

## **Contemplating Success in the Balkans: Bosnia – Return and Ethnic Re-Integration**

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### **Introduction**

As recent events in Iraq attest, there are occasionally difficulties involved in the implementation of policies that have been conceived without due regard for the complexity or practical considerations that may be encountered in their application. Similarly, while academic creativity may stimulate valuable debate, policy prescriptions that follow from such papers must also be considered in the light of both the facts on the ground and the implications of any recommendations for, above all, the populations who would be most affected by any recommendations. The sacrifice of vulnerable populations on the altar of academic adventurism cannot be justified.

We were thus surprised to see published in Volume 29 (2004) of the *Yale Journal of International Law* an article by Timothy W. Waters (“*Contemplating Failure and Creating Alternatives in the Balkans: Bosnia’s Peoples, Democracy, and the Shape of Self-Determination*”) in which the author appears to portray secession of parts of Bosnia and Herzegovina (BiH) as a recipe for furthering prosperity and democracy without taking into account as fundamental considerations the human rights, past suffering and future fate of those most affected by the 1992-1995 war.

Waters maintains that in BiH “the effects of the war and the American-brokered Dayton Accords have created the political and territorial basis for the Serbs especially, and to a lesser degree the Croats, to press a territorially based argument for the right to self-determination, or its equivalent.”<sup>1</sup> He notes that “two events have occurred since the outbreak of the war to change the picture: radical demographic shifts, and the creation of new, internationally sanctioned boundaries.”<sup>2</sup>

Waters essentially argues that the status quo, in both legal and de facto terms, militates in favour of allowing a claim for secession to be favourably received by the International Community (IC), should such a claim be made. While the legal basis for his argument remains a matter of debate, the factual assumptions and the conclusions that follow from these must also be questioned.

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<sup>1</sup> Timothy W. Waters, *Contemplating Failure and Creating Alternatives in the Balkans: Bosnia’s Peoples, Democracy, and the Shape of Self-Determination*, 29 *Yale J. Int’l L.* at 444.

<sup>2</sup> Waters, *supra* note 1, at 444.

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*The views expressed in this letter are those of the authors alone and do not necessarily reflect those of the United Nations, UNHCR, or any other organisation or institution with which either author is affiliated.*

## The state of Bosnia and Herzegovina

As will be familiar to many of those who have followed Bosnian and Balkan political developments generally since the break up of Yugoslavia, the commitment of the IC to the unity of BiH as a state has seldom wavered. This commitment stretches back to the international and domestic political circumstances surrounding the break-up of Yugoslavia, and has since been reinforced by the rights-based approach taken to rebuilding the Bosnian state, within the context and despite the limitations of the General Framework Agreement for Peace (GFAP) agreed at Dayton, Ohio in 1995. Whether such intervention has failed or succeeded, in the words of the High Representative for BiH from 1999 to 2002, “is for the returnees to Kozarac, Drvar, or Bijeljina to determine.”<sup>3</sup> To consider with any seriousness the idea of adjusting the post-war constitutional settlement, however, on the basis of arguments premised on debatable points of international law and of questionable factual assumptions, runs the risk of jeopardising the progress that has been made to date in terms of democratisation, establishing the rule of law and respect for human rights in BiH.

To portray BiH as a “fragile, fictive, even failed state”<sup>4</sup> ignores the evidence that significant progress has been made in developing the capacity of state institutions as well as conditions of stability conducive to the eventual integration of BiH into the European Union. By contrast with elsewhere (e.g. Kosovo), post-war developments in BiH can in fact be presented as a successful test-case from which positive lessons can be learned.

While one could argue that the Bosnian state is dysfunctional (to a lesser or greater degree), the extent to which state institutions have been embedded, along with democratic norms, must not be understated. Thus, on 19 April 2004, Donald Hays (then Principal Deputy High Representative) noted that “BiH is no longer a failed state” but that we have been “seeing growing evidence that the self-sustaining mechanisms through which democracies reform and renew themselves from the inside are beginning to operate.”<sup>5</sup> Similarly, while there is no doubt that the level of inter-ethnic tolerance in certain areas leaves much to be desired, one cannot underestimate the changes which have materialised over a relatively short time. By way of example, according to a survey undertaken by the NATO Stabilisation Force in BiH (SFOR) in May 2004, only 14% of Bosnian-Serbs did not like having persons who belong to other constituent people living in the Republika Srpska. The equivalent figure in August 2001 was 30%.<sup>6</sup>

The need to embed state institutions in order to proceed with European Union and NATO membership applications is also understood and recognised by all concerned. As noted by the International Crisis Group (ICG) “the government announced on 10 April 2003 that its major policy goal is to join the EU in 2009.”<sup>7</sup> It has long been recognised at the highest levels that “a unified state with responsibility for an independent currency and foreign trade... (is) absolutely essential for participation in international commerce and European integration”,<sup>8</sup> and indeed clear

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<sup>3</sup> Wolfgang Petritsch, *Dayton and Beyond: Perspectives on the Future of Bosnia and Herzegovina*, Nomos, 2004, Preface, at 11.

<sup>4</sup> Waters, *supra* note 1, at 427.

<sup>5</sup> *Bosnia Daily*, April 21, 2004, at 6.

<sup>6</sup> SFOR, Omnibus Survey Results, “*Inter-Ethnic Tolerance*” “*Perception of BiH political future*”, May 2004.

<sup>7</sup> ICG, *Thessaloniki and After II: the EU and Bosnia*, Sarajevo/Brussels, 20 June 2003, at 1. Available at: <http://unpan1.un.org/intradoc/groups/public/documents/UNTC/UNPAN010502.pdf>.

<sup>8</sup> See Carl Bildt, *Peace Journey*, 1998, Weidenfeld and Nicolson, London, at 106.

warnings have been given by Paddy Ashdown, the current High Representative, that “the entities’ state-like pretensions could stop Euro-Atlantic integration in its tracks.”<sup>9</sup>

In any event, if one were to maintain that in order for a state to be viable, mono-ethnicity is a necessary condition, this would (as Noel Malcolm puts it) beg “the question of whether only nation-states are viable states. If so, the majority of the 170-odd member-states of the United Nations must be deemed unviable.”<sup>10</sup> We assume that Waters would agree that this is not, in fact, the case.

### **The myth of perfect ethnic homogeneity**

Waters appears to consider the current “status quo” in BiH to constitute a situation in which there are identifiable, ethnically homogeneous areas which are simply waiting for recognition as separate states. While the idea of a necessary identification with any particular “ethnicity” may be somewhat anathematic to many citizens of BiH, in any event such an assumption ignores the inextricable ethnic mix of many areas.

The current ethnic mix of various areas across the country can be noted by way of illustration. In Bugojno municipality, for example, which before 1992 had a population that was approximately 42% Bosniak, 34.2% Bosnian Croat and 18.5% Bosnian Serb - with the balance being made up of self-declared ‘Others’ and ‘Yugoslavs’ - the minority Croat population is close to its pre-war levels in terms of numbers while significant numbers of Bosnian Serb returnees (3,288) have further bolstered the post-war mixed character of this region. In similar fashion, Jajce municipality can once again be considered one of the most integrated municipalities in Canton 6 (9,437 Bosniak returnees out of a pre-war population of 17,615), while in Kiseljak municipality (again Canton 6) where the pre-war population was almost equally divided between Bosniaks and Croats (40.5% to 51.9%) there have been 4,494 Bosniak returnees alone (more than half of the pre-war Bosniak) population.

In Canton 7 the ethnic mosaic is also particularly complex. According to municipal records in Konjic, for example, where Bosnian Croats constituted a pre-war minority making up 26% of the population, they now constitute 14% of the population (and this is taking into account ‘registered’ returns only). Similarly, in Stolac unofficial estimates put the current balance of populations at 40% Bosniak and 57% Bosnian Croat. However, in both of these municipalities, while the balance of populations is not so far removed from that that obtaining pre-1992, it must be noted that the numbers of returnees alone (2,527 in the case of Konjic and 1,924 in the case of Stolac) do not account for this retained balance. In some cases BiH’s local ethnic mixes have outlived the 1992-1995 war. With regard to the Republika Srpska, while it is evident that the ethnic mix here is not so pronounced as in the Federation, return statistics in particular (as detailed in the following pages) are indicative of a changing situation. For the first time since the signing of the GFAP, returns to the Republika Srpska in 2004 outnumber those to the Federation, although it is certainly fair to note that these returns are taking place within a pattern of decreasing returns across the board.

The situation in Brcko also serves as a salutary reminder of the difficulties of implementing partition along ethnic lines. Of 87,332 inhabitants in 1991, 44% were Bosniaks, 25% Bosnian

<sup>9</sup> See ICG, *supra* note 7, at 4.

<sup>10</sup> See Noel Malcolm, *Bosnia: A Short History* (2nd Edition), 1996, Macmillan, London, at 234.

Croats, 21% Bosnian Serbs and 10% others. According to the local administration's estimates as at late 2003, the District's territory is nowadays populated by some 85.000 inhabitants, who belong to the three constituent peoples and other citizens. Over 22.000 of these are returnees, of whom 15,116 are Bosniaks, 3,742 are Bosnian Croats and 2,491 are Bosnian Serbs. The question of how to divide Brcko along ethnic (or any) lines bedevilled the Dayton negotiations in 1995, and was finally solved by the adoption of an 'integrative' approach following arbitration. The success of this approach in Brcko can be measured by the economic dynamism visible in the District since the handing down of the arbitration award. There is no reason to assume that it would be any more straightforward to split the territory of Brcko along ethnic lines today than it was in 1995.

Figures such as those detailed above put the lie to assertions as to the absolute 'mono-ethnicity' of either Entity. As a result, any attempt to divide BiH along truly 'ethnic' lines would result in such a convoluted and geographically absurd division as to render negligible the prospects of economic recovery in either territory. More to the point, the practical difficulties involved in fostering ethnic secession (whether at entity, cantonal or municipal level) can only be imagined, while it would seem a matter of fantasy to consider any such division to be possible without either encouraging, or running the risk of giving the impression of tacitly condoning, wide scale violations of the rights of minorities.

### **Minority Returns**

Waters' argument also appears to be reliant on the view that cross-ethnic returns have in fact been minimal.<sup>11</sup> As Tim Judah has indicated, 'minimal' can be a somewhat misleading term. As he puts it (describing the returns to Kozarac, Drvar etc.): "when it comes to the former Yugoslavia, and you see a town with half its pre-war population, do you say that it is "half full" or "half empty"?"<sup>12</sup> Waters also questions the accuracy of the return statistics compiled by the United Nations High Commissioner for Refugees (UNHCR). These are, however, widely regarded as being authoritative and in fact are the only country-wise set of statistics gathered (and regularly updated) on return since 1996. Their usefulness should thus not be underestimated.

According to these statistics, 443,704 "minority" returns (defined as "persons who have returned to their pre-conflict municipalities, where these are currently dominated by (an)other constituent people(s) of BiH") were reported as having taken place between January 1996 and June 2004. Almost half a million people, in a country of 4 million, had thus decided to return to their homes of origin in areas where constituent people or peoples other than their "own" are numerically and politically stronger. The most significant factors in this population movement appear to be the success of the unprecedented property repossession process that has taken place in urban areas, and the availability of (admittedly insufficient) international reconstruction assistance, predominantly in rural areas. These processes and the related assistance have enabled returnee families to re-start their lives in their pre-war homes of origin, albeit often under initially basic living conditions.

The right of return, as envisaged in Annex 7 of the GFAP, "embodies the hope and presumption of its authors... that the return and reintegration of Bosnia's national groups would serve both as the foundation of a stable state and the scourge of chauvinist politics."<sup>13</sup> In this regard, the figures

<sup>11</sup> Waters, *supra* note 1, at 458.

<sup>12</sup> Tim Judah, *Half-Empty or Half-Full Towns*, Transitions online, February 2004.

<sup>13</sup> ICG, *The Continuing Challenge of Refugee Return in Bosnia and Herzegovina*, Balkans Report No. 137, 13 December 2002, at 5.

for minority returns speak for themselves. To mention only a few, according to UNHCR data from April 2004: in Novi Grad municipality, Canton 9 (Sarajevo), there had been 4,692 Bosnian Croat returnees and 24,751 Bosnian Serb returnees; in Novo Sarajevo, 3,097 Bosnian Croat and 15,733 Bosnian Serb returnees; in Drvar (Canton 10) there had been 6,759 Serb returnees, while in Zenica municipality (Canton 4), there were 3,620 Bosnian Croat returns and 3,436 Bosnian Serb returns. As far as the Republika Srpska is concerned, in Banja Luka alone (the capital of the Republika Srpska), there were 9,346 Bosniak returnees and 2,486 Bosnian Croat returnees. Similarly, in Bijeljina (Eastern RS), there were 12,910 Bosniak returnees (in what was one of the first areas in BiH to be ethnically ‘cleansed’ in 1992.) In Doboj municipality, there had been 23,695 Bosniak returnees by April 2004. In Prijedor, during the war the site of the infamous Omarska and Keraterm “concentration camps”, there were 11,900 Bosniak returns, while in Zvornik, there were 13,795 Bosniak returnees.

Waters’ speculation that “the actual, meaningful number of cross-ethnic returnees is considerably less than the UNHCR figure commonly reported”<sup>14</sup> also omits to consider that – as noted by the Norwegian Refugee Council<sup>15</sup> - spontaneous individual returns (of persons who for one reason or another did not register with UNHCR or approach the local authorities) have taken place, but have not been captured by return statistics. Such unrecorded movements may have resulted in an under-reporting of real minority return figures.

Moreover, while monitoring of the exact duration of each individual’s return both in urban and rural areas would be virtually impossible (and in any event well beyond the scope of UNHCR’s mandate and resources), Waters’ claim that UNHCR defined a returnee as a person who “stayed one night in his former home or town”<sup>16</sup> appears to be baseless. Ongoing monitoring has been carried out by both various international and national bodies. Similarly, while incidences of empty, reconstructed houses have been recorded, legal measures and procedures have been put in place to address this. Additionally, the international community is aware that some persons are disposing of repossessed properties. This phenomenon, however, does not justify discounting minority return figures, and the long-term benefits of property repossession (absent return-related considerations) should not be ignored either. As noted in one Property Law Implementation Plan (PLIP) publication, history teaches that “unresolved property disputes remain as a source of tension for decades... (this) has made the return of property an essential part of the peace-building and reconciliation process in Bosnia.”<sup>17</sup> While repossessed property may or may not eventually be sold, return without property restitution would be impossible.

Given these considerations, it simply does not seem reasonable to conclude that minority returns have been insignificant in terms of numbers, nor that those returns that have taken place have been unsustainable.

## Reversing Return

Waters’ paper appears to imply that minority returns perhaps can (or would) acceptably be reversed in the course of implementing any secessionist project. In one footnote, for example, Waters notes that while “there is no reason to assume that non-integration or separation would

<sup>14</sup> Waters, see supra note 1, footnote no. 88, at 445.

<sup>15</sup> Norwegian Refugee Council, *Profile of Internal Displacement: Bosnia and Herzegovina*, January 28 2004, at 128.

<sup>16</sup> Waters, see supra note 1, at 444.

<sup>17</sup> PLIP, *Inter-Agency Framework Document*, October 2000, p. 2. Available at: <http://www.unhcr.ba/protection/plip/PLIPFRAM.PDF>.

necessarily lead to the persecution of minorities... we should assume any minority community compelled to separate would likely depart.”<sup>18</sup> Aside from the idea that contemplation of such a notion would fly in the face of stated and accepted international policy as regards BiH, this could moreover be construed by some as condoning the breach of a fundamental human right.<sup>19</sup> If contemplation of secession requires contemplation of the departure of minorities from their homes of origin, this would appear to negate the application of refugees’ and IDPs’ oft-cited right of return.

Such a departure may also be incompatible with the United Nations’ ”Guiding Principles on Internal Displacement”. As noted in a publication supported by the United Nations Office for the Co-ordination of Humanitarian Affairs, “protection against arbitrary displacement is a fundamental human right... Displacement is prohibited, no matter what the circumstances, when it seeks to alter the ethnic, religious, or racial composition of particular areas.”<sup>20</sup> The centrality of human rights concerns to return has also been underlined by Walter Kaelin (Representative of the UN Secretary General on Human Rights of Internally Displaced Persons). As he has put it, “full respect for and implementation of human rights is a necessary condition for making the return of persons displaced in Bosnia and Herzegovina sustainable.”<sup>21</sup>

There is no doubt that academic work such as Waters’ paper should not in any event be linked to the nationalist agenda (and tactics) that lay behind the ethnic cleansing that characterised the 1992-1995 war. Nonetheless, there can be little doubt that were policy makers to begin to entertain with any degree of seriousness the division of BiH into multiple states, fugitives from justice such as Radovan Karadzic and Ratko Mladic would have sufficient grounds to celebrate a victory of sorts, both over their wartime enemies and the IC.

As for the returnees’ themselves, Waters is doubtless correct to note that the IC owes ‘Bosnians a great deal’.<sup>22</sup> It seems difficult to envision, however, in what manner the IC could justify failing to satisfy the legitimate expectations of minority returnees, who have returned in good faith in reliance on and with support provided in accordance with the long-stated policies and objectives of the IC. If we owe Bosnians anything, surely our greatest obligation must be to protect those who suffered most seriously in the recent conflict, who remain more vulnerable than others in BiH, and who must be able to continue to exercise their constitutional right “freely to return to their homes of origin.”<sup>23</sup>

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<sup>18</sup> Waters, see supra note 1, at 458.

<sup>19</sup> The right of return to a pre-war home has been affirmed separately (and variously) by the UN Security Council (Resolution 876, 1225, 1255 and 941), the Commission on Human Rights (Turku/Abo Declaration on Minimum Humanitarian Standards) and the Sub Commission on Prevention of Discrimination and Protection of Minorities (Resolution 94/23).

<sup>20</sup> Brookings Institution Project on Internal Displacement, Handbook for Applying the Guiding Principles on Internal Displacement, 1999, at 16.

<sup>21</sup> United Nations Press Release, Sarajevo, 15 June 2005 “UN Representative Urges Authorities to Use Human Rights as a Yardstick for Addressing the Remaining Problems of Displacement in Bosnia and Herzegovina”. Available at: [http://www.brook.edu/fp/projects/idp/20050615\\_bosnia\\_pressrelease.htm](http://www.brook.edu/fp/projects/idp/20050615_bosnia_pressrelease.htm).

<sup>22</sup> Waters, see supra note 1, at 424.

<sup>23</sup> GFAP, Annex 7, Article 1, Paragraph 1. Available at: <http://www.oscebih.org/overview/gfap/eng/annex7.asp#ArticleIRightsofRefugeesandDisplacedPersons>.

## Conclusion

As Waters recognises, the question of secession remains problematic in international legal terms. Even if, in principle, the ‘Badinter Commission’ decisions were to be considered applicable to the state of BiH, and assuming that their consistent application would result in the creation of new, mono-ethnic states from the ashes of BiH, the practical application of such rules would seem nigh-impossible without simultaneously accepting that such implementation would necessitate trampling on the rights of those most in need of continuing protection. As one recent study has noted, “Bosnia and Herzegovina’s recent political history has seen many mapmakers. Redrawing boundaries has been a feature of both local politics and international peace-making for some time, with tremendous costs in terms of individual lives and institutional instability.”<sup>24</sup>

Similarly, to justify such an exercise in the name of democracy,<sup>25</sup> is perhaps not altogether wise either. As noted by a previous head of the OSCE Mission in BiH, Ambassador Robert Beecroft, in his departing address, the so called ‘nationalist’ political leaders in BiH “shamelessly abuse people’s fears and misery so as to preserve and reinforce their own economic interests. For these ‘leaders’ waving ‘nationalist’ banners, domination, control and power matter more than a common, lawful and functional state in which all citizens would prosper and which would one day assume its proper place in Europe.”<sup>26</sup>

At the end of the day, if traditional legal doctrine in regard to secession is to be discarded as regards BiH, then there would seem to be no reason why the same novel doctrine should not be applied in places not only such as Kosovo, but also other cases, ranging from northern Italy to southern Sudan, and, in the case of any Quebecois secession, to West Montreal (why not?). Given the practical absurdity of such thoroughgoing application, and as argued by D. L. Horowitz, it seems far more likely that “most people will have to find political techniques to enable them to live together within existing states; unless they are prepared to do so much ethnic cleansing that the world will soon run out of soap”.<sup>27</sup> Thus, to argue that international law militates in favour (or otherwise) of the secession (and presumably subsequent recognition) of the Republika Srpska, the Federation of BiH, Brcko District or West Montreal is to some extent to debate the number of angels that may be able to fit comfortably on the head of a pin. In the case of BiH, however, the implications of such academic discourse must be noted – such arguments provide additional ammunition, as well as credibility, to nationalist leaders who would deny refugees, displaced persons and minority returnees their rights. In order to ensure that these rights are fully respected, to talk of encouraging secessionist tendencies in BiH thus remains irresponsible. As events in Iraq and elsewhere have shown, while talk may be cheap, to act without due consideration and sufficient forethought may be extremely costly.

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<sup>24</sup> European Stability Initiative, *Making Federalism Work – A Radical Proposal for Practical Reform*, 8 January 2004, Brussels. Available at: [http://www.esiweb.org/pdf/esi\\_document\\_id\\_48.pdf](http://www.esiweb.org/pdf/esi_document_id_48.pdf).

<sup>25</sup> Waters, see supra note 1, at 4 464-470.

<sup>26</sup> Robert M. Beecroft, *Comment: Parting Thoughts on Bosnia’s Paralysis*, 8 July 2004. Available at: [http://www.iwpr.net/index.pl?archive/bcr3/bcr3\\_200407\\_506\\_5\\_eng.txt](http://www.iwpr.net/index.pl?archive/bcr3/bcr3_200407_506_5_eng.txt).

<sup>27</sup> Donald L. Horowitz, *Self-Determination: Politics, Philosophy, and Law*, in Schapiro, I. and W. Kymlicka (eds) *Ethnicity and Group Rights*, New York University Press, 1997, at 453.