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Michael Barutciski

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POLITICS OVERRIDES LEGAL PRINCIPLES: TRAGIC CONSEQUENCES OF THE DIPLOMATIC INTERVENTION IN BOSNIA-HERZEGOVINA (1991-1992)

Michael Barutciski*

Many commentators have suggested that the international community could have played a more positive role regarding the crisis in Bosnia-Herzegovina if it had enforced well-established legal principles and decisions made by the United Nations Security Council.¹ This commentary on the importance of law should have been considered from the beginning of the crisis when the international community made critical decisions concerning the recognition of independence. These decisions had grave consequences for the protection of civilian populations. Unfortunately, the real problems in Bosnia-Herzegovina were ignored despite the relevance of the legal opinion written by the Arbitration Commission² composed of the European Community's finest jurists. Legal principles were pushed aside in favor of political interests, resulting in international policy that does not reconcile with international law.

* Atle Grahl-Madsen Fellow in Law, Centre for Refugee Studies, York University. B.A. (McGill University, 1989), LL.B. (Université de Montréal, 1992), LL.M. (Osgoode Hall Law School, 1995). The author is grateful to the Centre for Refugee Studies for its support. Special thanks are due to family members and friends.

1. See Amiral Antoine Sanguinetti, *L'oubli choquant du droit international: Faux-fuyants européens en Bosnie*, LE MONDE DIPLOMATIQUE, Jan. 1995, at 3 (noting that the international community was unwilling to militarily enforce Security Council resolutions).

2. *Conference on Yugoslavia Arbitration Commission Opinion No. 4*, 31 I.L.M. 1501 (1992).

I. CONSTITUTIONAL CRISIS IN BOSNIA-HERZEGOVINA

A. THREE CONSTITUENT NATIONS

Three constituent nations existed in the former Yugoslav Republic of Bosnia-Herzegovina: Croats, Serbs and Muslims. According to 1981 census figures, the population of the Republic was composed as follows: 18.3% Croat, 32% Serb, 39.5% Muslim.³ The remainder of the population included various minorities and people who identified themselves as "Yugoslavs".⁴ The term from which the translation "nation" is obtained, *narod*, is used in the 1974 Constitution⁵ in a way that most resembles the German *Volk* in that it refers to a people defined by common cultural and historical ties. One should not confuse it with citizenship.

There has been confusion, nevertheless, in the way the international news media has used the terms "Muslim" and "Bosnian." Muslims were recognized *de facto* as a distinct nation in the 1971 census and *de jure* in the 1974 Constitution.⁶ With their own recent and growing nationalist

3. PAUL GARDE, *VIE ET MORT DE LA YUGOSLAVIE* 116 (1992).

4. *Id.* The figures for the uncompleted 1991 census were established in the context of ethnic-nationalist tensions and state dissolution: 17.3% Croats, 31.4% Serbs, 43.7% Muslims and 5.5% Yugoslavs. For statistics on the region's population during the last two centuries, see, e.g., GEORGES CASTELLAN, *HISTOIRE DES BALKANS* 316 (1991) (citing statistics for religious population in former Yugoslavia in 1807-1808); IVO BANAC, *THE NATIONAL QUESTION IN YUGOSLAVIA* 361 (1984) (citing statistics for religious population in former Yugoslavia in 1910); Xavier Bougarel, *Bosnie-Herzégovine: anatomie d'une poudrière*, *HÉRODOTE*, no. 67, 1992, at 89 (organizing statistics reflecting the religious and ethnic populations in the former Yugoslavia between 1879 and 1991). In general, it appears the Serb population has slowly decreased over the last two centuries, while the Muslim population has slowly been increasing in number. See also LENARD J. COHEN, *BROKEN BONDS: YUGOSLAVIA'S DISINTEGRATION AND BALKAN POLITICS IN TRANSITION* 139 (1995) (noting figures on the composition of the region's population in 1991).

5. See generally CONSTITUTION OF BOSNIA-HERZEGOVINA.

6. *Id.* The Communist Party actually began recognizing a distinct Muslim nation in the late 1960s: "An official of the Central Committee of the Bosnian Communist Party officially proclaimed in 1968 that 'Muslims, as our socialist praxis demonstrates, are a distinct nation.'" *LE MONDE*, March 29, 1969, at III, cited in ALEXANDRE POPOVIC, *LES MUSULMANS YUGOSLAVES* 25 (1990) [hereinafter POPOVIC]. See MISHA GLENNY, *THE FALL OF YUGOSLAVIA* 141 (1993):

In the 1960s, young Moslem graduates and professionals were able to articulate the needs and requirements of their community as a distinct entity within Yugoslavia for the first time. The student unrest which swept Europe in 1960 found a powerful resonance in Sarajevo, where for the first time young Moslems were able to force concessions from the Party which grudgingly admitted that their

sentiment,⁷ Muslims resented being referred to as "Serbs" or "Croats" who had simply converted to Islam under the Ottoman rule in order to enjoy privileges over the Christian populations.⁸ The problem was that they lacked a national name.⁹ The attempt to introduce the term "Yugoslav" did not accommodate their desire to have their own distinct culture recognized. Although they have become largely secular, the explicit religious origins of their identity have made it difficult to define their nationhood.¹⁰ The term "Bosnian" could not be used since it suggested that they were somehow more indigenous than the majority of the inhabitants of Bosnia-Herzegovina who belong to the Serb and Croat nations and who have been present on the territory for as long as the

people fulfilled the requirements of a Yugoslav nation.

7. The following historical account provides insight on the recent nature of this nationalist sentiment among Muslims:

[D]espite its total mastery of the Bosnian Muslim community [following the First World War], the JMO [Yugoslav Muslim Organization] could not present itself as the representative of a formed national group, the notion of a separate Bosnian Muslim nationhood being unacceptable not only to the Serbs and Croats but to the Muslim leaders themselves.

BANAC, *supra* note 4, at 371.

8. See DANIEL VERNET & JEAN-MARC GONIN, *LE RÊVE SACRIFIÉ: CHRONIQUES DES GUERRES YOUGOSLAVES* 98 (1994) ("[T]he Ottoman Empire granted privileges to those who embraced the Prophet's religion: fiscal advantages, positions in the administration, and even titles of nobility. This allowed Bosnian Muslims to comprise the Bosnian elite right through today").

9. See *Jesmo li Srbi ili Hrvati?* [Are We Serbs or Croats?], PRAVDA, Dec. 30, 1920, at 1, cited in BANAC, *supra* note 4, at 374 n.33 (observing the Bosnian failure to produce a "new hybrid nationality").

10. See Mark Pinson, *The Muslims of Bosnia-Herzegovina Under Austro-Hungarian Rule, 1878-1918*, in *THE MUSLIMS OF BOSNIA-HERZEGOVINA* 89 (Mark Pinson ed., 1993) (discussing the "substitution among Bosnian Muslims of religion for national identity").

Muslims themselves.¹¹ Eventually, the term "Muslim" (with a capital "M" in the local language) was officially adopted.¹²

As peculiar as this may seem to readers who are accustomed to the notion that the term "Muslim" refers to a follower of the Islamic faith, one should understand that this is how the 1974 Constitution attempted to deal with the profound desire on the part of some inhabitants of Bosnia-Herzegovina to have their nationhood recognized and distinguished from the other two nations sharing the same territory. The constitutional terms designating nationhood have to be retained in order to grasp correctly the nationalist dimension of the conflict in Bosnia-Herzegovina, and in order to avoid the confusion and imprecision resulting from the use of the term "Bosnian" by many commentators.¹³

11. The Austro-Hungarian Empire failed in trying to create a specific "Bosnian" nationhood (encompassing Muslims, Serbs and Croats) when they controlled the region following the Treaty of Berlin (1878) until the First World War. *Id.* at 88. Ever since the Ottoman Empire left the region in 1878, the growing nationalism among Serbs and Croats has placed the issue of nationhood at the forefront of political tensions in Bosnia-Herzegovina. A multinational "Bosnian" identity has never officially emerged, despite the region's distinctive character:

The Austro-Hungarian Civilian Administration of Bosnia-Herzegovina has decided to promote a specific Bosnian national conscience; it thought it could rally the Muslims from whom faith in the Koran had encaptured all memory of the historical background. This attempt turned out to be artificial and in vain. The more the conflicts of nationality multiplied in the Habsburg Empire and in the Balkans, the more Bosnia-Herzegovina strengthened the double equation, Catholic equals Croat, Orthodox equals Serb, while the Muslims formed a separate core for which national identity remained problematic.

CASTELLAN, *supra* note 4, at 350. See BANAC, *supra* note 4, at 360 (noting attempts to foster a separate Bosnian nationhood); Pinson, *supra* note 10, at 103 (discussing Austrian attempts to introduce an official Bosnian identity).

12. When referring to followers of the Islamic faith, local languages use a small "m". GLENNY, *supra* note 6, at 141. Theoretically, people in Bosnia-Herzegovina could therefore declare themselves as Muslim atheists, Muslim catholics, etc.

13. Muslims have often been designated as "Bosnians" who are defending "Bosnia" against Serb or Croat attacks. This, in turn, has led to the erroneous suggestion that the conflict in Bosnia-Herzegovina is purely an example of foreign aggression. One year after the outbreak of hostilities, the United States Secretary of State was playing an active role at international negotiations on the crisis, unaware that the Serbs were as "Bosnian" as the Muslims:

David Owen is astonished by a reproach from Warren Christopher:

"The Serbian invasion is the fault of the Europeans. You should have prevented the Serbs from entering Bosnia."

He understands that the Secretary of State does not know that 1,300,000 Serbs live in Bosnia.

B. PARLIAMENTARY IMPASSE

Even though it is arguably the main cause of the present armed conflict, there has been almost no discussion of the constitutional crisis in Bosnia-Herzegovina. The first free elections in the former Yugoslav Republic of Bosnia-Herzegovina's short history¹⁴ occurred in 1990 and resulted in the nationalist parties of the three constituent nations taking 86% of the vote in proportions generally reflecting their percentages of the population.¹⁵ Though the nationalist parties agreed that the multinational Communists should be removed from power, the deep divisions created by the organization of parties along national lines should not be underestimated.¹⁶

The three nationalist parties agreed to share various functions at the Republican level and agreed to continue with the principle of consensus when working on important constitutional matters.¹⁷ This was in accordance with the 1974 Constitution which provided for the equality of the three constituent nations.¹⁸ A limited veto power for each nation was crucial since a combination of any two nations automatically produced a

"Take a look at the map," the European mediator tells him, "the Serbs live here."

VERNET & GONIN, *supra* note 8, at 163.

14. Tito's Communists created the former Yugoslav Republic of Bosnia-Herzegovina when they decided at the end of the Second World War to join two distinct geographic regions in order to form one of the constituent Republics of the new Communist Yugoslavia.

15. See GARDE, *supra* note 3, at 292 (showing that the makeup of the body included: SDA (Muslim): 86 parliamentary seats; SDS (Serb): 72; HDZ (Croat): 44; Communists (multinational): 20; Markovic's Reformist Party (multinational): 13).

16. GLENNY, *supra* note 6, at 147.

Driving across Bosnia in 1990 just prior to the elections afforded me a brief glimpse into the republic's miserable future. One village drowning in a sea of green crescents, which proclaimed the (Moslem) Party of Democratic Action (SDA), would give way to another, where the *šahovnica* (denoting the Croatian Democratic Union) was sovereign, or where every wall was covered with the four Cs and the acronym SDS (the Serbian Democratic Party). In some villages, the western half was green while the eastern half was red, white and blue (Serbian) while in many towns it was easy to identify the predominantly Croat, Serb or Moslem districts. Many doomed settlements were a jumble of all three.

Id.

17. The leader of the Muslim nationalist party, Alija Izetbegovic, became the President of the Republic's Presidency, while Momcilo Krajisnik (Serb) became the parliamentary President and Jure Pelivan (Croat) became the Prime Minister. GARDE, *supra* note 3, at 292-93.

18. CONSTITUTION OF BOSNIA-HERZOGOVINA, arts. 1, 2, 3.

majority in the event of a vote. Only strict adherence to the consensus principle could guarantee that the rights of the three nations would not be threatened. At the local level, however, the party that represented the majority group in each particular *opština* (sub-Republican administrative unit) seized absolute control.¹⁹

Following the 1990 elections, the parliament of Bosnia-Herzegovina did not adopt a single law. The tensions in the parliament finally exploded when the Muslim and Croat parties agreed in October 1991 to adopt a "platform" on the future sovereignty of Bosnia-Herzegovina that was to be confirmed by referendum.²⁰ According to this document, Bosnia-Herzegovina would remain in a new Yugoslav community only if it included both Croatia and Serbia. Since this was an unlikely development given the fighting between Croats and Serbs in Croatia following its declaration of independence from Yugoslavia, the Serbs interpreted this gesture as the beginning of Bosnia-Herzegovina's formal separation from the Yugoslav federation, in which they felt secure. The Serbs consequently left the parliament and created their own assembly near the capital city, Sarajevo (Pale).²¹ During autumn 1991, so-called Serb autonomous provinces appeared throughout Bosnia-Herzegovina.²² The creation of several Croat autonomous regions immediately followed.²³

By the end of 1991, the parliament of Bosnia-Herzegovina found itself in an impasse since it had to enact a new constitution in order for the Republic to become independent. To do this legally, the three nation consensus principle dictated that the parliament needed the participation of the Serb parliament members. Although no longer formally participating in the parliament's activities, the Serbs made it clear through unofficial channels that they had no intention of cooperating unless a

19. See GLENNY, *supra* note 6, at 153 ("[T]he local [Bihac] SDA leadership had begun a purge of Serb officials who controlled many state enterprises. This was the normal practice throughout BiH. The dominant party in the region would undertake a purge of the administration although it was never as severe as the HDZ purge of Serbs in Croatia."). See also Robert M. Hayden, *Constitutional Nationalism in the Formerly Yugoslav Republics*, 51 SLAVIC REV. 654, 661 (1992) (noting "the victorious part of the majority ethnic group took absolute control over local government, purging all not of their nation").

20. MIHAILO CRNOBRNJA, *LE DRAME YUGOSLAVE* 176-77 (1994).

21. See GLENNY, *supra* note 6, at 165 (noting that Serbian MPs had walked out of the parliament and formed their own nearby).

22. Bougarel, *supra* note 4, at 144.

23. *Id.*

political solution could be achieved that would sufficiently protect their rights. In the event that such a solution was not possible, the Serbs made no secret of their preparations for an armed conflict.²⁴ Equally worrisome was the huge presence in Bosnia-Herzegovina of the Yugoslav People's Army (JNA) which was legally stationed in the Republic since it was still part of the Yugoslav federation.²⁵ At that stage, however, the JNA was clearly supporting the Serb nationalist cause and had no intention of allowing territory where its military material and installations were concentrated to leave Yugoslavia.²⁶

II. INTERNATIONAL INTERVENTION

A. PURSUIT OF INDEPENDENCE

Despite the fact that the parliament no longer contained the elected representatives of one of the constituent nations, President Izetbegovic decided to seek international recognition for the independence of Bosnia-Herzegovina. The European Community (EC) created an Arbitration Commission that consisted of the presidents of five EC constitutional courts in order to deal with legal problems regarding the former Yugoslavia.²⁷ The Commission received notification on December 20, 1991 so that it could examine the request.²⁸ The fact that the EC was even considering the recognition of Bosnia-Herzegovina's independence under these circumstances worried key actors in the international community's preventive diplomatic efforts.²⁹

24. GLENNY, *supra* note 6, at 151.

In August [1991], . . . the [Yugoslav] federal Prime Minister . . . leaked a tape conversation between President Milosevic [of Serbia] and General Nikola Uzelac, who ran the Banja Luka corps of the JNA [Yugoslav People's Army] . . . During this conversation, Milosevic ordered Uzelac to release weapons to the leader of the SDS [Serb nationalist party in Bosnia-Herzegovina], Radovan Karadzic.

Id.

25. *See id.* (noting President Izetbegovic's concern over the presence of the JNA in Bosnia).

26. Jean-Arnault Derens, *La Bosnie-Herzégovine*, in *LA FRAGMENTATION DE LA YUGOSLAVIE* 42 (Catherine Samary ed., 1992); GLENNY, *supra* note 6, at 151-152.

27. Alain Pellet, *Note sur la commission d'arbitrage de la conférence européenne pour la paix en yougoslavie*, 37 *ANNUAIRE FRANCAIS DE DROIT INTERNATIONAL* 329, 332 (1991).

28. Marc Weller, *The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 *AM. J. INT'L L. AND POL'Y* 569, 587 (1992).

29. As a senior European diplomat who served as the assistant to Lord

It is important to understand the EC's position in order to grasp the relationship between preventive diplomacy and state self-interest regarding the crisis in the former Yugoslavia. The German Government, under pressure from German public opinion which was sympathetic to Croatian and Slovenian independence, presented an ultimatum to EC Member States at a meeting on December 16, 1991: if the EC did not recognize the independence of Croatia and Slovenia, Germany would proceed by itself in recognizing these two states even though this was contrary to the common European foreign policy provision agreed to in the Maastricht Treaty that had just been signed several days earlier.³⁰ EC Member States reached a "compromise" solution whereby any Republic from the former Yugoslavia could apply for recognition of independence. The formal recognition of independence was to take place on January 15, 1992. The one month delay would allow the Arbitration Commission to advise the EC whether the applicants satisfied an extensive list of basic criteria relating to the rule of law, democracy and human rights.³¹

While the Arbitration Commission's opinions were not legally binding, what fundamentally undermined its role was that, in the end, the German government decided not to wait for the issuance of advisory opinions but proceeded to recognize Croatia and Slovenia on December 23, 1991.³² Furthermore, even though the Arbitration Commission stated on January 11, 1992 that Croatia did not completely fulfill all the

Carrington (Chairperson of the EC's Peace Conference on Yugoslavia) has stated: "The decision to ask Bosnia-Herzegovina if it wanted independence, was, according to Carrington, 'a tragic error.'" HENRY WYNAENDTS, *L'ENGRENAGE - CHRONIQUES YUGOSLAVES* 154 (1993). See Report of the Secretary General Pursuant to Security Council Resolution 721, UN Doc. 23280-21 (Dec. 1991) (relaying fear that "early, selective recognition could widen the present conflict and fuel an explosive situation . . .").

30. VERNET & GONIN, *supra* note 8, at 78-85; WYNAENDTS, *supra* note 29 at 151.

31. *European Community: Declaration on Yugoslavia and on the Guidelines on the Recognition of New States (December 16, 1991)*, in 31 I.L.M. 1485, 1486 (1992).

The Community and its member States agree to recognize the independence of all the Yugoslav Republics fulfilling all the conditions set out below. The implementation of this decision will take place on January 15, 1992 . . . The applications of those Republics which reply positively will be submitted through the Chair of the Conference to the Arbitration Commission for advice before the implementation date.

Id.

32. VERNET & GONIN, *supra* note 8, at 86; GLENNY, *supra* note 6, at 163-164.

criteria,³³ the other EC Member States proceeded to recognize both Croatia and Slovenia on January 15, 1992, as planned.³⁴ In order to accommodate Germany's new political demands³⁵ and pressure from public opinion, the Member States openly discarded the EC's top jurists.³⁶ Unfortunately, this set the tone for the EC's handling of the particularly explosive situation in Bosnia-Herzegovina, in spite of the many warnings against premature recognition.

On January 11, 1992, the Arbitration Commission examined President Izetbegovic's request and issued an advisory opinion on Bosnia-Herzegovina's independence.³⁷ The Arbitration Commission rejected the request, noting "that the Serbian members of the Presidency did not associate themselves" with the various independence declarations and undertakings.³⁸ Referring to the wishes of the Serbs to remain in a Yugoslav federation as established by a plebiscite and a Serb Assembly resolution, the Arbitration Commission declared "that the will of the peoples of Bosnia-Herzegovina to constitute the Socialist Republic of Bosnia-Herzegovina (SRBH) as a sovereign and independent State cannot be held to have been fully established."³⁹ It concluded that its position was reviewable if "appropriate guarantees were provided by the Republic applying for recognition, possibly by means of a referendum of

33. *Conference on Yugoslavia Arbitration Commission, Opinion No. 5*, in 31 I.L.M. 1503, 1505 (1992). Notably, the human rights legislation did not accord sufficient autonomy to the Serb inhabitants who were supposed to be protected by provisions relating to an agreed "special status."

34. VERNET & GONIN, *supra* note 8, at 86.

35. *Id.* at 22. See GLENNY, *supra* note 6, at 191-192 (relating the difficulty that the United Kingdom had in accepting Germany's decision).

According to one senior Foreign Office (FO) official, the British government had still not decided two days before the official recognition date, 15 January, whether to accept the German position or not. There were two lines of thinking inside the FO. The first, centered on the Embassy in Belgrade, argued flatly against recognition. The second, known as the Brussels lobby, maintained that because Germany had afforded Britain so many concessions at Maastricht then it would be churlish to oppose Germany's main foreign policy concern of the early 1990s, particularly as Britain's interest in Yugoslavia was limited.

Id.

36. See VERNET & GONIN, *supra* note 8, at 35 (describing Chancellor Kohl's decision to capitulate to German public pressure and recognize Croatia although he acknowledged that it would not solve anything).

37. *Conference on Yugoslavia Arbitration Commission, Opinion No. 4*, in 31 I.L.M. 1501 (1992).

38. *Id.* at 1503.

39. *Id.*

all the citizens of the SRBH without distinction, carried out under international supervision."⁴⁰

The limited explicit basis for the Arbitration Commission's short advisory opinion requires considerable efforts in order to understand the reasoning. One element that seems certain, however, is that the Arbitration Commission rightly focused on the fact that the Presidency was not representing the interests of all three constituent nations of Bosnia-Herzegovina. Consequently, it had to refuse the request and thereby recognize that President Izetbegovic had exceeded his constitutional powers by seeking independence without the approval of the Serbs. The only way the Arbitration Commission could change its opinion would be if the Serb nation somehow indicated that it was favorable to independence: a referendum with Serb participation would manifest this, and implicit in the reasoning is the requirement for the Serbs to vote in favor of independence given the constitutional guarantee of equality between all three nations. Any other interpretation would ignore Bosnia-Herzegovina's consensus principle and would allow a majority to determine the fate of a protected minority.⁴¹

The Muslim and Croat parliament members decided to proceed with a referendum on independence even though the Serbs vowed to boycott it.⁴² The Muslim nationalist party campaigned for a unitary, democratic and independent Bosnia-Herzegovina, while the Croat nationalist party backed the project of separation from Yugoslavia, yet remained ambiguous regarding the unity of Bosnia-Herzegovina since the Croats were interested in establishing closer ties with Croatia.⁴³ The results were

40. *Id.* (emphasis added).

41. Regrettably, it appears some commentators have not actually read the opinion. Several authors have described the opinion in a manner suggesting that the Arbitration Commission was not particularly troubled about the legitimacy of the request for recognition and that a referendum with a simple majority would suffice for independence to be recognized. See James B. Steinberg, *International Involvement in the Yugoslavia Conflict*, in ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS 41 (Lori Fisler Damrosch ed., 1993) (suggesting that EC criteria had been met); CRNOBRBJA, *supra* note 20, at 147 (suggesting a simple majority would suffice for independence to be recognized).

42. Florence Hartmann, *Le Parlement de Bosnie-Herzégovine a décidé d'organiser un référendum sur l'indépendance*, LE MONDE, Jan. 28, 1992, at 3.

43. WYNAENDTS, *supra* note 29, at 153. The group within the Croat nationalist party which received the backing of the government of Croatia (Mate Boban's group) created their own state in western Herzegovina several months later. In the meantime, however, an objective need existed for the Croats to ally with the Muslims in order to separate from Yugoslavia, which at that point was clearly Serb-controlled. Never-

made public on March 1, 1992: those Muslims and Croats who participated voted overwhelmingly for independence, while the Serbs effectively boycotted the referendum.⁴⁴ With the Muslims and the Croats explicitly violating the principle of consensus by holding a referendum without Serb participation (and in which a total of 37% of the population did not participate), the referendum failed to fulfill the Arbitration Commission's requirement that *all the citizens* of Bosnia-Herzegovina be consulted. Even if one of the constituent nations chose not to participate, the constitutional arrangement prohibited the other two nations from carrying out constitutional changes affecting the recalcitrant nation.

According to its policy on Bosnia-Herzegovina, the EC was prepared to recognize independence if the three constituent nations could achieve an agreement.⁴⁵ The EC therefore organized negotiations among the three sides so that Bosnia-Herzegovina could become a political union divided into three ethnic regions. It had been clear for many months that no agreement among the three nationalist parties could occur legally and legitimately that did not involve a substantial transfer of power from the centralized government to the representatives of the three constituent nations.

Moreover, none of the parties would accept any form of domination by another party.⁴⁶ The Muslims and the Croats feared the aggressive

theless, this did not prevent the Croats from organizing their own military units which were not under the Muslim president's command. The more moderate group of the Croat nationalist party (Stjepan Kljuic's group) which favoured the unity of Bosnia-Herzegovina was removed from the party's leadership several weeks before the referendum.

44. Tim Judah & James Bone, *Sarajevo Erupts After Vote for Independence*, LONDON TIMES, Mar. 3, 1992, at 1.

45. VERNET & GONIN, *supra* note 8, at 95.

46. See Tihomar Loza, *Separation Anxiety*, in YUGOFAX, BREAKDOWN: WAR & RECONSTRUCTION IN YUGOSLAVIA 29 (1992) (asserting that despite the efforts of progressive individuals who wanted to maintain a multinational Bosnia-Herzegovina, the nationalist tensions cannot be ignored along with the fact that no significant pluralist political force emerged).

This mutual distrust naturally helps the chauvinist forces stay in power. But even a unified opposition would be at a disadvantage against the three national parties, with their fantastic amounts of arms and money, network of clerical support, and likely backing from abroad. The established parties can pretty well smash all anti-nationalist movements. This was proved during the tense days of the barricades following the independence referendum. What the Serbian Democratic Party (SDS) accomplished on its own in Sarajevo on March 2 and achieved with the help of the Muslim Party for Democratic Action (SDA) on March 3 proves that the war . . . can be started whenever the leaders deem it

Serb nationalism promoted by Serbia's President Milosevic who believed the Yugoslav federation no longer served Serb interests; the Muslims and the Serbs also feared the Croat nationalist party which was under the influence of Croatia's President Tudjman who presented himself as a democrat in the West while adopting reactionary positions in order to achieve his separatist dream; the Serbs and the Croats equally feared the ambiguous Muslim nationalist party which combined nationalism with radical Islamic tendencies.⁴⁷ Whereas the Serbs unleashed a furious propaganda campaign designed to eliminate the dangerous cosmopolitanism (especially in Sarajevo and the major towns) which they considered undesirable in the national territories emerging from the former Yugoslavia,⁴⁸ the Muslim-controlled Presidency presented itself as having pluralist intentions and favoring multinational coexistence. Of course, the true intentions of the Muslim leadership could be suspect given that the more numerous Muslims had everything to gain from maintaining a unitary Republic in which they could exert the most influence.⁴⁹ One

necessary.

Id.

47. For an example of the Muslim nationalist party's religious component, see President Izetbegovic's *Islamska Deklaracija* [Islamic Declaration], published in Sarajevo by the Mala Muslimanska Biblioteka in 1990. This politicized Islamic text written in 1970 and widely distributed during the 1990 elections, includes the following phrases: "Our goal: Islamization of Muslims"; "There can be no peace or coexistence between Islamic faith and non-Islamic institutions"; "The Islamic movement must and can take power as soon as it is morally and numerically strong enough, not only to destroy the non-Islamic power, but to build up a new Islamic one." (Author's own translation).

For an attempt at presenting Izetbegovic's *Islamic Declaration* in a most favorable light that ignores the context of the rising Islamic activism in the Arab world during the 1960s and 1970s, see Ivo Banac, *Bosnian Muslims: From Religious Community to Socialist Nationhood and Postcommunist Statehood, 1918-1992*, in *THE MUSLIMS OF BOSNIA-HERZEGOVINA* 147-148 (Mark Pinson ed., 1993). Izetbegovic's lifelong Islamic activism has resulted in his imprisonment on two separate occasions: first in 1946 for the creation of the journal *Mudzhahid* and then in 1983 following the well-known "Sarajevo Trial" which represented the culmination of an abusive crack-down on certain Muslim nationalist excesses. See, e.g., VERNET & GONIN, *supra* note 8, at 180; GARDE, *supra* note 3, at 293; POPOVIC, *supra* note 6, at 35-40, 66.

48. See FOR SARAJEVO 65 (Ammiel Alcalay ed., 1993) (describing posters warning against the ever present threat of Islamic daggers and phrases such as: "*Podijelimo se što je prije moguće!*" [Separate yourselves as soon as possible!]).

49. Although the following passage regards the historical dominance of Serbs in multinational Yugoslavia, it can just as easily apply to the position of Muslims in multinational Bosnia-Herzegovina:

should not forget that the Muslims were the first to form a party along nationalist lines in 1990⁵⁰ and had established ties with the Islamic world that were bound to appear threatening to the Christian Serbs and Croats, given the history of various civilizations clashing in the Balkans.⁵¹

So it is not surprising that the EC held negotiations among the three constituent nations in order to divide the territory of Bosnia-Herzegovina in a manner that would be acceptable to the nationalist leaders. Indeed, all three sides finally reached such an agreement in Lisbon on February 23, 1992 when they signed a document dividing Bosnia-Herzegovina into three national regions (the cantonization of the Republic).⁵²

B. PREVENTIVE RECOGNITION

It is a grave mistake to believe that the actors at this stage were only former Yugoslavs. The emerging conflict had captured the attention of various interests around the world. Of particular importance is the solidarity that countries with strong Islamic populations expressed toward Bosnia-Herzegovina.⁵³ Turkey, Iran and Saudi Arabia have all figured

[T]he ruling elite indulges in overbearing violations of national equality in favor of one - usually the most numerous - constituent nationality (hegemonism), promotes supranational ideologies (often ersatz nationalism), or suggests, at least, the benefits of union, sometimes implying that the national criteria are an inferior means of political organization. BANAC, *supra* note 4, at 30.

50. GLENNY, *supra* note 6, at 149 ("Alija Izetbegovic and the Moslem leadership also bear a historical responsibility for the breakdown of the consensus between the three Bosnian communities, for they were the first to organize a political party, the SDA, along nationalist lines on 26 May 1990.").

51. See JACQUES MERLINO, *LES VÉRITÉS YOUGOSLAVES NE SONT PAS TOUTES BONNES À DIRE* 151 (1993) (relaying that following his trip to Tehran in 1991, President Izetbegovic attended the Istanbul meeting of the Organization of the Islamic Conference in August 1991 and that by November 1991, the Turkish government was proposing to form and train an army in Bosnia-Herzegovina that would be loyal to President Izetbegovic); VERNET & GONIN, *supra* note 8, at 101 (recounting a chance encounter between French diplomats and Izetbegovic in Iran during the spring of 1991).

52. See Derens, *supra* note 26 (reporting the division of Bosnia-Herzegovina into three national regions in an effort to reach an agreement among nationalist leaders). Although the details and viability of this option remain unclear, it is important to retain that agreement among the three parties is central to any solution.

53. See Étienne Copeaux & Stéphane Yerasimos, *Le Bosnie vue du Bosphore*, *HÉRODOTE*, no. 67, 1992, at 151-159 (examining the shift in regional powers due to the collapse of the former Soviet Union and Yugoslavia, particularly with regard to

prominently in President Izetbegovic's attempt to gain international sympathy for his cause.⁵⁴ Yet it is the United States that most directly managed to influence the outcome of the EC's negotiation efforts in an attempt to improve and fortify its relations in the Islamic world.⁵⁵ Contrary to popular belief, the United States did play a pivotal role before the outbreak of hostilities in Bosnia-Herzegovina.⁵⁶ In fact, the United States Ambassador to Yugoslavia at the time has since suggested in an interview that he encouraged President Izetbegovic to publicly renounce

increased Islamic presence).

54. Paul-Marie de la Gorce, *Les risques d'extension du conflit en Bosnie*, LE MONDE DIPLOMATIQUE, Jan. 1993, at 9. See Paul-Marie de la Gorce, *La crise yougoslave prise en main par Washington*, LE MONDE DIPLOMATIQUE, Apr. 1994, at 11 (noting the Islamic world's interest in the Bosnian conflict).

55.

As [President] Turgut Ozal said during a trip to Washington in May 1992, the fluid situation in the Balkans has presented Turkey with "a once-in-a-lifetime" opportunity for Turkey to restore its economic, diplomatic and cultural influence among Moslem vestiges of the Ottoman empire' . . . While showing the appropriate diplomatic interest in countries like Poland, Czechoslovakia, Hungary and Romania, Washington has developed its relations with Sofia, Tirana and (tacitly) with Skopje with an unparalleled zeal since the collapse of communism in the three republics. The central focus of US policy is Turkey, which Washington recognizes as a major regional power with considerable potential for expansion. GLENNY, *supra* note 6, at 240-41. The extraordinary developments in Albania since the fall of communism should be kept in mind since they contribute to Balkan tensions and reflect the recent geo-political developments in the region. From a strictly secular and anti-capitalist isolated totalitarian state, Albania now has strong ties with the US—including a reorganized Army assisted by the Pentagon—and is a member of the Organization of the Islamic Conference. See *Second Phase of Army Restructure Completed*, BALKAN NEWS, Oct. 24, 1993, at 5 (discussing the potential significance for democracy and Albanian independence in light of Albania's efforts to restructure its army); *Albania Should Probably Rethink its Position*, BALKAN NEWS, Nov. 7, 1993, at 4 (outlining Albania's new ties with the US).

56. See David Gompert, *How to Defeat Serbia*, 73 FOREIGN AFF., July/Aug. 1994, at 32 (providing a commentary by the former Senior Director for Europe and Eurasia on the Bush administration's National Security Council Staff in which the suggestion that the US was not interested or lacked solid information on the situation in Bosnia-Herzegovina is dismissed as simply not true).

Contrary to a widely held view, the Bush administration was well aware of the dangers in Yugoslavia prior to the crisis. It simply knew of no way to prevent a violent disintegration. National Security Advisor Brent Scowcroft and Deputy Secretary of State Lawrence Eagleburger, among others, understood Yugoslavia and its volcanic nature.

Id. at 32.

the Lisbon (territorial partition/cantonization) agreement soon after having signed it.⁵⁷ This occurred because the United States government had decided that it would support President Izetbegovic's drive for independence even without the existence of an agreement among the three constituent nations.⁵⁸ Consequently, after returning to Sarajevo, the emboldened President Izetbegovic appeased his own party's hard-liners by announcing that the Lisbon partition maps were unacceptable and indicated his intention to pursue full independence despite objections from the Serbs.⁵⁹

57. David Binder, *U.S. Policymakers on Bosnia Admit Errors in Opposing Partition in 1992*, N.Y. TIMES, Aug. 29, 1993, at 10.

Immediately after Mr. Izetbegovic returned from Lisbon, [Ambassador] Zimmermann called on him in Sarajevo. The Bosnian leader complained bitterly that the European Community and Bosnian Serbs and Croats had pressured him to accept partition. 'He didn't like it,' Mr. Zimmermann recalled. 'I told him, if he didn't like it, why sign it?' In retrospect, Mr. Zimmermann said in a recent interview, 'the Lisbon agreement wasn't bad at all.' But after talking to the Ambassador, Mr. Izetbegovic publicly renounced the Lisbon agreement.

Ambassador Zimmermann has claimed in a letter published in the N.Y. Times that he was misinterpreted. *Letter from Ambassador Zimmerman*, N.Y. TIMES, Sept. 30, 1993, at A24.

58. Binder, *supra* note 57, at 10.

The Bush Administration pushed ahead with its plan for recognition. "The policy was to encourage Izetbegovic to break with the partition plan," said a high-ranking State Department official who asked not to be identified. "It was not committed to paper. We let it be known we would support his Government in the United Nations if they got into trouble. But there were no guarantees, because [Secretary of State] Baker didn't believe it would happen."

Id.

59. GLENNY, *supra* note 6, at 166-167; VERNET & GONIN, *supra* note 8, at 96; CRNOBRNJIA, *supra* note 20, at 177-178. See Bougarel, *supra* note 4, at 145 (diagramming the Muslim nationalist party's cantonization proposal). In a similar manner, further negotiations and one more agreement reached in the following weeks ultimately collapsed. These were not the first occasions in which President Izetbegovic had backed down from agreements concerning future constitutional arrangements for Bosnia-Herzegovina. In fact, he has acknowledged in a conversation with Adil Zulfikarpasic (who was the co-founder along with Izetbegovic of the first Muslim nationalist party in 1990 but later left the party in order to become leader of the opposition Muslim Bosnian Organization) his reputation for untrustworthiness among the Serbs that resulted from his repudiation of a well-known statement he made in 1991 showing support for transforming Yugoslavia into a confederation in order to avoid conflict among the constituent Republics. What is less well-known outside Bosnia-Herzegovina is that Muslim nationalists denounced him as a "sell-out" and a "Serb" following this statement. Consequently, he quickly renounced his support for a confederation and embarked on an independence trajectory increasingly influenced by

United States intervention raised tensions in an already explosive situation and complicated the EC's preventive diplomatic efforts. On March 13, 1992, the United Nations (UN) military force sent to the former Yugoslavia set up its headquarters in Sarajevo.⁶⁰ Although the United Nations Protection Force's (UNPROFOR) mandate concerned only Croatia,⁶¹ the UN Secretary General ordered it to establish its headquarters in Bosnia-Herzegovina in the hope that such a presence would help to calm the situation.⁶² The three hundred UN personnel who arrived were well short of the large preventive UN peacekeeping force secretly requested by President Izetbegovic.⁶³

Fighting broke out in various parts of Bosnia-Herzegovina one week later as it became clear that President Izetbegovic was not going to respect the principle of consensus in his drive for independence.⁶⁴ Reports indicate Serb paramilitary forces began almost immediately to

the clerical and anti-Serb elements of his party. By refusing to sign a historic agreement [*"Istorijskog sporazuma"*] negotiated between Zulfikarpasic and the leaders of the Serb nationalist party in July 1991, President Izetbegovic undermined any real chance for the continuation of multinational coexistence in Bosnia-Herzegovina. The local population approved of this agreement which had the crucial approval of Serbia's President Milosevic and had temporarily calmed Serb insecurities and paranoid fears of subjugation. Nonetheless, President Izetbegovic refused to sign the historic agreement even though he had admitted that Zulfikarpasic was negotiating on his behalf. See MILOVAN DJILAS, BOŠNJAK ADIL ZULFIKARPASIC 203-230 (1995) (relating an interview between Milovan Djilas and Adil Zulfikarpasic on the situation in Bosnia-Herzegovina).

60. LEWIS MACKENZIE, *PEACEKEEPER - THE ROAD TO SARAJEVO* 118 (1993).

61. U.N. SCOR, 3,049th mtg., Annex U.N. Doc. S/23280 (1991) *reprinted in* 31 I.L.M. 1427, 1442. UNPROFOR's military command advised against the establishment of the headquarters in Sarajevo since it would be located too far from the troops in Croatia.

62. Lewis Mackenzie, *World Focus on Bosnia: Tragic Errors*, MACLEAN'S, Dec. 12, 1994, at 35.

63. *Id.*

64. GLENNY, *supra* note 6, at 167. The Serbs were not the only ones who resorted to aggressive and bellicose statements. Prior to the armed conflict, one of the most influential members of the Muslim nationalist party, Omer Behmen, did not hide that his party was arming the Muslim inhabitants of Bosnia-Herzegovina and spoke admiringly of two Muslim paramilitary organizations: the Green Berets and the Patriotic League. MILOVAN DJILAS, BOŠNJAK ADIL ZULFIKARPASIC 203-30 (1995), *reprinted in* DIALOGUE, 1995, at 53. Another popular member of the Muslim nationalist party with strong ties in the Arab world is Foreign Affairs Minister Haris Silajdzic (who later became Prime Minister after the war started), who warned that if the Yugoslav People's Army did not leave Bosnia-Herzegovina following the independence referendum, it would be thrown out. VERNET & GONIN, *supra* note 8, at 181.

engage in a campaign of ruthless ethnic cleansing on territories coveted by the Serb leadership.⁶⁵ Acting as President Izetbegovic's new ally, the United States government⁶⁶ convinced the EC states to recognize the Republic on April 6, 1992, by agreeing to recognize Croatia and Slovenia along with Bosnia-Herzegovina the following day.⁶⁷ Those involved used the expression "preventive recognition" in order to justify this admittedly dangerous gamble given that the Serbs had often repeated their intention to resort to the use of force should recognition precede a political agreement.⁶⁸

Thus, the international community proceeded to recognize the independence of a state that had ceased to exist in any meaningful way.⁶⁹ The constitutional crisis left a parliament that no longer represented the three constituent nations and a government that no longer functioned legally.⁷⁰ Furthermore, a majority of putative citizens denied the author-

65. AMNESTY INTERNATIONAL, REPORT ON BOSNIA-HERZEGOVINA: GROSS ABUSES OF BASIC HUMAN RIGHTS 7 (Oct. 1992).

66. VERNET & GONIN, *supra* note 8, at 96-97.

67. Binder, *supra* note 57, at 10; John Palmer, *US Forces Early Move on Bosnia*, GUARDIAN, Mar. 10, 1992, at 8. There are, of course, many simple and unconvincing explanations as to why the US was so interested in having Bosnia-Herzegovina recognized, especially after having encouraged the EC to assume leadership in the Yugoslav crisis and having opposed Croatian recognition.

When a two-thirds majority of Bosnians - made up of Muslims and Croats, with Bosnia's Serbs boycotting - voted for independence, the United States pressured the EC to recognize Bosnia in exchange for United States recognition of Slovenia and Croatia. Recognition of Bosnia did not precipitate the use of force by the Bosnian Serbs any more than it deterred it. Very simply, Bosnian Muslims would not stay in a Yugoslavia dominated by Serbia, and Bosnian Serbs would not stay in a Bosnia dominated by Muslims. In any case, there was no legal basis for the United States to recognize Croatia but not Bosnia-Herzegovina.

Gompert, *supra* note 56, at 36-37. See Steinberg, *supra* note 41, at 41-42 (providing a naive explanation for the US position).

68. CRNOBRNJA, *supra* note 20, at 211.

69. Muhamed Filipovic, *Conditions et circonstances du maintien de la paix en Bosnie-Herzégovine*, in LA FRAGMENTATION DE LA YOUGOSLAVIE 43 (Catherine Samary ed., 1992) (providing a description written by one of the leaders of the main Muslim opposition party (Muslim Bosnian Organization) just before the outbreak of hostilities in which the chaos regarding the control of governmental institutions is described).

70. GLENNY, *supra* note 6, at 177.

None of these people [members of the Presidency] had a constitutional mandate - parliament had been dissolved illegally before it had agreed to grant the Presidency emergency powers. The government still existed but . . . the

ity of the Muslim-controlled Presidency, while violent militia units from the various constituent nations were seizing the territory.⁷¹

International law generally recognizes that the elements which constitute a state include the existence of a defined population, a distinct territory and an effective government.⁷² The case of Bosnia-Herzegovina represents a striking example of disregard for established legal principles since the international community recognized an independent state where an illegitimate government⁷³ never controlled a significant part of the population or territory which it claimed.⁷⁴ Legal commentators have failed to comment on the fact that the UN later admitted this state as a member, even though the state was never in a position to assume the obligations contained in the UN Charter.⁷⁵ This example of premature recognition does, nevertheless, confirm the importance and relevance of the present criteria regarding statehood and international recognition.

In the context of the brutal disintegration of the former Yugoslavia, the recognition of Bosnia-Herzegovina's independence without respect

cabinet wielded no authority. Its members were window-dressing, fashioned to give the impression of legality where none existed.

Id.

71. Jean-François Kahn, *Bosnie: L'histoire d'une manipulation*, L'ÉVÉNEMENT DU JEUDI, Aug. 24-30, 1995, at 11.

72. JOHN DUGARD, *RECOGNITION AND THE UNITED NATIONS* 7 (1987).

73. Although one should note that international law does not require that a government hold power in conformity with internal constitutional provisions. The applicable principle is non-interference in the internal matters of a state.

74.

Criteria for recognizing a state include whether it has effective control over a defined territory and population, an organized governmental administration and the capacity to act effectively to conduct foreign relations and to fulfill international obligations . . . International law does not require recognition of a state, even when these conditions are met.

THOMAS BUERGENTHAL & HAROLD G. MAIER, *PUBLIC INTERNATIONAL LAW IN A NUTSHELL* § 8-4 (2d ed. 1990).

75. "Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, *are able and willing to carry out these obligations*." U.N. CHARTER art. 4 (emphasis added). Despite these clear requirements, the UN Security Council recommended to the General Assembly that the UN admit Bosnia-Herzegovina as a member. S.C. Res. 755, U.N. SCOR, 47th Sess., 3079th mtg., U.N. Doc. S/RES/755 (1992). The General Assembly admitted Bosnia-Herzegovina as a UN member state on May 22, 1992 by its Resolution 237(XLVI). G.A. Res. 237, U.N. GAOR, 47th Sess., Supp. No. 49A, U.N. Doc. 46/237 (1992).

for international legal principles (and internal constitutional guarantees) only encouraged the various parties to seek their goals by the use of force.⁷⁶ The victims of these ruthless military solutions would be the inhabitants of Bosnia-Herzegovina who found themselves in the "wrong" national territory (1.4 million people or 1/3 of the total population)⁷⁷ and who would become the objects of forced population shifts.⁷⁸ Far from preventing an explosive situation, self-interested members of the international community aggravated a situation that any informed observer should have known would assure that these population shifts would be of the most violent kind:

By denying that partition of Bosnia could take place when in fact it was inevitable, the international community ensured that it would be accomplished in the worst possible way. The map of Bosnia was redrawn in blood on the ground, rather than around a table.⁷⁹

III. UPROOTED SECURITY FOR BOSNIA-HERZEGOVINA

It is important to understand that the deep tensions resulting from the constitutional crisis made coexistence and the survival of a multinational territory virtually impossible.⁸⁰

76. It is unfortunate that it has taken some influential newspapers several years before they started publishing articles acknowledging the controversial conditions under which the international community recognized Bosnia-Herzegovina's independence:

On such treacherous ground, prudence is a virtue. The consent of all three Bosnian nations was clearly a precondition for independence without war. But distracted by other matters then viewed as more pressing, the United States and Europe tried to will Bosnia into being as an independent state without the consent of its Serbs.

Roger Cohen, *Bosnia - Where Facts Strangle Principles*, N.Y. TIMES, Aug. 14, 1994, at E3.

77. Michel Roux, *À propos de la purification ethnique en Bosnie-Herzégovine*, HÉRODITE, no. 67, at 58 (1992).

78. The observations of the former special envoy of the UN High Commissioner for Refugees in the former Yugoslavia shed some perspective on this situation. "In Bosnia, as early as April 1992, it became obvious to UNHCR that one of the basic characteristics of the conflict was that civilian displacement was not a consequence, but an objective of the war (a finding that we reported early on)." José-Maria Mendiluce, *War and Disaster in the Former Yugoslavia: The Limits of Humanitarian Action*, in U.S. COMMITTEE FOR REFUGEES, WORLD REFUGEE SURVEY 1994, at 13.

79. Robert M. Hayden, *U.S. Efforts to Resolve Balkan Crisis Have Only Added to Muslims' Losses*, SUN-SENTINEL, Feb. 9, 1994, at 19.

80. Kahn, *supra* note 71, at 11-12. This became evident after the nationalist and chauvinist actors brushed aside the only progressive political forces in Bosnia-

Moreover, it is difficult to imagine a long-term settlement of the current conflict in what used to be Yugoslavia that will not involve some major, permanent, shift of populations What is noteworthy about each of these [possible outcomes to the war] is that they would all involve some blend of the movement of borders and people with the ultimate result being that the remaining entities would more approximate a one state/one nation norm - or in Bosnia, a one canton/one nation norm - than did their predecessor republics in communist Yugoslavia.

Such a movement of borders and people would be scarcely the first time governments in the Balkans or elsewhere opted to solve the security problems posed by the inter-ethnic rivalries of a larger multi-national entity by attempting to better approximate a one nation/one state model In all three of these scenarios, Croatia, Serbia including the Vojvodina, and parts of Bosnia would all emerge from the civil war more nearly ethnically homogeneous than each has been in the past. Unfortunately, the transition implied by any of these outcomes will involve huge human costs.⁸¹

The attempt to maintain the unity of Bosnia-Herzegovina was terribly unrealistic and inappropriate.⁸² In other words, this was not the time to experiment with notions of multiethnicity and multinationalism.⁸³ While

Herzegovina.

81. William Zimmerman, *Migration and Security in Yugoslavia*, in *INTERNATIONAL MIGRATION AND SECURITY* 79-80 (Myron Weiner ed., 1993).

82.

That's why borders, and the movements of individuals and groups across borders, are bitterly disputed as soon as imperial rule recedes and nations begin the process of "liberation." And, once again, to reverse this process or to repress its effects would require massive coercion on a global scale. There is no easy way to avoid the country (and the proliferation of countries) as we currently know it. Hence the theory of justice must allow for the territorial state, specifying the rights of its inhabitants and recognizing the collective right of admission and refusal.

MICHAEL WALZER, *SPHERES OF JUSTICE* 44 (1983).

83.

Globalism in a post-imperial age only permits a post-nationalist consciousness for those cosmopolitans who are lucky enough to live in the wealthy West It is only too apparent that cosmopolitanism is the privilege of those who can take a secure nation state for granted At the very least, cosmopolitan disdain and astonishment at the ferocity with which people will fight to win a nation state of their own is displaced. They are, after all, only fighting for a privilege cosmopolitans have long taken for granted.

MICHAEL IGNATIEFF, *BLOOD & BELONGING: JOURNEYS INTO THE NEW NATIONALISM* 9 (1993).

it is unlikely that an early partitioning of Bosnia-Herzegovina before the outbreak of hostilities would have completely avoided the displacement of civilian populations, an early partitioning may have limited the human costs by creating an atmosphere in which population shifts could occur in a more orderly and secure manner and in which displacement would not be intimately tied to military objectives.

Population shifts during an ongoing civil war inevitably result in terrible human suffering. As soon as the armed conflict in Bosnia-Herzegovina began, it should not be surprising that only an individual's national group offered security and protection from violence. Thus, the "logic" of ethnic cleansing took over as people no longer trusted their neighbors and sought to live uniquely among their own ethnic national group:

Never say ethnic cleansing is just racial hatred run wild, just Balkan madness. For there is a deep logic to it. By 1990, this part of Yugoslavia was a Hobbesian world. No one in these villages could be sure who would protect them. If they were Serbs and someone attacked them and they went to the Croatian police, would the Croats protect them? If they were Croats, in a Serbian village, could they be protected against a night-time attack from a Serbian paramilitary team, usually led by a former policeman? This is how ethnic cleansing began to acquire its logic. If you can't trust your neighbours, drive them out. If you can't live among them, live only among your own. This alone appeared to offer people security. This only gave respite from the fear which leaped like a brush-fire from house to house.⁸⁴

Although valuing ethnicity in this context does not amount to valuing ethnic cleansing, one cannot ignore that the separation of warring nationalities that have previously coexisted together in the same territory is perhaps the only form of trustworthy security:

84. *Id.* at 26. The following account, given by a BBC Correspondent, is also useful in understanding how ethnic cleansing tragically became the norm:

I took a short walk with a local Serb policeman to discuss the situation with him. He confirmed the countless observations which I had made when talking to local fighters of all nationalities - he was not a man of evil. On the contrary, he explained how he found it very difficult to shoot at the other side of his village, because he knew everybody who lived there. But the war had somehow arrived and he had to defend his home. The man was confused and upset by the events but he now perceived the Green Berets and the Ustashes to be a real threat to his family.

GLENNY, *supra* note 6, at 173-74.

Nobody in the West wants to appear to be condoning ethnic cleansing, but every day, every hour, civilians are fleeing war zones, or being driven hence by men with guns, into the relative safety of their own ethnic enclaves. Ethnic apartheid may be an abomination, but for the more than two million refugees who have fled or been driven from their homes, apartheid is the only guarantee of safety they are prepared to trust.⁸⁵

Prevention of the outbreak of hostilities could have avoided the situation in which the belligerents perceived ethnic cleansing as "logical." Yet, in this regard one must concede that considerable international efforts at preventive diplomacy existed and that these efforts did in fact address the central issue of the dispute. Nevertheless, influential members of the international community decided to promote their own interests even though these interests were contrary to the preventive diplomatic efforts that were showing some signs of success. Furthermore, when the predictable refugee flows began crossing international borders, these same states concentrated on developing mechanisms that would help avoid legal obligations toward involuntary migrants, while insisting that their contribution to refugee protection would focus on concepts such as "preventive protection." On a more cynical level, the case of Bosnia-Herzegovina suggests that powerful and affluent states in the UN are not firmly committed to preventive diplomatic activity, despite all the rhetoric of the early 1990s.⁸⁶

When Serb nationalists challenged secessionist aspirations in Croatia and Slovenia during 1991 by claiming to be defending a multinational Yugoslav federation, the international community saw through the Serb propaganda and denounced the transparent Serb hegemonic intentions. When Muslim nationalists in Bosnia-Herzegovina suddenly began to promote a newly independent multinational state, the international community naively accepted this rhetoric while the Muslim leaders pursued their own hegemonic interests. It is striking how the idea of a multina-

85. IGNATIEFF, *supra* note 83, at 26. See Aleksa Djilas, *Fear Thy Neighbor: The Breakup of Yugoslavia*, in NATIONALISM AND NATIONALITIES IN THE NEW EUROPE 99 (Charles A. Kupchan ed., 1995) (pointing out that since "Bosnia's Parliament, courts, press, and police had no authority as impartial institutions, affiliation with one's national group emerged as the only source of protection, whether of one's human rights or physical security").

86. See Boutros Boutros-Ghali, *Preventive Diplomacy*, AN AGENDA FOR PEACE 13-19 (1992) (documenting diplomatic precautions and actions necessary to avoid political conflict); *Prevention*, THE STATE OF THE WORLD'S REFUGEES 121-137 (1993) (outlining early political steps for the prevention of national conflicts which might generate refugees).

tional Bosnia-Herzegovina gained the widespread approval of an international community that readily accepted the dissolution of the multinational former Yugoslavia.

The numerous commentators and observers who insist on the preservation of Bosnia-Herzegovina's territorial integrity, while invoking international principles, do not understand that the recognition of this state had nothing to do with respect for international law. Even after three years of fighting between the three constituent nations, the international news media continues to portray the Muslim-controlled government in Sarajevo as a legitimate representative of a Bosnia-Herzegovina that is genuinely committed to multinational coexistence.⁸⁷

The myth of an existing and genuine multinational government based in Sarajevo has only served to obscure the real political actors in this conflict.⁸⁸ It is time to recognize that the international community inap-

87. Some observers who had initially believed in the sincerity of President Izetbegovic's commitment to multinationalism changed their opinion soon after the outbreak of hostilities: "Let's not kid ourselves either about the nature of the [Muslim-controlled] Bosnian government It is only to the outside world that the Bosnian government maintains the fiction of its 'multiethnic' character, for the obvious reason that a multiethnic state is more likely to get international aid." George Kenney, *A Forced Peace Is Worth Trying*, L.A. TIMES, Feb. 6, 1994, at M5. See Rémy Ourdan, *La fin du rêve bosniaque - Les dirigeants musulmans donnent le coup de grâce à l'espoir d'un état multiethnique*, LE MONDE, Sept. 28, 1994, at 1 (discussing the implementation of Islamic rules in government-controlled areas). Surprisingly, some observers continued after several years to believe the pluralist declarations of Bosnia-Herzegovina's Muslim-controlled government. Unfortunately, the international news media rarely questioned the statements made by frequently interviewed representatives such as the Foreign Affairs Minister Muhamed Sacirbey who claimed to be protecting an ideal of multinational tolerance. The fact that Sacirbey, an American citizen, is the son of an Islamic activist (Nezid Sacirbegovic, recently appointed as an Ambassador for Bosnia-Herzegovina) who left Yugoslavia after being convicted together with Izetbegovic in 1946, makes him an unconvincing spokesman for genuine multinational coexistence in Bosnia-Herzegovina. See also VERNET & GONIN, *supra* note 8, at 181 (describing Sacirbey's problematic background). Surely, Sacirbey's support for the Parliament's vote to assure that only a Muslim (and member of Izetbegovic's party) can become President as long as a state of war exists indicates an agenda carefully hidden from the outside world:

But earlier this month the Parliament, which is controlled by the governing party, changed the Constitution, taking over from the Executive Council the power to replace members of the presidency who are unable to continue in their posts. Parliament also determined that while the war lasts, the council president, currently Mr. Izetbegovic, must be a Muslim and a party member. Mike O'Conner, *Split Divides President and Premier In Bosnia*, N.Y. TIMES, Aug. 16, 1995, at A8.

88. The myth of a genuinely multinational political force in Bosnia-Herzegovina

propriately involved itself in a dirty civil war that, not surprisingly, included atrocities and political manipulation.⁸⁹ Positive contributions to ending the armed conflict must acknowledge that while a multinational state with Croats, Serbs and Muslims living harmoniously together would have been an inspirational example of coexistence, the reality is that these warring nations have to be separated.⁹⁰ The tragic conse-

has received considerable academic support. John V.A. Fine, *The Medieval And Ottoman Roots of Modern Bosnian Society*, in *THE MUSLIMS OF BOSNIA-HERZEGOVINA* 2, 21 (Mark Pinson ed., 1993).

One third of the Territorial Defense Forces of Sarajevo, including its second in command, is Serb. Thus Serbs (and Croats too) are on both sides. And both Croats and Serb chauvinists want to depict the conflict as an ethnic war - to justify their states' territorial expansion, to demean the Bosnian cause by making it seem as if it too were just one more narrow ethnic one, and also to label it ethnic Muslim to stir fears of the Turkish past and of Muslim fundamentalism . . . the Bosnian cause is not simply a Muslim cause but a cause that includes all three nationalities, and it includes Bosnia's Serbs and Croats along with Muslims. Yugoslavs of all ethnic groups should see that the true interest of their respective nationalities is represented by the Bosnian cause, that rises above the divisive chauvinism. The cause of Serbs and Croats is not represented by the ethnic militias running around Bosnia and Herzegovina claiming to speak for their respective peoples. *The true Serbian cause is that of the Bosnians.*

Id. (emphasis added). While the suggestion that chauvinist Serbs and Croats have tried to manipulate public opinion against the Muslims is correct, a detailed examination of the nationalist tensions should make it clear that very few non-Muslims would willingly participate in the armed forces under President Izetbegovic's command). Indeed, observers believe that the recognized government's army included 13% Serbs at the beginning of the conflict and that this number dropped to around 3-6% after several months of fighting (this percentage includes Serb males used for forced labor). COHEN, *supra* note 4, at 322.

89.

So the West and Bosnian Muslims would have to admit they were wrong to try to force their new Bosnia down the throats of Bosnian Serb Christians. If admitting errors to gain peace damages the "credibility" of Western diplomats and politicians, that seems a bearable price for ending a war that should never have started.

A.M. Rosenthal, *Bombs for Bosnia*, N.Y. TIMES, July 21, 1995, at A25.

90.

Of course it would be preferable to have a pluralistic, multi-ethnic Bosnian society and state, where everyone lives together. But the parties had that once. It was called Yugoslavia, and the Serbs, Muslims and Croats all helped to rip that state apart. That is why the only way to stabilize things now is to divide Bosnia among them Neither the [US] Administration nor the Congress

quences of the international community's diplomatic intervention have only worsened the fate of the violently uprooted inhabitants of Bosnia-Herzegovina.

wants to recognize what the Europeans already have - that the ideal multi-ethnic, democratic Bosnia, if it were ever possible, cannot be achieved now. The only way to achieve it would be to force the Serbs, Muslims and Croats to live together under one roof, which they demonstrably do not want to do. None of the parties right now are fighting to live together. They are each fighting for ethnic survival or independence. We can lament the idea of a multi-ethnic, pluralistic Bosnia but we cannot build it from the raw material at hand.

The only sane thing left is to stop the killing and build the least bad peace around the Bosnia we have, which is one in which Serbs, Croats and Muslims live apart until they can learn again to live together.

Thomas L. Friedman, *Fire, Ready, Aim*, N.Y. TIMES, July 30, 1995, at 15.