

SELF-DETERMINATION UNDER THE TERMS OF THE 2002 UNION
AGREEMENT BETWEEN SERBIA AND MONTENEGRO: TRACING
THE ORIGINS OF KOSOVO'S SELF-DETERMINATION

ENVER HASANI, PHD*

INTRODUCTION

The Serb-Montenegrin Union (“USM”) is generally regarded as a means of preventing the further fragmentation of the constituent republics of the former Yugoslavia, which includes preventing the future independence of Kosovo. The Union Agreement of March 2002¹ was signed not only to prevent Montenegro’s secession, but to thwart Kosovo’s outright independence. Under the terms of the agreement, sovereignty over Kosovo reverts back to Serbia if Montenegro secedes from the USM.² Independence for Kosovo is contemplated neither within the USM nor after the USM’s dissolution.

Although the future of the Serb-Montenegrin Union is itself uncertain, the structure of the USM reflects the European position on Kosovo’s self-determination. The USM is not only one model for Kosovo’s future political and legal position; at least in the minds of many EU opinion leaders, it is also a useful reflection of the external political constraints likely to circumscribe other options for Kosovo—constraints that have consistently been applied under the Badinter Commission principles, in the Dayton

* Dr. Enver Hasani is Professor of International Law and Relations at the University of Pristina in Kosovo. Parts of this Article are reprinted from ENVER HASANI, SELF-DETERMINATION, TERRITORIAL INTEGRITY AND INTERNATIONAL STABILITY: THE CASE OF YUGOSLAVIA (2003) with kind permission from the Austrian Ministry of Defence.

1. Agreement on Principles of Relations Between Serbia and Montenegro Within the Framework of a Union of States (2002) [hereinafter Union Agreement]. The Union Agreement was signed in Belgrade on March 14, 2002, under the supervision of Javier Solana, the European Union (“EU”) High Representative for Foreign and Security Policy. The Agreement is often referred to as the “Solana Agreement.” For the full text, see <http://www.reliefweb.int/w/rwb.nsf/0/c604a3782756fa27c1256b-8100663089?OpenDocument&Click=> (last visited Dec. 21, 2004).

2. The Provision on Reconsideration provides:

Upon the expiration of a three-year period, the member states shall be entitled to instituting proceedings for the change of the state status, that is, withdrawal from the state union. If Montenegro withdraws from the state union, international documents related to the FRY, the U.N. Security Council Resolution 1244 in particular, shall relate to and fully apply on Serbia as its successor.

Id. ¶ 3.

Accords, in the Rambouillet negotiations, and finally in the Serb-Montenegrin Union.

Provisions of the Union Agreement bear witness to the fact that the Western stance on Kosovo's self-determination has been very consistent since 1991. To prove such consistency, this Article traces the Euro-Atlantic position on self-determination from the first opinion of the Badinter Commission for the former Yugoslavia in November 1991 up through the Union Agreement of 2002.³

I argue in this Article that there are initial flaws in the implementation process of the Union Agreement, and that these implementation problems threaten the ultimate success of the USM. The Union Agreement has a good chance of surviving if the international administration clearly pursues the path and the agenda of the European Union ("EU") in foreign policy. This is not what is happening at present. Currently, there are two agendas in Kosovo, one pursued by the United Nations Mission in Kosovo ("UNMIK"),⁴ and another pursued by local Kosovar Albanians and others (primarily the United States), whose security concerns in Kosovo take precedence. Neither is aligned with the EU agenda. In general terms, the EU agenda is related not to security *per se*, but to peace, which is defined in terms of filling the power gap left after the end of the Cold War with soft power rather than hard power, much in the manner described by Robert Kagan in his seminal work on transatlantic relations.⁵ In contrast to the expectations of some European leaders, the Kosovo crisis did not manage to rejuvenate any the European defensive mechanisms that developed following the fall of the Berlin Wall.⁶

The main challenge to the realization of the EU's goals in the implementation process of the Union Agreement is the cohesiveness of the new union. Simply put, the agreement fails to address the same issues and con-

3. I do not examine the Constitutional Framework for Provisional Self-Government in Kosovo. Constitutional Framework for Provisional Self-Government, U.N. Interim Administration Mission in Kosovo, U.N. Doc. UNMIK/REG/2001/9 (May 15, 2001), available at <http://www-unmikonline.org/constframework.htm>. The Constitutional Framework is a consequence of other documents and has no importance as a single document looked at in isolation and on its own terms.

4. UNMIK is the United Nations Interim Administration Mission in Kosovo. See generally Henry H. Perritt, Jr., *Introduction*, 80 CHI-KENT L. REV. 3 (2005).

5. ROBERT KAGAN, *OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER* (2003); see also ZBIGNIEW BRZEZINSKI, *THE CHOICE: GLOBAL DOMINATION OR GLOBAL LEADERSHIP* 7-40 (2004). For special and concrete effects of this policy in Kosovo and its successes and failures, see generally Orla McBreen, *The Diplomatic Involvement of the EU in the Kosovo Crisis*, in *OLD FRONTIERS-NEW FRONTIERS: THE CHALLENGE OF KOSOVO AND ITS IMPLICATIONS FOR THE EUROPEAN UNION* 79 (Dieter Mahncke ed., 2001).

6. See Manuel Szapiro, *Will the Kosovo Crisis Rejuvenate CFSP and European Defence?*, in *OLD FRONTIERS-NEW FRONTIERS*, *supra* note 5, at 203.

cerns that eventually led to the violent and tragic destruction of Yugoslavia, namely the divisive force of nationalism and the unsatisfactory position of the Albanians in the region vis-à-vis others. The EU, as the key player in the drafting process of the Union Agreement, lacks the necessary means to build social and political cohesion within the new Serb-Montenegrin Union. Moreover, the European approach lacks popular appeal among the majority of the Kosovar Albanians. Most likely, the Union Agreement will come to be a cause of political and ethnic violence for a long time, no matter the scale and intensity of hard work in the field by EU foreign policy personnel.

I. THE BADINTER COMMISSION OPINIONS

A. *The Badinter Commission Generally*

The Badinter Commission is a body that was formed within the framework of the 1991 Hague Conference on Yugoslavia.⁷ The former European Commission (“EC” now known as the EU) led the Hague Conference and established the Commission. The Commission was named after French judge and lawyer, Robert Badinter. No discussion of Yugoslav self-determination, its forms, and its content is complete without an understanding of the work of the Commission. The Badinter Commission clarified the so-called *Guidelines on Recognition of New States in Eastern Europe and in the Soviet Union*.⁸ It provided, above all, a framework for the EC and the international community at large to settle sovereignty and self-determination issues in Yugoslavia.⁹ Nevertheless, the work of the Commission has resulted in divergent, and in some cases, controversial interpretations among scholars.¹⁰

7. See Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia, Jan. 11 & July 4, 1992, 31 I.L.M. 1488 [hereinafter Badinter Commission: Opinions] (Introductory Note by Maurizio Ragazzi) (explaining the background of the Badinter Commission).

8. European Community: Declaration on Yugoslavia and on the “Guidelines on the Recognition of New States in Eastern Europe and the Soviet Union,” 31 I.L.M. 1485 [hereinafter EC Declaration & Guidelines]. The Guidelines were issued on December 16, 1991, in the form of a declaration intended to impact the ongoing dissolution of the former Communist federation. *Id.*

9. See *id.*; see also THOMAS D. GRANT, THE RECOGNITION OF STATES: LAW AND PRACTICE IN DEBATE AND EVOLUTION 83–121, 149–213 (1999); STEVE TERRETT, THE DISSOLUTION OF YUGOSLAVIA AND THE BADINTER ARBITRATION COMMISSION: A CONTEXTUAL STUDY OF PEACE-MAKING EFFORTS IN THE POST-COLD WAR WORLD 69–119, 254–309 (2000); James Gow, *Serbian Nationalism and the Hisssing Ssssnake in the International Order: Whose Sovereignty? Which Nation?*, 72 SLAVONIC & E. EUR. REV. 456, 461–62 (1994).

10. The Badinter Commission’s claim to international legitimacy was weaker than that of earlier commissions in Africa dealing with the status of new states. Neither Yugoslavia nor its constituent

In providing this framework, the Badinter Commission treated “external” self-determination quite differently from “internal” self-determination. This distinction has been followed by most of the international efforts to consider Kosovo within the context of the dissolution of Yugoslavia. External self-determination focuses on the right of a people to secede, such as in Slovenia, Croatia, Bosnia, and Macedonia. Internal self-determination focuses on the right of a people to have certain individual and collective rights respected within an existing state.¹¹ The Albanian population of Kosovo has been uniformly relegated to internal self-determination at most, while the Slovene, Croat, Bosnian, and Macedonian populations have been assumed to be entitled to make a case for external self-determination.

Among its major decisions, the Commission concluded:

1. that the Socialist Federal Republic of Yugoslavia (“SFRY”) no longer met the definition of a state;¹²
2. that the Serbian minority within Bosnia was entitled to have its nationality respected, but was not entitled to alter the boundaries of Bosnia;¹³
3. that the former internal boundaries that defined republics within Yugoslavia had become external boundaries of new states, and that these boundaries could not be altered without the consent of the new states;¹⁴ and
4. that Slovenia,¹⁵ Macedonia,¹⁶ Croatia,¹⁷ and the Federal Republic of Yugoslavia (“FRY”) (comprising Serbia and Montenegro)—but not Bosnia¹⁸—were entitled to recognition as states.

republics were members of the EC, which created the Badinter Commission. By contrast, following the decolonization of Africa in the 1960s, the conflicting parties (Nigeria and Zaire/Congo) were full-fledged members of the Organization of African Unity (“OAU”), which considered their status.

11. See Stephen Alvstad, *The Quebec Secession Issue, With an Emphasis on the “Cultural” Side of the Equation*, 18 TEMP. INT’L & COMP. L.J. 89, 99 n.90 (2004) (explaining the distinction between external and internal self-determination).

12. Badinter Commission: Opinions, *supra* note 7, at 1497 (Badinter Opinion No. 1).

13. *Id.* at 1498 (Badinter Opinion No. 2); *id.* at 1500 (Badinter Opinion No. 3).

14. *Id.* at 1499–1500 (Badinter Opinion No. 3). This is an application of the principle of “uti possidetis”—defined as “[t]he doctrine that colonial administrative boundaries will become international boundaries when a political subdivision or colony achieves independence.” BLACK’S LAW DICTIONARY 1582 (8th ed. 2004).

15. Badinter Commission: Opinions, *supra* note 7, at 1517 (Badinter Opinion No. 7).

16. *Id.* at 1511 (Badinter Opinion No. 6).

17. *Id.* at 1505 (Badinter Opinion No. 5) (recognition to be conditioned on certain amendments to the Croatian constitution).

18. *Id.* at 1503 (Badinter Opinion No. 4).

The Commission, however, made no reference to the situation in Kosovo or to the 1991 Declaration of Independence by Kosovar Albanians. Its decision regarding the sanctity of internal borders, its recognition of the former Yugoslav republics as states, and its rejection of the request by the Serbian minority within Bosnia to secede are generally construed as an implied rejection of Kosovar Albanian aspirations to secede from Serbia and be reorganized as a separate state.

With a few exceptions,¹⁹ scholarly work has for the most part rejected the pronouncements of the Badinter Commission. However, this rejection has not concerned the validity of the Commission's work *per se*,²⁰ but has focused instead on the merits of the work in policy terms. Some scholars argue that Badinter's work was nonlegal, thus putting the Commission's entire efforts into the realm of pure politics.²¹ Others go further and accuse the Commission of being a direct accomplice and the very cause of the Yugoslav dissolution and tragedy.²² Still others hold the view that the

19. See BRAD R. ROTH, GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW 22–26 (1999); Ove E. Bring, *Correspondents' Agora: U.N. Membership of the Former Yugoslavia*, 87 AM. J. INT'L L. 244 (1993); Antonio Cassese, *Self-Determination of Peoples and the Recent Break-Up of USSR and Yugoslavia*, in ESSAYS IN HONOUR OF WANG TIEYA 131, 142–43 (Roland St. John MacDonald ed., 1994); Vladimir Djuro Degan, *L'arbitrage juridique ignoré: la jurisprudence de la Commission Badinter*, in L'EX-YOUGOSLAVIE EN EUROPE: DE LA FAILLITE DES DÉMOCRATIES AU PROCESSUS DE PAIX 31 (Marie-Françoise Allain et al. eds., 1997) [hereinafter L'EX-YOUGOSLAVIE EN EUROPE]; Vladimir-Djuro Degan, *Correspondents' Agora: U.N. Membership of the Former Yugoslavia*, 87 AM. J. INT'L L. 240 (1993); Vladimir-Djuro Degan, *Jugoslavija u raspadu*, 28 POLITICKA MISAO 50 (1991); Vladimir-Djuro Degan, *Samoodređenje Naroda i Teritorijalna Cjelovitost Država u Uvjetima Raspada Jugoslavije*, 46 ZAKONITOST 543 (1992); George Karipsiadis, *State Succession in the Balkans: Its Impact Upon International Boundaries*, in SOUTHEAST EUR. Y.B. 151, 151–81 (1994); M. Kelly Malone, *Correspondents' Agora: U.N. Membership of the Former Yugoslavia*, 87 AM. J. INT'L L. 246 (1993); Konstantin Obradovic, *Problemi Vezani za Sukcesiju SFRJ*, in MEDUNRODNO PRAVO I JUGOSLOVENSKA KRIZA: ZBORNIK RADOVA 275–315 (Milan Sahovic ed., 1996); Alain Pellet, *L'activité de la Commission d'arbitrage de la Conférence européenne pour la paix en Yougoslavie*, 38 ANNUAIRE FRANÇAIS DE DROIT INT'L 220 (1992); Alain Pellet, *The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples*, 3 EUR. J. INT'L L. 178 (1992); Milan Sahovic, *Raspad SFRJ i Stvaranje Novih Drzava*, in MEDUNARODNO PRAVO I JUGOSLOVENSKA KRIZA, *supra*, 14–47.

20. Apart from the fact that former Yugoslavia was not a member of the EC, all actors of the Yugoslav drama accepted the work of the Badinter Commission as legitimate. Even Serbia did not deny the Commission's legitimacy until after it issued its first opinion on November 29, 1991. Apparently, Serbia ultimately denied the legitimacy of Badinter's work because it hoped that the Commission would dogmatically apply international criteria for statehood that unconditionally recognized the right to territorial status quo on behalf of the Yugoslav federation (then controlled by Milosevic's regime in Belgrade).

21. See, e.g., JOHN WILLIAMS, LEGITIMACY IN INTERNATIONAL RELATIONS AND THE RISE AND FALL OF YUGOSLAVIA 130–31, 138, 140–41 (1998); Payam Akhavan, *Self-Determination and the Disintegration of Yugoslavia: What Lessons for the International Community?*, in SELF-DETERMINATION: INTERNATIONAL PERSPECTIVES 227, 227–28, 233–35, 240–42 (Donald Clark & Robert Williamson eds., 1996); Martyn Rady, *Self-determination and the Dissolution of Yugoslavia*, 19 ETHNIC & RACIAL STUDS. 379, 382–84 (1996).

22. RENE O LUKIC & ALLEN LYNCH, EUROPE FROM THE BALKANS TO THE URALS: THE DISINTEGRATION OF YUGOSLAVIA AND THE SOVIET UNION 275–81 (1996); Said Mahmoudi, *Recogni-*

Commission misapplied, and misinterpreted, the internationally recognized criteria for international statehood and self-determination.²³

B. Political Motivation

The first group of Badinter Commission critics focuses on the political context within which the Commission operated. Once the fighting was underway, the EC's goal was order and stability. The EC sought to contain the conflict and used a mixture of traditional principles and innovative ideas in order to find a political solution to the Yugoslav crisis. Many issues on the European agenda became entangled with the development of policy towards Yugoslavia, including the future role of the EC in foreign policy in the region; the relationships among major EC powers (especially France and Germany); and the relationships among the EC, the North Atlantic Treaty Organization ("NATO"), and the Western European Union ("WEU"). The EC was entering uncharted waters by striving to lead the international effort to manage the crisis in Yugoslavia. Its previous diplomatic role focused on trade relations.²⁴ Its role in more "classical" foreign policy issues had been limited to discussion and coordination of positions within the European Political Cooperation process. With the end of the Cold War came the end of the principal reason for U.S. involvement in European security affairs, indicating that U.S. leadership was likely to be less decisive and the U.S. government was seeking to reduce its role. Proponents of the Common Security and Foreign Policy (the "EC CSFP") saw a gap for the EC to fill.²⁵ Proposals were made for the revival of the WEU

tion of States: The Case of Former Yugoslav Republics, in CURRENT INTERNATIONAL LAW ISSUES NORDIC PERSPECTIVES: ESSAYS IN HONOUR OF JERZY SZTUCKI 135, 135-59 (Ove Bring & Said Mahmoudi eds., 1994); Raju G.C. Thomas, *Nations, States, and Secession: Lessons from the Former Yugoslavia*, MEDITERRANEAN Q., Fall 1994, at 40, 40-65; Peter Radan, *The Badinter Arbitration Commission and the Partition of Yugoslavia*, 25 NATIONALITIES PAPERS 537, 537-57 (1997).

23. These authors claim that Badinter could have declared Bosnia-Herzegovina as being in the process of dissolution as of January 1992, as was former Yugoslavia in the Commission's first opinion rendered a few months earlier in November of 1991. In other words, these authors say that Bosnia-Herzegovina lacked effective control over its own territory and population by the time Badinter declared Bosnia-Herzegovina to be a state (provided that it held a referendum on independence). See Robert M. Hayden, *Bosnia's Internal War and the International Criminal Tribunal*, 22 FLETCHER F. WORLD AFFS. 45, 50-51 (1998).

24. Branislava Alendar, *Evropska Unija i SR Jugoslavia*, in JUGOSLAVIA I SVET 2000, at 73-83 (Evropski Pokret u Srbiji: Beograd, published by Belgrade-based *Forum za Medjunarodne Odnose* 2000). See generally Mario Zucconi, *The West and the Balkan Conflict*, in THE YUGOSLAV CONFLICT AND ITS IMPLICATIONS FOR INTERNATIONAL RELATIONS 27 (Stefano Bianchini & Robert Craig Nation eds., 1998).

25. See HAROLD JAMES, *EUROPE REBORN: A HISTORY, 1914-2000*, at 386-446 (2003).

as the defense arm of the EC's new security role.²⁶ The fact that the former Yugoslavia was not a member of the EC mattered little in light of the new challenges that the EC was facing at the time.

C. Innovative Approaches

The work of the Badinter Commission, as noted earlier, was in essence a mixture of traditional and innovative approaches. In this context, the authors who see the work of this body as politically motivated try to deny the competence of the Commission's work. Being innovative and using politically motivated judgment, however, are distinguishable. The Commission was innovative in the way it tried to achieve the goals of order and stability. In achieving these goals the Commission used only the former administrative borders of the Yugoslav republics as reference points. The Commission followed the precedents set in Latin America, Africa, and Asia.²⁷ This means that the Commission set no precedent itself; it only applied an old rule in a new context, and it did so innovatively, not according to political considerations. The innovation consisted of specifying the nature of the new states that would succeed the former Yugoslavia and in answering whether the new states should be dictatorships as their predecessor was. This question was resolved by the Commission's imposition of

26. See SAADIA TOUVAL, *MEDIATION IN THE YUGOSLAV WARS: THE CRITICAL YEARS, 1990–95*, at 45, 94 (2002); Georges-Marie Chenu, *Les limites des interventions européennes*, in *L'EX-YOUGOSLAVIE EN EUROPE*, *supra* note 19, at 59.

27. The Commission stated, in pertinent part:

The Commission therefore takes the view that once the process in the SFRY leads to the creation of one or more independent States, the issue of frontiers, in particular those of the Republics referred to in the question before it, must be resolved in accordance with the following principles:

First—All external frontiers must be respected in line with the principle stated in the United Nations Charter, in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV)) and in the Helsinki Final Act, a principle which also underlies Article 11 of the Vienna Convention of 23 August 1978 on the Succession of States in Respect of Treaties.

Second—The boundaries between Croatia and Serbia, between Bosnia-Herzegovina and Serbia, and possibly between other adjacent independent States may not be altered except by agreement freely arrived at.

Third—Except when otherwise agreed, the former boundaries become frontiers protected by international law. This conclusion follows from the principle of respect for territorial status quo and, in particular, from the principle of *uti possidetis*. *Uti possidetis*, though initially applied in settling decolonization issues in America and Africa, is today recognized as a general principle, as stated by the International Court of Justice in its Judgment of 22 December 1986 in the case between Burkina Faso and Mali (Frontier Dispute, [1986] ICJ Reports 554 at 565) . . . The principle applies all the more readily to the Republics since the second and fourth paragraphs of Article 5 of the Constitution of the SFRY stipulated that the Republics' territories and boundaries could not be altered without their consent.

Badinter Commission: Opinions, *supra* note 7, at 1499–1500 (Badinter Opinion No. 3).

new requirements for statehood—the rule of law, democracy, and respect for human and minority rights.²⁸ The legitimacy of the Badinter Commission decisions should have been judged through new lenses: the goal of order and stability was linked by the Commission to the liberal ideas of rule of law, democracy, free market economy, and respect for human and minority rights. But if Bosnia was not yet qualified for statehood because the views of its Serb majority had not been considered sufficiently,²⁹ and if Croatia was recognized only on condition that it reform its constitution to offer stronger protection to minorities,³⁰ why was the rump Yugoslavia's subjugation of its Albanian minority virtually ignored?³¹

The Badinter Commission's spirit of innovation did not go far enough, but it did further crystallize the criteria for international statehood. The Commission, out of necessity, took the international criteria for granted once the Yugoslav wars of succession started. Accordingly, it downplayed the principle of governmental effective control as a precondition for international statehood. But this was a logical attitude because, had it accepted this classical criterion as valid, the EC would have been required to take the aggressor's side, that is, Milosevic's.

The recognition of former administrative borders as the boundaries of new states was not new. The same approach, resulting in what some characterize as "premature recognition," occurred in Africa during the decolonization process and was aimed at keeping colonies under the control of former colonial powers and their favored elites.³² The Commission took a novel approach in the case of Yugoslavia by linking the application of these traditional criteria to liberal values, a linkage clearly missing during the African decolonization process. The Commission applied *The Guidelines on Recognition of New States*, which stated that the EC and other members of the international community should take into account, in their decision to grant recognition to new states, the "political realities in each case."³³ In the case of former Yugoslavia, parts of the country were no

28. The opinions contain firm and clear provisions regarding the conditions for statehood along the lines of respect for human and minority rights, rule of law, and democracy. See *id.* at 1502 (Badinter Opinion No. 4) (Bosnia); *id.* at 1507 (Badinter Opinion No. 5) (Croatia); *id.* at 1508 (Badinter Opinion No. 6) (Macedonia); *id.* at 1516–17 (Badinter Opinion No. 7) (Slovenia).

29. See *id.* at 1503 (Badinter Opinion No. 4) (concluding that will of the people of Bosnia to become independent was not fully established).

30. *Id.* at 1505 (Badinter Opinion No. 5) (conditioning the recognition of Croatia on modification of its constitution).

31. See *id.* at 1526 (Badinter Opinion No. 10) (concluding that the FRY (Serbia and Montenegro) was a new state; no reference to internal treatment of minorities).

32. For a thorough exploration of the African experience, see Enver Hasani, *Uti Possidetis Juris: From Rome to Kosovo*, 27 FLETCHER F. WORLD AFFS. 85, 88–89 (2003).

33. EC Declaration & Guidelines, *supra* note 8, at 1487.

longer under effective control of the Federal government in Belgrade by the time *The Guidelines* were issued by the EC. In fact, by the end of 1991, apart from Serbia, Montenegro, Kosovo, and Vojvodina, the rest of Yugoslavia was more or less under the control of new authorities.³⁴ While the international community could not deny that some parts of Croatia and Bosnia-Herzegovina were under Serbian control, the capitals of these republics were not. It is an established international practice that emerged from the decolonization period that no recognition should be granted to authorities not in control of the capital city, though they may be in control of other parts of the country. Had the Badinter Commission pursued the old rule of total effectiveness³⁵ it would have had to support the Serbs because they controlled so much territory in Croatia and Bosnia. Such support would have been a tacit approval of the policy of ethnic cleansing.³⁶

The Badinter Commission was innovative in that it embraced democratization and respect for human rights as criteria for recognition of new states. Otherwise, it did nothing but elaborate into more detail the practical side of self-determination. The Commission began in the midst of the Yugoslavian dissolution and dealt with such issues as succession, independence referendums, minority and human rights, and former republican administrative borders. The Commission had to address the implementation of self-determination and its destabilizing force in international relations. Although the Commission's rulings only addressed the breakup of Yugoslavia, the Commission had appeal beyond the Yugoslavian context, not because of the legally binding force of its rulings, but because of the moral credibility of the EC and because of the competence and professionalism of the Commission itself.

34. As for Kosovo, its application for international recognition did not receive any response at all in January 1992 when the Badinter Commission declared its views on this matter, although the application had been submitted properly and in due time as demanded by the Guidelines. In scholarly work, though, the lack of effective control over Kosovo's territory and its population is deemed as the main reason for the nonrecognition of Kosovo's international statehood and sovereignty by the Badinter Commission, acting on behalf of the EC and the international community at large. See *Recognition of States*, 41 INT'L & COMP. L.Q. 473, 478-80 (A.V. Lowe & Colin Warbrick eds., 1992).

35. The traditional criteria for statehood are: (1) territory, (2) population, (3) subject to (4) an organized political authority. Badinter Commission: Opinions, *supra* note 7, at 1495 (Badinter Opinion No. 1). If a purported government controls its capital city but not the countryside, it fails the third criterion. Moreover, an insurgent group controlling most of the territory might come closer to satisfying the criteria than the authority in control of the capital city.

36. Serb control of territory was reinforced by removal of the non-Serb population, a practice that came to be known as "ethnic cleansing."

II. THE DAYTON MODEL FOR BOSNIA-HERZEGOVINA AND ITS IMPACT ON THE FINAL STATUS OF KOSOVO: TREATING KOSOVO ON PAR WITH “REPUBLIKA SRPSKA,” IF NOT WORSE

The 1995 Dayton Accords³⁷ settled the war among Croat, Serb, and Muslim (“Bosniak”) forces in Bosnia. Bosnia had seceded from Yugoslavia in early 1992, and at the same time, the Serb areas of Bosnia declared their independence from Bosnia. Fighting erupted almost immediately thereafter among Muslims, Serb irregulars, the Yugoslav National Army (“JNA”), and Croatian irregulars. The Serbs initiated a siege of Sarajevo and other Muslim population centers and began an intensive campaign of ethnic cleansing, driving Muslims from their homes in territory occupied by Serb forces.³⁸ By July 1992, conflict and ethnic cleansing had also broken out between Bosnian forces and Bosnian Croat forces seeking to annex parts of Bosnia to Croatia.³⁹ In November 1995, the Bosnian war ended with the negotiation of the Dayton Accords.⁴⁰

The Dayton Accords have been heavily criticized because, by recognizing the “Republika Srpska” as an “entity” within the relatively weak Bosnian state, the results of the ethnic cleansing of Bosniaks from the “Republika Srpska” territory were approved implicitly.⁴¹

Ethnic cleansing by the Serbs was part of a comprehensive strategy to strengthen the claim of Serbs to their own political territory—perhaps as part of a Greater Serbia, perhaps as independent statelets carved out of Bosnia and Croatia. The creation and transformation of the Serb entities in Bosnia-Herzegovina was a coordinated process that included not only the territory of that republic, but also large parts of neighboring Croatia. Initially, the formation of these Serb entities was connected to the new consti-

37. General Framework Agreement for Peace in Bosnia and Herzegovina, Dec. 14, 1995, 35 I.L.M. 75 [hereinafter Dayton Accords]. U.N. Security Council Resolution 1031 embraced the Dayton Accords. S.C. Res. 1031, U.N. SCOR, 3607th mtg. at pmb., ¶ 1, U.N. Doc. S/RES/1031 (1995). Explicitly acting under Chapter VII of the Charter, the Security Council “welcome[d] and support[ed] the Peace Agreement and call[ed] upon the parties to fulfill in good faith the commitments entered into in that Agreement.” *Id.*

38. See ROGER COHEN, HEARTS GROWN BRUTAL: SAGAS OF SARAJEVO (1998).

39. See generally MICHAEL A. SELLS, THE BRIDGE BETRAYED: RELIGION AND GENOCIDE IN BOSNIA (1996) (featuring the destroyed bridge in Mostar as a symbol of the destruction of Yugoslavia and the conflict in Bosnia).

40. See RICHARD HOLBROOKE, TO END A WAR (1998).

41. See, e.g., Timothy William Waters, *The Naked Land: The Dayton Accords, Property Disputes, and Bosnia's Real Constitution*, 40 HARV. INT'L L.J. 517, 583–84 (1999) (criticizing the Dayton Accords as legally ratifying “military and political divisions created by the war and ethnic cleansing campaigns”).

tutional changes underway in Bosnia-Herzegovina during 1990.⁴² These changes were undertaken for the purpose of the regionalization of the republic in order to enable it to become a modern, reform-oriented, European state.⁴³ The process of regionalization in Bosnia-Herzegovina was to be based on economic and social criteria, enhancing the effectiveness of the whole state of Bosnia-Herzegovina.⁴⁴ However, long before the war started, it was becoming clear that the Serbs had no intention of basing their concept of regionalization on economic or social criteria, but instead relied exclusively on the principle of ethnicity.⁴⁵

The Serb insistence upon the ethnic principle coincided entirely with their overall manipulation and misinterpretation of the prevailing economic trends in some Serb-inhabited parts of Bosnia-Herzegovina, regardless of the numbers.⁴⁶ This strategy was meant to showcase the alleged Serb economic discrimination and their economic backwardness in that republic.⁴⁷ The strategy covered not only those areas where the Serbs were in the majority, but also other areas where they lived in community with others in very small numbers.⁴⁸

The first manifestation of this strategy, which aimed at the dismemberment of the state of Bosnia-Herzegovina, took the form of an association named “the Community of Municipalities of *Bosanska Krajina*,” which was composed of nine to thirty municipalities of Bosnia-Herzegovina.⁴⁹ This entity was formed by an alleged agreement between the municipalities called *The Agreement on the Establishment of the Association of Municipalities* (in Serbian, *Dogovor o Udruivanju u Zajednicu Općina*).⁵⁰ The resulting association had a legal and separate personality from the organs and state structures of Bosnia-Herzegovina. This means that it had the right to exercise all powers otherwise falling within the jurisdiction of the Re-

42. See Badinter Commission: Opinions, *supra* note 7, at 1501–02 (Badinter Opinion No. 4) (discussing aspects of Bosnian constitutional reform).

43. KASIM I. BEGIC, *BOSNA I HERCEGOVINA: OD VANCEOVE MISIJE DO DAYTONSKOG SPORAZUMA, 1991–1996*, at 45–69 (Bosnaska Knjiga, Sarajevo 1997).

44. See, for example, the Preamble of the European Charter of Self-Government (Rome 1984), which speaks of the same values to be promoted by the local self-governments and the decentralization of powers. European Charter of Local Self-Government, Oct. 15, 1985, Europ. T.S. No. 122. For comments, see GUY HOLLIS & KARIN PLOKKER, *TOWARDS DEMOCRATIC DECENTRALISATION: TRANSFORMING REGIONAL AND LOCAL GOVERNMENT IN THE NEW EUROPE* (1995).

45. See Waters, *supra* note 41, at 525.

46. BEGIC, *supra* note 43, at 55–79.

47. *Id.*

48. *Id.*

49. There were few proposed versions of this document so that the exact number of municipalities remains unknown to date. See *id.* at 57.

50. *Id.* at 58.

public of Bosnia-Herzegovina. On December 16, 1991, this “autonomous” region was transformed into the Srpska Autonomna Oblast, or Serbian Autonomous Area.⁵¹ The Declaration of this first Serbian Autonomous Area was followed by similar declarations in other parts of Bosnia-Herzegovina. These actions covered almost eighty percent of the Bosnian territory.⁵² The new entities exercised jurisdiction not only over the organs of Bosnia-Herzegovina, but also over defense and related issues pertaining to the FRY.

At the same time as Serbian autonomies were emerging, Serbian authorities created an “Assembly of the Serbian People in Bosnia-Herzegovina.”⁵³ This assembly was constituted on October 24, 1991. It rendered a decision stating that the Serbs had decided to live in a common state of Yugoslavia together with Serbia, Montenegro, and other self-styled Serb entities in Croatia. According to the decision of the Assembly, the will of the Serbs would be demonstrated on November 9 & 10, 1991. In justifying these actions, the Serb leaders openly put forward ethnic rather than economic or social reasons. It was called a “plebiscite,” although its very aim was the dismemberment of the state of Bosnia-Herzegovina. The plebiscite was indeed held on the above dates, making more explicit the idea of a Greater Serbia. In characteristic manner, the Serbs printed their voting lists in a blue color, leaving yellow lists for the non-Serbs.⁵⁴ This difference in color was accompanied by different questions as well. Namely, the non-Serbs had to answer the question whether Bosnia-Herzegovina should remain an equal republic, while the Serbs had to answer the opposite, that is, whether they should remain within Bosnia-Herzegovina.⁵⁵

Serbia’s next step following the November 1991 “plebiscite” was to make the utmost use of the results of the plebiscite, both domestically and internationally. Internationally, the Serbs sought to represent themselves before the EC Conference on Yugoslavia, underway in the Hague, as a separate party in relation to the legal organs of Bosnia-Herzegovina. Domestically, the Serb leaders used the results of the “plebiscite” to foster the

51. Both its creation and the transformation into an autonomous area were initially justified on pure economic and social terms, although in practice it was obvious that the ethnic criterion was a driving force. This became clear as the time went on, especially following the discovery of a Serb plan designed for the total dismemberment of Bosnia-Herzegovina along ethnic lines. The plan had been drafted in September 1991 in the name of “science” and “profession,” clearly opting for ethnic principle as the main pillar in the regionalization of Bosnia-Herzegovina. Economic and social factors were manipulated and misinterpreted to serve the ethnic principle. *See id.*

52. *Id.* at 59.

53. *Id.* at 60.

54. *Id.* at 61.

55. *Id.* at 60–61.

final proclamation of the “Republic of the Serbian People of Bosnia-Herzegovina” on January 9, 1992. This transformation of the previous autonomous entities into a single republic was done in hopes that it would be internationally recognized as a federal unit within the still-existing Yugoslav federation and, in case that failed, as an independent and sovereign state.⁵⁶

The strategy failed. The Badinter Commission for the former Yugoslavia, in its January 1992 opinion, opted in favor of the recognition of Slovenia and Macedonia.⁵⁷ For Bosnia and Croatia, the Commission set out some conditions that these two Yugoslav republics were to fulfill before any international recognition would be extended to them. The Commission asked that a referendum be held in Bosnia-Herzegovina and that minority rights be respected in Croatia.⁵⁸ Serb leaders used the Commission’s coerced conditions as a pretext to boycott the referendum, which was held on February 29 and March 1, 1992. Following this, Serb leaders openly threatened that they would declare their own independence if Bosnia-

56. This “republic” recognized its counterpart in Croatia. *Id.* at 63–64. This shows that the Serbs believed that only republic-type entities would be recognized internationally. This view relied on the November 1991 legal opinion of the Badinter Commission for former Yugoslavia.

57. See Badinter Commission: Opinions, *supra* note 7, at 1511 (Badinter Opinion No. 6); *id.* at 1517 (Badinter Opinion No. 7). For scholarly comments see TERRETT, *supra* note 9.

58. In the case of Croatia, the Arbitration Commission considered that:

- i. the Constitutional Act of 4 December 1991 d[id] not fully incorporate all the provisions of the draft Convention of 4 November 1991, notably those contained in Chapter II Article 2(c), under the heading “Special Status”;
- ii. the authorities of the Republic of Croatia should therefore supplement the Constitutional Act in such a way as to satisfy those provisions; and
- iii. subject to this reservation, the Republic of Croatia m[et] the necessary conditions for its recognition by the Member States of the European Community in accordance with the Declaration on Yugoslavia and the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, adopted by the Council of the European Communities on 16 December 1991.

Badinter Commission: Opinions, *supra* note 7, at 1505 (Badinter Opinion No. 5). In the case of Macedonia, the Arbitration Commission took the view:

- that the Republic of Macedonia satisfie[d] the tests in the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union and the Declaration on Yugoslavia adopted by the Council of the European Communities on 16 December 1991;
- that the Republic of Macedonia ha[d], moreover, renounced all territorial claims of any kind in unambiguous statements binding in international law; that the use of the name “Macedonia” c[ould] not therefore imply any territorial claim against another State; and
- and that the Republic of Macedonia ha[d] given a formal undertaking in accordance with international law to refrain, both in general and pursuant to Article 49 of its Constitution in particular, from any hostile propaganda against any other State; this follow[ed] from a statement which the Minister of Foreign Affairs of the Republic made to the Arbitration Commission on 11 January 1992 in response to the Commissions request for clarification of Constitutional Amendment II of 6 January 1992.

Id. at 1511–12 (Badinter Opinion No. 6).

Herzegovina was recognized as a sovereign and independent state. By these actions, the Serbs attempted to justify in advance the ethnic cleansing of all non-Serbs from their entities.

The Serb interpretation of international statehood was an arbitrary and entirely wrong one. They believed that only republic-type entities would be recognized internationally, regardless of the manner in which they were created.⁵⁹ In line with this thinking, Serbs declared their own “independent republic” following the international recognition of Bosnia-Herzegovina on April 6 and 7, 1992.⁶⁰ This time, however, the Bosnian Serbs put aside the idea of remaining within the rapidly dissolving Yugoslavia. In a matter of months following the declaration of this “independent republic,” the Serbs managed to ethnically cleanse almost seventy percent of the territory of Bosnia-Herzegovina, thus securing the territorial base for their new “state.”⁶¹ Hoping to gain international recognition for their *fait accompli* policy, the Serbs left behind the old idea of Yugoslavism and focused instead on a Greater Serbian project, based entirely on a policy of ethnic cleansing of non-Serbs.⁶²

The initial reactions from the international community, including the EU, were almost exclusively acceptance of the Serb assertion of international statehood.⁶³ This constituted open support for the division of Bosnia-Herzegovina into two or three separate states along ethnic lines. Milosevic was generally suspected of persisting in his goal of forming a Greater Serbia, but the focus had shifted to the Bosnian Serbs’ claim of independence. Only the 1995 Dayton Peace Accords, adopted under U.S. leadership, managed to defeat this ethnic principle.⁶⁴ Other peace plans, such as the Cutiliero Plan, the Vance-Owen plan, and the Owen-Stoltenberg plan were drafted in accordance with the ethnic principle.⁶⁵

This does not mean that the EU foresaw the ethnic principle as a basis for internal or external self-determination within the territory of former Yugoslavia. In its documents, the EU relied instead on the principle of

59. See BEGIC, *supra* note 43, at 31–44; TERRETT, *supra* note 9, at 254–308.

60. JOZE PIRJEVEC, *LE GUERRE JUGOSLAVE, 1991–1999*, at 145–46 (Einaudi, Torino 2001).

61. *Id.* at 153–55.

62. JAMES GOW, *THE SERBIAN PROJECT AND ITS ADVERSARIES: A STRATEGY OF WAR CRIMES* 118–44 (2003).

63. See *id.* at 145–223, 263–309.

64. Dayton Accords, *supra* note 37.

65. For a detailed account of the five proposals on the peace in Bosnia-Herzegovina, especially those based on ethnic criteria (all but the Dayton Accords) over the years 1992–1995, see BEGIC, *supra* note 43, at 100–97; ALEKSANDER PAVKOVIĆ, *THE FRAGMENTATION OF YUGOSLAVIA: NATIONALISM AND WAR IN THE BALKANS* 155–93 (2d ed. 2000); WOLFGANG PETRITSCH, *BOSNA I HERCEGOVINA OD DAYTONA DO EVROPE* (Sarajevo 2002).

territoriality, taking the Yugoslav republics as a reference point.⁶⁶ To be sure, the EU supplemented its adherence to the traditional principle of territoriality with the promulgation of new requirements: the rule of law, democracy, and respect for human and minority rights.⁶⁷ But in practice, when problems arose in the enforcement of these conditions, the territorial/ethnic principle prevailed, resulting in tolerance of the Serb policy of ethnic cleansing.

Logically, the principles underlying the Dayton Accords' treatment of "Republika Srpska" within Bosnia seemed to presage international support for autonomy—almost independence—for Kosovo within Serbia. Indeed, Kosovo seemed to occupy a stronger claim to international recognition than "Republika Srpska." "Republika Srpska" was the beneficiary of a policy of ethnic cleansing and genocide against an entire nation, while Kosovo possessed a clear territorial base and an ethnically dominant population despite being the victim of the Serbian policy of ethnic cleansing.

But this logic has not been reflected in reality. To be sure, efforts to ethnically cleanse Kosovo of its non-Serbian population were prevented by NATO military action undertaken in March–June 1999. But Kosovo legally remains a part of the USM, which makes it doubtful that the project of Greater Serbia has been defeated in Kosovo. It might well be the case that the Belgrade regime has been successful at preserving its formal sovereignty over vast areas not inhabited by a Serbian majority, thus leaving the international community with no choice but to assume the role of caretaker of the Greater Serbian project, the brutal and violent realization of which is presumably postponed until a later date when the international balance of forces changes in favor of Serbia. In order to diminish this unhappy prospect, the next section deals with the Kosovar Albanians' pursuit of self-determination, both prior to the 1998 conflict in Kosovo and after NATO's military action. In light of the developments considered in the next section, the Dayton Accords represent a powerful precedent for an internationally sanctioned agreement guaranteeing the Kosovar Albanians at least as much autonomy as the Serbs enjoy in "Republika Srpska."

66. See EC Declaration & Guidelines, *supra* note 8.

67. See *id.* For scholarly comments, see GRANT, *supra* note 9, at 149–98.

III. RAMBOUILLET PEACE ACCORD AND ITS MODEL OF SELF-DETERMINATION: A COMPARISON OF RAMBOUILLET WITH THE DAYTON MODEL

The Rambouillet Accords were the product of an unsuccessful attempt by the Contact Group of the Former Yugoslavia, in late 1998 and early 1999, to mediate a settlement of the increasingly violent conflict in Kosovo between the Kosovo Liberation Army and Serb forces.⁶⁸ The refusal of Serbia to agree to the Accords precipitated the NATO bombing campaign. Furthermore, the reference in U.N. Security Council Resolution 1244 to the Rambouillet Accords as a partial model for the final status of Kosovo gives the Rambouillet Accords continuing relevance.⁶⁹

In the aftermath of the 1995 Dayton Accords, Dragoljub Micunovic, one of the most influential Serbian opposition leaders, told the media that Serbia felt relaxed because the international community recognized its frontiers as international borders, and the territory of Kosovo was included within those borders.⁷⁰ The same opinion prevailed in the circles of the Serb regime and has since been frequently reiterated in public.⁷¹ The coincidence between this position and the international community's stance that internationally recognized borders cannot be modified, when contrasted with the Kosovar Albanian claim to independence, reveals two crucial things about NATO's actions against the FRY in March–June 1999 and their possible ramifications for the future of Kosovo. The first issue is related to the international community itself, while the second is related to Kosovo and its possibilities for achieving independent statehood.

68. The Contact Group is an informal grouping of countries, including the U.S., U.K., France, Germany, Italy, and Russia that first came together in response to the crisis in Bosnia. Later, the EU joined to coordinate Kosovo policy with UNMIK. The Rambouillet negotiations occurred from February 6–23, 1999. The Rambouillet Peace Process officially ended with the signing of the Rambouillet Accords in Paris on March 19, 1999.

69. See Interim Agreement for Peace and Self-Government in Kosovo, Feb. 23, 1999, U.N. Doc. S/1999/648 (June 7, 1999), at http://www.state.gov/www/regions/eur/ksvo_ambouillet_text.html [hereinafter Rambouillet Accords]. Resolution 1244 incorporates the Rambouillet Accords for determining Kosovo's future status. S.C. Res. 1244, U.N. SCOR 54th Sess., 4011th mtg. ¶ 11(e), U.N. Doc. S/RES/1244 (1999).

70. Five years later, however, Micunovic was not sure about this. Criticizing plans to secede by June 2001 (the deadline set out for holding a referendum for the independence of this republic), Micunovic said that Montenegro's secession from the FRY (Serbia and Montenegro) would make highly probable the secession of Kosovo as well, thus putting into danger the very survival of the FRY. See *Radio Slobodna Evropa* (Apr. 1, 2001) (broadcast in South Slavic languages).

71. Regarding the so-called Kumanovo Agreement, which made it possible for NATO troops to enter Kosovo in June 1999, and the promulgation of U.N. Security Council Resolution 1244 (June 12, 1999), the Chief of the General Staff of the Yugoslav Army, Nebojsa Pavkovic, told the press in Belgrade that they (the Serbs) held the deeds over Kosovo because both of the above documents recognized and guaranteed the integrity and sovereignty of the Federal Republic of Yugoslavia. See *Radio Slobodna Evropa* (Dec. 17, 1999) (broadcast in South Slavic languages).

The above attitude in Serbian circles speaks of nothing but a certain political orientation prevalent within Serbian society at large. This orientation takes the state, not the citizenry or ordinary individuals, as a reference point. Regarding the issue of borders and self-determination in general, the Serbian mentality coincides with the approach taken by the international community following the end of the Cold War. This in no way implies that the international community *per se* has created this Serbian political orientation. The current orientation within Serbia stems rather from the very nature of Serbian nationalism. However, the international community's stance on the inviolability of former administrative borders has only further cemented Serbian myths regarding Kosovo and Serbs' *a priori* right to unquestionably rule Kosovo's majority population.⁷² Why was the Belgrade regime given these assurances regarding the unconditional inviolability of Serbia's borders? Was it a matter of legal principle or of a pure *realpolitik* that took into account other geopolitical and geostrategic factors, particularly an international desire to avoid encouraging secessionist movements in Northern Ireland, Tibet, Chechnya, Quebec, Bosnia, and Macedonia? I shall try to answer these questions in the following paragraphs.

Two dilemmas emerge when discussing the NATO intervention against the FRY. First, a *realpolitik* dilemma emerges, based on geopolitical and geostrategic considerations, which means that the inviolability of former republican borders was not an aim in itself, but a side effect of NATO's concern for peace and stability in the Balkans (and elsewhere in the territories of permanent members of the U.N. Security Council). Next, a dilemma based on humanitarian considerations emerges, because humanitarian concerns were a publicly stated aim of NATO officials both before and after the intervention against the FRY.⁷³ The then Secretary General of

72. For similar views, see GREG CAMPBELL, *THE ROAD TO KOSOVO: A BALKAN DIARY* (1999); TIM JUDAH, *KOSOVO: WAR AND REVENGE* (2000); NOEL MALCOLM, *KOSOVO: A SHORT HISTORY* (1998); JULIE A. MERTUS, *KOSOVO: HOW MYTHS AND TRUTHS STARTED A WAR* (1999); STEPHEN SCHWARTZ, *KOSOVO: BACKGROUND TO A WAR* (2000); Shlomo Avineri, *The Future of Kosovo*, E. EUR. CONST. REV., Summer 1999, at 79; Warren Zimmermann, *The Demons of Kosovo*, NAT'L INT., Spring 1998, at 5-6; Aleksa Djilas, *Imagining Kosovo*, FOREIGN AFFS., Sept.-Oct. 1998, at 124 (book review).

73. This aim was expressly stated by NATO's Council in a special statement on Kosovo on December 8, 1998: "NATO's aim has been to contribute to the international efforts for stopping the humanitarian crisis in Kosovo, to put an end to the violence there, and to assure a permanent solution to the crisis in Kosovo." KOSOVO INFO. CTR., DAILY REP. NO. 2264 B, Dec. 8, 1998 (Albanian version only). On the other hand, scholars have been disunited over NATO's real motives and how NATO's actions should be interpreted in the future. The most influential authors, such as Thomas Franck and Antonio Cassese, have favored humanitarian considerations. See Thomas M. Franck, *Lessons of Kosovo*, 93 AM. J. INT'L L. 857 (1999); Antonio Cassese, *Ex iniuria ius oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10

NATO, Javier Solana, put forward humanitarian considerations on the day before the air strikes began on March 24, 1999.⁷⁴ In fact, NATO officials referred almost exclusively to humanitarian considerations in justifying the use of the air strikes against the FRY. This was not the case, as we shall see below, during the early stages of the Kosovo conflict in February–March 1998. But regardless of the role of humanitarian rather than political considerations in justifying the bombing campaign, the end result of the NATO air strikes was the preservation of FRY territorial integrity and, by consequence, the imposition of internal self-determination rather than independence on Kosovo in the long run. This is supported unambiguously by

EUR. J. INT'L L. 23 (1999); Richard A. Falk, *Kosovo, World Order, and the Future of International Law*, 93 AM. J. INT'L L. 847 (1999); Louis Henkin, *Kosovo and the Law of "Humanitarian Intervention"*, 93 AM. J. INT'L L. 824 (1999); Ruth Wedgwood, *NATO's Campaign in Yugoslavia*, 93 AM. J. INT'L L. 828 (1999). Others have supported NATO actions against the FRY on humanitarian grounds as well, but with reservation. These authors have argued that the Kosovo case should not set a precedent for the future but should instead be taken as an exception due to regional considerations; Kosovo, they say, belongs to Europe, where gross human rights violations cannot be tolerated. See W. Michael Reisman, *Kosovo's Antinomies*, 93 AM. J. INT'L L. 860 (1999). In fact, a majority of the authors take the stance that Kosovo's location within Europe has played an important role, more or less, in NATO's decisions to strike against the FRY. The last group of authors, cited below, does not support NATO's actions in Yugoslavia, stressing the rule of sovereignty and the principle of nonintervention in the internal affairs of sovereign and independent states. See Jonathan I. Charney, *Anticipatory Humanitarian Intervention in Kosovo*, 93 AM. J. INT'L L. 834 (1999); Christine M. Chinkin, *Kosovo: A "Good" or "Bad" War?*, 93 AM. J. INT'L L. 841 (1999); Mary Ellen O'Connell, *The U.N., NATO, and International Law After Kosovo*, 22 HUM. RTS. Q. 57 (2000); Bruno Simma, *NATO, the U.N. and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1 (1999). As for NATO itself, its officials have been explicit that the decision to go into Kosovo did not set any precedent for its future actions elsewhere, despite some Russians' fears and some East Europeans' hopes of deterring Russian expansion. See Paul Goble, *Another Precedent From Kosova?*, RFE/RL NEWSLINE, Nov. 9, 2000, at <http://www.rferl.org/newsline/2000/11/5-NOT/not-091100.asp>.

74. See Press Release, Dr. Javier Solana, Secretary General of NATO (Mar. 23, 1999), available at <http://www.nato.int/docu/pr/1999/p99-040e.htm>. When the air campaign started, NATO leaders referred more explicitly to humanitarian considerations as a basis for their actions against the FRY. See BILL CLINTON, NE LUFTËN, JU PAQEN: MESAZHE, ARTIKUJ, KONFERENCA SHTYPI, INTERVISTA DHE FJALIME PËR KOSOVËN (Lutfi Dervishi trans., Tirane 2000). In terms of assessing the success or failure of the air campaign against the FRY, it is important to understand the previous goals set by the Alliance. These goals have varied during the air campaign. Thus, at the outset, the Clinton administration circulated three goals for the bombing campaign against the FRY: (1) "to 'demonstrate the seriousness of NATO's opposition to aggression'"; (2) to deter Milosevic's "'continuing and escalating . . . attacks' in Kosovo"; and (3) to "damage Serbia's capacity to wage war in the future." R.W. Apple, Jr., *A Fresh Set of U.S. Goals*, N.Y. TIMES, Mar. 25, 1999, at A1; see also Barton Gellman, *Allies Facing the Limits of Air Power*, WASH. POST, Mar. 28, 1999, at A1, A30. The same goals were reflected throughout NATO's statements on the crisis in Kosovo. The statements required that Milosevic end repression in Kosovo, withdraw his forces from the province, agree to an international military presence there, agree to the safe return of refugees and displaced persons, and provide assurances of his willingness to work toward a political framework along the lines of the Accords. NATO Secretary General Javier Solana, Press Conference after the Extraordinary Meeting of the North Atlantic Council at Foreign Ministers Level (Apr. 12, 1999), available at <http://www.-nato.int/docu/speech/1999/s990412a.htm>; Press Release, NATO, Statement on Kosovo Issued by the Heads of State and Government Participating in the Meeting of the North Atlantic Council in Washington, D.C. on 23rd and 24th April 1999 (Apr. 23, 1999), available at <http://www.nato.int/docu/pr/1999/p99-062e.htm>.

provisions of U.N. Resolution 1244, which acknowledge Serbian sovereignty while mandating a final status for Kosovo that assures autonomy.⁷⁵

Reference to humanitarian considerations cannot fully explain the NATO air campaign against the FRY. This argument stems from the events before and after the air campaign, spanning the period from January–June 1999. While NATO publicly announced its commitment to and endorsement of Resolution 1244, the humanitarian considerations in this U.N. document did not take precedence over issues such as borders and, most notably, the preservation of international peace and stability and the resolution of the final status of Kosovo. In fact, Resolution 1244 is presently the only legal foundation on which both the civilian and military branches of the international administration in Kosovo are based.⁷⁶ Further, when the Contact Group issued a statement on January 19, 1999, agreeing to summon representatives from the FRY and Serbian governments and representatives of the Kosovo Albanians to Rambouillet (southwest of Paris, France), it attributed the humanitarian crisis in Kosovo to political issues, suggesting that political solutions related to peace, stability, and the territorial integrity of the FRY and its neighboring states were the only viable solution to the crisis in Kosovo.⁷⁷ This statement was fully endorsed by NATO on January 30, 1999.⁷⁸ In both NATO's statement and the U.N.'s endorsement of that statement, the previous U.N. Security Council resolutions on the matter were taken fully into account, thus reinforcing the international community's commitment to the FRY's territorial integrity and to the preservation of regional peace and stability.⁷⁹

The above stance of the international community permeated the entire negotiating process at Rambouillet. The so-called “nonnegotiable principles” put forward for signature as a condition for any further discussions on the Rambouillet Accords stressed the inviolability of the FRY's borders, implying that any solution had to be found within the FRY's sovereignty and territorial integrity.⁸⁰ In terms of self-determination, this meant, as a practical matter, that Kosovo and its majority population would have to

75. See S.C. Res. 1244, *supra* note 69.

76. *Id.*

77. See KOSOVO INFO. CTR., KOSOVO DAILY REP. NO. 1677, *Big Powers Demand Deal on Kosovo Within Weeks*, Jan. 29, 1999, at <http://www.hri.org/news/balkans/kosova/1999/99-01-29.ksv.html>; *Contact Group Sets Deadline for Kosova Agreement*, RFE/RL NEWSLINE, Feb. 15, 1999, at <http://www.rferl.org/newsline/1999/02/4-SEE/see-150299.asp>.

78. See KOSOVO INFO. CTR., DAILY REP. NO. 1679, *NATO Statement on Kosova, January 30th*, Jan. 31, 1999, at <http://www.hri.org/news/balkans/kosova/1999/99-01-31.ksv.html>.

79. See S.C. Res. 1160, U.N. SCOR, 53d Sess., 3868th mtg., U.N. Doc. S/RES/1160 (1998); S.C. Res. 1203, U.N. SCOR, 53d Sess., 3937th mtg., U.N. Doc. S/RES/1203 (1998).

80. See Rambouillet Accords, *supra* note 69, at pmb1.

remain satisfied with the internal right to self-determination. This was nothing new for Kosovar Albanians, but they did not want, and still do not want, to believe that their right to self-determination is limited to internal self-determination. Earlier, the international community labeled the right to internal self-determination as “a substantial autonomy for Kosovo.”⁸¹ However, apart from vague comparisons with other existing autonomies, no precise document had been produced showing the full content of a substantial autonomy for Kosovo, at least not before the Rambouillet Accords. The Rambouillet Accords specified the content of Kosovo’s substantial autonomy, albeit for an interim period of three years.⁸² The document provided for a democratic self-government and for peace and security for everyone living in Kosovo. Democratic self-government included all matters of daily importance to people in Kosovo, such as education, health care, and economic development. Kosovo would have a president, an assembly, its own courts, strong local government, and national community institutions with the authority needed to protect each community’s identity.⁸³ Security was meant to be guaranteed by international troops deployed on the ground throughout Kosovo.⁸⁴ Local police, representative of all of the national

81. In the past, there have been various models for Kosovar autonomy, some proposed by the international community and others by the parties themselves. Kosovar autonomy has usually followed the models of the international community. See Dimitrios Triantaphyllou, *Kosovo Today: Is There No Way Out of the Deadlock?*, 5 EUR. SECURITY 279, 291–92 (1996); Zoran Lutovac, *Options for Solution of the Problem of Kosovo*, 48 REV. INT’L AFFS. 10, 10–12 (1997). The first model consisted in granting Kosovo a type of autonomy reminiscent of Kosovo’s 1974 status. Lutovac, *supra*, at 10. This was proposed most frequently by the international community’s circles. This version was made public by the Special Group on Kosovo, acting within the Working Group on Ethnic and National Minorities of the International Conference on Former Yugoslavia, and it remained an option until the conflict in Kosovo began in February 1998. This model, drafted by the chairperson of the Special Group on Kosovo, German ambassador Gerht Ahrens, envisioned an autonomy for Kosovo based on the 1974 Yugoslav Constitution and the experiences of South Tyrol, Spain, Aaland Islands, Bosnia-Herzegovina, and Croatia (the so-called “Plan Z4” drafted on behalf of the Serbs living in Croatia). See Hugh Poulton, *The Rest of the Balkans*, in MINORITY RIGHTS IN EUROPE 66, 71–72 (Hugh Miall ed., 1994). The second model dealt with the refederalization of the FRY. It meant a supplemental or new federalization of the FRY, making Kosovo, in addition to Serbia and Montenegro, a separate federal unit, that is, a third republic. This was exactly what the Kosovar Albanians demanded in the 1981 riots. Since the dissolution of Yugoslavia, however, this solution has been considered obsolete. On the Serbian side, this proposal was supported by the so-called Serbian Resistance Movement leader, Momcilo Trajkovic. See KOSOVO INFO. CTR., DAILY REP. NO. 1736, Carl Bildt, *Kosovo Should Have the Same Status as Montenegro*, June 3, 1997 (Albanian version only). Trajkovic has on several occasions asked for Kosovo to be a third republic within the FRY. In one case, Trajkovic has even threatened that if Kosovars do not accept this, Serbs should pursue refederalization by a military campaign against Kosovo. See KOSOVO INFO. CTR., DAILY REP. NO. 1945, Jan. 20, 1997 (Albanian version only).

82. The Rambouillet Peace Accords also contained the so-called nonnegotiable principles, in which the issue of the FRY’s territorial integrity and sovereignty took precedence. See Rambouillet Accords, *supra* note 69, at pmb1.

83. *Id.* at ch. 1, arts. II–VII.

84. *Id.* at ch. 7, arts. I–XVI.

communities in Kosovo, were to provide for routine law enforcement.⁸⁵ Federal and Republic security forces would have to leave Kosovo, except for a limited border protection presence.⁸⁶ The final issue concerned a final settlement for Kosovo: an international meeting was to be convened after three years to develop a mechanism for a final settlement. The will of the people was established as an important factor to be taken into account at that international meeting.⁸⁷

Despite the guarantees given regarding the FRY's territorial integrity and sovereignty, Belgrade authorities refused to sign the document. Milosevic's regime, instead of negotiating the peace terms of Rambouillet, continued its war campaign throughout Kosovo, expelling thousands of Albanians from their homes.⁸⁸ By the time the Rambouillet Conference ended, the humanitarian situation in Kosovo was becoming a real threat to regional peace and stability as hundreds of thousands of refugees flowed into Albania and Macedonia. NATO had no choice but to act according to its statement of January 30, 1999.⁸⁹ However, by the time the air strikes began on March 24, 1999, the language of NATO leaders changed. Emphasis was now put entirely on humanitarian concerns rather than on other considerations connected to regional peace and stability.⁹⁰ This was not, however, the language of Resolution 1244. Resolution 1244's ranking of issues in order of importance differs from the Rambouillet Accords. In the Resolution, as in previous resolutions concerning the crisis in Kosovo, the preservation of regional peace and security and the FRY's territorial integrity and sovereignty took prominence. Only then did humanitarian issues

85. *Id.* at ch. 2, art. II.

86. *Id.* at ch. 7, arts. III–V.

87. *Id.* at ch. 8, art. I, para. 3. The Rambouillet Accords provide:

Three years after the entry into force of this Agreement, an international meeting shall be convened to determine a mechanism for a final settlement for Kosovo, on the basis of the will of the people, opinions of relevant authorities, each Party's efforts regarding the implementation of this Agreement, and the Helsinki Final Act, and to undertake a comprehensive assessment of the implementation of this Agreement and to consider proposals by any Party for additional measures.

Id.

88. Justin Brown, *Uncomfortable Peace in Kosovo*, CHRISTIAN SCI. MONITOR, Oct. 14, 1998, at 1.

89. Norman Kempster, *Warring Sides in Kosovo Get Ultimatum*, L.A. TIMES, Jan. 30, 1999, at A1.

90. In fact, apart from the FRY's territorial integrity, regional stability and security, and the humanitarian situation in Kosovo, there had been only one case where NATO expressly referred to a political aim if it intervened in Kosovo. Namely, the then NATO Secretary General, Javier Solana, said on January 22, 1999, that NATO's political aim was to restore the autonomous status that Kosovo enjoyed according to the 1974 Constitution of Yugoslavia. This meant that military intervention would have as a result, if not a direct aim, the imposition of a status of autonomy (or internal self-determination) on Kosovo, which it enjoyed previously during Tito's time. See KOSOVO INFO. CTR., DAILY REP. NO. 2308 B, Jan. 22, 1999 (Albanian version only).

(the return of refugees and the displaced persons), the final settlement of the status of Kosovo, and the implementation of a temporary regime of self-government play a role.⁹¹ In practical terms this meant that NATO's air strikes, viewed from the perspective of Kosovar self-determination, have resulted in the preservation of the regional peace and stability, the conclusion of the FRY's territorial integrity and sovereignty, the protection of the Kosovar Albanian population, and, finally, the initial preparation for a political solution of the Kosovo issue *via* granting "substantial autonomy" for the region.⁹² In fact, governance in a form of "substantial autonomy" has been offered to the Kosovar Albanians on and off since 1989. It would be a mistake to focus on the humanitarian justification at the expense of the broader political agenda.

Resolution 1244 recalls and fully endorses the previous U.N. Security Council resolutions on the crisis in Kosovo.⁹³ Earlier resolutions, as well as Resolution 1244, called for the preservation of the FRY's territorial integrity and the integrity of its neighboring states.⁹⁴ Resolution 1244 further codified the G-8 formula for the political solution of the Kosovo conflict,

91. Two international mediators, one on behalf of the EU, Martti Ahtisari, and the other on behalf of the Russian Federation, Victor Chernomyrdin, have later revealed that Milosevic had accepted NATO's conditions for surrender when he was given by them assurances that the international mission in Kosovo would be under the U.N. auspices and, above all, that the same community guaranteed the FRY's territorial integrity and sovereignty over Kosovo. See Letter dated 28 July 1999 from the Chargé D'Affaires A.I. of Yugoslavia [Vladislav Jovanovic] to the United Nations Addressed to the President of the Security Council Annex, ¶¶ 2-4, U.N. SCOR, 54th Sess., Doc. S/1999/828 (1999). For the comments of both international mediators, see Victor Chernomyrdin, *Nismo Izdali Srbiju* [Interview], NIN (Belgrade), Oct. 14, 1999, at 49; Martti Ahtisari, *Nuk e Kam Kercnuar Milosevicin*, KOSOVA SOT, July 26, 2000, at 8 (Pristina-based Kosova daily).

92. Apart from NATO's pronouncements on political issues, such as that regarding the status of the 1974 autonomy enjoyed by Kosovo during Tito's time, some Western officials have, at an earlier stage of the conflict in Kosovo, made statements regarding the Western commitments to the FRY's territorial integrity. Thus, in his visit to Prishtina in early March 1998, the U.S. Special Envoy for Kosovo, Robert Gelbard, unwittingly underscored the validity of the peace option by revealing Americans' and others' support (mainly in NATO countries) for "Yugoslav integrity." This, in turn, gave Milosevic a free hand to expel almost the entire population of Kosovo, killing innocent civilians and applying a scorched earth policy. For criticism of this Western stance, see James Brady, *History Proves Again Balkan's Bite is Worse Than its Bark*, ADVERTISING AGE, July 13 1998, at 25; Justin Brown, *Living in Cross Hairs of NATO*, CHRISTIAN SCI. MONITOR, Oct. 7, 1998, at 1; Brown, *supra* note 88, at 1; Janusz Bugajski, *Act Now in Kosovo, or Regret it Later*, CHRISTIAN SCI. MONITOR, Mar. 11, 1998, at 19; Mark Dennis, *Kosovo: Locked and Loaded*, NEWSWEEK, Oct. 19, 1998, at 50; Michael Hirsh, *The Balkans: Holbrooke's Nervy Game of Chicken*, NEWSWEEK, Oct. 26, 1998, at 50, 51; Jonathan S. Landay, *NATO's Drums Beat Louder Over Kosovo*, CHRISTIAN SCI. MONITOR, Sept. 25, 1998, at 1, 7; Richard J. Newman, *NATO's Patience is Wearing Thin*, U.S. NEWS & WORLD REP., Oct. 19, 1998, at 40; Miles A. Pomper, *NATO Readies Strike Plans Against Serbia*, 56 CONG. Q. WEEKLY 2031 (1998); Ronald Steel, *Hijacked*, NEW REPUBLIC, July 13, 1998, at 10.

93. S.C. Res. 1244, *see supra* note 69, at pmb1.

94. *Id.*

adopted on May 6, 1999.⁹⁵ The formula is more or less the one expressed in Resolution 1244 which “reaffirm[s] the call in previous resolutions for substantial autonomy and meaningful self-administration for Kosovo.”⁹⁶ Among the responsibilities of the international civil presence in Kosovo is to “facilitate[e] a political process designed to determine Kosovo’s future status, taking into account the Rambouillet Accords.”⁹⁷ The end result of this is that, at least in a formal sense, the policy of Greater Serbia has not been defeated in Kosovo, at least not as long as the international community treats the policy as an integral part of the Serb-dominated FRY. In this formal sense, again, there is a striking similarity between the position of Kosovo and the “Republika Srpska” in Bosnia-Herzegovina.⁹⁸ Both are entitled to “autonomy” but not to independence.

IV. THE UNION AGREEMENT EMBRACES THE SELF-DETERMINATION MODEL OF RESOLUTION 1244 AND RAMBOUILLET

Despite the fact that Resolution 1244 strives to preserve territorial integrity and international stability by all means possible, it still refers repeatedly to the provisional nature of the international mission in Kosovo. This provisional character of UNMIK suggests a need for further settlement of the final status of the country. At first glance, it would appear to one unfamiliar with the legal and political background as if the final status

95. See Letter Dated 6 May 1999 from the Permanent Representative of Germany [Dieter Kastrup] to the United Nations Addressed to the President of the Security Council, Annex, U.N. SCOR, 54th Sess., U.N. Doc. S/1999/516 (1999).

96. S.C. Res. 1244, *supra* note 69, at pmb1.

97. *Id.* ¶ 11(e).

98. Some argue that Resolution 1244 and UNMIK were meant to empower Kosovo, but that they have created a sovereignty problem instead. This is not true at all. Kosovo is not under international governance, but under an international administration. According to international practice and theory, there is a huge difference between these two forms of political organization, and both forms have their own characteristics. In the case of Kosovo, UNMIK and Resolution 1244 are unambiguous in purpose—to preserve the sovereignty and territorial integrity of the USM, which includes Kosovo. However, it was and is unclear how this should be achieved. Initially, UNMIK pursued a custodian-style mission, and only recently has it realized that this kind of international administration does not work. It should either turn itself into a kind of “helping hand system,” such as that in Bosnia-Herzegovina at present, or into an “advise and help system,” like what we saw in East Timor. Locals should be allowed to assume more responsibility for their own government, and the will of the people should be at least observed, if not respected entirely, in decisions about daily life and the future of the country. For more on these issues, see the following: Patrick T. Egan, *The Kosovo Intervention and Collective Self-Defence*, 8 INT’L PEACEKEEPING 39 (2001); Espen Barth Eide, *The Internal Security Challenge in Kosovo*, INT’L SPECTATOR, Jan.–Mar. 2000, at 49; Enrico Milano, *Security Council Action in the Balkans: Reviewing the Legality of Kosovo’s Territorial Status*, 14 EUR. J. INT’L L. 999 (2003); Daniel N. Nelson, *Kosovo Futures, Western Dilemmas*, INT’L SPECTATOR, Apr.–June 2002, at 11–12; Ralph Wilde, *From Danzig to East Timor and Beyond: The Role of International Territorial Administration*, 95 AM. J. INT’L L. 583 (2001); Susan L. Woodward, *Kosovo and the Region: Consequences of the Waiting Game*, INT’L SPECTATOR, Jan.–Mar. 2000, at 35.

of Kosovo, and of the “Republika Srpska” for that matter, is not yet settled. This might be well true if looked at from an Albanian perspective. Kosovar Albanians continue to believe that Resolution 1244 and the Agreement, discussed further below, do not foreclose the issue of independence. Indeed, Kosovar Albanians equate the issue of the final status of Kosovo with full independence. As we saw from our earlier discussions, this is not the most likely scenario.

More likely, Resolution 1244 and the Union Agreement foreclose only one form of self-determination, that is, the full independence and sovereignty of Kosovo. One might respond that in a strict legal sense, the Union Agreement is not legally binding because it does not fit the terms of the U.N. Charter, which require the registration of the document in order for it to be a valid international treaty. Almost all documents regarding former Yugoslavia, however—including the Dayton Agreement—have been of dubious validity if viewed through the classical lens of international law. What matters is that the West, as the author of the all basic papers on former Yugoslavia, has played “a major role in shaping the region’s past, present, and—as it now seems—future.”⁹⁹

The Rambouillet Accords were reinforced by the Union Agreement. The Union Agreement has very few articles, but the meaning and the message it conveys are quite far-reaching and comprehensive. The Union Agreement represents in a sense a kind of a road map for the stabilization of the overall situation in the USM. In that regard, its provisions can be divided into two categories. The first category deals with the relationship between Serbia and Montenegro.¹⁰⁰ The second category of provisions, which is by far shorter, deals with the relationship between Serbia and Kosovo, on the one hand, and the relationship between both of them and the international community on the other.¹⁰¹ Only the latter provisions are of interest here because the provisions concerning the relationship between Serbia and Montenegro are of a constitutional nature and are chiefly intended for internal use. Thus far, both categories have, in fact, been implemented entirely, including the election of all bodies under the new Union between Serbia and Montenegro.

The second part of the Union Agreement states that:

Upon the expiration of a three-year period, the member states shall be entitled to instituting proceedings for a change of the state status, that is, withdrawal from the state union. If Montenegro withdraws from the state

99. Charles Ingrao, *Understanding Ethnic Conflict in Central Europe: An Historical Perspective*, 27 NATIONALITIES PAPERS 291, 291 (1999).

100. Union Agreement, *supra* note 1, ¶¶ 1, 2.

101. *Id.* ¶ 3.

union, international documents related to the FRY, the U.N. Security Council Resolution 1244 in particular, shall relate to and fully apply on Serbia as its successor.¹⁰²

The insertion of this provision in the Union Agreement, absent in the final draft of the Rambouillet Accords due to fervent opposition by the Kosovar Albanians, means that if and when Montenegro secedes from the Union, Serbia will once again have full sovereign rights over Kosovo. In addition, it means that the international community would endorse such an assertion of Serb sovereignty because it is in line with the general understanding of the internal forms of self-determination.

The main problems with the Union Agreement as a model for Kosovo are, first, that the agreement is more symbolism than substance, and, second, that it is the result of an ad hoc, pragmatic political response to the threat of Montenegrin secession that does not reflect any carefully thought-out structures that would be likely to promote the viability of the Union. The Union Agreement lacks credible enforcement mechanisms. Compared with the Dayton Peace Accords, this agreement lacks instruments that would encourage and help build social and political cohesion within the new USM. This means that the Union Agreement is based on temporizing—putting off a crisis for another day—much as UNMIK has treated the question of final status for Kosovo.

CONCLUSION

The philosophy of the Union Agreement is what makes us fearful of proposals for territorial rearrangements of Kosovo's interior, whether in the form of cantons, decentralization, or otherwise. The only way to produce peace and stability in the region as a whole is to invest in an overall social and cultural restructuring of Kosovar society through efforts that change the minds and behavior of ordinary Kosovars. Self-determination forms, applicable since 1991, can and should be a reference point to start work on a new enlightenment project beneficial to all.

102. *Id.*