Secession, Law, and Rights: The Case of the Former Yugoslavia[1]

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Of the worst cases of human rights catastrophes in the last forty years, a striking number have involved actual or perceived threats of secession: Biafra, Bangladesh, and Bosnia at the highest level of violence, but also at least three wars in the Horn of Africa (the Ogaden, Eritrea, and the southern Sudan), Kurdistan (Turkish, Iraqi, and Iranian), the Tamil-inhabited Jaffna peninsula in Sri Lanka, Kashmir, Ngorno Karabakh, Chechnya, Indonesia (various secessionist movements), Croatia (and Slovenia), and now Kosovo as well. Could much of the massive killing, maiming, induced starvation, torture, rape, and other systematic abuses of human rights been avoided with a different attitude of the international community to secession? That is the question I wish to examine below, with particular attention to the response of the international community to the breakup of the Socialist Federal Republic of Yugoslavia (SFRY).

The common view among academics, diplomats, jurists, as well as lay people, is that secessions "cause" war. This impression is reinforced by newspaper headlines and the summaries and blurbs on bookjacket flaps and in prefaces, where secession is routinely juxtaposed with violence. It seems but a further small step to the view that a more permissive right of secession in international law would be a recipe for more violence, chaos, and conflagration around the globe. The carelessness of this sort of thinking, however, becomes apparent when certain general facts, and cases such as the former Yugoslavia, are considered in greater depth.

First, it is important to note that secessions *per se* do not cause war; invariably, unionist attempts to crush them do. Contrary to headline-induced impressions, there have been several peaceful secessions: Norway from Sweden (1905), Iceland from Denmark (1944), Senegal from Mali (1960), Singapore from the Malaysian Federation (1965), Slovakia from Czechoslovakia (1993), and indeed most Soviet republics from the Soviet Union. Of the conflicts that have taken place, it is more than a semantic question whether we regard them as secessionary or anti-secessionary (unionist). The thrust of arguments against a more permissive right of secession is precisely that it would cause war and instability. But the history of the last half century indicates that many seces-

sionists have persisted in pursuing independence while lacking security guarantees from the international community, and that this lack of support has left their populations highly vulnerable to unionist violence. It is true, of course, that if secessionists all dropped their demands the *casus belli* would disappear; so too, however, if unionists dropped theirs.

There is good reason to suppose that in the worst cases, it would be easier for the international community to compel unionists to acquiesce to secession than to force the independentists to accept rule they regard as alien and hostile. Unfortunately, there is no space to defend a theory of secession here. Instead, I will mostly have simply to assert its outline, while referring the reader to theoretical defenses I have made elsewhere.[2] I will then consider the breakup of the Socialist Federal Republic of Yugoslavia in light of the theory. But I begin with some general remarks about the current state of international law and its relation to theory.

International law has been notoriously ambiguous about the right of self-determination. Not that it has been silent about it; on the contrary, as one author put it, there has been a "veritable blizzard of General Assembly and Security Council resolutions [in favor of self-determination] over the years."[3] The UN Charter, in Articles 1 (2) and 55, asserts self-determination to be a guiding "principle" of the organization. The "right" of self-determination is upheld by General Assembly Resolutions 1514, 1541, and 2625 (the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States), and the UN International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, proclaims: "All peoples have the right of self-determination." The Helsinki Final Act as well proclaims (Article VIII) "the principle of equal rights and self-determination of peoples," that is, that "all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference."

But in every case these declarations are accompanied by caveats to the effect that "nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States."[4] For several decades the law of nations interpreted this ambiguity according to the "salt-water principle" upholding the right of colonies to acquire independence from their mother countries (from whom they were separated by salt water) but disallowing secessions from these newly founded states in Africa and Asia, or elsewhere, if the central state opposed it. This interpretation has never lacked critics, including among international jurists.[5] But what does seem to have a broad consensus is the view that present statutes are themselves vague and open to widely conflicting interpretations.[6] It is arguably the case, therefore, that existing statutes on self-determination in international law are inadequate, and lagging behind the customary practices of

civilized nations. For this reason one cannot simply read off of the aforementioned legal caveats and earlier "salt-water" interpretation a supposedly settled legal view of secession. This point is critical, yet frequently misunderstood, with regard to interpretations of the breakup of Yugoslavia (SFRY).[7] From human rights to secession, international law at the end of the millennium is being *extended* by states and international organs in a novel post-Cold War setting, and it is futile to protest in the name of older practices that recent decisions were departures from international law. This is as true for the case of Augusto Pinochet of Chile as it is for the European Arbitration Commission's decisions on the breakup of the SFRY. In a trivial sense, of course, every development of customary law is a departure from hitherto prevailing norms. The crucial factor is whether the new practice follows a defensible interpretation of broad principles animating previous practice, where the defensibility will be based in part on the capability of the new practice to resolve previous conflicts of principles (e.g., between stability and self-determination) while enabling a more rigorous implementation of other principles (such as securing human rights). In short, some understanding of the normative justification of self-determination and secession is required before one can assess whether recent developments are "violations," or rather reasonable developments, of previous customary law.

What motivates claims to self-determination based on ethnic distinctiveness? In our world, still dominated for better or worse by a sovereign state system, states or belonging to a state confers benefits on groups with historical-cultural identities. Much of the benefit to a group sharing a national identity derives from the control it acquires over the entire complement of jurisdictions that makes up a state. This itself can be analyzed into several benefits or interests: first, that a group can take control, to a much greater degree, of its own destiny. A nation generally conceives of itself as formed by a historical narrative, and continuing that narrative as freely or autonomously as possible is in its interest; it thus has an interest in getting hold of the powers that shape that narrative in the future. Relatedly, by bringing all these jurisdiction—criminal and civil law, public construction, roads, rail, air and shipping routes, parks, gardens, historical sites, labor relations, fiscal policy, industrial incentives, gender, immigration and foreign policy—under its control, it can adapt them to the particular shared values, styles, tastes, and beliefs of its members.

Moreover, having a state at one's disposal enables a group symbolically to represent its distinctiveness by the most powerful means available in the contemporary world, namely by the pervasive symbols of state, from coins, stamps, and flags on government buildings, to the singing of anthems at official and sporting events. Perhaps most important of all, however, the fact that the entire cluster of jurisdictions coincide in their boundary powerfully unites members by reinforcing their sense of community. Since the political decisions of

state pervasively affect the lives of citizens, state boundaries naturally demarcate a field of significant common experience and communication. This explains how states consolidate and reinforce a common identity among their respective citizens by their mere existence; one cannot otherwise account for the phenomenal success of "nation-building" in so many states inheriting multiethnic colonial boundaries. Finally, in obtaining independence a group acquires the highest and most prestigious external recognition available in the contemporary world—membership in the General Assembly, participation in international conferences, treaties, sporting events, and so forth—which stands to boost the self-esteem of the group and reinforce its perception of the distinction between group members and outsiders. All of these together fortify and foster a sense of collective identity in a way that is scarcely available otherwise. Indeed, the crux of this analysis is that even extensive internal autonomy falls considerably short of the power of an independent state to foster collective identity, and that national groups lacking independence are and will no doubt remain fully cognizant of the difference.

Various restrictions, however, need to be in place for a right of secession to be workable. An unrestricted right of secession for any territorial majority of any kind, as advocated by a handful of liberal philosophers, would be indeterminate, leaving no way of adjudicating between inevitable competing claims. It would also not rule out temporary claims of convenience or strategic expedience, like the short-lived statelet of Fikret Abdic in Velika Kladusa, northern Bosnia. At its worst, it would be an invitation to armed conflict and ethnic cleansing, as every neighborhood becomes a potential claimant of statehood, even if only out of a desire to reunite with other statelets sharing an ethnicity.

Another important reason to restrict the right to national groups is that a more general right would be detrimental to democracy by threatening the minimum of commitment and loyalty necessary for a viable democratic process. Other qualifications involve distributive justice, including the need to share the national debt and other obligations. In addition, a seceding group must be respective of human and minority rights; on some views, it must be at least as respective of them as the state from which it is breaking apart.

But even with all these qualifications, the right of secession will still be indeterminate, as long as some national groups live intermingled with others. An institutionalized right of secession would not be justified if it provided an incentive to racism, xenophobia, and ethnic cleansing, nor if it created a permanent sense of instability as boundaries became constantly renegotiable. The right, then, needs to be restricted further, so that not any leftover minority group should think it can secede anew. The basis of the right, as we saw, is that identity groups deprived of states of their own should have a matrix to foster and develop their identities. But it is not necessary, and arguably not even desirable, that all members of the group live in that matrix, the independent state. It suffices that members living outside of the matrix—Hungarians in

Transylvania, Anglophones in Quebec, Russians in the Baltic states—enjoy a full complement of individual and minority rights, including easy access to the cultural goods of their kin state, and freedom to visit it and be visited by those from it; in short, freedom to participate in it. Stability requires the avoidance of pernicious incentives and indeterminacy, which in turn requires that when a national group secedes, the leftover minority of the remainder state does not itself have a right to secede, provided its own rights are respected by the new state. International law recognizes something like this in the longstanding principle of *uti possidetis* (literally: it may be possessed; that is, the frontiers of the seceding administrative unit should be kept intact). This principle recognizes the need to establish strict rules in cases of secession precisely to avoid recursive extravaganzas. Originally adopted with regard to the frontiers of colonies gaining independence, it has been extended by the European Arbitration Commission for the former Yugoslavia to the seceding republics of those states, and is now regarded by some as "a principle of customary law of general application."[8] It is useful to give it some, though not absolute, weight in a theory of national self-determination to prevent border rectifications by force of arms and ethnic cleansing. Administrative boundaries bear added significance when they are constituents of a federation, especially one whose constitution announces itself to be "proceeding from the right of every nation to self-determination, including the right to secession"[9]; roughly, the greater the autonomy and constitutional powers of the administrative unit, the firmer the application of *uti possidetis* should be, all else being equal.

Remainder minorities of regional majorities (Russians in the seceding republics of the former Soviet Union, Serbs in the seceding republics of the former Yugoslavia, Anglophones in Quebec) have particularly weak claims to partition newly seceding states. If the seceding states are democratic and respectful of minority rights, the options available to remainder minorities—including dual citizenship—are robust and meaningful without recourse to destabilizing alternatives. The institutional matrixes of their identities are secure and based on the statehood of their nation, whether or not that state is extended to include them. The claims of leftover minorities can become stronger, however, if their concentration is very high, or if there is a strong likelihood that their minority and individual rights will be violated (the Albanians of Kosovo could make both claims convincingly). But that likelihood has to be shown with evidence; it is not sufficient for the group merely to claim that it "fears" attacks by the new majority.

These general considerations aim optimally to combine principles of self-determination, stability, and territorial integrity that have long been accepted as principles of international law. They also appear to be the rough direction in which the right of self-determination has developed in the previous decade, including in the decisions of the European Arbitration Commission (Badinter Commission) for the former Yugoslavia. Those decisions fell short of endors-

ing the right of self-determination argued for here, relying primarily on the view, reasonable under the circumstances, that the SFRY was in a state of dissolution. But they appear more cogent and consistent against the background of the developing recognition of a qualified national right of self-determination, and it is in this light that an increasing number of jurists have interpreted them.

Let us turn, then, to the case of the former Yugoslavia. The history of the breakup of the SFRY has been recounted and analyzed in numerous works[10] and need not be repeated here. However, given that this history is sometimes tendentiously related,[11] it might be worth drawing attention to a few salient facts. In the late 1980s, a reform-minded nationalism was on the ascendancy in Slovenia. Events came to a head in 1987 when the JNA responded with a crackdown on the publication of the leading dissident organ, *Mladina*, the Socialist Youth weekly, and arrested "the Ljubljana Four." It is worth recalling the remarks of one of the four, Franci Zavrl, editor-in-chief of *Mladina*: "In early 1989, I and most others would still have opted for Yugoslavia. But then began Milošević's attacks in Kosovo, the attacks on Slovenes in the Army, and the whole irrational pressure from Serbia and Milošević. It drove us out much faster."[12]

The "attacks in Kosovo" referred to by Zavrl culminated in the March 1989 abrogation of Kosovo's status as an autonomous province. A clear violation of the 1974 Constitution of the SFRY[13], it was carried through by surrounding the parliament in Priština with JNA tanks, and firing into crowds of protesters (killing scores).[14] This was followed by the imposition of a regime of repression, to last a decade, in which an entire administrative bureaucracy and police force of ethnic Serbs were imposed on an 85 percent majority Albanian population. At the end of the eighties these events were unfolding against the backdrop of militant Serbian nationalism encapsulated by the famous Memorandum of the Serbian Academy of Sciences and Arts. Published in 1986, it described the 1974 autonomous status granted to Kosovo as an act of "treason" by Tito, implicitly equated the higher Albanian birth rate—and unsubstantiated allegations of crimes committed against Serbs—with "genocide" against the Serbian people, and called for the abrogation of Kosovo's status. Milošević was to oblige within three years. By essentially taking over both provinces, Kosovo and Vojvodina, yet retaining their votes in the eight-man federal Presidency against the protests of Slovenia and Croatia, and with Montenegro already having been brought to heel as well, Milošević had in effect destroyed Yugoslavia as a federation and prepared the rise of secessionist sentiment in the remaining republics. A final straw was his prevention of the Croat Štipe Mesić from taking his place as head of the rotating presidency, a move that directly led to the Croatian independence referendum of May 19, 1991.[15]

One further factor in the breakup is worth bringing out here. It is sometimes claimed that Ante Marković, the last Federal Prime Minister (1989–1991)

before the disintegration, a Croat and economic reformer who enjoyed popular support, might have succeeded somehow in "holding the country together" had the new "nationalists" in the breakaway republics been less recalcitrant, and perhaps had the West "done more" to support him.[16] Nothing in the argument presented here for the right of the republics to self-determination hinges on whether these claims are true. But in fact they have been ridiculed as baseless by observers not usually suspected of partiality. Among other things, the claims ignore that Milošević, through his influence over the central bank (Beobanka) in which he had risen to power, had already plundered the Yugoslav federal reserves and redirected them to his base in Serbia. As one writer has put it, "In fact, Milošević's theft had already wrecked the economic plan for 1991, by making off with no less than half the entire primary emission of money set aside for all six Yugoslav republics for that year.... Indeed, the Marković plan was already a failure by the time it was touted in the West as Yugoslavia's salvation."[17]

Before returning to the question of the right of secession, it is necessary briefly to sketch the position of the international community at the time. Somewhat surprisingly, Donald Horowitz asserts that while Western countries supported central governments against secessionists in Biafra and elsewhere in the past, "Barely a glimmer of such Western central-government bias was in evidence in the Yugoslav case."[18] In fact, considerably more than a glimmer of such bias was evident. Just four days before Slovenia and Croatia were set to declare their independence, American Secretary of State Baker arrived in Yugoslavia (June 21, 1991), declared the U.S. opposition to the declarations of independence, threatened the Slovenian and Croatian leadership that the U.S. would oppose recognition of their unilaterally declared states (citing the Helsinki Final Act), urged them to drop their UDI plans, declared U.S. support for the "territorial integrity of Yugoslavia," promised the Serbian leadership that the U.S. would refuse recognition of the breakaway republics, and urged Prime Minister Marković (however naively) to pressure the republics to abandon their plans.[19] Nor was the European Community (EC), as a whole, saying anything essentially different at this point, despite later revisionist insinuations by some writers to the contrary. EC President Jacques Delors, British Foreign Secretary Douglas Hurd, and Italian foreign minister Gianni De Michelis reiterated the EC's view that "the territorial integrity" of the SFRY must be preserved, and that the EC would not recognize the UDIs of Slovenia and Croatia. Its representatives continued to insist it was committed to the preservation of the Federation even as the JNA was planning attacks on both seceding republics. The Conference on Security and Co-operation in Europe (CSCE) adopted a declaration, June 19, 1991, in favor of "democratic development and [the] territorial integrity of Yugoslavia."[20]

At the same time that Baker and EC spokesmen were insisting on Yugoslavia's "territorial integrity," they declared their opposition to Belgrade's use of force

to repress the secessions.[21] Such admonitions against the use of force are bound to ring hollow when coupled with opposition to secession, since territorial integrity is constituted precisely by the display of a monopoly of force on the territory. Once the international community declared itself committed to the territorial integrity of the federation, especially a leader like Milošević was bound to interpret the signals, while superficially mixed, as a green light to deploy force.

This interpretation would have received further confirmation from the reaction of the powers once the war did break out. Back in Washington after his final-hour trip to Yugoslavia had failed, Baker uttered his famous "We have no dog in this fight."[22] Throughout the corpse-filled summer, Lawrence Eagelburger declaimed in like spirit.[23] As late as September 1, 1991, when Croatia was well awash in blood, the EC, while repeatedly condemning the use of force by all sides, called for Croatian forces "to be disbanded" and the JNA (merely) to return to its barracks.[24] Indeed, it was Yugoslavia which pushed for a UN Security Council meeting, the first to be held since the outbreak of war, at the end of September; and it was Yugoslavia again which requested, and received, the imposition of sanctions against all parties to the conflict[25], thereby ensuring massive JNA military superiority for the next few years.

By October 1991 international acceptance that the dissolution of the Federation was a *fait accompli* was growing. (It would be yet another two months before Germany would recognize the two breakaway republics, that is, six months after the declarations of independence and outbreak of war.) It was clear by this time that Serbia had itself accepted the dissolution and was aiming for the creation of a Greater Serbia out of chunks of Croatia and eventually Bosnia. It is neither possible nor necessary to pursue the narrative of diplomacy in detail here.[26] The question under consideration is the merits of the international community's policy of support for Yugoslav unity and territorial integrity until the fall of 1991, versus a hypothetical policy of support for the secessionist republics. After assessing the case for such a policy with regard to Slovenia and Croatia, we will consider the more complex case of Bosnia.

The theory outlined previously held that distinct national groups lacking states of their own in their region have a *prima facie* strong claim to be allowed to secede. When such groups form the primary residents of administrative boundaries of a federal structure, especially the constitution of which is predicated on the self-determination of the constituent units, then the boundaries of that unit should be kept, provided that rights of leftover minorities are respected.

In the case of Slovenia, there was no significant leftover minority of Serbs to raise any questions. In Croatia there was. It is interesting to note the opinions of the Badinter-led Arbitration Commission, set up by the EC in October of 1991 as it came increasingly to accept the fact of Yugoslav disintegration. The Commission did not assert the right of any republic (or far less, former prov-

ince) of the federation to secession. That is, its opinions fell short of the more permissive view argued for above. It also made no explicit reference to a constitutional right to secede, perhaps on the grounds that the 1974 constitution left some ambiguity with regard to such a right.[27] It did, however, take the reasonable view, minimalist under the circumstances, that since it was a "case of a federal-type State, which embraces communities that possess a degree of autonomy and, moreover, participate in the exercise of political power within the framework of institutions common to the Federation," and since four of the Republics "have expressed their desire for independence," three of them by that time through popular referenda, therefore the SFRY "is in the process of dissolution" and the constituents could determine their own futures within the constraints of respect for minority and human rights.[28] One might elaborate the argument somewhat: When four of six republics have already indicated their wish to leave a federation, and when the fifth has already acted in violation of the constitution and declared it will no longer abide by it, the federation is in dissolution. This basis of the claims of the seceding republics is critically enhanced, however, though the Commission did not take note of it, by the fact that each had a separate historical identity with a distinct national character.

To the question of whether the leftover Serb minorities in Croatia and BiH had the right of self-determination, the Commission replied in Opinion 2 that while "international law as it currently stands does not spell out all the implications of the right to self-determination," the principle of *uti possidetis* should apply. That is, the Serb minorities had a right to a full complement of minority rights and guarantees, but not a right of (recursive) secession from the new states. In Opinion 6, dealing with the possible recognition of Croatia by the EC, the Commission specified that the Republic had not yet satisfied the provisions of an earlier draft Convention of the Conference on Yugoslavia defending the minorities, and recommended that it do so; implicitly, it conditioned EC recognition on these changes.

The objections by some writers that even this grievously belated recognition by the EC went too far do not seem cogent. With an air of profundity, Woodward declares that: "The idea that nations have a right to their own state thus turns...West European history on its head...at the moment when the principle of national self-determination is used to create a modern state, it is reversing the west European process whereby states created nations, not nations states."[29] The historical claim that states created nations, familiar from the works of writers like Gellner, no doubt has some truth to it, but of course it cannot be the whole truth; otherwise there would be no minority nations seeking national self-determination *against* existing states. Nor does it follow that if an earlier historical tendency was for states to create nations, minority nations cannot have rights to states. It also "turns...Western European history on its head" to abolish slavery and to decolonize; few would consider this an argument against abolition and decolonization.

More confusedly, Woodward goes on to analyse four "conflicting concepts of the nation" which can serve as the basis for a right to statehood: historicist, democratic, "the Helsinki (and United Nations) principle...that all existing, internationally recognized borders are `inviolable' and define states," and the realist principle of physical control through military force. Since "there is no agreed-upon lexical priority among these principles," the departure from the "Helsinki principle" was an invitation to war; moreover, the European Community applied the principles in an *ad hoc* and inconsistent way.[30]

In fact, the Badinter opinions prioritized the principles in an optimally reasonable way, consistent with customary law, despite having fallen short of explicitly endorsing the rights of the republics to secession. (Their rights to independence followed only from the dissolution of the Federation, a consequence of over half the republics wanting out). It held, quite consistently, that the republics could each have independence (thereby giving each primary identity group one state in which it formed a majority or plurality), but that leftover minorities required only minority and human rights guarantees, not further destabilizing partitions. To the extent that an "invitation to war" was broadcast to Belgrade, it was precisely the American and EC *adherence* to the "Helsinki principle" of preserving territorial integrity and the inviolability of Yugoslavia's borders, long into the blood-soaked summer of 1991. This is the case for German recognition as well. As Alain Finkelkraut observed, the German decision to recognize Slovenia and Croatia, taken in December 1991 and carried out January 15, 1992, came only "after the destruction of Vukovar, after the bombardment of the historic downtown of Dubrovnik, during the siege of Osijek. At that point, the war against Croatia had gone on for six months and had already inflicted about ten thousand deaths and made more than half a million Croats into refugees."[31] This was precisely the reason that German Foreign Minister Genscher gave for beginning to consider the possibility of recognition: the JNA escalation of violence in July 1991. Recognition, by internationalizing the conflict, would give the international community new levers to use against Serbia in an effort to stem the violence.[32] The lesson argued for at the beginning of this essay was slowly dawning: denial of the right of secession contributed to and possibly precipitated war; removing that denial at least made deterrence of violence possible. That the international community, even after extending recognition, failed to back up its words with deeds is a different story, one which has been told many times since and need not be repeated here.

The reasons for doubt about the soundness of Bosnia's claim to self-determination are well-known. Indeed, they were rehearsed repeatedly in the media throughout the war not only by Bosnian Serb and Serbian officials, but also by Western diplomats and commentators intent on showing why the notion of a sovereign unified BiH was misconceived from the beginning. The arguments have since been taken up and elevated by writers like Susan Wood-

ward and Robert Hayden to the level of explanations of the very cause of the war. There are actually a variety of claims, not always consistent with each other, but they generally run roughly as follows.

Bosnian Muslims, or Bosniaks, never formed a majority in the Republic of BiH. If self-determination is based on national belonging, clearly Bosniaks could not claim for themselves the independence of an entire republic in which they themselves were a minority. Either they wished to maintain a multiethnic republic, or they didn't. If they were indeed committed to a multiethnic republic, the SFRY was already one; what logic could there be in breaking away from it to set up a microcosm of it? If, on the other hand, the Bosniaks sought an ethnic Muslim state, either they would have to subjugate the other two main ethnic groups, which would of course lack any legitimacy, or else they would have to accept the partition of Bosnia, as Bosnian Serb nationalists demanded.

Sometimes the argument was put more simply. If the Socialist Federal Republic of Yugoslavia could be broken up, why not the Republic of Bosnia and Herzegovina? Whatever arguments applied to the first applied with at least equal force—given their respective ethnic compositions—to the second. So any claim of a right to secession for a unified independent Bosnia was automatically self-defeating.

Robert Hayden[33] provides a Badinter-focused variation on this theme. If Badinter was correct that the SFRY was in dissolution, then so was BiH:

> The legal problem of the nature of the Bosnian conflict stems from the international recognition of Bosnia as an independent state in circumstances in which it did not meet the customary requirements for recognition in international law, because the putative Bosnian state had collapsed. While the international community recognized Bosnia as a state, a very large percentage of its putative population did not. The government that was recognized never controlled more than 30 percent of the territory, nor did it enjoy the allegiance of large, definable portions of the population...[34]

In short, "when it was recognized as an independent state and admitted to the United Nations" the Republic of BiH "was at least as advanced in a 'process of dissolution'[Badinter] as was the SFRY in January 1992."[35] (Actually, Badinter Opinion 1 was issued in November 1991).

These arguments have a superficially persuasive appeal, which accounts for their influence beyond the group of partisan pro-Serbian writers. The appeal, however, derives its force from the elision of several fundamental facts.

First, a multiethnic society can have a supra-ethnic identity, and a right of self-determination. Switzerland, Canada, and Belgium, to name a few, enjoy rights of self-determination despite being multiethnic. Secondly, not every homogeneously ethnic group enjoys a right of self-determination in the widest sense that includes a right of secession. It was argued above that leftover minorities have relatively weak claims to secede (or "partition" new states). The weakness of the claim, it was suggested, stemmed from two essential facts:

that their needs were different from the first secessionists (because they reside next door to their established kin state), and that new states are particularly vulnerable, especially to irredentist claims from the remainder state.

In other words, for good reasons, international law recognizes a *basic asymmetry* between primary and secondary secessions. Going beyond Badinter, however, it was argued above that strong evidence of likely discrimination, as well as high concentrations of a group's population in some area, would increase the strength of a leftover minority's claims. But such evidence, of course, could only be available if the group did not first resort to force even before independence was declared.

Now let us reconsider the case of Bosnia. The largest ethnic group, the Bosniaks, could make a convincing case that in the rump-Yugoslavia available to them they could not hope to freely express and develop their distinct identity; this was evident from the briefest of glances in the direction of either Kosovo or the Sandjuk. But as they were not a majority (Bosniaks, Serbs, and Croats were respectively 44 percent, 31 percent, and 17 percent of BiH in the 1991 census), the only conceivably legitimate way they could enjoy a right of self-determination was if they could carry a majority of the residents of the territory, and if they were committed to a multi-ethnic society in which their particular identity could flourish without subjugating the other groups. Herein lies the fundamental flaw in the microcosm argument. In a Serb-dominated (and Milošević-run) rump-Yugoslavia they stood to be a small and subjugated minority; in an independent multi-ethnic Bosnia they could flourish and promote their distinct identity as a plurality—the most important constituent group—while giving due recognition to the other main constituents, provided enough of those constituents were willing to go along.

It remains to consider what evidence there was that the BiH government met these conditions in fact, and what validity there was to the Bosnian Serb claim to partition.

The evidence, in fact, is overwhelming that the BiH Presidency consistently announced its intentions to pursue a multi-ethnic policy, and acted accordingly. The Bosnian Serb leadership, on the other hand, declared its intentions from the spring of 1991 onward to refuse to comply with the BiH government if it sought independence. As early as July 1991 the SDS mounted a boycott of Parliament, declaring that they no longer considered themselves bound by its decisions.

Even before that, as early as May 1991, they set up SAOs (Serb Autonomous Areas) manned by their own gunmen, and the SDS (Serbian Democratic Party, headed by Radovan Karadzić) "began demanding the secession of large parts of northern and eastern Bosnia, which would then join up with the Croatian 'Krajina' to form a new republic.... More alarmingly, by July 1991 there was evidence that regular secret deliveries of arms to the Bosnian Serbs were being arranged by Milošević, the Serbia Minister of the Interior, Mihalj Kertes, and the Bosnian SDS leader, Radovan Karadzić. Confirmation of this came in Au-

gust, when outgoing federal Prime Minister, Ante Marković, released a tape recording of a telephone conversation in which Milošević could be heard informing Karadzić that his next delivery of arms would be supplied to him by General Nikola Uzelač, the federal army commander in Banja Luka."[36]

It is important to stress that all this was occurring well before the BiH government had even decided to seek independence (indeed, Croatian nationalists would repeatedly blame Bosnians for their understandably fearful dallying) and still several months before the EC had decided to put in place a procedure for republics to apply for recognition. Moreover, many of the SAOs had no Serb majority, let alone majority support from all their residents (one cannot assume all Serbs supported them). The entire Drina Valley lacked not only a Serb majority, not only a Serb plurality, nor was it even the case that no group had a majority; it had an absolute majority of Muslims. Other regions claimed by Serbs also had no Serb majority.

Only a brief chronology of events can be provided here. On October 14, 1991, Radovan Karadzić issued his notorious threat of annihilation of the Muslims in the event of war.[37] In January 1992, Milošević issued secret orders to transfer all JNA officers who had been born in Bosnia to Bosnian territory. Borišav Jović, Milošević's right-hand man, later explained: "We did not wait for international recognition of Bosnia to redeploy the troops in Bosnia. By the time of recognition, out of 90,000 troops in Bosnia... 85% of them were from Bosnia." On January 9, Bosnian Serb politicians proclaimed the Republika Srpska of BiH, and stated that it was part of the Yugoslav Federation. Again, the borders encompassed areas where Serbs were a minority.[38]

During February 29–March 1, the Bosnian Presidency held a referendum according to the recommendation of the Arbitration Commission (Opinion No. 4) that "a referendum of all the citizens of the SRBH *without distinction*" (italics added) be held under international supervision[39]; it was boycotted by nationalist Serbs, who had held their own referendum November 9–10. In the Bosnian referendum, 63.4 percent of eligible voters went to the polls; 99.7 percent of valid ballots voted for independence. Serbian paramilitary forces began ethnic cleansing at the beginning of April, as Arkan's "Tigers" seized control of Bijeljina and Zvornik, with the support of JNA units.

By all accounts, the BiH government was completely unprepared for the savage war which befell it. Izetbegović had even hoped that the JNA would defend Bosnia. Even after the nature of the war had finally dawned on the BiH leadership, its members initially resisted adopting a reciprocal policy of ethnic cleansing.

As a potential leftover minority, did the Bosnian Serbs have any grievances against the Bosnian government which might have strengthened their case for partition? Journalist Blaine Harden summed up the situation on the 24th of April, 1992 in the *Washington Post*:

> Independent observers in Bosnia agree that prior to the outbreak of fighting, the Serb minority there had no reason to fear ethnic discrimination, let alone ethnic violence. The Muslim-led government in Sarajevo had given the Serbs elaborate assurances of political and civil rights, and Milošević acknowledged as much to U.S. diplomats in private meetings.[40]

No evidence has been cited by Hayden or Woodward that would undermine the conclusion of Lukić and Lynch that:

> the primary cause of the war in Bosnia and Herzegovina lay not in the relations between the various national groups but in Serbia's refusal to accept the sovereignty of the breakaway republic. Milošević was determined, independently of the attitude and conduct of the Bosnian Government, to establish a greater Serbian state encompassing all areas of ex-Yugoslavia where significant concentrations of Serbs lived.[41]

We can take stock here of the essential points relevant to assessing the legitimacy of SDS claims to partition:

1. The SDS resorted to force long before the BiH government's declared policy of multiethnicity could be tested, and indeed, even before the elected government sought independence.

2. They demanded independence in territories in which they had no majority, in some even no plurality, and which had no prior standing as political units of any kind.

3. While there was no evidence that Serbs faced discrimination, there was no hope that Serbs, under prevailing conditions, would respect the rights of minorities in territories in which *they* seized control; their primary aim in these territories was to "cleanse" them of non-Serbs.

Even had none of these facts obtained, the claims to partition of a leftover Serb minority would have been weak and highly questionable under the interpretation of self-determination offered above, as well as the less permissive standard view of international law. Given that the facts *did* obtain, the conclusion is inescapable that Serbian nationalist claims to partition BiH lacked any legitimacy, on any construal of self-determination in international law. Hayden argues at length that the republican constitution of BiH had provisions granting veto power to any of the three main constituent groups on constitutional change, and that the BiH government "never controlled more than 30 percent of the territory."[42] But neither of these facts supports the conclusion he draws. On the first point, the constitution was in effect just so long as the SFRY was. It meant that constituent groups held vetoes over constitutional change *within* the SFRY. But the dissolution of the SFRY created a constitutional vacuum in which it was necessary to reconstitute BiH. The means of assessing the self-determination of the Republic recommended by Badinter were the only legitimate, recognized means available: a referendum throughout the republic for all citizens *without distinction*. The alternative, to allow a Serbian veto to hold sway, would have been not self-determination but other-determination: rule

by a minority over the majority. Once majority, or a supermajority (not demanded by Badinter, but provided by the populace) will had been ascertained, it would have been possible further to assess Bosnian Serb claims to partition, had they not first resorted to force. As argued above, those claims had virtually no substance because they were by a leftover minority facing no discrimination, nor did Serbs seek partition on lands, prior to cleansing, on which they had a majority. Moreover, their chief aim was to partition an integral metropolis, Sarajevo, which violates the constraints of even the most permissive theories of self-determination.[43] As for the lack of control of most of the territory by the BiH government, this again does not point to Hayden's conclusion. The Badinter opinion (No. 1) that the SFRY was in dissolution was based on recognition that "in the case of a federal-type State," when four of the six federal republics vote to leave (citing the referenda in three and the then BiH Parliamentary resolution, contested by the SDS), the federation is in dissolution. In BiH, there were no territorial units with analogous standing, the great majority of citizens (at the time including Croats) voted for independence, and the lack of control of the territory was accomplished with the military backing of Serbia proper, both JNA and paramilitaries, and maintained by a Security Council arms embargo imposed at the request of Yugoslavia itself (see above). The lack of control of territory, then, merely underscored the violation by Serbia, in collusion with the SDS, of UN Charter Article 2 (4) ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State.").

In sum, there was both a factual and a normative asymmetry in the conditions of the SFRY and BiH. The factual asymmetry lay in the different respective reasons for the collapse of the SFRY, on the one hand, and the lack of control over most of BiH, on the other hand. The SFRY collapsed when most of the federal units, and most of the population, opted to leave (itself in response to the illegal hegemony imposed by Serbia). BiH, to the extent that it was in "dissolution," was in that condition because of armed aggression by a minority and its outside backers, in direct opposition to the expressed will of the majority of the population in an internationally supervised referendum. The normative asymmetry lay in the different requirements and rights in primary and secondary secessions, implicitly recognized in international law in the principle of *uti possidetis*.

Bosnia, then, was one more case of a seceding republic, led by a group with a distinct identity that could not flourish in the repressive state it wanted to leave and supported by the majority of its population due to its policy of multiethnicity, which fell victim to irredentist violence directed from the remainder state, and lack of effective support from the international community for its independence and integrity. The intervention that did take place was in response to the humanitarian consequences, which soon attained catastrophic dimensions. In this, the attitude to Bosnia was *mutatis mutandis* similar to the inter-

national response to the Russian assault on Chechnya, and to other secessions.

As international law continues to develop, the question of secession will remain one of its greatest challenges. The lessons of the past half century, and especially of the past decade, indicate that failure to support popular national secessionist groups and insistence on preserving the "territorial integrity" of the original state as long as possible tend to contribute to the likelihood that violence, violations of human rights, and even humanitarian catastrophe will ensue. The case of the breakup of the former Yugoslavia illustrates this as well as any. The international community insisted on preserving the territorial integrity of the SFRY throughout the crisis from 1989–1991, and even after the outbreak of fighting in Slovenia and Croatia. It failed effectively to support BiH independence even after recognizing it, and sought solutions based on appeasing irredentist claims. Even in Kosovo, it first waited until a violent crisis erupted before becoming involved, and then granted the Serbian government a year in which to conduct a repressive campaign against the KLA; it was thought that that organization had to abandon its claim to outright independence so that a solution could be found that preserved the (illegally established) territorial integrity of the Federal Republic of Yugoslavia. The reluctance until now to accept a more permissive right of secession in international law is at the root of these policies, but this reluctance needs to be reassessed in light of the general theory of self-determination and the lessons of the recent past.

NOTES

1. I would like to express my indebtedness to Andras Riedlmayer, Fine Arts Library, Harvard University, for consistently excellent, expeditious, and generous bibliographical help.
2. See my "Rights of Secession," *Society* 35:5 (July /August 1998) For a normative defense of territorial states, see my "Territorial States: Who Needs Them? What Are They Good For?", in *Liberalism and Social Justice: International Perspectives*, ed. G. Calder, and E. Garrett, forthcoming.
3. Lee C. Buchheit, *Secession: The Legitimacy of Self-Determination* (New Haven and London: Yale University Press, 1978), 34.
4. This particular quotation is from the aforementioned Gen.Ass.Dec. 2625. See *Blackstone's International Law Documents*, 3rd Edition, ed. Malcolm D Evans (London: Blackstone Press Limited, 1991), 211. Resolution 1514 (December 14, 1960), after asserting (Article 2) that "All peoples have the right to self-determination," adds in article 6: "Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations" (*Yearbook of the United Nations*, 1960, 49). The Helsinki Final Act stipulates that the principle must be pursued "in conformity" with the UN Charter and international legal norms, "including those relating to territorial integrity of States"; articles III and IV respectively uphold the "inviolability of frontiers" and the "territorial integrity of states" (*International Legal Materials: Current Documents*, Bimonthly Publication of the American Society of International Law, XIV:4, July 1975:1292 ff.).
5. For a useful summary of juristic debate up to the mid-seventies, see Buchheit, *Secession*, 127–137.
6. Akehurst, for instance, observes that "Many people in the West have accused the United Nations of applying double standards, but these double standards are inherent in the

Charter"; the articles asserting the principle of self-determination "are so vague that it is doubtful whether they create any legal obligation at all": (Michael Akehurst, *A Modern Introduction to International Law*, sixth edition, (London: Routledge, 1986, 1995), 296.

7. A common refrain of writers hostile to the secessionist republics is that "Led by Germany, European and American recognition of the former Yugoslav republics was accomplished in disregard of international-law doctrine forbidding recognition of secessionist units whose establishment is being resisted forcibly by a central government" (Donald Horowitz, "Self-Determination: Politics, Philosophy, and Law", in *National Self-Determination and Secession*, ed. M. Moore (Oxford University Press, 1998), 189.
8. Dixon, *International Law*, 145.
9. These words are taken from the opening sentence of "The Constitution of the Socialist Federal Republic of Yugoslavia" (Promulgated on February 21, 1974) (in *Yugoslavia Through From Documents: From Its Creation to Its Dissolution*, ed. Snezana Trifunovska (Dordrecht: Martinus Nijhoff Publishers), 224.
10. Reneo Lukić and Allen Lynch, *Europe from the Balkans to the Urals: The Disintegration of Yugoslavia and the Soviet Union* (Oxford: Oxford University Press, 1996); Laura Silber and Allan Little, *The Death of Yugoslavia* (London: Penguin, 1995); Marc Weller, "The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia," *American Journal of International Law* 86 (1992).
11. For example, Woodward introduces a discussion of the issue by alleging that "Western powers.. sped up this process [of Yugoslav disintegration] by accepting the nationalists' definition of the conflict, undermining or ignoring the forces working against radical nationalists and acting in ways that fulfilled the expectations and reinforced the suspicions of nationalist extremists" (*Balkan Tragedy*, 147). The epithet "nationalist extremist" is her term primarily for the Slovenian and Croatian leadership, that is, any non-Serb seeking greater autonomy or independence.
12. Quoted in Laura Silber and Allan Little, *The Death of Yugoslavia*, 59.
13. Article 5 of the constitution states: "The territory of a Republic may not be altered without the consent of that Republic, and the territory of an Autonomous province — without the consent of that Autonomous Province" (Trifunovska, *Yugoslavia Through Documents*, 227).
14. *N. Y. Times*, March 29, 1989
15. "Croatian Leader Warns of Crisis," *International Herald Tribune*, May 15, 1991.
16. This was told to me by former British Foreign Secretary Douglas Hurd, in Lincoln College, Oxford, April 1996.
17. Jonathan Eyal, *Europe and Yugoslavia: A Lesson From a Failure* (Royal United Services Institute for Defence Studies, 1993).
18. Horowitz, "Self-Determination," 191. Horowitz excoriates recent philosophical literature sympathetic to a more permissive right of secession as displaying "a thoroughgoing ignorance of the complexities of ethnic interactions" (199).
19. *Times*, June 25, 1991.
20. Quoted in Marc Weller, "International Response," 570.
21. On Baker, see Silber and Little, *Death of Yugoslavia*, p. 165. For Douglas Hurd, see the *Independent*, June 28, 1991, quoted in Weller, "International Response," 572: Hurd was "obliged significantly to qualify an early statement supporting the 'integrity of Yugoslavia' by adding that this should not include the use of force."
22. Quoted in Mark Danner, "Endgame in Kosovo," *New York Review of Books*, May 6, 1999.
23. Some of his remarks are quoted in Danner, "Endgame."
24. Agreement on Cease-Fire, September 1, 1991. See Weller, "International Response," 576.
25. Weller, "International Response," 578, who notes that a state requesting sanctions against itself was unprecedented.
26. Indeed, the recounting of this much was necessitated only by the tendentious accounts of a group of pro-Serbian writers, and the reliance on them by other commentators. Woodward's chapter 6, in *Balkan Tragedy*, "Western Intervention," is a particularly egregious example.
27. The preamble, quoted earlier, refers to "The nations of Yugoslavia, proceeding from the right of every nation to self-determination, including the right to secession, on the basis of

their will freely expressed in the common struggle of all nations and nationalities in the National Liberation War and Socialist Revolution.. "Article 1 calls the SFRY "a federal state having the form of a state community of voluntarily united nations and their Socialist Republics, and of the Socialist Autonomous Provinces of Vojvodina and Kosovo". However, no article explicitly asserts a right of secession, and Article 4 holds that "The territory of the SFRY is a single unified whole," the frontiers of which "may not be altered without the consent of all Republics and Autonomous Provinces." ("The Constitution of the Socialist Federal Republic of Yugoslavia," in Trifunovska, *Yugoslavia Through Documents*, 224–226)

28 "Opinion No. 1 of the Arbitration Commission of the Peace Conference on Yugoslavia," 29 November 29, 1991, in Trifunovska , *Yugoslavia Through Documents*, 415–417.

29. Susan Woodward, *Balkan Tragedy*, 204.

30. Woodward, *Balkan Tragedy*, 212.

31. Alain Finkelkraut, *Comment peut-on etre Croate?* (Gallimard: Paris, 1992), 140–141. Also quoted in Lukic and Lynch, *Europe*, 274.

32. See Lukic and Lynch, *Europe*, 270.

33. Robert Hayden, along with his wife Milica Bakić-Hayden, have been among the leading academic writers in the U.S. defending Serbia against what they regard as unfair attack.

In an article co-written with Milica Bakić-Hayden, "Orientalist Variations on the Theme 'Balkans': Symbolic Geography in Recent Yugoslav Cultural Politics," *Slavic Review* 51, and Bakić-Hayden's own "Nesting Orientalisms: The Case of Former Yugoslavia," *Slavic Review* 54:4 (1995) 917–931, the authors argue that Serbs are the true victims of Orientalist stereotypes of the Balkans. Other articles maintain that the war in Bosnia was a "civil war" because it was fought by local residents of Bosnia not controlled by Serbia, while the war between Serbia and Croatia was also a "civil war" this time apparently because within the "civil" arena of the entire Yugoslavia. ("Bosnia's Internal War and the International Criminal Tribunal," *The Fletcher Forum* (Winter/Spring 1998: 45–48, 50.) Also, "by classifying recent Yugoslav events as 'genocide', the nature of the events is actually obscured rather than explained." "Schindler's Fate: Genocide, Ethnic Cleansing and Population Transfers," *Slavic Review* 55 (1996): 731. The "nature of events" that is "obscured" is the "inevitability" of the Serbian campaign of ethnic cleansing once the Bosnian government held a referendum and declared independence.

34. Hayden, "Bosnia's Internal War and the International Criminal Tribunal," *The Fletcher Forum of World Affairs*, 22:1, (Winter/Spring 1998):47.

35. Hayden, "Bosnia's Internal War," 51.

36. Noel Malcolm, *Bosnia: A Short History* (London: Papermac, 1996), 224-225.

37. Silber and Little, *Death of Yugoslavia*, 237-8.

38. Silber and Little, *Death of Yugoslavia*, 240.

39. Opinion No. 4, January 11, 1992. Trifunovska, *Yugoslavia Through Documents*, 486.

40. Blaine Harden, "Fighting flares across Bosnia despite truce," *Washington Post*, April 24, 1992. Cited in Lukić and Lynch, *Europe*, 206.

41. Lukić and Lynch, *Europe*, 206.

42. Hayden, "Bosnia's Internal War and the International Criminal Tribunal," *The Fletcher Forum of World Affairs*, 22:1 (Winter/Spring 1998): 47 and passim.

43. SDS leader and indicted war crimes suspect Radovan Karadzić repeatedly stated throughout the war that he "wants to partition Sarajevo along ethnic lines," citing "Berlin, Jerusalem and Beirut" as models for his vision (this quote taken from Blaine Harden, "Bosnia's problems mount under Serbian siege," *Washington Post*, April 28, 1992, quoted in Lukić and Lynch, *Europe*, 207.)