

The challenge of achieving agreement on contentious issues rooted in a legacy of violent conflict, by democratic means

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The challenge of achieving agreement on contentious issues rooted in a legacy of violent conflict is, perhaps, nowhere more obvious than in the constitutional realm. In fact, the difficulties or even the inability to achieve agreement on the constitutional framework of a state is the most difficult issue faced by any state, and certainly most contentious issue faced by a divided society. Bosnia is no exception; actually, Bosnia seems to be a paradigmatic case of a post-conflict, divided society facing a challenge of achieving agreement on constitutional issues. (Robert Dahl rightfulness of the unit).

What I want to focus on in this presentation is the difficulty of achieving agreement on constitutional issues in the context where claims are cast in moral terms; that is, when one group puts forward a moral claim about the appropriate and just form of statehood and uses the moral claim to de-legitimize other group's visions of the shared state.

The Dayton Peace Agreement has in many ways institutionalized a de facto partition through territorialization of ethnicity achieved by means of ethnic cleansing and genocide in an asymmetric, two entity (con)federal structure. According to many, such state structure legitimized the genocide and awarded aggression associated with the 1992-1995 war. The DPA held the promise of reversing - to the extent this was physically possible - the effects of ethnic cleansing and genocide, but its troubled implementation could not fulfill the promise. Since the signing of the peace agreement, Bosniak elites have insisted on the moral claims associated with the genocide against their people and have sought to repair the Dayton foundations of the Bosnian state with such moral considerations in mind. These demands have focused on both domestic/constitutional and international legal and political realms with the aim of achieving a new territorial and constitutional organization of the Bosnian state, one in which the RS as a "genocidal entity" will not exist. Those who put forward such moral claims can be divided into two broader groups - the first insists on restoring the old Bosnian state, the one that fell victim to aggression and genocide, in its constitutional and territorial form that existed at the time of independence AND the second focuses on the removal of the RS, but instead of insisting on the restoration of the 'old' state it seeks a state structure not organized around ethnic principles, territorially or politically.

Bosnia's case at the ICJ has been the most important strategy pursued by the Bosniak elites in their quest for the removal of the Serb entity. The hope was that the ICJ ruling in Bosnia's favour, one which found YU guilty of committing genocide, one which established that the RS was merely YU surrogate on Bosnian territory, and one which asked the guilty party for restitution on behalf of the injured state. Such ruling was to undermine the Dayton state in following ways: first, the party guilty of committing

genocide would be required to wipe out the consequences of its internationally illegal act – genocide - that is, remove the RS; second, the ruling on "total" rather than "partial", that is, territorially restricted genocide, was to undermine the legality of the Dayton Agreement as an international treaty since it would show that the treaty was signed under pressure and threat of genocide.

However, the ICJ ruling was a bit of a disappointment. The ruling upheld the ICTY finding regarding Srebrenica but ruled that genocide was not committed by the respondent on the entire territory of Bosnia. It also questioned the notion/definition of the target group that the applicant put forward. ICJ found that neither the RS nor its army could be regarded as mere instruments through which YU was acting, and as lacking any real autonomy.

Such ruling notwithstanding, the Bosniak political leaders, most vocally Haris Silajdzic, the Bosniak member of the collective presidency, are arguing that the ICJ ruling by suggesting that the institutions of the RS (its army and command) are responsible for genocide in Srebrenica, necessitates their examination of the constitutional order of Bosnia, including its administrative-territorial divisions. They argue that the current ethnic and territorial divisions are direct consequences of genocide, and that the ICJ ruling obliges all citizens and communities in Bosnia to work on reintegrating the Bosnian society and reconstruction its authentic multiethnic culture (essentially, on restoring the pre-conflict Bosnian state). Silajdzic's party, its members in the Parliament, were the ones who buried the constitutional reform brokered in the spring of 2006. Their strategy has been the one of waiting for the ICJ ruling before any constitutional amendments are agreed and passed.

Focusing on Bosnia's de facto partition as international crime which by the very nature cannot possibly give rise to a valid legal title, moral-political claims emphasize de jure continuity of the pre-conflict Bosnian state and the preeminence of the Bosnian state people not its current constituent peoples as sovereign right holders. Such claims reinforce the notion that the law is not just alien but that it has been imposed against the backdrop of the most serious injustice, that of genocide.

The most important point is that the Bosniak demands aimed at re-structuring the Dayton state are legitimate because the state's territorial jurisdiction and constitutional framework as they exist now are set up on the basis of a serious and very recent injustice. However, the major problem with moral political demands made by Bosniak elites is that they are not being used to de-legitimize the current structure only but are being used to de-legitimize any accommodation of national groups through institutional separation, something that is a requirement of fairness in the context of multinational societies, such as Bosnia. And this attempt to de-legitimize other visions of the state using moral high-ground is highly problematic in the context of the project aimed at building a shared, sovereign state.