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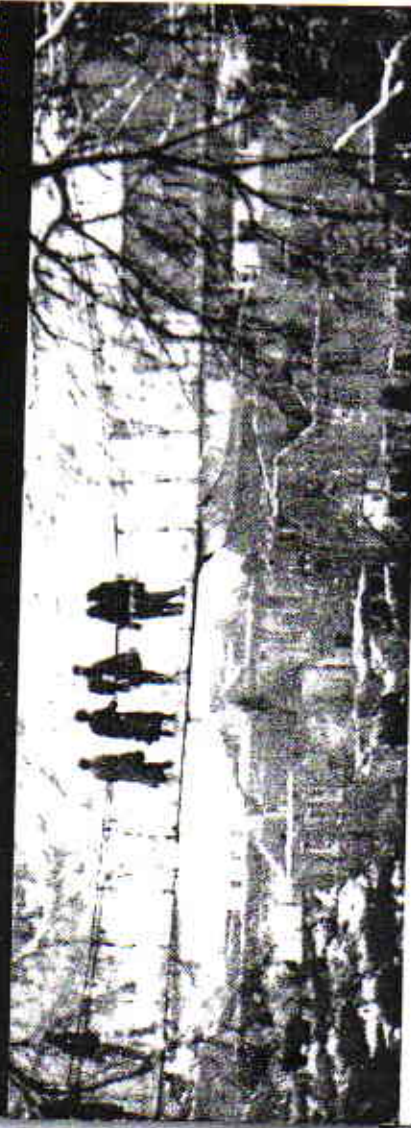
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# Neighbors at War

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Anthropological Perspectives on Yugoslav Ethnicity, Culture, and History



## National Minorities under the Dayton Accord

Lessons from History

Julie Mertus

After the First World War, the victorious allies used international law to rearrange the European landscape, parceling out the losses of Germany, the Ottoman Empire, Bulgaria, and the successor states of the Hapsburg empire, Austria and Hungary. "The principle 'one nation, one state' was not realized to the full extent permitted by the ethnographic configuration of Europe, but it was approximated more closely than ever before" (Claude 1955: 12). Protections for religious, cultural, linguistic, and ethno-national minorities<sup>1</sup> within the newly created nation-states were designed as a compensation for national self-determination for the millions of people left out of "their" nation-states. Under the interwar agreements, "the victors took the spoils, but with the stipulations often clothed in the idealistic language of national self-determination and justice" (Jelavich 1983: 122).

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1. The terms "ethno-national" minorities and members of "national" minority groups to refer to groups united not necessarily by geography, but by a sense of identity based on their common history, language, and tradition.

More than half a century later, the peace settlement negotiated for the former Yugoslavia at Dayton, Ohio, made a similar compromise: the territorial victors were rewarded in a peace process that trumpeted self-determination and justice. Through formal affirmation of the legal integrity of the internationally recognized state of Bosnia and Herzegovina,<sup>2</sup> the Dayton Accord claimed to respect that state's earlier act of self-determination. Yet the peace settlement also took steps to eviscerate that act. It divided Bosnia and Herzegovina roughly in two, giving the Serbs what they had wanted all along, a semi-autonomous state, and paving the way for what the Croats had long desired, the securing of their borders and political and military inroads into Herzegovina.

Under the Dayton Accord, post-World War II international human rights provisions constitute a corollary and corrective to well-worn attempts to address the tensions between states, ethno-national groups, and nationalisms. Nevertheless, despite changes in international law and policy, the grand scheme to protect ethno-national groups embodied in the Dayton Accord is remarkably similar to the guarantees for minority rights created after the First World War. The "minorities treaties"<sup>3</sup> concluded under the auspices of the League of Nations and other interwar minority rights measures failed both to protect the rights of ethnic, religious, and linguistic minorities and to create lasting peace. The Dayton Accord appears predestined to similar failure. Dayton not only repeats the international peace techniques of earlier times but also jettisons the language through which the people of the former Yugoslavia had become accustomed to define themselves—that is as a nation (*narod*) or a national minority (*narodnost*). On top of all of its heavy human rights machinery, the Dayton Accord creates a government that imposes a slightly different set of ethno-national divides. What vision of society does Dayton impose? Is it likely that the people of the former Yugoslavia will accept this vision? Will Dayton be any more successful than the interwar plans were at fostering rights and securing peace?

Examination of the historical underpinnings of the Dayton Accord has been missing from policy discussions on protections for members of ethno-national minority groups in Bosnia and Herzegovina, Croatia, and other troubled parts of Central and Eastern Europe. Yet Dayton was not concluded in a policy vacuum; it was influenced by earlier international and regional responses to crumbling states, nationalisms, and the need to protect the rights of members of minority groups. Understanding the stumbling blocks to Dayton's effective enforcement requires an inquiry into earlier international frameworks designed for constructing peace.

2. See Article 1 of the Constitution for the Federation of Bosnia and Herzegovina: "The Republic of Bosnia and Herzegovina . . . shall continue its legal existence under international law as a state, with its internal structure modified as provided herein."

3. "Minorities treaties" were included in the Treaties of St. Germain, Triano, Neuilly, and Lausanne and in the Albanian and Lithuanian Declarations. They empowered the League of Nations to receive petitions, conduct fact-finding investigations, and issue directives to those nations in violation of the treaties. See League of Nations Publication 1927, *Azcarate y Florez* 1945, and Capotorti 1979.

Additionally, Dayton's attempt to address the question of "national minorities" runs headlong into previous Yugoslav efforts to manage and construct ethno-national identities. Thus an assessment of Dayton also requires that we analyze how Dayton projects identity constructs onto an already laden identity field in which deep-rooted cultural and legal identity tags have already been deployed.

This chapter explores the Dayton Accord through two historical inquiries. First, it analyzes how Dayton responds to the question of national identity as framed by earlier notions of group identity. Second, it examines Dayton in light of the minorities rights agreements of the interwar years, beginning with a brief outline of the interwar system and proceeding with a comparison of that system with Dayton. My thesis is twofold. I suggest that while the similarities between Dayton and the treaties of the interwar period could spell disaster for minority groups in the Balkans, and perhaps elsewhere as well if the international community continues to repeat its mistakes, the differences between Dayton and the interwar agreements could be sufficient to avert that disaster.

### Addressing the Problem of Ethno-National Identity

Given the regime's attempts to enforce Yugoslav national identity over all other senses of belonging, the matter of national identity became increasingly important in the former Yugoslavia. Although ethno-national identity issues did not cause the wars in Croatia and Bosnia and Herzegovina, they provided the soil in which the elites' struggle for power could take root. In turn, this soil was fertilized by a combination of ingredients. These include the actions and inactions of international financial institutions that led Yugoslavia to the brink of disaster. In addition there was tremendous fear and uncertainty among the general populace, heavy state and Party control over the broadcast media, a "heritage of authoritarianism" (Janjić 1995: 33), and a lack of a civil society that could challenge government and support a diversity of opinions. Although commentators have recognized the role of nationalism in fanning the flames of war in the Balkans, few have analyzed how the Dayton Accord responds to national identity constructs hardened by years of war. To be viewed as legitimate by the people of the region, the Dayton Accord must, at the very least, address the past ways of naming identities; in order to promote long-term peace, it must somehow take steps to break down the virulent national divides that have become a reality in Bosnia and Herzegovina. Dayton accomplishes neither of these tasks.

This section will examine the development of national identity in the former Yugoslavia over three periods: (1) the formal naming of groups in the constitutional developments between 1946 and 1974; (2) the impact of the collapse of Yugoslavia; and (3) the impact of war (1992-95). Against this backdrop, the section then outlines the response of the drafters at Dayton.

## Development of National Identity in Yugoslavia

### Constitutional Development

Yugoslavia had three main constitutions between 1945 and its collapse:<sup>4</sup> 1946, 1963, and 1974. By arranging the legal and social terms with which people were to operate, each of these constitutions had an impact on shaping national identity.<sup>5</sup> Officially, everyone enjoyed Yugoslav nationality; however, by time of the 1946 constitution, the people of Yugoslavia were *de facto* divided into two categories—in Zoran Pajić's terms, the "hosts and the historical guests" (Pajić 1995: 162). The hosts, or nations (*narodi*), were Serbs, Croats, Slovenes, Macedonians, and Montenegrins. The guests were called national minorities.

In the 1963 constitution, the term "national minority" was replaced by the term "nationality" (*narodnost*). The word "minority" was perceived to be demeaning. The term *narodnost* was understood to include all those with national homelands elsewhere: Albanians, Hungarians, Italians, Bulgarians, Turks, Slovaks, Czechs, and Russians. Those without homelands elsewhere, such as the Romany and Vlachs, seem to have been ignored by the constitution. Perhaps the most significant development in the 1963 constitution was the elevation of the Muslims from a nationality to a nation.

In the 1974 constitution national difference became "constitutionally enshrined" (Verdery 1993: 179-203; Kaldor 1996: 42-58). Article 1 of the 1974 constitution defines Yugoslavia as "a federal state having the form of a state community of voluntarily united nations and their Socialist Republics" (Durović 1974). The possessive construction of this provision is important: the republics belonged to the nations. But many people lived outside their national homelands; the fit between homeland and nation was not perfect. Unlike earlier constitutions, under the 1974 constitution, sovereignty did not rest with the people but in the "sovereign rights" that the "nations and nationalities . . . shall exercise in the socialist republics, and in the socialist autonomous provinces . . . and in the SFRY<sup>6</sup> when in their common interests" (*ibid.*).

In a manner that lent more importance to national identity, power under the 1974 constitution was decentralized from the federal level to the republican. Each of Yugoslavia's six republics and two provinces had its own central bank and separate police, educational, and judicial systems. These units, with the exception

4. The exact date of the collapse is open to dispute. Some would set the beginning of the collapse Serbian Tito's death in May 1980. Others would point to eruptions in Kosovo in March 1989, after the Serbian parliament had stripped Kosovo and Vojvodina of their autonomous status. Still others point to January 1991, when the Assembly of the Republic of Slovenia adopted the Charter announcing that it would initiate the procedure of disassociation from Yugoslavia. Still other dates can be found. See Silber and Little 1995.

5. This does not of course settle the question of which came first, the identity or the constitution. 6. SFRY stands for the Socialist Federal Republic of Yugoslavia.

of Bosnia and Herzegovina, were *de facto* organized largely around national identity, based on the majority nation of that region. Thus benefits from the state were in fact made based on national status. Through such arrangements, national status, "which had seemingly been buried by the 1971 intervention (Tito's squelching of nationalist movements in Croatia), returned by the back door" (Schopfin 1993: 190).

The "nationality key" system was another institutional arrangement that pushed national identity into the forefront. A scheme to ensure proportional representation of all nationalities within a republic, the "key" system became a means for many incompetent and/or corrupt Party members to achieve positions of importance simply because they were of the right minority national status. Within each republic or province, members of the majority nation complained of the incompetence of the members of the minority nation who had been promoted to high positions of power; widespread backlash against the "key" system widened national divides.<sup>7</sup>

Even after the 1974 constitution, Yugoslavia operated politically as a unitary state governed by a centralized communist party. The greatest flaw of the 1974 constitution was that it set up a "consensus" system that officially "prevented any decisions from being adopted if opposed by any single federal unit (including the autonomous provinces)" (Dimitrijević 1995: 60). This further weakened the federation "by paralyzing the decision-making process and removing real authority of federal decisions" (71), placing it back in the hands of the Party. With everything in the control of the Party, individuals had little incentive to become involved in politics, and under these circumstances, the concept of civil society among the population was nearly nonexistent.

### The Collapse

During the years after Tito's death, the population of Yugoslavia was increasingly forced to choose sides according to national identity. Many politicians used the notion of "sovereignty" as a rhetorical device, claiming that another group was violating their own group's "sovereignty." Similarly, national status was used as a rhetorical device, with each side, beginning with the Serbs, pitting themselves against the evil Other.

In the first democratic elections, nationalism became the mechanism for political differentiation. The electorate had almost no other way to distinguish the candidates; the previous authoritarian regime had not encouraged the development of a civil society in which more sophisticated distinctions could have

emerged. Political and economic structures swayed under the weight of internal bickering as new leaders struggled for power and international financial institutions pressed Yugoslavia to restructure its economy.<sup>8</sup> This situation fostered intense nationalist bureaucratic competition, and often corruption, usually along national lines (Woodward 1995: 47–81). Certainly, nationalism was not the only force pushing Yugoslavia toward collapse, but once it was co-opted by the politicians, it became one of the most important.

### The Impact of War

The war affected national identity in three ways. First, it accomplished the complete demonization of other nations and national groups. State-controlled propaganda machines initiated the process by broadcasting stories of the Other's inhumanity. Over time, many of the witnesses and victims of acts of great cruelty began to tell their stories as well—and their neighbors listened. The diaspora often played an important role in this demonization process. Far away from the home region, living in nationally homogeneous marriages (at least at a rate much higher than their kin back home), the diaspora had an easier time painting the Other as evil.<sup>9</sup>

Second, the war precipitated the physical segregation of the population by nationality. People who had been forced to leave their villages and cities because of their national background now crowded into new cities, creating new enclaves of "their own people" (Helsinki Watch 1993, 1994). This segregation exploited and reinforced otherness.

Finally, the war closed the ranks within each nation. People throughout the former Yugoslavia were forced to decide who they were among three narrow choices: Serb, Croat or Muslim. This left four categories of people without any identity: those of mixed parentage or marriage; those of another national identity, such as Albanian or Hungarian; those who wanted to identify themselves as something else, either above the nation, such as European, or below the nation, such as a member of a particular neighborhood or organization; and those who wanted out of the labeling process altogether. Those who failed to make a choice usually left the country (if they could) or fell silent; a few stubbornly fought back, despite the extreme backlash by co-nationals against anything different and potentially challenging to the Nation (Milić 1996: 169–83).

### Dayton's Response: Cementing the Ethno-National Divides

The Dayton Accord Jeffersons the terminology of the most recent Yugoslav constitutions—*nation (narod)* and *nationality (narodnost)*. The agreement does not

8. For one review of the economic situation, see Cohen 1995: 45.

9. Those who experienced wartime atrocities tend to be much less likely to seek revenge against an entire group of people, although they may want to avenge the death or torture of a particular family member (Mertus 1997, 1999).

7. Other key attributes of the Yugoslav constitutional system pertaining to national minorities included poly-ethnic rights, such as the right to use one's own language in public and to primary education in one's own language. These were counterbalanced by constitutional prohibitions against propagating or practicing national inequality and incitement of national, racial, or religious hatred and intolerance.

even mention the words "nations" and "nationalities," except in referring to international documents by name and in a section on the rights of refugees to return. Instead, Dayton and the Preamble to the Constitution of the Republic of Bosnia and Herzegovina (an annex to Dayton) refer primarily to three groups: Bosniacs,<sup>10</sup> Croats, and Serbs as "constituent peoples . . . (along with others)." Those who did not fall into this "group of three" saw their status reduced from nation (*narod*) or national minority (*narodnost*) to complete invisibility. The Constitution of the Federation of Bosnia and Herzegovina (the smaller entity) makes clear that there are only two constituent nations, Muslims and Croats—thereby devaluing the status of Serbs to that of the invisible. The omission of the words *narod* and *narodnost* from the Dayton Accord did not make the problem of group identity go away; rather, it created a new basis for conflict.

Dayton, it may be argued, actually cements the national divide by creating a system of nation-based governance. Under its provisions, two smaller sub-entities are drawn according to battlelines, which in turn reflect national identity: Republika Srpska (Bosnian Serb) and the Federation of Bosnia and Herzegovina (Croat and Muslim/Bosniac). These two entities are held together by a "thin roof,"<sup>11</sup> a central government with so little power that it "makes the American Articles of Confederation of two centuries ago look like a centralized, unitary form of government" (Morrison 1996: 145). The central government, the "Republic of Bosnia and Herzegovina," is responsible for foreign policy; foreign trade and customs; monetary policies; immigration, refugee, and asylum policy and regulation; international and inter-entity criminal law enforcement; establishing international communication facilities; regulation of inter-entity transportation; air traffic control; enacting legislation to carry out the decisions of the presidency or responsibilities of the federal assembly; and funding and budgeting for federal institutions (Constitution for the Federation of Bosnia and Herzegovina [hereafter Constitution], Art. 3, sec. 1, and Art. 4, sec. 4). The remaining responsibilities of government, including promulgating and enforcing local civil and criminal laws and control over courts (except for the joint Constitutional Court, the only federal court) is given to the entities.

The entire federal government is divided into three parts, according to the same limited choice of ethno-national identity—Serb, Croat, or Muslim ("Bosniac"). The executive arm of the government has three presidents, one from each group. Even the armed forces is decentralized in three: "Each member of the Presidency shall, by virtue of the office, have civilian command authority over armed forces" (Constitution, Art. 5, sec. 5[a]). Given that each ethno-national group has at least one army, this provision effectively creates three armies di-

10. According to some observers and participants in the peace process, the term "Bosniac" has become "a euphemism for Muslim" (Szasz 1996). However, "Bosniac" could also mean all persons who do not identify themselves as Serb or Croat.

11. This term was used by Muhamed Sacirbey and others involved in the Dayton negotiations (see Sacirbey 1996).

vided along ethno-national lines. Similarly the bicameral legislature is proportioned equally into the three national categories. The upper house (House of Peoples) has five representatives from each group; the lower house (House of Representatives) has fourteen from each (Article 4, secs. 1, 2, 3[b]).

Dayton consequently perpetuates the rule of consensus that previously worked so well to block any chance of democratic decision-making and promote national splintering. In either house of parliament, block voting by any one national group, and in some cases the simple failure of a group to show up for a vote, can defeat a legislative proposal. In the upper house, for example, any action can fail if opposed by two-thirds of a national group. These complex consensus provisions were adopted at Dayton, not because they will work, but because Serbian president Milošević refused to sign the agreement without them (Silber 1995: 308). Through some form of majority vote, a coalition of Muslims and Croats representatives could have always outvoted the Serbs. On the other hand, the present compromise grants any national group the power to make the central government unworkable; a *de facto* delegation of all state power to the entities.

"Kin-states"—that is, states composed primarily of the same national group as another entity—are recognized as having special status under the plan. Unlike most federal constitutions, which forbid their subnational units to enter into treaties or other agreements with foreign governments, the Constitution for the Federation of Bosnia and Herzegovina explicitly permits each entity to "establish special parallel relationships with neighboring states consistent with the sovereignty and territorial integrity of Bosnia and Herzegovina" (Art. 3, sec. 2[a]). Among the foreseeable arrangements, this provision will likely permit Republika Srpska to enter into agreements with "Yugoslavia" (also predominantly ethnic Serb), thus, effectively achieving the Serb nationalists' goal of creating a "Greater Serbia."

On what appears to be a more positive note for ethno-national minorities, outsiders play a creative and essential role in the new government, particularly with respect to decision-making bodies considering questions of human rights and related issues. The people of the former Yugoslavia tend to view the intervention of outsiders in tie-breaking and supervisory positions as legitimate and potentially helpful. The Constitutional Court is made up of nine members, two from each national group and three foreign "neutrals," appointed by the European Court of Human Rights (Constitution, Art. 6, sec. 1). The European Court of Human Rights also appoints three outsiders to join the six local members (again two from each group) of the commission that considers the claims of refugees (Dayton Accord, Annex 7, Art. 9, sec. 1). The Organization for Security and Cooperation in Europe (OSCE) appoints the Human Rights Ombudsman, an individual who in the beginning will be a citizen of another state, to investigate and make reports on the existing human rights violations (not those committed during war) (*ibid.*, Annex 6, Art. 5). The Committee of Ministers of the Council of Europe appoints eight outside members to complement the six local members (again, two from

each group) to a Human Rights Chamber, a body that reviews complaints filed by individuals or by the Human Rights Ombudsman (*ibid.*, Annex 6, Art. 5, sec. 7). Similarly, UNESCO appoints two outside members to a five member "Commission to Preserve National Monuments" (*ibid.*, Annex 8, Art. 2).

The Dayton Accord further establishes an extensive structure for human rights protection: "Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms" (Constitution, Art. 2, sec. 1). To accomplish this goal, Dayton both creates new mechanisms, such as the Human Rights Chamber and the Refugee Commission, and builds in an array of existing international and regional human rights systems and mechanisms; it both lists a series of rights and incorporates a list of international and regional instruments. Of these instruments, the European Convention on Human Rights (United Nations Treaty Series 1950: 222) is supreme. The constitution specifies that this convention and its protocols "shall apply directly in Bosnia and Herzegovina" and that these "shall have priority over all other law" (Art. 2, sec. 2).

Dayton includes numerous protections for people of minority nations, albeit for the most part of an individualistic and not of a collective nature. At the same time, the Constitution of Bosnia and Herzegovina grants citizenship regardless of "association with a national minority" (Art. 1, sec. 7[b]). Also the Annexed Agreement on Refugees and Displaced Persons calls for the prosecution of persons in the military, paramilitary, and police forces who are "responsible for serious violations of the basic rights of persons belonging to ethnic or minority groups" (Dayton Accord, Annex 7, Art. 1, sec. 3[e]). In addition, many of the regional and international guarantees referenced to in the document safeguard the rights of minorities.<sup>12</sup> Also, the Dayton Accord contains extensive provisions requiring cooperation with international human rights organizations (Annex 6, Art. 13). These include the UN Commission on Human Rights, the UN High Commissioner on Human Rights, the OSCE, the supervisory bodies of human rights treaties and the International War Crimes Tribunal for the Former Yugoslavia and Rwanda.

To be effective, these human rights guarantees must be enforced. Without enforcement, the operation of the Dayton Accord may well serve to legitimize nationalist interests under the guise of protecting minority rights and securing peace. Will the positive measures undertaken to promote human rights be sufficient to offset the seemingly inoperable system of government created by Dayton and its demeaning of peoples who do not or will not fit into the "group of three?" As we shall see, the legal approach to minority protection adopted at Dayton has much in common with that adopted in the interwar period, which, as history attests, proved insufficient to protect religious, national, and linguistic minorities.

12. Two of the regional instruments provide particularly extensive guarantees for national minorities. See *European Charter 1992* and "Framework Convention" (1994).

## The Interwar Plans: Dayton's Ghost

After World War I, despite the radical rearrangement of European boundaries to conform to a principle of nationality and despite wide-scale movements to conform with the goal of "one nation, one state," it proved impossible to avoid creating religious, ethno-national, and linguistic minorities. The twenty to twenty-five million people who remained "outside of their nation-states" were placed under the protection of the League of Nations. This was to enable them to "live side by side in one and the same state, without succumbing to the temptation of each trying to force his own nationality on the other" (Robinson 1943: 35).

### Scope of Protections

By design, the League of Nations system for the international protection of minority groups was exceptional: it applied to a limited set of states a limited set of rights. "It purported not to establish a general jurisprudence applicable wherever racial, linguistic, or religious minorities existed, but to facilitate the solution of problems of minority groups in countries where 'owing to special circumstances,' these problems might present particular difficulties" (Claude 1955: 17). Moreover, states subject to the provisions—the so-called "minorities states"—felt unjustly discriminated against, since the obligations imposed on them by the great powers differed from those required of other states. The selective nature of the system eroded its legitimacy and hindered adherence to its terms.

In general, the system consisted of three types of obligations: multipartite minorities treaties and the special chapters of peace treaties dealing with minority groups; declarations made by certain states before the Council of the League of Nations; and regional, bi-partite agreements—notably the Germano-Polish Convention of May 15, 1922, relating to Upper Silesia (Stone 1933).

The terms of obligation varied according to the status of the state (Claude 1955: 16). Defeated states—Austria, Hungary, Bulgaria, and Turkey—were bound by minority provisions inserted into the various peace treaties. New or enlarged states—Poland, Czechoslovakia, Yugoslavia, Romania, and Greece—concluded special minorities treaties with the Principal Allies and the Associated Powers (France, Japan, the United Kingdom, and the United States). Some states that fell within or between these two categories made declarations to the Council of the League of Nations, including Albania, Lithuania, Latvia, Estonia, Finland (concerning the Åland Islands), and Iraq. As a great power, Germany was treated somewhat differently. Instead of agreeing to general minority clauses for all of its territories and populations, Germany signed a bilateral treaty with Poland, which created a special minority regime for Upper Silesia.

The instruments purported to safeguard certain rights of "racial, religious or linguistic minorities," but the framers of the system made it clear that they regarded this terminology as synonymous with "national minorities." The obliga-

tions contained in the minorities treaties and declarations fall into four general categories: (1) nationality provisions; (2) negative rights; (3) positive rights and; and (4) specific minority provisions. With the exception of the last category, the exact wording of the articles varied little from treaty to treaty. These obligations shall be considered in turn.

*Nationality Provisions.* The nationality provisions concerned the acquisition of nationality by persons belonging to minority groups. For example, the Treaty Between the Principal Allied and Associated Powers and the Serb-Croat-Slovene State declared "to be Serb-Croat-Slovene nationals *ipso facto* and without the requirement of any formality, Austrian, Hungarian or Bulgarian nationals habitually resident or possessing the rights of citizenship" (Treaty 1919: chap. 1, art. 4) or "born in the said territory of parents habitually resident or possessing the right of citizenship" (*ibid.*). Furthermore, the treaty provided that "persons referred to above who are over eighteen years of age will be entitled under the conditions contained in said treaties to opt for any other nationality which may be open to them" (*ibid.*, chap. 1, art. 3).

*Negative Rights.* Individuals belonging to minority groups were granted non-discrimination and negative equality rights, unimpaired by their membership in the minority group. The treaties demanded, with only minor variations: the right to life and liberty (chap. 1, art. 2); freedom of religion (chap. 1, art. 2); equality before the law and enjoyment of the same civil and political rights "without distinction as to race, language or religion" (chap. 1, art. 7); and freedom from interference with the "enjoyment of civil and political rights, as for instance admission to public employment, functions and honors, or the exercise of professions and industries" because of "differences of religion, creed or confession" (chap. 1, art. 7).

*Positive Rights.* The treaties also included provisions that promoted "positive equality," to enable minority groups to "preserve and develop their national culture and consciousness" (Azcarate 1945: 82). These included the right to the use of their own language in private relations; the use of their own language before the courts; adequate facilities for a public education in primary schools in their own language, whenever there was a "considerable proportion" of minority students; the establishment of religious and welfare institutions, schools, and other educational facilities under their own control and with their own language; and the right to an equitable proportion of state and communal expenditures for educational, religious, and welfare purposes.

*Specific Minorities Provisions.* For the most part, the provisions applied equally to members of all minority groups within the jurisdiction of a particular treaty. However, Muslims received special protections in the treaty with the Kingdom of Serbs, Croats, and Slovenes as did the Jewish minority population in treaties between the Allied Powers and Greece, Poland, and Romania, as well as in the Lithuania declaration (Macartney 1934: 230–52); stipulations for the Magyar and Saxon communities in Transylvania were included in the treaty with

Romania; Czechoslovakia provided for an autonomous territory for Ruthenians; and Greece accepted special obligations for the Vlachs of the Pindus region and for the non-Greek communities of Mount Athos (*ibid.*).

As worded, most minority clauses provided protection for the rights of individual members of minorities and not the minority groups as collective entities (Claude 1955: 19; Robinson 1943: 71). This was intentional; the drafters deliberately avoided most terminology that would have clearly given minorities status as corporate units, except for the purpose of allocation of an equitable share of public funds for schools and the like (Temperley 1920: 137). To recognize minorities *per se*, the drafters feared, would be to recognize "states within states," a concept at odds with then prevalent absolute notions of state sovereignty. Thus even the positive rights were framed in individual terms, as arising out of membership in a minority and facilitating the maintenance and development of group life (Chaszar 1988: 3). At the same time, however, the minorities treaties included references to group-based rights, such as stipulations concerning proportional representation and political and cultural autonomy.

### *Innovations over Earlier Times*

Three interrelated elements differentiated the minorities clauses from the previous systems: who established and guaranteed the provisions of this system; the methods by which it was to maintain peace and protect the rights of ethnolnational minority groups; and the assumptions upon which it rested.

For the first time, enforcement was not left merely to the signatories or to the prerogative of an interested state, usually a "kin-state"; instead the League of Nations guaranteed the agreement, thus intending to give a "more disinterested character to the performance of international obligations toward minorities" (Robinson 1943: 40). Unlike previous attempts to guarantee minority protection, an independent judicial institution, the Permanent Court of International Justice, was to settle disputes and not the state that had the most political power (or the highest degree of self-interest) (Capotorti 1979: 24–25). Outside "neutrals" played a special role in other aspects of minority protections as well. The plan for Upper Silesia, for example, envisioned the establishment of a Mixed Commission (presided over by neutrals) to which members of minority groups could address complaints, and an Arbitral Tribunal (also presided over by neutrals) (Kaackebecck 1942).

Not only were "neutrals" brought in to guarantee minority rights, but also the methods at their disposal were revolutionary in admitting the right of individual minority groups—who were not then recognized as subjects of international law—to appeal directly to an international body. Although individual complaints were not provided for in the treaties, through a series of interpretive documents members of minority groups, other states, and other entities gained the right to petition for redress of discrimination.

The assumptions on which the minorities treaties were grounded also demonstrated a dramatic change in the use of international policy proposals. In contrast with the earlier ad hoc system of opposing alliances, collective security was viewed as essential for maintaining the peace.<sup>13</sup> The treaties also rested on the belief that people of different nationalities could live in peace, side by side, in the same state; political democracy and economic liberalism were values to be promoted. Moreover, the system recognized a need for both external and internal guarantees for national minority protection. As Inis Claude explains: "The operation of the treaties and declarations depended heavily upon the compliance of minority states with the obligation to treat the stipulations as fundamental laws and to implement them by internal legislation. However, it was deemed essential to supplement internal provisions by an external guarantee, based on the premise that the treatment of minorities in the treaty-bound states was a problem of international concern" (Claude 1955: 20).

By implicitly and explicitly providing for both external and internal guarantees, the interwar plans posed a challenge to the then accepted notion of sovereignty. The "intervention of an external agency in the relationship between a state and its own nationals was clearly incompatible with the concept of absolute sovereignty" (21), the invalidation of which the interwar plans demanded: "In the Versailles peace system, the minorities provisions constituted a corollary and corrective to the principle of national self-determination. They became possible only through the restriction of absolute state sovereignty. Insofar as the disturbance of external peace was caused by internal discord, the minorities provisions, as a means of regulating the relations between national groups were a part of the general peace structure" (Robinson 1943: 41).

Indeed, the Kingdom of Serbs, Croats, and Slovenes, Romania, and Poland fought against the minorities treaties largely on these grounds (Robinson 1943: 154–55). Despite these innovations, the minorities treaties proved insufficient to protect the rights of minority groups and preserve peace. The explanation may lie in the lack of political will on the part of the international community to stand behind the League of Nations and enforce the provisions, and the lack of the will of the "Minorities States" to stand by their agreements. However, weaknesses within the system encouraged and exacerbated the lack of political will, and the system was crippled at the outset by the impression that it was of a temporary nature. Enforcement mechanisms were weak: the treaties were not enforceable in domestic courts, and the Council of the League of Nations established no effective rules of enforcement. At the same time, "Minorities States" frequently did everything within their power to block enforcement<sup>14</sup> and would forestall peti-

13. For historical background, see Grenville 1987.

14. States could enact provisions to undermine the intention of the treaties. For example, although minority groups are allowed schools in their own language, a state could deprive private schools of the right to issue diplomas. In addition, economic measures that would have a particular impact on a national minority could be enacted as long as the provisions did not single out the minority explicitly.

tions by imposing obstacles intended to intimidate and discourage complainants. While individual minorities filed few complaints, self-interested kin-states that were members of the Council of the League of Nations tended to take the initiative in implementing League guarantees. The provisions within the treaties were vague and sketchy; they failed both to account for differing needs for and claims to education and autonomous institutions among minority groups and to settle major, explosive issues such as language rights. Finally, the minorities provisions applied only to a select number of states. Ultimately, these drawbacks outweighed the treaties' innovations, and the agreements failed to safeguard the rights of members of minority groups.

### Looking Forward: Foreboding and Hope

The Dayton Accord displays a persistent faith in some of the underlying assumptions and practices of the interwar international legal policy proposals. At the same time it shows a pragmatic shift to address today's conflicts between members of different ethno-national groups in the context of postwar regional and international human rights systems and mechanisms. This section examines the similarities and differences between the Dayton Accord and the interwar minorities treaties and asks whether members of minority groups will fare better under Dayton.

#### *Similarities with Interwar Schemes*

The discredited schemes, designed to protect minority rights in the interwar period, evinced a "paradoxical 'alliance' between turbulent nationalist passion and a newly autonomous international law" (Bernan 1993: 1798). In contrast, today's international law, grounded in a host of post-World War II agreements and practices, can no longer be considered newly autonomous. The place of law in the regional and international spheres has taken hold; and in the words of the Vienna Declaration from the 1993 World Conference on Human Rights (United Nations Department of Public Information 1993: 20M), human rights can now be said to be "universal, indivisible and interdependent and interrelated." Regional and international systems and mechanisms designed to protect human rights are now in place. Still, given its own paradoxical alliance with nationalism, the Dayton Accord has much in common with the minority protections spawned by the Treaty of Versailles. Some of these similarities are beneficial for members of minority groups; many are foreboding. I consider only the foreboding ones here.

First, the Dayton Accord, just like the minority rights protections of the interwar period, approaches nationalism with a "mixture of desire and terror" (Bernan 1993: 1805). The carving up of the newly recognized state of Bosnia and Herzegovina along ethno-national lines reinforced the concept of the "nation," an imaginary community defined in opposition to the "Other" by reference to

real and imagined differences in history, culture, language, and tradition. The national purification of Croatia, and the establishment of a "blood" principle for Croatian voters (whereby "Croats" living anywhere could vote in Croatian elections), further entrenched Balkan nationalism as a defining social, political, and legal principle. Granted, Dayton did not create the nationalisms or draw the battle lines; it only recognized territories already controlled by the parties, a situation that no state had the will to reverse. Nevertheless, in doing so, ethnonationalism was not only tolerated by the Dayton Accord, but once again in European history, the nation became part of a "solution" for peace.

Second, international diplomacy in the former Yugoslavia may have begun with a call for human rights, but it culminated in the same legal pragmatism of the interwar period: those with power to act as the state *were* the state. Whether and how the powerful gained their power became less and less relevant. U.S. Assistant Secretary of State Richard Holbrook's guiding principle for diplomacy was simple: negotiate with those who have power over people at any given time—stop the war at all cost. This strategy brought accused Bosnian Serb war criminals Karadžić and Mladić to the bargaining table and then, ultimately, Serbian president, Slobodan Milošević, as the negotiator for Bosnian and Croatian Serbs, populations that never elected Milošević as their leader. Croatian president, Franjo Tuđman, became the negotiator for Bosnian Croats, a group from which he enjoyed no formal legal mandate.

Holbrook and the other diplomats cannot be blamed for adopting a strategy that merely reflected political and military realities. Indeed, Holbrook's negotiations only became potent when power shifted, in particular when Croatia destroyed the Krajina Serbs and threatened to drive the Bosnian Serbs out of Banja Luka, and when, after Srebrenica, NATO finally became involved in the conflict. The fact that negotiations divided the peoples by nationalist groupings was of little concern to Holbrook and his team. That the success of the agreement depended on Milošević gaining and retaining power over Bosnian Serbs and Tuđman doing the same for Bosnian Croats could not stand in the way of negotiations. The success of the Dayton Accord, like the interwar agreements, required the support and cooperation of nationalist leaders.

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

More troubling for members of minority groups, just as in the interwar years, in the former Yugoslavia "the problem of nationalism came to be perceived as a primal 'clamoring' to which one should respond with a sophisticated and heterogeneously composed 'Plan'" (Berman 1993: 1800). Nationalisms, supported by myth and history, are firmly rooted in the culture of the Balkans. Economic crisis and political and social insecurity laid the foundations for chauvinist ideologies

in the then Yugoslavia. Far from a primal clamoring, however, nationalism in the former Yugoslavia spread as the direct result of a deliberate political plan crafted by political and academic elites at the top. The emergence of nationalist ideologies was far from inevitable; in a calculated series of maneuvers, political and academic elites tapped nationalist undercurrents, squelching alternative voices and pitting national groups against each other. It is of some concern, therefore, that the Dayton Accord does nothing to challenge those in positions of power, but instead further entrenches their grasp. At the time of this writing, Serbian president Slobodan Milošević and Croatian president Franjo Tuđman continue to direct, or at least condone—human rights violations with impunity, as the foreign media continue to read the conflict as primal, overlooking the hand of political elites in shaking the nationalist tree.

Fourth, during the interwar years and under Dayton, relationships with neighboring kin-states and subsequent bilateral treaties were permitted and even encouraged. In the interwar years, bilateral treaties with kin-states, although initially bolstering the minorities agreements, eventually led to their demise (Robinson 1943: 50). There is every reason to believe that unless preventive steps are taken, the same problem with bilateral agreements will reoccur in the Balkans.

Fifth, the Dayton Accord contains many of the specific attributes of the interwar plans; in particular it is reminiscent of the plans designed to resolve the disputes over the Saar, Danzig, and Upper Silesia. Similarities include (1) minority guarantees, including nationality provisions, nondiscrimination provisions and the guarantee of negative rights, and even some positive rights; (2) provisions for emigration and restitution of property; (3) provisions for self-determination of the peoples, including popular elections; (4) limited supranational integration, including a joint presidency, parliamentary assembly, constitutional court, and institutions pertaining to arbitration, human rights, refugees and displaced persons, preservation of national monuments, and public corporations; and (5) internationalization, such as agreement to a short-term international military presence and an international police task force, and to neutral regional and international organizations and individuals playing a critical role in the structure and operations of the new federal government.

The core similarities between the Dayton Accord and the interwar schemes are foreboding. The possibility that the rights of minority groups will be better safeguarded under the Dayton Accord than in interwar times is guided not by technical innovations, as there are very few such innovations, but rather by something else: shifts in international law and diplomacy.

### *Shifts in International Law and Diplomacy*

The interwar minorities treaties and the Dayton Accord were both reached during a time of complex changes in international law and diplomacy. In both periods, lawyers and diplomats struggled to reconcile international law with nationalisms,

The interwar lawyers bypassed "the dichotomy between statist positivism and liberal nationalism in favor of a simultaneous affirmation of the autonomy of international law and an openness to the vital forces of nationalism" (Berman 1993: 1803). This meant reshaping nationalism by endowing it with legal form. At the same time, "the constraints of the stable legal order grounded in sovereignty were rejected in favor of an autonomous, 'experimental' exploration of specifically legal international techniques, doctrines and institutions" (1805). Similarly, the Dayton lawyers endowed the nationalisms of the former Yugoslavia with legal form, setting up a system under which today's international human rights techniques, doctrines, and institutions would check nationalisms. The main difference between the two periods is that the global legal environment has changed, shifting further away from states to regional and international systems and mechanisms. While this shift may be seen as cause for alarm, as states may be presupposed as necessary enforcers of rights (Ghai 1996), it may also provide an opening in which we can locate hope.

On its face, the Dayton Accord acts as if it supports statist positivism. On the one hand, it trumpets the legal fiction of an independent, functioning state of Bosnia and Herzegovina. It creates entities formed through battle and takes steps to encourage the development of a government within the resulting structure. In doing so, the Dayton Accord bows to the kind of statist thinking that is a core tenet of many of the leaders of Croats, Serbs, Muslim Slavs, and Albanians of the former Yugoslavia. According to these leaders, every nation must have a state and every state must include all members of the nation, although the collective identity may indeed transcend state boundaries. The provisions of Dayton protecting human rights and the expression of minority viewpoints can be an attempt to open space for the development of civil society within the resulting weak federal state.

On the other hand, however, the state created by the Dayton Accord is at odds with the statist paradigm. Each of the two internal entities of the state of Bosnia and Herzegovina have more power than the federal unit, and as a result of formal and informal agreements with kin-states, the boundaries of the state are *de facto* porous. Moreover, and also contrary to the traditional statist paradigm, the international community is invited to make decisions and take actions normally within the sovereignty of a state, from international policing to choosing members of the Constitutional Court of Bosnia and Herzegovina. In addition, to the extent that self-determination is viewed as an element of a state, the Dayton Accord's recognition of a Bosnia created by battle runs squarely against this principle. The Bosnia that the local population had voiced for prior to the war and that the international community had originally recognized no longer effectively exists: the boundaries, character, and composition of the state have changed dramatically. In reality, today's Bosnia and Herzegovina does not operate like a state, but rather more akin to an interim arrangement, enforced from above by the international community.

In moving away from the statist paradigm, the Dayton Accord is influenced most by the environment in which it finds itself: a world marked by rapid global-

ization in markets, information, and security arrangements. "The past role of the nation-state," Lung-Chu Chen writes, "cannot be taken for granted without a critical reappraisal in light of the changing demands, expectations and conditions of the present" (Chen 1989: 26). These developments chip away at state boundaries. According to Richard Falk, "The essence of the new order is the globalization of capital and the power of market forces, bypassing even the strongest states. States are now unable really to control interest rates or the value of their own currencies, the most elemental aspects of traditional notions of territorial sovereignty" (Falk 1993: 398). Residents of Europe, especially in areas of conflict, look to regional and international legal institutions for protection, jobs, and goods. Their leaders look to international bodies for markets, military support, and other assistance.

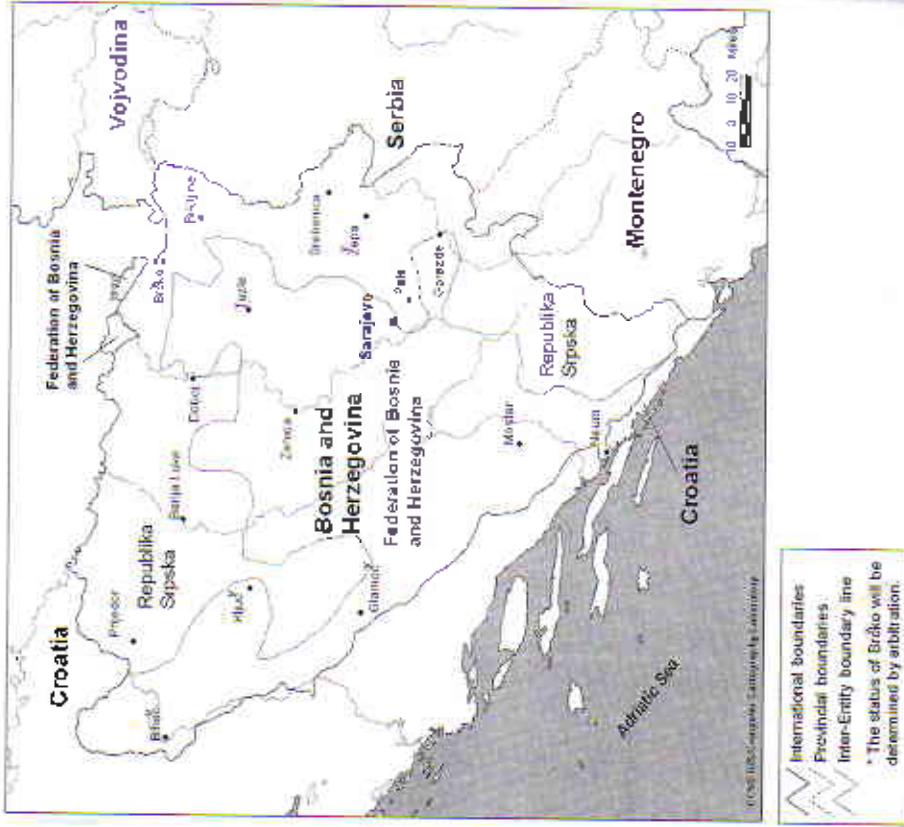
Where the interwar period witnessed a shift in international law from states to nations (and to individuals as well), Dayton demonstrates a double shift. Global power and the reach of international law have moved simultaneously out to international and regional actors (such as financial institutions, security arrangements, and mechanisms and institutions to protect human rights) and down to transnational social forces. Transnational social forces, from environmental and human rights NGOs to communal groups that spread over nation-state lines, are "gradually shaping a very weak but still real global civil society that represents a form of globalization from below" (Falk 1993: 399). Leaders of nation-states today have lost power, as they must answer to both of these levels if they are to survive. At the same time, with the decline of the nation-state, responsibility for rights enforcement has shifted increasingly from the state to regional and international entities. Both today's problems and tomorrow's solutions must recognize a new concept of state sovereignty.

## Conclusion

The main failing of the Dayton Accord lies in its attempt to impose a firm set of ethno-national categories on the people of Bosnia and Herzegovina. On one hand, these categories jettison the identity constructs of the past, and on the other, they perpetuate much of what went wrong in the old Yugoslav government, in particular the charade that an ethno-nationally divided government could function on "consensus." The Dayton Accord offers few technical innovations over the schemes to protect minorities of the interwar years. However, the legal, economic, and political landscape has changed greatly since the interwar minorities treaties. Today's international policy proposals for dealing with the tensions between states, ethno-national groups, and nationalisms are framed within the context of increased global interdependence, accelerated regionalization, and marked development in international legal systems and mechanisms. It is within these changes that we may find salvation.

The Dayton Accord also reflects the understanding that in today's Europe nation-state boundaries have become more fluid and less relevant for the purpose

of fashioning guarantees for regional and international security and minority rights. International and local elites create regional and international law and policy on treatment of minority groups; international treaties and customary law on human rights can serve to set their boundaries. This process in turn influences the identity of national groups and the range of acceptable solutions to their problems. Ultimately, as in the interwar period, enforcement of the Dayton Accord will depend not only on legal technique but also on political will. Given the shifts in the global landscape, it will be actors above and below the state who are called upon to act.



Map 5 Post-Dayton Bosnia and Herzegovina

## PART IV

### EXPRESSIVE CULTURE AS INSTRUMENT AND OUTCOME OF WAR