous, isolated communities, often near the inter-entity boundary line; they are in effect moving the former frontline, not reintegrating, and many areas have seen almost no returns whatsoever. See, e.g., *BiH DPRE Union Press Conference, supra.*

It is therefore speculative, but reasonable, to assume that the actual, meaningful number of cross-ethnic returnees is considerably less than the UNHCR figure commonly reported. The number of *re-integrated* returnees—that is, the number of people whom a separation would affect or whose presence would militate against the creation of a new population balance—may actually be very small, and is certainly much less than the UNHCR figure, although no one today knows how many there are. The rate of return has apparently peaked: minority returns in January 2004 were at their lowest rate since March 1999, and on track for the year as a whole to be the lowest since the war ended. *Id.* This is not because almost everyone has returned, as hundreds of thousands remain listed as refugees or internally displaced persons; instead, it may be that almost everyone who wants to return has done so.

In any event, the overall lesson is the same. Even if returns were quantitatively and qualitatively

Though the product of war and, in many instances, international crimes, these new areas are in fact homogenous. As such, they are, at the least, far better candidates for a Wilsonian exercise of self-determination—which ideally devises borders to match ethnic groups<sup>89</sup>—than they were before the war.<sup>90</sup> One of the principal objections to the self-determination of nations (rather than of populations in defined territories) is the disruption that this division causes in terms of partitions and population transfers. Given that the harm has already occurred in this case, the map has shifted here in favor of allowing a claim of secession. If allowed, the populations of these regions could effectively and legally separate themselves from their fellow citizens without causing significant additional harm,<sup>91</sup> because for over ten years they have already been separated in fact.

### B. *Recognition of New Internal Boundaries*

Perhaps even more important than the homogenization of population groups is the fact that their ethnicized territories received recognition and an imprimatur from the international community through the peace process. The nations became the possessors by proxy of defined territories with potential significance in any future claim for state reformation.

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as significant as the international community claims, Bosnia would still be radically less integrated than it was before the war; it is, at the least, a *relatively* stronger Wilsonian case today. Bosnia is far more homogenous now than it was in 1991 and returns have not changed that: there is no longer any ethnic “crazy quilt.” Interview with anonymous OHR official, in Sarajevo, Bosn. & Herz. (Mar. 15, 2004) *supra* note 9. A partition, whatever its cost then, would be much less costly today.

89. And ideally a Wilsonian self-determination devises borders around ethnic groups’ traditional homelands. Brilmayer, *supra* note 23, at 180. *See also id.* at 189-92 (arguing that claims of recent provenance outside of a group’s traditional or historical territory will be disfavored). Claims to newly created ethnic territories indeed seem weaker; the shape and even location of the new territories are as much the result of recent military exigency as any historical attachment to the land. For example, Serbs seized a largely non-Serb corridor in northeastern Bosnia and expelled Muslims from areas of eastern Bosnia that had never had an ethnically Serb majority to consolidate their territories. Into these territories came Serb refugees from other parts of the country, who had themselves fled fighting and persecution or had been expelled (similar accounts could be made for the two other groups and the territories under their present control.). Their flight was surely unwilling, but that is not the question facing anyone seeking to determine the state of things in Bosnia today. Instead, one must recognize that the ethnic groups are now collected on territories not necessarily corresponding to their original or historical ethnic claims, but representing the pragmatic locus of existing, ethnically defined state institutions. As a matter of theory, Brilmayer’s assessment is probably accurate, but as an analytical question of doctrine embedded in politics, it perhaps overstates the controlling effect. It hardly matters if the ethnic territory is the ancestral hearth or a recent acquisition—the real questions concern the territory’s severability, the secessionist group’s present-day commitment to that territory, and its relationship to other groups besides the secessionists.

90. *Cf.* TINDEMANS ET AL., *supra* note 1, at 29 (“This non-correspondence of ethnic and political boundaries is of course the continuing challenge to nation-state building in the Balkans. Hence this is the classic situation of ‘one territory for two dreams.’”); *id.* at 188 (“Groups that are ethnically distinct, but possess no independent territorial claims, have very poor chances of convincing anyone of their right to secede.”). The dreams and claims still exist, but now they are heard from a distance. The territory is, for the first time in history, possessed by discrete groups.

91. Of course, previous expulsions and seizures of property can constitute continuing harm. Note, however, that *denial* of the right to self-determination has not translated into actual implementation of those Dayton provisions concerning the return of refugees and displaced persons to their homes, so it is possible to suppose that recognition would not result in any additional or greater harm. Further, secession would not preclude compensation or returns, and so would not necessarily create any new or greater harm than the present dispensation.



A major component of the peace was the creation and recognition of a series of international borders in Bosnia, along lines comporting with the military, and thus the ethnic, division of the country. These plans, realized in the Washington Accords<sup>92</sup>—which ended the fighting between Croats and Muslims—and in the 1995 Dayton Accords, confederalized and cantonized Bosnia.<sup>93</sup> The Washington Accords created a Federation between the Muslims and Croats that divided their territories into ten cantons. The Dayton Accords largely retained this structure, adding to it a separate and highly autonomous Serb entity within a confederal Bosnia.

Together, these two agreements created a political structure with striking analogies to the former Yugoslavia prior to its collapse.<sup>94</sup> The structural similarities between Bosnia and the former Yugoslavia have often been noted, but usually in the context of concerns about Bosnia's political viability. Less commented upon is the opportunity those structural similarities create in law, should the day come when Bosnia indeed finally fails—or when we wish, finally, to admit that it has. Even accounting for all the progress towards integration, Bosnia today is even *more* confederalized than the former Yugoslavia ever was. Its internal units are even more independent, even more homogenous, and even more alienated from the capital, than the republics and provinces of Yugoslavia were.

Recall that the international recognition of the republics' claim to succeed Yugoslavia was in significant part based on the internal boundaries of the country. This was an application of the principle of *uti possidetis*<sup>95</sup> in keeping with the general rule governing self-determination. It might be, then, that the fruits of the war and the Washington and Dayton Accords have placed the Republika Srpska and the cantonalized Federation, and therefore the ethnic groups for which they are proxies, in a position comparable to that of the republics that inherited sovereignty from the former Yugoslavia.

92. Outline of a Preliminary Agreement on the Principles and Foundations for the Establishment of a Confederation Between the Republic of Croatia and the Federation, in Washington, Mar. 1, 1994 (text annexed to Letter Dated 3 March 1994 From the Permanent Representatives of Bosnia and Herzegovina and Croatia to the United Nations Addressed to the Secretary-General, U.N. SCOR, 49th Sess., U.N. Doc. S/1994/255 (1994)); see also Proposed Constitution of the Federation of Bosnia and Herzegovina, 33 I.L.M. 743 (1994); Dayton Agreement on Implementing the Federation of Bosnia and Herzegovina of 10 November 1995, 35 I.L.M. 172 (1995); Paul Szasz, *Introductory Note*, 35 I.L.M. 75, 76-77 (1995) (discussing the various documents relating to the creation of the Federation, and noting that the Agreement just cited was "the latest in a series of instruments . . . designed to shore up the uneasy alliance between the parties that constitute the . . . Federation.").

93. The President of the Republika Srpska, Mirko Šarović, has been reported as having described Bosnian Serb acceptance of the Bosnian state as a quid pro quo for recognition of the Republika Srpska in the 1995 Dayton Agreement. "The interests of the Serbian people [were satisfied] by the creation of a 'functional and decentralized state' consisting of the Republika Srpska and the Croat-Muslim Federation. . . . Looking back, we have nothing to be ashamed of. Our way was the right way, and we would do it the same way if we had to again." Patrick Moore, *Republika Srpska Marks 10th Anniversary*, RFE/RL NEWSLINE, Jan. 9, 2002, <http://www.rferl.org/newsline/2002/01/090102.asp>.

94. Bosnia and Herzegovina consists of two 'entities'—the Republika Srpska and the Federation. The Republika Srpska has a unitary political structure, while the Federation has ten cantons as well as entity-level institutions. The Bosnian state has a small number of ministries, a parliament, and a tripartite presidency, all of whose selection and operation ensure representation for the main ethnic groups and for the entities. See Waters, *supra* note 8, at 531-32.

95. See *supra* note 37.

Moreover, it may place them in a position comparable to that of many colonial peoples inasmuch as they have a clearly defined territory and an ethnically distinct one at that.<sup>96</sup>

All that is missing from the analogy to the old Yugoslavia prior to its collapse is the formal claim of a right to secede, problematic and contested as that was. But the logic of state failure does not actually require that element, which, if present, only provides guidance for identifying the successor. The Badinter Commission's findings were not premised on a pre-existing municipal right of the republics to secede, but instead on a fact of state dissolution in a federal context. Any state can dissolve, not only those with constitutional provisions for secession and self-determination. The Badinter dissolution principle could apply to any state, and its determinants are contingent, historical, contextual, and political. They do not rely on the existing municipal legal framework. In addition, the Badinter Commission's preference for the republics as the recipients of sovereignty was primarily justified, not on a municipal right of secession, but on the international legal principle of *uti possidetis*—i.e., on the existence of salient internal borders. As a general principle of international law, *uti possidetis* can apply to any state's internal or administrative boundaries, and no further municipal provisions are required for the international community to invoke the principle once dissolution has occurred.

### C. *Interpretative Objections: Domestic or International Claims*

If the Dayton Accords expressly forbid secession, should that not close the matter? Interpretations of the Dayton Accords differ dramatically. Quite often, both the local groups and their international interlocutors have insisted that they favor full implementation of the Accords, while disagreeing about what that means. The document itself is ambiguous, probably purposefully so. Certainly, the political field is still open, whatever the text may say.<sup>97</sup> Still, it

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96. This is especially true for the Republika Srpska. See PEGG, *supra* note 81, at 162 (noting that the Republika Srpska could be considered an example of a *de facto* state forming out of state collapse). The case for Croat or Muslim secession on *uti possidetis* grounds is more complicated. Ethnicity was explicitly a factor in the creation of the Federation's internal borders and joint institutions, which scrupulously respect a rule of dual ethnic representation. However, the fit between ethnicity and boundaries is not perfect and, indeed, was made with the idea in mind that at least some of the cantons should be multi-ethnic, given the number of small Croat pockets spread throughout generally Muslim central Bosnia. Therefore, dividing the Federation along its cantonal boundaries would only imperfectly correspond to ethnic control of territory, although most of the cantons are ethnically homogeneous.

97. The open-ended nature of Dayton's ultimate consequences has been described as follows: The Dayton agreement stopped four and a half years of terrible conflict, but it did not foreclose either of the ultimate options for Bosnia and Herzegovina: reintegration or partition. The eventual outcome still might be the creation of a unified Bosnia-Herzegovina, or the opposite—a final splitting-up of Bosnia into two or three parts; or it might be an uneasy, indefinite survival of a nominally unified Bosnia.

TINDEMANS ET AL., *supra* note 1, at 55. Indeed, the nervousness with which the United States and the European Union contemplate any territorial or constitutional change elsewhere in the region (e.g., the secession of Montenegro, the independence of Kosovo, or the conflict in Macedonia) for fear of the effect in Bosnia—while at the same time insisting that Bosnia undertake reforms (e.g., to its economic and military structures) that themselves require revision of the Dayton Accords—suggests the parties' belief in the integrity of Bosnia as a single state in its current form is far from a given.

is reasonable to suppose that Dayton was premised on a “no-secession” bargain.<sup>98</sup>

Yet, even if we concede that the Accords rule out secession, why should this bind the parties or our analysis? If a right to state formation is found in international law, it trumps a contrary limitation in Bosnia’s constitution or the Dayton Accords. After all, the anti-colonial doctrines of self-determination, including the claims of *uti possidetis*, were not domestic constitutional law in any colony. In recognizing the Yugoslav republics’ independence, the Badinter Commission relied on principles of international law that trump domestic law, and, in so doing, constitute a model for how it might be done again. When considering an international legal claim, the domestic legal dispensation is a question of fact. Whatever the reservations, it seems incontrovertible that the Washington and Dayton Accords have made the international legal framework relatively more conducive to a claim of secession, or rather, to recognition that the war, by its killing, its horrors, and its dispossessions, had already made it so.

#### D. *Moral Objections to Rewarding Aggression and Genocide*

A more powerful objection to secession is that the territorial changes in Bosnia resulted from aggression, war crimes, crimes against humanity, and genocide, and that allowing secession now would be contrary to the principle that such acts shall not be rewarded. For example, the crimes committed by Serbs<sup>99</sup> might vitiate their present claim to territory conquered during the war.<sup>100</sup> Rejecting the Serbian claim, and similar claims, seems intuitively persuasive and morally salutary. On closer inspection, however, it does not seem to bear up or to provide much guidance about the future.

Moral judgment clearly has a role not only in politics, but in the doctrines: it is implicit in requirements that a state maintain a representative government and in the doctrine *ex iniuria ius non oritur* (from a wrong, no right can be derived)<sup>101</sup>—and it forcefully affects the legal assessment when a community’s rights are altered because its society is considered irredeemably

98. Thanks to Dana Susan Burde for this point. See also *infra* note 93.

99. Similar objections could be raised on a far more limited scale against Croats and Muslims.

100. See THOMPSON, *supra* note 20, at 7 (describing the Republika Srpska as the international community’s “great failure in the region. It has been a compound failure, starting with the refusal to prevent, then confront Serb belligerence (1991-93); continuing through the presentation of increasingly pro-Serb peace plans (1993-95), followed by the legalisation of the [Republika Srpska] itself, an entity founded on acts of genocide . . .”).

101. See Council of the European Community, Declaration on Yugoslavia, Dec. 16, 1991, 31 I.L.M. 1485-86 (1992); EC Guidelines, *supra* note 55 (“The Community and its Member States will not recognize entities which are the result of aggression. They would take account of the effects of recognition on neighboring states.”); Szasz, *supra* note 57, at 35 (“[A] separate ‘Declaration on Yugoslavia’ incorporated by reference the entire general Declaration [on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union] and imposed further behavioral rules for these states, including the requirement that the successor republics adopt constitutional and political guarantees that they: (1) asserted no claims to neighboring states . . . and (3) would conduct no hostile propaganda against neighbors.”). Of course, many groups—such as insurgent predecessors in Algeria and Israel—have successfully prosecuted state-formative claims despite waging campaigns involving terrorism.

evil.<sup>102</sup> Moral judgment would surely weigh heavily in the international community's assessment of a Serb secession, for example, given the numerous and well-documented atrocities committed in the course of creating the Republika Srpska. It was the same, one might suppose, in 1992, when the international community recognized one claimant to statehood on the territory of Bosnia, but not others.

But, that is not exactly how things happened then. International recognition of Bosnia occurred prior to, or just after, the outbreak of hostilities. It is impossible for the United States and the European Union to have based that recognition on atrocities that had not yet occurred nor were even known to be contemplated;<sup>103</sup> Srebrenica is simply not relevant to the recognition granted in 1992. We must search elsewhere for the rationales for that initial decision, and we must still ask what reasons motivated, and what effects arose from, that original decision, as well as later actions. As we have seen, the Badinter Commission decisions that governed the process and that favored the claim of the republican government to statehood exhibit a logic about the role of borders that may play out very differently after Dayton, without reference to the effects of crimes and injustice.

There is scant support in literature or practice for the position that peoples *otherwise* having a claim to self-determination lose that claim simply because of the method by which they seek to exercise it.<sup>104</sup> Even in the ashes of the Second World War, it was assumed there would be, as there is, a German state.<sup>105</sup> Though it may seem morally unpalatable, it is analytically supportable that even committing genocide does not extinguish an independent claim to self-determination or succession to a dissolved state.

102. See ALLEN BUCHANAN, SECESSION: THE MORALITY OF POLITICAL DIVORCE FROM FORT SUMTER TO LITHUANIA AND QUEBEC 56, 61 (1991) (defining Nazism as a culture and noting that "some cultures may be so pernicious as to warrant no protection at all . . . . Indeed, some cultures are so heinous that they may be and should be destroyed.").

103. See Hannum, *supra* note 58, at 68 n.43 ("The war crimes and crimes against humanity reportedly committed at least by Serbian and Croatian forces cannot be cited in an *ex post facto* manner to justify the earlier secessions.").

104. M.J. PETERSON, *supra* note 74, at 81-85 (noting a lack of support for limits on recognition of states founded through violence). Only the most extreme instances might warrant such a conclusion. BUCHANAN, *supra* note 102, at 56, 61. Buchanan's argument speaks to culture, rather than political formations, in a way that further limits its reach. I have heard no argument, for example, that Serb or Croat *culture* ought to be destroyed because of acts of genocide or ethnic cleansing committed by organized groups of Serbs or Croats against Bosnian Muslims. Political reconstruction usually focuses on ruling elites and ideologies, not on the broader people and its claims: de-Nazification in Germany and de-Baathification in Iraq target leadership groups, but assume state continuity (and in Iraq's case, territorial integrity). Buchanan's argument seems apposite only in ultimate cases such as Nazism, and even then only because of the aggressive and threatening nature of those cultures or regimes. It would be difficult to find support in Buchanan or elsewhere for the proposition that a society whose perniciousness had not reached the level at which it was deserving of destruction would not still retain whatever claims to self-determination it might have had.

105. Certainly there was *discussion* of the alternative: the permanent pacification, demilitarization, and de-industrialization of Germany, as well as its dismemberment. See KÖZTES-EURÓPA 1763-1993 [EUROPE-BETWEEN 1763-1993] 502-03 (Lajos Pándi ed., 1995). But these views did not prevail except to the degree of creating two German states—later unified—and effecting massive transfers of industrial infrastructure to the Soviet Union. There are no discernible international legal constraints on the sovereign states of Germany or Austria today owing to their conduct in the Holocaust.

Moreover, even if a group's actions were immoral and illegal in a way that altered or abrogated a prior claim, the objection is still not dispositive. It does not necessarily follow that an immoral or illegal act never has legally cognizable results or that situations created by that act are always void in every respect, the doctrine of *ex inuria ius non oritur* notwithstanding.<sup>106</sup> Even if a situation is fully voided by the illegal nature of its creation, the continuation of that situation through time may create a habitualized acceptance, culminating ultimately in other members of the international community recognizing the validity of the situation. If the Serb entity were to maintain its separate nature and its ethnic exclusivity for a sufficiently long period, the argument that it would have the right to determine its own future would be strengthened in inverse proportion to the weakening of the direct claims of exiled Muslims and Croats.

One need not wait on time; intervening acts may legitimate the effects of an otherwise illegal or immoral event. One need look no further than the Bosnian peace process itself: the United States' public commitment not to reward aggression was formalized and de-problematized by Dayton's "51-49" rubric, whereby Serbs retained less than half of Bosnia's territory in exchange for recognition of a separate Republika Srpska, which had not even existed before the war.<sup>107</sup> Arbitrary and unprincipled as it may have been, recognition of Republika Srpska and the cantonalized Federation satisfied the determination of the international community not to recognize the fruits of aggression. Yet *any* gain—any change in the political and legal dispensation—conceded in the wake of aggression surely recognizes and rewards that aggression. After all, just months before Dayton was negotiated, Srebrenica was still home to tens of thousands of Muslims; today it is a rather desolate town in eastern Republika Srpska, and one can find the signatures of President Bill Clinton and Alija Izetbegović on the agreement that put it there.<sup>108</sup> The war and the Dayton Accords created a new border that did not match any already on the map, though it tracked the front line and with it the map of ethnic predominance. Those many places where the map of the beginning and the map of the end were different—Srebrenica, Bijeljina, Prijedor, Višegrad—mark caesurae in our humanity. Eight years' effort has not significantly reversed that separation, nor filled the empty places Dayton inscribed in law.

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106. See Müllerson, *supra* note 67, at 21. The examples of conquests that have entrenched themselves in the international order and given rise, in their turn, to new claims are too numerous to require citation.

107. The Republika Srpska is a signatory to several of the Dayton annexes and documents, and it authorized Milošević to negotiate on its behalf at Dayton. See, e.g., Letter to President Slobodan Milošević, Head of the Delegation of the Federal Republic of Yugoslavia, from the Delegation of the Republika Srpska (Nov. 20, 1995), *reprinted in* 35 I.L.M. 75, 153 (1995) (asking Yugoslavia to act as guarantor "that the Republika Srpska shall fulfill all the obligations it [under]took"). It must therefore have some meaningful international legal personality.

108. Dayton Accords, *supra* note 4. Izetbegović was the recognized President of the Republic of Bosnia and Herzegovina during the war and at the Dayton negotiations; Clinton signed for the United States as a witness to the Accords, as did representatives of the European Union, France, Germany, Great Britain, and Russia. *Id.*

The Dayton Accords thus gave legitimating sanction to an admittedly immoral and illegal state of affairs. The voluntary accession of the principal claimants for an integral Bosnia to Dayton's territorial configuration arguably overcomes any previous objection based upon the method of acquisition.<sup>109</sup> Such acquiescence in turn creates a new dispensation relevant to future calls for change. The dynamics of state dissolution and reformation necessarily refer to the status quo that preceded them, not only to some fictive preference.

This suggests that a rhetorical stance opposing aggression is analytically, politically, and legally separable from concrete proposals for a settlement, or for changes in that settlement. "[A]t some point, the principle of *ex iniuria jus non oritur* gives way to the principle of *ex factus jus oritur*."<sup>110</sup> Indeed, following the international community's own logic, it might be that, since a secessionist Republika Srpska would remove less than half of Bosnia's territory, recognition of that entity would not reward the original act of aggression either. Whether that would be a salutary policy is a different matter, one of preference, but the point is that it would be at least equally consistent with our prior legal and moral commitments.

These seem like narrow, technical rebuttals to a moral objection, but they are broader and deeper than that. They are really about the importance of time in law. Once this becomes clear, it is more possible to think about the antecedents to our policy choices as the contingent preferences they are, rather than as ahistorical legal necessities. Much of the moral thinking about the Balkans takes place in a kind of time warp, in which it is still 1991, and the United States and Europe are still considering what is to be done to prevent the dissolution of Yugoslavia. With wholly admirable goals of encouraging multiculturalism and co-existence, that discourse starts from the premise that Bosnia must be preserved, and therefore any secession or partition is a definitional evil.<sup>111</sup> It seems clear enough, however, that the choice of year, whether it be 1991, 1995, or 2004, affects the salience of that premise. After 1995, and still in 2004, there is no unified Bosnia to be preserved. It exists more by virtue of its international recognition than in fact. Arguments for multiculturalism or against rewarding aggression must therefore start from the premise that Bosnia would have to be *created*, not preserved. It is still possible to make a moral commitment to that project, and perhaps it is a worthy enough goal to warrant the disruption, but it is necessary to take those costs fully into account. This implies changing a status quo in which effective control of the territory has already been divided among three groups and

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109. This argument might come at a heavy price for secessionists, however. Relying on the Dayton Accords implicates its other provisions and effects, and invites an interpretation of that agreement by the international community, which is far more likely to read into it a bar to secession. But as a doctrinal question, all that matters is that, as of 1995, their territorial claim has been vindicated; subsequent events, including a potential future dissolution of Bosnia are therefore interpreted and constructed upon that agreed base.

110. Richard C. Visek, *Creating the Ethnic Electorate Through Legal Restorationism: Citizenship Rights in Estonia*, 38 HARV. INT'L L.J. 315, 328 (1997).

111. See, e.g., Szasz, *supra* note 2, at 47-48 ("The objection against further fragmentation [of Croatia or Bosnia] . . . is basically a preservationist approach—a wish to maintain what still exists. Yugoslavia is gone, but Croatia and Bosnia may still be salvageable. There is no particular logic in that position.").

mediated by the international community's military, political, and economic interventions. That surely implies recognizing, first, that the status quo has already changed, and asking what that might mean for one's commitments. We turn to that now, before considering an additional, more compelling, rebuttal to the moral objection.

#### V. *STATUS QUO NOVO*: PEACE AND STABILITY AS ARGUMENTS FOR RECOGNIZING SECESSION

Was not the attempt at maintaining the status quo of borders, first at the level of Yugoslavia, then at the level of its republics, a contribution to war?<sup>112</sup>

Discussing the role of historical grievances in secessionist claims, Lea Brilmayer notes that:

[e]ven if an historically sound evaluation is possible, this will not end the inquiry. A key remaining issue is the extent to which the status quo should be altered to rectify past wrongs. This could be called the problem of "adverse possession." Few would say that the status quo deserves no weight at all. Even a separatist is likely to concede (albeit reluctantly) that the status quo is sometimes important.<sup>113</sup>

In Bosnia at war's end, separation was effectively completed, if unrecognized. That truth has changed little in the intervening years. Despite the reintegration that has admittedly occurred, who today could doubt that it would be easier—if not necessarily preferable—to create three separate states than to integrate fully Bosnia's fractious elements? In the context of Bosnia's politics today, Brilmayer's status quo argument sounds like a defense of the existing separation. Today, arguments for restoring an integral Bosnia have become Brilmayer's "historical grievance"—a recent one, to be sure, but a grievance against the new status quo nonetheless. Arguments against secession are reversed by a *status quo novo* of effective separation. The question then

112. Laponce, *supra* note 33, at 37.

113. Brilmayer, *supra* note 23, at 199. There is no canonical consensus on how to interpret group-based claims for the reformation of state borders outside the colonial context. See, e.g., ROBERT MCCORQUODALE, SELF-DETERMINATION IN INTERNATIONAL LAW, at xi (2000); Simpson, *supra* note 13, at 255-58 ("The vocabularies and strategies of classical colonial self-determination are no longer adequate tools with which to confront 'the tumult of ethnicity' that has propelled us into the post-Cold War era.") (citing DANIEL P. MONYIHAN, PENDAEMONIUM: ETHNICITY IN INTERNATIONAL POLITICS 15 (1994)). I rely on Lea Brilmayer, a respected scholar in the field, not so much for a novel argument, but as an important and creative synthesis of elements and interpretative perspectives already present in the debate. Brilmayer explicitly frames her test as a way to see past a false choice to the underlying constituent elements of group, claim, and territory. Brilmayer's reliance on the interpretative or decisional importance of the status quo finds foundation in other scholars, such as Buchanan. BUCHANAN, *supra* note 102. Indeed, many views of self-determination share Brilmayer's elements in some way. So the particular choice of interpretative framework would not, I think, greatly alter the thrust of the argument in that all tests inevitably weigh one group's claim to a particular piece of territory against another's; this is, in fact, Brilmayer's point. Readers are welcome to consider the argument I make here about status quo effects in light of any other scholar's approach to border reformation claims.

There is an additional, though not unique, advantage, of my chosen approach. Brilmayer is writing in 1991, just before the outbreak of the Yugoslav wars, and consequently, her synthesis of the law on self-determination reflects the range of doctrinal views in which international actors themselves were operating at that time. I do not presume to know her view of my argument; the modification and extension of her views into the postwar environment is my own.

becomes: do those desiring an integral state have a strong enough claim to justify disrupting the present *de facto* order, whether by reconquest<sup>114</sup> or, more to our point, by claiming diplomatic, economic, and military support from outside powers?

#### A. *Arguments Concerning Restoration of the Status Quo Ante*

One of the principal rationales for resisting self-determination claims is the need to maintain peace and stability. Stability is also related to moral concerns because we place moral value on stability as a prerequisite for a just and prosperous society. If two parties, namely the would-be secessionist group and dominant group, have otherwise equally valid claims to territory, or if the secessionist group's claim is not overwhelming, the secessionists ought not risk armed conflict detrimental to the good of all. The strong version of this argument says the potential harm from conflict is so great that it trumps almost any group's interest in seceding.<sup>115</sup>

This argument is compelling, but once secession has occurred it is equally compelling as an argument *against revanchism*. The potential harm from renewed conflict, regardless of purpose, outweighs the ongoing injustice and harm incurred by a completed *de facto* secession. At a minimum, the burden would be on the revanchist party, just as it would normally be on the seceding one, to justify its insistence on restoring the *status quo ante*.

For example, economic disruption and harm to the remaining or majority population's economy is often cited as an objection to secession.<sup>116</sup> Yet, eight years after the peace agreement, Bosnia's various economies are still only minimally integrated. Separation would not provoke economic disruption, and indeed, re-integration would arguably be more disruptive. Although there is now considerable economic activity between the various ethnic sectors, there is still probably more economic interaction between, for example, Herceg-Bosna and Croatia than between Herceg-Bosna and the Muslim sector or the Republika Srpska. Likewise, Republika Srpska retains close ties to Serbia's economy. Indeed, the level of cross-ethnic integration is almost surely less than cross-border integration with other units of the former Yugoslavia.<sup>117</sup>

114. The Dayton Accords prohibit the entrance of armed forces of either of Bosnia's entities onto the other's territory. Recent constitutional changes promoting greater integration of the various armed forces do not remove the effective veto of each ethnic group on the use of military force. In this light, it is interesting to consider that "[m]aintaining territorial integrity may no longer remain as the best means of maintaining world stability." Demissie, *supra* note 41, at 192.

115. The exception when the dominant group has already embarked upon a campaign of destruction against that group is essentially an argument for survival, in which secession is a mere means. See BUCHANAN, *supra* note 102, at 64-67 (noting that the threat must be a lethal one).

116. See *id.* at 92-93 (economic self-defense); Whelan, *supra* note 25, at 109 (noting Sudetenland's importance to the viability of the Czech state).

117. Interview with anonymous OHR official, in Sarajevo, Bosn. & Herz. (Mar. 15, 2004), *supra* note 9; Interview with anonymous OHR official, in Banja Luka, Bosn. & Herz. (Mar. 13, 2004), *supra* note 9; Interview with anonymous OSCE official, in Sarajevo, Bosn. & Herz. (Mar. 12, 2004), *supra* note 10; Interview with anonymous OSCE official, in Banja Luka, Bosn. & Herz. (Mar. 12-13, 2004), *supra* note 9 (noting the activity of Croatian and Slovenian companies in Bosnia). See also Jelacic & Katana, *supra* note 11 (noting the relatively small amount of inter-entity traffic).



Similarly, moral concerns argue for allowing displaced persons to return to their homes. However, if reasserting integral Bosnian authority over all areas of the country would threaten the well-being of other more numerous refugee groups and original inhabitants—or would create greater instability, as seems plausible—then under Brilmayer’s test, it is difficult to imagine the moral or legal justification for such action. In any event, the burden would be on the revanchists to prove that return, however morally preferable, would not run afoul of concerns about upsetting the status quo with all its harmful side effects.<sup>118</sup>

Here, as elsewhere, the damage has already been done. The relevant question is whether the new situation—in which, despite eight years of international effort, the units are still more separate than they are integrated—should be undone.<sup>119</sup> Under Brilmayer’s test, the burden of demonstrating that it should be undone lies on those favoring the change, not on those favoring the continuation of the status quo.<sup>120</sup>

## B. *Factors in Determining the Status Quo Novo*

If this argument holds in principle, the remaining issues are evidentiary and procedural. If we isolate out the effects of recognition, the very act at issue,<sup>121</sup> we are left with a question: what is required for a stable *status quo novo*? What conditions, and how much time? As an experiment, let us first see how the elements of Brilmayer’s secession test play out *after* separation, and then, keeping in mind the definition of a state,<sup>122</sup> consider some minor modifications of that test suitable to judging post-separation claims for recognition.

### 1. *Applying a Secession Test to Revanchist Claims*

Brilmayer identifies the following factors in evaluating competing secessionists’ claims to territory:

- a) immediacy of the group’s historical grievance; b) the extent to which the group has kept its claims alive; c) whether members of the state’s dominant group resettled on the

118. Consider the legal and political situation of Palestinian refugees from 1948 or German and Polish expellees after the Second World War.

119. Eight years after the war, it is unclear how much of the harm to the entities’ economies has been due to wartime disruption, sanctions, and postwar corruption, and how much to disruption of ‘natural’ economic spheres. A sufficiently liberal trade system, however, could probably capture almost all of the benefits of natural economic spaces while still allowing political separation. Croatia and Slovenia have extensive and increasing business dealings with other parts of the former Yugoslavia, despite having rejected all political integration with them.

120. Of course, further separation is itself a change to the extant status quo, and requires its own justification. Yet if I am right that re-integration would be *more* disruptive than further separation, then Brilmayer’s test would still place the greater burden on the more radically disruptive proposal.

121. The effect of granting or withholding recognition logically cannot itself be part of the evidence in favor of or opposed to a doctrinal finding about whether or not recognition should be granted. Yet while analytically distinct, it is politically inescapable that the states’ determinations about what the status quo is are effected by what they think it should be, and are made in the course of deciding about what group to recognize.

122. See Montevideo Convention, *supra* note 76.

territory; and d) the nature of the historical grievance related to the territorial claim.<sup>123</sup>

By applying this test but substituting “revanchism” (or “re-integration”) for “secession,” we may test how claims to revise a de facto secession sound.

*The immediacy of the historical grievance.* Claims on behalf of an integral Bosnian state are of recent vintage, at most twelve years. This means that revanchists’ grievance is immediate. But, the grievance is also novel, since the state itself only came into recognized existence twelve years ago.<sup>124</sup>

*The extent to which the revanchist group has kept the claim alive.* This is probably the weakest element in the Brilmayer test, since maintaining a claim is not necessarily the same as having a good claim. Yet, revanchists favoring an integral state have kept their claims alive throughout these twelve years, defeating any easy claim of adverse possession by secessionists.<sup>125</sup>

*The extent to which the territory has now been settled by members of the dominant group.* Following massive, systematic expulsions, voluntary flight, and resettlement of refugees from other areas, political-military control and ethnic distribution now track almost perfectly in Bosnia. In that factual context, consider the following from Brilmayer:

From the point of view of separatists, such new settlement ought to have no significance whatsoever. They did not ask for these new inhabitants. Had the secessionists’ territory not been improperly annexed, the newcomers could have been excluded entirely. Taking the newcomers’ presence into account compounds the original injury. Yet, as a practical matter, the new settlers tend to legitimize the territorial status quo.<sup>126</sup>

Merely replacing the term “separatist” or “secessionist” with “revanchist,” or accepting the thesis that a new status quo has obtained, produces a

123. Demissie, *supra* note 41, at 173-74 (relying on Brilmayer, *supra* note 23, at 199-200). Compare another list of relevant factors drawn from a discussion of the effects of intrusive settlement by a dominant group:

A settler infusion policy can significantly affect a number of the criteria by which the international community will judge the legitimacy of a people’s struggle for external self-determination. These criteria include: the historical legitimacy and territorial integrity of the geographical area claimed by a people; the degree to which the demanding group can form a viable political entity; the consequences of self-determination upon the non-group members in the territory; and the effects upon the region as a whole.

Eric Kolodner, *Population Transfer: The Effects of Settler Infusion Policies on a Host Population’s Right to Self-Determination*, 27 N.Y.U. J. INT’L. L. & POL. 159, 198 (1994). If the secessionists—who include large numbers of refugees—are thought of as effectively “settlers” under Kolodner’s terms, then again we see that those calling for an integral country are in fact the ones who must make a case, because it is they who wish to change the status quo.

124. Imagine how we might apply this criterion to a claim by Serbs who boycotted the vote in 1992, or those living elsewhere in Yugoslavia, that the Bosnian secession itself was illegal—a claim of the exact same age and immediacy. Indeed, at no point has Bosnia been a peaceful, stable, and integral country. It has been contested since its founding.

125. But note the unsatisfactory nature of the adverse possession analogy in the absence of a sovereign to vindicate the claim. In a world of sovereign states, arguably the passage of time and the solidification of the new status quo could extinguish the right even in the face of consistent complaint by non-state actors. The Sudeten Germans are a case in point. No party accepts that they have a right to return, except as individual immigrants, or that they have a right to the return of their property. See also BUCHANAN, *supra* note 102, at 88 (arguing that there must be a moral and temporal “statute of limitations” on claims to secession).

126. Brilmayer, *supra* note 23, at 200.

surprisingly strong statement in defense of the *successful* separatist who has resettled his own people in a given territory:

From the point of view of [revanchists], such new settlement ought to have no significance whatsoever. They did not ask for these new inhabitants. Had the [revanchists'] territory not been improperly annexed, the newcomers could have been excluded entirely. Taking the newcomers' presence into account compounds the original injury. Yet, as a practical matter, the new settlers tend to legitimize the territorial status quo.<sup>127</sup>

Note how little change is required, and how the conclusion requires no change at all. Brilmayer's logic is compelling, equally so to resist secession or, as in Bosnia, to resist revanchism.<sup>128</sup>

*The nature of the historical grievance.* The particular facts of an historical claim may well affect parties' moral, political, and legal judgments about that claim, and even about the legitimacy of a secession. Here, the test may favor revanchists' claims because of the secessionists' record of forcible expulsions and horrible crimes. As we have seen, political and moral disapproval plays an unquestionable role in legal judgment. But, as we have also seen, the evident power of moral objections or moral insistence on reversing an already effectuated claim does not clearly guide one to a given settlement or dispensation, especially if that moral sense mostly arises from a past time and subsequent actions have altered conditions or even given an imprimatur to an originally admittedly immoral situation. Simply put, the legal force of the historical grievance may have been diminished at Dayton.

One particular feature of the Bosnian situation implicates all four aspects of this historical grievance test: the presence of (presumably) pro-integration minorities in the territories subject to potential secessionist claims and revanchist counterclaims. Because they were themselves victims of the conflict, these minorities directly represent the moral nature, the immediacy and salience of the revanchist claim; because they are almost all refugee returnees, they materially affect the demographic dispensation as well. Do these vitiate or constrain the argument for a largely completed secession?<sup>129</sup> Four points arise.

127. *Id.* (with words in brackets replaced).

128. *Cf.* Kolodner, *supra* note 123, at 202 (arguing that settlers who have lived in a territory for some period gain rights, including the right not to be deported). Of course, some "revanchism" has already occurred, in the form of international support for refugee resettlement across ethnic lines. Nothing in this argument suggests that revanchist settlers are not equally capable of creating a new status quo. Even if refugee returns have been relatively small, *see supra* note 88, they may have occurred in numbers sufficient to make the costs of separation too high.

129. In 1995, separation of the populations was almost total, but persistent international pressure has produced some returns, and separation would represent a harm to them. Indeed, the International Crisis Group has argued:

The partial nationalist victory in October [2002] prompted some commentators to suggest the time had come for the international community to give up on its multinational experiment in BiH and accept a final partition. The will of hundreds of thousands of refugees and displaced persons to return has already rendered such a division nearly impossible, barring more war and ethnic cleansing . . . . Bosnian returnees have rejected the nationalist programs, encapsulated in the wartime refrain that "we cannot live with *these people* anymore", by returning to their pre-war homes. The viability of the Bosnian state and the stability of the region depend in large measure upon whether they can stay and prosper.

First, there is no reason to assume that non-integration or separation would necessarily lead to the persecution of minorities. Technically, separation would be of a territory and its population, not an ethnic group, and the international community could perfectly well maintain an interest in minorities' welfare, including a right to intervene to prevent abuses of their rights. Indeed, one of the central insights of this argument is that the increased security separation afforded to the majority might allow a relaxation of policies towards remaining minorities. It is reasonable to suppose that many in the Republika Srpska, for example, would accept the existing refugee populations, and even accept more returns or border adjustments that would reassign many returnee settlements to the Federation, as the price of international support for secession. Right now, the majority has almost no positive incentives to accept returns, and the results of eight years of efforts against majority interests, however morally justified, reflect that. But even if this is correct, it would be unduly optimistic to suppose that many minorities would wait around to test the proposition; given the actual events surrounding the creation of these ethnic-majority territories, we should assume any minority community compelled to separate would likely depart.

Yet second, as noted earlier, the actual numbers of meaningful returns may actually be quite small, and many of those returned communities could probably be accommodated in places through minor, mediated border adjustments (some large returnee groups of Muslims in Prijedor, for example, live in homogenous communities quite close to the confrontation line). This was the model Dayton itself imposed, despite its strong commitment to refugee returns, by requiring the transfer of districts around Sarajevo, a decision which led to the departure of some 60,000 people after the war had ended.<sup>130</sup>

Third, even if we concede that separation would encourage some or most minorities to leave, we must recognize that the present policy is also implicated in continuing population shifts. The uncertainty and instability that enforced integrative policies create are probably factors in the continuing departure of some individuals. Of course, poor economic prospects probably motivate the majority of departures. This, however, is also partly a function of the present dispensation, because the destabilizing integrative project discourages investment.<sup>131</sup> One need not equate these demographic effects with the proximate effects on minorities that recognizing separation now would have, but neither ought one simply pretend that the costs are entirely on one side. It may be that, in the long term, the present policy will lead to more

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INT'L CRISIS GROUP, *supra* note 7. If this is right, it would represent a powerful objection to the observation that the population has been decisively altered.

130. See, e.g., Norwegian Refugee Council, *supra* note 88.

131. No census has been conducted, so no one knows for certain, but many observers suggest, for example, that the population of the Croat areas is collapsing as Croats move abroad, often to Zagreb or the coast; Croats may now represent only eleven percent of the population, down from seventeen percent before the war. Interviews with two anonymous OHR officials, in Sarajevo, Bosn. & Herz. (Mar. 15, 2004), *supra* note 9; Interview with anonymous OSCE official, in Sarajevo, Bosn. & Herz. (Mar. 12, 2004), *supra* note 10. The main reason these people are leaving is economic, but there is an ethnic underlay: Croats have somewhere to go, and Muslims do not, so they stay. Is this a victory for integration?

depopulation than would a stable separation.

Finally, we must ask difficult, even uncomfortable questions about the model in which we *currently* operate, and its precedential effects. If a majority of a defined territory's population desires separation, and a small minority with a legitimate concern for its security rejects it, what is our doctrinal and political response? Does the historical memory of ethnic cleansing permanently disable a territorial or majoritarian claim? Does non-violent harm to the political interests of a minority necessarily preclude a majority's exercise of a claim to separation? In 1992, when Bosnia seceded, it did not.

## 2. *Modifications for a Generalized Status Quo Test*

Much of Brilmayer's test can be usefully adopted wholesale for considering revanchist claims, that is, objections to acknowledging Bosnia's non-integration. Applying the test, the results are mixed. Because Brilmayer's test is directed at claims by groups that have not yet attempted secession, it focuses less on their factual success in creating functioning state structures than on the moral quality of the claim.<sup>132</sup> Thus, we might usefully augment the test by explicitly considering the actual existence and functioning of the separatist entity. As a first approximation, this analysis might address the stability of the military separation, the existence of a civil and legitimated state structure, and the effects of time and intervening action.

*Military stability.* The military outcome should not still be at issue. There should either be peace or a clear stalemate, not merely a temporary truce. Even though many observers have considered Dayton a "trucial way-station,"<sup>133</sup> the evidence favors a new military status quo. Peace has held for eight years, and the risk of combat in the near or middle term is very low. Moreover, Dayton secured the continued separate identity of unintegrated military forces, leaving multiple armies for a single country. The recent creation of a joint defense ministry does not really alter this situation, even in law, as it ensures a veto by each of the communities over the use of the armed force. As the experience of the supposedly joint institutions of the Federation armed forces shows, there is little reason to expect real integration of forces, instead of a paper ministry.<sup>134</sup> Indeed, the general opinion is that the situation is sufficiently militarily stable such that war would *not* break out were the international peacekeeping forces to further reduce their presence, as they plan to do.

132. For example, Brilmayer does not give weight to factors like prospects for economic viability.

133. WATERS, *supra* note 8, at 518. See also ČUVALO, *supra* note 52, at 48 (1997) ("None of the three sides is happy with the idea of a multiethnic state and each side considers the Dayton treaty as a temporary solution.")

134. Interview with anonymous OHR official, in Sarajevo, Bosn. & Herz. (Mar. 15, 2004), *supra* note 9; Interview with anonymous OHR official, in Banja Luka, Bosn. & Herz. (Mar. 13, 2004), *supra* note 9; Interview with anonymous OSCE official, in Sarajevo, Bosn. & Herz. (Mar. 12, 2004), *supra* note 10; Interviews with anonymous OSCE official, in Banja Luka, Bosn. & Herz. (Mar. 12-13, 2004), *supra* note 9; Interview with anonymous Ministry of Foreign Affairs official, in Sarajevo, Bosn. & Herz. (Mar. 15, 2004).

Still, this is not to say that the state would remain intact or that peace is assured. Indeed, the most likely scenario for renewed violence would be if the Muslim population decided to resist Serb and Croat moves to convert their existing, effective separation into formal independence.<sup>135</sup> One important change since the end of the war is that Muslim forces<sup>136</sup> are considerably better equipped, and Serb forces considerably degraded. In the event of renewed conflict, it is entirely possible that Muslim forces would decisively defeat the Serbs and overrun much of the Republika Srpska in short order, opening territories to resettlement by Muslim refugees and probably creating large numbers of Serb refugees.<sup>137</sup> Preventing such an outcome would therefore require either a forcible intervention by NATO or the maintenance of the present integrationist course. It is possible, in other words, that continued intervention in support of integration, or even increased pressure for integration, actually constitutes less of a risk of violence than separation.<sup>138</sup> That would seem to be a strong argument for opposing separation.

That appearance is misleading, and misconstrues the doctrinal logic. A campaign of military conquest would clearly overthrow the existing peaceful status quo. It would be incumbent on the Muslim revanchists and their international supporters to explain why such a move was justified. Merely observing that one side is prepared to resort to violence to prevent the peaceful exercise of a desire to complete separation is not sufficient to defeat the claim that there is a status quo. Indeed, the need to resort to violence suggests that there *is* one. Perhaps the answer is simply: the international community ought not tolerate a *violent* shift in the status quo. Is that not actually the rule now? Merely saying, “the Muslims would not tolerate secession and would fight and perhaps win,” does not necessarily decide the matter: what should our response be? What was it when the Slovenes, Croatians, and Bosnians sought to secede in 1991 and 1992, when violence was used by a superior military force to prevent separation? Properly considered, the increased strength of the Muslim forces complicates the decision, but does not alter it: separation is largely completed, and could be recognized. Only violent overthrow of the status quo could alter that.<sup>139</sup>

On balance, then, the military situation favors a finding that there is a new status quo among three discrete, semi-independent armed entities. It

135. Interview with anonymous OHR official, in Banja Luka, Bosn. & Herz. (Mar. 13, 2004), *supra* note 9. Serb and Croat nationalists have relatively little incentive to take up arms again, having secured most of their objectives except recognition.

136. Technically, of course, there is no separate Muslim force—the Army of the Republic of Bosnia and Herzegovina merged with the Croatian Defense Forces in 1994. Yet in practice, these forces have retained a functionally separate structure. In the event of hostilities, they could and would fight as separate forces.

137. Interview with anonymous OHR official, in Banja Luka, Bosn. & Herz. (Mar. 13, 2004); Interview with anonymous OHR official, in Sarajevo, Bosn. & Herz. (Mar. 15, 2004).

138. By comparison, there is no question that at the war’s end, in 1995, separation could have been completed with far less violence or dislocation than integration would have entailed. To the degree that this has become less true, the international intervention has had some effect in reintegrating the territory by resettlement of refugees or by changing the military balance, or both.

139. Moreover, one should consider the total costs of dislocation. If Muslim revanchism would create more non-Muslim refugees than it created opportunities for Muslim refugees to return, as seems likely, would it be justified?

definitely supports the proposition that the old status quo of an integrated, multi-ethnic Bosnia (in Yugoslavia) has been definitively disrupted.

*Effective and legitimated civil control.* The new status quo requires that some new civil entity have arisen on the contested territory—not merely soldiers, but some new state-like body to replace the old, which has at least as much legitimacy for those over whom it rules. It would be preferable, though not necessary, that this control be *democratically* legitimate. The test is civil legitimacy: could the new entity vindicate its control in an open political contest or, more broadly, by means other than direct violence and repression? This criterion is clearly satisfied in the Croat, Serb, and Muslim cases by functioning institutions with most of the powers and accoutrements of statehood except recognition. As we have seen, in the case of the Republika Srpska, these institutions were even recognized by the international community though the peace process.<sup>140</sup> All of these groupings, as of Dayton in 1995 and to this day, probably have greater legitimacy (that is, internal legitimacy, not necessarily international legitimacy, which is the very object of our inquiry) than do state institutions.<sup>141</sup>

*Passage of time.* The amount of time required to alter the former status quo is dependent on substantive events. It may be as short as is necessary to establish effective control. While this runs counter to much thinking about secession,<sup>142</sup> it rests on solid ground as a general proposition in international law. Consider how this claim applies to conquest, as when the Allied Forces defeated Nazi Germany; there was no lag period during which effective sovereignty still vested in the Third Reich, even in regard to areas not yet liberated when the capitulation was signed.<sup>143</sup> Arguments for the prevailing right of Bosnia over secessionist claims are themselves based on a novel dispensation that had no colorable claim before 1992, prior to which time Bosnia was not a state.<sup>144</sup> Arguably, the amount of time required is a function of the international community's moral evaluation of a claim, which is shorter

140. Herceg-Bosnian governing institutions have never been recognized under the Dayton regime, although the repeated calls for them to stop functioning in the early postwar years suggested that they had a certain reality. Nonetheless, over time their power has been much reduced and, though informally still formidable, they in no way approximate the formal or real powers of the Republika Srpska.

141. See, e.g., Waters, *supra* note 8, at 518; cf. Wood, *supra* note 8. Of course, the actual authorities in control of those institutions may be corrupt or unpopular, see *infra* note 164, but this is analytically separate from popular opinion about the institutions or existence of a (nascent) state.

142. For instance, Buchanan suggests that to defeat an interest based on a historic grievance, "the interval would presumably have to be substantial. It would certainly have to be more than one lifetime." BUCHANAN, *supra* note 102, at 89. See also Brilmayer, *supra* note 23, at 199 ("The further in the past the historical wrong occurred, the more likely that it is better now to let things remain as they are.").

143. "Supreme authority" vested in the Allied Control Council, acting on behalf of Germany, which continued its state personality. MALCOLM N. SHAW, *INTERNATIONAL LAW* 163 (1997). In theory, authority over areas still under Nazi control transferred with the surrender even *before* their actual conquest.

144. The integral Bosnian claim could be constructed on a longer timeline deriving from veto rights over border changes under the Yugoslav constitution, as well as the contested but ultimately vindicated right to secede under that constitution. What is less clear is that an independent and integral Bosnia's right vis-à-vis its Serb and Croat populations can be derived from the pre-independence period, especially since those groups had an equally colorable claim of veto over any assertion of sovereignty. As noted, claims deriving from domestic Yugoslav law are of questionable application in any event.

for decidedly moral claims and longer for immoral ones. This probably weakens the case for secession, though the standard moral objections probably have been vitiated by our own intervening actions.

One objection to this “effective and legitimate civilian-military control over time” model is the fact that even long-established insurgencies holding land and exercising civil functions are not often recognized.<sup>145</sup> Yet, states do ultimately make legally relevant accommodations to the fact of power.<sup>146</sup> A blanket rejection of secession is not the operative principle. Most likely, there is no principle,<sup>147</sup> only a calculation of interest in the case at hand. This describes the Yugoslav dissolution itself, in which the United States and the European Union first opposed republican secessions, then recognized them, and now defend those republics against sub-secessions. So, we speak here about a speculative yet plausible scenario in which powers support or acquiesce in changes to a regime that they were instrumental in creating—a far more fluid vision of the legal limits of our political options than present policy contemplates.

Because Brilmayer’s test is unfavorable to easy claims of secession, it is also surprisingly unfavorable to the revanchist claims of Bosnian integrationists. Incorporating the “effective control over time” modifications proposed here probably makes a revanchist claim even less compelling, regardless of one’s own preferences. Indeed, whatever the test, the new status quo in Bosnia shifts analysis significantly in favor of acknowledging the obvious: since 1991, there has not been an integrated state on Bosnia’s territory. Dayton did not reverse, but rather cemented, that dispensation, and subsequent developments have not fundamentally changed matters. There is still barely a Bosnian state, and still not enough of one to matter. A U.N. seat does not make a state, and most decidedly not a nation. Yet in the case of Bosnia, that is about all there is: recognition has meant little more, except, of course, the denial of everything else that is happening or could happen.

Let us revisit the historic logic of dissolution and recognition with an eye to the international community’s role in confirming and creating a sovereign Bosnia and thereby denying the secessions that have already occurred. That logic contains the seeds of the strongest argument in favor of a realizable right to secession today, or at least to secession’s fruit—democracy.

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145. See HANNUM, *supra* note 23, at 498 (referring to “the continued rejection of secessionist movements in other regions, even where such movements control substantial amounts of territory,” as demonstrated by, for example, the lack of foreign recognition for Tamils in Sri Lanka or rebels in Southern Sudan). The prospects for recognition of claims in southern Sudan have recently improved.

146. Foreign recognition has been forthcoming for some groups that have been secessionist in all but name: Algeria, Bangladesh, and perhaps the Palestinian entity. Even Taiwan, which the United States explicitly derecognized, is still *de facto* independent, to the point where the United States has committed naval forces to dissuade China from adopting a more assertive posture about its (admitted) rights of sovereignty over the island.

147. Secession is of course not technically illegal under international law, but rather a “political” matter.



VI. SELF-DETERMINATION REDUX: DISSOLUTION AND DEMOCRACY,  
MORALITY AND DOCTRINE

A. *Dizzy with Failure: The Moment of Recognition*

Ten years on, external support for Bosnia's integration is still essential and still insufficient, and Dayton Bosnia increasingly represents a real obstacle to stabilization and prosperity. If one can identify any consistent themes in Western law and policy towards Yugoslavia, they must reflect a concern with stability<sup>148</sup> and, in a minor key, with justice. A principled continuation of that policy would ensure a stable base for the region's prosperity. How will that be achieved? It may be that stabilization would be more easily achieved by state reformation. This is, after all, an empirical, and not a moral question, although it would represent a pragmatic retreat from the West's preferential commitments to the state of Bosnia.<sup>149</sup>

The premises upon which the United States and the European Union based their recognition decisions were not the only possible ones. Even if we concede that the premises were correct, it still follows that in analogous situations, the same logic should apply. What answer then would that logic yield? The doctrines remain as rigidly opposed to secession as ever,<sup>150</sup> but the experience of the Yugoslav Wars has provided the world with an interpretative tool—a finding of dissolution—to relax that rigidity. Recognizing new formations on Yugoslavia's territory did not necessarily mean recognizing a right to secession. Dissolution moots a state's defenses against secession, allowing new state formation even where secession or self-determination does not doctrinally apply.<sup>151</sup>

Thus, our policies on recognition were not and are not bound by *a priori* rules, but instead are proxies for preferences that in turn give those policies solidity. In Bosnia, recognition went a long way toward making a state and clarifying the process of sorting out which claimant to support in more

148. See JOHN WILLIAMS, LEGITIMACY IN INTERNATIONAL RELATIONS AND THE RISE AND FALL OF YUGOSLAVIA 158-66 (1998); Francis Fukuyama, *Nation-Building 101*, THE ATLANTIC MONTHLY, Jan./Feb. 2004, at 159 (arguing that "the chief threats to us and to world order come today from weak, collapsed, or failed states").

149. See Jelacic & Katana, *supra* note 11 (quoting International Crisis Group analyst Senad Slatina as saying, "No one in the international community is even considering [secession] as a possibility. Too much money and time were invested in Bosnia-Herzegovina, and international organisations, ranging from NATO through the European Union to the OSCE, are too involved here to allow any changes to the existing state borders.").

150. The Helsinki Act has been described as having similar problems of rigidity to the Dayton Accords:

The Helsinki Act, which was an instrument for peace when it was signed, became a dysfunctional ideology with monumental perverse effects when it led, as it did in the Yugoslav crisis, to an unwillingness to put pressure on the states with 'bad' borders to make them good; when it led, on the contrary, as in the Dayton Accords, to the command 'Do not change borders; make do with what you have.' That is not always bad advice. . . . But the advice is an invitation to disaster if one makes it a universal rule, good for all types of antagonisms. . . . What was required in the days of the cold war no longer makes sense.

Laponce, *supra* note 33, at 36-37.

151. See PEGG, *supra* note 81 (distinguishing between secession and state failure).

material ways. The decision in law mattered tremendously, even if it was defined almost wholly in politics. Given outsiders' weakening resolve to invest anything beside rhetoric in the costly project of creating Bosnia, the theoretical alternatives are perhaps much closer than the rhetoric makes them appear. Recognition of the existence of other new states on the territory of the former Yugoslavia—that is, on the territory of the former Dayton Bosnia—could likewise be attributed to the fruits of failure and dissolution which would likely follow the withdrawal of our support and recognition.

In 1990, Bosnia's nations had no claim to separate political existence. The war and the peace have made their claims stronger by identifying territorial proxies whose claims are cognizable. Together with the war, the choices the international community made in recognizing Yugoslavia's dissolution, the Bosnian republic's statehood, and Dayton Bosnia's borders have brought the territorial dispensation, the shape of the rules, and the borders of the nations into an alignment that only awaits the moment of acknowledgement. The question is, how do we know when to say Bosnia is a failure? How do we know when we may, and should, withdraw our recognition?

#### B. *Democracy at the Dissolution, Democracy at the Creation*

It is the preferred rule in international law that recognition does not constitute a state but merely acknowledges (and perhaps approves) its objective existence; at least, recognition does not alone constitute a state in the absence of objective factors.<sup>152</sup> This means perforce that the validity of a secession, whether from an inchoate state or a failing one, is also a question of fact to which recognition adds only expressive patina. In the case of stillborn Bosnia, what of a state was there, save recognition? What differentiated the parties at the outset, politically and legally? Apart from the preference for republican borders, there was, perhaps, only the referendum.

Whatever the real reasons for our choice about whom to recognize and our insistence on a republican solution, the core instrument of interpretation for that choice was the referendum as an expression of the people's will. Criticism of the recommendation that Bosnia hold a referendum has been widespread.<sup>153</sup> Once it was apparent that the entire Serb population had rejected independence, the Europeans and Americans were presented with a choice, in a sense, between a Wilsonian moment and a territorial one. It was not a choice that delayed them very long:

152. See, e.g., Montevideo Convention, *supra* note 76; PETERSON, *supra* note 74; SHAW, *supra* note 143, at 296-98, 317; Hannum, *supra* note 58, at 63-64 ("The [Badinter] Commission . . . noted that, under principles of public international law, the existence or disappearance of a state is a question of fact and . . . recognition by other states is purely declaratory.").

153. Szasz has described the referendum as "a disastrous initiative, because no such device was provided for in Bosnia-Herzegovina's Constitution":

When the vote was held, the Serbs boycotted it; and when independence was thereupon proclaimed the Serb could say: "You have violated the Constitution, and we are bailing out." This claim became the main justification for the Serbian separation and subsequent actions in Bosnia . . .

Szasz, *supra* note 57, at 36. Note, however, that the Serbs had already taken steps towards separation.

The question . . . arises whether such a referendum should be considered a legitimate or sufficient basis for granting recognition of independence of Bosnia-Herzegovina. The European Community and the United States had to make one of the following two choices. They could have said, "Since Serbs did not participate in [the] referendum, the decision arrived at by the referendum is not legitimate." Following that course would give Serbs in Bosnia a kind of veto power, which would be very problematic. After all, since Serbs in Bosnia represent something like thirty-two percent of the total population, that group should not have a veto on such matters as the independence of Bosnia. Instead, the European Community and the United States said, "This was a democratic decision supported by the majority and therefore we shall recognize the situation resulting from the decision."<sup>154</sup>

War, as we know, broke out immediately, though that might have happened anyway. The legitimacy of the decision—both the Badinter Commission's interpretative turn and the international community's extension of recognition consequent upon it—was correct under a strict understanding of democratic majoritarian process, though hardly unproblematic. Accepting the result only made sense if the territory of Bosnia was taken as a given—the conundrum classically supposed to be a defect of Wilsonianism, but here a consequence of the preference for a territorial system of self-determination—or if Bosnia itself were seen as a moral and political necessity. If a Wilsonian rubric had been applied, the outcome, though uncertain, would have been different. The same, perhaps, is even more obviously true today.

But, the territorial-democratic rubric *was* applied, as the existing doctrinal structure and the emerging right of internal self-determination would have suggested. Bosnia was a legally significant territory—the population of its territory constituted a people—and so that people's will, we said, determined the matter. What is that will today? If a majoritarian democratic logic proved decisive then, it could and perhaps should now, too. The only question would be: what question should we pose?

Some might suppose that Bosnians today have rejected extreme nationalist fantasies and want to live together in a peaceful, prosperous, integral state.<sup>155</sup> No doubt everyone wants to live in peace and prosperity, but the shape and nature of the state they want or expect is a different matter. What do the people in Bosnia themselves want? I certainly do not know, but neither does the international community, since its core policy of supporting and integrating the Bosnian state has never been put to a popular test. The indicators we do have tend to suggest that project is not supported. As we have seen, media reports and polling data show very weak support for the state.<sup>156</sup> In various elections, Bosnians keep voting for nationalist parties that are directly descended from those advocating independence for territories encompassing their own groups and currently defend continued autonomy

154. Türk, *supra* note 75, at 55.

155. See, e.g., Wood, *supra* note 8 (noting the claims of international officials that "they regularly test public reaction to their policies with opinion polls"). A survey in Mostar, where the OHR has recently imposed a single municipal structure, indicated that "72 percent of the respondents supported 'a unified city.'" *Id.* The local—as opposed to state—patriotism of Bosnians is proverbial; during the war, many fought for Sarajevo more than for Bosnia. Interview with anonymous OSCE official, in Republika Srpska, Bosn. & Herz. (Mar. 11, 2004).

156. See *supra* notes 11 and 20-22.

within the country—and under the Dayton regime, a politician cannot openly call for independence.<sup>157</sup> It may well be that, empirically, a majority could be found in support of division. Imagine a simple experiment: what if Bosnia's next election asked for a vote on continuing with a single state or dissolving into separate states along the 1995 ceasefire lines to be guaranteed by the same international force already in the country? What would be the result? Can anyone say with any confidence that the Bosnian people would choose a unitary Bosnia?

Almost any conceivable anti-integrative scenario<sup>158</sup> *might* reasonably yield a majority for state reformation. If a territorially defined referendum (for that is what the 1992 Bosnian referendum was relative to Yugoslavia) were held today in the Republika Srpska or Croat cantons, it is entirely plausible that a majority, perhaps a clear majority, would vote for independence—even if it were to include all absent refugee voters. Most Serb or Croat<sup>159</sup> voters probably would favor secession or union with their neighboring conationals.<sup>160</sup> If the whole population of Bosnia were asked the question posed

157. To be sure, none of the political parties call for secession, but the international community's intervention and its refusal to countenance public opposition make it difficult to gauge the real political commitments of local actors. Acquiescence in reform may not signal anything but tactical withdrawal. Interview with anonymous OHR official, in Banja Luka, Bosn. & Herz. (Mar. 15, 2004), *supra* note 9 (noting that local politicians will not tell international officials their actual opinions on integration). One observer has noted:

The Bosnian Muslim (Bosniak) Party of Democratic Action, SDA; Croat Democratic Union, HDZ, and the Serb Democratic Party, SDS, have moderated their attitudes somewhat—at least publicly . . . . The SDS and HDZ in particular have learned not to openly confront the international community, choosing instead to accept the terms of any western deal in public—and then blocking its implementation on the ground. The OHR and other international organisations are in the process of moving customs, taxes, defense and some other key institutions from entity to state level. Only a couple of years ago, the mere mention of such initiative could have triggered widespread demonstrations and even violence, especially among Bosnian Serb and Croat hard liners.

Janez Kovac, *Bosnia's British Bulldozer*, BALKAN CRISIS REP., Nov. 18, 2002, [http://www.iwpr.net/index.pl?archive/bcr3/bcr3\\_200211\\_383\\_2\\_eng.txt](http://www.iwpr.net/index.pl?archive/bcr3/bcr3_200211_383_2_eng.txt).

158. There is no single anti-integrative solution. Possibilities include separation of only the Republika Srpska, union of the Croat and Serb areas with their respective kin states, creation of a third Croat entity, a division of the Federation by cantons, and so on. I certainly am not advocating for any, or any particular, solution, but am only observing that any plausible scenario for Bosnians' future will likely correspond, in some meaningful way, to the existing ethnic divisions of the country. Even strongly pro-integrative proposals concede that. *See, e.g.,* EUROPEAN STABILITY INITIATIVE, MAKING FEDERALISM WORK—A RADICAL PROPOSAL FOR PRACTICAL REFORM (2004), [http://www.esiweb.org/pdf/esi\\_document\\_id\\_48.pdf](http://www.esiweb.org/pdf/esi_document_id_48.pdf) (proposing conversion of the Republika Srpska into a canton). In speculating on levels of support for various solutions, I am most emphatically not purporting to put words or policies into the mouths of Bosnians. But they believe *something*, and my argument suggests that discerning what that is, without interference, is what matters and what should be the aim of our policy.

159. To the degree that there might be a split in the Croat vote, it would likely be between more hardline, nationalist Croats in Herzegovina and the more conciliatory Croats living in the pockets in Muslim territory. *See* Patrick Moore, *What To Do About Bosnia?*, *supra* note 5. This geographically delineated split—which also dovetails with the separation of the Croat communities within cantonal boundaries—could actually make it easier to identify discrete majorities for secession in Herzegovina. Although the joint secession of all Croat areas is one scenario, it is not the only one, and nothing requires the totality of an ethnic group's population to adopt a single territorial solution. This is especially true if they are already separated into defined territorial units that may decide separately.

160. Nerma Jelacic, *Bosnian Croats Turn to Far-Right*, BALKAN CRISIS REP., Nov. 20, 2003, [http://www.iwpr.net/index.pl?archive/bcr3/bcr3\\_200311\\_469\\_3\\_eng.txt](http://www.iwpr.net/index.pl?archive/bcr3/bcr3_200311_469_3_eng.txt) ("An opinion poll conducted . . . by the marketing agency Promedia showed that 98 per cent of more than 5,000 Bosnian Croats

above, almost all Serbs and Croats, and some Muslims—a small portion of whom probably favor a nationalist, Muslim-dominated state over co-existence<sup>161</sup>—might vote for dissolution. The vote in favor might even be higher than it was for secession from Yugoslavia in 1992. If the intervening variable of continued Western commitment to integration were removed, and the direct, punitive disincentives for local politicians to speak openly about opposition to integration were lifted, these possibilities might become even more likely.<sup>162</sup> Certainly the very act of asking these questions would make an

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questioned said they wanted to abolish the border with Croatia.”). Other opinion polls revealed interesting information, as well:

Recent polls in Republika Srpska, RS, show that eight years after the end of the brutal war that divided the country into two entities, the Serbs still do not want to live in a union with the Federation’s Bosniaks and Croats . . . . “I would not like to live in Bosnia without entities,” Slavenka Ducanovic, a 28-year-old shopkeeper from Banja Luka [said]. “I think we [the RS] should join Serbia as our lives would definitely improve then.” . . . More than 50 per cent of the population in RS share her opinion according to a public opinion survey conducted by the Banja Luka-based Partner agency in July [2003] . . . . “I think if Kosovo is taken away from Serbia, something should be given it in return,” said Sanja Vujicic, a 33-year-old hairdresser in Banja Luka. “Serbs are majority citizens in RS so it would only be logical for us to be united with Serbia. I don’t think the two entities of Bosnia should be integrated under any circumstances because that definitely wouldn’t work.” Darko Kurtovic, 32, a driver, differs only in so far as he believes RS should become independent in the event of Kosovo being allowed to [secede] . . . . “I certainly do not think unifying with the Federation would work. We would only see the repeat of what happened between 1992 and 1995.” Sasa Borjanovic, a 23-year-old electrician, [said] that unification was unthinkable, “I would be disgusted if it happened. If anyone else in this town tells the truth they would say the same thing.”

Jelacic & Katana, *supra* note 11.

161. Probably only very marginal numbers of Muslims affirmatively favor an Islamic state, and only marginally more favor an ethnically Muslim-dominated (smaller) state over a multi-ethnic Bosnia, assuming the latter could be successfully recreated. See Woodard, *supra* note 7, at 1 (quoting International Crisis Group analyst Senad Slatina as saying, “Bosnian Muslims are so European that the radical form of Islam has absolutely no chance of spreading [in Bosnia]”); Interview with anonymous OHR official, in Sarajevo, Bosn. & Herz. (Mar. 15, 2004), *supra* note 9; Interview with anonymous OHR official, in Banja Luka, Bosn. & Herz. (Mar. 13, 2004), *supra* note 9; Interview with anonymous OSCE official, in Sarajevo, Bosn. & Herz. (Mar. 12, 2004), *supra* note 10; Interviews with anonymous OSCE official, in Banja Luka, Bosn. & Herz. (Mar. 12-13, 2004), *supra* note 9; Interview with anonymous OSCE official, in Banja Luka, Bosn. & Herz. (Mar. 12, 2004), *supra* note 9; However, this does not necessarily preclude Muslims’ voting for separation: few Muslims have a commitment to an Islamic state, but neither do many have a strong affirmative commitment to a multi-cultural Bosnia either. Furthermore, many might well adopt a “good riddance” attitude, akin to the views of many English Canadians. And, in any event, one does not need a majority of Muslims to make a majority in Bosnia. Indeed, if the Serbs and Croats voted as a bloc for separation—an entirely plausible scenario—not a single Muslim vote would be required for a majority. Any Muslims voting for separation, however few, would only increase the size of the majority.

162. In fact, the population may be *more* committed to nationalist and separatist solutions than the political parties, whose platforms and actions are directly restrained by the international presence:

Many of the estimated 350,000 Croats living in Bosnia—the biggest proportion of the Croatian diaspora—still dream of their regions of the country being annexed to Croatia and are increasingly unhappy with the HDZ [the Croatian Democratic Community, the dominant wartime Croat party], which once shared their goal, but has followed a less nationalist agenda in recent months . . . . Even now, Bosnian Croats feel they were forced into the Federation and still entertain thoughts of establishing a separate entity or a union with Croatia. In Mostar, a local Croat, who gave his name only as Petar, spoke for many when he said, “The question of Croats in Bosnia will not be resolved until we secede. It’s either secession or extermination.”

Jelacic, *supra* note 160.

One of the principal justifications proffered by the international community for its intervention is that local political actors are corrupt and unaccountable. See, e.g., Knaus & Martin, *supra* note 6, at 69. They undoubtedly are (and not only the nationalists), but the prospect that more accountable parties

anti-integrative majority more likely, given the tendency of electoral cycles, to encourage more, rather than less, conciliatory positions on matter of symbolism and identity.<sup>163</sup>

One can quibble about details, margins, and timing, but the point is clear: no one could deny that meaningful majorities for the dissolution of the present state *might* well be found in almost any combination imaginable. No one could say with confidence that Bosnia could clearly, easily withstand such scrutiny by its own people, the way so many states in Europe could.

All this is speculative, but so is continued insistence that Bosnians favor a Bosnian state. The evidence we have suggests that there may not be any meaningful, affirmative majority for an integral state and that there may in fact be larger and stronger constituencies for alternatives. This is all the more plausible if one disaggregates the relevant population by region or by ethnicity, rather than assuming the total Bosnian population as the only relevant one.

Perhaps the main point is that there is evidence to debate, and that this is an empirical question, not a moral assertion. Anyone who argues that Bosnians themselves want integration, or that Bosnians are capable of rational, self-interested democratic choice, should be prepared to accept and support the opposite if it turns out that Bosnians do not.<sup>164</sup> Our present policies will not allow that question onto the ballot or into the debate. Why not? In 1992, the international community actually insisted upon an explicit measure of the people's will on this ultimate question, however flawed that decision may have been. Now, with all parties conceding that the present structure is defective and with calls for constitutional reform multiplying, one of the most obvious possible structural solutions is absolutely off the table.

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might be even *more* nationalistic radically undercuts the rationale for continuing, non-democratic intervention. *But see* Alic, *supra* note 21 (noting surveys and phone call-in shows suggesting support for the OHR's efforts).

163. One frequent objection to a more open democratic process is that bad economic conditions make voters more susceptible to radical or nationalist political appeals, including calls to resist further political integration—and therefore it is premature to allow a fully open democratic debate. Interview with anonymous OHR official, in Sarajevo, Bosn. & Herz. (Mar. 15, 2004), *supra* note 9; Interview with anonymous OHR official, in Banja Luka, Bosn. & Herz. (Mar. 13, 2004), *supra* note 9; Interview with anonymous OSCE official, in Sarajevo, Bosn. & Herz. (Mar. 12, 2004), *supra* note 10. This is probably accurate, but only begs the question of whether such political choices by voters are illegitimate. The economy *is* bad, has been bad, and will be bad for as far into the future as anyone dares speculate. What is the rational, correct, or legitimate response to that, and what is our justification for ignoring or overriding it?

164. Braithwaite considers whether reform can succeed with nationalist governments: But can reform succeed with nationalist governments? The non-nationalists say no. Perhaps they are right—they have seen what they are capable of. But the war ended seven years ago. And yet the nationalist parties are still the largest in the country. To say that they have not changed and can never change suggests there is not much hope for Bosnia-Herzegovina. [High Representative Paddy] Ashdown prefers to be an optimist. To believe that a majority of its citizens can be convinced to support the state and Europe. And to believe that the nationalist parties will accept reform, because that is what their constituencies want. To believe otherwise would be to give up on Bosnia-Herzegovina, and on the millions who yearn for a normal life.

Braithwaite, *supra* note 11. Note the conflation of “a normal life for millions” with Bosnia-Herzegovina—a possible connection, but not a necessary one, nor one that is actually argued as much as assumed.

What is the legal or moral rationale for outside powers to insist that such a question is out of bounds?

Decisions about what territory to use as the electoral baseline predetermine electoral outcomes. One must therefore ask serious, substantive questions about what is the most appropriate territorial baseline, and why. Does continuing to insist on Bosnia make sense? If Bosnia today is a functioning democracy,<sup>165</sup> what can justify limiting the choices that democracy may make about itself? If Bosnians today wish to maintain their present state, there is no justification for imposing a separation on them, and nothing in my argument intends to advocate that. But, if Bosnians today were to wish to discuss dissolution, what possible objection could outside powers raise to their doing so? There is no good, no principled argument for insisting on the perpetuation of a single, integral Bosnian state if that state's own freely elected representatives and its peoples do not wish it. No proposal for a constitutional convention, constitutional dialogue or reform of Dayton should *a priori* exclude this possibility; indeed, no legitimate proposal could.

Some observers suggest that despite being a democracy, Bosnia is still too fragile to survive an open, unrestrained debate. I agree, but could imagine an alternative conclusion: perhaps Bosnia is fragile because its people do not support it. After eight years of relative military stability, is this a state of emergency or the status quo?<sup>166</sup> Unquestionably, even democratic societies occasionally need to suspend democratic processes to ensure peace and stability, and we have a legitimate interest in restricting election platforms calling for violence or inherent evils.<sup>167</sup> Yet it stretches credulity to suggest

165. See, e.g., Knaus & Martin, *supra* note 6, at 72 (noting that the 2002 elections were deemed "free and fair" and that [in] October 2002, Bosnia's democratic institutions were deemed mature enough for the country to be received into the Continent's oldest club of democracies, the Council of Europe").

166. As analysts have noted:

The conditions that obtained in 1996 and the conditions that obtain today are separated by a gulf too wide to be bridged by the assertion that both represent a state of emergency that only a decisive and unquestioned authority can handle. When the High Representative today speaks of an "emergency," he refers not to hate[-]filled radio broadcasts inciting violence against peacekeeping troops but rather to inefficient tax collection, the excessive regulation of private business, corruption in the public utilities, or technical drawbacks that make the court system less efficient than it otherwise might be.

Knaus & Martin, *supra* note 6, at 69.

167. Traditionally societies have provided for such a process through concentration of power during a defined state of emergency or martial law. See, e.g., *id.* at 70-71. I can think of no good theory or practice that provides for a *permanent* or *open-ended* abrogation of an entire society's democratic autonomy. It is necessary to suppose that Bosnia—despite all the supposed progress over eight years—is still in a state of emergency to justify a continued restriction on its democratic sovereignty. Yet if Bosnia is still in a state of emergency, what does that say about the success of the project, or about the international community's legitimate right to consider alternatives to an evidently failed project? While it might reasonably be objected that it has only been eight years, and that more time is needed to embed a democratic culture and a commitment to this fragile state, accepting that objection immediately raises the question: how long will be required? At what point would we have to admit that it has been too long, that democracy too long delayed is democracy denied: eighteen years? Twenty-eight years? Even the almost infinitely larger projects of subduing and democratizing Nazi Germany and Imperial Japan were sufficiently completed by the mid-1950s—in less than a decade—to allow a restoration of sovereignty greater than what has been achieved in Bosnia, where international civilian administrators still hold ultimate authority over democratically elected officials. Military occupation continued, but that seems rather a different matter related to an obviously greater international security threat than Bosnia poses or

that preferring not to integrate Bosnia is *per se* evil, or to maintain that preferring division would be tantamount to defending or advocating the means used to carry out the war.

This objection really masks a complex, underlying, unacknowledged theory of democratic rationality's limits—a belief that people in certain political and economic conditions cannot decide their own interests. This is true, to a point; proponents of this “fragile democracy” argument therefore need to define that point, a temporal limit, to have any legitimacy. Integrationists face a Hobbesian choice of their own devising: either Bosnia is stable and democratic enough to *choose dissolution* if it wishes, or it is not, in which case, it will eventually fail and could *be dissolved* by our fiat. Indeed, even proponents of “reform within limits” face an argumentative bind: if the original 1992 referendum was the right process, what can justify barring talk of state reformation today? If it was wrong, it must be the case that there was something wrong with equating a republic's borders with a “people.” If it was right to dismiss anti-integrationist objections then because of democratic principles, why not allow pro-integrationist objections now? If it was wrong then, it must be because ethnicity does, after all, matter. But, if ethnicity matters, then Bosnia makes little sense.

### C. *No Justice Without Peace: Morality, Rigid Doctrines, and Other Options*

Our thinking about state reformation remains strongly opposed to further change in Bosnia or beyond. But this view, neither necessary nor persuasive, actually conflicts with thinking about what an internal, democratic right to self-determination means. These are the basic elements of this intuition and argument: Bosnia barely exists; identifiable, coherent structures and polities exist within it; the structure of Bosnia present today is strikingly analogous to that of Yugoslavia when all agree it began to dissolve; doctrine restrains us—Bosnia's peoples are not candidates for self-determination—but doctrine's alternatives have shown us, in Yugoslavia's own collapse, a way, a precedent, and a compelling rationale. Only the catalytic impetus of violent crisis is missing. Must we wait on that to effect needed change in the absence of a functioning state, if we have the means at hand?<sup>168</sup>

Why is the international community committed to the maintenance and flourishing of *this* state—more committed, as almost everyone concedes, than

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ever posed. See SHAW, *supra* note 143, at 165. And still nobody imagines that the foreign military presence in Bosnia can be withdrawn in the foreseeable future, if Bosnia is to survive.

168. It should be clear from the preceding discussion that I do not think a partition—even assuming a majority desired it—would be likely to occur without any political violence whatsoever, and I readily concede that the international community might have a legitimate interest in abrogating Bosnians' democratic autonomy if the risk of general violence were too great. I only suggest: that post-war political structures make partition, not easy, but easier or more possible from a doctrinal and political perspective; that the level of risk is a speculative empirical question which the international community's current policy does not seriously measure but rather assumes; and that in so doing it does not seriously consider the costs to Bosnians' democratic autonomy of its policy, when a possible alternative exists. It is reasonable to suppose that an internationally monitored and policed political process of debating state reformation could be conducted with minimal violence or disruption; if that is accurate, then it does not make sense to refuse to consider the possibility out of fear that any discussion of separation will inexorably lead to violence.



the populace itself? A host of shibboleths are ranged against the idea that Bosnia might be divided: division would risk renewed war; destabilize the region; damage fragile economies; jeopardize refugees' returns; harm democracy; and validate injustice. Most of the objections are grounded in empirical estimates and can be debated.<sup>169</sup> It is possible partition might actually achieve greater stability now, if only because the moments of greatest risk have passed and the most dangerous tests failed long ago: Bosnia is already divided, its economies dissolved and reformed, its tens of thousands killed, and its millions removed; there is arguably more instability in trying to force these peoples and these systems back into something together than in ordering the dregs of dissolution. These are not preferences, but claims about what would likely happen. Others may disagree, but even to have this debate on empirical grounds would be a sea change in our thinking about possible outcomes in Bosnia. A shibboleth cannot be challenged, whereas a policy based on empirical claims can be, and if the base is found wanting, the policy can be abandoned.

The structure of the state and the law that binds it together are both so weak and tenuous that policymakers should ask fundamental questions, unconstrained by the conventions and proprieties of comity that normally accompany relations between states. States in dissolution and states so weakly supported by their own populations, including Bosnia, do not require those

169. For example, an important question concerns the state that would be left behind: the Muslim remainder. Would the Muslim sector be a viable state? In principle, a remainder state might be unviable, and it is an open question how this might affect an otherwise valid claim by a territory or group to secede. It is not clear, however, that the issue even arises in the Bosnian case.

There is no reason to think the Muslim sector would not be *economically* viable: though small, it would be considerably larger and have a greater population than many independent states. Bosnia is not a necessary or even logical economic unit, so it is not clear that the Muslim sector would lose any essential economic hinterland—areas which, in any event, have been largely separate economically since 1992. The Muslim sector would be land-locked, but that is not an essential element of economic prosperity. It would be non-contiguous, but that simply means it would require good relations with Croat areas—which, having secured independence, would have no reason for conflict with the Muslim sector. Of course, its economy would be prostrate and pathetic, but it already is.

It is hard to see why the Muslim sector would not be *politically* viable. It was already recognized as the government of Bosnia during the war, when it controlled less territory and had an even more tenuous authority than it does today. The Muslim sector would certainly be *militarily* viable: its armed forces are the strongest in Bosnia, and in the event of renewed conflict, would probably defeat the now-decrepit Republika Srpska forces. Interview with anonymous OHR officials in Sarajevo, Bosn. & Herz. (Mar. 15, 2004), *supra* note 9.

In any event, outsiders often overestimate the necessary size of a state. In 1991, the European Community mediator, the Foreign Minister of Luxembourg, “[went] on record as saying Slovenia is too small to be viable.” Bernard D. Kaplan, *Can Freedom Come in Packages Too Small To Suit U.S.?*, SEATTLE POST-INTELLIGENCER, July 10, 1991, at A11. Slovenia joined the European Union in May 2004.

The Muslim sector's viability is probably not the issue. Rather, even if viable, such a state might be a source of resentment, given the large numbers of aggrieved refugees who would view a separate Serb or Croat state as an injustice; this might give rise to instability that would directly affect the broader region. Yet even if we concede this possibility, it is not clear that a territorially defined, legally cognizable people's right to create a state ought to be restricted because of security concerns, however legitimate and justifiable, that emanate from a neighboring state and community. It is not clear, in other words, why the appropriate response for the international community would be to restrain that resentment, rather than refuse the secession that generates it. The example is Yugoslavia itself: the evident dissatisfaction of many nationalist Serbs and the Belgrade authorities at the prospect of Bosnia's independence did not give them a recognized right to resist that secession.

niceties; they rather require us to draw the conclusions that necessity, justice, and preference dictate, or allow.

The key intuitive leap is to admit that the state of Bosnia, like any state, is a means toward the security, welfare, and hopes of the peoples who happen to live in it – or rather, who live in what happens to be it. Bosnia is not an end unto itself, nor a mirror for our vanities, nor an abstract moral claim. Our policies towards that state are therefore instrumental and preferential, not bound by some supposed absolute obligation, whether moral or legal. Outsiders united in a common desire for those peoples' prosperity, and a common interest in peace and stability, should contemplate whatever condition or state(s) will best attain those aims. Making Bosnia a moral imperative limits our vision and their options.

Our only response to this intuition thus far has been: "you cannot ask these questions." This is a circular policy that, like colonialism, is probably sustainable as long as our will holds. It might even work, given enough time and enough pressure. But, it is not a policy that is necessary for increased stability and prosperity, nor one that respects the prerogatives of democracy. If we reflect upon it seriously, it is not a policy that brings Bosnians or us closer to justice, since justice has been deracinated, reduced to nothing but defense of these borders for their own sake—not for the people they enclose—as a totem of the justice we failed to ensure a decade ago.

I began by noting the aura of moral imperative hovering around "Bosnia." If we begin to ask these questions, what becomes of claims for justice, which surely implicate us all? This is the moral objection again, and the rebuttal is that democratic autonomy has its own moral value. However salutary our intention not to vindicate today those who profited by evil yesterday, there is hubris in asserting that humanity's interests are necessarily and always greater than those of that portion of humanity most directly and deleteriously affected by our interpretations of the higher good. We have every right to insist that individuals charged with crimes against humanity face justice in The Hague and be excluded from the political process.<sup>170</sup> We have every right to insist that no state and no people in that region threaten our common security again. But, insisting on a particular territorial dispensation as the only expression of historical justice, regardless of historically created contemporary conditions, is to insist on justice though the heavens may fall. But then, the heavens will not fall on *us*.

Bosnia's peoples live with the effects of a political system distorted by our rigid, shibboleth-ridden, imposed conception of what their future can be. Our reflexive commitment is now, ten years on, anachronistic and tragically late for those still living. Refusing to allow millions of people to find political and economic certainty even though another policy might better achieve those

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170. The International Criminal Tribunal for the Former Yugoslavia was established by the U.N. Security Council in 1993. Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for the Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia: Report of the Secretary-General, S.C. Res. 808, U.N. SCOR, 48th Sess., Annex, U.N. Doc. S/25704 (1993), *reprinted in* 32 I.L.M. 1159 (1993). The Tribunal sought to address the atrocities taking place in the Balkans War.

goals, solely to vindicate a moral principle ten years after its vindication was sorely needed, ten years after it was affirmatively possible, is not necessarily the moral thing to do. If that principle is, moreover, more deeply felt and insisted upon in foreign capitals, universities, and think-tanks than in the former killing fields themselves, it may not only offend a properly considered moral sensibility, but trespass upon other political and moral values, such as the autonomy of individuals and their societies, living in the wake of their own history, to make and unmake of themselves what they will.

Even if real existing Bosnia really were the only way to give meaning to the claims of justice, the retrospective demands of justice, however important, cannot alone dictate the future, nor a whole people's hopes for justice, stability, and prosperity in that future. Bosnia's recent tragic past does not insulate it from the risk of failure or the logic of dissolution as a legal category. If Bosnia were to fail, or if we were to admit that it has, what would or should succeed it? It cannot be that the war and its cruelties have foreclosed an obvious and compelling alternative: national states. On the contrary, however uncomfortable it may make the moralist to admit it, the war and its cruelties may have made that alternative the only one, if people there no longer believe in any other. Our greatest gift on Dayton's next anniversary might be allowing Bosnia's peoples peaceably to continue or to end their own state, not perpetuating it like the ghost of a departed dream playing out in someone else's waking.

It is at least worth asking Bosnians what they want now. It is worth letting "them" become a part of "us." On the battlefields of law and politics after the Yugoslav wars, little seems to have changed, but much more is possible. Bosnia's Croats, Muslims, and Serbs do not have a right to self-determination because formal doctrine is too clearly aligned against such a possibility, but Bosnia's peoples may increasingly have a claim about democracy and an expectation of recognition. These possibilities may not be grounded on the right to secede, but instead on the claim that Bosnia has failed to come fully into being—or at least on a recognition that Bosnia's constituent populations ought not be asked to integrate further without first being free to express their will. This is within the realm of political possibility—and may actually be more just—whatever the doctrines say.

#### D. *Mere Doctrine: Limits to the Precedent and Underlying Ferment*

The Yugoslav crisis showed that non-territorial ethno-national groups had no doctrinal claim in 1990 and have no claim today *qua* nations. Yet the war and the peace have also shown how an underlying ethnic claim can be brought into concordance with a doctrinally cognizable claim (i.e., by recognizing territorially delimited federal successions to a failed state), such that the population of a territory, not a nation itself, might secede. This, so far, might be one more in a dangerous line of destabilizing precedents,<sup>171</sup> or

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171. See, e.g., Radha Kumar, *The Troubled History of Partition*, FOREIGN AFF., Jan.-Feb. 1997, at 22 (placing a possible Bosnian partition in the context of the Indo-Pakistani, Cypriot, Irish, and Palestinian partitions). *But see* Chaim D. Kaufmann, *When All Else Fails: Ethnic Population Transfers*

nothing more than a variant of the claims advanced in the 1990s, by scholars, about a right for federal units to secede.<sup>172</sup> Yet the implications of this argument are at once limited and dynamic.

The claim is limited by its *post hoc*, status quo basis. Nothing in it would require the international community to acquiesce in violent change, ethnic cleansing, the violation of human rights, or even in any particular attempt at secession. Nothing in it requires us to support a challenge to any status quo. All the claim does assert is that, having failed to intervene, the international community may, and perhaps eventually should, recognize the formation of a new state, especially if events have created that new state in a shape that international law already recognizes (i.e., defined territories succeeding to failed states). This might make Bosnia a precedent for Kosovo,<sup>173</sup> but not for Macedonia, or much of Africa, where, rightly or not, the status quo still holds and separatism has so far been avoided.<sup>174</sup>

Though limited, the claim is also dynamic: acknowledging the generative potential of recognition in the context of dissolved, failed, or inchoate states frees policymakers from the limits of doctrinal rigidity, whether in Bosnia, elsewhere in the Balkans, or in places like Afghanistan, Iraq, Indonesia, the Congo, or Sudan. If there is no external or objective grounding to a policy other than our will and a sense of moral rightness, then at least we should see that clearly, and persist only if we are certain the policy is right and liable to succeed. If success is stability and peace, then it may be the case that a different dispensation or a different recognition would serve better. In place of the rigid rule of territorial integrity absolute, this is a doctrine of possibility.

More than mere flexibility, there is a normative drive to the claim. It is in effect a doctrinal proxy that converges with an underlying claim about the shape of the polity, the self that determines in a democratic society. Over time, proxies should and do give way to their authentic expressions. There is probably an inevitable and unavoidable question arising from this claim: do the internal structures in a country comport with or hinder the expression of political sentiment by groups of individuals who identify with each other? Only defined territories may receive recognition, but could a state permanently refuse to create territorial definitions that its own people wanted, solely to forestall the risk of partition? What would the justification for this be?

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*and Partitions in the Twentieth Century*, INT'L SECURITY, Fall 1998, at 120, 120-56 (rebutting Kumar).

172. See, e.g., Otto Kimminich, *A "Federal" Right of Self-Determination?*, in MODERN LAW OF SELF-DETERMINATION, *supra* note 23, at 83; Patrick Thornberry, *The Democratic or Internal Aspect of Self-Determination with Some Remarks on Federalism*, in MODERN LAW OF SELF-DETERMINATION, *supra* note 23, at 101; Hannum, *supra* note 58, at 64-65, 69.

173. See Morton Abramowitz, *Going Backward in the Balkans*, WASH. POST, Mar. 19, 2004, at A23 (noting linkages between Kosovo and Bosnia, and stating that "[t]he failure to establish Kosovo statehood creates massive uncertainty in the Balkans, exacerbates tensions between Albanians and Serbs, delays investment and growth, and keeps Serbia focused on the past").

174. *But see* Patrick Moore, *What To Do About Bosnia?*, *supra* note 5 ("The problem—of virtue—of partition is that it would most likely involve not just Bosnia-Herzegovina but every state in the region. . . . [and] would vindicate the results of previous ethnic cleansing campaigns, set off new ones, and preclude any attempt at multiethnic statehood . . .").

The most obvious objection is that a flexible doctrine poses risks to states' stability. This may prove a sufficient objection, but that is a question for further research: what *are* the costs of our commitment to territorial integrity in places like the Balkans and Africa? It may be that the commitment to territorial integrity actually increases suffering by strengthening the hand of elites in ruling peoples whom they have no business ruling. If states truly are so fragile that allowing their own peoples peaceably to consider their reformation would destroy them (and while many are, not all states are so fragile), why do we believe it is not only necessary, but preferable to defend them? Why not see that fragility as a proof of the need for reform? The answer is, I suggest, unclear, and certainly less clear than our confident, unquestioned doctrinal commitment would suggest. The limited case of Bosnia—unique in being a secession nearly perfected save for recognition—only suggests the outlines of this future debate. It does not resolve the question for societies that have not yet been through wars of their own.

So, this argument seems like a claim for a doctrine in transition, in that it is a conceptually coherent doctrinal position, but an interim one that will ultimately raise underlying questions about the legitimacy of insisting on fixed, territorially defined resolutions that pre-define supposedly self-determining polities. This will have extraordinary, explosive, liberating, dangerous, moral implications for states and for their peoples, though not just yet. The limit of Bosnia is that, for now, only identifiable territories need be subjects for our recognition in international law. The challenge of Bosnia is that when such territories are obviously proxies for something else, that something else—or someone else—will demand recognition, a demand to which mere doctrine should, must, and ultimately will respond.

