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Abstract

This article examines the relationship between moral claims and political demands made by the Bosniak elites against the backdrop of Bosnia's Genocide Case at the International Court of Justice. The article demonstrates how in the post-Dayton period, the Genocide Case became an integral element of the statebuilding strategy seeking the constitutional and territorial overhaul of the Dayton Bosnian state and the restoration of the pre-Dayton, unitary state, consistent with the interests and the identity of the Bosniak majority. Situating the Genocide Case in the realm of the 'politics of entitlement' characteristic of many divided societies, this article argues that the Bosniak statebuilding strategy compounds the challenges faced by Bosnia's post-conflict, divided society.

In February 2007, the International Court of Justice (ICJ) rendered its judgment on the merits of Bosnia's Genocide Case, ruling that genocide was committed against the Bosnian Muslims (Bosniaks) in Srebrenica by the Bosnian Serb army. Initiated in 1993 by the Muslim-controlled Bosnian government in an effort to solicit external intervention in the Bosnian civil war (1992–1995), the case was from its inception politically motivated. Its primary aim was to assist the Bosnian Muslims in preserving Bosnia as a unitary, centralized republic and in preventing ethnoterritorial decentralization of the state favored by Bosnia's Serb and Croat minorities.¹

In 1995 Bosniaks, Serbs, and Croats accepted the internationally brokered Dayton Accords, which guaranteed the territorial integrity of the Bosnian state but divided it into ethnic regions. The externally imposed peace settlement, however, failed to reconcile the dramatically competing visions of the Bosnian state among groups with divergent national identities and state allegiances. The Dayton Peace Agreement (DPA) has in many ways institutionalized a de facto partition based on territorialization of ethnicity in an asymmetrical, two-entity (con)federal structure, giving Serbs (and to a lesser extent Croats) significant autonomy from the Bosnian state, while leaving Bosniaks dissatisfied with a disempowered, although unified Bosnian state.

Since the signing of the peace agreement, the Bosniak elites have insisted on the moral claims associated with the massive violence unleashed against their people between 1992 and 1995 and have sought to repair the Dayton foundations of the Bosnian state with such moral considerations in mind. The initial dissatisfaction with the DPA grew among the Bosniaks, as it was becoming increasingly clear that not even a more vigorous implementation of the agreement could bring the return to the status quo ante conflict in terms of Bosnia's state structure. In this context, the Genocide Case, still pending at the time, became an integral element of the state-building strategy seeking the constitutional and territorial overhaul of the post-Dayton state, along the lines of the constitutional and territorial setup of Bosnia at the time of independence in 1992. Central to this strategy have been the principles of a victim group's entitlement to a state and the obligations, both moral and legal, to restore the state that was destroyed in the process of genocidal aggression, namely the Republic of Bosnia and Herzegovina (R BiH) with the constitution effective at the time of official independence in 1992.² In accordance with this strategy, the DPA was more vigorously interpreted as an agreement that legitimized genocide against the Bosniaks and that rewarded Serb aggression and genocide during the 1992–1995 war. The main thrust of the Bosniak state-building strategy has been the argument that Bosniaks, as victims of genocide, have the right to have

restored to them the only state—a unitary, centralized, preconflict state—that can guarantee the restoration of their community and its long-term survival. Moreover, it was argued that the state which was destroyed as a consequence of internationally wrongful actions, aggression and genocide, ought to be restored by the international community which, having recognized Bosnia as an independent state, remains obligated to uphold its sovereignty.

Ethnic Cleansing and Genocide

The question whether ethnic cleansing in Bosnia constituted genocide arose at the outset of the war, provoking much legal, political, and scholarly debate ever since. Helsinki Watch was the first organization to define, in August 1992, the situation unfolding in Bosnia as genocide.³ The UN General Assembly Resolution 47/121 of December 18, 1992, was very explicit, referring in the preamble to: “the abhorrent policy of ‘ethnic cleansing’ [which] is a form of genocide.”⁴ At around the same time that the legal team representing the Bosnian government filed its case against Serbia and Montenegro at the International Court of Justice, some officers and legal experts from the U.S. State Department started pressuring the U.S. government to use the term *genocide* and identify Serbian forces as responsible for attempted genocide. One of the most prominent legal experts pressuring the administration was Paul Williams, who after leaving the State Department began to provide pro bono legal assistance to the government of Bosnia and served as its legal adviser and a member of its delegation during the Dayton negotiations.⁵

In contrast to Williams, another legal scholar and a leading expert on genocide in international law, William Schabas, concluded as late as 2007 that the Serb atrocities, including the Srebrenica massacre, constituted crimes against humanity but did not meet the conditions of the legal definition of the crime of genocide.⁶ Genocide scholars have been similarly divided. Helen Fein has argued that in Bosnia “retributive genocide” was committed by the Bosnian Serbs, representing a segment of the dominant ethnic group that felt threatened by the imposition of a new structure in which their ethnic group’s interests could be subordinated.⁷ Manus Midlarsky describes the massacre of Srebrenica as “genocidal behavior,” situated in intensity of the killing between *massacre* and *genocide*, the latter being distinguished from the former by an exterminatory state policy and targeting of noncombatants.⁸ Eric Markusen has argued that Bosnian Serbs, and on a smaller scale Bosnian Croats,

did commit genocide during the Bosnian war, while Martin Mennecke contends that none of the warring parties committed the crime of genocide.⁹

Area studies scholars have also been divided on the question of ethnic cleansing versus genocide in Bosnia. Xavier Bougarel has argued that because the creation of ethnically homogenous territories through forced population transfers was the primary goal in the Bosnian conflict, it is imperative to distinguish between genocide as physical destruction of a group and ethnic cleansing as forced transfer of a group. He contends that ethnic cleansing was systematically committed by the Army of Republika Srpska and the Croat Defense Council, while the Army of the Republic of Bosnia and Herzegovina committed it only occasionally.¹⁰ Similarly, Steven Burg has argued that there are numerous difficulties involved in applying the concept of genocide to the events in BiH. Not only have the three parties been engaged in what amounts to a war of each against all, but as Burg points out, Croat actions against the Bosnian Muslim population, although on a smaller scale than those carried out by the Serbs, may warrant the description as genocide.¹¹ However, Bosnian Croats have not been indicted for genocide, nor have the Bosniak leaders articulated political claims based on charges of Croat genocide against the Bosniaks. Robert Hayden has also questioned the applicability of the term *genocide* to the mass killings in Bosnia in the 1990s, including the Srebrenica massacre. Criticizing the international courts for making inconsistent findings with respect to allegations of genocide in Bosnia, Hayden has argued that the extension of the concept of genocide to well-proved crimes against humanity represents politicization of mass killings by international and domestic actors in the context of contemporary political competition.¹²

In contrast, scholars like Sabrina Ramet and James Gow have argued that genocide was committed against the Bosnian Muslims and that it was a state-sponsored affair, orchestrated by Belgrade and conducted in conjunction with Bosnian Serbs, with the purpose of annexing parts of Bosnian territory to Serbia.¹³ A number of scholars who are not area studies specialists, such as Michael Sells and Norman Cigar, have also argued that a state-sponsored genocide, rooted in Serbian nationalism and its hegemonic tendencies, targeted Bosnian Muslims for destruction.¹⁴ But equally significant as the debate over whether atrocity crimes committed by Serbs in Bosnia should be categorized as genocide is the debate about the concrete political implications that such categorization should have for post-Dayton Bosnia. In this regard, Ramet and Gow (and Williams mentioned above) have staked out an integrationist position, advocating a complete revision of Dayton as a morally righteous and just solution which clearly distinguishes between victims and aggressors. Bougarel, Burg, and Sumantra Bose have been more cautious about the question of atrocities and its

political implications, suggesting that an integrationist position imbued with moral righteousness can harm the prospect of postconflict state-building and reconciliation in Bosnia after Dayton.¹⁵

The Politics of Entitlement: Genocide as Political Argument

Two sets of legal processes initiated during the conflict have dealt with atrocity crimes in Bosnia—the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Court of Justice (ICJ). The Dayton Peace Agreement itself emphasized elements of both retributive and restorative justice by incorporating provisions pertaining to arrests of individuals indicted for atrocity crimes and provisions guaranteeing the right of return. For Bosniak leaders, these mechanisms were deemed insufficient, not only because they were not being implemented, especially in the immediate aftermath of conflict: they were deemed insufficient because they could not fully capture what Bosniak leaders argued was the unique crime committed against their people—the crime of genocide, as opposed to ethnic cleansing committed against other groups on the territory of the former Yugoslavia. Bosnia’s case at the ICJ, like the Eichmann trial in 1961, was to serve three distinctive functions: to render justice for the victims of unspeakable crimes, to clarify a tortured history, and to define the terms of the victim group’s collective memory.¹⁶ Although the ICJ case is on some level an integral component of the quest for justice in the aftermath of “unspeakable crimes,” political demands surrounding the case are consistent with group demands for priority and preeminence in relation to other groups. As Donald Horowitz argues, ethnic claims to priority or exclusion are supported by appeals to moral principles, which are invoked to justify departures from strict equality and the pursuit of nationalizing policies or territorial expansion.¹⁷ Discourse surrounding demands for the removal of the effects of genocide against the claimant group (the territorial and constitutional setup of the Bosnian state, or the cultural and linguistic Russification of Ukraine) is effective because it cloaks ethnic claims in ideas and associations that have acknowledged moral force beyond the particular society and its conflicts, thereby masking something that might otherwise be controversial. The larger principle—genocide—in which the ethnic claim is cast provides justification and renders it more difficult to deny the validity of the claim.¹⁸

Consistent with Horowitz’s arguments about the relationship among moral claims related to genocide, the politics of entitlement, and ethnic conflict is Lea

Brilmayer's argument about the sources of nationalist claims. Brilmayer argues that there are two interpretations of nationalist claims. The first, which she calls a "national entity analysis," focuses on the status of the entity asserting the claim. This interpretation assumes a close analytical link between the particular right that is being asserted—a right to self-government or to the resources necessary for cultural flourishing—and the type of entity asserting that right. The alternative interpretation focuses on the relationships that the entity has with other claimants to the particular resource in question. Brilmayer calls this interpretation "an analysis of independent moral claims." The moral claims are independent in the sense that the entity status of the claimant is not integral to the claim; the claims are independent of the status of the entity making them. As Brilmayer reminds us, ethnonational groups are competing for scarce resources against other claimants, whether in the context of intrastate or regional ethnic conflicts. It is unclear why it is a good argument against other claimants that the ethnonational group itself has certain internal characteristics, such as cultural or linguistic homogeneity. What is needed to defend one's claim against competing claimants, Brilmayer argues, is a justification for depriving those competing claimants of the resource in question: this is the function of the underlying independent moral claim.¹⁹ Insofar as the independent underlying claim rests on an argument of corrective justice, claims relating to genocide against a particular group represent the most authoritative independent moral claims. However, genocide is also significant as a marker of internal characteristics of the claimant group which is constructed in opposition to the accused perpetrator, not only as an innocent victim, but as morally and politically superior in other ways, such as peaceful, tolerant, democratic. A case that illustrates this notion of an independent underlying moral claim in particularly interesting ways is the Israeli-Palestinian dispute. Idith Zertal has demonstrated how the post-Holocaust Zionist narrative represents Jewish people as entitled to the land and the state in question as reparations for their suffering during the Holocaust (as well as over previous centuries), and Jewish settlements in the occupied territories as preemptive measures to prevent a new Holocaust.²⁰ It is certainly no coincidence that this interpretation of the Holocaust, as a midwife and a legitimizing narrative of the Jewish state, enjoys popularity among Bosniak elites. These elites have sought to "Judaize" their respective genocide and base their own politics of entitlement on this interpretation of the founding and the durability of Israel as a Jewish state.²¹

The notion that the ICJ case is the central component of Bosniak state-building strategy requires some elaboration. It is useful here to note that the state is not a unitary actor but a variably configured and contested political field, as Brubaker

and Migdal have conceptualized it following Bourdieu.²² This concept of the state is useful for understanding not only the dynamic of Bosnia's state-sponsored initiative to obtain the "genocide ruling" from the ICJ, but also the function this initiative plays in political battlefields of Bosnia's divided society.

Migdal defines a state as a "field of power marked by the use and threat of violence and shaped by (1) the *image* of a coherent, controlling organization in a territory, which is a representation of the people bounded by that territory, and (2) the actual *practices* of its multiple parts."²³ Image, according to Migdal, implies perception of the state by those inside and outside its claimed territory as the chief and appropriate rule maker within its territorial boundaries. This perception assumes a single entity that is fairly autonomous, unified, and centralized. The second key aspect of the definition of state is its practices, that is, the routine performance of state actors and agencies. Practices may reinforce the image of the state or weaken it; they may bolster the notion of the territorial and public private boundaries or neutralize them.

The existence of multiple and often conflicting practices characteristic of states in divided societies, and the difficulty, in those societies, of nurturing the image of the state as a representation of the people bounded by its territory, suggest the analytical usefulness of Migdal's definition. The source of conflicting state practices in (ethnically) divided societies often concerns the very definition of the people that the state in question is perceived to be a representative of. Are the people defined in civic/territorial or ethnonational terms? Is the state defined in culturally neutral or multicultural terms, or is it defined as a national-state, a state of and for a state-bearing nation?

The politics of entitlement—to return for a moment to this concept—rests on the instrumental and argumentative value of moral arguments, including genocide, for ethnonational elites demanding superior collective rights for their group. Nationalizing state practices, insofar as they promote superior collective rights for the nominally state-bearing nation on the basis of moral claims, are consistent with the politics of entitlement. Nationalizing state practices are characterized by a tendency to see an ethnically heterogeneous state as an "unrealized" nation-state and by a commitment to transform the state into what it is properly and legitimately destined to be—a state of, and for, a nominally state-bearing nation.²⁴ For nationalizing state elites who rely on moral claims to legitimate their policies, the injustice to which moral claims refer is often seen as the source of the perceived defect of being an "unrealized" nation-state. The argument that many nationalizing elites make is that the state-bearing nation (whether it is articulated as Ukrainian, Bosnian/k, or

Rwandan) is not simply entitled to a state of its own because it suffered historical injustice (genocide) but that the very presence of other politicized ethnic communities is a product of genocide.

The Genesis of the ICJ Genocide Case

Since gaining international recognition as an independent state in April 1992, Bosnia's stateness has depended more on its international legal sovereignty than on the legitimacy and capacity of the Bosnian state. In fact, the very survival of the state in the wake of violent ethnic civil war hinged upon the ability of Bosniak leaders to mobilize the member-states of the international community into recognizing their international obligations vis-à-vis the newly recognized Bosnian state. Of central importance were those obligations implicit in the norms of nonaggression and the inviolability of sovereign borders, as well as those pertaining to the prohibition of genocide and the emerging norm of humanitarian intervention. This is why it was crucial for the Bosniak leaders to categorize the Bosnian civil ethnic war as genocidal aggression and to have all crimes carried out in the course of that war judicially recognized as crimes of genocide and crimes of aggression. This was the essence of Bosnia's ICJ Genocide Case.

The Republic of Bosnia and Herzegovina was granted international legal sovereignty on the basis of its referendum on independence held at the recommendation of the European Community, more precisely the Badinter Commission.²⁵ The referendum was scheduled over the objections of the elected Serb representatives in the Bosnian Assembly and boycotted by the majority of Bosnia's Serb population. The rhetoric of popular sovereignty, which was considered by the Bosniak leaders and many external supporters of Bosnia's independence to have indicated the will of the people of Bosnia to constitute the republic as an independent state, concealed the possibility that Bosnia was led to independence by the Bosniak leadership intent on attaining a unitary Bosnian state under Bosniak political control.²⁶

The conflict that led Bosnia into a brutal civil war following its declaration of independence involved three communities holding divergent visions of the identity, borders, and citizenship of the state. The Bosniaks, Bosnia's self-perceived *Staatsvolk*, desired a unitary centralized state in which they would enjoy a large plurality and probably soon a majority because of their faster growth and the likelihood that Serbs and Croats could continue to voluntarily depart from Bosnia. The Serbs and Croats, who saw themselves as "homeland groups" and not "minorities," sought

significant degrees of autonomy from the Bosnian state in the form of ethnic cantonization and special ties with their “national homelands,” Serbia and Croatia respectively. But while Serbs insisted that Bosnia be divided internally along ethnic lines prior to any secession, the Croats—eager to see Bosnia leave Yugoslavia following Croatia’s secession—supported the referendum on independence. In either case, by early 1992 both the Serbs and the Croats had established their own separatist entities, the Republika Srpska (RS) and Herceg-Bosna.²⁷ In February 1992, the European Community sponsored belated negotiations in Portugal among the republic’s three communities to divide Bosnia into ethnic cantons prior to secession. Even though the plan offered at least an equitable deal to the Bosniaks, Bosniak leaders rejected the proposed cantonization and pushed for the independence of a unitary republic, despite the looming threat of a full-scale war against a more powerful enemy. But gaining international recognition was a central component of the Bosniak strategy to pursue a “state-of-their-own.” Recognition was supposed to deter Serb military campaigns in the republic on the basis of international commitment to Bosnia’s sovereignty or, in the case of the failure of deterrence, to have the international community compel the withdrawal of Yugoslav army troops who supported Bosnian Serb rebellion.²⁸

The position of the internationally recognized Bosnian state in the months preceding the filing of the application with the International Court of Justice was precarious, to say the least. After Bosniak leaders rejected cantonization of the republic in favor of armed resistance, the republic’s Serbs, supported by Belgrade, immediately launched a brutal campaign to capture most of Bosnia’s territory and purge it of non-Serbs.²⁹ By October 1992 conflict erupted between Bosniaks and Croats, plunging Bosnia into a full-scale, three-way civil war in early 1993. While Serbs and Croats were provided with arms and personnel by Belgrade and Zagreb, the arms embargo imposed on the former Yugoslavia in 1991 (UN Security Council Resolution 713) made it extremely difficult for Bosnian government forces to overcome their military weakness, especially vis-à-vis the Serbs. The period between December 1992 and March 1993 was critical. Having suffered great civilian and combatant losses, in addition to significant loss of territory, Bosniak leaders were faced with an urgent task of reviewing their tactics, if not the entire strategy. At the Bosniak National Congress in December 1992 it was decided that priority must be given to lifting the arms embargo in order to enable Bosniaks to defend themselves and to preserve the territorial integrity of the Bosnian state.³⁰

The congress, according to its organizers, had two goals. First, it was to express the unity and resistance of Bosnian Muslims in their struggle for survival as a political community, if not for their very existence, in light of Yugoslav aggression and

the campaign of genocide against the Bosnian Muslims. Second, the congress was to define the political aspirations and demands of Muslims as a nation—their place in the Bosnian state and in the international context. A sixteen-point resolution was issued, focusing primarily on the first goal, namely halting aggression and genocide, but also containing a number of provisions related directly to the postconflict political future of Muslims and the Bosnian state. Expressing outrage at the fact that the international community did not consider the Bosnian war as external, namely Yugoslav aggression against Bosnia and the Bosnian Muslims in particular, and recalling the basic principles of individual and collective human rights, including the right to self-defense guaranteed to all states under the UN Charter, the resolution called for lifting of the arms embargo imposed on the RBiH. It implied that the international community violated international law in two fundamental ways. First, the arms embargo violated the UN Charter, which enshrines the right of states to defend themselves against external aggression; second, since the insistence on maintaining the arms embargo directly benefited the aggressor who was also committing genocide on the territory of a sovereign, internationally recognized state, the international community was violating its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide.

With the approach of the Vance-Owen negotiations in March 1993, it was becoming increasingly clear that the international community favored some form of ethnoterritorial decentralization of the republic and was not willing to become militarily engaged in defense of the unitary Bosnian state.³¹ The decision by the Bosniak-led government to launch the Genocide Case was thus motivated by two factors: first, the need to bolster its military-defense capacities by lifting the arms embargo or soliciting military intervention; and, second, to prevent any form of ethnoterritorial decentralization of the Bosnian state.³²

In its application, Bosnia and Herzegovina claimed that Yugoslavia had breached its obligations under Article I of the Genocide Convention and had planned, prepared, conspired, promoted, encouraged, aided and abetted, and committed genocide against the “People and State of Bosnia and Herzegovina.” It also claimed that Yugoslavia had expressly violated Article II, paragraphs (a), (b), (c), and (d) and that it had committed numerous, gross, and consistent violations of Article III, paragraphs (a), (b), (c), (d), and (e) with respect to the “People and State of Bosnia-Herzegovina.”³³ As long as the international community considered the Bosnian conflict to be an ethnic conflict and not constituting acts of genocide and external aggression, Bosnia would be deprived of the right to individual and collective defense guaranteed under the UN Charter. In its application, the Bosnian government asked the court to

adjudge and declare that the UN resolution imposing an arms embargo on the former Yugoslavia should not be construed in a manner that would impair the right of the RBiH to individual and collective self-defense. In essence, it was argued, the arms embargo was unlawful because Bosnia had to have the means to defend itself from genocide.³⁴ Furthermore, in its requests to the court for the indication of provisional measures, the Bosnian government asked the court to adjudge and declare that any peace agreement premised on ethnoterritorial autonomy (the ethnic cantons of the Vance-Owen plan, or the confederal, three-way partition of the Owen-Stoltenberg plan) was illegal if achieved on the basis of genocidal aggression.³⁵

Following the submission of Bosnia's application and the first request for provisional measures, the ICJ issued two orders for provisional measures against Serbia and Montenegro, ordering it to immediately cease and desist from committing all acts of genocide in Bosnia and Herzegovina, although neither of the two orders said anything about the arms embargo. According to Francis Boyle, Bosnia's general agent at the ICJ, explicit references to the "crime of genocide" in the court's orders constituted an outright prejudgment on the merits of the issue of genocide in favour of BiH. Moreover, Boyle argued, the order of September 13, 1993, contained a measure which constituted the court's ruling against the legality of the Owen-Stoltenberg proposal specifically, and of any partition of BiH, more generally. Ironically, in its final decision the ICJ eventually found that genocide did occur in Bosnia, but that it occurred in 1995 in and around Srebrenica, and not in 1993 when this alleged prejudgment was issued. These arguments about ICJ's orders as a prejudgment in favor of BiH became the basis of Bosniak state-building strategy aimed at the constitutional and territorial overhaul of the post-Dayton Bosnian state.

Another important element of this strategy was the notion of compensation for the victims of the crime of genocide. In its initial application, BiH demanded reparations for the injury to the victims of genocide and to the applicant, commensurate with the link that could be established between the violations of the convention and the injury in question. However, in its written pleadings—especially in the memorial of 1994 and the reply of 1998, the BiH legal team made claims for an additional kind of restitution, namely, the return to the political status quo ante conflict. In part 7 of the "Submission" of the memorial, BiH requested that the ICJ adjudge and declare "that the Federal Republic of Yugoslavia (Serbia and Montenegro) must wipe out the consequences of its international wrongful acts and must restore the situation existing before the violations of the Convention on the Prevention and Punishment of the Crime of Genocide were committed."³⁶

Similarly, the reply issued by BiH on April 23, 1998, reemphasized the return to the political status quo ante genocide as the central component of the satisfaction deemed appropriate for the internationally wrongful acts that BiH was accusing Serbia and Montenegro of committing: “Therefore, the Applicant considers that the gravity of the unlawful acts committed by the Federal Republic of Yugoslavia should be reflected in the amount of the damages to be paid. The gravity should also ensure that the Respondent not be allowed to avail itself of certain limitations to its responsibility; on the contrary, the Respondent should as far as possible and without restrictions, remove all the consequences of its internationally wrongful acts.” And further, “There can be absolutely no doubt that, as a consequence of the illegal acts of the Respondent, the Applicant has the right to obtain full reparation for the damages caused. However, such reparation under the forms of a restitution in kind and of a compensation . . . would never ‘wipe out all the consequences of the illegal act’ . . . if the moral and legal damage suffered by Bosnia and Herzegovina were not taken in full consideration.”³⁷

In deciding the legal consequences of, and remedies for, the wrongful acts that Serbia and Montenegro was to be held responsible for, BiH applied the norms of general international law concerning state responsibility, stressing that genocide was a particularly serious internationally wrongful act.³⁸ This appeal to *jus cogens* was not directed only, or even primarily, at Serbia and Montenegro by invoking a special regime of state responsibility for the acts of genocide. The appeal to *jus cogens* was directed primarily at the status of Bosnia and Herzegovina as an entity created by the Dayton Peace Agreement, an international treaty subject to the Vienna Convention on the Law of Treaties. The argument, implicit in Bosnia’s written pleadings to the ICJ, but explicit in arguments made by Bosniak elites, is that the Dayton Peace Agreement as a state-creating and a treaty-making act violated peremptory norms and was therefore void.³⁹ Dayton conflicted with peremptory norms of general international law because, first, it incorporated into Bosnia’s constitutional structure Republika Srpska, an entity which violated the obligation not to perpetrate genocide, and second, because the RBiH was coerced into signing the agreement by the continued threat of genocide.⁴⁰

As foreseen by the Bosniak leadership, circumventing the arms embargo proved to be necessary to overcome the Serbs’ hold on Bosnia. This was done through the U.S.-sponsored joint Bosniak and Croat offensive against the Bosnian Serb forces in 1995, part of U.S. efforts to end the war through a strategy of coercive diplomacy.⁴¹ These actions provoked a Bosnian Serb counteroffensive, culminating in the attack on the UN-protected area of Srebrenica and the massacres of some eight thousand

Bosniak men and boys—incidentally, the only actions in the case of the Bosnian war that the ICJ categorized as genocide. Another important element of the U.S. strategy to end the war was the need to address the real interests of all sides in the conflict, including the outside, regional actors, Serbia and Croatia. The Dayton Peace Agreement, which was the culmination of U.S.-sponsored coercive diplomacy, prescribed a soft partition of the republic combining a (con)federal, two-entity solution with that of ethnic cantonization (the RS and the Federation).⁴² The negotiators at Dayton did not dispose of Bosnia’s lawsuit in the agreement, leaving the Bosniaks—a group most dissatisfied with the settlement—the opportunity to use the case to affect the elements they were most dissatisfied with or to call for its revision.

Bosnia after Dayton: Moral Claims and the Politics of State-Building

For the Bosniaks, the Dayton Agreement institutionalized a de facto partition through territorialization of ethnicity achieved by means of genocide. This state structure legitimized the genocide and rewarded the aggression associated with the 1992–1995 war. Not only did the Bosnian Serbs, the accused perpetrators of genocide, continue to live side by side with their Bosniak victims but their “genocidal creation,” Republika Srpska, enjoyed a status of a constitutionally privileged entity inside Bosnia’s state structure. The agreement held the promise of reversing—to the extent this was physically possible—the effects of aggression, ethnic cleansing and genocide, but its troubled implementation could not fulfill this promise.⁴³ As a result, Bosniak elites formulated a state-building strategy, whose most important element—a quest for justice—centers on a dual claim. First, it asserts that Bosniaks, as victims of genocide, are entitled to restitution and that they have the right to have restored to them the only state that can guarantee the long-term survival of their community. And the only state that can do so is a unitary, pre-Dayton, Republic of BiH. Second, it argues that the state which was destroyed as a consequence of internationally wrongful actions, aggression and genocide, ought to be restored, and that the international community is obliged to assist in its restoration. Since Dayton, genocide has been used to delegitimize not only the institutions and territorial delimitation of the Dayton state but the putative right to selfdetermination of ethno-national minorities based on ethnic territorial autonomy.

The oral proceedings in the ICJ Genocide Case were held from February to May 2006, thirteen years after the filing of the application and ten years after the

signing of the peace agreement. Given that Dayton negotiators failed to dispose of the case, its litigation could proceed in the post-Dayton period despite the exigencies of Bosnia's governmental structure, which enabled those who opposed the case to try to obstruct its litigation. Bosnian Serbs who saw the Genocide Case as a threat to their political position used Dayton's constitutional framework, which established ethnic-based veto powers for most major state decisions. Most significantly, state funding for the lawsuit was cut off, forcing its supporters inside the Bosnian state to rely on private funds, mainly from the contributions of the Bosniak diaspora and citizens inside Bosnia.⁴⁴

Bosniak elites and their public had extremely high expectations of what the genocide judgment would bring and they believed that the case was already won.⁴⁵ This attitude influenced the behavior of Bosniak political leaders during the critical period of constitutional reforms during late winter and early spring 2006, which coincided with the oral proceedings at the ICJ. A decade into the implementation of the Dayton Peace Agreement, external actors, engaged in postconflict state-building in Bosnia, launched a process of constitutional reform. Framed as an effort to strengthen Bosnia's candidacy for the European Union and promote more effective government, the process was aimed at phasing out external involvement. Constitutional negotiations among the major political parties in the government and the opposition, with the help of the United States and the European Union began in spring 2005, ahead of general elections, scheduled for October 2006. While these negotiations were yielding some positive results, especially in regard to reforming state-level institutions, the radically different agendas on the future fundamental political structure of the state prevented agreement on a compromise package of constitutional reforms.⁴⁶ Bosniak leaders largely expressed the view that any package of reforms, whether constitutional or merely legislative, that appears to retain or further embed the entity structure is merely a gloss on the current "unjust" Dayton structure and therefore unacceptable. Leaders of the Party for BiH, a nominally civic although in practice a Bosniak party, eventually voted against the package of constitutional reforms agreed in 2006 in a move consistent with ethnic outbidding.⁴⁷ The party was one of the winners of the October 2006 general elections, and its leader, Haris Silajdzic, Bosnia's wartime foreign minister, became a member of the three-member collective presidency.

The much awaited but for the Bosniaks ultimately disappointing decision in the Genocide Case was rendered in February 2007. The International Court of Justice found that genocide was committed against the Bosnian Muslims (Bosniaks) by the Bosnian Serb army in and around Srebrenica, upholding thus the previously

rendered decision by the International Criminal Tribunal for the Former Yugoslavia in the Krstic case.⁴⁸ The court did not find that Serbia was responsible under the convention for the commission or for aiding and abetting genocide although it was found responsible for failing to prevent it. Although disappointed by the overall decision, Bosniak political leaders found that even such a decision provided enough grounds for legitimately attacking Dayton's ethnic territorialization and for lending legitimacy to their demands in the context of the ongoing police and constitutional reforms. According to Bosniak leaders, the ICJ findings that Bosnian Serb armed forces committed the Srebrenica genocide mandated the removal of the two-entity constitutional structure, especially of the RS as a "genocidal entity" whose institutions, most notably its security forces had been found responsible by the ICJ for genocide.

In light of the ICJ ruling that it was the Bosnian Serbs who devised and implemented genocide against the Bosniaks in Srebrenica, Bosniak elites intensified their attacks on the political institutions of the RS and on the constitutional structure embedded in the Dayton Peace Agreement. Silajdzic argued that the court's judgment mandated a new constitution for Bosnia and emphasized that genocide in Srebrenica was committed by the RS as a legal entity. He asked that as an interim measure, Srebrenica and other municipalities from which the victims of the Srebrenica genocide originated be accorded special constitutional status, but that in the long run a new constitutional order, which would annul the results of genocide, must be established.⁴⁹ Reacting to the judgment, Bosniak returnees to Srebrenica threatened that they would collectively leave the municipality if Srebrenica was not given special status, arguing that in light of the ICJ judgment "nobody has the right to leave Srebrenica under RS jurisdiction."⁵⁰ Within a month of the issuing of the ICJ judgment, SBiH and SDA representatives in the House of Representatives of the Bosnian Parliament started an initiative to change the constitution of BiH and to accord special status to regions that the victims of the Srebrenica genocide came from.⁵¹ Most importantly, Bosniak leaders, primarily Haris Silajdzic, insisted on tying the ICJ judgment to the ongoing police reform negotiations. Silajdzic and Sulejman Tihic, leader of the SDA, ultimately refused to accept a deal which, even though it provided for a state-level Ministry of Security, did not eliminate the designation "Republika Srpska" from local police forces.⁵²

While the RS political establishment responded to Bosniak arguments and initiatives by denying the collective responsibility of RS institutions, and accusing Bosniak leaders of "war-mongering rhetoric," the RS government also took some concrete steps in response to those arguments and initiatives pertaining to the ICJ

judgment and its implications for Bosnia. The government decided to proclaim Srebrenica a “zone of special concern,” announcing millions of investment funds for regional development.⁵³ Moreover, the government demonstrated its willingness to “respect the decision of the ICJ and its categorization of the [Srebrenica] atrocity” by arresting several individuals indicted by the ICTY.

Unsatisfied with developments inside Bosnia, especially after High Representative Schwarz Schilling warned against political manipulation of the ICJ judgment, Haris Silajdzic continued his campaign for the overhaul of the Dayton structure by lobbying international actors outside Bosnia, specifically the United Nations and the U.S. Congress. During his visit to the United States, where he went as the president of Bosnia’s collective presidency in order to participate in constitutional negotiations, Silajdzic continued to tie the ICJ judgment with the need to change Bosnia’s constitution. In his arguments he emphasized that the Dayton structure must be overhauled in order to meet the demands of retributive justice aimed at the perpetrators of genocide and more importantly, in order to meet the demands of restorative justice aimed at the victims of genocide: “If the judgment has no bearing on the internal situation in Bosnia-Herzegovina, that would lead to frustration in Bosnia, especially the victims of genocide—their families. And they are mostly—not exclusively, but mostly—Bosniaks or Muslims. The Muslim population in Bosnia-Herzegovina—it’s about 50 percent of the population—has proved to be a constructive and civilized element in Bosnia-Herzegovina. They were tested during the war. They never returned the same. They did not create concentration camps. They did not commit genocide—they could. So they deserve to be treated as constructive citizens of Europe. He stressed that the international community, which has a continued obligation toward Bosnia as a member state of the United Nations and toward Bosniaks in light of the ICJ judgment, needs to act in order to “implement the judgment.” For his audience at the Centre for Strategic and International Studies, Silajdzic summarized his address to UN Secretary General Moon: “Your organization [the UN] committed colossal mistakes in Bosnia-Herzegovina, admitted it through the former secretary general. And those mistakes cost ten thousands of lives in Bosnia-Herzegovina. Now, we have the judgment that it was genocide and you are silent as an organization. And I hope they will have something to say about that, because this is the court of the United Nations that ruled that there was a genocide in Bosnia and that the institutions of the entity of Republika Srpska within Bosnia-Herzegovina committed this genocide.”⁵⁴

In August 2007, Bosniak and Croat members of the three-member presidency addressed a letter to the UN secretary general, asking him to “invalidate” the results

of genocide in Bosnia, meaning primarily the current constitutional structure.⁵⁵ A month later, the Bosniak-American Advisory Council for BiH, in cooperation with the Congressional Club for BiH initiated a new resolution in the American Congress.⁵⁶ In essence, it calls for the United States to help Bosnia carry out constitutional transformation that would eliminate “the ethno-territorial arrangements, which reflect and institutionalize the effects of the genocide, war crimes, and crimes against humanity committed in Bosnia and Herzegovina.”

The Bosniak National Narrative: Genocide, Territory, Community and Statehood

In the context of Bosnia’s violent conflict, the naming of acts of mass violence has undoubtedly been a political process, one which brings to fore the relevance of Horowitz’s notion of the metaconflict, the “conflict about the nature of the conflict.”⁵⁷ In order to understand the significance of the ICJ Genocide Case from the perspective of Bosniak majority nationalism and its role in Bosniak nationalizing state practices, it is necessary to briefly analyze the manner in which the reality of the conflict was explained and narrativized by Bosniak elites.

The conflict over the conflict revolves around three basic disagreements, which Bosniaks have articulated in their own narrative: the significance of ethnic identity and competing ethnic claims as sources of tension; the nature of political and cultural differentiation among the three groups, and especially between Bosniaks and Serbs; and the role of history in shaping ethnic antagonisms.⁵⁸

In the Bosniak narrative, the internationally recognized Bosnian state fell victim to Serb genocidal aggression, with Bosnia’s non-Serbs in general and Bosniaks in particular becoming victims of sustained genocidal campaigns from 1992 until 1995. The international community, which had the responsibility to prevent and stop genocide, not only failed to do so; in the Dayton Agreement it legitimated the effects of genocidal aggression by incorporating the Serb entity into the Bosnian state as the salvaged remnant of the now failed Greater Serbia project. Since Dayton, Bosniaks have advocated a vigorous and nonnegotiable implementation of the Dayton Peace Agreement, especially Annex 7, the Agreement on Refugees and Displaced Persons, as the means of reversing some of the effects of genocide. In addition, they have argued that restitution of the political status quo ante—the 1992 territorial and constitutional structure of the Bosnian state not based on ethnic territorialisation,

which has primarily disadvantaged Bosniaks as a group—is owed to them as the principal victims of genocide.

Focusing on Bosnia's de facto partition as an international crime which by its very nature cannot possibly give rise to a legitimate state, moral-political claims articulated by Bosniak elites emphasize de jure continuity of the preconflict Bosnian state and the preeminence of the Bosnian state people, not its current "constituent peoples." The term *People of BiH* has been used by BiH at the ICJ, especially in the early phases of the proceedings, to designate the principal protected group targeted by genocide. This insistence on the People of BiH, although used in conjunction with Bosnian Muslim and other non-Serbs, was clearly intended to underline a deethnicised, civic, and inclusive Bosnian identity, intimately tied to the institutions of the RBiH. While over time, Bosniak elites began emphasizing the Bosniak ethnonational community as the principal victim of genocide, there was no contradiction in focusing on these two seemingly irreconcilable forms of identity—the People of BiH and Bosnian Muslims (Bosniaks). The often parallel processes of denial and assertion of ethnonational identity among the Bosniaks were consistent with the nationalizing state practices of Bosniak elites. On the one hand, by seemingly subsuming their collective ethnic identity as Bosniaks to the civic Bosnian identity, and focusing on the People of BiH, Bosniaks could claim several things: first, that they were concerned with the quest for a democratic state based on a political majority as distinct from an ethnic majority; second, that Serb ethnoterritorial claims are a dangerous manifestation not simply of tribalism or communalism but ultimately of a genocidal mentality and tendency; and, third, that the verdict of history is entirely consistent with the Bosniak contention of basic social harmony among the three groups, marred only by Belgrade's hegemonic projects. On the other hand, the promotion of a collective Bosniak consciousness, mobilized through victim-centered history, and the championing of collective claims based on victim status become preconditions to significantly alter power relations and legitimize majority rule in Bosnia.

At the heart of the Bosniak state-building strategy, centered on the ICJ Genocide Case, is the charge of territorial injustice which has been built into the foundation of the post-Dayton state. Territorial injustice occurs when the group's governance over the territory has been forcibly replaced by outsiders. A group has a legitimate title to territory if it has continuously occupied the territory over which it claims territorial sovereignty; it has been concentrated in that territory; and its removal from the territory in question has been forcible and recent. These criteria comprise major elements of the "historic occupancy argument," which links past history with current occupation patterns, and with people's subjective sense of attachment in order

to articulate an argument for jurisdictional authority over territory.⁵⁹ Historically, Bosnia has not known ethnically defined administrative regions inside its territory, although all of its three ethnonational groups have claimed title to Bosnian territory—whole or part—deriving such title from private ownership, indigenoussness, or historic right, or more often a combination of all three. During the Yugoslav period, all three groups governed the Bosnian territory through a power-sharing mechanism characteristic of communist rule in Bosnia. With the collapse of the Yugoslav state, Serbs and Croats proclaimed their own self-determining regions inside the RBiH. These regions quickly became quasi-states, closely linked with Serbia and Croatia respectively. The formation of these quasi states occurred through massive expulsions and mass atrocities, committed systematically by the Army of Republika Srpska and to a lesser degree by the Croat Defence Council. As a result of territorialization of ethnicity—institutionalized by the DPA in the form of a two-entity and cantonal structures—territorial injustice has been built into the foundation of the post-Dayton state.

In an attempt to reconcile the mutually exclusive ends pursued by each party and the conflicting international principles to which each side appealed, the foundational documents of the post-Dayton Bosnian state established a fundamental contradiction that has beset processes of peace implementation and state-building in Bosnia after Dayton. The Dayton Agreement guarantees the continued legal existence of BiH under international law, but it also provides for a significantly altered internal structure which empowers ethnically defined substate units (entities and cantons). While Bosnia's ethnic regions enjoy substantial constitutional powers, which have allowed them to be governed as ethnocracies, the agreement also contains provisions for ensuring the highest level of internationally recognized human rights and fundamental freedoms, including the rights of those who have been “cleansed” or displaced to return to their prewar homes.

Annex 7 of the Dayton Agreement has generally been seen as the agreement with the greatest potential for reversing the effects of ethnic cleansing. For the Bosniaks, it was perhaps the leading motive for signing the peace agreement. In the words of Alija Izetbegovic, Annex 7 contained the most important provisions, for which Bosniaks “swallowed many bitter pills.”⁶⁰ Dayton's constitutional texts articulate the right of return as primarily an individual human right. By stressing a link between return and human rights the constitutional texts ground the ethic of return within the generally accepted framework of human rights, and a generally accepted theory of state legitimacy. A legitimate state, to quote Michael Walzer, “owes something to its inhabitants simply without reference to their collective or

national identity. And the first place to which the inhabitants are entitled is surely the place where they and their families have lived and made a life.⁶¹ The importance of Annex 7 is immense given the fact that the 1992–1995 war displaced more than two million people as refugees and internally displaced persons. Since the end of the war around one million have returned to their prewar homes, and almost half of those have been “minority returns,” that is, persons who have returned to their preconflict municipalities, dominated in post-Dayton Bosnia by (an)other group(s). The failure of the entities, in particular of the RS, to implement relevant provisions of Annex 7 has interfered with the right of return guaranteed by the Dayton Agreement, delaying return and preventing effective reintegration of refugees and displaced persons.

In the Bosniak narrative, the Dayton state is seen as illegitimate not only because it is based on recent injustices (ethnic cleansing and genocide) and because it perpetuates these injustices in the present (through constitutional provisions, electoral laws, inability to enable all refugees to return to their prewar homes), but also because it represents a future threat to the cultural and physical survival of Bosniaks as a group. Ethnic territorialization implicit in the Dayton state, in which the Bosniak presence has been reduced to less than half the state territory, is seen as a prelude to their ultimate disappearance, their “ultimate Srebrenica.” Bosniaks have a stronger argument for territorial reorganization of the state on a theory of correction of group and territorial injustice based on charges of genocide against them, than if they were to ground such a claim merely on the theory of the liberal democratic state in which liberal institutions and legal guarantees protect universal human rights and provide a framework for the political coexistence of ethnic groups.

In the aftermath of genocide or ethnic cleansing, restoration of communal integrity, on which the Bosniaks have insisted, is required by justice. Communal integrity, as Walzer argues, ordinarily derives its moral and political force from the rights of contemporary men and women to live as members of a historical community and to express their inherited culture through political forms worked out among themselves.⁶² However, in postconflict, divided societies such as Bosnia, the very notions of “communal integrity” and “historical community” are problematic. In fact, the inability of members of different historical communities in Bosnia to work out political forms through which to govern themselves in a shared state has been at the root of the conflict which, in the aftermath of a violent civil war, remains unresolved. Bosniak demands that Republika Srpska pay group reparations for damages to the Muslim religious heritage on its territory and punish persons responsible for the demolition of its buildings, or that the official holidays of the RS be altered in order to be inclusive of non-Serbs, are legitimate, even if they remain controversial

among the RS Serb elites.⁶³ The difficulty lies with implicit claims that communal integrity derives its primary moral and political force from the rights of victims of genocide. In the Bosniak narrative, a unitary state not based on ethnoterritorial principle is the political form that, first and foremost, affords safety and protection to Bosniaks victimized by genocide, while at the same time, it best expresses the Bosniak inherited culture, its democratic spirit, and its tradition of tolerance. This form of state, however, has clearly been unacceptable to Bosnia's Serbs and Croats, who, since the early 1990s, have supported the ethnofederal principle of state organization. Bosnia's constitutional reforms, launched in 2005, have reemphasized the strong commitment of Bosnia's Serbs and Croats to the ethnofederal principle of state organization and brought to fore the difficulty of reconciling these dramatically different visions of a common state.⁶⁴

Claims that nationalists typically make, writes Lea Brilmayer, are centered more on the moral merits of their interactions with others and less on a presumed entitlement arising from the fact of nationhood.⁶⁵ Bosniak political demands in the aftermath of the recent conflict embody both the moral merits of their interactions with others, specifically the Serbs, and also a presumed entitlement arising from the fact of nationhood in general, and from their self-perception as Bosnia's *Staatsvolk* in particular. The idea of Bosniaks as foundational people of Bosnia, whose statehood has stretched continuously from the eighth to the twenty-first century, has become widespread among the Bosniaks, especially since the early 1990s. In the Bosniak national narrative, the tension between the concepts of nation, religion, and culture as they are played out in reference to spatial belonging has been politicized for the purpose of marginalizing Bosnia's Croat, and especially, Serb populations. In the post-Dayton period, Bosniak elites have focused almost exclusively on the actions and beliefs of Serb perpetrators and their creation—the genocidal entity Republika Srpska—as the root problem of post-Dayton Bosnian politics. This strategy has served two important and potentially problematic goals. By means of genocide—which is becoming one of the main references in Bosniak relations with other communities in Bosnia, as well as with the world at large—Bosniak elites render themselves and their community immune to criticism and impervious to a constructive dialogue with those around them.⁶⁶ Furthermore, responsibility for atrocity crimes committed by the Serbs in Bosnia, especially when those are authoritatively labeled as genocide, has been conflated with responsibility for starting the war and for obstructing postconflict reconstruction and state-building, keeping the Serbs in a permanent position of culpability. In this context, cast in the discourse of genocide, Bosniak claims about territorial and constitutional reorganization of the state, which

involve disputed claims to territory and the control of the state, seek to delegitimize any and all ethnoterritorial claims, not only of Serbs, but also of Croats.

Bosniaks, Serbs, and Genocide as Political Argument

By placing the responsibility for genocide in the hands of the Bosnian Serbs, the ICJ judgment emphasized one of the most crucial difficulties of the post-Dayton state-building project—the fact that the group victimized by genocide and the group associated with the perpetrators of genocide are required to construct a shared, self-sustaining state on the premise that both groups are state forming. To the extent that there are some important similarities, as well as some important differences, between post-Dayton Bosnia and post-WWII Yugoslavia, the Yugoslav experience is illuminating here, and it offers reasons for some concern and caution.

For the Yugoslav Communists, WWII was a dual struggle: it was a war of national liberation against fascist occupiers and a socialist revolution. In this context, the interethnic violence which gripped the country during the war was seen as the culmination of political and social antagonisms of the interwar kingdom, and of manipulation by occupying powers fighting for influence in the Balkans.⁶⁷ Emphasizing that the Partisans' military victory and their revolutionary state-building project provided the conditions for peaceful and tolerant interethnic relations, the Communists suppressed any serious investigation of wartime ethnic violence for fear of its destabilizing effects. In the 1980s, following Tito's death, WWII became the subject of much research and debate among Yugoslav intellectual and political elites, especially among Serbs. Just as in the Bosniak case, much of the inquiry and debate about the genocide of the Serbs in the Independent State of Croatia during WWII was motivated by the need to come to terms with a traumatic history and to restore the memory of the victims. This was especially significant given that in the context of Communist nationality policy and the officially sanctioned narrative of WWII many issues were suppressed or distorted. In the aftermath of Tito's death and in the atmosphere of greater openness, Serbs and other groups could focus on their traumatic history, especially on events from WWII. But these debates were connected, often explicitly and purposefully, to contemporary political and economic issues.⁶⁸ As questions pertaining to the political, economic, and cultural position of Serbs in some Yugoslav republics and provinces were being raised by Serb nationalist elites, the question of Serb historical victimization gained tremendous importance.⁶⁹ As symbol of Serb genocide in the Independent State of Croatia, Jasenovac emerged

as perhaps the most powerful example of Serb victimization, and genocide soon became an important political argument.⁷⁰ Scholars studying the disintegration of Yugoslavia have shown how in the context of renewed ethnic conflict in the late 1980s and early 1990s genocide accusations and victimological narratives offered key resources for those seeking to seize the “disjunctive moment” of history, when relations of power are transformed through reformulations of ideology that combine theory with myth. The invocation of the 1940s genocide was an especially prominent part of an effort by Serb leaders to stir up nationalist sentiment among the Serbs in Yugoslavia.⁷¹

For Serb intellectuals who first began to write and speak about the oppression of Serbs in post-WWII Yugoslavia, the most obvious source of their grievances was the way in which the national question had been resolved during the war, especially in light of genocide perpetrated against Serbs by the Ustasha regime in the Independent State of Croatia. In the 1980s Serb elites began attacking the wartime settlement which, they argued, was especially disadvantageous to the Serbs, the population who sacrificed the most both demographically (having suffered the greatest population losses) and territorially (having been dispersed in four federal republics).⁷² This sentiment was best captured by Svetozar Stojanovic, in his book on the fall of Yugoslavia, in the section entitled “Was Yugoslavia Possible after Jasenovac?”: “The YCP [Yugoslav Communist Party] leadership headed by Tito, who sought the cure for ‘greater Serbian hegemony’ in a federalist state system, did not allow the Serbs in post-Jasenovac Yugoslavia to have influence on the determination of inter-republican ‘borders.’ . . . The question arises as to whether the renewal of Yugoslavia was possible, and if it was, then what kind of Yugoslavia?”⁷³

Implicit in Stojanovic’s question was the critique of the Yugoslav federal state in which the Serb nation was “fragmented” into four federal republics and Serbia was “parcelized” through the establishment of two autonomous provinces within its borders, while Croats were “rewarded” with a territorially intact Croatian republic. The narrative that emerged in the second part of the 1980s emphasized the uniqueness of Serb victimhood—genocide of the Serbs versus war crimes committed against other groups in Yugoslavia during WWII, and the precarious position of Serbs in a post-genocide Yugoslavia which did not acknowledge their victimhood.⁷⁴ In this context, the centralizing tendencies of Serb political elites, especially vis-à-vis Kosovo, Croatia and Bosnia were legitimized, in part, as measures necessary to prevent another genocide against the Serbs.⁷⁵ Genocide-as-political argument played an important role in the context of Bosnia’s competing claims to territory, with Bosnian Serb leaders arguing that Serb territories in Bosnia encompass not

only areas in which Serbs constituted a majority in 1991, but also those in which they would have constituted a majority if genocide had not been committed against them during WWII.⁷⁶ The Serb political establishment in the RS continues to focus on the WWII genocide of the Serbs, and more specifically on Jasenovac, in a clearly politicized fashion. In May 2007, a conference on Jasenovac, held in Banja Luka, emphasized the need to keep the memory of genocide alive and criticized attempts to dispute the number of Jasenovac victims.⁷⁷ A month later, Banja Luka hosted another conference, “Republika Srpska—Fifteen Years of Survival and Development.” At this event, Milorad Ekmečić, a historian who is considered to be the ideological father of the SDS, presented a paper titled “Historical and Strategic Foundations of Republika Srpska.”⁷⁸ This paper, which was a direct response to charges that the RS is a “genocidal entity,” opens with the following paragraph: “If we could hypothetically accept the argument that Republika Srpska is a consequence of genocide—as contemporary enemies of peace usually argue—then this argument should state that Republika Srpska is a consequence of genocide perpetrated against the Serb people, and not of genocide perpetrated by the Serb people against others. Republika Srpska is the remnant of what has remained of the Serb community west of the Drina.”⁷⁹

The question that Stojanović raised about post-Jasenovac Yugoslavia undoubtedly resonates very powerfully with much of what is being said by many Bosniak political leaders in the aftermath of Dayton. In fact, much of the debate about Srebrenica between Bosniak and Serb leaders resembles the debates between Serb and Croat politicians in the 1980s about Jasenovac. Responding to attacks on the RS as a “genocidal entity,” Bosnian Serbs—like Croats in Yugoslavia defending Croatia’s position—have argued that the RS is an expression of their historically legitimate claims to self-determination and that the atrocities, including Srebrenica, have been perpetrated by an extremist regime linked to Karadžić’s SDS.⁸⁰ They object to the attempts to blame the Serbs collectively for these crimes, and most of all, the attempts to attack their legitimate rights on the basis of moral claims arising from such crimes. It is true that one very significant difference between post-WWII Yugoslavia and post-Dayton Bosnia is the fact that retributive justice meted out by ICTY (and some domestic courts) have put an end to impunity, which to a large degree characterized post-WWII Yugoslavia. The individuals most responsible for massacres and genocidal violence in Yugoslavia—including in particular the leadership of the Independent State of Croatia—have by and large, escaped justice.⁸¹ And while Communist policy toward “past crimes”—very much in line with Renan’s dictum about the need to balance remembering and forgetting in the service of nation-building—

has not been entirely misplaced, Communist failure to punish the masterminds of the greatest crimes was, to say the least, a misguided policy.

There is some fragmentary evidence to suggest that the Serb elites' emphasis in the 1980s on the genocide perpetrated against the Serbs by the Independent State of Croatia could have culminated in an official policy of pushing genocide recognition into the international arena. In the 1980s, however, the moral claims and political demands of the Serb elites were made against competing groups inside the Yugoslav state but were not directed at the international community. Bosniak claims in the post-Dayton period are directed primarily at external constituents, namely the United States, the European Union, and the United Nations.⁸² They are still made against the competing claimants inside Bosnia, in the first instance, against the Serbs, who also have a strong claim to victimhood based on genocidal violence perpetrated against them. While benefiting from the new international context shaped by the demands that states and nations act morally, the Bosniak narrative has not only emphasized Bosniak historic and more recent victimization, but has also sought to challenge Serb claims to victimhood. Questioning the number of Serb victims of WWII genocidal violence has gone in parallel with the emphasis on the historic genocidal predisposition among the Serbs and their political elites, efforts inspired by the need to demonstrate greater victimhood and state a more legitimate claim to control the state.

For Bosniak elites, retribution against individuals responsible for atrocity crimes—including most recently the trial of Radovan Karadzic in the Hague—remains only a small segment of what they consider justice in the aftermath of their great tragedy. Justice for the most part is conflated with the restoration of the preconflict state, a unitary republic whose organization does not contain ethnoterritorial or ethnic power-sharing principles. Bosniak political demands for restoring the preconflict state take as conclusive the claims of entitlement oriented toward political circumstances which are very different from what Bosnia actually faces with respect to competing visions of the Bosnian state among the three groups. To the extent that Bosniak claims of entitlement that promote a particular state model as justice and compensation for a group victimized by genocide ignore the interests of the other two groups, interethnic relations in Bosnia will continue to be plagued by the same contentious and destabilizing issues as those of Yugoslavia in the 1980s.

Notes

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1. *Bosnia’s Genocide Case*, 1993–2007. The case was launched at the International Court of Justice in March 1993 and the Court reached its decision in February 2007.

2. Republic of Bosnia and Herzegovina (RBiH) was the official name of the state recognized in April 1992, with the constitution effective at that time. The Dayton Peace Agreement, signed in December 1995, reaffirmed Bosnia’s international legal sovereignty, but under the provisions of the Agreement, Bosnian state officially exists as Bosnia and Herzegovina (BiH), and has a constitution very different from the one it had at the time of independence in 1992.

3. *War Crimes in Bosnia and Herzegovina*. 1992. 1–2.

4. UN General Assembly Resolution 47/121, 18 December 1992. For a good overview of war-time international reports and documents pertaining to ethnic cleansing and genocide in Bosnia, see Petrovic 1999.

5. See Williams and Scharf 2002, esp. chaps. 5 and 9. Williams has also been involved in the latest process of constitutional reform in Bosnia through the Public International Law Group.

6. Schabas 2007 seems to adopt a definition of genocide consistent with the one formulated by Manus Midlarsky (2005, 25–28) which categorizes cases of genocide on two dimensions: exterminatory state policy and the selection of noncombatants. Schabas has argued that neither the International Court of Justice, nor the International Criminal Tribunal for the Former Yugoslavia, whose “genocide ruling” in the Krstic case the ICJ upheld, concluded that exterminatory Serb state policy with respect to Bosnian Muslims existed. Noting that the Srebrenica massacre was accompanied by the evacuation of women and children, Schabas writes: “As for the massacre of the men of military age, the so-called genocidal act at the heart of the Srebrenica atrocities, this too is an act shrouded in ambiguity. Murdering prisoners of war is, of course, an atrocious and unpardonable war crime. But it does not unequivocally reveal an intent to destroy an ethnic group” (114). For a different view, see Scheffer 2007.

7. Fein 1999, 160–163.

8. Midlarsky 2005, 23, 25–28.

9. Mennecke and Markusen 2004. See also, Mennecke and Markusen 2003, 293–359.
10. Bougarel 2004, 29–35.
11. Burg 1997.
12. Hayden 2008b, 502–507; 2008a.
13. Ramet 2005, esp. chaps. 1 and 4. While Ramet’s work is written as a monumental review of the literature on Yugoslav disintegration and wars of succession, her own views are discernible through arguments of other scholars which she endorses and praises (or criticizes and attacks). See Gow 1997.
14. Sells 1996, 29–52; Cigar 1995, 22–38.
15. Bougarel 2004, 35–37, 140–142; Burg and Shoup 1999, 184; Bose 2002, esp. chap. 4.
16. Douglas 2001.
17. Horowitz 1985, 201–207.
18. Thus, for example, calls for the removal of ethnoterritorial autonomy for Bosnia’s minorities (namely Serbs and Croats) are not seen as a challenge to the putative right of self-determination when cast in the language of genocide. Similarly, the nationalizing policies of the Ukrainian state are rendered unproblematic when framed as the means of healing the postgenocidal society.
19. Brilmayer 1995, 11, 12.
20. Zertal 2005, 91–128, 164–209.
21. On the role of Holocaust as model for the Bosniak elites’ postgenocide state-building strategy, see Catic 2008. On the Holocaust and the use of memory in the former Yugoslavia, see Miller 2007.
22. Brubaker 1995, 107–132; Migdal 2001, 15–23.
23. Migdal 2001, 16.
24. Brubaker 1995, 109.
25. Burg and Shoup 1999, see chap. 5.
26. On the role of Bosnian Muslim leadership in the dynamic leading to war, see Kuperman 2008, 52, 49–80. For a more detailed account, see Burg and Shoup 1999, chap. 3; Bougarel 2004, chap. 2; Cohen 1995, 241–251.

27. On Herceg-Bosna, see Ribicic 2000.
28. Kuperman 2008, 56–64.
29. Burg and Shoup 1999, 171–181.
30. The War Congress of the Bosnian Muslim intellectuals held on December 22, 1992. See Kamberovic 1994.
31. For an overview of the role of external actors in the Bosnian conflict, see Burg 2005.
32. Boyle 1997. Boyle was Bosnia’s former general agent at the ICJ.
33. Article I of the Genocide Convention states: “The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.” Article II defines the international crime of genocide:

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious groups, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Article III declares certain acts to be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.

34. *Application Instituting Proceedings*, 20 March 1993, esp. Para. 135(1)-(o). *Request for the Indication of Provisional Measures of Protection*, submitted by the Government of the Republic of BiH, July 27, 1993, Section E, paragraph 5. While the application stresses that BiH has the sovereign right to defend itself and its people under the UN Charter (Article 5), the request explicates that Bosnia must be able to exercise this right in order to prevent itself and its people from “acts of genocide.”

35. *Request for the Indication of Provisional Measures of Protection*, submitted by the Government of the Republic of BiH, July 27, 1993, Section E, paragraphs 2 and 7; Section G. Section E, paragraph 7 states that “all Contracting Parties to the Genocide Convention have the

obligation thereunder ‘to prevent’ acts of genocide, and partition and dismemberment by means of genocide, against the People and State of Bosnia and Herzegovina.”

36. *Memorial of the Government of the Republic of Bosnia and Herzegovina*, April 15, 1994, 294.

37. *Reply of Bosnia and Herzegovina*, April 23, 1998, Chapter 12, Section 3; Chapter 2, Section 2.

38. *Ibid.*, Chapter 12, section 2, paragraph 6; Chapter 12, section 3, paragraph 9.

39. Article 53 of the Vienna Convention on the Law of Treaties states that a “treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” Vienna Convention on the Law of Treaties, 1979.

40. Article 52 of the Vienna Convention on the Law of Treaties states that a “treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations. Vienna Convention on the Law of Treaties, 1979.

41. Burg 2005, 199–200.

42. In accordance with the DPA, Bosnia consists of two “Entities,” the equivalent of provinces and states in federal systems. One of its entities is the Serb Republic (Republika Srpska), comprised of 49 percent of Bosnia’s territory, fairly centralized, and predominantly Serb. The other entity, comprised of 51 percent of Bosnia’s territory, is the Federation of Bosnia-Herzegovina (also known as the Bosniak-Croat Federation), further decentralized into ten cantons, five of which are predominantly Bosniak, three of which are predominantly Croat, and two mixed Bosniak-Croat.

43. Parts of the DPA that are seen as central to the promise of reversing the effects of ethnic cleansing are: Annex 7, Agreement on Refugees and Displaced Persons; Annex 6, Agreement on Human Rights, Article IX of the General Framework Agreement on Peace, dealing with the cooperation in the realm of war crime prosecution at the International Criminal Tribunal for the Former Yugoslavia. Implementation, although aided by external actors—NATO/EUFOR troops and civilian officials—is in the hands of domestic actors, each of whom accepted the peace agreement for very different reasons.

44. For more details on funding, see Dimitrijevic and Milanovic 2008, 74–75.

45. William Schabas has suggested that the Bosnian legal team should not have expected a winning judgment for Bosnia given that ICTY produced only one conviction based on the genocide indictment in the Krstic case. (Radislav Krstic was found guilty for events in and around Srebrenica in July 1995.) Schabas’s lecture at the Genocide and Human Right University

Program, Toronto, 7 August 2007.

46. Hitchner 2006.

47. The Party of Democratic Action, founded and headed until his death by Alija Izetbegovic, the wartime president of Bosnia, is the largest and most prominent Bosniak national party. The Party for BiH draws primarily on the Bosniak constituency and is the most vocal proponent of radical constitutional reforms that would do away with the two-entity structure.

48. *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina vs. Serbia and Montenegro)*. Summary of the Judgment of 26 February 2007.

49. P.K. 2007.

50. Sarac 2007.

51. Stranka za Bosnu i Hercegovinu or Party for Bosnia and Herzegovina; Stranka demokratske akcije (Party of Democratic Action); Agencije 2007.

52. See Gregorian 2007.

53. Risojevic 2007. Several months later, Milorad Dodik, the Prime Minister of the RS, announced that instead of the initial 16 million, the RS government pledged 25 million KM for the development of the Srebrenica region. Threatening to sever ties with local government if the resolution on Srebrenica's special status was not withdrawn, Dodik emphasized that the goal of his government was not to help Srebrenica only because of the horrible tragedy of the Bosniaks in this municipality, but also in order to address the "ethnic inequality" of Serbs in this region. See Radic 2007.

54. *Statesmen's Forum*, 2007. Transcript available at: http://www.csis.org/component/option,com_csis_events/task,view/id,1294/.

55. Bosnian Presidency non-Serb members ask UN to annul Srebrenica genocide results, *BBC Monitoring Europe*, June 18, 2007.

56. Bosniak American Advisory Council for Bosnia and Herzegovina (BAACBH) was formed in January 2006 and is based in Washington, D.C. It is primarily a lobbying front of the Congress of North American Bosniaks, an organization that represents the interests of the Bosniak diaspora in the United States and Canada. BAACBH was instrumental in forming the Congressional Caucus on Bosnia. The resolution, HR Res. 679, was submitted by Congressman Christopher Smith in September 2007. Text available at: <http://www.baacbh.org/site/en/?action=projects>.

57. Brass 1997; Horowitz 1991, 2.

58. I follow here Rene Lemarchand's arguments about the Hutu-Tutsi conflict in Burundi. See Lemarchand 1994, 17–33.

59. See Moore 2001, 189–193.

60. Izetbegovic 2001, 322.

61. Walzer 1983, 43.

62. Walzer 1980, 211.

63. Cano 2007. The Constitutional Court of BiH ruled—in two separate cases—that names of cities given the designation “srpski” (Serb) in the RS and the laws on official holidays and festivities violated the constitutional principle of group equality of all three constituent peoples.

64. The majority of Croat initiatives regarding the constitutional and territorial organization of Bosnia have been compatible with two long-promoted visions: canonization of the entire territory of Bosnia, in which cantons would have a marked, though not exclusive, ethnic character; and, the creation of a Croat-dominated area, most often called the “Third Entity.” The ethnofederal principle is endorsed not only by most Croat political parties, but also by the Conference of Catholic Bishops in BiH, an organization which has played a prominent role in Croat politics in Bosnia. While Serbs have generally focused on defending the Dayton status quo with regard to the constitutionally privileged position of Republika Srpska as one of Bosnia's two entities, the Serb political establishment has been receptive to the “three-entity” solution, provided that the new solution does not threaten the territorial integrity of the RS.

65. Brilmayer 1995, 31.

66. Two examples illustrate of this attitude. In early March 2007, the news program *Centralni dnevnik*, produced by a prominent Sarajevo journalist, Senad Hadzifezovic, featured three regional leaders: Stjepan Mesic, president of Croatia; Haris Silajdzic, member of BiH presidency; and Boris Tadic, president of Serbia. The chief topic of the program was the ICJ decision announced only a month earlier. Expressing his frustration at the ruling, Silajdzic proceeded to elaborate on the differences between Bosniaks and Serbs, and explained that unlike Bosniaks, Serbs have been raised as fascists and criminals. He went on to remind everyone that the 1992–1995 genocide is not the first genocide against the Bosniaks and that everything must be done that it is the last. In August 2007, responding to claims made by Deputy High Representative Raffi Gregorian about Al-Qaida sympathizers in Bosnia who are aiding international terrorists, Bosnian Grand Mufti Mustafa Ceric said at a religious ceremony in Herzegovina: “It is a sin and immoral to link Bosnian Muslims with terrorists' organizations. . . Such statements give us grounds to fear that this is an introduction for the next act of genocide against our people.” See HINA Croatian News Agency 2007.

67. On interethnic violence in Bosnia during WWII, see Redzic 2005 and Dulic 2005.

68. Dragovic-Soso, 2002.

69. The most (in)famous example of debates and analyses of both the historical and the contemporary position of Serbs in Yugoslavia is certainly the *Memorandum of the Serbian Academy of Sciences and Arts*, published in September 1986. It identified the most pressing political, economic, and cultural problems facing Serbs in Yugoslavia, analyzed their historical roots, and signaled apocalyptic warnings if measures were not taken to rectify the position of Serbs. See “SANU Memorandum 1986.” Jasenovac was the largest extermination camp in the Independent State of Croatia and occupied Yugoslavia during WWII, where the largest number of victims comprised ethnic Serbs, along with Jews and Roma.

70. Radic 2000, 247–274, discusses aspects of this victimological narrative with respect to the role of the Serbian Orthodox Church. See also Hayden 2008b and Hayden 1994.

71. Denich 1994; Hayden 1994.

72. For example, see Cavoski 1987, “Prividna jednakost nacija u zaslugama.”

73. Stojanovic 1997, 77.

74. Starting in the early 1980s historians engaged themselves in the theme of wartime atrocities in Yugoslav lands. One of the first to do so was Vladimir Dedijer, a Yugoslav historian and member of the Russell Tribunal, who raised the issues of the atrocities against Serbs in the Independent State of Croatia, the role of the Catholic church, and the number of dead in the Jasenovac concentration camp. See Dedijer 1981, 531–557. In 1984 Dedijer was elected head of a committee established by the Serbian Academy of Sciences and Arts to collect “material on genocide on the Serbian and other Yugoslav peoples in the Twentieth century.” See Dedijer and Miletic 1989, 8. By 1990, six out of twenty-one planned volumes had been published, including a large work on Chethnik genocide against the Muslims, the only one that did not have Serbs as the victim group. See Dedijer and Miletic 1990. This focus on genocide produced polarizing historiographic and public debates, especially in Serbia and Croatia. In addition to the works by Dedijer and Miletic, which sought primarily to document wartime atrocities, especially those against the Serbs, Vasilije Krestic in his publications sought to provide historic and structural analysis of the genocide against the Serbs. See Krestic 1986. He later published *Genocidom do Velike Hrvatske* (1998) in which he elaborates on his earlier arguments. Croatian historians, such as Ljubo Boban and Franjo Tudjman, responded to these publications. In their works they disputed not only the more controversial, nationalist arguments marshaled by Krestic, namely the long-standing “genocidal tendency” among Croat national elites vis-à-vis the Serb minority in Croatia, but also the estimates of victims of Ustasha terror and the wider institutional background of genocide, including the role of the Catholic church. See Boban 1990 and Tudjman 1990.

75. This excerpt from the *Memorandum of the Serbian Academy of Arts and Sciences* is a good illustration of the political implications of moral claims associated with genocide: “The establishment of full national and cultural integrity of the Serbian people, regardless of which republic or province they live in, is their historical and democratic right. The achievement of equal status and independent development has a deeper sense for the Serbian people. In less than fifty years, during two successive generations, [it was] twice exposed to physical annihilation, forced assimilation, conversion, cultural genocide, ideological indoctrination, devaluation and rejection of its own tradition under an imposed guilt complex, [and] intellectually and politically disarmed.” See Covic 1991, 297.

76. Article 2 of the 1992 constitution of Republika Srpska states that “the territory of Republika Srpska consists of Serb ethnic regions, including those regions in which genocide was committed against the Serb people.” *Ustav Republike Srpske* 1998.

77. Popovic 2007.

78. Srpska Demokratska Stranka (Serb Democratic Party)

79. Ekmecic 2007.

80. This position has been associated primarily with Milorad Dodik and his party, the SNSD. In early August 2008, Dodik publically stated that SDS and its wartime leader Radovan Karadzic planned and executed the massacre in Srebrenica. See ONASA 2008. Dodik and his party, have been trying to distance their politics, as well as the position of Republika Srpska, from the radical politics of the wartime SDS leadership, arguing that the SDS’s barbaric and misguided policies have been detrimental for the position of Bosnian Serbs. See interview with Rajko Vasic, a prominent SNSD politician, Vasic 2006. See also Dodik 2008.

81. High-ranking Ustasha leadership, including Ante Pavelic, escaped into exile. In 1986, Andrija Artukovic was extradited from the United States to Yugoslavia, tried for war crimes and condemned to death. He died in prison in 1988. See Blumenthal 1988.

82. On January 15, 2009, members of the European Parliament adopted a resolution on Srebrenica recognizing July 11 as the “day of commemoration of the Srebrenica genocide.” Text of the resolution available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2009-0028&language=EN&ring-P6-RC-2009-0022>. On June 27, 2005, the U.S. House of Representatives passed HR Res 199 commemorating the tenth anniversary of the Srebrenica massacre. Text of the resolution available at: <http://www.baacbh.org/site/endocs/USHouseSrebrenicaResolution.pdf>. The Senate version, S Res. 134, was agreed to on June 22, 2005.

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