

THE CONSTITUTION OF BOSNIA-HERZEGOVINA

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The new constitution of the Republic of Bosnia and Herzegovina is clearly a transitional document. It is, of course, the product of civil war, of "ethnic cleansing," and of (well justified) mutual mistrust. It was created as part of the peace package negotiated at Dayton in November 1995 and accepted by the two constituent "Entities" (the Federation of Bosnia and Herzegovina, and the Republic of Srpska) and by the central government as the new constitution of the internationally recognized Republic. It is the second new constitution to be negotiated with international assistance and encouragement in the course of the recent hostilities; the first, as amended, now serves as the constitution of the Federation which forms one half of the Republic.¹

This new Bosnian constitution makes the American Articles of Confederation of two centuries ago look like a centralized, unitary form of government. It distributes almost all governmental authority to the two "Entities," the Federation of Bosnia and Herzegovina (in the territory controlled by the former Croat and Muslim government) and the Republic of Srpska (in the territory formerly controlled by the Bosnian Serbs), and then effectively disables the central government from exercising the few powers given to it. It thus combines a "minimalist" approach to national government with a "maximalist" approach to checks and balances. The central government of the new Bosnia has very few competences and these can be exercised only with acquiescence of all parties. The constitution is only one of 12 annexes to the General Framework Agreement on peace in the area. Some of the other annexes also have constitutional dimensions and will be discussed here. The protection of human rights, the restoration of the infrastructure, and the settlement of disputes between the Entities are all subjects of separate agreements outside of the constitution itself.

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1. 33 I.L.M. 740 (1994).

The level of distrust evidenced by the instrument is illustrated by the heavy reliance on “outsiders,” i.e., on persons from outside of the former Yugoslavia, to provide many of the leadership functions of the new government by providing the neutral tie-breaking vote in many important governmental institutions.

BACKGROUND

A brief word of history is necessary, if only to identify the players. The former Yugoslavia was nominally a federation of six republics: Slovenia, Croatia, Serbia, Montenegro, Macedonia, and Bosnia-Herzegovina. In the days of Tito, the federation operated with an amazing uniformity, at first because of the personal influence of Tito, and later because of the unifying role of the Communist Party. With the collapse of the communist bloc, it flew apart. Slovenia quickly became an independent republic, and Croatia followed soon thereafter. Macedonia also became independent, but engaged in endless squabbles with Greece over its name; it is now known as the Former Yugoslav Republic of Macedonia. Serbia and Montenegro continued a quasi-federal existence, internationally recognized under the name Yugoslavia (Serbia and Montenegro).² Bosnia-Herzegovina, the most multi-ethnic of the nations, collapsed into its civil war.

There were really three parties to that conflict: the Bosnian Serbs, who were initially supported by Serbia, i.e., by Yugoslavia (Serbia and Montenegro); the Bosnian Croats, who were initially supported by Croatia, but soon came to ally themselves with the Moslems, and the Bosnian Moslems, who had the leadership of the Bosnia-Herzegovina government. (There was also another small group, called simply “Others,” who were caught in the middle of all of this, and who considered themselves only citizens of the region, without ethnic allegiance.³ In this group were some individuals of Italian extraction, some Jews, and some mixed families.)

In 1994, under the aegis of the Vance-Owen peace talks, a constitution was worked out for the portions of Bosnia-Herzegovina

2. None of the successor states of the former Yugoslavia has inherited its international recognition. The Arbitration Commission established by the Conference for Peace in Yugoslavia ruled that the former Socialist Federal Republic of Yugoslavia had been dissolved and that all of the successors were new states. Opinion No. 9, reprinted in 31 I.L.M. 1523 (1992). Most other international organizations have followed suit. Thus all of the former Yugoslav republics are on an equal footing in international law. This does create some difficulties with respect to succession to treaty rights and obligations.

3. The “Others” were specifically recognized in the constitution of the Federation, but are not recognized as a separate group in the constitution of the Republic.

vina then controlled by the Bosnian government. This called for a cantonalization of those portions of the country under Croat-Moslem control into fairly autonomous provinces, with executive and legislative bodies representative of the two groups. That constitution explicitly recognized that the Serbian controlled areas would establish their own framework of government. Maintaining the unity of Bosnia-Herzegovina and providing protection for human rights remained national aims. The Serbs, however, formed the Republic of Srpska, with an apparent view to its eventual unification with Yugoslavia (Serbia and Montenegro).

THE CONSTITUTION

The Dayton Peace Accords sought to end the ethnic fighting by providing fixed boundaries between the two warring factions. Annex 4 to the Framework Agreement contains the text of the new constitution.⁴ It preserves the pretense of a single Bosnia-Herzegovina by establishing a national government overarching the actual regimes of the two "Entities" (or States) within it.⁵ One of these was the old Federation of Bosnia and Herzegovina (in the territory controlled by the Muslims and Croats); the other was the Republic of Srpska. Note the linguistic anomaly: the federal or central government is called the Republic of Bosnia and Herzegovina, while the State or "Entity" government is called the Federation.

The weakness of the new Republic is seen most clearly in the allocation of powers between the central and Entity levels. The central government is responsible for foreign affairs, foreign trade, and currency matters. Virtually everything else—courts, police, ordinary legislation, local government, education, and even military affairs—is left to the two Entity governments. The full list of powers allocated to the central government is set forth in Article III of the new constitution:

The following matters are the responsibility of the institutions of Bosnia and Herzegovina:

- (a) Foreign policy.
- (b) Foreign trade policy.
- (c) Customs policy.
- (d) Monetary policy as provided in Article VII.

4. The entire Dayton Accords are reproduced at 35 I.L.M. 75 (1996). The Constitution can be found in *id.* at 117.

5. Bosnia-Herzegovina Const., Art. I, § 3.

(e) Finances of the institutions and for the international obligations of Bosnia and Herzegovina.

(f) Immigration, refugee, and asylum policy and regulation.

(g) International and inter-Entity criminal law enforcement, including relations with Interpol.

(h) Establishment and operation of common and international communications facilities.

(i) Regulation of inter-Entity transportation.

(j) Air traffic control.⁶

Even within these areas, the choices of the central government are strictly limited. For the first six year period, the constitution prohibits the new central bank from “creating money.”⁷

The central government is organized on a federalist scheme—but one driven to an extreme of states’ rights. Everything is apportioned in thirds—one part Serbian, one part Bosnian,⁸ and one part Croatian. The Presidency consists of three individuals, one from each group.⁹ The bicameral legislature consists of an upper house (House of Peoples) with five from each group, and a lower house (House of Representatives) with fourteen from each group. Each of these bodies is to have three presiding officers who rotate in office.¹⁰

The checks and balances are honed to a fine degree. The three-member Presidency is supposed to act by consensus.¹¹ If that fails, two members may adopt a decision, but the dissenting member may then declare that decision “destructive of a vital interest of the Entity from the territory from which he was elected.”¹² In that case, the matter is referred to the legislature of the ethnic group from which the dissenting member of the Presidency was elected.¹³ If they uphold “their” member of the Presidency by a two-thirds vote, the challenged action does not take effect.¹⁴

6. Bosnia-Herzegovina Const., Art. III, § 1.

7. Bosnia-Herzegovina Const., Art. VII, § 1.

8. The Constitution refers to citizens of Bosnian extraction as “Bosniacs.” See, e.g., Bosnia-Herzegovina Const., Art. V, § 2(d).

9. Bosnia-Herzegovina Const., Art. V.

10. Bosnia-Herzegovina Const., Art. IV, §§ 1, 2, 3(b).

11. Bosnia-Herzegovina Const., Art. V, § 2(c).

12. Bosnia-Herzegovina Const., Art. V, § 2(d).

13. In the case of Srpska, this is its National Assembly; in the case of the Bosniac and Croat members, it is the members of the upper house of the Federation who are of that ethnic group. *Id.*

14. *Id.*

The most ominous evidence of the divisions that remain within the troubled country is to be seen in the provisions relating to the armed forces. With respect to most civilian matters, the Presidency acts by consensus. With respect to military issues, however, the Constitution provides: "Each member of the Presidency shall, by virtue of the office, have civilian command authority over armed forces."¹⁵ Clearly, the constitution writers could not ignore the stark fact that each of the ethnic groups has its own military force, which will not be responsive to any single central authority. It may be one country, but it has (at least) three armies.

In the legislative branch, the Parliamentary Assembly, there are similar checks and few balances. In the upper house, the House of the Peoples, a majority of each ethnic group must be present in order for there to be a quorum,¹⁶ so a dissenting ethnic group could forestall action if three of its five members fail to attend sessions. In both houses, the presiding officers are supposed to encourage decisions to be taken with a majority of each ethnic group concurring. Failing such broad support, a simple majority may take action, but if two-thirds of an ethnic group opposes the legislation, it does not take effect.¹⁷

There is still another "ethnic veto." A majority of the five members of the upper house from any one of the ethnic groups may declare a proposed decision of the legislature to be "destructive of a vital interest" of that ethnic group. Such a declaration then requires the votes in the upper house to be taken separately; a majority of each of the three ethnic "caucuses" is necessary for passage. (If a majority of an ethnic group has already identified the decision as "destructive," it seems unlikely that a majority of that same group will vote for the legislation.) If one of the other ethnic caucuses objects to the declaration, the declaration is first referred to a joint committee and then to the Constitutional Court, "which shall in an expedited process review it for procedural regularity."¹⁸ Note that only the procedure of making the declaration, not its substance, is subject to judicial review.

The legislative body is, however, a relatively powerless institution. Since most of the powers of the central government are in those fields that are essentially executive, there is little for the

15. Bosnia-Herzegovina Const., Art. V, § 5(a).

16. Bosnia-Herzegovina Const., Art. IV, § 1(b).

17. Bosnia-Herzegovina Const., Art. IV, § 3(d).

18. Bosnia-Herzegovina Const., Art. IV, §§ 3(e), (f).

parliament to do. Under Article IV, section 4 of the Constitution, the powers of the Parliamentary Assembly are limited to:

- (a) Enacting legislation as necessary to implement decisions of the Presidency or to carry out the responsibilities of the Assembly under this Constitution.
- (b) Deciding upon the sources and amounts of revenues for the operations of the institutions of Bosnia and Herzegovina and international obligations of Bosnia and Herzegovina.
- (c) Approving a budget for the institutions of Bosnia and Herzegovina.
- (d) Deciding whether to consent to the ratification of treaties.
- (e) Such other matters as are necessary to carry out its duties or as are assigned to it by mutual agreement of the Entities.¹⁹

Even these powers are circumscribed by other parts of the constitution. For example, if the Parliamentary Assembly fails to pass a budget, the budget from the previous year continues in effect.²⁰ (The government of Bosnia may have little power, but the authors of the constitution, sitting in Dayton during a period of shutdown of the United States government, were aware of the possibility of even further stalemate.) Although the national government may collect taxes (e.g., the customs duties provided under its authority), it is expected that the bulk of national revenue will come from assessments on the two Entities. The Federation will contribute two-thirds and Srpska will contribute one-third. With tight control of the purse strings, the two Entity governments will be able to control central action.

The structure of the Constitutional Court also demonstrates the delicate balancing of the situation. It will have nine members, including two from each ethnic group (appointed by that group), and three foreign neutrals, appointed by the President of the European Court of Human Rights "after consultation with the Presidency."²¹ The Court will have very limited jurisdiction. It will have original jurisdiction in cases arising between the Entities, between the Entities and the central government, or between organs of the central government.²² It also will have appellate jurisdiction only over cases involving constitutional is-

19. Bosnia-Herzegovina Const., Art. IV, § 4.

20. Bosnia-Herzegovina Const., Art. VIII, § 2.

21. Bosnia-Herzegovina Const., Art. VI, § 1.

22. Bosnia-Herzegovina Const., Art. VI, § 3(a).

sues.²³ In human rights cases, it will have jurisdiction on referral of legal questions from courts in either of the two Entities.²⁴ This distinction may be mischievous. The only direct right of access for a litigant will be in constitutional cases. In other "human rights" cases, the litigant will be forced to rely upon the willingness of the local court to refer the matter to the Constitutional Court for its decision. Because human rights issues are fundamentally interwoven into the constitution, it may be possible for litigants to characterize them as involving constitutional issues. Other than the Constitutional Court, there is no provision for a federal judiciary.

Several other provisions of the constitution deserve special note, including the protection of human rights, the provisions permitting the two Entities to enter into agreements with neighboring states, and the effort to exclude the greatest offenders of the war from political leadership positions. The intense commitment to human rights, both within the constitution and in the other agreements that are part of the Dayton accords, is discussed separately below.

One unusual provision permits each of the Entities to "establish special parallel relationships with neighboring states consistent with the sovereignty and territorial integrity of Bosnia and Herzegovina."²⁵ Unlike most national constitutions, which normally forbid or limit their States from entering into foreign compacts, this document specifically authorizes such agreements. This will primarily permit Srpska to enter into various arrangements with neighboring Yugoslavia (Serbia and Montenegro) without violating either the Accords or the constitution. A gradual absorption of many governmental services into the ambit of Belgrade is to be expected, since only foreign affairs and foreign trade are effectively within the scope of powers exercised by the central government and thus excluded from the parallel arrangements. Disputes about whether a "special parallel relationship" violates these standards may be decided by the Constitutional Court.²⁶

23. Bosnia-Herzegovina Const., Art. VI, § 3(b).

24. Bosnia-Herzegovina Const., Art. VI, § 3(c). The relationship between the Constitutional Court and the Human Rights Chamber, created by a separate annex to the Dayton peace settlement, remains unclear.

25. Bosnia-Herzegovina Const., Art. III, § 2(a).

26. Bosnia-Herzegovina Const., Art. VI, § 3(a).

HUMAN RIGHTS

The world has been appalled by the violations of human rights in the Former Yugoslavia. The Dayton Agreements address this issue in two ways. Human rights are the subject of Article II of the constitution. An institutional framework for dealing with human rights issues is also spelled out fully in a separate agreement, which is Annex 6 of the Accords. The constitution also contains provisions prohibiting discrimination²⁷ and protecting refugees.²⁸

Although the constitution contains a catalog of human rights to be protected by the Republic,²⁹ the most interesting provision is the adoption of human rights norms by reference: "The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law."³⁰ This has the effect of incorporating the highly developed law of the European Convention, as developed by the European Commission and the European Court of Human Rights, directly into the Bosnian constitution, making it the supreme law of the land. Such a noble aspiration is to be applauded. Bringing it to realization will be the more difficult task.

The constitution also requires the national government to become (or remain) a party to fifteen listed international human rights agreements. These include the Genocide Convention, the Geneva Conventions (including the protocols protecting persons in times of internal war), the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, and European and international conventions on the protection of minorities.³¹

Separate from the constitution, but referred to in it,³² the central government and the two Entities entered into an Agreement on Human Rights.³³ It not only contains a list of rights parallel to that in the constitution, but also establishes a series of mechanisms to enforce them. There are an Ombudsman and a

27. Bosnia-Herzegovina Const., Art. II, § 4.

28. Bosnia-Herzegovina Const., Art. II, § 5.

29. Bosnia-Herzegovina Const., Art. II, § 3.

30. Bosnia-Herzegovina Const., Art. II, § 2.

31. Bosnia-Herzegovina Const., Art. II, § 7, and Annex I to the Constitution.

32. Bosnia-Herzegovina Const., Art. II, § 1.

33. Annex 6 to the Dayton Accords, 35 I.L.M. 130 (1996) ("*Human Rights Agreement*").

Human Rights Chamber.³⁴ These bodies are responsible for considering alleged violations of the provisions of the European Convention as well as alleged discrimination by official action.³⁵ In the initial stages, the Ombudsman will be an individual from outside of the geographic area, to be appointed by the Organization for Security and Cooperation in Europe (OSCE), the Helsinki Declaration organization.³⁶ The Ombudsman's function is to investigate (both on the basis of allegations and on the basis of apparent violations) as well as to make reports.³⁷ Enforcement functions are, however, limited to forwarding reports to the various parties or initiating proceedings in the Human Rights Chamber.³⁸

The Human Rights Chamber is to be composed of fourteen members, but normally acts in two chambers of seven members each.³⁹ There will be two Croats, two Bosniacs, and two Serbs, each appointed by their own governments,⁴⁰ and eight outside members, appointed by the Committee of Ministers of the Council of Europe, the Strasbourg organization.⁴¹ Each seven member chamber will thus consist of three members from the ethnic groups and four outsiders. It has jurisdiction to review complaints filed by individuals or by the Ombudsman and may issue decisions that are binding on any of the governments.⁴² After five years, at the end of the year 2000, administration of the human rights machinery will revert to the central government, unless the parties otherwise agree.⁴³

Another side agreement, Annex 7 to the Accords, establishes a regime for refugees.⁴⁴ Under that agreement, refugees and displaced persons have the right to return to their homes where they are entitled to protection by the local authorities, even if they are members of the minority. They are entitled to a general amnesty for all crimes connected with the conflict, except those defined as "serious violation[s] of international humanita-

34. *Human Rights Agreement*, Art. II, § 1.

35. *Human Rights Agreement*, Art. II, § 2.

36. *Human Rights Agreement*, Art. IV, § 2.

37. *Human Rights Agreement*, Art. V.

38. *Human Rights Agreement*, Art. V, § 7.

39. *Human Rights Agreement*, Art. VII, § 1; Art. X, § 2.

40. The two Croat and two Bosniac members will be appointed by the Federation; the two Serb members by Srpska. *Human Rights Agreement*, Art. VII, § 2.

41. *Human Rights Agreement*, Art. VII, § 2.

42. *Human Rights Agreement*, Art. XI, §§ 3, 6.

43. *Human Rights Agreement*, Art. XIV.

44. Annex 7 to the Dayton Accords, 35 I.L.M. 136 (1996) ("*Agreement on Refugees and Displaced Persons*").

rian law” by the Statute of the Yugoslav War Crimes Tribunal.⁴⁵ Again the issue will be supervised by a commission, consisting of six representatives of the three conflicting factions and three appointed by the President of the European Court of Human Rights.⁴⁶

OTHER SIDE AGREEMENTS AND INSTITUTIONS

The constitution is, of course, part of a package—the Dayton Accords. Unlike the basic agreement, which is signed by the three internationally recognized governments, the Republic of Bosnia and Herzegovina (i.e., the central government), Croatia, and Yugoslavia (Serbia and Montenegro), the constitution was “accepted” by the two Entities, Srpska, and the Federation of Bosnia and Herzegovina.

The whole package, however, contains additional elements of a constitutional character. Annex 5 of the Agreement commits the two Entities to arbitration of disputes between them.⁴⁷ No details are provided, but presumably this is separate and independent of any reference of these disputes to the Constitutional Court. Again, this is a sign of the expected weakness of the institutions of the new national government.

Annex 9 creates a commission to establish joint public corporations of the two Entities to operate such activities as railroads and communications facilities.⁴⁸ The fragility of the situation is underscored by the fact that this task was not given to the central government, but rather to a joint venture of the two Entities, to be presided over by a neutral chair selected by the European Bank for Reconstruction and Development.⁴⁹ Indeed, the central government is not even a party to the instrument creating this commission; it will be run by the two Entities and the neutral overseers without central participation. It is to establish a transportation corporation and may establish other public corporations for services such as posts and communications.⁵⁰

45. *Agreement on Refugees and Displaced Persons*, Art. VI.

46. *Agreement on Refugees and Displaced Persons*, Art. IX, § 1.

47. 35 I.L.M. 129 (1996).

48. 35 I.L.M. 144 (1996) (“*Agreement on Establishment of Bosnia and Herzegovina Public Corporations*”).

49. *Agreement on Establishment of Bosnia and Herzegovina Public Corporations*, Art. I, § 2.

50. *Agreement on Establishment of Bosnia and Herzegovina Public Corporations*, Art. II, § 1; Art. 3.

Another separate agreement establishes a Commission to Preserve National Monuments.⁵¹ Here again, two members will come from the Federation, one from Srpska, and two will be appointed by the Director-General of UNESCO.⁵²

CONCLUSIONS

The constitution and its accompanying documents confirm the fragility of the situation and the difficulties that confronted the negotiators who set forth to create a peace settlement. Several factors deserve special notice.

The consistent pattern of checks and balances has created a system in which unanimous agreement of the three factions is necessary for any governmental action at the central level. This is no "Connecticut compromise" in which there is a balancing of power. Each of the Entities possesses a virtually absolute veto over the activities of the central government. This may have produced a consensus within the time limits available for settlement in Dayton, but it is hardly auspicious for the functioning of Bosnia and Herzegovina as a modern national state.

In light of the weakness of the central government, the provision for cooperation agreements with neighboring states is a thinly disguised effort to make it possible for the Republic of Srpska to achieve most of the elements of its war aims, including unification with Serbia, while preserving the identity of Bosnia-Herzegovina as a national state as a legal fiction. Indeed, it may be an incentive for the Croat-dominated sections of the Federation to seek similar arrangements with Croatia. In short, the idea of a single Bosnia won on paper, but not in reality. This decision may have significant consequences in other ethnic conflicts, because it may provide some evidence that ethnic separatists can get most of what they want.

The multiple mechanisms that call for the appointment of the controlling members of important national institutions to be foreigners, selected by foreigners, reemphasize the absence of national unity. Table I indicates their positions and the appointing authorities. The list of appointing authorities also emphasizes the number of public international organizations that have become involved in the attempt to settle the problem. Each seems to have obtained a responsibility for management of some part of the troubled life of Bosnia for five years, or perhaps

51. Annex 8, 35 I.L.M. 141 (1966) ("*National Monuments*").

52. *National Monuments*, Art. II, § 1.

TABLE I

Institution	Membership on Bosnian Governmental Bodies				Foreign Members
	Bos.	Croat.	Serb.	Foreign	Appointed By
Constitutional Court	2	2	2	3	President, European Court of Human Rights
Central Bank Governors	1*	1*	1	1	International Monetary Fund
Ombudsman	0	0	0	1	Chairman of Organization for Security and Cooperation in Europe (OSCE)
Human Rights Chamber	2**	2**	2	8	Committee of Ministers of the Council of Europe
Commission for Displaced Persons and Refugees	2**	2**	2	3	President, European Court of Human Rights
Commission to Preserve National Monuments	1	1	1	2	Director-General, UNESCO
Commission on Public Corporations	1	1	1	2	President, European Bank for Reconstruction and Development

* The Bosniac and Croat members each have one-half vote; the foreign member has an additional tie-breaking vote.

** Technically the Federation names 4; an even split between Bosniac and Croatians is assumed.

more. These are in addition to the roles of NATO in preserving the peace, and of the United Nations High Representative in coordinating the other activities of international organizations in rebuilding the country.⁵³ Most of these transitional arrangements are for a five year period. They will expire in December

53. Annex 10, 35 I.L.M. 146 (1996).

2000. At that time, the central government of the Republic is supposed to assume responsibility for the appointment of members of these public bodies, unless all of the parties agree otherwise. Although the first real test of the viability of this arrangement will come shortly after the NATO peacekeepers depart in late 1996, another test of the success of the constitution will come when the central government is to take over these governmental responsibilities from the foreign intervenors. If the healing process has been thorough, the central authorities may be able to resume many of these functions. If it has been only adequate, the parties may agree to continue the foreign administrations of these functions for a few years into the future. If it has failed, there may be partition or even renewal of the hostilities.

These arrangements may be situation-specific, but they may have a more general significance. Nation states, which once asserted an exclusivity of their internal administrative apparatus and a virtually unconditional requirement that their governors also be their citizens, may be undergoing radical transformation. For virtually all Europeans, the participation of the regional European Court of Human Rights in deciding the validity of national actions is commonplace. For those in the European Union, participation of that organization in planning the economic policy of the country, with a broader perspective in mind, is also an accepted derogation from stronger forms of traditional sovereignty. We may be entering a time in which the geographic nation state no longer has the exclusivity of governing power that it once claimed. With that change, constitutions may become increasingly complex.

Bosnia-Herzegovina continues to be a troubled place. Its peace is held together by a military presence from NATO that is monitoring the lines between the two Entities that form the nation. An international police task force is providing additional enforcement.⁵⁴ The constitution of Bosnia-Herzegovina is thus clearly a transitional document. Like the Articles of Confederation of the United States, it is too weak to maintain a long lasting nation state. Whether the transition is toward a more effective constitutional structure in which a community will emerge, or toward a more formal dismemberment cannot be answered yet. It is clear, however, that the constitution produces a much looser confederation than that of any other geographic unit that purports to be a single nation state.

54. Annex 11, 35 I.L.M. 149 (1996).