BOSNIA'S INTERNAL WAR AND THE INTERNATIONAL CRIMINAL TRIBUNAL

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In the first case to be tried before it, the International Criminal Tribunal for the former Yugoslavia[1] (ICTY) found the accused, Dusko Tadic, not guilty on 20 of the 31 counts with which he was charged. Surprising many observers, a majority of the judges declared that 11 counts of the indictment were inapplicable because the conflict was considered an internal one between co-nationals, which meant that the alleged victims were not protected persons under Art. 4 of the Fourth Geneva Convention of 1949.[2]

This ruling dismayed a number of western observers. New York University law professor Theodor Meron, a strong public supporter of the Tribunal, described the majority opinion as "Alice in Wonderland."[3] *Newsday* reporter Roy Gutman, who won a Pulitzer prize in 1993 for his coverage of the 1992 genocide in Bosnia, said that "the judges injected confusion and controversy in their split ruling that, six weeks after it began, the [Bosnian] conflict went from international to internal."[4] The major concern was that by ruling the conflict to be internal rather than international, the majority of the *Tadic* judges accepted a "subterfuge" concocted by Serbia's President Milosevic of "making the Bosnian look like an internal conflict."[5] "Most western governments," on the other hand, would hold that it was international because "ruthless ethnic cleansing campaigns were orchestrated from Belgrade" and "after Bosnia became independent in March 1992, the assaults from Belgrade continued."[6] The generally accepted view in the press was, as then-Executive Director of Human Rights Watch/Helsinki put it in 1994, "Milosevic and high-ranking members of the Yugoslav Army appear to have planned and instigated the wars in Croatia and Bosnia."[7] Thus when the majority in *Tadic* decided that the conflict was not an international one, *The New York Times* reporter who

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had covered the trial asserted that Serbia's President Milosevic had "hoodwinked two of the Tribunal's judges."[8]

Judge Gabrielle Kirk McDonald of the United States, the presiding judge, argued in dissent that "the Federal Republic of Yugoslavia (Serbia and Montenegro) established what is essentially a puppet regime in the [Bosnian Serb Army]" and that "the evidence supports a finding beyond a reasonable doubt that the [Bosnian Serb Army] acted as an agent of the Federal Republic of Yugoslavia."[9] Applying her reading of *Nicaragua* v. *United States*,[10] Judge McDonald concluded that "the dependency of the [Bosnian Serb Army] on and the exercise of control by the Federal Republic of Yugoslavia (Serbia and Montenegro)" support finding that the Bosnian Serb Army was an "agent" of the Federal Republic of Yugoslavia, thus rendering the conflict an international one.[11]

The majority opinion also followed *Nicaragua*, but its reading of that case was quite different. The majority understood *Nicaragua* to establish a test of the relationship between a *de facto* organ or agent, as a rebel force, and its controlling entity or principle, as a foreign power, namely the more general question whether, even if there had been a relationship of great dependency on the one side, there was such a relationship of control on the other that, on the facts of the instant case, the acts of the [Bosnian Serb Army]...can be imputed to the Government of the Federal Republic of Yugoslavia.[12]

The majority then looked at the relationship of the Bosnian Serb Army to the political authorities of the "*Republika Srpska*," which had been proclaimed by the Serb members of the Bosnian Parliament in January 1992 when that Parliament broke down and was recognized as a self-governing "entity" within Bosnia by the Dayton Agreement of 1995. The majority then distinguished the situation in *Tadic* from that in *Nicaragua*: "unlike the situation confronted by the Court in the *Nicaragua* case, where the United States had largely selected and installed the political leaders of the Contras, in the *Republika Srpska* political leaders were popularly elected by the Bosnian Serb people of the Republic of Bosnia and Herzegovina."[13] Further, the Court found that the Bosnian Serb Army was a creation of the *Republika Srpska*, responding to the popularly elected political leadership of that entity rather than to Belgrade. While noting that the war aims of the Bosnian Serb political authorities and the Bosnian Serb Army were, at least in 1992, "largely complementary," it did not find an agency relationship because the Bosnian Serb political and military actors were following the will of the Bosnian Serb people themselves:

> The...political leadership of the *Republika Srpska* and their senior military commanders no doubt considered the success of the overall Serbian war effort as a prerequisite to their stated political aim of joining with Serbia and Montenegro as part of a greater Serbia, unifying as it would the territories in which Serbs lived in the former Yugoslavia. *This was also the desire of the majority of the Bosnian Serb people, who feared, rightly or wrongly, their fate in the hands of a State controlled or dominated by other groups.*[14]

By referring to the actions, desires and fears of the Bosnian Serbs themselves, the majority in *Tadic* considered the reality of a situation that most commentators, and the dissenting Judge McDonald, ignored: the Bosnian Serbs overwhelmingly rejected the government that the international community had recognized against their clearly expressed wishes. It is only by ignoring the actions of the Bosnian Serbs, and the Croats of Herzegovina, that Western commentators or Judge McDonald could make what one journalist formerly from Sarajevo saw as the puzzling assertion that even if her neighbors were "fighting each other in the land of their birth, this does not yet mean that they are waging a civil war."[15]

By looking only at the actions of the Serbian/Yugoslav government and not at the acts of the Bosnian Serbs themselves, Professor Meron and others who are dismayed by the finding that the Bosnian conflict was not proved in *Tadic* to be an international conflict have themselves gone through the looking glass. However, the more appropriate fairy tale is not Professor Meron's Alice in Wonderland, but rather the Emperor's New Clothes. The legal problem of the nature of the Bosnian conflict stems from the international recognition of Bosnia as an independent state in circumstances in which it did not meet the customary requirements for recognition in international law, because the putative Bosnian state had collapsed. While the international community recognized Bosnia as a state, a very large percentage of its putative population did not. The government that was recognized never controlled more than 30 percent of the territory, nor did it enjoy the allegiance of large, definable portions of the population which, as explained below, must consent for the government to be legitimate.

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This disjuncture between the pretense of international law and the reality of state collapse is important for several reasons. One reason concerns the legitimacy of the ICTY which is meant to act as a moral compass and pedagogue to the ex-Yugoslavs, particularly to the Serbs.[16] Most Bosnian Serbs have regarded the ICTY as biased against them, particularly because they know very well that they themselves were the ones doing the fighting, and to characterize the war as "international" rather than "internal" is, to them, nonsense. Perhaps more than anything else could have, the *Tadic* holding on the character of the war may help legitimate the ICTY for one of its primary target groups—the Bosnian Serbs.

The *Tadic* holding may also be important as a check on the post-colonial tendency to view statehood as a matter only of territory, paying little or no attention to the question of whether in fact there is a viable form of government in that territory.[17] In Bosnia, by the time recognition was granted, there

was no state. As the *Tadic* court noted, "the disintegration of multi-ethnic federal Yugoslavia was...swiftly followed by the disintegration of multi-ethnic Bosnia and Herzegovina...Both Bosnian Serbs and Croats made it apparent that they would have recourse to armed conflict rather than accept minority membership of a Muslim-dominated State."[18] This conflict was not a matter of external aggression, but rather of the complete failure of the Bosnian state as it had been defined by its own constitutional structures.

In a constitutional state, civil war is the ultimate constitutional crisis.[19] In a state with a complicated mechanism for sharing power between ethnic groups, a constitutional breakdown means the collapse of the basic set of arrangements that permits a joint state to continue. Insisting that the territory not be partitioned at this point may well be misguided. As Chaim Kaufmann has recently argued, "restoring civil politics in multi-ethnic states shattered by war is impossible because the war itself destroys the possibilities for ethnic cooperation."[20] In so far as the stress on finding an "international conflict" diverts attention from the breakdown of domestic political institutions, this seemingly technical jurisdictional question has profound implications for the ways in which a conflict is viewed, and thus for the ways in which responses to it are designed by even well-intentioned interveners.

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Examination of the actions of Bosnian political actors rather than those from Serbia or Croatia, and of the progressive breakdown of the institutional structures of Bosnia and Herzegovina as defined by the republic's own constitution makes clear the internal character of the conflict. This account is supported by the evidence presented by the *Tadic* defense and also by the draft report of the ICTY Prosecution's expert witness, Marie-Janine Calic,[21] in the case of three Muslims and a Croat accused of crimes against Serbs at a camp in Celebici.[22]

A Question of Law or a Matter of Fact?

But is the nature of the conflict a question of law or a matter of fact? This question was raised on interlocutory appeal by the defense in *Tadic*, leading to a decision by the Appeals Chamber that refrained from provising a definite answer. Instead, the key test was to be one of fact: "To the extent that the conflicts had been limited to clashes between Bosnian Government forces and Bosnian Serb rebel forces in Bosnia-Herzegovina...they had been internal (unless direct involvement of the Federal Republic of Yugoslavia (Serbia-Montenegro) could be proven)."[23]

This Appeals Chamber decision has been criticized on the grounds that "it complicates unnecessarily the further work of the Tribunal by suggesting that each prosecution will have to involve arguments and decisions as to the characterization of the armed conflict in which the alleged events occurred."[24] Yet to obviate this decision on fact in order to make the Prosecutor's job easier would require ignoring *Nicaragua*, which had very clearly distinguished circumstances under which conflicts could be considered international. The criticism of the Appeals Chamber Decision amounts to inverting *Nicaragua*, which had debated the question of when an outside power controlled a rebel force. Judge McDonald recognized the factual nature of the question by her characterization of the Bosnian Serbs as "essentially a puppet regime."[25] The alternative would be to view *any* international involvement in a civil war as internationalizing it. The Appeals Chamber, which had not, of course, heard evidence on the character of the conflict, could not determine the factual question of alleged Federal Republic of Yugoslavia control over Bosnian Serb forces, unless it were to adopt the stance reported by the Bosnian novelist Mesa Selimovic as that of the Ottoman regime: "Justice is the right to do whatever we think must be done, and thus justice can be anything."[26]

In order to make the fictive state a reality, the international community would have to support a war of conquest on those who reject it, either to impose the state on them or to expel them.

The facts of Bosnia also reveal the present lack of a legal regime for handling problems of state collapse. Presently, the overwhelming tendency is to ignore the problem by proclaiming populations within specified territories to be sovereign states.[27] In Bosnia, the problem was precisely that very large percentages of the putative citizens of the supposed state rejected inclusion within it. In order to make the fictive state a reality, the international community would have to support a war of conquest on those who reject it, either to impose the state on them or to expel them.

It is possible to pretend that this problem can be solved by the creation of some kind of federal structure for the parts of the territory of the supposed state that are controlled by mutually hostile regimes. Such a solution has been proposed for Cyprus,[28] and forms the structure of the Bosnian state that was supposedly created by the Dayton Agreement.[29] The Dayton constitution, imposed by the United States, was never subject to ratification by the peoples in whose name it was supposedly enacted[30] and was never accepted in fact by either the Bosnian Serbs or the Herzegovinian Croats. It purports to create a state composed of two entities, each of which controls its own armed forces and virtually all governmental functions other than foreign relations and foreign trade. Thus the supposed central government is left with what Alexander

Hamilton, referring to a much more robust confederation, once called "the mere pageantry of mimic sovereignty."[31] Legal fictions have their uses, but this amounts to proclaiming a house divided to be a condominium.

At present, legal principles are inadequate to handle a conflict which "could have been characterized as both internal and international, or alternatively, as an internal conflict alongside an international one, or as an internal conflict that had become internationalized because of external support, or as an international conflict that had subsequently been replaced by one or more internal conflicts, or some combination thereof."[32] As a practical matter, can the international community respond adequately to state collapse when it refuses, supposedly on principle, to see the matter accurately?

Defining Dissolution of the State

In 1991, as civil war broke out in the Socialist Federal Republic of Yugoslavia (SFRY), the European Community (EC) appointed an Arbitration Committee to consider legal questions arising from the apparent breakdown of the Yugoslav federation. This committee was composed of the presidents of the constitutional courts of five EC countries headed by the French jurist Robert Badinter. On November 20, 1991, the President of the EC Conference on Yugoslavia, Lord Carrington, presented the Arbitration Committee with what he termed a "major legal question:" whether republics that declared themselves independent should be regarded as seceding from the SFRY, which would continue to exist, or whether instead "the question is one of a disintegration or breaking-up of the SFRY as the result of the concurring will of a number of Republics."[33]

In order to answer this question, the Badinter Committee first stated a generally accepted principle of international law: that "the existence or disappearance of the state is a question of fact; that the effects of recognition by other states are purely declaratory." The Committee then provided a definition of the state that it viewed as commonly held: "a community which consists of a territory and a population subject to an organized political authority," and said that it is necessary to take into consideration "the form of internal political organization and the constitutional provisions" of a putative state "in order to determine the Government's sway over the population and the territory." Further, the Committee stated that in a "federal-type state, which embraces communities that possess a degree of autonomy and, moreover, participate in the exercise of political power" within the framework of common political institutions, the existence of the state "implies" that these common institutions represent these component communities and wield effective power. When the composition and workings of the central organs of the Yugoslav federation no longer met "the criteria of participation and representativeness inherent" in a federal state of several communities, and fighting had broken out that no political authority had the power or willingness to stop, the Socialist Federal Republic of Yugoslavia was "in the process of dissolution."[34]

This first opinion of the Badinter Committee might be criticized on many grounds, not least of which is the extraordinary fragility it imparts to a "federal-type state." Such a state, it now seems, can be "dissolved" by a proclamation of independence by any of its components, a position that was definitively rejected for the United States by Lincoln and is firmly denied by the leaders of other federations.[35]

The criteria provided by Badinter for determining whether a state exists may be useful, if the existence of the state really is a question of fact. If one examines the internal political organization and the constitutional provisions of the Socialist Republic of Bosnia and Herzegovina when it was recognized as an independent state and admitted to the United Nations, it will be seen that that Republic was at least as advanced in a "process of dissolution" as was the SFRY in January 1992.

Constitutions are crucial for evaluating the factual question of dissolution of political consensus and thus the legal question of the dissolution of the state. In regard to the political facts, a constitution embodies the consensus of the political elites who adopt it, even if consensus here indicates simple lack of overt opposition. On the legal question, a constitution is even more important. If a key component of a state is an "organized political authority," in modern states it is the constitution that defines this authority and its organization.

In this situation of breakdown of political consensus and constitutional order, civil war was inevitable.

In Yugoslavia and Bosnia in the late 1980s and early 1990s, sovereignty was defined as resting with each nation ethnically defined (*narod*). This concept of sovereignty was reflected in the partitioning of the Bosnian electorate in 1990. Muslims, Serbs and Croats emerged as political identities as well as national or personal ones. The resulting politics of confrontation produced a breakdown of consensus on the existence of the Bosnian state, followed by a breakdown of the constitutional system of the republic. This breakdown is revealed most clearly in the very referendum that international actors, and the Badinter Committee itself, cited as justification for recognizing Bosnia and Herzegovina as an independent country. Ironically, this referendum was illegitimate under the existing constitutional structures of Bosnia and Herzegovina, leading to the odd situation that the international community granted legitimacy to the putative state by accepting an illegitimate referendum. This exercise in wishful legality may have been well intended, but certainly never provided the supposed state of Bosnia and Herzegovina with legitimacy to the large proportion of its population that rejected independence. In this situation of breakdown of political consensus and constitutional order, civil war was inevitable.

Constitutionality and Sovereignty in Yugoslavia, 1974-1990

In its incarnation as a socialist state, the SFRY and each of its components exhibited a form of dual sovereignty, belonging to "the working class and all working people" and also to "the nations and nationalities of Yugoslavia."[36] Since the 1974 Constitution was concerned with setting up a particular kind of socialist state, most of its provisions were aimed at creating the unique Yugoslav system of "socialist self-management" by the first of these two bearers of sovereignty, the working class and all working people. References to the other sovereign, the "nations and nationalities of Yugoslavia," tended to be hortatory, stressing their "brotherhood and unity"[37] and "equality."[38]

The 1974 Constitution provided for the equality before the law of all citizens,[39] granting a citizen of one republic, while in the territory of another republic, equal rights and obligations with citizens of the latter republic.[40] It also gave state and federal citizenship to citizens of all republics.

With the demise of Yugoslav state socialism in the late 1980s, separate nationalisms re-emerged among the several Yugoslav peoples. "Nationalism" in this context meant a political position of demanding that each of the "nations" of Yugoslavia be sovereign in its own state. The success of nationalist politics in the various Yugoslav republics led to the adoption of constitutional formulations justifying each republic, except Bosnia and Herzegovina, in the struggle for self-determination of the specific nation (Slovene, Croat, Serb, Montenegrin, Macedonian) in the republic bearing its name and resting sovereignty primarily in that nation.[41]

These republican constitutions effectively degraded the status of those not of the titular group in each republic. Thus Amendment 43c to the Slovenian Constitution (1989) granted minority language and cultural rights only to the "autochthonous" Italian and Hungarian minorities in Slovenia, effectively denying such rights to the much larger minority populations from the other parts of Yugoslavia, in contradiction to Arts. 154, 245 and 246 of the federal constitution.[42] A 1990 amendment to the Constitution of Croatia removed the provision that Croatia was "the state of Serbs in Croatia" as well as the national state of Croats, rendering the Serbs a minority with, implicitly, fewer rights than in a "state-forming nation."[43]

The nationalist position excluding minorities from the sovereign entity was well expressed in 1993 by Dr. Franjo Tudjman, President of Croatia, as follows:

> The Serbs in Croatia cannot become a ruling people. We have arranged our affairs in democratic Croatia the way the Serbs in Serbia, the Slovenes in Slovenia, the Macedonians in Macedonia, and every people the world over have arranged their affairs. *Here in Croatia the Croatians are sovereign,* and to the Serbs are accorded all the rights of a national minority and all individual rights....But it cannot be asked that about 8% of the population, the Serbs, who

> found themselves here as a result of historical developments, should be sovereign in the country of Croatia, because nowhere in the world could such [an arrangement] exist.[44]

With these considerations in mind, the EC and U.S. position on self-determination that justified recognizing these republics was unrelated to the concepts driving the parties involved in the conflict. As expressed by the German government, the EC supported a "limited right of self-determination," meaning "the right of the citizens of the individual Yugoslav republics to decide democratically, within the framework of existing frontiers, and only within this framework, whether and to what degree their republics should be part of the Yugoslav state."[45] While this phrasing envisions a civic definition of each republic, in which the decision would be made by equal citizens, all of the republics except Bosnia and Herzegovina were premised on an ethnic definition, in which the decision would be made by the majority nation (*narod*). Put another way, the justification for the independence of the various republics was that each ethnic nation, not the body of citizens, needed to be sovereign.

Constitutionality and Sovereignty in Bosnia and Herzegovina, 1974-1990

In all of the other Yugoslav republics, a single majority nation could make a plausible claim to sovereignty. Bosnia and Herzegovina, however, had no single majority "nation." The dual sovereignty referred to in the preceding section was expressed in Art. 1 of the Constitution of the Socialist Republic of Bosnia and Herzegovina (1974) as follows:

> The Socialist Republic of Bosnia and Herzegovina is a socialist democratic state and socialist self-management democratic community of the working class and citizens, nations of Bosnia and Herzegovina—Muslims, Serbs and Croats, members of other nations and nationalities, that live within it, based on the authority and self-management of the working class and all working people and on the sovereignty and equality of the nations of Bosnia and Herzegovina and the members of other nations and nationalities living within it.

While Art. 3 of this Constitution guaranteed "proportional representation in the assemblies of social-political bodies" to "the nations of Bosnia and Herzegovina—Croats, Muslims, and Serbs and members of other nations and nationalities," the governing bodies established by that Constitution paid primary attention to representation by "the working class and all working people" under the leadership of the League of Communists of Bosnia and Herzegovina.

Amendments in 1990 to the Constitution of the Socialist Republic of Bosnia and Herzegovina terminated this dual sovereignty by removing the referenc-

es to "the working class and all working people" from the constitutional definition of the state. Thus under Amendment LIX, the definition of state and sovereignty quoted above was replaced as follows:

> The Socialist Republic of Bosnia and Herzegovina is a democratic sovereign state of equal citizens, the nations of Bosnia and Herzegovina—Muslims, Serbs and Croats and members of other nations and nationalities who live within it.[46]

In addition, Amendment LXI "supplemented" the provision in Art. 3 as follows: "In the assemblies of social-political organizations, organs that they appoint, the Presidency of the S.R. B&H and other state organs, proportional representation of the nations and nationalities of Bosnia and Herzegovina is guaranteed."[47] Other amendments at this same time removed most of the references to and structures for representation by "the working class and all working people," as well as the hortatory provisions of the prefatory "Basic Principles" of the 1974 Constitution, which had provided the ideological justification for socialist self-management under the leadership of the League of Communists.

The provisions of Amendment LXI were implemented and given greater specificity in Arts. 19 through 22 of the "Constitutional Law for the Implementation of Amendments LIX-LXXIX on the Constitution of the Socialist Republic of Bosnia and Herzegovina,"[48] providing, for example, that deviation from strict proportionality is permitted as long as such deviation is not greater than 15 percent (Art. 19).

Further protection of the equality of the "nations and nationalities of Bosnia and Herzegovina" was provided by clause 10 of Amendment LXX, providing for the formation of a "Council for Questions of the Establishment of Equality of the Nations and Nationalities of Bosnia and Herzegovina" in the Republican Parliament. This Council, to be composed of equal numbers of Muslims, Serbs and Croats and appropriate numbers of members of other groups, was to decide on questions "by agreement of the members from the ranks of all of the nations and nationalities."[49] The Council was required to consider any question referred to it by at least 20 members of Parliament, and had to approve the question for Parliament to consider it. Further, once such a question was approved by the Council, Parliament would be able to pass it only by a special procedure requiring a two-thirds majority of the total number of representatives in Parliament.

The transition in constitutional views of state and sovereignty in Bosnia and Herzegovina at the fall of state socialism, and of constitutional provisions for implementing these visions, was that the "dual sovereignty" of working class and "ethnic" nations of the period of state socialism was replaced conceptually by a single sovereign, "the nations and nationalities of Bosnia and Herzegovina." However, this single sovereign was divided into segments, each of which was guaranteed equality. The amended Constitution and its implementing Constitutional Law, after July 31, 1990, required participation by rep-

resentatives of the "nations and nationalities" in governmental organs at all levels, in proportion to their respective numbers in the population. A special two-thirds majority was required to pass legislative provisions challenged as violating the principles of national equality, even after such legislation had obtained unanimous consent in the Council for Questions of the Establishment of Equality of the Nations and Nationalities of Bosnia and Herzegovina in the Republican Parliament.

The Partitioning of the Bosnian Electorate, 1990

In the November 1990 free elections that marked the end of communism, the Bosnian electorate partitioned itself into Muslims, Serbs and Croats. A single Muslim party, the *Stranka Demokratske Akcije*, or Party of Democratic Action (SDA), took 86 of the 240 total seats (35.8 percent); a single Serb party, the *Srpska Demokratska Stranka*, or Serbian Democratic Party (SDS), took 72 of the seats (30 percent); and a single Croat Party, the *Hrvatska Demokratska Zajednica*, or Croatian Democratic Union (HDZ), took 44 of the seats (18.35 percent); the remaining seats were taken by smaller parties.[50] The Muslim, Serb and Croat percentages of the 1991 population were, respectively, 43.7, 31.3 and 17.5.[51]

Thus the election was essentially an ethnic census. Given the chance to vote as Bosnians, the population of Bosnia and Herzegovina chose instead to vote as Muslims, Serbs and Croats. This 1990 voting pattern was consistent with the results of the few other relatively free elections in Bosnia and Herzegovina in the twentieth century (1910 and in the 1920s), when Bosnians "voted overwhelmingly for ethnically based parties, and a single party achieved an overwhelming majority among the voters of each nationality."[52] A similar result was also achieved in the fairly free but rather less than fair elections of 1996.

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Initially, the victorious nationalist parties in 1990 formed a coalition government by dividing up key governmental positions and ministries. Thus a Muslim became chair of a seven-member presidency, a Serb the president of the Parliament, a Croat the prime minister. Ten cabinet ministries were headed by members of the SDA, seven by members of the SDS, five by members of the HDZ.[53] These positions were to rotate after two years, in November 1992. However, such rotation never took place. This ethnic division of governmental positions was in keeping with the principle of ethnic balance enunciated in the Constitution. Within republican administrative bodies and within many local governments, the party in control staged ethnic purges of people from different political parties and ethnic groups.[54]

The Dissolution of Political Consensus

The events leading to the breakdown of the constitutional structure of Bosnia and Herzegovina began on October 14, 1991 with parliamentary consideration of a memorandum on the sovereignty of Bosnia and Herzegovina that was presented in the Parliament by the Muslim SDA party with the support of the Croatian HDZ party.[55] This memorandum stated that while Bosnia and Herzegovina would support the continued existence of the Yugoslav federal state, representatives from Bosnia and Herzegovina would not participate in any activities of the federal Parliament and presidency unless representatives from all other federal units also participated. Moreover, the Republic would not regard as binding any decisions taken by these federal organs without participation of all federal units. The memorandum also asserted that it was the right of the parliamentary majority to decide on the fate of the Republic, and that such a majority vote constituted an "obligatory basis"[56] for actions by republican authorities.

A competing "Resolution on the Position of the S.R. Bosnia and Herzegovina in the Resolution of the Yugoslav Crisis," sponsored by the SDS, provided that representatives of Bosnia and Herzegovina would participate in the federal Parliament and presidency; but that if Croatia were to secede from Yugoslavia and gain international recognition, a process would begin to initiate a "mechanism for the realization of the right of self-determination including secession of the constituent nations of Bosnia and Herzegovina (Muslims, Serbs and Croats)."[57]

During an extended parliamentary session on October 14 and 15, 1991, no compromise between these positions was found. SDS members of Parliament then demanded that the memorandum be referred to the "Council for Questions of the Establishment of Equality of the Nations and Nationalities of Bosnia and Herzegovina" provided for in Amendment LXX of the republican Constitution. Since this council had not yet been formed, SDA members of Parliament disputed the Serbs' attempt to exercise this constitutional right. When the president of the Parliament, a Serb, proclaimed the session adjourned, a Muslim member took the podium and instead proclaimed a one-hour pause. At the end of the hour, the Muslims and Croats returned to the parliamentary chamber and passed the memorandum, with 142 votes out of 240 in the parliament.[58] The Serb leadership proclaimed the passage of the memorandum to be unconstitutional and said that Serb representatives would not participate in the work of republican governmental bodies until that decision was nullified, and would regard as invalid any decisions taken by such organs without Serb participation.[59] Thus the SDS took the same position toward Serb representation in republican authorities that the SDA's memorandum adopted in regard to representation from Bosnia and Herzegovina in the governmental organs of the Yugoslav federation.

The actions of the SDA and HDZ members of Parliament in regard to the adoption of the memorandum were contrary to both the letter and the spirit of the Constitution of the Socialist Republic of Bosnia and Herzegovina, which

was then valid. That Constitution provided a mechanism for ensuring the protection of the equality of the component nations of Bosnia and Herzegovina, and the Serb representatives attempted to exercise the provision. Any action so challenged, taken without recourse to this constitutional mechanism, must be invalid. This is particularly so when the vote to take such action did not obtain the two-thirds majority required by Amendment LXX (10) of the then-valid constitution.

The importance that all parties in Bosnia and Herzegovina attached to the protection of national equality may be seen in the inclusion in the SDA's own platform of the provision that "Any possibility of outvoting in the process of decision-making on crucial issues concerning the equal rights of all nations and nationalities living in the Republic will be precluded through an appropriate structure of the Assembly of the Republic of Bosnia-Herzegovina."[60] In these circumstances, the vote to adopt the platform violated not only the letter and spirit of the then-valid Constitution, but also the letter and spirit of the platform itself.

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The provision in the memorandum that purported to proclaim a simple parliamentary majority as sufficient to bind the policy and political actors in the Republic was contradictory to Amendment LXX of the Constitution, and hence invalid; it was also contrary to the "outvoting" preclusion in the platform itself.

While the Serb representatives in Bosnian state organs did not resign in October 1991, they did reject the validity of decisions by those bodies that did not meet the constitutional requirements of referral to the Council for Questions of the Establishment of Equality of the Nations and Nationalities of Bosnia and Herzegovina. Participation by Serb members in these bodies declined throughout the rest of 1991, just as participation by Croats and Slovenes in SFRY bodies had declined in the first part of the year.

The Referendum on Independence of February-March 1992 may be seen as the ultimate step in the dissolution of the political consensus that made possible the Bosnian state. The legality of this referendum was questionable, and EU insistence on its being held destroyed attempts to reach a political solution within the Bosnian Assembly.

Illegitimacy of Referendum on Independence, February-March 1992

In its Opinion no. 4 on the recognition of Bosnia and Herzegovina, the Badinter Committee noted that various declarations and pledges made to international actors by the government and presidency of Bosnia and Herzegovina,

but that Serbian members of the presidency did not join in these actions. The Committee also noted that Serbs in Bosnia and Herzegovina voted in a plebiscite, "outside of the institutional framework" of the republic, for a "joint Yugoslav" state and that an "Assembly of Serbian people in Bosnia and Herzegovina" proclaimed the independence of the "Serbian Republic of Bosnia and Herzegovina" in January 1992. In these circumstances, the Badinter Committee concluded that "the expression of the will of the peoples of Bosnia and Herzegovina to constitute the SRBH as a sovereign and independent state cannot be held to have been fully established." Having already noted that by the provisions of Amendment LXVII [sic] "citizens exercise their power through a representative assembly or by referendum," the Committee stated that "the will of the peoples of Bosnia and Herzegovina to constitute the republic as an independent state could *possibly* be established by a referendum of all of the citizens of the Republic."[61]

The result of the referendum could not be said to have indicated the will of the peoples of Bosnia and Herzegovina to constitute the Republic as an independent state.

In its Opinion no. 8, on July 4, 1992, the Badinter Committee stated that "the referendum proposed in Opinion no. 4 was held...on February 29, and March 1; a large majority of the population voted in favor of the Republic's independence." Opinion no. 11, on July 16, 1993, repeated this view of the referendum and also stated that "the constitutional authorities of the Republic have acted like those of a sovereign state."[62] Notwithstanding these views expressed by the Badinter Committee *after* European Community recognition of Bosnia and Herzegovina was a *fait accompli*,[63] the readings of the Bosnian constitution given by Badinter were erroneous. The result of the referendum could not be said to have indicated the will of the *peoples* of Bosnia and Herzegovina to constitute the Republic as an independent state, which was the original failing stated by the Badinter Commission in its first opinion, issued *before* recognition was given to Bosnia and Herzegovina.[64]

The Committee's citation of "Amendment LXVII" was obviously erroneous, since that Amendment refers to means of funding obligations in regard to health, culture and science. The Badinter Committee clearly meant to cite Amendment LXVIII, which states that, "Citizens are the bearers of power, which they exercise through representatives in assemblies of social-political communities, by referendum, *in public meetings and other forms of personal declaration of opinion.*" (emphasis added).

While the Badinter Committee omitted the phrase emphasized in the above translation of Amendment LXVIII, its inclusion in the amendment makes the Committee's pronouncement on the Serbian plebiscite doubtful, because the Serbian plebiscite was a form of personal declaration of opinion.

The referendum itself was scheduled over the objections of the elected Serb representatives in the Bosnian Assembly. This event was dramatic, and constituted the ultimate breakdown of the Bosnian Assembly. As reported by the major Yugoslav newspapers at the time, the parliamentary session involved lasted for about 17 hours on January 24-25, 1992, with frequent pauses.[65]

It is important to note that the SDS was still participating in the Assembly and negotiating with the Muslim SDA party in late January 1992. They had seemed to reach a deal with that party during the long pause in the parliamentary session on the night of January 24-25, 1992. After that pause, SDS President Radovan Karadzic appeared at the podium with the SDA politician Muhamed Cengic to announce a deal by which a political-territorial reorganization of the Republic would first be achieved, to be followed immediately by the referendum demanded by the Muslims. As reported in *Oslobodenje*, Dr. Karadzic's statement that "We were never so close to an agreement as this time" was greeted with applause, and the approval of the president of the HDZ caucus in the Parliament. However, Muslim leader Alija Izetbegovic then rejected the proposed deal, saying that the referendum must take place without any preconditions. At that point, the president of the SDS caucus demanded that the question of the referendum be put to the Council on National Equality. The president of the Assembly, an SDS member, then pronounced an end to the day's session, at 3:30 a.m. on January 25, 1992, scheduling a new session for 10:00 a.m. the same day. However, one hour later, an SDA member took the podium, called the Assembly to order and, in the absence of the Serb delegates, called for a vote on the proposal to hold a referendum, which passed by the unanimous votes of the 130 members present (of 240 total members).

Muslim leader Alija Izetbegovic rejected the proposed deal, saying that the referendum must take place without any preconditions.

In view of the care taken in the 1990 amendments to the Bosnian constitution to prevent "outvoting," and even the position of the Platform adopted by the SDA and HDZ representatives in the Bosnian Assembly, it is difficult to see the scheduling of the referendum as an act congruent with the letter or spirit of the Bosnian constitution. It is also difficult to see the 4:30 a.m. session as legitimate, considering that the President of the Assembly had adjourned that body until 10:00 a.m.

Even if the referendum had been legitimate, its results could not be said to have indicated the will of the *peoples* of Bosnia and Herzegovina to constitute the Republic as a sovereign and independent state. In this regard, the Badinter Committee's original statement of the failed condition of the will of the peoples, plural, rather than the people of the republic, was an accurate reflection of both constitutional mandates and political reality in the republic at the time. But the results of the referendum indicated clearly that the Serb people

in Bosnia and Herzegovina were solidly opposed to independence. Thus while the Badinter Commission had said that a referendum might *possibly* establish the will of the peoples of Bosnia and Herzegovina for independence, this vote could not be said to have accomplished that goal.

The Dissolution in Fact of the Bosnian State

The Badinter Committee defined a state, as "a community which consists of a territory and a population subject to an organized political authority," but by late 1991, Bosnia and Herzegovina was empirically not a state. Its population formed three "communities" rather than one, its former "organized political authority" had failed and much of its population had rejected subjugation to a putative political authority that was operating in violation of the Constitution. International recognition of Bosnia and Herzegovina is irrelevant to this conclusion, because, as the Badinter Commission had explained, "the existence or disappearance of the State is a question of fact" and "the effects of recognition by other States are purely declaratory."

This dissolution of the state, however, was the manifestation of the dissolution of the political consensus that had made a single state of Bosnia's peoples possible. Had the citizens of Bosnia and Herzegovina defined themselves as Bosnians during the elections of 1990, the Republic could have existed as the state of the Bosnian people. Instead, the population of Bosnia and Herzegovina overwhelmingly divided itself into three nations: Serbs, Croats and Muslims. This partitioning of the Bosnian populations led to the breakdown of the constitutional system of Bosnia and Herzegovina, which required consent of these three constituent peoples for the state to function.

Partitioning of the Bosnian populations led to the breakdown of the constitutional system of Bosnia and Herzegovina.

Whether any state can be stable under such a consensual constitutional structure is a question for political theorists, and Americans are likely to answer no. After all, it was the unworkable consensual nature of the Articles of Confederation that led to their replacement in 1787 by the present United States Constitution, and even then, the possibility of secession was not rejected definitively until 1865. But this question simply returns us to the problem of how to respond to a failed state. External imposition of a constitution mandating power sharing was tried in Cyprus with spectacularly unsuccessful results.[66] The failed Cyprus Constitution is the closest parallel to the Dayton plan for Bosnia.[67]

It is most interesting that the expert witness for the ICTY's prosecution in the *Celebici* case seemed to accept the fact that the Bosnian state was in fact dissolved by 1992:

> In the context of the armed conflicts that were occurring in other parts of the SFRY...and the disintegration of the federal institutions of the SFRY, the debate over the future set-up of the republic of Bosnia and Herzegovina created a persisting constitutional and legal vacuum...Bosnian society began to divide itself generally into ethnic factions, *which led to the disintegration of Bosnia's state structures in the summer of 1991.*[68]

She then goes on to detail the partitioning of the local municipality involved in the case into Muslim and Croat structures and forces.

Thus the *Tadic* majority reflects the reality recognized by the defense expert witness in *Tadic* and the prosecution's expert witness in *Celebici*: the conflict has been primarily between Bosnians, and the Bosnian state that had existed within Yugoslavia disintegrated along with the larger state that had contained it. This reality is distasteful, but ignoring it will not legitimate the ICTY in the eyes of the very people who are supposed to see it serving justice, nor will it teach the benefits of the rule of law. Unless, of course, Mesa Selimovic had it right, and justice really *is* the right to do what we think must be done, and thus can be anything.

Notes

1. Formally, the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed on the Territory of the former Yugoslavia since 1991
2. "Opinion and Judgment" in *Prosecutor* v. *Dusko Tadic*, No. IT-94-1-T (I.C.T.Y., 7 May 1997) at paras. 607-608 (hereafter "*Tadic* opinion").
3. Quoted in Roy Newman, "Confusion in War Crimes Case," Newsday, May 13, 1997.
4. Roy Gutman, *A Witness to Genocide* (New York: Macmillan Pub. Co., Toronto: Maxwell Macmillan Canada, New York: Maxwell Macmillan International, 1993).
5. *The New York Times*, May 18, 1997, E4.
6. Ibid.
7. Jeri Laber and Ivana Nizich, "The War Crimes Tribunal for the Former Yugoslavia: Problems and Prospects." *The Fletcher Forum of World Affairs* 18:2 (1994): 10:8.
8. *The New York Times*, May 18, 1997, E4.
9. *Prosecutor* v. *Dusko Tadic*, No. IT-94-1-T (I.C.T.Y., 7 May 1997), "Separate and Dissenting Opinion of Judge McDonald Regarding the Applicability of Article 2 of the Statute" (hereafter *Tadic* dissent), paras. 33-34.
10. 1986 I.C.J. Reports 14.
11. *Tadic* dissent para. 34.
12. *Tadic* opinion para. 588.
13. Ibid. para. 599.
14. Ibid. para. 603, emphasis added.
15. L. Smajlovic, "From the Heart of the Heart of the Former Yugoslavia," *Wilson Quarterly* (Summer 1995): 113.
16. Antonio Cassese, President of the ICTY, at the conference on "A Year After Dayton: Has the Bosnian Peace Process worked," held at Yale Law School, 16 Nov. 1996, as quoted by S. Woodward, "Genocide or Partition: Two Faces of the Same Coin?" *Slavic Review* 55 (1996): 760.

17. R. Jackson, *Quasi-States: Sovereignty, International Relations and the Third World* (Cambridge: Cambridge University Press, 1990).
18. *Tadic* opinion, para. 83.
19. See A. Bestor, "The American Civil War as a Constitutional Crisis," *Am. Hist. Rev.* 9 (1964): 328.
20. C. Kaufmann, "Possible and Impossible Solutions to Ethnic Civil Wars," *International Security* 20 (1996): 137; see Kaufmann, "Intervention in Ethnic and Ideological Civil Wars: Why One Can be Done and the Other Can't," *Security Studies* 6 (1996): 62 and J. Mearsheimer and S. van Evera, "When Peace Means War," *The New Republic* 18 (Dec. 1995): 16-25.
21. *Draft Expert Report of Marie-Janine Calic* , 19 February 1997 (hereafter, "Calic Report"), in author's possession. The Calic Report was prepared for the Prosecutor of the ICTY, and is marked "strictly confidential." Author obtained this report from sources who wish to remain anonymous.
22. *Prosecutor* v. *Delalic and others* (IT-96-21) "Celebici," initial indictment available from ICTY at *http://www.un.org.icty.*
23. Appeals Chamber Decision, para. 72.
24. G. Aldrich, "Jurisdiction of the International Criminal Tribunal for the former Yugoslavia," AJIL 90 (1996): 68; see T. Meron, "The Continuing Role of Custom in the Formation of International Humanitarian Law," AJIL 90 (1996): 239.
25. *Tadic* dissent, para. 33.
26. M. Selimovic, *Death and the Dervish*, trans. by Bogdan Rakic and Stephen Dickey (Evanston: Northwestern University Press, 1996), 46.
27. Jackson, *Quasi-States.*
28. D. Wippman, "International Law and Ethnic Conflict on Cyprus," *Texas International Law Journal* 31 (1996): 141.
29. R. Hayden, "The 1995 Agreements on Bosnia an Herzegovina and the Dayton Constitution: The Political Utility of a Constitutional Illusion," *E. Eur. Const. Rev.* 4 (1995): 59.
30. Ibid.; see C. Cvetkovski, "The Constitutional Status of Bosnia and Herzegovina in Accordance with the Dayton Documents," Balkan Forum 4:1 (1996): 111.
31. The Federalist, no. 15.
32. Appeals Chamber Decision, para. 72.
33. "Opinion of the Arbitration Committee of the Conference on Yugoslavia," *Yugoslav Survey* 23:4 (1991): 17. (hereafter "Badinter Opinion no. 1"). All quotes from this Opinion in this paragraph and the next are from this source.
34. Ibid.
35. The relevant logic is well expressed by Alexander Hamilton in *Federalist no. 6*, which was as applicable to Yugoslavia in 1991 as it was to the confederated United States in 1787: "A man must be far gone in Utopian speculations who can seriously doubt that if these states should either be wholly disunited, or only united in partial confederacies, the subdivisions into which they might be thrown would have frequent and violent contests with each other....To look for a continuation of harmony between a number of independent, disconnected sovereignties situated in the same neighborhood would be to disregard the uniform course of human events, and to set at defiance the accumulated experience of ages." Badinter and his colleagues seem to have been so far gone in the Utopian speculations surrounding Maastricht as to have thought the accumulated experience of ages to be no longer relevant.
36. R. Hayden, "Constitutional Nationalism in the Formerly Yugoslav Republics," *Slavic Review* 51 (1992): 665.
37. Const. of the S.F.R. Yugoslavia (1974), "Basic Principles" I.
38. Ibid., Art. 3 and Art. 245.
39. Ibid., Art. 154.
40. Ibid., Art. 249.

41. See constitutional preambles quoted in Hayden, "Constitutional Nationalism," and in "Constitutional Nationalism and the Logic of the Wars in Yugoslavia," *Problems of Post-Communism* (September 1996).
42. Slovenian Amendment 43c in *Porocevalec Skupscine SR Slovenije in Skupscine SFR Jugoslavije za Delegacije in Delegate* vol. 15 no. 17 (July 17, 1989), 18-19.
43. Const. of the Republic of Croatia, 1990, "Historical foundations" [preamble], in Parliament of the Republic of Croatia (Sabor), *The Principal State Acts* (Zagreb, April 1993), 9; Const. of Croatia 1974, Art. 1, in *Ustav SFRJ [i] Ustavi Socijalistickih Republika i Pokrajina* (Beograd, 1974).
44. *Danas*, July 2, 1993; quoted in Stan Markotich, "Ethnic Serbs in Tudjman's Croatia," *RFE/RL Research Report* (September 24, 1993): 30. The translation is by Markotich, but the emphasis is mine.
45. "Recognition of the Yugoslav Successor States." Position paper of the German Foreign Ministry, March 10, 1993 [official translation]; *Statements & Speeches*, vol. xvi, no.10 (New York: German Information Center).
46. Amandman LIX na Ustav Socijalisticke Republika Bosne i Hercegovine, *Sluzbeni Glasnik Socijalisticke Republike Bosne i Hercegovine* XLVI (21), (July 31, 1990): 590.
47. Amandman LXI na Ustav Socijalisticke Republika Bosne i Hercegovine, *Sluzbeni Glasnik Socijalisticke Republike Bosne i Hercegovine* XLVI (21), (July 31, 1990): 590.
48. Ustavni Zakon za Sprovodenje Amandmana LIX - LXXIX na Ustav Socijalisticke Republike Bosne i Herzegovine, *Sluzbeni Glasnik Socijalisticke Republike Bosne i Hercegovine* XLVI (21), (July 31, 1990): 594-595.
49. Amandman LXX(10) na Ustav Socijalisticke Republika Bosne i Hercegovine, *Sluzbeni Glasnik Socijalisticke Republike Bosne i Hercegovine* XLVI (21), (July 31, 1990): 591.
50. Figures derived from the official report of the Republican Election Commission as reported in *Sluzbeni List SR BiH*, (December 19, 1990): 1242-1263.
51. S. Bogosavljevic, "Bosna i Herzegovina u Ogledalu Statistike," in S. Bogosavljevic et al., *Bosna i Herzegovina izmedju Rata i Mira* (Beograd and Sarajevo: Forum za Etnicke Odnose, 1992), 27. The 1981 census figures, used by the election commission in its report, were Muslims, 39.52%; Serbs 32.02%; Croats 18.38% (*Sluzbeni List SR BiH*, December 19, 1990): 1262-1263.
52. R. Donia and J. Fine, *Bosnia & Herzegovina: A Tradition Betrayed* (New York: Columbia University Press, 1994), 211; S. Arnautovic, *Izbori u Bosni i Hercegovini '90* (Sarajevo, 1996), 25-37.
53. V. Goati, "Politicki Zivot Bosne i Hercegovine, 1990-92," in S. Bogosavljevic, et al., *Bosna i Herzegovina izmedju Rata i Mira* (Beograd and Sarajevo: Forum za Etnicke Odnose, 1992), 48.
54. Ibid., 48-49; M. Djilas and N. Gace, *Bosnjak Adil Zulfikarpasic* (Zurich: Bosnjacki Institut, 1994), 187-188.
55. The account of this parliamentary episode that follows is based on the accounts in the independent daily newspaper *Borba*, October 14, 15, 16 and 18, 1991. The texts of the SDA/ HDZ "Memorandum" and opposing texts presented separately by the Serb SD party and the united opposition were printed in *Borba*, October 16, 1991, 2.
56. Ibid.
57. The text of this Resolution is also printed in *Borba*, October 16, 1991, 2.
58. *Borba*, October 16, 1991, 3.
59. *Borba*, October 18, 1991, 5.
60. The text of this Resolution is also printed in *Borba*, October 16, 1991, 2.
61. Badinter Committee Opinion no. 4, reprinted in S. Triufonsvka, ed., *Yugoslavia through Documents* (Dortrecht, Holland, 1994). (emphasis added).
62. Badinter Committee Opinions no. 8 and 11 are reprinted in S. Trifunovska, ed., *Yugoslavia through Documents* (Dortrecht, Holland,1994).
63. In an interview with the independent Belgrade daily *Nasa Borba* on October 22, 1996, Badinter stated in very strong terms that the hasty recognition of Bosnia and Herze-

govina was an error: "Bosnia was a special case. In the Commission we discussed this with the greatest attention, and wanted to say that it was not clear what was the will of the nation[s] in Bosnia, and that because of this there was a need to continue with investigation and not to hurry with international recognition. That was a mistake and that was immediately understood. In the case of B&H it was necessary to wait, to move slowly towards a balanced solution, and not to hurry its recognition. B&H was recognized so unexpectedly, and it is not known what was the basis of such a rush. That was such a large error!" (note that in this quote it is not clear in the original whether *naroda* is genative singular or genative plural, thus "people of Bosnia" or "peoples of Bosnia" but the plural formulation was the one used in the opinion Badinter discusses in the interview). With this quote in mind, in would seem that the Badinter Committee's views on Bosnian statehood in Opinions 8 and 11 did not reflect the real thinking of Badinter.

64. Badinter Committee Opinion no. 1, reprinted in S. Trifunovska, ed., *Yugoslavia through Documents* (Dortrecht, Holland, 1994).
65. The account of this parliamentary session in this statement follows that in *Oslobodenje*, January 26, 1992, 1, 3. Congruent accounts appeared in *Borba*, January 27, 1992, 6 and *Vreme*, February 3, 1992, 8-9.
66. Wippman, "International Law and Ethnic Conflict on Cyprus."
67. Cvetkovski, "The Constitutional Status of Bosnia;" see D. Wippman, "Change and Continuity in Legal Justifications for Military Intervention in Internal Conflict," *Colum. Human Rights L. Review* 27: 482-483.
68. Calic Report at 2, emphasis added.