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PROSPECTS FOR NATIONAL MINORITIES UNDER THE DAYTON ACCORDS—Lessons From History: The Inter-War Minorities Schemes and the “Yugoslav Nations”[†]

*Julie Mertus**

*Nothing . . . is more likely to disturb the peace of the world than the treatment which might in certain circumstances be meted out to minorities.*¹

I. INTRODUCTION

After World War I, the victorious allies used international law to rearrange the European landscape, parceling out the losses of Germany, the Ottoman Empire, Bulgaria and the successor states of the Habsburg Empire, Austria and Hungary. As one author described, “[t]he principle of ‘one nation, one state’ was not realized to the full extent permitted by the ethnographic configuration of Europe, but it was approximated more closely than ever before.”² Protections for minority groups within the newly created nation-states—religious, cultural, language and national minorities—were designed as a counter-balance to national self-determination since millions of people were left out of “their” nation-state. To some degree, it was advantageous to protect the rights of nations that had

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* Julie Mertus is a visiting professor at Emory Law School. This article was written when she was a fellow in the Human Rights Program at Harvard Law School and an affiliate with the Harvard Center for International Affairs (suitcase@igc.apc.org). Research for this Article was made possible with the support of the Stable Foundation and the Human Rights Program at Harvard Law School. The author wishes to thank Henry Steiner, Barnett Rubin, Nathaniel Berman, Marcus Schmidt and Paul Hunt for their comments on earlier versions of this work and, in addition, Michael Asaro for his attention to editing this piece. An earlier version of this work is published in *MINORITY RIGHTS IN THE “NEW EUROPE”* (Steven Wheatley & Peter Cumper eds., forthcoming Spring 1998).

1. President Woodrow Wilson, Speech at the Plenary Session of the Paris Peace Conference (May 31, 1919), *reprinted in* 5 *A HISTORY OF THE PEACE CONFERENCE OF PARIS* 130 (H.W.V. Temperley ed., Oxford University Press 1969) (1924).

2. INIS L. CLAUDE, JR., *NATIONAL MINORITIES: AN INTERNATIONAL PROBLEM* 12 (Greenwood Press 1969) (1955).

been trampled by empires. Barbara Jelavich explains:

The victors had two roads to peace. First, they could base the terms of the treaties on the idealistic principles enunciated during the war by the Socialist parties, the Bolshevik government and Woodrow Wilson in his Fourteen Points. The aim would be a just peace based on self-determination and conciliation between the victor and the vanquished The second alternative . . . would be to apply the secret treaties and impose a punitive peace on the defeated governments. After all, no state in either camp had shown much interest in self-determination in the formulation of its own wartime objectives, unless . . . the principle would advance its own claims.³

Under the interwar agreements then, "the victor states took the spoils—but with the stipulations often clothed in the idealistic language of national self-determination and justice."⁴

The negotiators for peace in the Balkans⁵ made a similar compromise: the territorial victors were rewarded and, at the same time, the peace process trumpeted self-determination and justice. In the Dayton peace system, human rights provisions constitute a corollary and corrective to a new twist on the principle of self-determination. The Dayton Accords⁶ simulta-

3. 2 BARBARA JELAVICH, *THE HISTORY OF THE BALKANS* 122 (1983).

4. *Id.*

5. The process of negotiations was extended and cumulative, in the sense that each new proposal built in some way on a previous proposal. This Article discusses only the agreement known as the "Dayton Accord." See *infra* note 6. An analysis of the proposals leading up to this agreement, with a particular emphasis on human rights provisions, appears in Paul C. Szasz, *Protecting Human and Minority Rights in Bosnia: A Documentary Survey of International Proposals*, 25 CAL. W. INT'L L.J. 237 (1995). An analysis of the constitutional proposals leading up to the Constitution adopted by Dayton can be found in Paul C. Szasz, *The Quest for a Bosnian Constitution: Legal Aspects of Constitutional Proposals Relating to Bosnia*, 19 FORDHAM INT'L L.J. 363 (1995).

6. The General Framework Agreement for Peace in Bosnia and Herzegovina, Dec. 14, 1995, Bosn. & Herz.-Croat.-Yugo., 35 I.L.M. 89 [hereinafter Dayton Accords], is also reproduced in U.N. Doc. A/50/790-S/1995/999 in the form initialed in Dayton on November 21, 1995. The version that appears in International Legal Materials or I.L.M. is the agreement as it was signed on December 14, 1995, in Paris. The latter version corrects minor errors that are present in the United Nations (UN) printing. All references herein to "Dayton" or the "Dayton Accords" are to the latter. The Constitution of the Federation of Bosnia and Herzegovina, contained in the Dayton Accords, *supra*, Annex 4, 35 I.L.M. 114, is referenced herein as BOSN. & HERZ. CONST. Although I have chosen to use the shorthand of "Dayton," I realize that a more proper name for the agreement would be the "Dayton/Paris Agreement." Cf. Paul C. Szasz, *The Protection of Human Rights Through*

neously advance alternative visions of self-determination. Through formal affirmation of the legal integrity of the internationally-recognized state of Bosnia,⁷ Dayton claims to respect the Bosnians' earlier act of self-determination. Yet Dayton also takes steps to eviscerate the earlier moment of self-determination. Dayton divides the state of Bosnia and Herzegovina roughly in two, giving Serbs what they wanted all along, a semi-autonomous state,⁸ and paving the way for what Croats wanted all along, the securing of their borders and political and military inroads into Herzegovina.⁹

In crafting its guarantees, the drafters of Dayton faced far different circumstances than interwar diplomats, circumstances marked by increased global interdependence, accelerated regionalization and marked development in international legal systems and mechanisms. Europe had already been divided into nation-states; economic insecurity and power struggles within these nation-states had created new instabilities and tapped nascent nationalisms; war raged in Bosnia and

the Dayton/Paris Peace Agreement on Bosnia, 90 AM. J. INT'L L. 301, 301 (1996). Agreements subsequent to the Dayton Accords can be found on the web page for the Office of the High Representative in Bosnia and Herzegovina at the following internet address: <<http://www.ohr.int:81/index.html>>.

The parties to the Dayton Accords were the Republic of Bosnia and Herzegovina (represented by its President, Alija Izetbegovic), the Republic of Croatia (represented by its President, Franjo Tudjman) and the Federal Republic of Yugoslavia (represented by the President of Serbia, Slobodan Milosevic). See Dayton Accords, *supra*, signatures, 35 I.L.M. 91. By a special agreement of August 29, 1995, Milosevic was granted power to negotiate for Republika Srpska. Milosevic's delegation included three officials of Republika Srpska, Momcilo Krajisnik, Nikola Koljevic and Aleska Buha. Although these leaders, all members of the Republika Srpska Parliament, refused to participate in the initialing of the agreement at Dayton, they initialed the texts in Pale on November 24, 1995, and they participated in the signature ceremony later in Paris. See Szasz, *supra*, at 304 n.13.

7. In particular, see BOSN. & HERZ. CONST. art. I: "The Republic of Bosnia and Herzegovina . . . shall continue its legal existence under international law as a state, with its internal structure modified as provided herein," divided into two "Entities"—the Federation of Bosnia and Herzegovina and the Republika Srpska—and with its present internationally recognized borders. *Id.* art. I(1),(3).

8. If put to a vote, there is little question that at this time Bosnian Serbs would vote for either an autonomous state or a semi-autonomous state aligned closely with Serbia. The Dayton accord advances both of these agendas.

9. Bosnian Croats, unlike Bosnian Serbs, do not have sole control over their own semi-autonomous state as they must share it with Bosnian Muslims. However, recent history has shown that this arrangement has indeed fulfilled the greater Croatian goals of making inroads into Bosnia-Herzegovina.

Herzegovina and Croatia. Post-war thinking had shifted away from the group-based minority rights of the interwar period to an individual-based human rights model.¹⁰ In contrast to the drafters of the interwar plans, the authors of the Dayton Accords had a host of post-World War II regional and international agreements at their disposal, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms¹¹ (European Convention) and the International Covenant on Civil and Political Rights.¹²

Nevertheless, this Article argues, the grand scheme to protect national minorities¹³ embodied in the Dayton Accords

10. Although support for group-based minority rights can still be seen today in several systems and mechanisms; for example, in the European system, the Organization for Security and Cooperation in Europe (OSCE) catalogue of rights. See, e.g., PATRICK THORNBERRY, *INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES* (1991); Gudmundur Alfredsson, *Minority Rights and a New World Order, in BROADENING THE FRONTIERS OF HUMAN RIGHTS: ESSAYS IN HONOUR OF ASBJØRN EIDE* 55-78 (Donna Gomien ed., 1993); Gudmundur Alfredsson & Danilo Türk, *International Mechanisms for the Monitoring and the Protection of Minority Rights: Their Advantages, Disadvantages and Interrelationships, in 30 MONITORING HUMAN RIGHTS IN EUROPE* 169, 169-186 (Arie Bloed et al. eds., 1993); Giorgio Sacerdoti, *New Developments in Group Consciousness and the International Protection of the Rights of Minorities*, 13 *ISR. Y.B. ON HUM. RTS.* 116 (1983); Felix Ermacora, *The Protection of Minorities Before the United Nations*, 182 *RECUEIL DES COURS* 247 (1983).

11. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 *U.N.T.S.* 222.

12. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 *U.N.T.S.* 171, 6 *I.L.M.* 360 (entered into force Mar. 23, 1976).

13. The term "national minorities" is used in the manner invoked by the people of the former Yugoslavia: nations are groups brought together by such factors as common language, culture, traditions and mythologies. "National minorities" are those people who do not belong to the majority nation in their country. Note that the term "nation" as used herein does not mean "state"—rather, nation is more akin to the American use of the term "ethnic group." At times, I also use the term "ethno-national minorities" to underscore the similarities with the Americanized term "ethnic" and to highlight the difference between nations and states.

In 1987, the UN issued a compilation of definition proposals submitted to it over a forty year period. See *Compilation of Proposals Concerning the Definition of the term "Minority"*, U.N. ESCOR, Comm. on Hum. Rts., 43rd Sess., U.N. Doc. E/CN.4/1987/WG.5/WP.1 (1986). The literature on nations and nationalisms is bountiful. For definitions of "nations", see generally *Definition and Classification of Minorities*, U.N. ESCOR, Comm. on Prevention of Discrimination and Protection of Minorities, 2nd Sess., U.N. Doc. E/CN.4/sub.2/85 (1949); PETER ALTER, *NATIONALISM* (2d ed. 1994); BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* (1983); JOHN BREUILLY, *NATIONALISM AND THE STATE* (1982); ERNEST GELLNER, *NATIONS AND NATIONALISM* (1983); MONTSERRAT GUBERNAU, *NATIONALISMS: THE NATION-STATE AND NATIONALISM IN THE TWENTIETH CENTURY* (1996); ERIC HOBBSBAWM, *NATIONS AND NATIONALISM*

bears marked similarities with the minority rights guarantees created after the first World War. The Minorities Treaties,¹⁴ concluded under the auspices of the League of Nations and other interwar minority rights measures,¹⁵ failed to protect the rights of ethnic, religious and linguistic minorities and to create a long-lasting peace. Dayton appears to be headed in the same direction. While tracking closely the international peace techniques of days gone by, Dayton jettisons the language and constructs through which the people of the land once called Yugoslavia had become accustomed to defining themselves—that is, as nations (*narod*)¹⁶ or national minorities (*narodnosti*). At the same time, on top of all of its heavy human rights machinery, Dayton creates a nation-based government designed to cement national divides. What vision of soci-

SINCE 1780 (1990); DAVID MILLER, ON NATIONALITY (1995); ANTHONY D. SMITH, NATIONS AND NATIONALISM IN A GLOBAL ERA (1995); John A. Hall, *Nationalisms, Classified and Explained*, in NOTIONS OF NATIONALISM 8, 8-33 (Sukumar Periwal ed., 1995); Lea Brilmayer, *The Moral Significance of Nationalism*, 71 NOTRE DAME L. REV. 7, 9-12 (1995); Thomas M. Franck, *Clan and Superclan: Loyalty, Identity and Community in Law and Practice*, 90 AM. J. INT'L L. 359, 360-68 (1996). For works on ethnicity, see PAUL R. BRASS, ETHNICITY AND NATIONALISM (1991); ETHNICITY (John Hutchinson & Anthony D. Smith eds., 1996); ETHNICITY: THEORY AND EXPERIENCE (Nathan Glazer & Daniel P. Moynihan eds., 1975).

14. As explained further below, a number of treaties were concluded by which the protection of national minorities was internationalized. "Minorities Treaties" were included in the Peace Treaties of St. Germain, Triano, Neuilly and Lausanne and the Albanian and Lithuanian Declarations. The Minorities Treaties empowered the League of Nations to receive petitions, conduct fact-finding investigations and issue directives to those nations in violation of the treaties. Only one of three cases brought before the Permanent Court of International Justice (PCIJ) was decided, although the court gave five advisory opinions on minority questions between 1923 and 1931. For an explanation of the operation of the treaties, see P. DE AZCÁRATE, THE LEAGUE OF NATIONS AND NATIONAL MINORITIES 92-136 (Eileen E. Brooke trans., 1945); see also generally Francesco Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious, and Linguistic Minorities*, U.N. Doc. E/CN.4/Sub.2/384/Rev.1, U.N. Sales No. E.78.XIV.1 (1979). For PCIJ opinions, see, e.g., Advisory Opinion, *Minority Schools in Albania*, 1935 P.C.I.J. (ser. A/B) No. 62 (Apr. 6); Advisory Opinion, *Treatment of Polish Nationals*, 1932 P.C.I.J. (ser. A/B) No. 44 (Feb. 4); Advisory Opinion No. 17, *Interpretation of the Convention Between Greece and Bulgaria Respecting Reciprocal Emigration*, 1930 P.C.I.J. (ser. B) No. 17 (July 31).

15. In particular, the Convention Between Germany and Poland Relating to Upper Silesia, May 15, 1922, Pol.-Ger. 9 L.N.T.S. 466 [hereinafter *Convention Relating to Upper Silesia*] (known as the "Geneva Convention" at the time), contained minority rights protections and even permitted individuals to bring cases against their own state. See GEORGES KAECKENBEECK, THE INTERNATIONAL EXPERIMENT OF UPPER SILESIA 47-55 (1942).

16. The Slavic word "narod" means both "nation" and "people."

ety is imposed by Dayton? Is this vision compatible with prior social and legal constructions? Will Dayton be any more successful than the interwar plans at fostering rights and securing peace?

In order to answer these questions one must look both backward and forward. Examination of the historical underpinnings of Dayton has been missing from policy discussions on protection for national minorities in Bosnia and Herzegovina, Croatia and other troubled parts of Central and Eastern Europe. Yet Dayton did not appear from nowhere. It was influenced by earlier international and regional attempts to respond to crumbling states, races for power and demands for self-determination. Understanding the stumbling blocks to Dayton's effective enforcement requires an inquiry into earlier international frameworks designed for constructing peace and patterns of (mis)use of power in response to such frameworks. Additionally, Dayton's attempt to address the question of "national minorities" runs headlong into previous Yugoslav and trans-Yugoslav¹⁷ efforts to manage and construct nationalist identities. Thus, an assessment of Dayton also necessitates an analysis of the ways in which Dayton projects identity constructs onto an already laden identity field: a field in which deep-rooted cultural and legal identity tags have already been reapportioned and redeployed by the protagonists of the wars in Croatia and Bosnia and Herzegovina.¹⁸

This Article opens¹⁹ an exploration of the Dayton Accords through two historical inquiries. First, it analyzes the ways in which Dayton responds to the question of national identity, as framed by earlier notions of group identity. Second, it examines Dayton in light of the minorities rights agreements of the interwar years, beginning with a brief outline of the interwar system²⁰ and proceeding with comparisons of the similarities

17. By "trans-Yugoslav" I mean everything outside of Yugoslavia—that is, international and regional—which could, of course, include Yugoslavia as well.

18. For this point, I am indebted to the work of Nathaniel Berman. See Nathaniel Berman, *The International Law of Nationalism: Group Identity and Legal History*, in DAVID WIPPMAN, *INTERNATIONAL LAW AND ETHNIC CONFLICT* (forthcoming Feb. 1998).

19. I use this terminology as this is only a modest beginning of what must be a much larger project.

20. For a more extended analysis of the minorities provisions of the interwar years, see Nathaniel Berman, "But the Alternative is Despair": *European Nationalism and the Modernist Renewal of International Law*, 106 HARV. L. REV. 1792

and differences with Dayton. My thesis is two-fold. On the one hand, the similarities between Dayton and the treaties of the interwar period could spell disaster for minorities of the Balkans and perhaps elsewhere as well, if the international community continues to repeat its same mistakes. On the other hand, the differences between Dayton and the interwar agreements could provide salvation.

II. NATIONAL IDENTITY: CONSTRUCTS BEFORE AND AFTER DAYTON

Over time, the matter of national identity became increasingly important in the former Yugoslavia due to the regime's attempts to enforce Yugoslav national identity over all other senses of belonging. Although national identity was not the cause of the wars in Croatia and Bosnia and Herzegovina, it provided the soil in which the elites' struggle for power could take root. In turn, this soil was fertilized by a combination of ingredients: the actions and inactions of international financial institutions which led Yugoslavia to the brink of disaster,²¹ tremendous fear and uncertainty among the general populace, heavy state and party control over the broadcast media, a "heritage of authoritarianism,"²² and a lack of civil society. Many have recognized the role of nationalism in fanning the flames of war in the Balkans. Few have analyzed how Dayton responds to national identity constructs hardened by years of war. Yet to be viewed as legitimate by the people of the region, Dayton must at least address the past ways of naming. Moreover, to promote long term peace, Dayton must somehow take steps to break down the virulent national divides.²³ As this

(1993).

21. Susan Woodward is one of the few commentators who speaks of the role of international monetary institutions in the collapse of Yugoslavia. See SUSAN L. WOODWARD, *BALKAN TRAGEDY: CHAOS AND DISSOLUTION AFTER THE COLD WAR* 47-81 (1995).

22. Dušan Janjić, *Resurgence of Ethnic Conflict in Yugoslavia: the Demise of Communism and the Rise of the "New Elites" of Nationalism*, in *YUGOSLAVIA: THE FORMER AND FUTURE* 29, 33 (Payam Akhavan & Robert Howse eds., 1995).

23. This does not mean that Dayton can or should abandon national divides altogether. On the contrary, these divisions exist and will exist for the unforeseeable future. The challenge is to turn virulent, combative nationalism into what Yael Tamir would call "liberal nationalism," that is, a state in which each nation has an actual voice. See generally Yael Tamir, *LIBERAL NATIONALISM* (1993).

section illustrates, Dayton accomplishes neither of these tasks.

This section makes a modest contribution²⁴ to the exploration of the development of national identity by sketching the trend in the former Yugoslavia over three periods: (a) the formal naming of groups in the constitutional developments between 1946 and 1974; (b) the impact of the collapse of Yugoslavia; and (c) the impact of war (1992-1995). Against this backdrop, it outlines Dayton's response: ignoring old ways of naming and cementing its own brand of national identity.

A. *Development of National Identity in Yugoslavia*

1. Constitutional Development

Yugoslavia had three constitutions after World War II and before its collapse:²⁵ 1946, 1963 and 1974. By arranging the legal and social terms with which people were to operate, each of these constitutions had an impact on shaping national identity.²⁶ Officially, everyone was Yugoslav, united for "brotherhood and unity (*bratsvo i jedinstvo*)."²⁷ But by the time of the 1946 Constitution,²⁸ Yugoslavia was divided into two categories—in Zoran Pajić's terms; the hosts and the "historical

24. The contribution is particularly modest in that many other factors can be examined to determine, explore and explain national identity. Based on the assumption that laws influence identity, this section focuses on the formal legal naming of groups. However, this is just the corner of the inquiry.

25. The exact date of the collapse is open to dispute. Some would set the beginning of the collapse before the death of former Yugoslavian leader Josip Broz (known to his supporters as Tito) in May 1980; others would point to the eruptions in Kosovo in March 1989, after the Serbian Parliament stripped Kosovo and Vojvodina of their autonomous status; others point to January 1991 when the Assembly of the Republic of Slovenia adopted the Charter announcing that it would initiate the procedure of disassociation from Yugoslavia; and still other dates can be found. Many books exist on the collapse of Yugoslavia. One of the best is LAURA SILBER & ALLAN LITTLE, *THE DEATH OF YUGOSLAVIA* (1995). See also generally LENARD J. COHEN, *BROKEN BONDS: THE DISINTEGRATION OF YUGOSLAVIA* (1993); BRANKA MAGAŠ, *THE DESTRUCTION OF YUGOSLAVIA* (1993); MARK THOMPSON, *A PAPER HOUSE: THE ENDING OF YUGOSLAVIA* (1992); WOODWARD, *supra* note 21; YUGOSLAVIA: THE FORMER AND FUTURE, *supra* note 22. For an overview of ethnic politics in all parts of the former Yugoslavia, see JANUSZ BUGAJSKI, *ETHNIC POLITICS IN EASTERN EUROPE* (1995).

26. This does not of course settle the question of which came first, the identity or the Constitution.

27. "Brotherhood and unity" was the slogan of the Tito era. See, e.g., Ivan Vejvoda, *Yugoslavia 1945-91—From Decentralisation Without Democracy to Dissolution*, in D.A. DYKER & I. VEJVODA, *YUGOSLAVIA AND AFTER* 10, 11 (1996).

28. YUGO. CONST. of 1946.

guests."²⁹ The hosts, or nations (*narod*), were: Serbs, Croats, Slovenes, Macedonians and Montenegrins. The guests were called national minorities. Under the 1946 Constitution, sovereignty rested with the people.

With the 1963 Constitution, national minorities were redesignated as nationalities (*narodnosti*),³⁰ apparently because the word "minority" was perceived to be too demeaning. Nationality includes all those with a national homeland elsewhere, such as Albanians, Hungarians, Italians, Bulgarians, Turks, Slovaks, Czechs and Russians. Those without a homeland elsewhere, such as the Romanians and Vlachs, were seemingly left outside the 1963 Constitution, but some were outside of nationalities—those without a country elsewhere. After the 1963 Constitution, Muslims were elevated in status from a nationality to a nation.³¹

The 1974 Constitution was a turning point in which national differences became "constitutionally enshrined."³² Article 1 of the 1974 Constitution defines Yugoslavia as "a federal state having the form of a state community of voluntarily united nations and their Socialist Republics."³³ The possessive construction of this provision is important: the republics belonged to the nations. Many people lived outside of their national homeland, however, frequently in their own national community, and thus the fit between homeland and nation could not be complete. Unlike earlier constitutions, under the 1974 Constitution, sovereignty did not rest simply with the people. Instead, sovereignty rested in the "sovereign rights" that the "nations and nationalities shall exercise . . . in the Socialist Republics, and in the Socialist Autonomous Provinces . . . [and] in the Socialist Federal Republic of Yugoslavia

29. Zoran Pajić, *Bosnia-Herzegovina: From Multiethnic Coexistence to "Apartheid" . . . and Back*, in YUGOSLAVIA: THE FORMER AND FUTURE, *supra* note 22, at 152, 162.

30. See GIBBERT H. FLANZ, CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: YUGOSLAVIA 10 (Albert P. Blaustein & Gisbert H. Flanz eds., 1971); see also YUGO. CONST. of 1963, reprinted in FLANZ, *supra*, at 1.

31. See FRITS W. HONDIUS, THE YUGOSLAV COMMUNITY OF NATIONS 247-48 (1968).

32. This term is used in Katherine Verdery, *Nationalism and National Sentiment in Post-Socialist Romania*, 52 SLAVIC REV. 179, 184 (1993); and Mary Kaldor, *Cosmopolitanism Versus Nationalism: The New Divide?*, in EUROPE'S NEW NATIONALISM 42, 49 (Richard Caplan & John Feffer eds., 1996).

33. YUGO. CONST. of 1974 art. 1.

when in their common interests"³⁴

In a manner that lent more importance to national identity, power under the 1974 Constitution was further decentralized from the federal to the republic level. Each of Yugoslavia's six republics and two provinces had a central bank, separate police, and educational and judicial systems. So did Serbia's two provinces, Kosovo and Vojvodina. Important economic and political perks were divided on the sub-federal level; that is, to the six republics and two provinces. These units, with the exception of Bosnia and Herzegovina, were *de facto*³⁵ organized largely around national identity, based on the majority nation of that region. Thus, rewards were in fact based on national status. Through such arrangements, "ethnicity [national status], which had seemingly been buried by the 1971 intervention [Tito's squelching of nationalist movements in Croatia], returned by the back door."³⁶

The "nationality key" system was another institutional arrangement which effectively promoted nationalist interests.³⁷ A proportional representation scheme, the "key" became a means for many incompetent and/or corrupt party members to achieve positions of importance simply because they were of the right national status. Obligated to support those who promoted them, these politico-bureaucrats were often subject to manipulation at the hands of their leaders. Within each republic or province, popular backlash began against the incompetents of the minority nation who had been promoted to high positions of power, thus indirectly widening national divides.

34. *Id.* preamble. To confuse matters more, Article 244 provided that "nations, nationalities, working people, and citizens shall realize and ensure sovereignty." *Id.* art. 244. For an analysis of this provision, see Vojin Dimitrijević, *The 1974 Constitution and Constitutional Process as a Factor in the Collapse of Yugoslavia*, in YUGOSLAVIA: THE FORMER AND FUTURE, *supra* note 22, at 45, 55-56.

35. Formally, the "national key" system demanded a system of proportional representation. See SILVO DEVETAK, THE EQUALITY OF NATIONS AND NATIONALITIES IN YUGOSLAVIA 8 (1988); Dimitrijević, *supra* note 34, at 59, 61.

36. George Schöpflin, *The Rise and Fall of Yugoslavia*, in THE POLITICS OF ETHNIC CONFLICT REGULATION 172, 190 (John McGarry & Brendan O'Leary eds., 1993).

37. The use of the terminology "national key" is quite common in Yugoslav literature. For one recent English usage, see Una Sekerez, *Nation and State Building in Bosnia and Herzegovina* (visited Jan. 9, 1998) <<http://www.cep.yale.edu/projects/studcon/papers/95/sekerez.html>>; see also JELAVICH, *supra* note 3, at 400.

Other key attributes of the Yugoslav constitutional system pertaining to national minorities included seemingly vast poly-ethnic rights,³⁸ such as the right to use one's own language in public and to primary education in one's own language. This was counter-balanced by constitutional prohibitions *against* propagating or practicing national inequality and incitement of national, racial or religious hatred and intolerance.

Even after the 1974 Constitution, Yugoslavia operated politically as a unitary state governed by a centralized Communist party. As Vojin Dimitrijevic has observed, "[p]arty members were submitted to the strict discipline of 'democratic centralism' and were removable by the decision of the superior party organs, which were obeyed even if they violated the [1974] Constitution and its laws."³⁹ The greatest flaw of the 1974 Constitution was that it set up a "census" system which officially "prevented any decisions from being adopted if opposed by any single federal unit (including the autonomous provinces.)"⁴⁰ This further weakened the federation "by paralyzing the decision-making process and removing real authority of federal decisions,"⁴¹ placing it back in the hands of the party. With everything in the control of the party, individuals had little incentive to become involved in politics and thus, the idea of a civil society was nearly nonexistent.

2. Collapse: Sorting Out Process⁴²

The collapse of Yugoslavia evidenced an even greater sorting out process according to national identity. Sovereignty, equated quickly with the right to have an independent state, was used as a rhetorical device along national lines, with each side claiming to have its own. Similarly, national status was used as a rhetorical device, with each side, beginning with the Serbs, pitting themselves against the evil "Other."⁴³

38. I take this characterization from WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP* 30-33 (1995).

39. Dimitrijević, *supra* note 34, at 72-73.

40. *Id.* at 60.

41. *Id.* at 71.

42. This section is condensed in the interest of space. An examination of the process of collapse can be found in JULIE MERTUS, *NATIONAL TRUTHS: REMEMBERING KOSOVO* (forthcoming 1998).

43. This process began first in Kosovo. See generally Julie Mertus, *Remember Kosovo?*, 8 *UNCAPTIVE MINDS* 65 (1995-96). The group known as "Others," which

In the first real elections, nationalism became the mechanism for political differentiation.⁴⁴ Few alternative categories existed to distinguish the candidates; the previous authoritarian regime had not encouraged the development of civil society in which more sophisticated differences could have emerged. Political and economic structures swayed under the weight of internal bickering as new leaders struggled for power and international financial institutions pressed Yugoslavia to pay its long overdue bills.⁴⁵ This situation fostered intense nationalist bureaucratic competition, and often corruption, often along national lines.⁴⁶ Certainly, nationalism was not the only force pushing Yugoslavia toward collapse, but it was a crucial ingredient.

3. The Impact of War: Closing of the Ranks

War led to the closing of the ranks through a series of interrelated steps. First, it accomplished the complete demonization of the Other. In the beginning, it was the intense, state-controlled propaganda machines that broadcast stories of the Other's inhumanity. Over time, many witnesses and victims of acts of great cruelty began to tell their stories—and their neighbors listened. The diaspora often played an important role in this demonization process. Far away from the region, living in nationally homogeneous marriages (at least at a rate much higher than their kin back home), the diaspora had an easier time painting the Other as evil.⁴⁷

Second, war accomplished physical national segregation. People who were forced to leave their villages and cities because of their national background crowded into new cities, creating new enclaves of "their own people."⁴⁸ Segregation

included Italians, Jews, and some mixed families, were citizens of regions in the former Yugoslavia that held no "ethnic allegiance." Fred L. Morrison, *The Constitution of Bosnia-Herzegovina*, 13 CONST. COMMENT. 145, 146 (1996).

44. See Kaldor, *supra* note 32, at 50.

45. See WOODWARD, *supra* note 21, at 73-81.

46. See *id.* at 82-88.

47. Those who experienced wartime atrocities tend to be much less likely to seek revenge against an entire group of people, although they may want to avenge the death or torture of a particular family member. See generally THE SUITCASE: REFUGEES VOICES FROM BOSNIA AND CROATIA (Julie Mertus et al. eds & Jelica Todosijevic et al. trans., 1997).

48. For documentation of this process, see HUMAN RIGHTS WATCH, WAR

exploited and created Otherness.

Finally, war closed the ranks. People throughout the former Yugoslavia were forced to decide who they were among three narrow choices: Serb, Croat or Muslim. This left four categories of people without any identity: those of mixed parentage or marriage; those who were of another national identity, such as Albanian or Hungarian; those who wanted to identify themselves as something else, either above the nation, such as European, or below the nation, such as a member of a particular neighborhood or organization; and those who wanted out of the labeling process altogether. Those who failed to make a choice usually left the country (if they could) or fell silent. A few stubbornly fought back,⁴⁹ despite the extreme backlash against anything different and potentially challenging to the Nation.⁵⁰

B. Dayton's Response: Cementing the National Divide

The Dayton Accords almost completely jettison the familiar terminology of the past—nation (*narod*) and nationalities (*narodnosti*). The agreement does not even mention the words “nations” and “nationalities,” except in referring to international documents by name and in a section on the rights of refugees to return.⁵¹ Instead, the Constitution of the Republic of Bosnia and Herzegovina, which is contained in an annex to Dayton, refers generally to three groups: Bosniacs,⁵² Croats and Serbs as “constituent peoples (along with Others).”⁵³

CRIMES IN BOSNIA-HERZEGOVINA 62-77 (Helsinki Watch Report, Aug. 1992).

49. Many of those who rejected the national labels were women's groups (although of course not all women's groups were non-nationalistic). For an example of a non-nationalist, anti-militarist women's group, see WOMEN FOR PEACE (Miranda Collet et al. trans., 1996).

50. See Andjelka Milić, *Nationalism and Sexism: Eastern Europe in Transition*, in EUROPE'S NEW NATIONALISM, *supra* note 32, at 169, 170-71.

51. See Dayton Accords, *supra* note 6, Annex 7, 35 I.L.M. 136, 136-40 [hereinafter Refugees Annex].

52. According to some observers and participants in the peace process, the term Bosniacs has become “a euphemism for Muslim.” Paul Szasz, Remarks, A Year After Dayton: Has the Bosnian Peace Process Worked?, Conference sponsored by the Orville H. Schell, Jr. Center for International Human Rights, the Council on Foreign Relations, and Yale United Nations Legal Studies (Nov. 15-16, 1996). However, Bosniac could also mean all who do not identify with the earlier two categories.

53. BOSN. & HERZ. CONST. preamble.

Those who do not fall into this "group of three" see their status reduced from nation (*narod*) or national minority (*narodnosti*) to Other.⁵⁴ The new framework of naming demeans those who could not or will not choose among the three groups. By omitting the words perceived as troublesome, Dayton does not make the trouble go away. Instead, it lays a new foundation for conflict.

Dayton actually further cements the national divide by creating a system of nation-based governance. Under Dayton, two smaller sub-Entities are drawn according to battlelines, which in turn reflect national identity: Republika Srpska (Bosnian Serb) and the Federation of Bosnia and Herzegovina (Croat and Muslim/Bosniac).⁵⁵ These two Entities are held together by a "thin roof"⁵⁶—a central government with so little power that it "makes the American Articles of Confederation of two centuries ago look like a centralized, unitary form of government."⁵⁷ The central government, the Republic of Bosnia and Herzegovina,⁵⁸ is responsible for: foreign policy; foreign trade; customs; monetary policies; immigration, refugee and asylum policy and regulation; international and inter-Entity criminal law enforcement; establishment of international communication facilities; regulation of inter-Entity transportation; air traffic control; enacting legislation to carry out the decisions of the Presidency or responsibilities of the federal Assembly; and funding and budgeting for federal institu-

54. The Constitution of the Federation of Bosnia and Herzegovina (the smaller Entity) makes clear that there are only two constituent nations—Bosniacs (Muslims) and Croats—thereby devaluing the status of Serbs to invisibility. See Proposed Constitution of the Federation of Bosnia and Herzegovina, Mar. 18, 1994, preamble, art. 1(1), 33 I.L.M. 743, 743-44; Preliminary Agreement Concerning the Establishment of a Confederation Between the Federation of Bosnia and Herzegovina and the Republic of Croatia, Mar. 18, 1994, 33 I.L.M. 611.

55. See BOSN. & HERZ. CONST. art. I(3).

56. This term has been used by Muhamed Sacirbey and others involved in the Dayton negotiations. Muhamed Sacirbey, Remarks, A Year After Dayton: Has the Bosnian Peace Process Worked?, Conference sponsored by the Orville H. Schell, Jr. Center for International Human Rights, the Council on Foreign Relations, and Yale United Nations Legal Studies (Nov. 15-16, 1996). However, Bosniac could also mean all who do not identify with the earlier two categories.

57. Morrison, *supra* note 43, at 145.

58. Note the confusion in terminology: the larger body is the republic, but so is one of the smaller parts—Republika Srpska—while the other smaller part is called a federation—The Federation of Bosnia and Herzegovina.

tions.⁵⁹ The balance of powers, including promulgation and enforcement of local civil and criminal laws and control over courts (except for the joint Constitutional Court, the only federal court), is given to the Entities.⁶⁰

The entire federal government is divided into threes based on the same limited choice of national identity—Serb, Croat or Muslim (Bosniac).⁶¹ The executive arm of the government has three presidents, one from each group.⁶² Even the armed forces are decentralized into threes. The Constitution states that “[e]ach member of the Presidency shall, by virtue of the office, have civilian command authority over armed forces.”⁶³ Given that each national group has at least one army, this provision effectively creates three armies divided along national lines.⁶⁴ The bi-cameral legislature is similarly proportioned equally into the three national categories. The upper house (House of Peoples) has five representatives from each group and the lower house (House of Representatives) has fourteen of each group—Serb, Croat and Muslim (Bosniac).⁶⁵

Dayton perpetuates the rule of consensus that previously worked so well to block any chance of democratic decision-making and to promote national splintering.⁶⁶ Fred Morrison explains:

With respect to most civilian matters, the Presidency acts by consensus

In the legislative branch . . . there are similar checks and few balances In the upper house, the House of Peoples, a majority of each ethnic group must be present in order for there to be a quorum, so a dissenting ethnic group could forestall action if three of its five members fail to attend sessions. In both houses, the presiding officers are supposed to encourage decisions to be taken with a majority of each ethnic group concurring. Failing such broad support, a simple majority may take action, but if two-thirds of an ethnic group opposes the legislation, it does not take effect.

59. See BOSN. & HERZ. CONST. arts. III(1), IV(4).

60. See *id.* arts. III(2)(c), (3)(a), VI.

61. See generally *id.* arts. IV, V.

62. See *id.* art. V.

63. *Id.* art. V(5)(a).

64. See Morrison, *supra* note 43, at 149.

65. See BOSN. & HERZ. CONST. art. IV(1)-(2), (3)(b).

66. See *id.* arts. IV(3)(d)-(e), V(2)(c).

There is still another "ethnic veto." A majority of the five members of the upper house from any one of the ethnic groups may declare a proposed decision of the legislature to be "destructive of a vital interest" of that ethnic group. Such a declaration then requires the votes of the upper house to be taken separately; a majority of each of the three ethnic "caucuses" is necessary for passage. (If a majority of an ethnic group has already identified a decision as "destructive," it seems unlikely that a majority of that same group will vote for the legislation.)⁶⁷

The complex consensus provisions, Laura Silber and Allan Little have explained, were adopted at Dayton not because they will work, but because Serbian President Slobodan Milosevic refused to sign the agreement without them.⁶⁸ Milosevic knew well that if the government had been permitted to operate through some form of majority vote, a coalition of Muslims and Croats could have always outvoted the Serbs.⁶⁹ On the other hand, the present compromise grants any national group the power to make the Dayton governments unworkable.

"Kin-states"—that is, states composed primarily of the same national group as another entity⁷⁰—are granted great leeway under the plan. The Constitution for the Federation of Bosnia and Herzegovina explicitly permits each Entity to "establish special parallel relationships with neighboring states consistent with the sovereignty and territorial integrity of Bosnia and Herzegovina."⁷¹ Most federal constitutions forbid their smaller units from entering into treaties or other agreements with foreign governments. Among the foreseeable arrangements, the aforementioned provision will likely permit Republika Srpska to enter into agreements with Yugoslavia (also predominately ethnic Serb).

On a more positive note, neutrals play a key role in the new government, particularly with respect to decision-making bodies considering questions of human rights and related is-

67. Morrison, *supra* note 43, at 149 (footnotes omitted) (quoting BOSN. & HERZ. CONST. art. IV(3)(e)).

68. See SILBER & LITTLE, *supra* note 25, at 308-10.

69. See *id.* at 308.

70. See Berman, *supra* note 20, at 1827.

71. BOSN. & HERZ. CONST. art. III(2)(a).

sues.⁷² The role of neutrals, unlike the exclusionary naming of groups and the nation-based structure of government, tends to be viewed as a legitimate, potentially workable step by the people of the region. The Constitutional Court is made up of nine members, two of each national group and three foreign neutrals appointed by the European Court of Human Rights.⁷³ The European Court of Human Rights also appoints three outsiders to join the six local members (two of each group) of a commission that will consider claims of refugees.⁷⁴ The Organization for Security and Cooperation in Europe (OSCE) appoints the Human Rights Ombudsman, an individual from another geographic area who will investigate and make reports on human rights (focusing on present violations, not those during war).⁷⁵ The Committee of Ministers of the Council of Europe appoints eight outside members to complement the six local members (again, two of each group) of the Human Rights Chamber, a body that reviews complaints filed by individuals or by the Ombudsman.⁷⁶ Similarly, the United Nations Educational, Scientific and Cultural Organization (UNESCO) appoints two outside members to a five member Commission to Preserve National Monuments.⁷⁷

Also on a positive note, Dayton establishes an extensive structure for human rights for minorities, the return of refugees and the restitution of property.⁷⁸ These guarantees are

72. See *id.* art. II(1)-(2); see generally Dayton Accords, *supra* note 6, Annex 6, 35 I.L.M. 130, 130-36 [hereinafter Human Rights Annex]. This reflects a growing trend in which states authorize external intervention in their internal affairs. For a discussion of the legality of these measures, see David Wippman, *Treaty-Based Intervention: Who Can Say No?*, 62 U. CHI. L. REV. 607, 684-87 (1995).

73. See BOSN. & HERZ. CONST. art. VI(1). The Constitutional Court has appellate jurisdiction over cases involving constitutional issues and original jurisdiction in cases arising between the Entities, the Entities and the Central government, or among the organs of the central government. See *id.* art. VI(3)(a)-(b). Significantly, in human rights cases, the court can hear legal questions referred from the courts of either Entity. See *id.* art. VI(3)(c). However, referral is strictly in the discretion of the local courts. See *id.*

74. See Refugees Annex, *supra* note 51, arts. VI, IX(1), 35 I.L.M. 138-39.

75. See Human Rights Annex, *supra* note 72, arts. IV-V, 35 I.L.M. 132.

76. See *id.* arts. V(7), VII(1)-(2), 35 I.L.M. 132-33.

77. Dayton Accords, *supra* note 6, Annex 8, art. II(1), 35 I.L.M. 144, 145 [hereinafter National Monument Annex].

78. These guarantees are found in three sections of the Dayton Accords: Annex 6 (The Agreement on Human Rights); Annex 7 (The Agreement on Refugees and Displaced Persons); and the Preamble, Article II, and the Annex (listing international and regional human rights documents) to the Constitution of Bosnia and

intended to counter-balance the nationalist divides created elsewhere in the Dayton structure and to provide protection for those who live outside "their appropriate" Entity—mainly Muslims and Croats living in Republika Srpska. A massive return of the expelled would only enhance the need for minority rights guarantees.⁷⁹ The Constitution declares that "Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms."⁸⁰ To accomplish this goal, on the one hand, Dayton creates new mechanisms, such as the Human Rights Chamber,⁸¹ Office of the Ombudsman⁸² and Refugee Commission⁸³ and, on the other hand, it builds in an array of existing international and regional human rights systems and mechanisms. Dayton both lists a series of rights⁸⁴ and incorporates a list of international and regional instruments.⁸⁵ Of all of these instruments, the European Convention is supreme. The Constitution specifies that the European Convention and its protocols "shall apply directly in Bosnia and Herzegovina" and "shall have priority over all other law."⁸⁶

Dayton includes numerous protections for people of minority nations, albeit for the most part of an individualistic and not collective nature. For example, the Constitution of Bosnia and Herzegovina contains a nondiscrimination principle which insures that rights are granted, on a nondiscriminatory basis, to individual persons associated with a particular national status, instead of to peoples, communities or nations.⁸⁷ At the

Herzegovina. For a concise analysis of this structure, see Szasz, *supra* note 6, at 308-10.

79. According to Ambassador Robert Frowick, Head of the Mission in Bosnia and Herzegovina for the OSCE, it is estimated that as of November 1996, at least 200,000 refugees and displaced people had returned. Robert Frowick, Remarks, A Year After Dayton: Has the Bosnian Peace Process Worked?, Conference sponsored by the Orville H. Schell, Jr. Center for International Human Rights, the Council on Foreign Relations, and Yale United Nations Legal Studies (Nov. 15-16, 1996).

80. BOSN. & HERZ. CONST. art. II(1).

81. See Human Rights Annex, *supra* note 72, arts. VII-VIII, 35 I.L.M. 133.

82. See *id.* arts. IV-V, 35 I.L.M. 132.

83. See Refugees Annex, *supra* note 51, arts. VII-IX, 35 I.L.M. 138-39.

84. See BOSN. & HERZ. CONST. art. II(3)(a)-(m); Human Rights Annex, *supra* note 72, art. I(1)-(13), 35 I.L.M. 130-31.

85. See Human Rights Annex, *supra* note 72, app. (Human Rights Agreements), 35 I.L.M. 136.

86. BOSN. & HERZ. CONST. art. II(2).

87. See BOSN. & HERZ. CONST. art. II(4).

same time, the Constitution of Bosnia and Herzegovina grants citizenship regardless of "association with a national minority"⁸⁸ and the Annexed Agreement on Refugees and Displaced Persons calls for the prosecution of persons in the military, paramilitary and police forces who are "responsible for serious violations of the basic rights of persons belonging to ethnic or minority groups."⁸⁹ In addition, many of the regional and international guarantees referenced by the document safeguard the rights of minorities.⁹⁰ While nearly all of these guarantees apply to individuals and not collectives, two of the regional instruments provide particularly extensive guarantees for national minorities: the 1992 European Charter for Regional and Minority Languages⁹¹ and the 1994 Framework Convention for the Protection of National Minorities (Framework Convention).⁹²

Also significant for national minorities, the Dayton Accords contain extensive provisions requiring the encouragement of and cooperation with international human rights organizations.⁹³ Among these organizations are the United Nations (UN) Commission on Human Rights, the UN High Commissioner on Human Rights, the OSCE and the supervisory bodies of human rights treaties and the International War Crimes tribunal for the Former Yugoslavia.⁹⁴ Furthermore, Dayton establishes an International Police Task Force to "provide a safe and secure environment for all persons in their respective jurisdictions, by maintaining civilian law enforcement agencies operating in accordance with internationally

88. *Id.* art. I(7)(b).

89. Refugees Annex, *supra* note 51, art. I(3)(e), 35 I.L.M. 137.

90. These agreements are listed in the BOSN. & HERZ. CONST. Annex 1, and the Human Rights Annex, *supra* note 72, app. (Human Rights Agreements), 35 I.L.M. 136.

91. European Charter for Regional or Minority Languages, Nov. 5, 1992, Europ. T.S. No. 148.

92. Framework Convention for the Protection of National Minorities, Feb. 1, 1995, 34 I.L.M. 351 [hereinafter Framework Convention].

93. Human Rights Annex, *supra* note 72, art. XIII, 35 I.L.M. 135.

94. *See id.* art. XII(2). For the main agreements on the International War Crimes Tribunal for the Former Yugoslavia, see G.A. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., U.N. Doc. S/RES/808 (1993); G.A. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993); *Report of the Secretary-General*, U.N. Doc. S/25704, revised by U.N. Doc. S/25704/Corr.1 (1993); *The Rules of Procedure and Evidence of the Tribunal Adopted on February 11, 1994*, U.N. Doc. IT/32, revised by U.N. Doc. IT/32/Rev.9 (1996).

recognized standards and with respect for internationally recognized human rights and fundamental freedoms."⁹⁵

To work, these human rights guarantees must somehow be enforced. Without enforcement, the operation of the Dayton Accords may well serve to legitimize nationalist interests under the guise of protecting minorities and securing peace. Will the positive measures undertaken to promote human rights be sufficient to counter-balance the seemingly inoperable system of government created by Dayton and its demeaning of peoples who do not or will not fit into the "group of threes?" As we will see from the discussion below, the legal techniques utilized by Dayton have much in common with the interwar techniques.

III. THE INTERWAR PLANS: DAYTON'S GHOST

After World War I, despite the radical rearrangement of European boundaries in line with a principle of nationality, and despite widescale population shifts in line with those definitions, it was impossible to eliminate racial, religious and language minorities. The twenty to twenty-five million people who remained outside of their nation-state were placed under the protection of the League of Nations to enable them to "live side by side in one and the same State, without succumbing to the temptation of each trying to force his own nationality on the other."⁹⁶

By design, the League of Nations system for international protection of minorities was *exceptional*: it applied to a limited set of states and a limited set of rights. Furthermore, "[i]t purported not to establish 'a general jurisprudence applicable wherever racial, linguistic, or religious minorities existed,' but to facilitate the solution of minority problems in countries where 'owing to special circumstances, these problems might present particular difficulties.'"⁹⁷ The second limitation was never really an issue: no states argued that minorities should

95. Dayton Accords, *supra* note 6, Annex 11, art. I(1), 35 I.L.M. 149, 150 [hereinafter Police Task Force Annex].

96. JACOB ROBINSON ET AL., WERE THE MINORITIES TREATIES A FAILURE? 35 (1943) (quoting Prince von Buelow, director of German foreign policy from 1897 to 1909, who believed that it was impossible for people of different nations to live side by side peacefully).

97. CLAUDE, *supra* note 2, at 17; see also JULIUS STONE, INTERNATIONAL GUARANTEES OF MINORITY RIGHTS 14 (1932).

have *more* rights.⁹⁸ However, the second limitation would plague the League of Nations system, as the states subject to the provisions—the so-called minorities states—felt unjustly discriminated against as differential obligations had been imposed on them by the Great Powers. The selective nature of the system eroded its legitimacy and hindered adherence to its terms.⁹⁹ In general, the system consisted of three types of obligations: (1) Multi-partite minorities treaties and the special chapters of peace treaties dealing with minorities; (2) Declarations made by certain states before the Council of the League of Nations;¹⁰⁰ and (3) Regional, bipartite agreements, in particular the German-Polish Convention of May 15, 1922, relating to Upper Silesia.¹⁰¹

The instruments signed by various states took form according to the status of the state.¹⁰² Defeated states—Austria, Hungary, Bulgaria and Turkey—were bound by minority provisions inserted into the various peace treaties.¹⁰³ New or enlarged states—Poland, Czechoslovakia, Yugoslavia, Rumania and Greece—concluded special minority treaties with the Principal Allies and the Associated Powers (France, Japan, the United Kingdom and the United States).¹⁰⁴ States that faced pressure on minorities rights issues when they applied to membership with the League—Albania, Lithuania, Latvia, Estonia, Finland (in respect of the Aland Islands); and Iraq—made declarations to the Council of the League of Na-

98. However, some minority groups did argue that they should have more affirmative rights. For a history of the drafting process and explanation of why stronger minority provisions did not prevail, see generally OSCAR I. JANOWSKY, *THE JEWS AND MINORITY RIGHTS (1898-1919)* (1933).

99. This complaint is "completely unjustifiable" according to Pablo de Azcárate and to Inis Claude, who argue that the choice was between selective minorities treaties and *no* minorities treaties. See PABLO DE AZCÁRATE, *PROTECTION OF NATIONAL MINORITIES 12* (Carnegie Endowment for Int'l Peace Occasional Paper No. 5, 1967); see also CLAUDE, *supra* note 2, at 36.

100. The declarations were addressed to "no other body than the League [of Nations], as the guarantor of the declared obligations, charged with assuring compliance with the stipulated provisions." ROBINSON ET AL., *supra* note 96, at 83. The PCIJ expressed the opinion that the declarations carried the same binding force as conventional undertakings. See Capotorti, *supra* note 14, at 18 n.17.

101. Convention Relating to Upper Silesia, *supra* note 15; see also generally JULIUS STONE, *REGIONAL GUARANTEES OF MINORITY RIGHTS* (1933).

102. See CLAUDE, *supra* note 2, at 16.

103. See *id.*

104. See *id.*

tions.¹⁰⁵ Germany received somewhat special status as a Great Power (although the reason for the special status was never formally acknowledged and articulated as such). Germany signed a bilateral treaty with Poland which created a special minority regime for Upper Silesia.¹⁰⁶

The instruments purported to safeguard certain rights of "racial, religious or linguistic minorities," but the framers of the system made it clear that they regarded this terminology as synonymous with "national minorities."¹⁰⁷ The obligations contained in the Minorities Treaties fall into four general categories: (a) nationality; (b) negative rights; (c) positive rights;¹⁰⁸ and (d) specific minority provisions. With the exception of the latter category, the exact wording of the articles varied little from treaty to treaty.

A. *Nationality provisions*

The nationality provisions contained in the minority treaties concluded under the League of Nations system concerned the acquisition of nationality by persons belonging to minority groups and the right to opt for the state to which they formerly belonged. For example, the treaty with the Serb-Croat-Slovene State declared "to be Serb-Croat-Slovene nationals *ipso facto* and without the requirement of any formality, Austrian, Hungarian or Bulgarian nationals habitually resident or possessing rights of citizenship"¹⁰⁹ or "born in the said territory of par-

105. *See id.*

106. *See* Convention Relating to Upper Silesia, *supra* note 15. Although a number of additional bi-lateral minority agreements were concluded in the interwar years, unlike the Upper Silesia agreement, they were external to the League of Nations minority system. *See* CLAUDE, *supra* note 2, at 16.

107. *Cf.* ROBINSON ET AL., *supra* note 96, at 40-41.

108. The PCIJ recognized the need for both nondiscrimination provisions (negative protections) and positive measures. In the *Minority Schools in Albania* case, the Court noted:

These two requirements [of negative and positive equality] are indeed closely interlocked, for there would be no true equality between a majority and a minority if the latter were deprived of its own institutions, and were consequently compelled to renounce that which constitutes the very essence of its being as a minority.

Advisory Opinion, *Minority Schools in Albania*, 1935 P.C.I.J. (ser. A/B) No. 62, at 17.

109. Treaty Between the Principal Allied and Associated Powers (the British Empire, France, Italy, Japan and the United States), and the Serb-Croat-Slovene State, Sept. 10, 1919, art. 3, 226 Consol. T.S. 182, 185 [hereinafter Serb-Croat-

ents habitually resident or possessing rights of citizenship."¹¹⁰ The treaty went on to state that "[n]evertheless, the persons referred to above who are over eighteen years of age will be entitled under the conditions contained in the said treaties to opt for any other nationality which may be open to them."¹¹¹

B. Negative Rights

Individuals belonging to minority groups were granted nondiscrimination and negative equality rights under the League of Nations system, irrespective of their minority status. The treaties demanded, with only minor variations: (1) right to life and liberty—"full and complete protection of life and liberty" irrespective of "birth, nationality, language, race or religion;"¹¹² (2) "free exercise, whether public or private, of any creed, religion or belief, whose practices are not inconsistent with public order or public morals;"¹¹³ (3) equality before the law and enjoyment of the same civil and political rights "without distinction as to race, language or religion;"¹¹⁴ and (4) no interference with the "enjoyment of civil and political rights, as for instance admission to public employments, functions and honours, or the exercise of professions and industries" because of "[d]ifference of religion, creed or confession."¹¹⁵

C. Positive rights

The League of Nations treaties also included provisions which promoted "positive equality;" that is, provisions for the equality of minorities to "preserve and develop their national culture and consciousness."¹¹⁶ These measures allowed minorities: (1) the use of their own language in private relations;¹¹⁷

Slovene Minority Treaty].

110. *Id.* art. 4, 226 Consol. T.S. at 186.

111. *Id.* art. 3, 226 Consol. T.S. at 185. The treaty further provided: "Option by a husband will cover his wife and option by parents will cover their children under eighteen years of age," and that "[a]ll persons born in the territory of the Serb-Croat-Slovene State who are not born nationals of another State shall *ipso facto* become Serb-Croat-Slovene nationals." *Id.* arts. 3, 6, 226 Consol. T.S. at 185-86.

112. *Id.* art. 2, 226 Consol. T.S. at 185.

113. *Id.*

114. *Id.* art. 7, 226 Consol. T.S. at 186.

115. *Id.*

116. AZCÁRATE, *supra* note 14, at 82.

117. See Serb-Croat-Slovene Minority Treaty, *supra* note 109, art. 7, 226

(2) the use of their own language before the Courts;¹¹⁸ (3) adequate facilities for a public education in primary schools in their own language, whenever there was a "considerable proportion" of minority students;¹¹⁹ (4) the establishment of religious and welfare institutions, schools and other educational facilities under their own control and with their own language;¹²⁰ (5) the right to an equitable proportion of state and communal expenditures for educational, religious and welfare purposes.¹²¹

D. *Specific Minorities Provisions*

For the most part, the provisions applied equally to members of all minority groups within the jurisdiction of a particular treaty. However, Muslims received special protections in the treaties with Greece and the Kingdom of Serbs, Croats and Slovenes.¹²² This was done over the objection of leaders of the Muslim community who argued that they should be considered a majority people, not a minority.¹²³ Similarly, special provisions for Jews were included in the treaties with Greece, Po-

Consol. T.S. at 186.

118. *See id.*

119. *See id.* art. 9, 226 Consol. T.S. at 187. The full text of the first paragraph of the article reads:

The Serb-Croat-Slovene Government will provide in the public educational system in towns and districts in which a considerable proportion of Serb-Croat-Slovene nationals of other speech than that of the official language are resident adequate facilities for ensuring that in the primary schools the instruction shall be given to the children of such Serb-Croat-Slovene nationals through the medium of their own language. This provision shall not prevent the Serb-Croat-Slovene Government from making the teaching of the official language obligatory in said schools.

Id.

120. *See Minorities Treaty Between the Principal Allied and Associated Powers (the British Empire, France, Italy, Japan, and the United States) and Poland, June 13, 1919, art. 8, 225 Consol. T.S. 412, 417 (giving minorities "an equal right to establish, manage and control at their own expense . . . religious and social institutions.")*

121. *See id.* arts. 9, 10, 225 Consol. T.S. at 418.

122. The Serb-Croat-Slovene State agreed "to grant the Muslims in the matter of family law and personal status provisions suitable for regulating these matters in accordance with Muslim usage . . . to ensure protection for the mosques, cemeteries and other Muslim religious establishments," and to grant full recognition to "Muslim pious foundations (Wakfs) and religious and charitable establishments." Serb-Croat-Slovene Minority Treaty, *supra* note 109, art. 10, 226 Consol. T.S. at 186-87.

123. *Cf. JELAVICH, supra* note 3, at 151.

land and Romania, as well as in the Lithuania declaration.¹²⁴ Stipulations for the Magyar and Saxon communities in Transylvania were included in the treaty with Romania; Czechoslovakia provided for an autonomous territory for Ruthenians; and Greece accepted special obligations for the Vlachs of the Pindus region and for the non-Greek communities of Mount Athos.¹²⁵

As worded, the minorities clauses can be read in a wholly individualistic way, to protect the rights of individual members of minorities instead of minority groups as collective Entities.¹²⁶ The drafters deliberately avoided terminology that would have clearly given minorities status as corporate units (except for the purpose of allocation of an equitable share of public funds for schools and the like).¹²⁷ To recognize minorities *per se*, the drafters feared, would be to recognize "states within states," a concept at odds with then prevalent absolute notions of state sovereignty.¹²⁸ Thus, even the positive rights were individually framed, as arising out of membership in a minority and facilitating the maintenance and development of group life.¹²⁹ Nevertheless, the individual nature of the Minorities Treaties should not be overstated. The rights protected by the League of Nations were, in part, rights accorded for the exercise and benefit of minority groups.¹³⁰ Minorities clauses

124. See C.A. MACARTNEY, NATIONAL STATES AND NATIONAL MINORITIES 230-52 (1934).

125. See *id.* at 243-48; see also Capotorti, *supra* note 14, para. 99(g), at 19.

126. See CLAUDE, *supra* note 2, at 19-20; ROBINSON ET AL., *supra* note 96, at 71.

127. See 5 A HISTORY OF THE PEACE CONFERENCE OF PARIS, *supra* note 1, at 137.

128. See *id.* For present, alternative visions of state sovereignty, see generally ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995); HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION (1990); Jürgen Habermas, *The European State. Its Achievements and Its Limitations. On the Past and Future of Sovereignty and Citizenship*, 9 RATIO JURIS 125 (1996); Anne F. Bayefsky, *Cultural Sovereignty, Relativism, and International Human Rights: New Excuses for Old Strategies*, 9 RATIO JURIS 42 (1996); Louis Henkin, *Human Rights and State "Sovereignty"*, 25 GA. J. INT'L & COMP. L. 31 (1995-1996); Richard B. Bilder, *Perspectives on Sovereignty in the Current Context: An American Viewpoint*, 20 CASE W. RES. CAN. U.S. L.J. 9 (1994); W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866 (1990).

129. See EDWARD CHASZAR, THE INTERNATIONAL PROBLEM OF NATIONAL MINORITIES 3 (1988).

130. Cf. ANDRE MANDELSTAM, LA PROTECTION DES MINORITIES 53-70 (1925).

at times included references to the agency of minority communities and stipulations concerning proportional representation and political and cultural autonomy, all group-based rights.¹³¹

Three interrelated elements differentiate the minorities clauses from the previous systems: *who* established and *who* guaranteed the provisions; the *methods* by which it was to maintain peace and protect the rights of national minorities; and the *assumptions* upon which it rested.

For the first time, enforcement was not left merely to the signatories or to the prerogative of an interested state, usually a "kin-state." Instead of this ad-hoc and often opportunistic oversight, an independent, neutral body (the League of Nations) gave its guarantee to the agreements.¹³² This new method of supervision was intended to give a "more disinterested character to the performance of international obligations toward minorities."¹³³ Unlike the systems of old, disputes were to be settled by an independent judicial institution, the Permanent Court of International Justice (PCIJ), instead of by the state that had the most political power (or the highest degree of self-interest).¹³⁴ Neutrals played a special role in other aspects of minority protections. The plan for Upper Silesia, for example, envisioned special guarantees for minorities on both sides of the new frontier—the establishment of a Mixed Commission to which these minorities could address complaints (presided over by neutrals) and an Arbitral Tribunal (also presided over by neutrals).¹³⁵

Minorities rights schemes of the interwar years were revolutionary in admitting the right of individual minorities—who

131. A discussion of the nature of group rights is beyond the scope of this Article. For a more extensive discussion of this topic, see generally GROUP RIGHTS (Judith Baker ed., 1994); NATAN LERNER, GROUP RIGHTS AND DISCRIMINATION IN INTERNATIONAL LAW (1991).

132. For example, disputes arising under the minority treaty of the Serb-Croat-Slovene State would not be subject to the signatory states, but would rather be brought before the Court of the League of Nations. See STONE, *supra* note 97, at 247; CLAUDE, *supra* note 2, at 20-21; ROBINSON ET AL., *supra* note 96, at 23.

133. ROBINSON ET AL., *supra* note 96, at 40. Nevertheless, the system could not become politically sanitized. As Robinson notes: "even the new system could not completely eliminate dissatisfaction on the part of those governments which were bound by minority obligations. Moreover, the collective will still had to find expression through the medium of individual powers. It was impossible to completely eradicate the political aspect from public law." *Id.*

134. See Capotorti, *supra* note 14, paras. 123, 128, at 24-25.

135. See KAECKENBEECK, *supra* note 15, at 10.

were not then recognized as subjects of international law—to appeal directly to an international body. On the one hand, access to the guarantee was restricted. Specifically, standing to bring breaches of any of the treaties to the attention of the League of Nations Council was limited to Member states and, as such, only member states had the right to bring appeals before the PCIJ.¹³⁶ Yet significantly, although individual complaints were not provided for in the treaties, through a series of interpretive documents minorities, other states and Entities gained the right to petition for redress of discrimination.¹³⁷

The assumptions on which the system was grounded demonstrated a dramatic change in the use of international policy proposals. In contrast with earlier times, collective security, instead of an ad hoc system of opposing alliances, was viewed as essential for maintenance of peace.¹³⁸ The system also rested on the belief that people of different nationalities could live in peace, side by side, in the same state. To this end, political democracy and economic liberalism were values to be promoted. Moreover, the system saw a need for both external and internal guarantees for national minorities. As Inis L. Claude explains:

The operation of the treaties and declarations depended heavily upon the compliance of the minority states with the obligation to treat the stipulations as fundamental laws and to implement them by internal legislation. However, it was deemed essential to supplement internal provisions by an external guarantee, based on the premise that the treatment of minorities in the treaty-bound states was a problem of international concern.¹³⁹

By implicitly and explicitly providing for both external and internal guarantees, the interwar plans posed a challenge to the traditional notion of sovereignty. In fact, it has been ob-

136. See Jose Felix Merladet, *International Protection of Minorities: Past, Present, and Some Prospects for the Future* (1981) (unpublished paper, Harvard Law School) (on file with Harvard Law School Library).

137. The 1929 report of the Council of the League which specifies its operating procedures (known as the "Adatci Report") is reproduced in full in an appendix to AZCÁRATE, *supra* note 14, at 161-209.

138. For historical background, see generally J.A.S. GRENVILLE, *THE MAJOR INTERNATIONAL TREATIES 1914-1945: A HISTORY AND GUIDE WITH TEXTS* (1987).

139. CLAUDE, *supra* note 2, at 20 (endnote omitted).

served that "[t]he intervention of an external agency in the relationship between a state and its own nationals was clearly incompatible with the concept of absolute sovereignty."¹⁴⁰ The interwar plans demanded the invalidity of this absolute concept of sovereignty as a prerequisite to their very existence. As one commentator has observed:

In the Versailles peace system, the minorities provisions constituted a corollary and corrective to the principle of national self-determination. They became possible only through the restriction of absolute state sovereignty. Insofar as the disturbance of external peace was caused by internal discord, the minorities provisions, as a means of regulating the relations between national groups were a part of the general peace structure.¹⁴¹

Despite these innovations, the Minorities Treaties were not enough to protect the rights of minorities and preserve peace. The explanation may lie in the lack of political will on the part of the international community to stand behind the League of Nations and enforce the provisions and the lack of the will of the Minorities States to stand by their agreements. However, weakness in the system itself encouraged and exacerbated the lack of political will. The system was crippled at the outset by the impression that it was of a temporary nature. Enforcement mechanisms were weak; as a matter of fact, treaties were not enforceable in domestic courts and no effective rules of enforcement were established by the Council of the League of Nations. At the same time, Minorities States frequently did everything within their power to block enforcement¹⁴² and forestall petitions by imposing obstacles to intim-

140. *Id.* at 21. Indeed, the Serb-Croat-Slovene State, Romania and Poland fought against the Minorities Treaties largely on these grounds. In the words of one author: "They characterized the minorities clauses as a violation of the principle of equality of states, an attack upon their sovereignty, and an indication of a lack of confidence and good faith . . . They claimed that an international guarantee was a source of potential danger, because the minorities would feel that their status rested upon the support of foreign powers." ROBINSON ET AL., *supra* note 96, at 154-55. Pashich, the head of the Serb-Croat-Slovene delegation, also protested against the application of the treaties to the entire territory of the former kingdom—that is, to Serbia and Montenegro as well as the newly acquired territories—arguing that such application violated his state's right to sovereignty. *Id.* at 155.

141. ROBINSON ET AL., *supra* note 96, at 41.

142. States could enact provisions that would undermine the intention of the

idate and discourage complainants. While individual minorities filed few complaints, kin-states which were members of the Council of the League of Nations tended to take the initiative in implementing league guarantees—for their own benefit. The wording of the Treaties was vague and schematic, failing to account for differences among minority groups such as differing needs and claim to education and autonomous institutions and failing to settle major explosive issues such as language rights. Finally, as underscored repeatedly, the minorities provisions applied only to a select number of states. Ultimately, the interwar agreements failed to reach their goals.

IV. LOOKING FORWARD: FOREBODING AND HOPE

Dayton displays a persistent faith in some of the underlying assumptions and practices of the interwar international legal policy proposals. At the same time, it shows a pragmatic shift in international law to address today's national conflicts in the context of postwar regional and international human rights systems and mechanisms. This section sketches the similarities and differences between Dayton and its predecessor. Ultimately, it asks whether the differences between Dayton and the interwar agreements could indeed provide salvation.

A. *Foreboding: Similarities With Interwar Schemes*

The schemes designed to protect minority rights in the interwar period, evinced a “paradoxical ‘alliance’ between turbulent nationalist passion and a newly autonomous international law.”¹⁴³ Today's international law, grounded in a host of post-World War II agreements and practices, no longer can be said to be newly autonomous. The place of law in the regional and international spheres has taken hold. Human rights can now be said to be “universal, indivisible and interdependent and interrelated”—the words of the Vienna Declaration from the 1993 World Conference on Human Rights.¹⁴⁴ Re-

treaties. For example, although minority groups were allowed schools in their own language, a state could deprive private schools of the right to issue diplomas. Also, economic measures that would have a particular impact on a national minority could be enacted as long as the provisions did not single out the minority.

143. Berman, *supra* note 20, at 1798.

144. WORLD CONFERENCE ON HUMAN RIGHTS, THE VIENNA DECLARATION AND

gional and international systems and mechanisms designed to protect human rights are now in place, although often neglected and inoperable. Yet still, with its own paradoxical alliance with nationalism, the Dayton Accords have much in common with the minority protections spawned by the Treaty of Versailles.¹⁴⁵ Some of these commonalities are beneficial for minorities; many are foreboding.

First, the Dayton Accords, like the minority rights protections of the interwar period, approach nationalism with a "mixture of desire and terror."¹⁴⁶ The carving up of the newly recognized state of Bosnia and Herzegovina along national lines re-enshrined the existence and power of the nation—the imaginary communities defined in opposition to the "other" by real and imagined differences in history, culture, language and tradition. The national purification of Croatia and the establishment of a "blood" principle for Croatian voters (whereby "Croats" living anywhere could vote in Croatian elections), further re-cemented Balkan nationalism as a defining social, political and legal principle. Granted, Dayton did not create the nationalisms, nor the battlelines. Dayton only recognized the facts on the ground that no one had the will to reverse. Nevertheless, in doing so, dreaded nationalism was not only tolerated by the Dayton Accords, but once again in European history, the nation became part of the "solution" for peace.

Second, international diplomacy in the former Yugoslavia may have begun with a call for human rights, but it culminated in the same legal pragmatism of the interwar period. The normative conception of the sovereign state and the duly elected leaders of that sovereign was replaced with a functional definition: those with power to act as the state *were* the state. Whether and how the powerful gained their power became less and less relevant. U.S. Assistant Secretary of State Richard Holbrook's principle of diplomacy was simple: negotiate with those who have power over people at any given time—stop war at all cost. At one time, this strategy brought accused Bosnian Serb war criminals Karadzic and Mladic to the bargaining table.¹⁴⁷ Ultimately, Serbian President Slobodan Milosevic (who

PROGRAMME OF ACTION 30 (June 1993).

145. Treaty of Peace Between the Allied and Associated Powers and Germany, June 28, 1919, 225 Consol. T.S. 188.

146. Berman, *supra* note 20, at 1805.

147. See *Serb General Rejects Bosnia Pact: Argues That Accord Will Put his*

himself has been named by human rights groups as a war criminal with command authority over documented war crimes) became the negotiator for Bosnian and Croatian Serbs.¹⁴⁸ These populations never elected Milosevic as their leader and do not in fact "follow" Milosevic, particularly after he failed to come to their rescue in the summer of 1995 when Serb-controlled Krajina collapsed to Croatian troops.¹⁴⁹ Croatian President Franjo Tudjman became the negotiator for Bosnian Croats, a group over which he has no formal power in positivist statist terms.

Holbrook cannot be blamed for a strategy that could merely reflect political and military realities. In fact, Holbrook's negotiations only became potent when power shifted, in particular when Croatia destroyed the Krajina Serbs and threatened to drive the Bosnian Serbs out of Banja Luka and when, after Srebrenica, NATO finally joined the fight. That negotiations divided the players by artificial nationalist groupings was of little concern to Holbrook and his team. That the success of the agreement depended on Milosevic gaining and retaining power over Bosnian Serbs and Tudjman doing the same for Bosnian Croats could not stand in the way of "peace now." The Dayton Accords, like the interwar agreements, *require* the perpetuation and domination of nationalist leaders.

Third, many of the fundamental assumptions underlying both Dayton and the interwar years were the same. Both saw a need for collective security, the promotion of political democracy and economic liberalism and external and internal guarantees for minority rights. As in the interwar years, under Dayton, external bodies are assumed to have the right to interfere in the relationship between a state and its own nationals.

More troubling for national minorities, just as in the interwar years, in the former Yugoslavia "the problem of nationalism came to be perceived as a primal 'clamoring' to which one should respond with a sophisticated and heterogeneously com-

People Under 'Butchers', CHI. TRIB., Dec. 3, 1995, available in 1995 WL 13107451.

148. See *id.*; Robin Knight, *Can There Be Justice as Well as Peace in Bosnia? War Crimes*, U.S. NEWS & WORLD REP., Dec. 4, 1995, at 30.

149. Serb refugees from Krajina and from parts of Serb-controlled Bosnia which fell at that time complained of being "sold" by Milosevic. Interviews with unnamed refugees, in Sremska, Mitrovica, Novi Sad and Belgrade (July-Aug. 1995).

posed 'Plan.'¹⁵⁰ "These people have been killing each other for so long, I don't know what we can do," one Dutch UN Peacekeeper said after the United Nations Protection Force (UNPROFOR) flight to Mostar was canceled due to renewed fighting.¹⁵¹ Far from a primal clamoring, however, nationalism in the former Yugoslavia spread as the direct result of a deliberate political plan crafted by political and academic elites at the top.¹⁵² Nationalisms, supported by myth and history, are firmly rooted in the culture of the Balkans. Economic crisis and political and social insecurity laid the foundations for chauvinist ideologies in then-Yugoslavia. Yet the emergence of nationalist ideologies was far from inevitable. In a calculated series of maneuvers, political and academic elites tapped nationalist undercurrents, squelching alternative voices and pitting national groups against each other.

Misinformed about the nature of the problem, UNPROFOR's Plan for managing and disarming nationalism failed. Similarly misdirected, the Dayton Accords do nothing to shake the power of those responsible at the top, but instead further entrenches their power. Today, Serbian President Slobodan Milosevic and Croatian President Franjo Tudjman continue to direct—or at least condone—human rights violations with impunity, including the harassment and mistreatment of national minorities (and in Serbia, Albanians in particular), foreigners, opposition journalists and political opponents. Moreover, the foreign media continue to read the conflict as primal, overlooking the hand of political elites in shaking the nationalist tree.

Fourth, both in the interwar years and under Dayton, relationships with neighboring kin-states and further bilateral treaties are permitted and even anticipated. In the interwar years, bilateral treaties, although initially bolstering the minorities agreements, eventually led to their demise. It has been observed that "[a]s a rule, these treaties were for the benefit of a minority whose kinsmen constituted the ruling majority of the neighboring state. In other words, the signatories were reciprocally interested in the establishment of a regime of law for their kinsmen."¹⁵³ Dayton allows each constituent Entity

150. Berman, *supra* note 20, at 1800.

151. Interview with unnamed UNPROFOR Officer, in Zagreb (June 1995).

152. See, e.g., SILBER & LITTLE, *supra* note 25, at 29-35.

153. ROBINSON ET AL., *supra* note 96, at 56. Not all of the treaties with neigh-

of Bosnia and Herzegovina to make its own treaties with neighboring "kin" states. There is every reason to believe that, unless preventive steps are taken, the same problem with bilateral agreements will reoccur in the Balkans. In the interwar years, some of the bipartite agreements provided their own machinery to settle conflicts which ultimately undercut the League's attempts at enforcement. There is little in Dayton to prevent the "kin" states in the Balkans from doing the same.

Fifth, the Dayton Accords contain many of the specific attributes of the interwar plans. In resolving thorny questions for members of minority groups, Dayton harks from the "products" of Versailles, in particular the plans designed to resolve the disputes over the Saar, Danzig, Upper Silesia (as well as the 1947 plan for Palestine).¹⁵⁴ Plans old and new include(d):

- *Minority guarantees:* Dayton includes the same kinds of rights as those seen in the interwar years: nationality provisions, nondiscrimination provisions, negative rights and even some positive rights. Significantly, it invokes the extensive protections of the Framework Convention.¹⁵⁵ As in the interwar years, nearly all of these guarantees are individualistic, not collective, but still within these guarantees national minorities can find protections.
- *Provisions for emigration and restitution of property:* Just as in the interwar years, provision has been made for the return of the displaced and for limited restitution of property.¹⁵⁶

bors during the interwar years were contrary to the general aims of the Minorities Treaties. See *id.* A number of them, however, did repudiate the very purpose of the Minorities Treaties. One of most egregious such cases, the bilateral agreement between Greece and Turkey concluded on January 30, 1923, provided for the compulsory exchange of Greek and Turkish populations. See *id.* at 57.

154. See *Resolution Adopted on the Report of the Ad Hoc Committee on the Palestinian Question*, G.A. Res. 181(II), U.N. GAOR, 2d Sess., at 130, 132, U.N. Doc. A/519 (1947).

155. See, e.g., Human Rights Annex, *supra* note 72, app. (Human Rights Agreements); see also generally Framework Convention, *supra* note 92.

156. See BOSN. & HERZ. CONST. art. II(5).

- *Elements for self-determination*: As in the interwar years, Dayton provides for two types of self-determination: both objective—unifying people by national groups (regardless of whether they identify with the group and elect the division)—and subjective—providing for control of the political will of the people.¹⁵⁷
- *Limited supranational integration*: As explained above, Dayton creates a “thin roof” to hold together the two constituent Entities of the Republic of Bosnia Herzegovina, that is Republika Srpska and the Federation of Bosnia and Herzegovina.¹⁵⁸ The roof includes: a joint presidency,¹⁵⁹ a parliamentary assembly,¹⁶⁰ Constitutional Court¹⁶¹ and institutions pertaining to arbitration,¹⁶² human rights,¹⁶³ refugees and displaced persons,¹⁶⁴ preservation of national monuments¹⁶⁵ and public corporations.¹⁶⁶
- *Internationalization, regionalization and international and regional supervision*: The parties to Dayton agree to both a short term international military presence¹⁶⁷ and an international police task force.¹⁶⁸ In addition, in striking resemblance to the interwar plans (particularly Upper Silesia), neutral regional and international organizations and individuals play a critical role in the structure and operations of the new federal government, particularly with respect to the

157. See generally Dayton Accords, *supra* note 6, Annex 3, 35 I.L.M. 114-17 (providing a framework for the holding of elections, supervised by the OSCE).

158. See *supra* notes 56-57 and accompanying text.

159. See BOSN. & HERZ. CONST. art. V.

160. See *id.* art. IV.

161. See *id.* art. VI.

162. See Dayton Accords, *supra* note 6, Annex 5, 35 I.L.M. 129 (providing for a system of arbitration to settle disputes between the Entities).

163. See generally Human Rights Annex, *supra* note 72, 35 I.L.M. 130-36.

164. See generally Refugees Annex, *supra* note 51, 35 I.L.M. 136-41.

165. See generally National Monument Annex, *supra* note 77, 35 I.L.M. 141-44.

166. See generally Dayton Accords, *supra* note 6, Annex 9, 35 I.L.M. 144-46 (establishing public corporations to operate various public facilities).

167. See generally Dayton Accords, *supra* note 6, Annex 1A, 35 I.L.M. 91-101 (dealing with military aspects of the peace settlement).

168. See generally Police Task Force Annex, *supra* note 95, 35 I.L.M. 149-52.

rights of minorities and related issues.

Finally, the Dayton Accords, like the treaties of the interwar period, are limited in scope, albeit in a much different manner. By adopting the language of universal human rights, Dayton does not suffer limitations identical to those of the interwar guarantees, which applied more selective rights on a state by state basis. Still, Dayton, like the interwar guarantees, has force in only limited geographic areas. Because the purpose of Dayton was limited to ending the wars in Bosnia and Herzegovina and Croatia, the agreement does not mention other troubled lands in the former Yugoslavia, including the ethnic-Albanian land of Kosovo.¹⁶⁹ Contrary to their practice of negotiating with all leaders with power—regardless of whether they are duly elected leaders of recognized states—the Dayton negotiating team did not deal with Ibrahim Rugova, the leader of Kosovo Albanians, the fourth largest national group in the former Yugoslavia.

Kosovo, like Macedonia, was seen as simply irrelevant to Dayton's limited goal of immediate cessation of hostilities. Yet Kosovo played a central role in the destruction of Yugoslavia and it continues to play a major role in destabilization of the region. Milosevic rekindled Serbian nationalism through Kosovo and the issue propelled him into power. Without Kosovo, Milosevic would not have had the power base he needed to plunge into Bosnia and Herzegovina and Croatia. Already a good Communist, Milosevic's deeds on Kosovo showed he was a good nationalist as well. Milosevic's strategy on Kosovo became a defining and delimiting moment for Serbian politics. Once Milosevic had become the protector of Serbs in Kosovo, his role spread as the protector of Serbs everywhere. Without the Kosovo card, Milosevic would have had a far more difficult time implementing this strategy. The end of the war in Bosnia and Herzegovina and Croatia did not completely disarm this

169. Kosovo is the Serbian term for this region which was an autonomous province under Tito's regime and until 1989, when Milosevic declared that henceforth it would be part of Serbia, subservient to Belgrade in all respects. Kosovo is the Albanian term for the self-proclaimed independent Albanian state of Kosovo, which Albanians created after Milosevic stripped Kosovo of its autonomy. The status of Kosovo today is disputed. *See* HUMAN RIGHTS WATCH, OPEN WOUNDS: HUMAN RIGHTS ABUSES IN KOSOVO xi-xii (1994).

strategy; Serbs still see themselves as the victims, and the first perpetrator is the Kosovar Albanian. As in the interwar period, the Dayton Accords may have put out the fire but, in the words of human rights activist Guzmund Pula, "next to the coals a combustible explosion awaits."¹⁷⁰

B. *Hope?: Shifts in International Law and Diplomacy*

The agreements of Dayton and of the interwar period both reflect complex, paradoxical shifts in international law and diplomacy. The interwar lawyers bypassed "the dichotomy between statist positivism and liberal nationalism in favor of a simultaneous affirmation of the autonomy of international law and an openness to the vital forces of nationalism."¹⁷¹ This meant reshaping nationalism by "endowing it with legal form."¹⁷² At the same time, "the constraints of the stable legal order grounded in sovereignty were rejected in favor of an autonomous, 'experimental' exploration of specifically legal international techniques, doctrines and institutions."¹⁷³ The nationalisms of the countries of the former Yugoslavia are as vital as ever, but they are similarly endowed with legal form and checked by regional and international doctrines and institutions. The main difference is that the global legal environment and system of checks have changed, shifting even farther away from states to regional and international systems and mechanisms. While this shift may be cause for alarm, as states may be presupposed as necessary enforcers of rights,¹⁷⁴ it may also provide an opening in which we can locate hope.

In operation, Dayton simultaneously sanctions and restricts liberal nationalism and statist positivism. In supporting the statist paradigm,¹⁷⁵ Dayton trumpets the legal fiction of

170. Interview with Guzmund Pula, in Kosovo (Oct. 1994).

171. Berman, *supra* note 20, at 1803.

172. *Id.*

173. *Id.* at 1805 (footnote omitted).

174. For this observation, I am indebted to Yash Ghai. He has elaborated his ideas in Yash Ghai, *Globalization and the Politics of Rights* (1996) (unpublished paper, on file with author). See also generally Charles Tilly, *Globalization Threatens Labor's Rights*, 47 INT'L LABOR & WORKING-CLASS HISTORY 1 (1995) (arguing that weak states have less ability to enforce labor rights).

175. Attention should be paid to the interests of the negotiating countries, and in particular the United States, in the perpetuation of the statist paradigm in Bosnia and Herzegovina. This important analysis is left to a later date.

an independent, functioning state of Bosnia and Herzegovina. It creates the entities that had been won through battle and takes steps to encourage the development of civil society within that structure. In doing so, Dayton bows to the statist thinking that is a core tenant of many of the leaders of Croats, Serbs, Muslims and Albanians of the former Yugoslavia. According to these leaders, every nation must have a state and that state must include all members of the nation, although the collective identity may indeed transcend state boundaries. To a varying degree, leaders of each nation have been unable and/or unwilling to develop a civil society which would offer alternative means for citizen participation and promote tolerance of different interests. Seeking to bolster liberal democracy within the statist paradigm, Dayton attempts to take up the slack by suggesting groundwork for civil society. Dayton alone cannot mandate the civil society or even all of the institutions and attitudes that will support civil society. Nevertheless, by creating a space for peace and for the existence of something (law?) beyond brute power, Dayton may also open the space for the development of civil society within the weak federal state.

While publicly praising the liberal state, Dayton's reality on the ground creates a much different impression. Political and military realities encourage ill-liberal practices and porous state boundaries. For example, the agreement set up a complex system for elections, but those who implemented the agreement had neither the power nor the will to enforce its own protections¹⁷⁶ and thus they denied the people of Bosnia and Herzegovina the chance to elect their own fate—by the time voters reached their polling place their choices were eliminated, their future determined. National lines had been drawn and people had been told where they fell. In many respects, the boundaries of the resulting entities are porous. Each component Entity can create strong alliances, including military agreements, with its neighbors. Indeed, they have already

176. For example, that the OSCE would find conditions in Bosnia suitable for elections was a *fait accompli*. That conditions for fair and democratic elections did not exist could not stand in the way of the United States deadline. Although the implementers of Dayton have made efforts to secure refugees' rights to return home to vote, they do not have enough power to compel respect for that right. See UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *THE STATE OF THE WORLD'S REFUGEES* 170 (1997).

begun to do so. Moreover, the international community is invited to make decisions and take actions normally within the sovereignty of a state, from international policing to choosing members of the Constitutional Court.¹⁷⁷ The intrusion of neutrals further corrodes the statist paradigm.

In moving away from the state, Dayton is influenced most by the environment in which it finds itself: a world marked by rapid globalization in markets, information and security arrangements. "The past role of the nation-state," Lung-chu Chen writes, "cannot be taken for granted without a critical reappraisal in light of the changing demands, expectations and conditions of the present."¹⁷⁸ These developments chip away at nation-state boundaries. According to Richard Falk, "the essence of the new order is the globalization of capital and the power of market forces, bypassing even the strongest states. States are now unable really to control interest rates or the value of their own currencies, the most elemental aspects of traditional notions of territorial sovereignty."¹⁷⁹ Residents of Europe, especially in areas of conflict, look to regional and international law and institutions for protection, jobs and goods.¹⁸⁰ Their leaders look to international bodies for markets, military support and other assistance.¹⁸¹

Where the interwar period saw a shift in international law from states to nations (and to individuals as well), Dayton demonstrates a "double shift." Global power and the reach of international law has shifted simultaneously out to international and regional actors (*i.e.*, international financial actors such as the International Monetary Fund and World Bank;¹⁸² international and regional security arrangements;¹⁸³ and in-

177. See BOSN. & HERZ. CONST. art. V.

178. LUNG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW 26 (1989).

179. Richard Falk, Remarks at the 87th Annual Meeting of the American Society of International Law (Apr. 2, 1993), in AMERICAN SOCIETY OF INTERNATIONAL LAW, PROCEEDINGS OF THE 87TH ANNUAL MEETING 398 (1993).

180. Cf. Jost Delbrück, *Global Migration—Immigration—Multiethnicity: Challenges to the Concept of the "Nation-State"*, 2 IND. J. GLOBAL LEGAL STUD. 45, 48-57 (1994).

181. For a book on this issue popular in certain business circles, see KENICHI OHMAE, THE END OF THE NATION STATE (1995).

182. See generally Lan Cao, *Towards a New Sensibility for International Economic Development*, 32 TEX. INT'L L.J. 209 (1997).

183. See generally LEGAL ASPECTS OF A NEW EUROPEAN INFRASTRUCTURE (Arie

ternational and regional arrangements to protect human rights,¹⁸⁴ in particular, the rights of racial, national, religious, linguistic and other minorities)¹⁸⁵ and down to "transnational social forces." Transnational social forces, from environmental and human rights non-governmental organizations¹⁸⁶ to communal groups that spread over nation-state lines, are "gradually shaping a very weak but still real global civil society that represents a form of globalization from below, as an alternative to the globalization from above being achieved by market forces."¹⁸⁷ Leaders of nation-states today have lost power as they must answer to both of these levels if they are to survive. At the same time, with the decline of the nation-state, responsibility for rights enforcement has shifted increasingly from the state to regional and international entities. Both today's problems and tomorrow's solutions must go beyond state sovereignty.

Dayton, in the course of reflecting the reality on the ground, was structured along these lines. While the state happens to be legitimized in the process, ironically it is the state that will likely lose power in the end. The Dayton Accords reflect the understanding that in today's Europe nation-state boundaries have become more fluid and less relevant for the purpose of fashioning guarantees for regional and international security and minority rights. International community elites create regional and international law and policy on treatment of minority groups; international treaties and customary law

Bloed & Wilco de Jonge eds., 1992); Max Jacobson, *Collective Security in Europe Today*, 18 WASH. Q. 59 (1995).

184. The OSCE is a good case in point. For a concise summary of issues in this regard, see generally Arie Bloed, *Monitoring the CSCE Human Dimension: In Search of Its Effectiveness*, in MONITORING HUMAN RIGHTS IN EUROPE 45 (Arie Bloed et al. eds., 1993).

185. See, e.g., Claire Palley, *Possible Ways and Means to Facilitate the Peaceful and Constructive Resolution of Situations Involving Racial, National, Religious and Linguistic Minorities*, U.N. Doc. E/CN.4/Sub.2/1989/43 (1989).

186. See, e.g., A. Dan Tarlock, *The Role of Non-Governmental Organizations in the Development of International Environmental Law*, 68 CHI.-KENT L. REV. 61 (1992); Peter J. Spiro, *New Global Communities: Nongovernmental Organizations in International Decision-Making Institutions*, 18 WASH. Q. 45 (1995).

187. Falk, *supra* note 179, at 399. For a different definition of "transovereignty" that requires a certain fundamental commitment to an organization's values, see generally Timothy P. Terrell & Bernard L. McNamee, *Transovereignty: Separating Human Rights From Traditional Sovereignty and the Implications for the Ethics of International Law Practice*, 17 FORDHAM INT'L L.J. 459 (1994).

on human rights can serve to set their boundaries. This process in turn influences the identity of national groups and the range of acceptable solutions to their problems.

Solutions to the conflict in the Balkans and elsewhere can only come from within this new global context. If Dayton is conceived as a static document, there is little hope for peace and justice in the Balkans. However, if Dayton is perceived as a peace *process*, adjustments can be made in the implementation phase of the plan to correct for missteps. This brief analysis of Dayton's response to the national question and comparison with the interwar minorities plans exposes some of the plan's weaknesses and suggests some steps for reform. Ultimately, as in the interwar period, enforcement will depend not only on legal technique but also on political will. Given the shifts in the global landscape, it will be actors above and below the state who are called upon to take action. It is unclear whether they are up to the task.