The Naked Land: The Dayton Accords, Property Disputes, and Bosnia's Real Constitution

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The Naked Land: The Dayton Accords, Property Disputes, and Bosnia’s Real Constitution

Timothy William Waters

The urge to destroy is a creative urge.

—Michael Bakunin

The government of the national revolution regards it as its duty . . . to keep those elements from influencing the nation which consciously and intentionally act against its interests. The theory of equality before the law cannot be allowed to lead to the granting of equality to those who treat the law with contempt . . . . But the Government will grant equality before the law to all who, by taking part in the formation of a national front against this danger, back the national interest and do not fail to support the Government.

Our legal system must serve to maintain this national community . . . . The nation rather than the individual must be regarded as the centre of legal concern.

—Adolf Hitler

Not only may one imagine that what is higher derives always and only from what is lower; one may imagine that—given the

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2. Adolf Hitler, Speech to the Reichstag on the Enabling Law (Mar. 23, 1933) in Alan Bullock, Hitler and Stalin: Parallel Lives 463 (1993). Bullock notes that “[t]he essence of the Nazi view of law was the distinction between friends and enemies of the national community as defined by the Nazis.”
polarity and, more important, the ludicrousness of the world—
everything derives from its opposite: day from night, frailty
from strength, deformity from beauty, fortune from misfortune.
Victory is made up exclusively of beatings.

—Ladislav Klima

I. INTRODUCTION

More than three years have passed since the Dayton Accords
brought the conflict in Bosnia and Herzegovina to an end. That
agreement has been remarkably successful in bringing peace, and
even tentative stability, to the country. Yet the Accords were in-
tended to do more: they were meant to create conditions for the re-
turn of the millions of refugees and displaced persons and to restore
political unity among Bosnia’s factions. On these scores, Dayton
has failed completely. Moreover, there remains a wide rift between
the international community’s perceptions of the local parties’ obli-
gations and those parties’ own perceptions and, indeed, their con-
duct. The international community views Dayton as a blueprint for
a final settlement of the conflict, whereas the parties view Dayton
as a trucial way-station, a means of continuing the struggle for
dominance and control.

3. In Bohumil Hrabal, Dancing Lessons for the Advanced in Age before title page (Mi-
4. See generally Bosnia and Herzegovina-Croatia-Yugoslavia: General Framework
Agreement for Peace in Bosnia and Herzegovina with Annexes, Dec. 14, 1995, 35 L.I.M. 75
[hereinafter GFAP]. The documents negotiated in Dayton, Ohio from November 1 to 21,
1995 were formally signed in Paris in December, but are still commonly referred to as “the
Dayton [Peace] Accord[s],” “Dayton,” “GFA,” or “GFAP.” I have worked from a Dayton, not
a Paris, version of the Agreement, but it is identical in all particulars. Also, I will often refer
in this Article simply to “Bosnia” as shorthand for the official name of the country, Bosnia
and Herzegovina.
of its Human Rights Provisions [hereinafter The Dayton Constitution], in Constitutional
Reform and International Law in Central and Eastern Europe 187 (Rein Müllerson, Malgosia
Fitzmaurice, & Mads Andenas eds., 1998) (noting in late 1996 that “[t]he General Frame-
work Agreement for Peace in Bosnia and Herzegovina . . . provided a comprehensive initial
framework for ending the war, and . . . a year of peace in [Bosnia].”); Cf. Charles G. Boyd,
Making Bosnia Work, in 47 Foreign Aff. 42, 43 (Jan.-Feb. 1998) (“It is often stated, incor-
crectly, that the Dayton Accords stopped the fighting in Bosnia. What it did, with the aid of
60,000 U.S. and coalition troops, was freeze in place an uneasy cease-fire and prevent a
resumption of hostilities.”).
of the three sides is happy with the idea of a multiethnic state and each side considers the
Dayton treaty as a temporary solution”); Boyd, supra note 5 at 43–44, 49 (noting that Day-
ton’s “dubious objective” was the “creation of a nation where no common sense of national
community existed . . . requir[ing] inclusion of two ethnic groups . . . who did not then and
do not now wish to live as minority peoples in a state dominated by the larger Muslim
group,” and noting expectations that further fighting is expected if NATO withdraws).
Within this wider context, one of the most complicated aspects of the Bosnian conflict is the range of disputes over real property. Hundreds of thousands of people have been displaced from their homes, which have, in many cases, been occupied by others similarly uprooted from elsewhere. Yet the situation is by no means anarchical. There are legal and quasi-legal structures in place in all areas of the country that shape the actions of the various parties—if only to shape the ways in which policies of eviction and ethnic cleansing can be pursued.

Resolution of the property question in Bosnia and Herzegovina is closely linked, therefore, to the issue of the return of refugees, which the Accords were supposed to facilitate. Any eventual return of displaced persons to their homes will necessitate a resolution of the conflicts inherent in a situation of multiple occupants and claimants. Even if most people give up their right to return, they will still seek compensation for their property. Moreover, investment that is critical to any meaningful reconciliation between the still hostile and separated groups will remain low as long as title is uncertain. So far, the Dayton mechanisms have proven singularly incapable of creating any meaningful resolution of outstanding property issues, let alone the return of individual refugees.

7. See, e.g., United Nations High Commissioner for Refugees Sarajevo Office of the Special Envoy [hereinafter UNHCR], Analysis of Compliance/Non-Compliance with Chapter 1 of Annex 7, 1 (undated, appended letters variously dated September and October 1996) (“In Eastern Herzegovina . . . [t]he homes of displaced Bosniacs from areas such as Nevesinje, Trebinje, Gacko, Lubinje and Bileća are being occupied by Serbs from the Neretva valley south of Mostar, [which is] controlled by Croats (HVO) who will not permit Serb returns.”).

Following increasingly common usage, in this Article I refer to the Muslim population as “Bosniacs.” “HVO” is the Croatian abbreviation for Croatian Defense Council, the title used by ethnic Croatian military forces during the conflict.

8. “Even if there were no other problems, property alone would present a huge hurdle to would-be returnees. Refugees live in the houses of other refugees, forming endless chains of squatters, at least one of whom is bound to balk at going home.” Brotherhood and Disunity, in Survey of the Balkans: A Ghost of a Chance (special section), Economist, Jan. 24, 1998, at 9. [hereinafter Brotherhood and Disunity]; see also Elena Popović, The Impact of International Human Rights Law on the Property Law of Bosnia and Herzegovina, in Post-War Protection of Human Rights in Bosnia and Herzegovina 141, 154 (Michael O’Flaherty & Gregory Gisvold eds., 1998) (noting that the Dayton Peace Accords establish, in Annex 7, “a mechanism to deal solely with one particular right—property[,]” and that “[t]hereby, the GFA recognizes the importance of property rights in finding durable solutions for uprooted people.”).

9. “The illegal suspension of the property rights of innocent people was one of the major weapons with which ethnic cleansing was accomplished . . . . Part of the normalization process is property.” The Commission for Real Property Claims of Displaced Persons and Refugees [hereinafter Property Commission], The Commission for Real Property Claims of Displaced Persons and Refugees (information sheet issued by the Property Commission) [hereinafter The Commission for Real Property Claims].

10. “If there is no definitive mechanism to resolve ownership, every new or repaired housing unit that is made available becomes a source of further confusion and conflict.” Id.
In this Article, I examine the modes of resolving property disputes enforced by the various ethnically based governments that have and/or continue to operate on Bosnian territory: the Serb-dominated Republika Srpska (RS), the Muslim-dominated Republic of Bosnia and Herzegovina (RBiH), the Croat Republic of Herceg-Bosna (H-B), and the joint Muslim-Croat government of the Federation of Bosnia and Herzegovina (Fed. BiH, or the Federation). In so doing, I will illustrate the disparities between the practical operation of these domestic legal regimes and the aspirations for the international mechanisms established at Dayton. Specifically, I examine the legal and quasi-legal structures that exist for resolving disputes involving the massive amount of abandoned property in the country. What are the rules that have actually shaped the disposition of property disputes in Bosnia? What is the relationship between the international community’s imposed solution—the Dayton Accords—and the systems actually operating in the country? What do those domestic systems tell us about the essential nature of the regimes operating there: their aspirations, their modes of legitimation, their purposes for being?

In answering these questions, I will explore the degree to which the nature and resolution of property disputes in Bosnia today can be considered evidence, not merely of violations of certain rights, but of a wholly different constitutional conception of what society and the polity should be. Bosnia’s domestic regimes, as I shall show, are fundamentally—constitutionally—at odds with the commitments imposed upon them in the Dayton Accords; they are therefore a great challenge to policymakers and scholars in the West who have placed their hopes for the restoration and reconstruction of Bosnia in the Accords.

Examining protection of property rights to illustrate the disparity between the legal regimes of the para-states now in existence on the territory of Bosnia and the constitutional order envisioned in the Dayton Accords seems apt. No other subject is more clearly linked to the issues over which the war itself was fought than property. The many terrible human rights abuses committed were not the purpose of the war, but only one means of prosecuting it. Property

11. They were, of course, an integral part of strategy: the logic of ethnic cleansing was aimed at least in part at ensuring that no one returned, and thus horrible abuses were deemed necessary as a way of permanently scaring off members of other ethnic groups. Even in this context, however, human rights violations are still a means to the end of a territory populated with and controlled by members of one ethnic group; they were not an end in themselves. See Tihomir Loža, *A Civilization Destroyed*, in Balkan War Report: Bulletin of the Institute for War and Peace Reporting [hereinafter War Report], at 1, *cited in* Why Bosnia? *Writings on the Balkan War* xiv–xv (Rabia Ali & Lawrence Lifschultz eds., 1993) [hereinafter Why Bosnia?].
systems, on the other hand, are designed to control resources, and control of resources and land was the motivation behind the war’s outbreak and behind the way it was conducted. To the degree a coherent property system exists, it should reflect the parties’ core conceptions about how the naked desire for power is channeled into a system the international community would recognize as “legal.”

This distinction is important for understanding why the international community has largely failed to achieve its stated goals beyond military stabilization. Although it has committed enormous resources to resolving the conflict, the international community has adopted a legalistic and rhetorical approach to the domestic political systems that has limited its ultimate effectiveness. The international community has sought to assess the legitimacy of the various parties by international legal standards and to impose human rights norms on them without reference to the parties’ internal dynamics of legitimacy. However salutary such aspirations may be, the method has proven less than effective. A more textured understand-

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12. This was true not just in Bosnia, but in the whole range of conflicts in the former Yugoslavia: “Until [the signing of the accord on Eastern Slavonia], the war in the former Yugoslavia had been about territorial conquest.” Zoran Daskalović, Dealing for Slavonia, War Report (formerly Balkan War Report: Bulletin of the Institute for War and Peace Reporting) (Nov.-Dec. 1995), at 11.

13. Consider, for example, this analysis:

The challenge in the evolving Western orthodox model of legitimacy to non-intervention and state dominance of the legitimate use of force as part of the basis of order is indicative of the importance of liberal values and the declining relevance of a clear division between domestic and international order for those within the consensus. The domestic-international link, rather than divide, both in the way Yugoslavia lost legitimacy and the effort to legitimize the international response, is indicative of this. . . .

The Western orthodox model was able to make headway into the emerging vacuum of legitimacy, but only as far as the consensus on the Western model as a viable alternative to the socialist legitimacy of the Titoist system extended. In the face of alternatives based on ethno-nationalism and an anti-Western version of Yugoslavia, the Western orthodox model was unable to make much progress.

The international response to Yugoslavia’s collapse seems to show, on the other hand, how much progress liberal political values have made within their Western heartlands. In particular, its cosmopolitan aspects have come through more clearly. . . .

Without consensus on the inclusion of liberal values in legitimacy and the absence of the civic-territorial nationalism it seemed to assume, the EC’s proposals to save Yugoslavia on the basis of a reformed confederation had minimal chance of success. The legitimacy of the EC and the legitimacy of the Serb-led proposals rested on different versions of the legitimacy of liberal political institutions and procedures. That liberalism has great difficulties with nationalism and the issue of identity made it impossible for the EC to deal coherently, consistently, and adequately with this challenge to the basis of their proposals.

John Williams, Legitimacy in International Relations and the Rise and Fall of Yugoslavia 167–68 (1998); Cf. generally Jack Donnelly, Universal Human Rights in Theory and Practice 266–67 (1989) (“Human rights are ultimately a profoundly national, not international, issue . . . [E]ven if we do attribute unrealistically pure motives and unbelievable skill and dedication to external powers, a regime’s ultimate success—its persistence in respecting, implementing, and enforcing human rights—will depend principally on internal political factors.”).
ing of these regimes’ relationship to the rule of law is therefore im-
portant because, to the degree that these systems can be character-
ized as legal and even internally legitimate, it must also be ac-
knowledged that their legitimation is independent of the norms out-
siders might seek to impose on them. Indeed, outsiders must even
consider whether their present social and political organization is
compatible at all with the substantive human rights goals the inter-
national community seeks to advance. I will argue that in failing
adequately to address these issues when seeking to implement hu-
man rights norms in Bosnia, the international community risks ei-
ther the complete irrelevance of those norms, or a dangerous and
compromising co-optation.

This Article proceeds as follows: Part I briefly lays out the back-
ground to the conflict and the present environment. Part II analyzes
the civilian provisions of the Dayton Accords, showing how they
form a radical blueprint for the future of Bosnia as an integral soci-
ety. Parts III and IV lay out the laws and practice of the domestic
regimes regarding property, showing how they stand in sharp con-
trast to Dayton. Part V then discusses concepts of the “rule of law”
and “constitutionalism” and suggests that the usual definitions of
those concepts seriously limit the ability to develop truly meaning-
ful critiques of societies that violate human rights within what are
internally consistent and legitimate legal systems. Then, applying
this theoretical construction to Bosnia, the section derives the em-
pirical rules concerning the resolution of property disputes there as
evidence of the unwritten, yet effectively existing, constitutions of
the domestic regimes. Part VI then argues that the international
community’s efforts to resolve the conflict in Bosnia suffer from an
irresolvable contradiction: they seek to ensure liberal human rights
on a foundation of illiberal, ethnically exclusive states. In conclu-
sion, I suggest that this contradiction poses a serious conceptual and
moral challenge to scholars and policy makers: ensuring the main-
tenance of peace in the former Bosnia will likely require partition
and consolidation of ethnic status, but that will in turn subordinate
the very values and commitments that have inspired much of the
human rights community’s hopes for the country’s future.

II. BACKGROUND: THE POST-WAR SITUATION

Explanations for the outbreak of war in the former Yugoslavia
vary widely, from historically grounded interpretations14 to models
positing elite manipulation of a very recent provenance.15

David Rieff, Slaughterhouse: Bosnia and the Failure of the West 256 (1996) (noting that
unlikely to recede to any meaningful degree. It relies on a recognition that the presently realized ethnic division is highly salient and argument in this Article does not rely on any particular view of the conflict’s genesis; rather, 1991–95, at 36–43 (1997) (surveying various authors on the origins of the conflict). The Bosnia); ing common perspectives on the origins and conduct of the wars in Croatia, Slovenia, and al have willingly embraced and promoted Nazi-like ideology, exerted political leadership, and mobilized the masses to a genocidal campaign.” Id. at 56. See generally Thomas Cushman & Stjepan Mietrostvci, Introduction, in This Time We Knew, supra, at 25–28 (summarizing common perspectives on the origins and conduct of the wars in Croatia, Slovenia, and Bosnia); see also Wayne Bert, The Reluctant Superpower: United States’ Policy in Bosnia, 1991–95, at 36–43 (1997) (surveying various authors on the origins of the conflict). The argument in this Article does not rely on any particular view of the conflict’s genesis; rather, it relies on a recognition that the presently realized ethnic division is highly salient and unlikely to recede to any meaningful degree.

Although Bosnia has figured in the geographical and political consciousness of southeastern Europe since at least the Middle Ages, its appearance in roughly the form in which it is presently recognized as a state dates to the late Ottoman Empire and the Austro-Hungarian protectorate established in 1878. See Ćuvalo, supra note 6, at 2. Although it had no distinct political character within interwar Royal Yugoslavia, Bosnia appeared as a constituent republic of Communist Yugoslavia following World War II. See id. at 36.

The country’s population has been heavily mixed, including large populations of Orthodox Christians, Catholics, and Muslims since at least the first century following the Ottoman conquest in the 1500s. See id. at 10, 15; Peter F. Sugar, Southeastern Europe under Ottoman Rule, 1354–1804, at 54 (1977). Although scholars dispute the origins of particularized national identity in the region, by the 19th century, Bosnia’s Catholics and Orthodox Christians had become firmly identified with their neighboring co-religionist Croats and Serbs, respectively. Muslim identity, as a national phenomenon in Bosnia, developed more slowly. See Ćuvalo, supra note 6, at 25–26.

Following the extreme fratricidal violence of the Second World War, Yugoslavia’s president, Josip Broz Tito, created a regime that enjoyed considerable legitimacy and achieved a measure of stability. The relationship of the Communist regime to the ultimate dissolution of the country, however, remains controversial. Many analysts trace the immediate origins of Yugoslavia’s dissolution crisis to the political events and economic changes leading to the promulgation of the 1974 Constitution, which greatly expanded the political and economic power of the republics and autonomous regions. See Mihailo Cmoklinja, The Roots of Yugoslavia’s Dissolution, in Why Bosnia?, supra note 11, at 269–70; Susan Woodward, Balkan Tragedy 47 (1995) (tracing international economic changes as the root of Yugoslavia’s dissolution).

The death of Tito in 1981 weakened the central government, which was now headed by a rotating collective presidency. See Ćuvalo, supra note 6, at xxvii, 37–38. The increasing paralysis of the center and the economic crisis that gripped Yugoslavia in the 1980s increased the autarkic tendencies of the republics and provinces and led to a reaction by Serbian intellectuals and political leaders, who argued that increasing decentralization threatened Serbs outside of Serbia proper, most especially in Kosovo, which became a flashpoint for Serbian grievances. Beginning with the “1986 Declaration” by a group of Serbian intellectuals, see Cohen, supra, at 39–40, this nationalist reaction broke the surface of political life in Yugoslavia, and rapidly became the dominant political force in Serbia, Montenegro, and Serbia’s two autonomous regions of Kosovo and Vojvodina, whose autonomy was effectively nullified in 1989. Increasingly, federal institutions, such as the army, came to identify their interests, and that of Yugoslavia as a whole, with those of ethnic Serbs. The other republics, especially Slovenia, feared that they, too, would be subordinated to Serb interests, and demanded a looser confederation. When their demands were left unmet, the republics moved towards independence. In response, in 1991 ethnic Serbs in Croatia demanded their own autonomy or independence, and were supported by the Yugoslav army. Full-scale war broke out in Slove-
nia and Croatia in 1991. Slovenia succeeded in gaining control of its territory after a brief conflict. Croatia also succeeded in establishing itself as an independent state, but large areas of its territory were held by the Serb minority. See Ćuvalo, supra note 6, at xxviii; Mihailo Crnobrnja, The Destruction of Bosnia-Hercegovina, in Why Bosnia? supra note 11, at 249–52.

A similar pattern followed in Bosnia later in 1991, when the Muslim and Croat leadership, increasingly fearful of domination by a Serb government, demanded independence from Belgrade, and the Serb leadership used these demands to justify its own program of partition. By early 1992, paramilitary forces working in cooperation with the Yugoslav army were already developing positions in various parts of the Bosnian countryside; in some areas, fighting had already broken out. On April 6, 1992, following a referendum that overwhelmingly favored independence but was boycotted by the Serbs, Bosnia declared its independence and was quickly recognized by the European Community (EC) member-states and the United States. See Ćuvalo, supra note 6, at xxx, 41. Fighting broke out on a wide scale, and Serb forces, backed by the federal army, seized most of eastern and northern Bosnia, while Muslims retained control of the center of the country and the extreme northwest (the Bihać pocket), as well as three isolated towns in the east (Srebrenica, Žepa, and Goražde). The Croats held the southwest and various pockets of land in the center of the country. The Serb advances, in particular, were marked by large-scale atrocities and wholesale expulsion of the non-Serb population. See Ćuvalo, supra note 6, at 42. Many Serbs fled from areas of the country held by Muslims and Croats, but the scale of violence against them was not comparable.

The Muslims and Croats were ostensibly allied against the Serbs, but their relationship was tense from the beginning. From the start of the conflict, they were effectively two separate communities organized on their respective portions of Bosnia’s territory. By 1993, full-scale war had broken out between Croats and Muslims, and their communities fully separated. See Woodward, supra, at 268. There was also fighting between one Muslim group in the northwestern Bihać area and the Sarajevo-based Muslim government. See Ćuvalo, supra note 6, at xxxiii, 44.

International attempts to resolve the conflict, meanwhile, were generally seen as ineffective, especially during the first two years of the war, when the United Nations (UN) led the effort. Outside involvement became vigorous only after 1994, when NATO began to intervene militarily.

In June 1991, then-Secretary of State James Baker had reassured the Yugoslav leadership that the United States supported the territorial integrity of the country, signaling the intention of the United States to take a secondary role in the conflict. See Bert, supra note 15, at 136, 138. The UN and the EC were therefore initially the most active players. The UN positioned lightly armed military units, the UN Protection Force (UNPROFOR), between the Croats and Serbs in Croatia in February 1992. See Ćuvalo, supra note 6, at xxix. The Security Council imposed sanctions against Yugoslavia in May, and in June extended the mandate of UNPROFOR to include securing humanitarian assistance inside Bosnia; in September, the General Assembly expelled Yugoslavia. See id. at xxx–xxxi. In October, the Security Council imposed a ban on military flights over Bosnia. See id. at xxxi. In April and May 1993, the Security Council declared six “safe areas” in Bosnia, including Sarajevo and Srebrenica. See id. at xxxii.

The EC was also prominent in the early stages. Following Germany’s earlier lead, a move often criticized as having enflamed the situation in Bosnia, on January 15, 1992, the EC recognized Slovenia and Croatia. See Woodward, supra note 15, at 276–78; Bert, supra note 15, at 137. In February, talks were initiated in Lisbon under EC auspices. At the negotiations, the first of several proposed cantonization plans were put forward, but they were rejected by the Bosnian government leadership which proceeded to declare independence on March 3, 1992. See Ćuvalo, supra note 6, at xxix.

The UN and the EC also cooperated in trying to broker a peace deal. A joint mediation team presented a second cantonization plan in October (the Vance-Owen plan), but the United States pushed for changes, and, by January 1993, the Serb leadership rejected it. See Bertrand de Rossanet, War and Peace in the Former Yugoslavia 126 (1997). In June 1993, another highly confederal plan (the Owen-Stoltenberg plan) was rejected by the Muslim government leadership. See Ćuvalo, supra note 6, at xxxiii; de Rossanet, supra, at 126–27.
While there remains intense debate about both the origins and the depth of divisions between the various populations, few dispute that the ethnic divisions, whatever their provenance, have now attained an undeniable salience. The course of the war itself, less controversial though more shocking, has been extensively documented, including the extreme depravities committed by the warring parties, particularly the Serbs and to a lesser degree the Croats and Muslims. Few indeed are the actors or observers who suggest that it is possible to return to the status quo ante in which ethnic differences were, depending on one’s view of history, either unimportant, repressed, or ignored.

Of greater importance than arguments about origins is an appreciation of the present situation. The Dayton Accords, signed under considerable pressure in late 1995, provided for the military stabilization of the country and the progressive disarmament of the main combatant forces by a heavily armed NATO force, referred to as the Peace Implementation Force (IFOR; later renamed the Stabilization Force (SFOR)). It also provided for the political reorganization of the country into a federal government of “Bosnia and Herzegovina (BiH)” composed of two “entities,” the Republika Srpska and the Federation of Bosnia and Herzegovina. The Federation was further divided into “cantons” roughly corresponding to ethnic enclaves of Croats and Muslims. A new constitution for the highly decentralized country was promulgated by the agreement, providing for mul-

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tiple levels of governance and administration, and including extensive guarantee for human rights and for the right of refugees and displaced persons to return to their homes anywhere in the country.

The military provisions of the agreement have been successfully implemented, but the civilian provisions, though somewhat invigorated by increased international intervention during 1998, have largely remained unenforced. The federal institutions of government barely function, and federal legal instruments, including the federal constitution itself, are ignored in all areas of the country; the internationally recognized government in Sarajevo governs only the Muslim sector. Local institutions representing ethnically exclusive constituencies continue to hold power over their respective parts of the country, which is, essentially, partitioned. The Serbs and Croats remain practically committed to strategies of obfuscation, partition, and secession, and while the Muslims favor reunification, all three parties remain, to varying degrees, hostile to and defiant of the stated intentions of the international community to effect the return of refugees. For most of the last three years, the international community’s attempts to implement the civilian aspects of Dayton have been almost totally frustrated by the abiding power of the local, ethnic governments that effectively control the country despite the presence of tens of thousands of NATO and other troops.

Although there have been generally positive developments in Bosnia in the past year—particularly in the disposition of the Serb

17. As the year of repatriation, 1998 seems to be over as there is no real strategy, Zdravko Todorović, president of the Serb Republic Helsinki Committee, said. The authorities in Bosnia-Herzegovina want to protect ethnically clean territories, and the failure of the Sarajevo declaration on returns [issued by an international conference of aid donors and refugee relief organizations on February 3, 1998] as well as the situation in Drvar [a Croat-controlled municipality in western Bosnia] confirm this Helsinki Committee’s view, Todorović said, adding that there was no serious possibility of exercising the right to return.

2 July 1998, Bosnia: Official Says Human Rights Violations Continuing in Bosnian Serb Republic, Sarajevo, BBC Monitoring Summary of World Broadcasts, BBC Monitoring Service: Central Europe and Balkans (July 2, 1998). The Office of the High Representative’s (OHR; see infra page 535) initiative for 1998 to be the “Year of Return” was “launched because the provisions on refugee returns had been among the least respected in terms of the 1995 Dayton peace accords, particularly in the area of minority returns . . . .” Gabriel Partos, Return in Slow Motion, 6 Transitions 42 (Mar. 1999).

18. Some of the most important developments since late 1997 include: the active intervention by SFOR forces in the rift between two factions of the ruling party in Republika Srpska, leading to the election of a new prime minister with the votes of delegates from all three nationalities and with open Western support; the announced introduction of common license plates and a common currency; and increased diplomatic pressure on the Muslim government to allow returns of refugees to Sarajevo. See generally Zoran Pajić, Protectorates Lost, War Report (Feb.-Mar. 1998), at 26; and Jane M.O. Sharpe, Dayton’s Unfinished Business, War Report (Feb.-Mar. 1998), at 27–28.

However, these changes have largely come to nothing, or have since been reversed; in the September 1998 elections, nationalist candidates won sweeping victories. “Bosnian Serb
government—and a newly assertive posture on the part of the international community, there have not been, as yet, any clear signs of substantive change in the core issues of refugee returns and political reintegration. Returns of refugees across ethnic divides remain almost non-existent (less than ten percent of all returns19), and the much heralded breakthroughs since the 1997 elections have been either cosmetic or have not been inconsistent with the maintenance of the present ethnic division:

At one level progress in establishing the institutions of the joint state has been made. However, real cooperation between the still dominant nationalist parties has been slight and grudging, while progress on the ground, in terms of the return of refugees, freedom of movement and the arrest of indicted war criminals, has been minimal. Not only has there been considerable resistance to reintegration by the RS, but Muslim- and Croat-controlled areas of the federation also remain effectively

President Biljana Plavšić has acknowledged losing her bid for reelection to ultranationalist Nikola Poplašen, AP reported on 21 September . . . . Poplašen, leader of the chauvinist Serbian Radical Party (SRS) and an ally of indicted war criminal Radovan Karadžić, said he will follow the Dayton agreement "to the letter, nothing more and nothing less." Pete Baumgartner, Plavšić Concedes Election Defeat, Radio Free Europe/Radio Liberty Newsline (Sept. 22, 1998) <http://www.rferl.org/newsline/1998/09/220998.html>. Even the more cosmetic changes have met with resistance: one local paper reported that replacement of license plates and drivers licenses had "hardly begun" in Croat-majority counties with only five days to go before the deadline for conversion. Jožo Pavković, Ili uzmite moje tablice i čirilicne vozačke ili autom ne možete u Europu (Either Take My License Plates and Cyrillic Driver's License or You Can't Drive to Europe), VECERNI LIST, May 25, 1998, at 2 (author trans.).

19. Partos, supra note 17, at 43. See also Brotherhood and Disunity, Economist, supra note 8, at 9 ("So far, minority returns have been negligible. By December 1997, just 35,000 of the 400,000 displaced Bosniacs who returned home had gone to areas where their ethnic groups constituted a minority. Most of them were old people going back to Muslim-controlled areas. Hardly any young non-Serbs have returned to the Serb Republic. Without a breakthrough, Dayton’s promise of the right to return will come to nothing." ) The Sarajevo Declaration called for the return of 20,000 non-Muslim refugees to Sarajevo during 1998. International Crisis Group issued a report assessing its progress:

The most glaring shortfall in the implementation of the Sarajevo Declaration are the return figures. Although some 7,100 minority families have registered to return, according to UNHCR, only 1,292 minority persons (504 Croats, 692 Serbs and 96 “Others”) moved into Sarajevo in the first seven months of 1998. In comparison, according to UNHCR figures, several municipalities during this period attracted a greater number of minorities in relation to their total populations. In all, 5,204 minorities returned to the Federation (current population 2.3 million) during this period, compared with only 859 minorities to Republika Srpska (current population 1 million).

Since the end of the war, 20,426 minorities moved to Sarajevo, 44 percent of all minorities (46,294) who moved to areas in the Federation; and 3,078 minorities moved to Republika Srpska. Taking into account the differential in overall population numbers, the return rate of minorities to the Federation has been nearly three times the return rate to Republika Srpska.

International Crisis Group, Too Little, Too Late: Implementation of the Sarajevo Declaration, Part 1, section entitled Paltry Return Figures (Sept. 9, 1998) <http://www.crisisweb.org> (citations omitted) [hereinafter Too Little, Too Late].
under separate administrations, making for an enduring three-way division of the country, which renders uncertain prospects for BiH’s survival as a unified state.20

The Bosnian war produced extremely high levels of displacement, as well as destruction of property.21 The 1991, prewar population 4.36 million was reduced to perhaps 3.2 million in 1996.22 As many as 250,000 people had been killed, and hundreds of thousands more fled from one side of the country to the other, or to third countries. As of late 1995, when hostilities ended, more than three million people had been displaced from their pre-war residences, and some two million still do not have “durable solutions.”23 In Mostar, for example, more than sixty percent of the population has been dispossessed of its prewar property.24 In addition, 200,000 to 300,000 refugees from other parts of former Yugoslavia, mostly Serbs but also some Muslims, have fled conflicts elsewhere and now live in Bosnia.25 Some towns have nearly doubled in population, while large rural areas have been depopulated, particularly in central Bosnia and Republika Srpska.26

Remaining minorities in the country had been reduced to insignificant numbers. For example, the United Nations High Commissioner for Refugees (UNHCR) estimated that 20,000 Muslims and Croats remained in Republika Srpska as of October 1996, all of them in the western part of the entity.27 As of mid-1998, these numbers had changed only slightly, and overall ethnic homogeneity has

20. Economist Intelligence Unit, Country Profile: Bosnia and Hercegovina/Croatia 1997-98 (1997), at 5. One journal covering the region noted that in 1998, “OHR and other international agencies decided against putting pressure on the authorities in Republika Srpska to take back non-Serbs. That policy was designed to avoid undermining the position of Prime Minister Milorad Dodik and his coalition of pragmatist Serb parties, particularly in the run-up to September’s elections. A large-scale return of Bosniaks [sic] and Croats to Republika Srpska might have provided hard-line Serb nationalists with a popular rallying point.” Partos, supra note 17, at 43. To the degree that returns represent the core of the international community’s vision for Bosnia’s future, such a policy suggests that the many changes that have occurred have not significantly changed the disposition of power.

21. “About a tenth of Bosnia’s housing stock was destroyed during the war; another 25-30% is uninhabitable.” Brotherhood and Disunity, Economist, supra note 6, at 9.

22. In 1997, the World Bank estimated the two entities’ populations as: 2.3 million in the Federation, 900,000 in Republika Srpska. Economist Intelligence Unit, supra note 20, at 3, 14.

23. Brotherhood and Disunity, Economist, supra note 8, at 8.


25. Economist Intelligence Unit, supra note 20, at 14.

26. Id. at 15.

27. See UNHCR, supra note 7, at 7. The report refers to “Northern Bosnia,” a designation that would generally be understood to refer to the half of the Serb entity from Brčko westward; however, the report mentions, in the same paragraph, minority communities in Zvornik, which is in the half of the Serb entity east (and south) of Brčko, although geographically it is indeed in the north of the country as a whole.
actually increased since the war.28 Those who have attempted to return, or to reclaim lost property, have met with opposition ranging from administrative obstacles29 to armed mobs on all sides.30 Destruction of refugees’ property, including abandoned property, is common, especially if the houses show any signs of repair that might suggest an attempt to return.

The great majority of expulsions and expropriations occurred during the war, governed, if at all, by wartime legislation, though most often subject to a more immediate and compelling law. At the end of the war, another layer was added: the international community’s vision of a just and integrated settlement as expressed in the Dayton Accords, and with it a new posture regarding the role of law, even in the domestic regimes. Let us now turn to the civilian provisions of Dayton, with an eye towards those affecting the disposition of property, to see what they promise for Bosnia and its peoples.

28. See, e.g., Boyd, supra note 5, at 48 (“[T]here are now at least 70,000 fewer people living in ethnically mixed areas than when the accord was signed.”); “Bosniacs accounted for 94.5 percent of all people who moved into Sarajevo [in 1997], including 19,623 who had not previously lived there.” International Crisis Group, Too Little, Too Late, supra note 19, section 5 entitled Abuses in Allocation of Available Housing (noting also that the percentage in 1998 has been lower, though Sarajevo is still overwhelmingly monoethnic).

Figures on the number of returns to predominantly Serbian Banja Luka, situated in the moderate half of Republika Srpska, give a sense of how little return has occurred. One official of the Organization for Security and Cooperation in Europe (OSCE) estimated that “approximately 200 Bosniaks [sic] and another 100 Croats have returned to the Banja Luka Municipality, exclusively family reunification (i.e., they have a house, with space waiting for them—which hasn’t been allocated to Serb DP/Refs. [displaced persons/refugees]). Perhaps a handful of cases where the original owner returned to his prewar home by arranging some sort of deal with the Serb DP currently inside.” Private communication with OSCE officer (Mar. 25, 1998).

29. A UNHCR report notes that “separate legislation and legal systems within each of the two . . . areas, particularly in property laws, discriminate against minorities and many categories of refugees/returnees.” UNHCR, supra note 7, at 4.

There are other problems as well: unemployment among returning refugees may be as high as 92%. Brotherhood and Disunity, Economist, supra note 8, at 9. Unemployment outside the agricultural sector is estimated at more than 40% in the Federation and at almost 70% in Republika Srpska. Partos, supra note 17, at 44.

30. One report notes: Resettlement of minorities in rural Bosnia is resisted about equally by the majority groups in the three respective sectors, although Muslim cities such as Sarajevo and Tuzla, secure in their dominance, are less resistant to minority settlers. Notwithstanding anecdotal evidence about this or that Croat woman who wants her pre-war Muslim neighbor to return, there seems to be a clear consensus that the hatred generated by the war must fade before any real mixing of the groups can take place without resistance. Boyd, supra note 5, at 47–48.
III. DAYTON’S PROMISE: THE INSTITUTIONALIZATION OF INTERNATIONAL HUMAN RIGHTS

The first, longest, and most detailed section of the Dayton Accords naturally deals with military stabilization, given the need to achieve peace and stability before any reconstruction could begin. The remainder, however, addresses the so-called civilian aspects of the settlement. These sections include: the constitution of the new federal government of Bosnia and Herzegovina; provisions dealing with human rights, refugees, and displaced persons; political participation; the role of various international agencies; and transitional provisions for transferring powers to the various levels of government over time. Out of these provisions, many of them quite narrow and technical in nature, emerges a vision of a radically transformed and internationalized society.

A. General Civilian Provisions

The Dayton Accords acknowledge each of the parties as “sovereign equals,” and recognize two entities, the Federation of Bosnia and Herzegovina and the Republika Srpska, as well as the federal government at the national level. The new Constitution of Bosnia and Herzegovina is incorporated as the fourth annex to the Accords. The preamble to the constitution declares its desire to protect private property, its commitment to “the sovereignty, territorial integrity, and political independence of Bosnia and Herzegovina in accordance with international law,” its inspiration by “the Universal Declaration of Human Rights, the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, as well as other human rights instruments,” and identifies “Bosniacs, Croats, and Serbs, as constituent peoples (along with Others) and citizens of Bosnia and Herzegovina.”

The Constitution commits Bosnia to be a democratic state under the rule of law. Citizenship is both national and entity-level, each regulated by its respective level, and neither citizenship can be revoked due to “language, religion, political or other opinion, national or social origin, association with a national minority, prop-

31. GFAP, supra note 4, Annexes 1A, 1B, & 2, 35 I.L.M. at 92, 109, 112. See infra Part VI.
32. GFAP, supra note 4, art. I, 35 I.L.M. at 89.
33. Id. Annex 4, art. I, § 3, 35 I.L.M. at 118.
34. Id. Annex 4, Preamble, 35 I.L.M. at 118.
property, birth or other status."37 Citizens of Bosnia and Herzegovina can hold other citizenships subject to a national parliamentary agreement with the other state, a provision included to allow Serbs and Croats dual citizenship.

Elaborate human rights guarantees are incorporated into the constitution. The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), including its Protocols, is directly applicable law and has priority over all other law at both the national and entity level.39 An extensive annex of conventions is also incorporated as law.40 Relevant enumerated rights include:

(e) The right to a fair hearing in civil . . . matters.

(g) Freedom of thought, conscience, and religion.

(k) The right to property.

40. The rights enumerated in the following agreements are secured to all persons in Bosnia and Herzegovina, see id. Annex 4, art. II, § 4, 35 I.L.M. at 119, and the country is to remain or become a party to all of the same agreements, see id. Annex 4, art. II, § 7, 35 I.L.M. at 119.
1. 1948 Convention on the Prevention and Punishment of the Crime of Genocide;
3. 1951 Convention relating to the Status of Refugees and the 1966 Protocol thereto;
4. 1957 Convention on the Nationality of Married Women;
5. 1961 Convention on the Reduction of Statelessness;
6. 1965 International Convention on the Elimination of All Forms of Racial Discrimination;
8. 1966 Covenant on Economic, Social and Cultural Rights;
9. 1979 Convention on the Elimination of All Forms of Discrimination against Women;
10. 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
11. 1987 European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment;
12. 1989 Convention on the Rights of the Child;
13. 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families;
14. 1992 European Charter for Regional or Minority Languages;
Id. Annex 4, art. I, 35 I.L.M. at 126.
Annex 6 includes an identical list, except that it also includes the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols. See id. Annex 6, Appendix, 35 I.L.M. at 136. This convention is incorporated directly into the text of the Constitution and thus does not appear on its annexed list.
(m) The right to liberty of movement and residence. 41

A specific non-discrimination clause guarantees that all enumerated or annexed human rights “shall be secured to all persons in Bosnia and Herzegovina without discrimination on any ground such as . . . language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” 42

B. Constitutional and Political Division of Power

The political system established by the constitution is highly confederal, with a weak central government retaining power over foreign policy, customs, monetary policy, inter-entity transportation and criminal enforcement, and, more relevant to this paper, immigration and refugee policy. 43 The national executive and legislative organs are so finely balanced among the three ethnic groups as to practically ensure effective paralysis at the whim of any of the three.

The lower levels of government have correspondingly more power and autonomy. Although few powers are enumerated, all powers not expressly granted to the national government belong to the entities, 44 and the effective ethnic paralysis of the national institutions created by the Constitution further ensures that the entities and cantons will not be checked from above. 45 The entities have broad police powers 46 and, although not specifically mentioned, the regulation of property rights is understood to be a power of the entities—or, in the Federation, of the ten cantons into which that entity is further divided. 47 The entities may also enter into ill-defined

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42. Id. Annex 6, art. II, § 4, 35 I.L.M. at 131.
43. See id. Annex 6, art. III, § 1, 35 I.L.M. at 131.
44. See id. Annex 6, art. III, § 3, cl. a, 35 I.L.M. at 131.
45. The central government has no independent taxing power and is dependent on the entities and international support. See Economist Intelligence Unit, supra note 20, at 13.
46. See GFAP, supra note 4, Annex 4, art. III, § 2, cl. c, 35 I.L.M. at 120.
47. The system of cantons was created by the so-called Washington Agreement, which established a federation between the warring Muslim and Croat communities. The Agreement reads in pertinent part:
Framework Agreement for the Federation
II Division of Responsibilities
2: The Central Government and the cantons have responsibility for:
-human rights
-infrastructure for communications and transport
"special parallel relationships with neighboring states consistent with the sovereignty and territorial integrity of Bosnia and Herzegovina." At the same time, however, any law or act of an entity inconsistent with the Constitution is superseded.

C. The Judicial System

An implicitly ethnically mixed Constitutional Court has exclusive jurisdiction in any dispute arising under the Constitution between the entities or between Bosnia and an entity, including determinations about the constitutionality of entity constitutions and laws and of any "special parallel relationship with a neighboring state."

No provision, however, is made for other levels of courts, and the proceedings of existing courts and administrative agencies are continued under the transitional provisions annexed to the Constitution, as are "[a]ll laws, regulations, and judicial rules of procedure . . . to the extent not inconsistent with the Constitution."

-use of natural resources.

As appropriate, these responsibilities may be exercised jointly or separately, or by the cantons as coordinated with the central government.

3. The cantons shall have all responsibility not expressly granted to the central government. They shall have, in particular, authority over the following:

- housing

- local land use (zoning) . . . 


48. GFAP, supra note 4, Annex 4, art. III, § 2, cl. a, 35 I.L.M. at 120.

49. See id. Annex 4, art. III, § 3, cl. b, 35 I.L.M. at 120.

50. Four members are selected by the House of Representatives of the Federation, two by the Assembly of Republika Srpska and three by the President of the European Court of Human Rights, with these last not being citizens of Bosnia or any neighboring state. See id. Annex 4, art. VI, § 1, cl. a-b, 35 I.L.M. at 123. This formula ensures that at least the Serbs and the Muslims can vote in members if they maintain ethnic solidarity in their parliaments. The implicit deal is that the Federation’s four seats would be divided two and two between Muslim and Croat candidates. Note that the inclusion of three international members allows any one ethnicity’s representatives, together with the internationals, to constitute a majority, or for any two ethnicities’ representatives to constitute a majority with even a single international vote. There are no provisions for an ethnic veto or opt-out, and the court’s decisions are final and binding. See id. Annex 4, art. VI, § 4, 35 I.L.M. at 123.

51. Such as Republika Srpska has attempted to do with Yugoslavia. See id. Annex 4, art. VI, § 3, cl. a, 35 I.L.M. at 123.

52. Except to note that the Constitutional Court has appellate jurisdiction over issues under the Constitution arising out of judgments of other courts in Bosnia, however constituted. See id. Annex 4, art. VI, § 3, cl. b, 35 I.L.M. at 123.


54. Id. Annex 4, art. II, § 2, 35 I.L.M. at 126.
establishment of courts is effectively left within the purview of the entities and cantons.

D. Provisions Relating to Refugees and Property

Because questions of property and returns are so central to the conflict and to any prospects for its resolution, the Accords give them extensive attention. The Constitution specifically addresses the rights of those who fled or were expelled during the war:

They have the right . . . to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any such property that cannot be restored to them. Any commitments or statements relating to such property made under duress are null and void.\(^{55}\)

Moreover, an entirely separate Annex deals specifically with the rights of refugees and displaced persons. All refugees and displaced persons are guaranteed the right “freely to return to the homes of origin” and to receive back their property or be compensated for it.\(^{56}\) They are free to choose their destination, and the parties must “facilitate the flow of information necessary for refugees and displaced persons to make informed judgments about local conditions for return.”\(^{57}\)

The parties acknowledge the importance of “early return”\(^ {58}\) and undertake to allow return “in safety, without risk of harassment, intimidation, persecution, or discrimination, particularly on account of their ethnic origin, religious belief, or political opinion.”\(^ {59}\) They specifically agree to repeal discriminatory legislation, suppress incitement of ethnic or religious hostility and acts of retribution by public or private individuals or forces, protect minority populations and provide access to them by international agencies, and prosecute or dismiss officials responsible for violating human or minority rights.\(^ {60}\) Dayton gave UNHCR a special role in developing repatriation plans for “an early, peaceful, orderly and phased return of refugees and displaced persons, which may include priorities for certain areas and categories or returnees.”\(^ {61}\)

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\(^{55}\) Id. Annex 4, art. II, § 5, 35 I.L.M. at 119.

\(^{56}\) See id. Annex 7, art. I, § 1, 35 I.L.M. at 136.

\(^{57}\) Id. Annex 7, art. I, § 4, 35 I.L.M. at 137.

\(^{58}\) Id. Annex 7, art. I, § 1, 35 I.L.M. at 136.

\(^{59}\) Id. Annex 7, art. I, § 2, 35 I.L.M. at 136.

\(^{60}\) See id. Annex 7, art. I, § 3, cl. a–e, 35 I.L.M. at 136.

\(^{61}\) Id. Annex 7, art. I, § 5, 35 I.L.M. at 136. This provision has sometimes been criticized as subjecting the ostensibly absolute right of return to conditions, but as it is impossible to return so many people simultaneously under even ideal political conditions, the practical
The Accords require deeper levels of social commitment and re-structuring because the security necessary to reassure returnees extends beyond mere formal legal guarantees. Accordingly, the parties “undertake to create in their territories the political, economic, and social conditions conducive to the voluntary return and harmonious reintegration of refugees and displaced persons, without preference for any particular group.”

E. The Property Commission

The parties must also establish an independent Commission for Real Property Claims of Displaced Persons and Refugees, or Property Commission, to determine “any claims for real property” involving involuntary loss. It aims to create an atmosphere of legality in which returns can proceed: “As the refugees learn that there is a formal mechanism which offers the possibility of return . . . the levels of confidence among refugees as to their future in Bosnia and Herzegovina will gradually increase.”

The commission has extensive powers to gain access to records, determine lawful title and value, and dispose of property. Acts of the commission are final. In developing its “rules and regulations, the Commission shall consider domestic laws on property rights” and strive to strengthen the local legal system. A list of its guiding principles states:

The Commission will seek to restore the integrity of the property law system as it stood in 1991. The Commission will disregard any wartime legislation which violates international human rights standards;

necessity of planning phased returns need not be seen as a limit, but rather as a means of implementing that right.

62. Id. Annex 7, art. II, § 1, 35 I.L.M. at 138. Responding to a very specific concern, the same article also bars the parties from discriminating in military conscription and even requires them to “give positive consideration to requests for exemption from military or other obligatory service based on individual circumstances . . . .” Id. Annex 7, art. II, § 2, 35 I.L.M. at 138. A subsequent article establishes an amnesty for all crimes unrelated to the conflict committed since January 1, 1991. See id, Annex 7, art. VI, 35 I.L.M. at 138.
63. Id. Annex 7, art. XI, 35 I.L.M. at 139.
65. See GFAP, supra note 4, Annex 7, art. XI, § 1, 35 I.L.M. at 139. The commission may also delegate other agencies to conduct such investigations. See id.
66. See GFAP, supra note 4, Annex 7, art. XI, § 4, 35 I.L.M. at 139.
67. See id. Annex 7, art. XI, § 5, 35 I.L.M. at 139.
68. See id. Annex 7, art. XI, § 7, 35 I.L.M. at 139. However, “Annex 7 . . . contains no detailed provisions regarding the execution and enforcement of such decisions. This may prove to be a serious obstacle to the work of the Commission, and may undermine not only the credibility of the Commission, but also the peace process as a whole.” Popović, supra note 8, at 155.
69. GFAP, supra note 4, Annex 7, art. XV, 35 I.L.M. at 140.
The Commission will seek to restore rather than replace domestic legal institutions. Wherever possible, the Commission will seek to have its decisions enforced by domestic institutions, but will co-ordinate with other international institutions to apply international pressure where these domestic mechanisms fail.\(^{70}\)

**F. Summary**

The picture that emerges from the Dayton Accords provisions is of a highly confederal state, with the bare minimum of authority and sovereignty at the center, and the concomitant maximum of power and autonomy at the entity and cantonal levels—the very levels that correspond to the ethnic and military division of the country. Counterbalancing this, however, are explicit and extensive guarantees for individual human rights and equally explicit rejections of any exclusion or discrimination on the basis of those very characteristics by which the population was divided during the war.

One of the most significant features of the Dayton Accords is that they create institutional monitoring and implementing mechanisms of considerable scope and power. It is not merely a hortatory document or one that creates a tiny straw commission to deal with a global problem. The Property Commission, for example, is assigned a specific and highly intrusive mandate dealing with property. In addition, the Accords introduce other institutional bodies, such as the Office of the High Representative (OHR),\(^ {71}\) the Human Rights Chamber and the Ombudsman,\(^ {72}\) and the International Police Task Force;\(^ {73}\) intergovernmental organizations such as UNHCR and the Organization for Security and Cooperation in Europe (OSCE) are given specific and broad-reaching mandates to involve themselves in activities closely related to refugee returns and human rights issues;\(^ {74}\) and the parties themselves are enjoined to create or participate in other independent bodies with important monitoring and adjudicative functions.

The whole effect is to move radically beyond the demands of such instruments as the International Covenant on Civil and Political Rights, which proclaims more rights than it founds mechanisms.

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\(^{70}\) Property Commission, Report to Donors on Operations: 1 April 1996 to 30 November 1996 (information sheet issued by the Property Commission) (undated). See also Property Commission, Joint Inter-Agency Appeal for the Year Ending 31 December 1997 (information sheet issued by the Property Commission) (undated).

\(^{71}\) See GFAP, supra note 4, Annex 10, 35 I.L.M. at 146.

\(^{72}\) See id. Annex 6, arts. II-XII, 35 I.L.M. at 131–34.

\(^{73}\) See id. Annex 11, 35 I.L.M. at 149.

\(^{74}\) See, e.g., id. Annex 6, art. XIII, 35 I.L.M. at 135.
There is perhaps no state in the world more closely linked to the web of international instruments guaranteeing various human rights, nor any state required to institutionalize those rights to a greater degree, nor any that must give greater access to the international community to ensure the realization of those rights. This is the formal framework, created by the United States and acceded to by the governments of the various ethnic communities. It may be fairly understood as a comprehensive and radical vision for the future of Bosnia as an integral society. It is both a promise and a blueprint for the realization of that promise. The laws promulgated by those governments, however, and their operation as expressions of ethnically exclusive standards, mean that the reality on the ground in Bosnia hardly reflects that vision. The promise of Dayton has been stillborn.

IV. THE ETHNIC COMMUNITIES’ LAWS AND PRACTICE DEALING WITH ABANDONED PROPERTY

All three communities—Serbs, Croats, and Muslims—incorporated large parts of the legal structure developed under Communist Yugoslavia into their new legal systems. Property law, however, was subject to broad-reaching revision from the very start. Control of property—of territory—was fundamental to the political and military aims of all three sides, and consequently all three sought to solidify their military gains and stabilize their new ethnic states with reformed property laws that institutionalized ethnic preference, though in tacit fashion.

One of the unique forms of property that all the sections of the former Yugoslavia, including all three of the communities in Bosnia, inherited was the occupancy right. This form of property is of particular importance in contemporary Bosnia. Relatively few principal dwellings in the former Yugoslavia were privately owned; the majority were owned by state corporations or enterprises, which granted rights of occupancy and use to employees or members of certain categories of citizens. In the late Yugoslav period, the pri-

75. See Pajić, The Dayton Constitution, supra note 5, at 188 (noting the “strong American influence in drafting the Constitution. . . .”); and Boyd, supra note 5, at 43 (noting that “Dayton [is] the centerpiece of U.S. policy. . . .”).

76. Another report by the OHR describes the right this way: The occupancy right, which is greater than a tenancy right and less than full ownership must be considered as a sui generis right: the right to quasi-ownership. There is no precedent in comparative law or in the practice of international human rights organisations (notably in the jurisprudence of the European Court of Human Rights) on which one could rely in order to determine its legal nature.

In the official ideology and the legal doctrine of the former Yugoslavia, the occupancy right was conceived as a basic right in the field of housing, which was gradually to replace the private property [sic]. It was also protected as such by the Constitution. As
vatization of socially owned apartments began, but this process was largely halted in Bosnia because of the war. Consequently, though the amount of socially owned housing remains uncertain, it is likely that most of the housing remains socially owned, especially in cities. It is unsurprising then that the legal instruments that have come in for greatest criticism deal with regulating abandoned socially owned property.

During the war, the three ethnic groups each had their own political and legal institutions in place and operated as sovereign governments or as effective appendages of neighboring mother states. Dayton was supposed to have reorganized those systems, severing the connections with neighboring states and bringing some functions back under the control of a national government, while requiring changes in other functions that remained under sub-national institutions. Despite these provisions, the three ethnic groups continued to implement their own laws well after Bosnia’s national institutions had, in theory, begun to function—and therefore, well after all authority to pass and implement such laws had been subordinated to the confederated structure.

The two entities’ main property laws purport to solve the practical problems facing each entity in finding housing for hundreds of thousands of displaced persons, while at the same time protecting the original owners’ rights. In practice, however, the laws of both entities make permanent the expropriation of the property of those who have fled and accelerate the departure of those minorities who still remain.

During the past two years, the various factions have been under considerable pressure from the international community to produce laws conforming to international, or at least European, norms and standards. Both entities’ abandoned property laws were declared inconsistent with the principles of the Dayton Accords and were to be rewritten in a collaborative effort between the Office of the High Representative and the entities. New legislation dealing with

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78. See OHR, Opinion of the Legal Adviser to the High Representative, (concerning the Law on Abandoned Property of Republika Srpska) (undated) (unofficial translation) (unpaginated) [hereinafter Opinion of the Legal Adviser to the High Representative (RS)], see discussion infra Part II.A; OHR, Opinion of the Legal Adviser to the High Representative (concerning the Law on Abandoned Apartments of the Republic of Bosnia and Herzegovina (RBiH)) 2 (undated) [hereinafter Opinion of the Legal Adviser to the High Representative (RBiH)], see discussion infra Part II.B. The laws of the Croat Republic of Herceg-Bosna are per se invalid
abandoned property was to have been submitted by November 1, 1996; the Federation passed a new law in early 1998 and Republika Srpska in late 1998.\footnote{79}

Following are discussions of the provisions of the principal property laws in each of the three domestic systems, with commentary relating to specific important provisions. When these provisions have been laid out, I will then enumerate the principles found operating through them. As I will demonstrate, while all three domestic laws are generally neutral on their face, as actually applied in the context of the Bosnian war and its aftermath, they produce almost universally consistent results in favor of the dominant ethnic group, and to such a degree that they must be recognized as evidence of a constitutional orientation, not merely a pattern of violations.

\textit{A. Republika Srpska Property Law}

The Law on the Use of Abandoned Property, the principal law dealing with abandoned property in Republika Srpska, was promulgated on February 27, 1996,\footnote{80} several months after the end of the war and the signing of the Dayton Accords. The stated purpose of the law is to regulate “the conditions and modes of abandoned property utilization with the aim of refugees and displaced persons accommodation . . . as well as the protection and preservation of the property.”\footnote{81} The law covers both real and movable property,\footnote{82} as well as “objects of historical, cultural, artistic, and scientific importance.”\footnote{83} It does not distinguish between private and socially owned property, but seems to apply to both.\footnote{84}

The definition of abandonment of property is rather circular, declaring that “the real estate and the movable property which had been left by the owners, which has to be proved in any concrete as Herceg-Bosna itself was never recognized and in any event ceased to exist legally after the creation of the Federation. \textit{See} note 47, \textit{supra}. In this paper, I consider the law of Herceg-Bosna as well, despite its non-validity in the eyes of the international community, because the law continues to be applied in fact. \textit{See infra} part III.B.2, section on the real property law of Herceg-Bosna.

\footnote{79. \textit{See} discussion \textit{infra} Part IV.A and IV.B.3.}

\footnote{80. \textit{Law on the Use of Abandoned Property, reported in} Republika Srpska Official Gazette, year V, no. 3 (Feb. 27, 1996).
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\footnote{81. \textit{Id.} art. 1. The sense of the phrase “refugees and displaced persons” does not refer definitively or exclusively to the \textit{same} persons who have abandoned the property; it can equally well refer to other, incoming refugees or displaced persons.
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\footnote{82. \textit{See id.} art. 2.
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\footnote{83. \textit{Id.}
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\footnote{84. \textit{See OHR, Law on the Use of Abandoned Property: Compliance with the Provisions of the General Framework Agreement for Peace and the International Instruments Referred Therein} (concerning the Republika Srpska Law on the Use of Abandoned Property) 4 (undated) [hereinafter \textit{Law on the Use of Abandoned Property: Compliance (RS)}].}
case by record, during the inventoring and keeping of a file on abandoned property.”\textsuperscript{85} OHR notes that

The abandoned property under this Law is practically undefined. The definition amounts to say that the abandoned property is the property that has been abandoned. No further criteria or conditions are set in order to determine or to limit the scope of this definition.

\ldots Such an imprecise, even negligent, manner of regulating an issue such as a loss of a vested right \ldots infringes directly upon one of the most fundamental, generally recognized principles of law—the principle of “legal certainty.” This principle is an integral part of the legal systems of Bosnia and Herzegovina and the Entities.\textsuperscript{86}

Subsequent articles do provide some clarification: persons granted use of property under Article 1 may be assigned commercial properties that have not been used for more than thirty days;\textsuperscript{87} residential and agricultural properties may be assigned if they have been abandoned (or are not in use), without any specified delay.\textsuperscript{88} Article 15 lays out the formal list of priorities for the allotment of abandoned residential property:

Abandoned apartments, houses and other abandoned residential area [sic] shall be handed out exclusively to refugees and displaced persons, and persons lacking accommodation owing to combat activities, according to the following priorities:

1. families of the killed soldiers
2. war invalids with physical injuries of category I–IV
3. war invalids with physical injuries of category V–X
4. educated staff of which there is a lack in the Republika Srpska.\textsuperscript{89}

\textsuperscript{85} Law on the Use of Abandoned Property art. 2, \textit{reported in} Republika Srpska Official Gazette, year V, no. 3 (Feb. 27, 1996) (English translation improved). Listing the responsibility of two separate offices in each community: the local geodetic records office lists abandoned private property, while the housing and jobs administration lists abandoned property to which the government holds title. \textit{Id.} art. 7.

\textsuperscript{86} See OHR, \textit{Law on the Use of Abandoned Property: Compliance (RS), supra} note 84, at 5.

\textsuperscript{87} See Law on the Use of Abandoned Property art. 11, \textit{reported in} Republika Srpska Official Gazette, year V, no. 3 (Feb. 27, 1996).

\textsuperscript{88} \textit{Id.} In addition, agricultural lands and open land are subject to additional criteria for determining abandonment: the commission may ascertain that agricultural land and other land is abandoned if the owner or user has settled at another place; if he has not farmed the land; or if he has not paid taxes or fulfilled other unspecified obligations. \textit{Id.} art. 29.

\textsuperscript{89} Law on the Use of Abandoned Property art. 15, \textit{reported in} Republika Srpska Official Gazette, year V, no. 3 (Feb. 27, 1996). Some other articles add modifications to this list:
Article 17, dealing with the assignment of space in occupied dwellings, is the most criticized provision in the Law. It provides that refugees and displaced persons who cannot be accommodated in abandoned property be temporarily housed in occupied residences that have extra space. Under this provision, each person in residence is accorded the right to use of 15 square meters of space; additional space can be expropriated, without compensation, to house one additional person for every additional 15 square meters. Article 17 accommodations are temporary, “until provision of other appropriate accommodation is made.”

Article 17 does not simply declare that all extra space shall be expropriated, however. It employs a priority system that is, if anything, more directed than that in Article 15; it prioritizes the assignment of residences “according to the following order:

— in the apartments and other kinds of accommodations whose owners or users have not complied with their military duties or work obligations;
— in the apartments and other kinds of accommodations of owners or users whose household members have left the Republic; or
— in other kinds of accommodation in which there is free room.”

Why the Law should establish this system of priorities is not difficult to see. Most of the abandoned property in predominantly Serbian territory belongs, by title or use, to non-Serbs, while all the refugees and displaced persons in that territory are Serbs. As long as the real title-holders (or any other non-Serb refugees) are kept outside, the displaced will be unable to find accommodations in the houses they are using.

Article 13 stipulates that refugees from urban areas be given priority to urban residential properties; Article 30 lays out a more detailed priority list for allotment of agricultural property which partly follows the priority list for residential property “according to the next priorities:

1. agricultural households of the killed soldiers of the Republika Srpska
2. agricultural households having the status of refugees
3. agricultural households of invalids of the war
4. other agricultural and non-agricultural households which use them temporarily and can work on the abandoned land which will be given in lease” [also, enterprises which had rights of usage to presently abandoned residences may receive 30 percent of that property to be distributed among their staff; “according to article 15 of this law . . . .”]

Id. art. 12.

90. Id. art. 17 (English translation improved). Thus, an 89 square meter house with three original inhabitants could receive two additional DP residents: the original three get 15 square meters each, for a total of 45; this leaves 44—that is two times 15 square meters, with 14 square meters left over.

91. Id. art. 17 (English translation improved).

92. Id. art. 17 (English translation improved). Refusal to accommodate persons in extra space can result in fines from 100 to 1000 dinars (roughly 16 to 160 dollars). Id. art. 43.
out by other means, then a *prima facie* neutral priority list can be applied without ethnic complications. That is to say, the law itself need not be discriminatory or applied in a discriminatory fashion, if the essential discriminatory act has preceded it or occurs elsewhere in the political or legal sphere. However, when the issue is the expropriation of housing from residents who are still present—and there are still a few thousand non-Serb families living in Republika Srpska—then ensuring that the brunt of expropriation falls most heavily on those non-Serbs can only be achieved by unequal application, or by a priority list that has a greater impact on those non-Serbs.

The priority list in Article 17 clearly adheres to that latter strategy (although unequal application is also employed). Among those who have not “complied with their military duties” are many non-Serbs who were not allowed to serve in the military as they were deemed untrustworthy. “Work obligations,” an ambiguous phrase, surely includes, *inter alia*, mandatory civilian work details to which many non-Serbs were subjected, such as trench-digging for military units; such work was imposed as an intimidation tactic. The second priority category, while including some Serbs, is overwhelmingly composed of non-Serbs who left because of the war and the intimidation and terror tactics by Serb authorities and irregular units.

Articles 39 through 42 deal with the return of the original owner or occupancy rightholder. Articles 39 and 40 establish “the right of fair compensation” as an alternative to the restoration of the property; these provisions “are to be applied on the basis of reciprocity,” a term for which no definition is given. Though the text is obscure, it has been interpreted as meaning that in the case of a socially owned apartment, the user may not move back in if the present occupant is unwilling to move out. OHR notes that

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93. *Id.* art. 42.
94. Human Rights Coordinating Center, OHR [hereinafter Hum. Right Coor. Cen.], Property Issues: Guidelines for Action 3 (undated). OHR notes that Article 40 [S]ubjects the right to return to a set of conditions, on which . . . the owner has no influence. If the real property has been allocated for temporary use, the restoration of the property to its owner will be subject to both:
- willingness of the temporary occupant to leave the property and return to [his] own property
- willingness of the Federation of BH or Republic of Croatia to restore or compensate the property to this temporary user.
These conditions limit substantially the possibility and the right to return and to have one’s property restored.

OHR, *Law on the Use of Abandoned Property: Compliance (RS)*, supra note 84, at 6. Also: “Articles 39 and 40 prioritize the rights of the temporary occupant over those of the original owner.” OHR, *Opinion of the Legal Adviser to the High Representative (RS)*, supra note 78, at 1.
Article 40 further prescribes the conditions for the restoration of the property to its owner upon his return. If the real property is not occupied by a temporary use, it will be restored to its owner within fifteen days. On the other hand, if it has been allocated for temporary use to a person whose property remained on the territory of the Federation of Bosnia and Herzegovina or the Republic of Croatia, the restoration of the property to its owner is foreseen in a longer term:

—within 30 days after the temporary user returns to his property or apartment
—within 60 days from the day of payment to this person of the compensation for the property he had deserted and the compensation of possible expenditures he had as a user.\(^{95}\)

The Law also voids all contracts for “renting, using[,] and guarding abandoned apartments, other premises and property concluded after 6 April 1992 between the owners or users who left the territory of the Republika Srpska and third parties.”\(^{96}\) However, contracts for the exchange of property between the present property-holder and the original owner of real property dated before the promulgation of the Law remain valid.\(^{97}\)

The Law closes with a general exemption of veteran invalids, war widows, and war orphans from its provisions\(^{98}\)—all categories adversely affected by the duty of defending the regime.

Following increased pressure that the international community applied to Republika Srpska throughout 1998,\(^{99}\) coupled with the

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\(^{95}\) OHR, Law on the Use of Abandoned Property: Compliance (RS), supra note 84, at 2.

\(^{96}\) Law on the Use of Abandoned Property art. 49, reported in Republika Srpska Official Gazette, year V, no. 3 (Feb. 27, 1996). Likewise, property placed in the control of proxies after April 6, 1992 (the beginning of the war in Bosnia) by persons who no longer reside in the territory of Republika Srpska cannot be alienated (with exceptions for the families of soldiers who have been killed, persons who are not military conscripts, and citizens of Republika Srpska who are temporarily working abroad and who have fulfilled their obligations towards Republika Srpska). \textit{Id.} art. 53. Wills concluded after April 6, 1992 are null and void, if they transfer property in Republika Srpska to persons not living in Republika Srpska. However, this Article shall not prejudice persons who inherit because a family member was a combatant killed in the war, or persons who are “citizens of the Republic who are temporarily staying abroad as migrant workers and who have fulfilled all their obligations towards the Republic.” \textit{Id.} art. 52 (English translation improved).

\(^{97}\) \textit{Id.} art. 51. The contract must have been for property that the present holder owns and which was situated on the territory of the Federation or other republics of the former Socialist Republic of Yugoslavia—that is to say, not in Republika Srpska. \textit{Id.} art. 51.

\(^{98}\) “The provisions of this law are not to be applied to the families of combatants killed in the war as well as to the families of war military invalids . . . who had not resolved their accommodation status before 6 April 1992 and who, until this law enters into force, have resolved their accommodation matters on some kind of legal basis.” \textit{Id.} art. 61 (English translation improved).

\(^{99}\) Western efforts came to the fore when the Peace Implementation Council, the body representing the states overseeing the implementation of the Dayton Accords, issued a statement in Luxembourg in June 1998 requiring that Republika Srpska pass new property legisla-
increased influence the West exerted through the administrations of Prime Minister Milorad Dodik, a new property law finally promulgated in December 1998. To date, there is little evidence about implementation of the new law.

B. Property Law of the Federation Communities

The following three Sections deal with the laws of the two principal communities in the other entity, the Federation of Bosnia and Herzegovina. These laws were promulgated during wartime and, despite being declared invalid by organs of the international community, continued in force during the Dayton period until a new Federation property law was promulgated in 1998. I will deal first with the provisions and practice of the wartime laws, and then see what changes, if any, have come about since the new law was enacted.

1. Republic of Bosnia and Herzegovina Property Law

For most of the post-Dayton period, a wartime Republic of Bosnia and Herzegovina property statute from 1992 was applied in the Muslim areas of the Federation. The Law on Abandoned Apartments was first promulgated in 1992 and frequently amended, with a consolidated version being issued on 1 September 1995; thus the consolidated version appeared before the signing of the Dayton Accords but after the point at which a settlement, or a major victory for the Croats and Muslims, seemed likely. That version remained in force until early 1998.

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100. "The Republika Srpska parliament approved a bill on 2 December that confirms the right of former occupants to their homes and gives the government 30 days to respond to demands by Muslims and Croats for the return of their apartments and houses. [Republika Srpska President Nikola] Poplašen's Radicals opposed the measure, but legislators belonging to Karadžić's Serbian Democratic Party (SDS) voted for it. SDS spokesmen told AFP that they backed the bill as "the lesser of two evils" because it allows Serbian refugees living in Muslims' and Croats' former homes to appeal their eviction and requires the Bosnian Serb government to rehouse them if they lose. The SDS officials added that they feared that the international community's Carlos Westendorp would impose a "far worse" law if the parliament voted down the draft." Patrick Moore, Bosnian Serbs Pass Property Laws, Radio Free Europe/Radio Liberty Newsline (Dec. 3, 1998) <http://www.rferl.org/newsline/1998/12/031298.html>.

101. Law on Abandoned Apartments, reported in Official Gazette of the Republic of Bosnia & Herzegovina no. 6/92, as amended in Official Gazette of the Republic of Bosnia & Herzegovina nos. 8/92, 16/92, 13/94, 36/94, 9/95, and 33/95 (volume numbers and dates not available) (unofficial translation by OSCE Human Rights Department) [hereinafter Law on Abandoned Apartments, reported in Official Gazette of the Republic of Bosnia & Herzegovina no. 6/92].
The laws promulgated by the Muslim community’s leadership during the war had a somewhat different status from those of the Croats or Serbs, as they were the laws of the Republic of Bosnia and Herzegovina (RBiH), a government effectively identical to the internationally recognized country and government. However, although the government purported to be making laws for the entire country, its effective reach was only over Muslim-populated territories; moreover, its repeated use of exclusionary formulations about the “aggressor” necessarily limited their beneficial effect mostly to Muslims.

Article 1 incorporated the occupancy right created under laws of the Yugoslav period, but added a provision that such rights would temporarily expire if the holder and his household had abandoned the apartment after April 30, 1991. Article 2’s definition of an abandoned apartment was just as circular as the Republika Srpska law’s definition, but also included occupied homes in which unlicensed weapons were found or illegal activities were being conducted.

Article 3 provided some illuminating clarification: an apartment is not considered abandoned if the rightholder and his household “had to leave it due to the aggressor’s compulsion intended to execute the ethnic cleansing of a population from certain areas or in the course of accomplishing the aggressor’s goals[,]” or “if it was de-

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102. Private property and socially owned property are dealt with in separate laws, though there is considerable, and ambiguous, overlap. The Decree with the Force of Law on Temporary [sic] Abandoned Real Property under Private Ownership during the State of War or the State of Immediate War Danger, reported in Official Gazette of the Republic of Bosnia & Herzegovina no. 11/93 (Apr. 3, 1998) (unofficial translation by OHR), was the principal regulating agent for private property during the war. However, the Law on Abandoned Apartments extended all its provisions to private property as well. “The provisions of this Law are also to be accordingly applied to apartments privately owned by citizens.” Law on Abandoned Apartments art. 12, Law on Abandoned Apartments, reported in Official Gazette of the Republic of Bosnia & Herzegovina no. 6/92. In addition, several other laws regulate property rights in Muslim sections of the country, and there is some inconsistency between the various enactments. Open Society Inst., supra note 77, at 5.

103. The relevant law is the Law on Housing—Consolidated Version, reported in Official Gazette of the Socialist Republic of Bosnia & Herzegovina nos. 14/85 and 12/87 (volume numbers and dates not available), cited in Law on Abandoned Apartments, reported in Official Gazette of the Republic of Bosnia & Herzegovina no. 6/92. In addition, several other laws regulate property rights in Muslim sections of the country, and there is some inconsistency between the various enactments. Open Society Inst., supra note 77, at 5.

104. Law on Abandoned Apartments art. 1, reported in Official Gazette of the Republic of Bosnia & Herzegovina no. 6/92.

105. Id. art. 2. Presumably, unlicensed weapons and illegal activities would encompass the actions of any non-Muslim who had attempted to organize for combat or even home defense prior to fleeing. Also:

Article 2 of the Law further restricts the right to return by failing to designate a fixed time period during which apartments may be declared abandoned. As a result, even after the Cessation of the State of War, apartments continued to be declared abandoned, despite the fact that the conflict was the basis of the justification for the determination of abandonment.

OHR, Opinion of the Legal Adviser to the High Representative (RBiH), supra note 78, at 2.
stroyed, burnt, or in direct jeopardy due to war activities (life-depriving threat, physical torture, expulsion by the aggressor and other similar grounds)."¹⁰⁶

These exclusions effectively defined the relevant polity to include first Muslims, and to a less certain degree, patriotic non-Muslims (i.e., those non-Muslims who remained in Sarajevo and other areas held by the government faction). Many of the military exigencies that might force a person from his home would have been equally applicable to Croats and Serbs fleeing before military operations of the Army of the Republic of Bosnia and Herzegovina (ABiH—the Muslim forces), but these individuals are perforce excluded from claiming an exemption under Article 3 because only the aggressor’s military operations or acts of ethnic cleansing establish an exemption, a term presumably not including the ABiH.

Another condition listed in Article 3 garnered the most criticism from the international community:

An apartment will not be considered as abandoned if the holder of the occupancy right [] is located on the territory of the Republic of BaH [sic] and who, [] with members of his/her household, commences to use the same apartment within seven days after this Law comes into force; or within fifteen days after this law comes into force, for the holder of the occupancy right who is located outside the territory of the Republic of BaH [sic].¹⁰⁷

Here the rule was framed as an exemption from the rules on abandonment; in Article 10, however, the exceptional nature of this exemption was made more positive:

If the holder of an occupancy right cited in Article 1 does not commence to use his/her apartment again, in the term cited in Article 3 after the date of the Decree on the Cessation of the State of War is passed, it is to be considered that he/she has deserted his/her apartment permanently.

On the day of the expiration of the term cited in paragraph 1 of this Article the holder of the apartment occupancy right loses that right for his/her apartment and that fact will be stated by the decision of the competent authority.¹⁰⁸

¹⁰⁶. Law on Abandoned Apartments art. 3, reported in Official Gazette of the Republic of Bosnia & Herzegovina no. 6/92 (English translation improved).
¹⁰⁷. Id. art. 3 (English translation improved).
¹⁰⁸. Id. art. 10 (English translation improved).
The “Cessation of the State of War” was proclaimed on December 22, 1995, meaning that returns had to occur by December 29 for displaced persons, or January 6, 1996 for refugees.¹⁰⁹ Thus these provisions, added just before the cessation of the war in Bosnia, effectively gave several hundred thousand Croat, Serb, and Muslim refugees who held occupancy rights to apartments on Muslim-controlled territory just over two weeks to return to the country from abroad (or one week, if they were living across the cease-fire line) to reclaim their apartments. At that time, of course, the political and military reality prevented this; almost no one was able to return in time to claim an occupancy right.¹¹⁰ No hearings were required; loss of right was automatic and immediate.

Many Muslims were also effectively stripped of their occupancy rights by these provisions; this might seem to belie any direct ethnic animus. The argument is more complex, however. First, because the law—though promulgated for the entirety of Bosnia—had effect only in Muslim-controlled areas, the great majority of those affected were non-Muslims who had fled. Only Muslims who had wished to escape the general privations of the war—but not ethnic cleansing—would have left from areas under Muslim control; their numbers were far fewer.

More importantly, the beneficiaries of the provision—those displaced persons presently occupying socially owned apartments who might be forced to vacate if the owner were to return—were almost exclusively Muslims who had stayed throughout the conflict. Thus the effect of the provision in Article 3 was to strip almost all Serbs, Croats, and “non-patriotic” Muslims, of their occupancy rights, and to transfer those same almost exclusively to patriotic Muslims; a dual animus—against other ethnicities and against insufficiently patriotic Muslims—motivated the exclusion, and the two instances of animus are of a piece.¹¹¹

¹⁰⁹. OHR, Law on Abandoned Apartments: Compliance (RBiH), supra note 76, at 3.
¹¹¹. Consider this interpretation:

Article 10 . . . infringes upon the right of return set forth in Annex 7 (Article I) and Annex 4 (Article II § 5) of the GFAP by imposing an arbitrary and discriminatory time period in which refugees and displaced persons are required to return and reoccupy their apartments . . . . In addition, given that war is itself a temporary state and that the Law in question was passed to address the consequences of abandonment in a war-time context, permanent loss of property rights (including rights regarding socially owned property) is both unjustified and violates the right to property provided for in Article I of Annex 7 and Articles II(3)(k) and (5) of the Constitution of Bosnia and Herzegovina (Annex 4).

OHR, Opinion of the Legal Adviser to the High Representative (RBiH), supra note 78, at 1. Elsewhere in the same document, however, this interpretation of the problem as one of arbitrariness is given over in favor of a more directed animus:
The Law then created a new hierarchy of rightholders. First listed were “an active combatant against the aggressor as well as . . . a person who is left without an apartment due to hostilities.”\textsuperscript{112} The article also noted that apartments distributed through the Ministry of Defense were to be given “for temporary use by members of the Army of the Republic BiH as well as to members of families of combatants who lost their lives in combat against the aggressor on the Republic.”\textsuperscript{113}

These rights of occupancy were temporary, but their termination depended on the government’s determination that the threat of war has ceased. The occupancy right lasted for up to one year after the formal cessation of the threat of war,\textsuperscript{114} which, despite hostilities having ended in November 1995, still has not been declared. Any loss to the original owner was final:\textsuperscript{115} “According to the Dayton Agreement . . . where the restoration of property is impossible, a fair compensation must be provided. The Law on Abandoned Apartments, however, d[id] not foresee even such a possibility.”\textsuperscript{116}

2. Herceg-Bosna Property Law

Laws and Decrees passed by the Croatian community are in a somewhat different position than those of the Serbs and the Muslims. The Serbs’ laws have become the recognized law of Republika Srpska, while the Muslims’ laws have become, for the most part, the laws of the Bosnian federal government or the Federation.

\textsuperscript{112} Law on Abandoned Apartments art. 7, \textit{reported in} Official Gazette of the Republic of Bosnia & Herzegovina no. 6/92.

\textsuperscript{113} \textit{Id.} A similar provision in the same article grants priority for Interior Ministry apartments to its employees and to family members of employees who were killed, presumably in connection with the war effort, though this is not explicitly stated.

\textsuperscript{114} \textit{Id.} at art. 8. It should be noted that this is not the same as the previously mentioned declaration of the \textit{state of war}.

\textsuperscript{115} UNHCR notes

The BiH property laws, in intent, discriminate against refugees and displaced persons who fled their place of origin for reasons other than ethnic cleansing or direct war damage. More than 80,000 apartments in the Sarajevo area have been declared ‘abandoned.’ These properties have been either systematically allocated by the authorities to displaced persons, members of the ABiH or their families or illegally seized.

UNHCR, \textit{supra} note 7, at 5.

\textsuperscript{116} OHR, \textit{Law on Abandoned Apartments: Compliance (RBiH), supra} note 76, at 7. Nor, of course, do the other two communities’ laws.
1999 / The Dayton Accords and Bosnian Property Disputes

though duly ignored on Croatian territory. For their part, the Croats’ laws were not recognized by the international community, because their entity, the Croatian Republic of Herceg-Bosna, is not recognized, having officially dissolved into the American-brokered Federation.\(^\text{117}\) Therefore, the nearly identical provisions that the Croat law shared with the Muslim law on termination of occupancy rights and on the maintenance of new temporary rights under a regime of war emergency did not generate the same level of criticism. Indeed, there has been almost no analysis of Croat legislation by the relevant international institutions.\(^\text{118}\) However, the laws and institutions of Herceg-Bosna continue to be applied in Croat areas.\(^\text{119}\)

\(^{117}\) See Ćuvalo, supra note 6, at xxxiv.

\(^{118}\) And, therefore, the abandoned property legislation of Herceg-Bosna was never reviewed on its own merits by OHR. If it were, it would almost certainly be found to be inconsistent with Dayton. Cf. Popović, supra note 8, at 152 (“Real property regulations of the Croatian Republic of Herzeg-Bosna [sic] represent a flagrant disregard of the GFA inasmuch as they practically impede the right of displaced persons to return to their homes. As such, they represent a final act of the policy of ethnic cleansing. . . . [T]hese ‘Herzeg-Bosna’ [sic] Decrees also violate the ECHR [European Convention on the Protection of Human Rights].”).

\(^{119}\) “Although formally dissolved, the self-proclaimed Croatian Republic of Herzeg-Bosna [sic] continues its existence and functions, including its self-styled legal system. This system maintains a comprehensive set of decrees and regulations concerning real property, and in particular regarding expropriation and confiscation.” Id. at 151. The regime in Herceg-Bosna continues to operate and to control the civil administration of its territory, though largely as a province of neighboring Croatia. It also maintains its own army, which, on paper, is integrated into the Federation forces together with the Muslim Army of the Republic of Bosnia and Herzegovina (ABiH), but in reality is entirely separate. For a brief discussion of the low level of real integration of the Croat and Muslim sections of the Federation, see Ćuvalo, supra note 6, at 48–49 (calling the Muslim-Croat federation one of “the two fundamental post-Dayton problems”); for a thorough overview of the problematic situation in the early Dayton period, see generally Thomas Ambrosio, The Federation of Bosnia and Herzegovina: A Failure of Implementation, in State and Nation Building in East Central Europe: Contemporary Perspectives 225–41 (John Micgijel ed., 1996) (identifying the critical elements of disjuncture—the division of Mostar, the essentially separate nature of the two national armed forces—which remain salient in 1998).

Indeed, the continuing relevance of Herceg-Bosna is best proven by the continuing efforts of the international community to confirm its non-existence: “William Dale Montgomery, the U.S. ambassador to Croatia, said in a statement in Zagreb on 16 April [1998] that Croatia must help dismantle the Herzegovinian quasi-state of Herceg-Bosna, which continues to exist in contravention of the Dayton agreement. ‘We look to the government of Croatia to use its influence to see that these parallel institutions are dismantled and that responsibility is ceded to the joint Croatian and Muslim federal government in Sarajevo.’” Patrick Moore, U.S. Demands End to ‘Herceg-Bosna,’ Radio Free Europe/Radio Liberty Newsline (Apr. 17, 1998) <http://www.rferl.org/newsline/1998/04/170498.html>.

Compare also this interview with Jacques Klein, Senior Deputy High Representative:

[Interviewer]. . . . What do you think about the mistake that the Croats did not get their own entity in Dayton?

[Klein] Croatia joined the Federation of B&H before Dayton. That is why they do not have the right to an entity. They probably are now looking toward Banja Luka asking themselves why the Serbs can have their own symbols, flag, etc. I have to point out that it would probably have been much easier to work with the Croatian residents in Bosnia if they had their own entity and culture. This could even be achieved within the Federa-
The Decree on Abandoned Apartments was first promulgated when the de facto separate Croatian Community of Herceg-Bosna was still formally a constituent element of Bosnia and Herzegovina. It was very similar to the Muslim law discussed above, employing identical language for several articles. These similarities nicely highlight the parallel purposes of the two bodies of law, which aimed to exclude the return of members of other ethnic groups. The generic language can be the same; only the identification of “the aggressor” need be changed to create the desired effect.

Article 1 was nearly identical with that in the Muslim law, extinguishing the occupancy right of anyone who abandons his apartment. Article 2 gave the same criteria for defining an abandoned apartment as the Muslim version: failure of the rightholder or his family to use the property; discovery of unlicensed weapons or ammunition; or, use of the apartment for illegal activities. It also added one criterion not found in the Muslim version: an apartment left vacant, without the occupancy right having been acquired or a rental contract signed.

In any event, the list of exemptions was considerably shorter than the comparable list in the Muslim law, and notably did not make reference to “the aggressor”: “An apartment is not to be considered as abandoned if the holder of the occupancy right and members of his/her household had to leave due to physical force intended to execute ethnic cleansing of a population from certain areas or to accomplish other goals[,]” or if the property was damaged or the...

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120. Decree on Deserted Apartments, reported in National Gazette of the Croat Community of Herceg-Bosna no. 13/93, as amended in National Gazette of the Croat Republic of Herceg-Bosna no. 5/95 (volume numbers and dates not available) (unofficial translation by OHR) [hereinafter Decree on Deserted Apartments, reported in National Gazette of the Croat Republic of Herceg-Bosna no. 5/95]. The Herceg-Bosna “para-state” was declared in July 1992. Economist Intelligence Unit, supra note 20, at 6. By the time the decree was amended, the community styled itself the Croatian Republic of Herceg-Bosna.
121. Decree on Deserted Apartments art. 3, reported in National Gazette of the Croat Republic of Herceg-Bosna no. 5/95.
122. Id. at art. 2. This effectively requires non-Croats to have transferred their property to a Croat who remains in the area to ensure any chance of reclaiming it later.
123. Id.
rightholder threatened by the war.\textsuperscript{124} And, in a variant of the most severe restriction in the Muslim law, “[a]n apartment will not be considered as deserted if the holder of the occupancy right or members of his/her household who live with him/her commence[ ] to use the same apartment/reoccupies [it] within 7 days after this Decree enter[s] into force.”\textsuperscript{125} As in areas under Muslim control, almost no one was able to return in time to reclaim an occupancy right; the immediate beneficiaries of that failure to return were almost all Croats.

Article 7 laid out a limited hierarchy of new recipients: Member of the Croatian Defense Council (HVO), the ethnic Croat military forces, or “other participant in combat against [the] enemy as well as to person[ ] who was left without [an] apartment[ ] due to the war activities (refugee, expelled person, or displaced person).”\textsuperscript{126} As in the Muslim law, new occupancy rights were temporary—but, as noted above, most former rightholders have been stripped of their rights, so there is no party to raise a claim against the new occupant.\textsuperscript{127}

3. 1998 Federation Law

In early 1998, following the successful installation of a new, more pro-Dayton leadership in Republika Srpska, the international community encouraged the Muslim and Croatian leaderships to produce new property laws.\textsuperscript{128} Negotiations on a new draft had been underway for over two years, a process one participant compared to “hitting your head against a wall.”\textsuperscript{129} Though evidently the product of compromises,\textsuperscript{130} the new Law on the Cessation of the Application of the Law on Abandoned Apartments seems to com-

\textsuperscript{124} Id. at art. 3. Because the words “the aggressor” are missing here, it is theoretically possible that an expelled Muslim or Serb could successfully argue that his occupancy right had not been extinguished because he had fled to avoid “physical force intended to execute ethnic cleansing of a population from certain areas or to accomplish other goals,” or even more compellingly because his house had been destroyed due to war activities of the HVO.

In practice, of course, this interpretation has not won out.

\textsuperscript{125} Id.

\textsuperscript{126} Id. at art. 7.

\textsuperscript{127} Id. at art. 8.


\textsuperscript{129} Interview with UNHCR official, in Sarajevo, Fed. BiH (Jan. 1997) (Name and precise date withheld to protect anonymity of source.).

\textsuperscript{130} The International Crisis Group noted

In response to threatened sanctions in the Sarajevo Declaration, Federation authorities did eventually amend the entity’s property legislation in line with the demands of the Office of the High Representative (OHR). Although the amendments remove most legal obstacles to return, Federation authorities refused to make further reforms, citing the failure of Republika Srpska authorities to amend their property laws.

International Crisis Group, Too Little, Too Late, supra note 19, at Executive Summary.
port with the requirements of the international community concerning opportunities for refugees to return and reclaim property rights. Although it establishes elaborate claiming procedures, tolerates long delays, and allows the ultimate extinction of occupancy rights, the Law—together with a law addressing private property and other new legislation—does represent, on paper, a significant improvement for members of other ethnic groups trying to reclaim their property in hostile territory.

The new Law, relating to abandoned socially owned property, specifically voids both the Muslim Law on Abandoned Apartments and the Croat Decree on Abandoned Apartments and bars, in general terms, any Federation authorities from making any further declarations of abandonment. All decisions taken under those laws to terminate occupancy rights are likewise declared void, and any new occupancy rights created under those laws are continued only until canceled in accordance with the new Law.

Anyone who abandoned his property after April 30, 1991 is presumptively held to have the right to return under Annex 7 of the GFAP, absent a showing that they abandoned the property for reasons unrelated to the war. If the rightholder’s apartment is presently unoccupied, he may reoccupy it immediately. If it is occupied illegally—that is, without color of any of the pre-existing law—he may seek an immediate eviction. Otherwise, the returning rightholder “shall be entitled to claim the repossession of an apartment,” and must file a claim for repossession within six months of the entry into force of the new Law, or lose his prior right permanently. Thus, any Annex 7 claimants who fail to file by Octo-

132. Id. at art. 2.
133. Id. at art. 3.
134. Also, the authorities are not obliged to provide emergency accommodation for the evicted squatter. Id. Such provisions have long been a pretextual justification for local authorities' refusals to evict squatters in favor of rightholders.
135. Id. at art. 4.
136. Id. at art. 5. Furthermore, the claimant must plan to reoccupy the apartment within one year, Id. at arts. 4, 12, unless he has good cause, defined to include, inter alia, “well-founded fear of persecution,” continuing occupation of the apartment following a request for eviction by the rightholder, or if “security measures are being applied to the occupancy right holder.” Id. at art. 12.

In parallel fashion, the Law on Taking Over the Law on Housing Relations art. 3, reported in Official Gazette of the Federation of Bosnia & Herzegovina no. 11/98 (Apr. 3, 1998) (volume number not available) (unofficial translation by OHR), amends the Communist-era Law on Housing Relations, reported in Official Gazette of the Socialist Republic of Bosnia & Herzegovina, 14/84, 12/87, and 36/89 (volume number and dates not available), which allowed social housing to be reallocated if it is not used for six months; this new law exempts property abandoned during the war from this six-month rule, so long as the rightholder is a refugee or displaced person covered under Annex 7.
ber 4, 1998 lose their occupancy right.\textsuperscript{137} This deadline was later extended by the High Representative until April 1999.\textsuperscript{138}

Claimants must present documentary evidence to support their claim to an occupancy right, such as contracts for exchange, court or administrative decisions,\textsuperscript{139} or “other evidence,” such as utility bills or witnesses’ statements.\textsuperscript{140} In any event, the municipal authorities “shall accept claims whether or not the necessary documentation is supplied,” confirming the claim through their own independent records searches.\textsuperscript{141}

Municipal authorities have to issue a decision within thirty days of receiving a claim,\textsuperscript{142} after which any temporary occupant must vacate the apartment within ninety days.\textsuperscript{143} In “exceptional circumstances,” the temporary occupant may stay up to one year, but only on presentation of “detailed documentation” of a lack of available housing, as determined by the cantonal authorities in accordance with the European Convention on Human Rights “and its Protocols.”\textsuperscript{144} If necessary, eviction of the temporary occupant shall be carried out at the request of the rightholder.\textsuperscript{145} Appeals to the cantonal authorities are possible,\textsuperscript{146} as are appeals to the Property Commission.\textsuperscript{147} Finally, rightholders have the right to purchase their apartments, subject to certain residency requirements and limits on alienation.\textsuperscript{148}

The Law on the Cessation of the Application of the Law on Temporarily Abandoned Real Property Owned by Citizens, promulgated the same day, applies to private property, and likewise voids the previously applicable law.\textsuperscript{149} This law contains similar provisions, save that private property owners may file claims for return at any

\begin{thebibliography}{99}
\item[140.] Id. § 8.
\item[141.] Id. § 9.
\item[142.] Law on the Cessation of the Application of the Law on Abandoned Apartments art. 6, \textit{reported in} Official Gazette of the Federation of Bosnia & Herzegovina 11/98 (Apr. 3, 1998).
\item[143.] Id. at art. 7.
\item[144.] Id.
\item[145.] Id. at art. 11.
\item[146.] Id. at art. 8.
\item[147.] Id. at art. 14.
\item[148.] Id. at art. 15.
\end{thebibliography}
time, without restriction or loss of right;\textsuperscript{150} procedures for claiming, appealing, seeking the eviction of the present occupant, as well as for delaying the return of the apartment for up to one year are largely the same as in the law on socially owned property.\textsuperscript{151}

In addition to promulgating the provisions themselves, the Federation authorities are called upon to take full measures for their implementation, including “a broad public information campaign” and “[e]ffective monitoring of the implementation of the laws.”\textsuperscript{152}

\section*{C. Conclusion}

In all, though these laws contain different provisions and different political emphasis, they are surprisingly consistent in their scope and style. All three laws hew to a formally neutral drafting, but are rife with provisions revealing their pragmatic project, which is to entrench and enforce the ethnic division and hierarchy that violence engendered. All three are indirect, relying on law’s neutrality to maintain distinctions already established by other means. And all three act to seal and solemnify, lifting up law’s atemporal, universal hand to smooth the rough ground ripped open by war.

\section*{V. PRACTICES OF COURTS, MINISTERIAL AND MUNICIPAL AUTHORITIES, AND POLICE}

The rhetorical and legislative thrust of the principal property laws is compelling enough as evidence of the true constitutional nature of the extant regimes; more compelling still is the evidence of how the rules of property are actually implemented through the courts, administrative organs, and police. The picture that emerges is of a legal system still surviving and operating, though reduced in scope and replaced by a web of fiat and ethnocentric adjudication; but withal, one that consistently comports with an integral legal and social vision, however unpalatable, of an ethno-majoritarian state.

\subsection*{A. The Courts}

One of the most important practical changes that occurred during the war with respect to many property cases was the large-scale

\textsuperscript{150} Id. at arts. 4, 11.


transference of authority from the judiciary to ministry and municipal administrative boards. In all sectors, the judiciary was stripped of jurisdiction over abandoned property by legislative acts enacted early in the war, with that authority vesting instead in administrative boards.153

There is nonetheless a tentative sense that the courts, having been almost totally eclipsed in the war years, are again a source of independent (if still ineffective) justice, as evidenced by the frequency with which recourse to the courts is sought. For example, in the northern Serbian areas, over 4000 cases were filed before the Banja Luka court in 1996, far more than in the preceding years; an official of the OSCE dealing with property issues estimated that the great majority of these are property-related cases.154

It is still possible to seek restoration of property or clarification of title through the courts by relying on older Yugoslav laws or other legislation. In predominantly Muslim Vareš, for example, some Croats approached the local court seeking restoration of their property, after their application was rejected by the local administrative board, and received favorable judgments.155

The courts, however compromised and delimited in their jurisdiction and practical scope of operation by the prevailing ethnic orthodoxy, are probably the one area of official action that has maintained some independent base of operation and a philosophical posture not entirely bent to the ethnic will.156 Those seeking evidence of the principles underlying the civilian half of Dayton will find proof, however weak, in the courts.157 As I will describe below, the

153. See infra Part V.B.
154. Interview with OSCE human rights official, in Banja Luka, RS (Jan. 1997) (Name and precise date withheld to protect anonymity of source.). Popović states that 70% of all cases pending in Banja Luka in 1996 concerned property: Popović, supra note 8, at 142.
155. In three such cases, dating from late 1996, Croat owners returned to their houses, refurbished them, and then were evicted under auspices of the abandoned property act. The Croats brought complaints under the Law on Owners’ Relations, a Yugoslav-era law which had been confirmed as valid law in Bosnia and Herzegovina. The court decided in favor of the Croat plaintiffs, ordering the return of their privately owned apartments to them. The Croats actually received their former homes. This process had already begun before the cases reached the court, and the judge did not believe that the court decisions had affected that process one way or the other. In an interview, the judge characterized this development as an agreement among politicians to respect private property rights, and noted that other Croats had received their property back without approaching the court, because the municipality had extra flats available. Interview with judge, in Vareš, Fed. BiH (Jan. 1997); Interview with OSCE official, in Vareš, Fed. BiH (Jan. 1997) (Names and precise dates withheld to protect anonymity of sources.).
156. “The courts are more than puppet theater—there was a highly developed legal system here, and people don’t want to be considered as barbarians.” Interview with UNHCR officer, supra note 129. “The problem isn’t with what comes into this court, but what doesn’t come in. I am a judge, but I can’t do anything about bringing a complaint . . . When there is a complaint, I apply the law.” Interview with judge in Vareš, Fed. BiH, supra note 155.
157. That is, proof of the underlying principles, not the formal rhetoric and rights guaran-
other principal organs—the municipalities and the police—have not demonstrated any reserve at all. Indeed, as the organs most responsible for restricting the courts’ remaining independence to act effectively on non-ethnic principles, they have shown themselves to be fully and completely instruments of the new states and the new order.

B. Ministry and Municipal Officials

With the near eclipse of the courts, ministries and municipal agencies have acquired almost exclusive authority over abandoned property. Various commissions are responsible for finding housing, for determining the status of property, and for distributing it to displaced persons. In addition, there are numerous ad hoc formations to respond to various property-related initiatives from the international community. The responsible agencies—most commonly municipal-level branches of ministries—are constituted in a variety of fashions, and there is no consistency even within ethnic sectors. Indeed, these are the institutions about which the least information is available. Anecdotal evidence suggests, however, that in Republika Srpska, the commissions have targeted the homes of remaining minorities in their search for excess housing space, while in the Federation, the extremely short timeline for returns has likewise been used to target minorities.

158. Each municipality in Republika Srpska, for example, has a Commission for the Resettlement of Refugees and the Administration of Abandoned Property, attached to the entity-level Ministry of Refugees. In the Banja Luka region, property abandonment is determined by one of two municipal departments of Republic (entity)-level ministries: the Ministry of Urban Planning for socially owned property, and the Republic Administration for Geodetic Issues, Cadaster, and Legal and Compensation Issues Concerning Property.

159. See, e.g., OSCE Doboj Field Office, Weekly Report, Nov. 14, 1996 (internal memo; on file with author.) (describing the use of “creeping evictions” employing Article 17 against remaining non-Serbs in Doboj and Prnjavor, as well as lack of access to files of the Ministry for Refugees and Displaced Persons); OHR, Human Rights Report, May 4–5, 1997 (OHR occasional bulletin) (unpaginated) (reporting harassment of Muslims in Teslić by local Serbs quartered in their homes under Article 17, with apparent complicity of the local Commission on Abandoned Property).

160. BiH Ombudsman Reports on Vareš Property Case, in OHR, Human Rights Report, Apr. 11–12, 1997 (OHR occasional bulletin) (unpaginated) (noting the use of the time limit provisions in Article 3 to evict or terminate the occupancy rights of Croats from Muslim-
The authorities responsible for questions of property do not merely utilize existing legal regulations to further an ethnic agenda; they also subvert internationally sponsored procedures to which they are a party.\textsuperscript{161}

\textsuperscript{161.} See, e.g., OSCE Field Office Doboj, Weekly Report, Nov. 21, 1996 (internal memo; on file with author). The memo notes that five Muslim-owned houses in the Doboj region of Republika Srpska which were destroyed in night-time explosions in a single weekend had all been on a list of applicants for return under a program to resettle displaced persons in their original homes. The list had been made available to local officials earlier that day. In fact, the level of destruction became so extreme, and the targeting of houses so clearly linked to the application process to which local officials had access, that the program was canceled after only a few weeks. \textit{Id.} Similar problems occur in other parts of the country as well:

- Arson Attacks against Serb Homes in Drvar: International monitors report that 25 Serb homes were damaged by fire in a village outside of Drvar [in Croatian-held territory] during the night of 2-3 May, and an additional 25 homes were vandalized (roofs, doors, and windows removed). This destruction directly followed a meeting concerning returns to Drvar held by Federation Mediator Christian Schwarz-Schilling on 2 May, in which local authorities agreed to permit returns on a case-by-case basis.


There have also been instances of Croat-owned houses being destroyed in Muslim-controlled Bugojno and Serb-controlled Prijedor following attempts by the owners to repair their houses, and in many other communities throughout the country.

The following excerpt describes a series of returns to a predominantly Croat area. It is typical of situations in which “success” has been claimed by the international community. Note, however, how that “success” is minimal, and achieved despite the efforts of local officials—all the supporting officials in this instance belong to canton- or entity-level offices controlled by Muslims, while the local officials are all Croats:

In Prozor-Rama, despite the fact that opposition to minority returns remains strong, the pace of returns has been increasing since the beginning of the year. UNHCR estimates that, between January and May 1998, 89 Bosniacs returned to Prozor-Rama, and that since then more than 50 Bosniac heads of household have returned.

In March 1998, the Prozor-Rama authorities came under heavy international pressure to submit a list of villages to which return could begin immediately as part of the cantonal plan for return. Reluctantly, the municipality complied . . . .

Bosniac returns began in April 1998 from Bugojno and Konjići to the village of Here. . . . The Prozor-Rama municipal authorities called the return “illegal,” arguing, wrongly, that each individual returnee had to be accepted for return in advance by the Municipal Returns Office (MRO).

Despite these objections, some 40 Bosniac heads of family returned. SFOR units in the area report that reconstruction is proceeding slowly and that most Bosniac families are not living in the village full-time. Returnees have encountered occasional harassment, but there have been no serious incidents.

On 28 May, more than 170 Bosniacs from Bugojno, Konjići and Jablanica visited Prozor-Rama town. 40 heads of families remained in their homes overnight. The return, which proceeded without obstruction, was supported by the Federal Ministry for Social Affairs, Refugees and Displaced Persons, which brought in 12 trucks of building materials, food, and basic supplies for the returnees.

In June there were also returns outside the return plan to the village of Borovnica, where 50 people were working on their houses on a daily basis. While ten stayed overnight in three houses to do repairs, the rest commuted from Bugojno. Bosniac returns will likely continue throughout the summer as families join heads of household who have already returned. Bosniac returnees are well-organised and supported by Bosniac officials at local, cantonal and federal levels.

International Crisis Group, \textit{The Western Gate of Central Bosnia: The Politics of Return in Bugojno and Prozor-Rama}, section entitled \textit{Prozor-Rama} (July 31, 1998)
These commissions demonstrate considerably less respect for the notion of the rule of law than do the courts.\footnote{42} There is little opportunity for review or for transparency in the decision-making process.\footnote{163} Most importantly, the anecdotal evidence suggests that their operational practices are considerably less respectful of the principle of the rule of law than are court proceedings.

162. The following is an extract from a complaint filed with an OSCE office by a Croatian couple seeking to have their house restored to their use (names have been omitted or replaced with letters), which demonstrates the practical operations of municipal authorities in cases involving remaining minorities and displaced persons; it also suggests the limited role of the courts:

Summary: . . . The Xs own a house in Doboj and some property nearby. In July 1994 a refugee couple S began to use the upper floor of the house, apparently per a decision issued by the municipality.

On 11 September 1995, a second refugee family T occupied part of the first floor; the Xs retained use of 1 1/2 rooms, including a 9 meter$^2$ room and part of a 16 meter$^2$ room. On the following day, the Ts forbade further use of the larger room; T threatened the Xs with a gun. T also asked that they sell him their car for 200 DM; the Xs gave the car as a gift, and signed a contract to that effect. That same evening, a soldier, R, came into their room and forced them to sit down. The husband was called out of the room . . . and in his absence, the soldier mistreated and raped Mrs. X. After the rape, the Xs left the house, and have not returned since. They have been living in one room at the husband’s sister’s apartment since 15 September 1995.

. . . The S family living upstairs had a certificate authorizing them to share the upper floor—the Xs say they saw this certificate, but were not given a copy or any other documentation. They also report that, after they left their apartment, the Ts got a new certificate to have exclusive use of the upper floor as abandoned property.

The T family showed some form of document on 11 September 1995, but the Xs received no copy; they believe that the document authorized the Ts to use one room, but added that they saw it for too short a time and were in shock at the arrival of the Ts, who came accompanied by six other people, including soldiers.

The Xs have twice requested some form of documentation from the Geodetic Ministry and the MRDP [Ministry for Refugees and Displaced Persons] regarding the status of their house and of the refugees living in it. At the end of October 1995, the Xs asked orally, and on 23 November in writing. On 24 November 1995 they received an answer to their oral request, showing that five members of the Ts had been awarded use of another house on 15 March 1995 (document [number deleted]). However, in May 1996, they were given, from an anonymous source, a copy of another decision which gave the Ts use of their house as abandoned property and dated 4 October 1995. This second document is apparently forged and backdated, as it bears the exact same document ID ([number deleted]) as the original decision from March 1995, and is dated one week before T, the husband, died at the front.

The Xs applied to the court on 1 December 1995 . . . and had their first hearing on 29 December . . . . A second hearing was scheduled for 31 May 1996, but was also postponed until 5 July 1996. At that hearing, the court decided to ask for a report from the MRDP regarding the house. The next hearing, on 15 August 1995, was also postponed, and no new date has been set.

163. Consider this comment on the RS procedures for determining abandonment of property:

No standards are articulated for the determination of abandonment; Article 2 of the Law provides for this determination on a case-by-case basis. Additionally, the Law does not specify parameters for adjudication of decisions, nor identifies a competent authority. The lack of clarity on the procedures for implementation of the Law leaves significant
decisions are far more consistent in their ethnic alignment than are
the courts’. This hardly seems surprising, given the more recent
provenance of these commissions, created as they were during the
war crisis with the specific purpose of dealing with property prob-
lems, which reflect the state of ethnic relations.

C. The Police Forces

Of all the government organs involved in civilian affairs, the
most severely and consistently ethno-national in focus and practice
are the police forces. Their role in the disposition of property, while
theoretically only to implement other institutions’ decisions, is in
practice the most decisive, since they are the engine by which fur-
ther cleansing occurs, through evictions, and also the principal bar-
rier to implementation of decisions that would comply with the
provisions of Dayton.

room for arbitrary or discriminatory interpretation; we have received reports that the law
has been applied in a manner which has a disproportionately harsh impact on non-Serbs.
OHR, Opinion of the Legal Adviser to the High Representative (RS), supra note 78.
164. Consider, for example, the following reports.

Laws passed in both the Federation and Republika Srpska during the war to deal with
abandoned property have been amended and enforced in a way that seems to deny peo-
ple the ability to return to the homes they lived in before the war. Local authorities
sometimes wrongfully enforce the laws and other regulations in a discriminatory or arbi-
trary way—often deciding in favor of a particular group, based on ethnicity or legal
status (e.g., war veteran, displaced person, etc.). As a result, many returning refugees
find themselves unable to re-enter their pre-war homes, and other persons are under
threat of eviction.

Senior Officials in Republika Srpska publicly state that there can not be return and there
will be no return of Bosniacs and Bosnian Croats to their territory. There can be no re-
turn because of the large number of displaced persons occupying every available dwell-
ing. There will be no return until Serbs from the Krajina can return to Croatia. These
sentiments are echoed by most local officials.

Evictions of Bosniaks [sic] from their apartments continue in [Croat] West Mostar, even
for some who have legal proof of ownership, and there is no legal redress. ‘I have never
heard of an expelled person going to the court,’ said an EU housing official. ‘People are
simply too afraid to make complaints. The legal system does not exist here. We hoped to
find a judge or lawyer to work with us but no one wanted the job.’ Croats with money or
political power, or those designated as war heroes, are awarded temporary permits for
flats that they are not even living in, effectively preventing the return of Bosniaks [sic].
Diane Paul, High Noon: The Good Sheriff has Been Run Out of Town, War Report (May
1996), at 7. The picture is somewhat more mixed in Muslim areas; see, e.g., UNHCR, supra
note 7, at 2 (“In Bosniac (ABiH) controlled territory there is more tolerance for return in
certain municipalities; in others, there is resistance.”); see also infra notes 168–172 and ac-
companying text.

Local police frequently stand by passively when orchestrated mob violence intimi-
dates returnees. This report from predominantly Croat Jajce in 1997 is atypical only in that it
occurred in the context of what international officials have claimed as a “successful” return
operation:

Returns accelerated . . . as returnees heard that the security situation was stable and
that SFOR was registering returnees . . . . On 1 August 1997, the illusion of security was
The police in each entity are the sole recognized enforcement arm for both the municipality and the judiciary. In practice, the police operate largely independently of the judiciary, neither carrying out court-ordered evictions nor actively protecting minorities in their homes. There are also many instances of policemen illegally evicting individuals, as well as evictions by paramilitaries, or secretive groupings within the police and military. According to one estimate, seventy percent of human rights violations in Bosnia are committed by the various police forces.

With a few internationally enforced exceptions, the various police forces are monoethnic: “[in the Federation] recruitment into

shattered. Crowds, witnessed passively by Croat police, gathered at several road junctions. Over the next several days, mobs threatened Bosniac villages, attacked several returnees, and intimidated the rest, almost all of whom were evacuated.

International agencies were quick to respond to the violence. .. A month after the August violence, IPTF published a report that described the police response as “wholly inadequate and in some instances deliberately negligent”. The report also found that: “Bosnian Croat officials themselves acknowledged that the demonstrations were being directed by the local Croatian Democratic Union [HDZ] party organisation . . . . Nonetheless, the response to the Jajce evictions provides an important model for future such incidents. The combination of high-level and immediate political intervention, active military steps to recreate a secure environment, and a definitive investigation by IPTF, succeeded in restarting the return process. The high-level attention devoted to central Bosnia after the evictions contributed to broader progress in the Middle Bosnia Canton.

International Crisis Group, A Tale of Two Cities: Return of Displaced Persons to Jajce and Travnik, sections 2.1.1. entitled Uncertain Return, and 2.1.2. entitled Responding to Violence (June 3, 1998) <http://www.crisisweb.org/projects/bosnia/reports/bh34main.htm> (citations omitted). This was, as noted, a “successful” instance—indeed, one quarter of all cross-ethnic returns have occurred in this one municipality alone. Id. In most cases attempted returns are generally reversed by such violent action.

166. Control of the police is at the entity, not municipal, level.

167. One human rights officer with OSCE noted that while the process in court works in a fairly correct fashion; it is during the execution of evictions, by the police, that the system fails to work according to its stated goals. Interview with OSCE human rights officer, supra note 154.

OHR reports similar problems:

Minority Reinstatements Blocked in Banja Luka: International organisations have been intervening with the RS authorities concerning their failure to enforce court decisions providing for the reinstatement of some 11 minority families to their homes in Banja Luka in the past week. Twenty-nine of the approximately 300 minority families that had been forcibly evicted from their homes during the war but have remained in the Banja Luka area have received favourable decisions from the court to be reinstated into their homes. However, the reinstatements of the first 11 families that were scheduled for this month could not be carried out due to the police’s failure to show up. International observers note that in a number of these cases, the current occupants of the properties are RS police officers and their families.


168. For an example of the influence of paramilitary cells in Republika Srpska, see Human Rights Watch, The Continuing Influence of Bosnia’s Warlords (Dec. 1996).


170. The strategically located town of Brčko, the most contested piece of territory in the post-Dayton environment, is under a special international administration and has an inte-
local police forces is along ethnic, or majority, lines: Croat police constitute the vast majority of units in HVO controlled areas and Bosniacs in ABiH controlled areas.”

Although corruption and a praetorian sensibility are widespread among the police forces, affecting both minority and majority peoples alike, there is a layer of ethnic animus to the actions of the police that transcends, or at least operates independently from, other ethnically neutral principles. The Mostar-based Ombudsman, while noting the problem of extreme corruption, nonetheless feels that the police treat two parties to a conflict who are of the same ethnicity normally, and does not consider such cases as matters for his office. The problems his office deals with concern Croat property in the East, and Muslim property in the West—that is to say, inter-ethnic property disputes. Intra-ethnic disputes “are something the court takes care of; this office perhaps just asks them to speed it up.”

D. Practice under the New Federation Property Laws

There is less evidence of judicial and administrative practice under the new Federation laws. However, one report from June 1998 noted that “adherence to the [new property] laws is problematic throughout the Federation,” and cited illegal summoning of claimants to administrative hearings, the charging of fees, delays in issuing decisions, and “problems with getting the authorities to accept and process claims,” as well as a “[l]ack of awareness of the laws [being] reported from various areas of the country.”

The example of Sarajevo canton is instructive. Despite being the recipient of tremendous amounts of money and the focus of most international efforts this year, Sarajevo remains an almost wholly Muslim city (though it is at the same time one of the most integrated cities in the country). In February 1998, the international community had called for 20,000 minority returns to Sarajevo in

Claim forms were printed in newspapers, for wider distribution, at the expense of the OHR and in co-operation with UNHCR and other organisations, yet some housing officials have illegally refused to accept these copies. Some have, incorrectly, required that occupancy-rights holders reclaim their property in person, rejecting claims submitted on behalf of others. Some housing officials have also refused claims unless accompanied by certain documents, even though none are required by law, and potential returnees from Republika Srpska have been required to submit documentation to which they do not have access.
1998, but by July, “[Sarajevo] city authorities [. . .] processed only 600 out of 7,000 requests by former residents of Sarajevo to return to their old homes . . . [,]”\(^{174}\) and only 859 had actually returned;\(^{175}\) by the end of the year, the United States and the European Union even suspended their aid to Sarajevo’s municipal government because it had “failed to even approach the target of 20,000 minority returns in 1998.”\(^{176}\) Observers placed the blame on the shoulders of recalcitrant domestic officials.\(^{177}\)

Elsewhere in the Federation, the situation has been, if anything, less favorable to refugee returns. Local officials often openly refuse to initiate evictions of illegal occupants, making it difficult for returnees to reoccupy their homes;\(^{178}\) in so doing, they continue to raise issues of reciprocity in returns.\(^{179}\)


\(^{175}\) See 16 July 1998, Bosnia: EU, US Aid to Sarajevo Suspended over Delay in Non-Muslims Return, BBC Monitoring Summary of World Broadcasts, BBC Monitoring Service: Central Europe and Balkans (July 16, 1998) (reporting Deputy High Representative Hanns Schumacher’s July statement that “so far only 365 Croats, 447 Serbs, and 47 ‘others’ had returned”).

\(^{176}\) Partos, supra note 17, at 43–44.

\(^{177}\) See, e.g., \textit{International Crisis Group, Too Little, Too Late, supra note 19, at Executive Summary}, (“Sarajevo officials have applied the laws regarding socially owned apartments so as to favour Bosniacs who remained in Sarajevo over minorities and even over Bosniacs displaced from elsewhere in the country.”).

\(^{178}\) One report says the mayors of some municipalities also bear some responsibility for obstructing evictions. In July 1998, according to international observers, the mayors of Novo Sarajevo, Stari Grad, and Novi Grad (all of which are split, with some territory in Republika Srpska) declared that illegal occupants would not be evicted unless alternate accommodation could be found. Such a policy flies in the face of the current law which provides that pre-war home owners and occupancy right holders have the right to reclaim their homes immediately if illegally occupied; they are required to wait for the occupants to find alternate accommodation only if the occupants had been lawfully granted occupancy rights.

\(^{179}\) Muslim-majority Konjić is a UNHCR “model city”: one that is ostensibly more willing to receive returning minorities than other municipalities. Despite that status, returns are effectively stalled due to municipal officials’ opposition:

Of the 101 cases of double occupancy UNHCR presented to the housing department, 54 could be resolved immediately and would allow for the return of minorities. Housing authorities claimed that by the end of May 1998 there had been 31 evictions but, according to UNHCR, as of 30 April 1998, there had been only one eviction. By the end of May 1998, the housing department could provide UNHCR with written confirmation of only ten evictions.

The secretary of the housing department has stated that he fears a negative reaction if he enforces evictions, and has claimed that he is already viewed as not defending Bosniacs . . . .

International monitors note that housing officials have raised the bogus issue of reciprocal returns, stating that minorities can return to Konjić when Bosniacs displaced in Konjić can return to their homes in Croat- and Serb-controlled areas.

\textit{International Crisis Group, The Konjić Conundrum: Why Minorities Have Failed To Return To Model Open City}, section 2.2.1., entitled Obstruction by the Housing Department and
does not have a new property law, and its practice has remained consistent.

VI. THE IMPLIED CONSTITUTION: RULE OF LAW AND RULES OF DECISION IN BOSNIA

There is no question that the legal systems existing in Bosnia today do not operate according to norms generally recognized in other industrialized countries, or even in other post-communist countries of Eastern Europe. The social dislocation and high levels of criminalization that accompanied the war have co-opted or marginalized much of the former legal system. Nonetheless, the current legal systems in Bosnia are informed by norms. These internal legal systems, in turn, function far more effectively than the still moribund organs of the international legal system in Bosnia. Bosnia is far from being a Rechtsstaat, and if one were forced to choose a single phrase to describe the state of property rights there, it would hardly be “ruled by law.” However, one is not limited to a single phrase. The state of property rights in Bosnia is far more nuanced, though not necessarily more positive.

Bosnia is not ruleless. The country has been at peace, however uneasily, since late 1995. What is lacking in Bosnia is not the rule of law, but the rule of a particular kind of law that enshrines the rights of the individual.

Definitions of the rule of law vary widely, but most involve procedural notions of fair, consistent treatment and predictability. In addition, several definitions share an emphasis on the importance of the individual and his or her rights. Indeed, many observers con-
sider a notion of rule of law that incorporates individual rights fairly uncritically as a good and an end in itself. 184 Certainly it is both appealing and reassuring to make that linkage, and if that is what is meant by rule of law, then it is most assuredly absent in Bosnia. “Collectivizing, ethnically based group law” better characterizes the legislation passed during and since the war, although almost never is it so explicitly stated.

In fact, however, what has come to be understood as the rule of law in Western academic discourse includes both legal process and legal content, 185 but the two aspects are analytically unrelated. Some elements of the common conception—consistent and neutral application, coherence, and transparency—are probably universal attributes of any meaningful conception of the rule of law. 186 How-

184. See, e.g., Ellen S. Cohn & Susan O. White, Legal Socialization Effect on Democratization, in 152 Int’l Soc. Sci. J. 151, 153 (1997) (linking liberal democracy to the rule of law ideal, and noting the “rigidity of Western liberal legality” and that “the predominantly Anglo-American/Western model of law under liberal democracy may be too narrow or restrictive to be adapted easily to less individualistic, more authoritarian, and more ethnically divided traditions”); see also Louis Henkin, Elements of Constitutionalism, in 60 The Review: The International Commission of Jurists 11 (1998).


Some authors . . . make a distinction between the formal and the material Rechtsstaat. In the former the authorities are bound by the rules of positive law, in the latter they . . . are also bound by the dictates of justice. In a material Rechtsstaat the rulers must not only act according to the law, but the law itself must respect the rules of justice . . . Unfortunately the notion of the material Rechtsstaat is difficult to apply in practice.


186. See Gibson & Gouws, supra note 181, at 174.

[Law is sovereign over all authority . . . law must be clear and certain in its content and accessible and predictable . . . law must be general in its application . . . there exists an independent judiciary charged with the interpretation and application of the law to which every aggrieved citizen must have a right to access . . . the law must have procedural and ethical content.

Id.

Richard Fallon lays out a proposed core description of the rule of law which is mostly procedural in nature; it identifies

[T]hree . . . purposes—against which competing definitions or conceptions can be tested—[which] appear central. First, the Rule of Law should protect against anarchy and the Hobbesian war of all against all. Second, the Rule of Law should allow people to plan their affairs with reasonable confidence that they can know in advance the legal consequences of various actions. Third, the Rule of Law should guarantee against at least some types of official arbitrariness.

Against the background of these purposes, leading modern accounts generally emphasize five elements that constitute the Rule of Law. To the extent that these elements exist, the Rule of Law is realized.

(1) The first element is the capacity of legal rules, standards, or principles to guide people in the conduct of their affairs. People must be able to understand the law and comply with it.
ever, many go beyond these procedural aspects to explicitly incorporate substantive values, such as respect for individual rights, into the rule of law.\textsuperscript{187}

This willingness to incorporate substantive values into the procedural ideal of the rule of law is part of a larger conceptual and ideological trend. This trend is a move “away from the Rechtsstaat . . . into a society in which social conflict is increasingly met with flexible, contextually determined standards and compromises . . . [a] turn away from general principles and formal rules into contextually determined equity.”\textsuperscript{188} This urge is understandable. Valued moral and ideological aims can be strengthened and secured by entrenching them in legal institutions with their “solemnity of effects.”\textsuperscript{189} Critiques based only on procedural grounds risk missing strategic opportunities to confront substantive abuses.\textsuperscript{190} For this

\begin{itemize}
\item[(2)] The second element of the Rule of Law is efficacy. The law should actually guide people, at least for the most part. In Joseph Raz’s phrase, “people should be ruled by the law and obey it.”
\item[(3)] The third element is stability. The law should be reasonably stable, in order to facilitate planning and coordinated action over time.
\item[(4)] The fourth element of the Rule of Law is the supremacy of legal authority. The law should rule officials, including judges, as well as ordinary citizens.
\item[(5)] The final element involves instrumentalities of impartial justice. Courts should be available to enforce the law and should employ fair procedures.
\end{itemize}

Fallon, \textit{supra} note 182, 7–9 (citation omitted). The purposes and elements Fallon proposes as a core definition may suggest certain substantive values, but they are generally procedural in nature.

\textsuperscript{187} See Gibson & Gouws, \textit{supra} note 181, at 173–75 (discussing scholarly efforts to distinguish South Africa’s legal system as not based on the rule of law because it violated individual human rights).

\textsuperscript{188} Koskenniemi, \textit{supra} note 180, at 56.

\textsuperscript{189} Stanley Hoffman comments that \[\text{[l]aw has a distinct solemnity of effects: it is a normative instrument that creates rights and duties. Consequently, it has a function that is both symbolic and conservative; it enshrines, elevates, consecrates the interests or ideas it embodies. We understand, thus, why law is an important stake in the contests of nations. What makes international law so special a tool for states is this solemnity of effects, rather than the fact that its norms express common interests; for this is far too simple: some legal instruments such as peace treaties reflect merely the temporary, forced convergence of deeply antagonistic policies. A situation of dependence or of superiority that is just a fact of life can be reversed through political action, but once it is solemnly cast in legal form, the risks of action designed to change the situation are much higher: law is a form of policy that changes the stakes, and often “escalates” the intensity, of political contests; it is a constraint comparable to force in its effects.}\]

\textsuperscript{190} See Koskenniemi, \textit{supra} note 180, at 57.

\[\text{[I]ssues of contextual justice cannot be solved by the application of ready-made rules or principles. Their solution requires venturing into fields such as politics, social and economic casuistry which were formally delimited beyond the point at which legal argument was supposed to stop in order to remain ‘legal.’ . . . Resolutions based on political acceptability cannot be made with the kind of certainty post-Enlightenment lawyers once hoped to attain. And yet, it is only by their remaining so which will prevent their use as apologies for tyranny.}\]
reason, the core procedural conception of the rule of law has expanded to include substantive values concerning the dignity of all human beings and the maintenance of specific human rights—to the point where many commentators take such values to be the very core of the rule of law.

While the incorporation of substantive values into the ideal of the rule of law may be attractive, individual values should not be included in the core definition of the ideal. An application of the core procedural attributes of the rule of law to the individual as opposed to some other subject is no more necessary to a functioning and internally fair legal system than a jury of one’s peers is to a fair trial. It is one expression—perhaps the one the Western community wishes to favor—but by no means the only possible, logical, or even reasonable one. Other forms of legal content—by which I mean the subject matter of the law as opposed to its processes—can well be envisioned: the state, the nation, class or caste, membership in an occupation or guild, religion, race, gender, age, alienage, or category of sexual orientation.

Id. See also note 187, supra, concerning scholars’ efforts to condemn Apartheid-era South Africa on explicit “rule of law” grounds incorporating individual rights analysis.

191. In making this assertion, I obviously identify with conceptions of the rule of law that are formalist and procedural, rather than substantive and material. As I have suggested above, the procedural aspects of the rule of law are most closely identified with its core definition, while substantive aspects, though commonly included, are peripheral to and analytically separate from that core definition. Fallon, for example, in attempting a synthesis of various conceptions of the rule of law, nonetheless prioritizes the procedural: of his four ideal types of the rule of law, three are principally procedural or formalist in essence, and only one substantive; moreover, his synthesis purposefully places these four in a hierarchy with the substantive ideal in the last position:

For at least two reasons, the substantive commitments of a theory of the Rule of Law ought to be minimized. First, in light of the persistent fact of moral disagreement, the Rule of Law requires a considerable willingness of public officials to “enforce the [positive] law even when it is in [their] confident opinion unjust, morally wrong, or misguided as a matter of policy.” . . . Second, a pervasively substantive conception of the Rule of Law would risk obliteration of the analytically and politically useful distinction between the Rule of Law, on the one hand, and a full theory of substantive justice, on the other.

Fallon, supra note 182, at 53–54 (citation omitted). But see id. at 55 (“But a sound theory of the Rule of Law, although emphasizing formal over substantive requirements, could not wholly exclude substantive content.”).

192. See Hitler, supra note 2.

193. American “suspect class” and “quasi-suspect class” analysis, though it does not go to core political rights, nonetheless accords meaningfully different legal status to individuals wholly based on their membership in racial or gender groups. Likewise, the distinctions made between citizens and aliens in American law do not seem understandable solely within the context of law focused on the individual—though again, the differences do not extend as deeply into the realm of core rights as do the differences in Bosnia.

194. Even theories of the rule of law that incorporate substantive values, as does Fallon’s, do not necessarily require an application to all individuals. Fallon argues

Perfectly realized, the Rule of Law would be rule (i) in accordance with the originally intended and understood meaning of the directives of legitimate, democratically-accountable lawmaking authorities, (ii) cast in the form of intelligible rules binding on
A state under the rule of law is not always an admirable thing, nor is it always a benefit to its populace. More to the point, a state need not accord equal recognition to every individual within its ambit to comport with the rule of law. The British judicial tradition continued to operate throughout the apartheid era in South Africa, generally applying transparent, predictable rule-based law to its white citizens, even while its black citizens received wholly different treatment. Even Nazi Germany exhibited the essential elements of a Rechtsstaat, by any reasonable definition of the term. It had clear and codified laws, derived from declared and elaborated principles (the Führerprinzip, racial biology, the inherent inferiority and threatening nature of the Jew, the distinction between the Staatsangehörigen and Reichsbürger, the subordination of the individual to the Volk) that, in general, were consistently applied.

What matters in a system bound by the rule of law is that its sub-citizens, governmental officials, and judges alike, (iii) as identified and elucidated in an interpretive process guided by publicly accessible norms and characterized by reason-giving, and (iv) consistent with legitimate public purposes and sound, shared principles of political morality. When law, in the positivist sense, fails to satisfy any of these elements, the Rule of Law is less than completely realized, but still may (or may not) be more nearly approximated than it is scorned or abandoned.

Fallon, supra note 182, at 38. Here the substantive values are revealed in the requirement of democratic process and in the "shared principles of public morality." However, democracy may be realized internally, within the confines of a group defined by other, restrictive means. Likewise, a requirement concerning "public morality" is silent as to the content of that morality, requiring only that it be public, or shared.

195. See Gibson & Gouws, supra note 181, at 173 ([L]aw can serve repression just as it can serve freedom.); id. at 175 (noting that authoritarianism is not incompatible with the rule of law).

196. Many scholars deny that South Africa exhibited any traces of the rule of law. Attempts to distinguish South Africa’s legal system rely, however on the importation of individual rights analysis. See Gibson & Gouws, supra note 181, at 177 (outlining the extensive efforts by scholars to distinguish South Africa’s legal system).

197. See Gibson & Gouws, supra note 181, at 175 (noting the existence of a “Nazi jurisprudence”); see generally Bullock, supra note 2 (discussing Nazi legal and political organization). But see van Caenegem, supra note 185, at 247 (noting that both the Soviet and Nazi regimes “rejected the Rechtsstaat, or rule of law, as no individual could possibly have the right to stand up to the state and its ideology . . . .”).

198. Id. at 289–90.

199. It might be objected that the Gestapo, the SS, and the Wehrmacht committed many horrible acts that not even German law of the time sanctioned. Yet, even if those acts are discounted, the deeds executed in full accordance with Nazi law were among the most horrible imaginable. Nor is it a valid objection to say that because international law and norms
that its subjects—however they are constituted or selected—be treated equally and fairly. The rule of law, as a conceptual ideal, is silent as to how to choose those subjects.\(^{200}\)

If, then, rule of law is taken to mean a coherent, rational, and consistent set of laws equally applied to whoever is a subject before the law, then there is at least the core of a Rechtsstaat—however twisted, unappealing, and cynical—in all three parts of Bosnia. Those who would criticize the human rights records of the regimes there have to find a different register in which to lift their voices, a different rhetoric with which to lay bare the rotting flesh beneath the thin but opaque robes of law.

proscribe much of what the Nazis codified, their system cannot be considered one of the rule of law. These norms were in part developed (or retroactively discovered) as a response to the actions of the Nazi regime, and to its self-evidently successful codification of its actions in national law. The international legal order may be treated as universal, but that does not make it the sole possessor of any attribute that may be deemed desirable in or necessary to a legal order. Indeed, this only proves that what is really meant by “rule of law” is “rule of one kind of law”—a humanistic law of and for the individual. The uncomfortable reality is that the principles of Nuremberg, and of the post-war human rights regime, only came to have “universal” authority following the military destruction of the principal opposing ideology. However noble their aspirations, they remain the fruits of the victors: they are spoils of war.

200. The example of the antebellum United States shows this point: the United States had well developed judicial systems dispensing substantively and procedurally fair justice to those citizens included in the polity, while effectively excluding others. It would be inapt to say that there was no “rule of law” in that society, imbued as it was with the deepest traditions of the Anglo-American legal system. When, for example, slavery was abolished, and later segregation dismantled, blacks were accorded the same rights that whites already had. It was not the case that those rights needed to be created anew because some segment of the population had not until that time enjoyed them. The language of the Civil Rights Act of 1866 is illuminating in this regard. Section I provides: “[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.” 42 U.S.C. § 1982. Thus the Act assumed the existence of these rights in some perfected form and extended these rights to another group, without making any changes in them. (The Civil Rights Act of 1866 was “passed pursuant to the thirteenth amendment and reenacted in 1870 after passage of the fourteenth amendment.” Joseph William Singer, Property Law: Rules, Policies, and Practices 1002 (2d ed. 1997)). A critique of such a system must be formulated on substantive, not procedural, grounds.

An excellent example of this principle is found in a different sphere in contemporary America: in the abortion debate. Anti-abortion advocates believe that the fetus is a human being and therefore entitled to the rights and protections afforded to all human beings by the Constitution. Pro-abortion advocates believe that the fetus is not a human being, and therefore not entitled to rights that trump those of women who are indisputably human beings protected by the Constitution. See Laurence H. Tribe, Abortion: The Clash of Absolutes 113–38 (1990). One strand of pro-abortion thought, however, acknowledges the humanity of the fetus but still maintains the social necessity and legal right to abort. This view is more difficult to reconcile with basic fairness requirements of the rule of law, but seems to operate on a principle that balances the rights of one human being—the woman—against those of another—the fetus, and essentially adopts a position similar to the traditional rule of no duty to assist. See Judith Jarvis Thomson, A Defense of Abortion, 1 Phil. & Pub. Aff. 47.
A. Constitutionalism and the Rule of Law

If the subjects of law, including individual human beings and their rights, cannot be conceptualized on the level of the rule of law, where can they be conceptualized? Judgments about whom the law shall recognize as its subject are properly made at the constitutional level. “Constitutions are often battle grounds for the very societies whose most fundamental values they seek to embody. Questions of inclusion, exclusion, and legitimacy provide the skirmishes and encounters from which the transcendent virtues of identity, liberty, and democracy emerge.”201

There is a strong conceptual connection between the idea of a constitution—defined as the “fundamental law” of a country “regulating the system of government”202—and the idea of the rule of law.203 Both privilege law over politics and commit their subjects to continue their social relations within a pre-established framework rather than as an open-ended contest.204 Their roles, too, are intertwined and complementary: the choice of a system ruled by law is surely a constitutional choice, while a constitution itself can be a commitment to law’s rule. Yet the two are distinct as well, and one may understand the distinction as one of substance and process: a

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203. See Henry J. Steiner & Philip Alston, Comment on Relationships Between the Human Rights Movement and Democratic Government, in International Human Rights in Context 658, 660 (Henry J. Steiner & Philip Alston eds., 1996) (noting the linkages between constitutionalism, democratic governance, and the rule of law); Henkin, supra note 184, at 11 (“[M]odern prescriptive constitutions reflect and give rise to . . . ‘the rule of law.’”); Louis Henkin, The Origins and the Present Interest of the United States Constitution, in The New Constitutional Law (International Association of Constitutional Law, Second World Congress 1991) at 296. Henkin cites a Professor Sokolewicz’s list of basic values reflected in the [U.S.] Constitution [which he] commends . . . even to Socialist states . . . including: The rule of law, not of men; limitations on government, and of democracy, even at the expense of efficiency; the separation if not of powers then of competence and responsibility; judicial and quasi-judicial implementation of constitutional guarantees; the need to reconcile the permanence and stability of a constitutional text with juridical precision in its formulation; and making constitutional amendment difficult.

Id. Fallon, supra note 182, at 24–26 (analyzing the use of various conceptions of the rule of law in American constitutional debate).

204. Consider, for example, Fuller’s assertion that the failure of rule of law in the procedural incarnation he espoused leads to the collapse of the whole legal system and to the dissolution of the “bond of reciprocity” between government and citizen: a constitutional consequence. Lon L. Fuller, The Morality of Law 33–41 (1964).
Constitutions are therefore by their nature politically substantive instruments, yet the idea of a constitution does not presume any particular political formulation. Instead a constitution can establish any form of relation between its choice of subjects. Nonetheless, given their close conceptual relationship, it is hardly surprising that scholars have also sought to imbue the idea of a constitution with particular substantive values analytically distinct from its core conceptions, just as they have done with the rule of law:  

205. See Henry J. Steiner & Philip Alston, Comment on Constitutions and Constitutionalism, in International Human Rights in Context supra note 203 at 710, 711. Scholars frequently use the term ‘constitutionalism’ to describe a particular genus of constitutional system. This fluid term is put to many different uses; there is no consensus over exact content, although most of the scholarly discourse would agree on the core meaning. Constitutionalism . . . refers to a constitutional system that falls within the liberal tradition . . . and possesses many characteristics of the democratic state. Id.; see also Radhika Coomaraswamy, Uses and Usurpation of Constitutional Ideology, in Constitutionalism and Democracy 159, 160 (Douglas Greenberg et al. eds., 1993) (“[T]he term ‘constitutionalism’ will be used broadly, both in its ideological sense and to imply a process and style of decision making specific to the genre of constitutions drafted in the Anglo-American tradition of jurisprudence.”).  

206. Henkin, supra note 184, at 11–12 (noting also periodic elections and bills of individual rights as elements of a constitution).  

207. See The Declaration of the Rights of Man and of the Citizen art. 16 (France 1789), in Henkin, supra note 184, at 13 (“[A]ny society in which rights are not guaranteed, or in which the separation of powers is not defined, has no constitution.”); id. at 14–19; id. at 21 (identifying respect for individual human rights as integral to constitutionalism); Steiner & Alston, supra note 203, at 711 (identifying linkages between constitutionalism and human rights).  

208. Steiner and Alston explain: A ‘constitution’ . . . need not follow any particular structure, impose or reflect any particular political or economic system or ideology, or prescribe any particular form of government. It may be democratic or authoritarian, oriented to private property and
The use of constitutionalism to refer solely to the liberal constitutional tradition does not necessarily encumber alternative constitutional forms with any negative connotations. If the term constitutionalism is used, however, to implicitly critique or exclude other forms as non-constitutional because they do not demonstrate the qualities of constitutionalism so defined, it must be recognized as an ideologically motivated definitional hijacking. Just as with their treatment of the rule of law, when scholars include particular substantive values deriving from the liberal tradition in the core definition of constitutionalism, they “solemnize” those values and give to them the imprimatur of neutral truth. At the same time, these scholars attain a position from which they can “neutrally” critique legal systems that in fact comport with all the procedural elements of constitutionalism, but not with the scholars’ own substantive values.

Just as with the rule of law, such an approach—whatever advantages it yields in seizing the debate—takes one far from the core conception of what is, indeed what can be, encompassed within the idea of constitutionalism. If, then, a set of understandings, rules, procedures, and practices can be identified that serve to order a society in much the same way as a classical, written constitution, then those understandings, rules, procedures, and practices should be engaged on their own terms. They should be acknowledged for what they are: an effective, though unwritten, constitution.

B. Bosnia’s Rules of Decision

In this section, I outline the practical norms of Bosnian property dispute resolution as evidence of unstated, normative constitutional assumptions informing the domestic systems. I refer to these features as “rules of decision;” they are descriptive of the extant (legal) system of property decision, even in those aspects where they depart from comfortably familiar legal principles.

markets or to collective ownership and central direction, multi-party or one-party, attentive or not to individual rights, and so on.

Steiner & Alston, supra note 203, at 710–11.

209. See, e.g., Fallon, supra note 182, at 23 (noting objections to a “substantive ideal” of the rule of law that this conception turns the rule of law into a “partisan” ideal).

210. This is exactly what scholars do in regard to “the exception”—the United Kingdom, which has no written constitution. See, e.g., Coomaraswamy, supra note 205.

There is no document or group of documents called the British constitution. But since Britain has a regular system of government, with a complex of rules defining the composition, function and interrelationship of the institutions of government, and delineating the rights and duties of the governed, Britain does have a constitution and a body of constitutional law, if these terms are used in a broader sense.

de Smith & Brazier, supra note 202, at 6.
I argue that, taken as a whole, they constitute a kind of legal system that, however unpalatable in its substance, does embody the necessary elements that the name requires: systematized, rational, understandable, predictable, and, to an unfortunate degree, workable, survivable and able to replicate itself. These are terms to describe separate societies, separate states; though human rights norms are meant to apply universally, a state’s sovereignty has never been reduced to a nullity in the calculation, and consequently the empirical recognition that some entity is effectively sovereign cannot be simply ignored or assumed away.  

211. Cf. Donnelly, supra note 13. It might well be appropriate to discuss theories relating state sovereignty and human rights at this juncture, but I will only note them in passing. Even if one establishes the elements of an illiberal constitution in Bosnia, it might still be objected that international law and human rights have precedence. Classical theories of the state system emphasized each state’s autonomy. In the post-war period, however, various theories have posited a universal obligation for states to comport with international law, in effect limiting their sovereignty. See generally R.B.J. Walker & Saul Mendlovitz, Interrogating State Sovereignty, in Contending Sovereignties: Redefining Political Community 1 (Walker & Mendlovitz eds., 1990). Most specifically, the modern human rights regime is generally acknowledged to trump claims to absolute state sovereignty. See, e.g., W. Michael Reisman, Sovereignty and Human Rights in Contemporary International Law, 84 Am. J. Int’l L. 866, 869 (1990) quoting the United Nations Charter ("[N]o serious scholar still supports the contention that internal human rights are ‘essentially within the domestic jurisdiction of any state’ and hence insulated from international law.")

In the present world there is no doubt that the few rules of generally recognized international law must have supremacy over national law. The generally recognized rules of international law must have supremacy over national law not only in regard to a new world order but also in regard to the modern relationship of states if this relationship should be a legal one.


As a matter of theory, this seems indisputable. However, as I shall show, I am posing a more practical question: Given that, whatever the preeminence of international legal norms in theory, the states that in fact exist are not constitutionally inclined to accept those norms, how does one formulate a criticism of and an opposition to those states? Does it make sense to formulate one’s criticism within the theoretical framework—that is, to call the state into compliance—or outside of it—that is, to oppose the state’s very existence as being antithetical to the theoretical framework itself? Such an approach does not rely on arguments about law and sovereignty, but rather locates its essential critique on the plane of politics and morality—in much the same way that commentators have suggested that law-based critiques or responses to the Nazi regime are completely inapposite.

terms of Dayton’s human rights regime, or why, in the aftermath of their wars of liberation, they would be willing to do so.\footnote{212}{“How anyone can expect the participants of a vicious, genocidal war to consent to and participate in the creation and maintenance of a supposedly civic state is a mystery.” George Schöpflin, \textit{Yugoslavia and the West: Getting It Wrong}, 58 War Report (Feb.-Mar. 1998), at 19.}

1. Ethno-Patriotic Status

\textit{The Law recognizes not only the legal merits of a case but also the legal status of the parties; ethnicity above all else, but also patriotic participation in the defense of the State, are defining factors in weighing the case.}

The merits of the parties to a dispute shall be considered as much as the merits of their cases. This is the core constitutional principle of the new ethno-territorial statelets.

This military and group-oriented preference has conceptual antecedents in the antebellum regime.\footnote{213}{See Williams, \textit{supra} note 13, at 64–66 (discussing the use of the “ethnic key” in distributing high government positions); Pajić, \textit{The Dayton Constitution}, \textit{supra} note 5, at 192 (“Preoccupation with the rights of ethnic groups reflects the transition from communist to nationalist collectivism, where the despotism of the ‘one and only’ ruling party is replaced by the despotism of presupposed (ethnic) interests.”).}

Consider the nature of socially owned property in the former regime: it was controlled by the state or municipality, and distributed to individual members for their long-term use, based on their needs and their merit. A baseline political acceptability was a prerequisite for getting an apartment, just as it was for a job or a position in university.\footnote{214}{Interview with attorney, in Doboj, RS, BiH (Dec. 1996) (Name and precise date withheld to protect anonymity of source.).}

It is hardly surprising that the successor regimes, only a few years later, operate along very much the same lines in distributing property. It is only a very small jump to extend those rules to administratively and judicially reviewable questions of restoration and compensation, and to include ethnicity as a criterion—something the old regime only did when it was seeking to ensure political stability and to stabilize the ethnic balance.\footnote{215}{Ethnicity was obviously never far from the minds of Yugoslavia’s former leadership, as evidenced by its efforts to maintain ethnic parity in the political and industrial leadership. These efforts did not affect the common citizenry nearly so much, and at any rate, the goal of nationalities policy under Tito was to contain and ultimately deracinate the ethnic issue, at least to the degree that it might represent an alternate source of social or political legitimacy or authority. See, e.g., \textit{Separating History from Myth: An Interview with Ivo Banac, in Why Bosnia?}, \textit{supra} note 11, at 142–44. Under the present regimes, contrariwise, the aim is to accentuate and give primacy to ethnicity as the ruling principle.}

The regulations governing distribution of abandoned property in all three zones specifically favor veterans and wartime invalids, or
their families. This might be compared to the discounted loan programs available to U.S. veterans, though not favorably; here, the stakes are considerably higher, and include advantages in the resolution of disputes before a court—a judicial advantage, not simply an administrative benefit or financial incentive.

The Muslim and Croat governments in particular effectively incorporated this mixed ethno-patriotic posture into its legislation. Their use of participation in the “patriotic defense” or “the aggressor’s army” as criteria for full political membership, during and immediately after a war mobilizing populations around ideals of ethnic solidarity, is tantamount to determining the polity along ethnic lines; the few exceptions only prove the rule. The Serb legislation, being the most consistently ethnic in formulation, is consequently also the least generous to patriotic citizens of other ethnicities.

The practice of local officials, even in the absence of statutory authorization, sometimes reflects the ethno-patriotic sensibility; in Odžak, a Croat-controlled territory, for example, “Local authorities will permit the return of Bosniacs if they were original inhabitants

216. Law on the Use of Abandoned Property art. 15, 30, 52, 61, reported in Republika Srpska Official Gazette, year V, no. 3 (Feb. 27, 1996); Law on Abandoned Apartments (RBiH), art. 7; Decree on Abandoned Apartments (H-B), art. 8, 11; Decision on Establishment of Basic Criteria for Assignment of Apartments for Use (H-B), art. 1.

217. The most prominent example is perhaps Dražen Erdemović, an ethnic Croat who fought with the Serb forces which occupied Srebrenica and participated in the subsequent mass killings. Erdemović was later tried and convicted before the International Criminal Tribunal for the Former Yugoslavia. See Prosecutor v. Erdemović, International Criminal Tribunal for the Former Yugoslavia, Case No. IT-96-22 (Trial Chamber Judgment Nov. 19, 1996, Appeals Chamber Judgment remitting for re-sentencing Oct. 7, 1997, Trial Chamber Judgment on re-sentencing Mar. 5, 1998) <http://www.un.org/icty/cases.htm>. See also Akhavan, supra note 211 at 791.

In any event, the rule as stated includes the concept of “patriotism,” and indeed each of the three laws includes preferences for veterans, which may—and in the case of the Muslims actually did on occasion—include members of other ethnic groups. (“The system is designed to favor those who remained and defended the country. Criteria include: looking after those who stayed and soldiers’ families. Ethnicity is the basis; yet, if you are a Serb who stayed, and you walk into the right court, you might do okay. It comes down to who you know . . . . If you’re a vet, you’ll do well.” Interview with UNHCR official, in Sarajevo, Fed BiH (Jan. 1997) (Name and precise date withheld to protect anonymity of source.). This may be seen as a partial abrogation of the ethnic thesis; on the other hand, since the “exception” for fighters involves an immediate and tangible contribution to the survival of the country, which in turn serves the general ethnic good, it is not inconsistent in the larger context. Cf. Boyd, supra note 5, at 48 (“Even refugees who return to majority areas are unwelcome, branded as cowards who fled in time of danger.”).

Nonetheless, even the value of veteran status is limited in the face of consistent application of the ethnic logic of the regimes. Even the most multi-ethnic of the three statelets has not allowed patriotic service to trump the ethnic hierarchy where it matters most: “the Sarajevo government retired most of its top Serbian and Croatian officers following the signing of the Dayton agreements at the end of 1995.” Patrick Moore, Bosnian General Says Army Will Be Multi-Ethnic, Radio Free Europe/Radio Liberty Newsl ine (Nov. 3, 1997) <http://www.rferl.org/newsline/1997/ 11/031197.html>.
and particularly if they fought with HVO forces during the conflict.”

There are limits, perhaps most evident in the disposition in court of suits for eviction brought by Muslims against Serb tenants in Banja Luka, where the court, in the cases it has decided, almost always rules in favor of the (Muslim) owner. Here the less activist role of civil law judges comes into play. Existing law is ethnically ambiguous on its surface, but clear enough about the path of ownership rights; barring a new law that overtly states this ethno-patriotic rule for evictions, judges applying existing law have little choice but to conclude in favor of the title owner, regardless of ethnicity.

When there is no ethnic factor, the courts are much freer to decide according to the written law. The organs of the international community, or its fruits, also recognize that the crucial locus of law and policy is ethnicity in their formulation of the problems they confront. In an interview, for example, the Federation Ombudsman in Mostar noted that “when [two disputants] are both Croat or both Muslim, it’s a normal process—the police treat them normally . . . the court takes care of it [such cases] . . . . This office just perhaps asks to expedite the process.”

2. Reciprocity

No member of another ethnic group or entity may receive back property presently held by a member of the dominant ethnic group, unless that member receives back his own property or its equivalent value.

In general, members of another ethnic group or entity shall not receive back property presently held by members of the dominant ethnic group until property taken from members of the dominant ethnic group in areas held by the other group is returned; this principle is not personal, but general.

This formula, if adopted by all sides, obviously excludes any state-sanctioned transactions at all, except perhaps simultaneous

218. UNHCR, supra note 7, at 3. This case is mostly unusual for the surprisingly moderate position regarding the return of other ethnic groups; usually, citing “original residence” would hardly improve one’s case, as that was the basis for the initial expulsion. In another respect, however, the example is not singular: many Muslims and Croats fought alongside each other early in the conflict, especially before hostilities broke out between the HVO and the ABiH in 1993.

219. Records of cases followed by the OSCE in the northern half of Republika Srpska show that in 43 cases involving Muslim owner-plaintiffs decided in 1996, all but one was decided in favor of the owner. Interview with OSCE human rights official, supra note 154.

220. Interview with Sefket Hadžihasanović, Federation Ombudsman, supra note 24.
exchanges. It is certainly at least in part an intellectual ruse, a principle adopted simply for the sake of its practical result in forestalling any reform. Indeed, it is valid to ask how meaningful any of the parties’ “commitment” to the principle of reciprocity is. Do they not in fact merely speak of reciprocity as a way of forestalling any returns in practice—that is, do they not really mean, “no returns, ever”? Perhaps that is true for some politicians—though that would only strengthen the finding that there is a core ethno-patriotic logic in operation—but there is evidence that many political actors do not in fact mean “never,” that, while operating very much in the perceived interest of their own ethnic groups, they also conceive of the dispute in terms of equal treatment and reciprocity.221 The degree to which administrators and legal professionals really adhere to this principle cannot be dismissed; alongside its cynical efficacy, the principle of reciprocity carries clear moral weight for many people, including many people in power.

Reciprocity as a legal principle222 is an excellent example of the distinction between procedural and substantive rule of law. Nothing in the principle of reciprocity offends notions of the rule of law, once the substantive focus of rule of law is shifted from the individual to the group. In application, reciprocity in a judicial (or administrative) setting yields predictable, stable results; contesting parties from the same given group will receive equal treatment before the court. This tends to support the proposition that the reciprocity can be a constitutional principle, and not necessarily just the name for a set of convenience policies.223

221. One set of local Serb officials dealing with (Serb) refugee resettlement demonstrated the range of reactions: several of the men acknowledged that they would be prepared to allow Muslims to return to their homes if and when Serb refugees were all able to return to their homes in Croatia, thus freeing up housing stock. Note that the housing in question is already “assigned,” and there is no sense that a Muslim/enemy’s claims are actionable until morally prior claimants are otherwise satisfied. Another official—the director—declared angrily that he would not allow their return, even then. Interviews with local refugee housing officials, in Teslić, RS (Dec. 1996) (Names and dates withheld to protect anonymity of source.). The largest group of Serb refugees in Bosnia and Yugoslavia were displaced from the Krajina region of Croatia in 1995.

222. “Mutuality. The term is used to denote the relation existing between two states when each of them gives the subjects of the other certain privileges, on condition that its own subjects shall enjoy similar privileges at the hands of the latter state . . . .” From Reciprocity, in Black’s Law Dictionary 2170 (6th ed. 1990). See Malcolm N. Shaw, International Law (4th ed. 1997) (noting the use of reciprocity in international law and relations.).

223. See id. (noting the pragmatic application of the principal of reciprocity in discouraging states from always seeking short-term gains, as it acts as “an inducement to states to act reasonably and moderate demands in the expectation that this will similarly encourage other states to act reasonably and so avoid confrontations”).
Reciprocity is declared overtly as a principle of Republika Srpska legislation: 224

Article 42 conditions the return of the property to its owners, on the existence of similar legislation and practice in the other entity and in the Republic of Croatia—that is, in the places from which Serbs have fled. Accordingly, even if an individual Muslim or Croat fulfills all the conditions for reclaiming his property, the general rule of reciprocity from Art. 42 can prevent the former owner from repossessing his property. 225

The Muslim legislation does not state a principle of reciprocity as such, though its practical effect has been much the same. Moreover, the ongoing return of several hundred thousand refugees to the Muslim sector will surely increase pressure on the government to use all available property to house its own core constituency, rather than to support the return of any Serbs or Croats until Muslims can return to areas under those groups’ control. In their dealings with the international community, both the Serb and Muslim authorities have consistently argued for a reciprocal approach to returns. 226

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224. Law on the Use of Abandoned Property art. 42, reported in Republika Srpska Official Gazette, year V, no. 3 (Feb. 27, 1996).

225. OHR, Law on the Use of Abandoned Property: Compliance (RS), supra note 84, at 7.

226. A letter to UNHCR from the Republika Srpska Ministry for Refugees and Displaced Persons states:

During the past period, the Republika Srpska has insisted that the parties do not interfere in the free and voluntary choice of return locations on the part of refugees and displaced persons.

The Republika Srpska has been against the practice to force refugees to stay in areas of instability and existential uncertainty.

The Republika Srpska is against pressures exerted on refugees and displaced persons to move to areas which do not provide the basic conditions for a normal life.

Therefore, the Republika Srpska and this Ministry have been persistent in the past period in the protection of those principles which originate from the general declaration on human rights and Annexes 6 and 7 of the Dayton Agreement:

Rights cannot be given and realized in the case of one person or one family, if that jeopardizes the rights of another person or family.

Analysis of Annex 7 of the Dayton Agreement: Agreement on refugees and displaced persons (Letter no. 01-05-3120/96 from Ljubiša Bladušić, Minister, Republika Srpska Ministry for Refugees and Displaced Persons 2 (Oct. 8, 1996) and Letter no. 01-05-3120-1/96 from Ljubiša Bladušić, Minister, Republika Srpska Ministry for Refugees and Displaced Persons 2 (Oct. 8, 1996) in UNHCR, supra note 7, attachment). Cf. The Federation’s response on the same issue: Noting what it sees as UNHCR’s and other implementing organizations’ failure to apply the “same, objective, persistent, even inexorable approach towards the Administration of the Serb side as they have had towards the Administration of the Federation,” the Federation cautions in a letter that these organizations risk “impeding the positive trend of returns in the federation of B&H, thus contributing to even greater unbalance in the resolution of the problems of displaced persons and refugees in the whole territory of Bosnia and Herzegovina.” The Ministry then calls for

[b]alance in the organization of return [which] has to be built up by synchronized action of the Republic [i.e. Republika Srpska] and Federation Governments . . . The Republic
Commenting on Republika Srpska legislation, OHR notes that:

[The i]ntroduction of the principle of reciprocity violates the foundations of the GFAP. Firstly, this is a principle known in the international law, in application among different states. It is unacceptable that two entities of one sovereign state base their relations on the principle of reciprocity.227

While it may be true, this statement merely shows that the leadership of Republika Srpska, to the degree that it is thinking in legal and not purely instrumental terms, probably does consider itself to represent exactly the kind of entity that the OHR acknowledges does employ reciprocity: a state. To reply that Republika Srpska, Herceg-Bosna, or the Muslim sector standing alone are not states is simply to adopt a stance on a politically contested question; it is not a position that can be derived from principle alone.
Core property rights may be retroactively voided, created, or redefined.

The right to property, defined by the state and devolved to individuals in the name of the people, exists to advance the welfare of the whole society and may therefore be altered to ensure that it continues to serve that overriding function.

All of the principal laws affected property rights retroactively. Commenting on the Republika Srpska law, the OHR notes that

The annulment of contracts has a retroactive effect, depriving therefore the persons of their vested rights, acquired under existing laws. Once again, this is in obvious contradiction with [sic] the generally accepted principle of legal certainty.

Furthermore, the retroactive effect of these provisions does not only affect the rights of the owner, but equally of the persons who entered the contract with him . . . . [T]he person who has taken possession of abandoned real or movable property without a decision on the allocation of the property for use will be evicted . . . .

The post hoc nullification of occupancy rights in the Croat and Muslim laws has much the same effect.

Retroactivity, though generally disfavored, exists in at least some forms, most notably in international law, where it has been invoked to defend the validity of the Nuremberg trials; indeed, in

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228. “‘Retroactive’ or ‘retrospective’ laws are generally defined from a legal viewpoint as those which take away or impair vested rights acquired under existing laws, create new obligations, impose a new duty, or attach a new disability in respect to the transactions or considerations already past . . . .” From Retroactive law, in Black’s Law Dictionary, supra note 222, at 1317.

A retrospective law has been defined as

[a] law which looks backward or contemplates the past; one which is made to affect acts or facts occurring, or rights accruing, before it came into force. Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past. One that relates back to a previous transaction and gives it a different legal effect from that which it had under the law when it occurred.

From Retroactive law, in Black’s Law Dictionary, supra note 222, at 1317–18.

229. OHR, Law on the Use of Abandoned Property: Compliance (RS), supra note 84, at 8.

230. Law on Abandoned Apartments art. 1, reported in Official Gazette of the Republic of Bosnia & Herzegovina no. 6/92; Decree on Deserted Apartments art. 1, reported in National Gazette of the Croat Republic of Herceg-Bosna no. 5/95.

231. “[Retroactive] laws may be unenforceable because violative of the ex post facto clause of the U.S. Const., Art. I, Sec. 9, Cl. 3.” Black’s Law Dictionary, supra note 184, at 1317.
domestic legal systems, any change in law affects existing rights to some degree. Its application is not fundamentally inconsistent with the rule of law, although it does offend some favored aspects, such as transparency and predictability.

More to the point, any project of constitutional reform, though generally thought of as a prospective exercise, is necessarily a substantively retrospective intrusion as well. While retroactivity itself is not inherently ethnic in focus, it is a necessary adjunct to a constitutional project that seeks to convert a system from an ethnically neutral focus\(^\text{232}\) to an ethnocentric focus.

4. State Urgency

_Laws concerning a property transaction are not construed in a manner that would jeopardize the defense and well-being of the State. The definition of “defense and well-being of the State” is broadly constructed._

The present property problems in Bosnia are not only a product of the war; they are in part its cause. The parties, and especially the Croats and Serbs, having recently conducted a punishing ethno-territorial war, are not inclined to see their positions eroded from within by court decisions ceding territory to their former adversaries;\(^\text{233}\) moreover, there is no evidence that the judges themselves are otherwise inclined. The principle of judicial deference in matters of foreign policy and national defense is therefore quite strong, and extends to what is normally thought of as a largely domestic matter—property rights—which in the context of this conflict has been thoroughly “internationalized” (at least as between the parties) and “militarized.”

The “States” referred to are not, of course, proper or recognized states (except to the degree that the Republic of Bosnia and Herze-

\[^{232}\text{Such a formulation does not describe Yugoslavia under Tito with any accuracy except by contrast to the present regimes.}\]

\[^{233}\text{Failing, or refusing, to take the domestic perspective into account produces pathways of analysis that diverge meaningfully from their internally consistent logic. Consider this comment on the Muslim legislation:}\]

_The existence of legislation such as the Law on Abandoned Apartments may only be justified by a need to temporarily regulate the direct consequences of the war—to place displaced persons in temporarily abandoned apartments, until their resettlement is possible. There is no need nor ground to permanently deprive a person, whose departure has been caused by the war, of the only property right he could acquire under the former regime. In the absence of any legal justification for permanent loss of such property rights, the Law is in violation of Article 1 of the First Protocol to the ECHR. OHR, Law on Abandoned Apartments: Compliance (RBiH), supra note 76, at 7. Presumably the actual justification, in the eyes of the legislation’s drafters, was a compelling state interest, or perhaps a compelling national interest._
govina and the Muslim regime were synonymous during the war and remain largely so in the Dayton period: Republika Srpska is an officially designated entity of the federal state, while Herceg-Bosna is not recognized at all. Nonetheless, it is the domestic perception that counts, and these entities definitely consider themselves to be states, if only until such time as they can become provinces of their neighboring mother countries. Any assessment of their internal dynamics and legitimation, including their view of judicial deference to the “foreign policy” and defense apparatus, must take account of this deeply held domestic perspective. That is, they are de facto states.

Even granted this realistic view of their state-like nature, however, the notion of judicial deference should not be pushed too far: unlike, say, a U.S. court that feels political and moral pressure to defer, courts in Bosnia may often feel more direct pressure to refrain from perceived involvement in security interests.

5. Closed Consistency

As between members of the dominant ethnic group, where there are no issues of political loyalty, the courts generally apply the law as written and without interference. In these cases, execution is generally as prescribed in the law.

This might at first seem a specious formulation: to say that something is a certain way whenever it is not another way is tautological; so too, here, to say that the court shall follow the principle of legality whenever it is not told not to, seems to be nothing more than to say that the principle of legality is not honored. But that is exactly the value of this distinction, for the issue is: How often, and how much, is it dishonored? Are there clearly identifiable, predictable and coherent realms in which the principle will be upheld, and in which it will not? Here, the answer is mixed. The ethnic outer limit is a clear one: the principle of consistency does not seem to be applied outside the ethnic group, except by the judiciary in narrow

234. Now only “Bosnia and Herzegovina.”

235. Most reports question the ultimate political independence of the judiciary, and, while I have tried to suggest that the judiciary retains more independence than other organs of the government, I agree with the consensus view that that independence is deeply compromised. One example will suffice: OSCE organized a conference for judges in January 1997, in the Muslim town of Tuzla. Not a single Serb or Croat judge attended; the invited Serb judges—perhaps 50 people—all canceled on the morning of the conference. Reports at the time made it clear that the judges had been instructed to decline the invitation. Interview with OSCE democratization officer, in Tuzla, RS (Jan. 1997) (name and precise date withheld to protect anonymity of source).
circumstances. Within the ethnic limit, however—that is to say, in disputes between two or more members of the ethnic majority—it is entirely possible that the law as written will be applied without prejudice. Rule of law cannot be conceptualized with respect to the decisions about who shall be its subject; rule of law only applies a posteriori to those who, by some other external and pre-existing process, have been selected as subjects of the law.  

This closed consistency is a proof of the constitutional nature of the ethno-territorial principle, not an exception to the rule of law.

6. Division of Legal and Executive Results

Except as noted above, execution of judicial judgments is a discretionary matter of State policy.

Despite these various rules and limitations, judges do nonetheless apply the written law, much of it inherited from or modeled on the former Yugoslav system. Where compelling their findings to conform with state policy would be embarrassing or insupportable, the preferred policy is simply to delay or refuse execution of the judgment.

As with the previous rule, it must be asked whether this can possibly be worked into a framework of legality: Can a government’s refusal to heed or carry out its own judiciary’s decisions be called a legal rule, or is it not instead the denial of the principle of legality?

Of course, it is precisely the latter; it seems to be the very definition of the absence of legal principles. And yet, the courts are not entirely subordinated or suppressed; they continue to render judgments. Court judgments retain their declaratory effect, and may be given effect at some future date. The independence of the judiciary—in the sense that it is at least independent enough to issue decisions that are not craven to political power, even if inefficacious—is one of the classic elements of the rule of law.  

It is a particular feature of the legal regime in Bosnia that the courts con-

236. The ombudsman in Mostar, speaking of the system in Croat West Mostar, noted that “it’s a Croat system; it’s good only for the people who are Croats; it was born while the HDZ was fighting[;]” he added that the parallel situation obtained in Muslim East Mostar, where Croats cannot reclaim property. Interview with Sefket Hadžihasanović, Federation Ombudsman, supra note 24.

237. See Geoff Budlender, Law and Lawlessness in South Africa, in 4 S. Afr. J. Hum. Rts. 139, 140 (1988) (identifying an independent judiciary as the key element distinguishing rule of law from the unrestrained and arbitrary exercise of power); Gibson & Gouws, supra note 181, at 174 (noting that in a state of law “there exists an independent judiciary charged with interpretation and application of the law to which every aggrieved citizen may have a right of access . . . ”).
C. Constructing the Implied Constitution

The various factions in Bosnia have been under sustained pressure from the international community to produce legal structures that conform to international, or at least European, norms and standards. Yet this pressure is misguided: the international community needs to understand its work as constitutional creation with an avowedly political agenda opposed to the present regimes by its very nature, and not merely the more effective implementation of human rights within the existing order, the nature of which is nearly universally contested.

In fact, the three domestic systems evince a deep, thorough-going and consistent commitment to ethno-majoritarian constitutional principles; the volatile political situation—specifically the threat of forceful intervention by quasi-occupying powers—prevents a too-open expression of these underlying principles, but they operate whenever possible. Thrown into the balance on the other side are Annex 4, the Constitution of Bosnia and Herzegovina, and Annex 6, the Agreement on Human Rights. Their combined weight hardly shudders the scales. The point is that the operation of these systems does not merely violate certain articles of the Dayton Accords’ human rights principles; these systems, at their core, constitutionally contradict those principles.239 Do they then contradict all of Dayton?

VII. DAYTON’S COMPROMISE: ETHNIC PARTITION IN EXCHANGE FOR HUMAN RIGHTS

Although the civilian aspects of Dayton remain moribund and contradicted by the continued power and internal legitimacy of the domestic systems, the military aspects of the Accords have been strictly implemented. These provisions have had a two-fold effect: they have internationalized the military situation on the ground, and they have vetted and stabilized the practical ethnic partition of the

239. Cf. Popović, supra note 8, at 156. ("[The war-time property regulations] provide a quasi-legal frame for deprivation of property. As these regulations and their application are discriminatory, they represent a final act of ethnic cleansing. Therefore, they not only violate the rules and principles of international law, but the basic notions of morality and justice as well.").
country that had already been effected by the war.\textsuperscript{240} The conventional understanding is that the military provisions were given priority in order to create a stable environment in which the elaborate civilian and human rights mechanisms could begin to operate. However, in so doing, they also have given meaningful support, recognition, and legitimation to the very groupings whose existence poses the gravest constitutional questions about the ultimate efficacy of the other, civilian, half of Dayton.

The central dilemma confronting any observer of the Dayton process then is this: How can one reconcile Dayton’s apparent partition of the country with its firm commitments to renewed integration? Within this question lies another, more particular to our exploration: How can one reconcile Dayton’s ethno-territorial partition of the country with its commitments to human and minority rights? The answer seems to be that the two parts can be conceived of, not as contradicting each other, but as forming two halves of a compromise, a \textit{quid pro quo}: first, ethno-territorial partition and the creation of illiberal ethnic states is guaranteed, and then (only then) human rights standards are introduced and institutionalized. However, it is a compromise that, I argue, will ultimately founder, and, even if it succeeds, presents a profound conceptual and strategic challenge to human rights advocates.

By far the largest part of the Dayton Accords addresses the phased separation and scale-back of military forces along the confrontation line and throughout the country, as well as the introduction of IFOR. Much of the material is technical and detailed in nature, however, and the military provisions relevant to the constitutional structure of the country may be summarized briefly. Each of the three groups retain their basic military structures, with the Muslim and Croat forces eventually scheduled to operate under a unified command.\textsuperscript{241} The military forces of either entity\textsuperscript{242} are barred

\begin{footnotesize}
\begin{enumerate}
\item The most obvious example of this is the effective military turnabout that has occurred since 1995, when the Serbs first were put on the defensive. Instead of working to defeat the Serbs militarily, the actual effective role of international troops is now safeguarding the Serb entity from an increasingly powerful Muslim military. See Economist Intelligence Unit, \textit{supra} note 20, at 10. This suggests, of course, that the present political state of affairs is not merely one that the West must tolerate, but rather one that it, at least in part, has structured and maintains.
\item In effect, there has been almost no integration of the Muslim and Croat militaries. The joint federation forces are supposed to number 45,000, with three Muslim and one Croat corps. There is also a joint rapid reaction brigade, but its Muslim and Croat battalions have separate bases. The federation defense law (from August 1996) requires full integration of the armies only after three years. Economist Intelligence Unit, \textit{supra} note 20, at 10.
\item Each of the three communities retains its own armed forces. Although the Muslim and Croat militaries formally compose two halves of an allied, joint fighting force, and do in fact receive weapons and training under the American “train and equip” program, they remain separated from and suspicious of each other. “The recently passed Federation defence
from entering the territory of the other without the consent of that entity and the federal presidency. A “zone of separation” is created between the two entities’ military forces, which must be withdrawn into barracks and reduced in size. Large, heavily armed NATO-led forces are introduced into the country, with extensive powers to patrol, monitor, and control the activities of the combatant forces. In addition, Western, principally American, military hardware and technical assistance is to be provided to the joint Muslim and Croat military forces.

The boundary between the two entities, the Inter-Entity Boundary Line (IEBL), basically tracks the 1995 cease-fire line, with some significant adjustments in favor of the Muslims near Sarajevo, and in favor of the Serbs in western Bosnia. The IEBL cannot be adjusted without mutual consent, except in the area around the strategic town of Brčko, whose status is to be decided by arbitration. The internationally recognized borders of the state—that is, of the former Yugoslav republic—are to continue, with only its internal structure being modified, but within that structure, two (and effectively three) ethnic territorial entities continue to operate under the security umbrella of a heavily armed international force.

The overarching principle of the Dayton Accords is that an internationally sanctioned regime replaces ethnically exclusive, domestic regimes. Where the two contradict, Dayton is authoritative and controlling; where Dayton is silent, the domestic regimes’ rules continue to have valid force. However, if one recognizes that the first, principal, and most successful part of Dayton is actually en-
tirely in accord with the purposes of the domestic regimes (whether or not its architects themselves share those sentiments\(^{252}\)), then it becomes more difficult to see those domestic systems as being overridden. Rather, they were, in a basic sense, reinforced by the Dayton Accords. On the legal plane, Dayton created the entities: Republika Srpska received official recognition for the first time,\(^ {253}\) and the presence of NATO-led troops is now its greatest guarantee of continued existence against Muslim revanchism.\(^ {254}\) Despite the rhetoric to the contrary, Dayton very much “rewarded aggression;” it is the imprimatur of a status quo achieved through four years of conflict. If, then, the implicitly ethnic character of these regimes contradicts, rather than complements, individual human rights norms, it is in part the international community’s own doing. How then can the international community both construct an illiberal regime and simultaneously impose upon it liberal institutions?

The structure of the Dayton Accords therefore appears internally contradictory, since, while assuming and requiring rule of law institutions, it also vets—indeed, legally establishes—the military and political divisions created by the war and ethnic cleansing campaigns.\(^ {255}\) In demanding a liberally motivated, humanistic regime while acceding to the maintenance of territorial divisions that are

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\(^ {252}\) Certainly, this view of the process is not one that the principal players themselves acknowledge. Richard Holbrooke has denied that there was any intention to allow a partition, in part or in whole, at the time of the Dayton Accords’ negotiation, and described the negotiating team’s goals for the entities as follows:

The interentity boundary line was designed to be similar to, say, a boundary between two American states or Canadian provinces, or, for that matter, two of the republics of the former Yugoslavia, but everyone knew that the Serbs would not voluntarily accept such a concept. As expected, they are trying to turn the interentity boundary line into a partition line, which they would later try to turn into complete separation . . . .

At Dayton, the warring parties agreed to accept a single state. The parties, including the Bosnian Serbs, went further than vague rhetoric. They also accepted the key elements of a sovereign state: a single, clearly defined international border; an internationally recognized central government and United Nations membership; a three-person presidency chosen by direct, free, and internationally supervised elections; a freely elected national assembly; a central bank and a single currency; compliance with the International War Crimes Tribunal; a “Supreme Court”; and joint commissions for such matters as railroads, national monuments, and even human rights.

These were, I stress, only paper agreements, but they were quite clear. Furthermore, some critically important parts of Dayton were carried out rapidly and successfully on the ground. Sarajevo was united under Federation control, the contending military forces separated, and, above all, the war ended.


\(^ {254}\) See Boyd, supra note 5, at 48–49.

\(^ {255}\) I do not mean to suggest that the historical incident of borders determines, for all time, the nature of the polity and state those borders contain; but I do assert that these borders, for the foreseeable future, serve as a reasonable proxy for a political vision fundamentally at odds with Dayton’s stated humanistic provisions and vision.
justifiable, even understandable, only on the most illiberal grounds, Dayton sets itself an impossible task: it seeks to justify both the rule of law and the “law of rule.”

Although it is true that the lines drawn in the Accord would effectively ensure the maintenance of a Serb majority in Republika Srpska, a Croat majority in the Croat cantons, and a Muslim majority in the Muslim cantons even if all refugees went home, large portions of the population would still be living as minorities in each of those parts. They would be dependent for their livelihoods and their very lives on the local ethnic majority’s goodwill and on the receptivity of that majority’s social, political, and legal institutions. This is in fact what Dayton assumes must happen and will happen. Yet, if that is to be the case, it is difficult to understand exactly what the war was fought for—at least as the parties themselves see it. It is equally difficult to see the purpose of what was created, or at least vetted, at Dayton. It is difficult, that is, to see why there are entities and cantons except to affirm and allow the ethnic division of the country, and to ensure the political supremacy—and thus the security—of each ethnic group on some territory of its own. To say that equal protection for minorities is the price of that security is to add a political term, not to restate an integral part of the argument. The state-creating aspects of Dayton are clearly and unambiguously ethno-territorial; protections for human and minority rights, however salutary, are adjunct, not essential, to that core project.

A constitutional, state-creating enterprise has been, in reality, the West’s core practical goal. Despite the familiar rhetoric about saving multiethnic Bosnia, by 1995 there was no longer any Bosnia to be saved; today, it would have to be created, not maintained, supported, or “saved.” However, the international community’s rights-oriented rhetoric masks the fundamentally political act that the promulgation of any constitution really is: the substantive political phase that precedes the period of law.

256. The cantons do not form a perfect ethnic fit; some of them, in central Bosnia, are “mixed,” with effectively separate Muslim and Croat sections, but administratively and juridically there is no distinction.

257. One analyst comments:

There are many ways in which one can read and interpret Dayton. I read it as a textbook of state-building from top to bottom. Everything is programmed to start from the tip of the pyramid. Making the central institutions function and affirming their role is crucial for the whole structure to work and by implication to encourage other, lower level institutions to operate according to the principles of Dayton. Pajić, Protectorates Lost, supra note 18, at 26. If, as in Bosnia, those “lower level institutions” are the vessels of all domestic legitimacy and power, however, this formula is backwards indeed.

For the local ethno-political communities, however, there is a continuity between their systems and their laws, which are under assault from the international community. Their systems, however substantively and morally reprehensible, are consistent on their own terms. They have, in however substantively perverted a fashion, a system and a rule of law: an effective constitutional order. What appears to the outsider as a disjuncture violative of the human rights—the exclusion of minorities—is properly understood within the country as a constituent element of the social and political order. It is a constitutional provision; the only question is whether or not that internally consistent system can be made to work with, and to incorporate, the rights and guarantees that constitute the other half of Dayton.

Some scholars speak with hope about the internal contradictions within authoritarian societies, saying that they will eventually bring down their repressive structures. I am sympathetic to such hopes, but I suppose too that the theories must be applied consistently: internal contradictions weaken and ultimately destroy any political enterprise, authoritarian or democratic, benevolent or despotic. In Bosnia today, the contradictions are in Dayton itself, and not in its enemies. The choices the international community has made have not been consistent. Simple partition or a full-scale “de-ethnicizing” occupation would have been consistent; so would a full military occupation, the much-discussed protectorate. But Dayton, because it seeks to graft liberal constitutionalism and humanistic equal protection onto ethnicized, territorialized polities, is neither of those things. Its ultimate failure to achieve its civilian goals—quite apart from the obvious problems of “lack of political will”—is a consequence of those inconsistencies and contradictions. Indeed, its apparent contradictions may be understood as partly underlying that lack of will, because states—already timid enough about undertaking even simple international adventures that may leave some of their soldiers dead—have no appetite at all to undertake the impossible.

259. In discussing Israel, Gad Barzilai provides a definition of the rule of law that includes human rights as an integral element, yet implicitly concedes the effectively constitutional nature of that determination: “A rule of law should be founded on greater appreciation of human rights and civil rights preserved unconditionally for the benefit of individuals, groups and nations who choose to coexist.” (emphasis added) Gad Barzilai, Between the Rule of Law and the Law of the Ruler: The Supreme Court in Israeli Legal Culture, 152 Int’l Soc. Sci. J. 193, 206 (1997).

260. See, e.g., Akhavan, supra note 211, at 810. (“Authoritarian power structures are often the best architects of their own demise through the internal contradictions and zero-sum power struggles that they generate.”).

261. See id. at 803 (“Ambassador Sacirbey recalled a comment by an American general at the time to the effect that ‘[i]t is not worth risking the life of one American soldier to arrest
VIII. CLOAKED IN ETHNICITY’S ROBE: THE NEED TO SUBORDINATE HUMAN RIGHTS

A. Human Rights’ (Illusory) Rhetorical Moment

Consider a simple thought experiment: if basic human rights protections were both adequate in themselves and the real core of the project, why not have simply drafted principles and created institutions ensuring human and minority rights throughout the territory of Bosnia, without any subdivisions, entities, or cantons? There is, of course, probably not a single observer who imagines that would work, even if the international community were to arrest, prosecute, and punish all those guilty of atrocities. The arguments against doing so—irreversible ethnic mobilization, rational choice in conditions of fear and uncertainty, the economic incentives of continued obfuscation, ancient hatreds and cycles of revenge—are well rehearsed, and, though themselves contested as to their details and moral qualities, they surely amount to a firm refutation of the notion that rights alone can patch up the damage already done.

Why, then, would an analogous formula work within each ethnic territory? The answer—partial, partially contradictory, and almost wholly unsatisfactory—must be that it has a better chance of working because it contains an implicit trade-off, an ethnic quid pro quo: if the rights and safety of the majority are secured, it must in return ensure the rights and safety of the minorities living among it. It is a formula that does not require any promises or protections of the other until the safety of the self has been secured. It is political, not principled.

This is the calculus of Dayton, if there is any. But what guarantee is there that this trade-off will produce the results the international community desires in the long-term? There is certainly no good will in the formula, so it must rely on continuing external pressure, institutionalization, or the exhaustion of alternatives to operate.

It is here that the rhetoric of rights had its moment. If ever there was an opportunity to create the kind of human rights regime that activists and scholars want, it was in Bosnia. At the least, the opportunity was there to take an uncompromising, principled rhetorical stance. Although the domestic parties drove hard bargains, they ultimately signed on to extraordinarily invasive and intrusive measures and institutions; there is no country on earth more beholden to the principles of the international human rights movement, on paper, than Bosnia and Herzegovina today.262 That would seem to be a
victory for the rhetoric, but that rhetoric is contradicted by and premised upon a substratum of political division and security guarantees that makes the principles and the promises conditional in a way that is not at all conventionally comfortable.

In practice, the domestic legal regimes continue to operate, and have a considerable degree of internal acceptance and legitimacy. The international mechanisms, in contrast, barely function. A domestic observer, considering the bifurcated Dayton Accords and his own ethno-territorial regime, could easily conclude that the odd man out is not his system, but rather the paper guarantees of human rights and cross-IIEBL institutions. As an empirical matter, he would be right indeed.

highly elaborate provisions” in the Accords, which “comprise one of the most complex regimes for the protection of human rights by law ever devised.”

263. Here is one institutional expression of the felt contradiction between the ethnic constitutions and the human rights norms:

On 5 May [1997] the Human Rights Ombudsperson for BiH, Gret Haller, issued her first annual report at a press conference in Sarajevo (Fed). She stressed that the concept of ethnically clean states or ethnically clean areas is completely incompatible with the concept of human rights. “As long as there are still politicians that promote the idea of creating ethnically clean states . . . this country can not become a country based on human rights, and so it will not be able to join the family of European states,” she added. Dr. Haller underlined the importance of progress in human rights and freedom of movement before Bosnia can become a member of the Council of Europe. “A society in which people do not want to have neighbors belonging to other ethnic groups is one that can never be based on human rights, democracy, and rule of law—the three pillars of the member states of the Council of Europe. The Ombudsperson then explained that the governments of BiH, Republika Srpska, and the Federation are not living up to their commitments vis-à-vis her office. For instance, the governments of the Federation and state BiH level rarely respond to her requests for observations on cases. The Office of the BiH Ombudsperson provides an important avenue for individuals to lodge complaints, especially in the current environment characterized by a lack of confidence in the authorities and the ability of the judicial system.


264. More to the point, to the degree they are viewed by the populace as illegitimate, it is more a recognition of the corruption of the domestic political powers, rather than any acceptance of the overarching authority of Dayton, which acts to undermine faith in their legitimacy. Biljana Plavšić successfully campaigned for president of Republika Srpska on an anti-corruption platform, not a pro-Dayton or anti-Serb platform. Knowing that one’s leaders are corrupt in no way need vitiate one’s commitment to the ideal project—here, the protection of the nation and its individuals. Other analysts, however, disagree:

The battle for power in Srpska between President Plavšić and former President Karadžić is not central to the long-term peace in Bosnia, although the United States is treating it as if it were. Rather, it is a symptom of the central problem: the uncertainty of the minorities about their right to national identity and self-determination.

Everything we know about Plavšić points to the conclusion that she is as extreme in her nationalism as Karadžić but is skillfully playing the Dayton card to gain U.S. support against him.

Boyd, supra note 5, at 51.
B. The Choice of a Constitutional or a Rhetorical Critique

As a consequence, the international community has failed to apprehend—or, despite apprehending, has failed to address—the real conceptual challenge facing it: that this is a project of formation, not reform; that it is constitutional, and not legal, in nature, and in so being, it is fundamentally political in a way that does not easily admit of a rhetorical posture of rights and legality. Yet this is precisely the mode in which the international community has proceeded. Most obviously, because it wishes there to be a single unified country called Bosnia, it has proceeded as if that country already existed, when in fact it has been complicit in the constitutional formation of illiberal states opposed by the terms of their creation to the civilian requirements of Dayton.

The international community has not acknowledged to itself, nor even recognized, that the disparate elements in the Dayton settlement—the ethno-territorial partition and the demand for human rights—can only be realized either as contradictions or as compromises. If realized as the former, they are doomed to failure or irrelevance; if realized as the latter, their success can only come at the price of accepting, legitimating, and cooperating with regimes whose very constitution and nature is opposed to the operation of those principles.

The international community has had its greatest successes when it has followed one of two strategies: first, when it has presented clear political demands backed by swift military intervention, and second, when, as with the military aspects of Dayton, its preferred outcomes actually comported with the core interests of the domestic parties. There is no reason to expect that the civilian aspects of the conflict and settlement—and the central issue of property in particular—occupy a different position in this basic formula. This means a choice between active intervention and a recognition, whether de facto or de jure, that the extant regimes are the effective actors. Yet the international community, despite having massive military formations in the country, has consistently refused to shoulder the burden of occupation that the real constitutional transformation of the country would require. In refusing, it has left

266. See Boyd, supra note 5, at 44 (“Military aspects of the accord are being implemented successfully partly because a robust Stabilization Force (SFOR) demands and gets compliance from all parties on matters for which it is responsible, but also because the coalition’s mission of separating the antagonists reflects the desires of the antagonists themselves.”).
itself only the leverage of half-measures and a rhetoric empirically at odds with the state of affairs on the ground.

The publicly recognized legal order notwithstanding, it is surely more accurate empirically to say that members of the various ethnic groups are now in effect citizens of their ethno-political territorial states within the former Bosnia, and not citizens of that defunct country as a whole. The rhetoric of the international community rebels at such a suggestion, but sense and experience confirm that it is so. The rhetoric is just as rousing, and the substantive moral critique retains all its vigor, but they are weak weapons indeed against the acknowledgment that these are states with a very different agenda, a very different reason for being.

Yet surely there is real value in adopting and maintaining a rhetorical commitment to legal standards that comport with one’s substantive political values. If consistently and broadly applied, such rhetoric might limit other actors’ ability or willingness to openly assert standards or values to the contrary, and might, it is sometimes hoped, ultimately contribute to a change in perceptions and attitudes that will translate into real political change as well.

There are two principal objections to this view, which serve at the least to temper its native optimism. One is that actors are remarkably capable of persisting in behavior contrary to their own public pronouncements, and thus there is little evidence that a conversion effect, or a political version of cognitive dissonance theory, actually obtains. Second, and more interestingly, there is a cost, as well as a benefit, to choosing a legal rhetorical mode: such a choice tends to change the chooser’s own perceptions and attitudes, and to bias them towards the very kinds of postures he is advocating. This may seem at first a highly positive thing: advocating commitment to legal standards may in fact increase one’s own commitment to those standards, as well as that of one’s target. As a matter of effec-

Spokesman for the international community’s High Representative in Bosnia Simon Haselock on Wednesday rejected claims that the High Representative was considering the possibility of introducing a protectorate over Bosnia-Herzegovina if the Bosnian Ministerial Council continued to block the adoption of important laws. Haselock said that if the obstruction continued High Representative Carlos Westendorp would need more authority to ensure that these laws are passed. Haselock denied that the suggestion of a protectorate was ever considered.

Likewise, NATO adamantly refuses to use the word “occupation” to discuss its role in Bosnia.

268. Indeed, I have argued this optimistic view myself. See Timothy Waters & Rachel Guglielmo, “Two Souls to Struggle With . . . .”: The Failing Implementation of Hungary’s New Minorities Law and Discrimination against Gypsies, in State and Nation Building in East Central Europe: Contemporary Perspectives, supra note 119, at 190–91 (arguing for the transformative potential of human rights rhetoric when adopted by state actors currently engaged in human rights abuses).
tiveness, however, it may be that a commitment to legal standards is not as effective as political engagement or advocacy. The rhetoric of legal standards compels the rhetorician to abstain from both overly political postures, and from becoming too clearly an advocate for substantive change.\textsuperscript{269} If, however, the core problem is political, and not legal—if, in other words, the very terms of a dualistic deal preclude the realization of one of those terms, which is the provisions on minority rights—then that rhetorician has handicapped his own effectiveness. Such is the case in Bosnia.

\textbf{C. The Illusion of Complementarity}

Given that the international community is patently unprepared to shoulder the burden of a truly substantive transformation, and has instead effectively provided military guarantees to the ethnic regimes, some scholars have sought to identify the conceptual common ground on which human rights and minority-based autonomies can coexist and reinforce each other. They rightly recognize the challenge that minority regimes pose to the universal voice of human rights, but they seek to join the two, or to find the underlying universal purposes in a particularistic program of autonomy.\textsuperscript{270} There is also a moderate position, which outlines how autonomies and group-based power-sharing can complement and advance individual human rights, and notes that, inasmuch as such schemes may sometimes be the only practical way of preventing bloodshed, they may represent “a ‘least worst’ solution to threats of ongoing violence and systemic denials of human rights.”\textsuperscript{271}

\textsuperscript{269} One way to understand the reticence of the international community to act is to ascribe to it a belief that more intrusive action is not politically possible, either because it would provoke a counterproductive reaction, or because there is insufficient political will on the home front to bear the costs of stronger intervention, an argument which implicitly includes the former variant. Another way to understand that reticence, however, is to observe that it is an implicit part of the Dayton deal that there be some level of baseline support from the international community for the ethno-territorial division of the country represented by the entities and cantons, and that this minimum level of support translates into a posture of greater neutrality than is necessary to realize the human and minority rights provisions of Dayton.


\textsuperscript{271} Steiner, \textit{Freedom of Settlement, supra} note 270, at 48–51; cf. Steiner, \textit{Ideals and Counter-Ideals, supra} note 270, at 1557.
In ensuring the reduction of bloodshed, such regimes allow for other rights to flourish. There is, however, little in the canon of individual human rights beyond the universal goods of peace and stability that such regimes offer. They cloak their people in the embracing robes of ethnicity; their benefit is to the community, and to the individual as a member of that community, but the rights expressed in the UDHR or the ICCPR are cut of a different cloth.

I do not mean to suggest that every form of autonomy, even if ethnically based, presents so stark a choice. Power-sharing and personal autonomy all can operate well below the threshold of ultimate contradiction. But all autonomies contain the germ of this contradiction, ethnic ones more so, and some cases—like Bosnia or Cyprus—rise to the level of presenting an ultimate challenge to the ideal of individual rights. In those cases, to try to reconcile ethnic autonomy to the canon of human rights is clearly a pointless rhetorical exercise; when an ethnically based autonomy is the only politically feasible way to ensure peace and safety for the populace, then it must be embraced whether or not it contradicts any or all of the rights enumerated in the ICCPR or any other canonical text. Indeed, on the contrary, it is the text that must reconcile to the autonomy.

It is an argument, in its essence, of lowered expectations: if you will have peace, you may not have rights. The main path to peace, for communities rife with ethnic strife, may be an illiberal constitution that is fundamentally at odds with universalizing individual liberalism; yet, it may provide the only practical means to end violence. It is not “the least worst,” but “the only possible.” If that characterization is accurate, it may be that a rhetorical strategy relying on a quid pro quo is doomed to failure from the start—doomed, at least, to achieve far less than the flourishing of rights.

I see the Bosnian conflict, in its slow and fatal dénouement, as a challenge—indeed, a harsh rebuke—to the hopes of the project that seeks to find an uncontradicted complementarity between ethnic autonomy and individual human rights. Bosnia has been a jeremiad on our limitations, our practical and philosophical inability to ensure both peace and justice.

Shameful as the West’s inaction was

274. Cf. Steiner, Freedom of Settlement, supra note 270, at 63 (“Human rights norms, while emphasizing freedom of residence, say little about the route to be followed in bringing two hostile communities together. The seriousness of the problems in reunifying ethnically divided countries cautions against dogmatic assertions about how and when these human rights can be fully realized.”).
throughout much of the war, its inability to acknowledge, in war’s twilight, that it has no better doctrines or answers to offer, deserves as great an indictment.

Moreover, where some scholars see the contradiction as a temporal one, trusting to time and the possibility of a “negotiated schedule” for realizing human rights, I see a more serious challenge: that the day of realization will never come, because it is not in the nature of the system called upon to realize those rights to do so, nor in its fundamental interest. Denial of the right to return is not some temporary derogation of human rights to be “regretted” by a commission: it is the purpose for which these states have come into being.

I do not suggest that reform of such a constitutionally illiberal society is impossible, or that gross violations of individual human rights can never be eradicated or ameliorated. What I do argue is that it will involve fundamental changes: in effect, the transformation of the present system, and not its mere incremental improvement. So long as the fundamentals of the present system abide, the tension between the purposes of that system’s being and the aspirations of universal human rights rhetoric is untenable. One must give. In the Balkans today, can anyone doubt which one will?

IX. CONCLUSION

There is another path for Bosnia, though it is no more palatable to those who seek to vindicate the rhetoric of human rights. Bosnia’s best hope for a stable, peaceful future with respect for human rights may lie precisely in following the present process of ethnic exclusion to its conclusion. Although it is uncomfortable to perceive it in such terms, the Yugoslav conflict has had the effect of creating nation-state polities with demographic characteristics much like the states of Western Europe, which had the good fortune to conduct their own great phase of “ethnic cleansing” before these modern, much-photographed, times. There is nothing in the history of the Bosnian communities, in the conduct of the war, or in the social, political, or economic fundamentals of the communities today to suggest that reconvergence—a “new Yugoslavia”—is more likely than consolidation of separate national states that will reach out to each other only as sovereign equals whose identity and purpose is to house and protect the nation. Stabilization, democrat-

275. Id. at 65.

276. Though I have not addressed it directly, it seems clear that a defense of the ultimate complementarity of autonomies and human rights on the basis of arguments for diversity (see, e.g., Asbjørn Eide, In Search of Constructive Alternatives to Secession, supra note 270, at 166; cf. Steiner, Ideals and Counter-Ideals, supra note 270, at 1547–48) ultimately fails in
zation, and a willingness to tolerate the remaining “others” among them may be more possible once each group has its own secure territory.277 This has been the history of modern Western Europe, which is only now engaging in an historical convergence after having secured for each nation its state. Therein lies, perhaps, the only path of hope for the former Yugoslavia, but it is a different path indeed from the one envisioned in the civilian provisions of Dayton, though very much in accord with the real lay of the land.

The observer who perceives things in this way—who understands this to be the actual situation, as opposed to the morally preferable outcome—will then have to decide if he supports the rhetoric of rights, at the price of destabilization and the miseries of war, or partition and peace, at the price of abandoning, perhaps for a very long time, the claim to rights.278 Ethnic autonomy is only rarely and incompletely a true complement to individual human rights; in many ways, it is their antithesis—and yet it may be the only possible, the necessary, even the morally right solution to many conflicts. For the sake of peace, it may be a solution that must be embraced, not to achieve human rights, but despite its denial of them.

I see no options for Bosnia that do not, in some more or less radical form, build upon ethnic autonomy as the basis for the social peace that must precede the realization of any human rights. I do

the case of Bosnia, since there has been at least as much threat and real damage to other cultural traditions (including “multi-ethnicity” and “Yugoslavism”) as there has been protection of endangered ethnic groups. Protection of diversity and political responses to the security dilemma simply do not collapse one into the other. As Steiner notes, “[s]uch a normative arrangement raises obvious, serious issues. The ideal in the human rights movement of preserving difference cannot so readily be bent to support the creation of autonom[ous] regimes. To the contrary, a further elaboration of that ideal prompts a deep criticism of such regimes and their fragmenting effects.” Steiner, Ideals and Counter-Ideals, supra note 270, at 1551. It is, in any event, a perversion of the word to suppose that what is occurring in Bosnia today is the protection of diversity, without more.

277. “Zagreb professor Žarko Puhovski argues controversially that ‘after ethnic cleansing, democracy is going to have a better chance.’ Certainly, the ethnicisation of territory in the Balkans is nearly complete, and there is no point in denying reality. Within the security of the tribes . . . a kind of plurality may yet emerge.” Anthony Borden, The Lesson Unlearned, War Report 58, at 8. Boyd foresees a somewhat different end result, but identifies roughly the same path there:

At least for now, people feel secure only when surrounded by their own kind. But as economic opportunity invites interaction, these same people will gradually become confident that they can live again in a mixed society. Bosnia can survive as a state in a loose confederation if the international community, led by the United States, explicitly acknowledges the right of the ethnic factions to live among their own and govern themselves. Once people’s sense of national identity is secured, the appeal of radical nationalist politicians will evaporate and a reasonable politics and economics can emerge.

278. See Steiner, Ideals and Counter-Ideals, supra note 270, at 1559 (noting that when elaborating a claim for autonomy, “the rhetoric of rights may here be inappropriate, even misleading.”).
not think there are any voices proposing the contrary anymore. But I assert further that these options—unavoidable, necessary, and the least worst hope for that torn country—are not compatible with what most scholars, optimistic as they are, imagine will come next. I do not think that the foundations of Bosnia’s regimes can be reconciled with a universal vision of human rights for all the former citizens of their territories; yet, nor do I see an alternative that would provide social peace and respite from war—and are not these last, in their way, the highest rights and the greatest gifts? They are the only values still clothed in robes of high regard, in that shattered, naked land.