

**WHAT'S LAW GOT TO DO WITH IT?:  
THE *BOSNIA V. SERBIA* DECISION'S IMPACT ON  
RECONCILIATION**

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*During the twentieth century a particular ideology inspired specific efforts to utilize the power of the law to redress episodes of mass atrocity—in particular genocide. The idea has been that accountability and reparations are necessary for moving beyond a past marred with crimes of genocide and crimes against humanity. Trials are often claimed to aid this process on the grounds that they create an irrefutable historic record, punish the perpetrators for the sake of justice and deterrence, and promote peace and reconciliation. This Article interrogates the stated goals of accountability, in particular the goal of reconciliation, against the impact, within Bosnia and Herzegovina (BiH) of the February 26, 2007 *Bosnia v. Serbia* decision of the International Court of Justice (ICJ).*

*This Article illustrates the shortcomings of international justice when measured against the proponents' claims and highlights that exaggerated claims about international justice are not mere hyperbole; they have actual and dangerous consequences within and without of the BiH context. They are dangerous to the legitimacy of international courts; dangerous for the victims who are meant to be served by international justice; dangerous because exaggerating what international justice does conceals the fact that actual prevention is not done; and dangerous because a great deal of financial and human resources are spent on international tribunals—resources that arguably are better utilized elsewhere. The Article argues that a realistic appreciation of what*

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*international justice can achieve will assist international policymakers redress mass atrocities. A balance, however, can only properly be struck between different mechanisms utilized to achieve reconciliation and human rights protections if we critically challenge some of the basic assumptions upon which international justice stands.*

## INTRODUCTION

“Srebrenica was a combination of all the elements of the war,” says Emir. “It was a siege the length of Sarajevo, only more intense. It was the brutality of Omarska, only more brutal. It was the complicity of the United Nations, only more obvious. Srebrenica was everything that happened over three years in Bosnia culminated into one place and one time.”

Emir Suljagic, Srebrenica massacre survivor.<sup>1</sup>

Proponents of the power of the law to redress episodes of mass atrocities make broad claims about the value of international justice; “No justice—no peace,” they cry. Their arguments are founded upon the belief that international justice serves important goals, without which there can be no peace. International justice punishes the perpetrator, providing retributive justice to the victim; international justice deters future crimes; international justice establishes the rule of law in broken societies; international justice creates an irrefutable history; and international justice promotes reconciliation.<sup>2</sup>

International justice is important for a myriad of reasons, not the least of which are taking perpetrators off the streets (out of sight of the victims) and out of the political system, and providing reparations to victims. This Article suggests, however, that proponents are too eager to make broad and overreaching claims about what international justice can actually achieve.<sup>3</sup> Such claims

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1. Ed Vulliamy, *Srebrenica: Ten Years On*, OPENDEMOCRACY, July 6, 2005, [http://www.opendemocracy.net/conflict-yugoslavia/srebrenica\\_2651.jsp](http://www.opendemocracy.net/conflict-yugoslavia/srebrenica_2651.jsp).

2. See MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW 194-205 (2007) (arguing in favor of state obligations for reparations); Laurel E. Fletcher & Harvey M. Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 HUM. RTS. Q. 573, 573-639 (2002) (examining the limitation of criminal trials to social reconstruction); Jenia Iontcheva Turner, *Defense Perspectives on Law and Politics in International Criminal Trials*, 48 VA. J. INT'L L. 529, 534-43 (2008) (examining the purpose of international criminal trials). For a general description of the evolution of international justice, see RUTI G. TEITEL, TRANSITIONAL JUSTICE (2000).

3. International justice refers, herein, to international criminal justice as well as international civil justice as pursued in, among other venues, the International Court of Justice (ICJ). International justice as used herein does not refer to the entire panoply of mechanisms utilized to address mass atrocities such as, but not limited to, truth commissions, lustration, or property claims commissions. Rather, it refers to judicial proceedings.

have consequences not only for the legitimacy of international justice, but also for the victims whom international justice is meant to serve. These exaggerated claims are not mere hyperbole. They are dangerous because they promise too much and deliver too little. They are dangerous to the legitimacy of international courts;<sup>4</sup> dangerous for the victims who are meant to be served by international justice by garnering high and unrealistic expectations; dangerous because a great deal of financial and human resources are spent on international tribunals, resources that are arguably better utilized elsewhere; and dangerous because they obscure the fact that actual prevention is not happening.<sup>5</sup>

The impact within Bosnia and Herzegovina (BiH) of the recent decision by the International Court of Justice (ICJ) of *Bosnia & Herzegovina v. Serbia & Montenegro*<sup>6</sup> illustrates the shortcomings of international justice when measured against the proponent's claims. In this case, BiH sued Serbia under the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide

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4. Diane Orentlicher, one of the early and significant proponents of international justice, states "[w]e must do better not only at defining our expectations [about international criminal tribunals and other forms of justice for mass atrocities], but in testing them through empirical assessments. . . . [R]igorous assessments are indispensable to the legitimacy of international tribunals. . . ." Diane F. Orentlicher, *Judging Global Justice: Assessing the International Criminal Court*, 21 WIS. INT'L L.J. 495, 503 (2003).

5. Some champions of global justice claim that the threat of trials has a deterrent effect on the actions of perpetrators. Perhaps this explains in part why the U.N. Commission of Inquiry recommended that the situation in Darfur be referred to the International Criminal Court (ICC). This referral, however, has not proven itself to be an act of prevention. Sudan has only increased its horrific atrocities in Darfur since the referral. In fact, one individual, Ahmed Haroun, who has been indicted by the ICC, has since been promoted to the Minister of Humanitarian Affairs for the Darfur region, made co-chair of a commission to investigate crimes in Darfur, and appointed to a committee responsible for overseeing cooperation with the U.N. peacekeeping force. See Nick Donovan, *Forget Trying to Talk to Khartoum*, TIMES ONLINE, Dec. 11, 2007, [http://www.timesonline.co.uk/tol/comment/columnists/guest\\_contributors/article3031168.ece](http://www.timesonline.co.uk/tol/comment/columnists/guest_contributors/article3031168.ece).

Likewise, against the backdrop of the war and impending genocide in BiH, and an impasse within the international community as to the appropriate response, the U.N. member states agreed to create the International Criminal Tribunal for Yugoslavia (ICTY) by a Security Council resolution in 1993. By July of 1995, when the genocide in Srebrenica occurred, the ICTY had yet to hear a case; the threat of prosecution had not been a deterrent. In the wake of the swift 100 day genocide in Rwanda—of which Roméo Dallaire had warned the U.N. Department of Peacekeeping Operations, explicitly—the Security Council responded by creating the International Criminal Tribunal for Rwanda (ICTR).

6. Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.) (Feb. 26, 2007), <http://www.icj-cij.org/docket/files/91/13685.pdf> [hereinafter Judgment].

Convention) for committing genocide in Bosnia during the 1991-1995 conflict.<sup>7</sup> The court ultimately found that genocide had been committed by the Bosnian Serbs, but only in Srebrenica.<sup>8</sup> It found that Serbia was not responsible for committing genocide.<sup>9</sup> Serbia was, however, found responsible under the Genocide Convention for failing to prevent genocide and for failing to punish genocide.<sup>10</sup> As will be explored below, the response within BiH to the decision was swift, alarming and enduring.

The first section of this Article gives a brief overview of the stated goals of international justice in addressing mass atrocities and provides a functional definition of reconciliation. The second section of this Article locates the *BiH v. Serbia* decision in the heart of BiH conflict that lasted from 1992 until December 1995 and its aftermath. The third section examines the impact of the *BiH v. Serbia* decision in BiH. This Article concludes with a cautionary note. It suggests that international lawyers and policymakers should more carefully calibrate claims about the expectations on international justice in order better to assess how to redress episodes of mass atrocity.

## I. THE DEVELOPMENT OF INTERNATIONAL JUSTICE

### A. *Accountability*

Since Nuremberg and the birth of the Universal Declaration of Human Rights,<sup>11</sup> how a sovereign treats its population has become a legitimate subject of international concern and international law. While the Universal Declaration set the standard for all human rights, the Nuremberg trials established individual accountability for the violations of certain human rights.<sup>12</sup> While the concept of individual criminal accountability was stalled by the geopolitical circumstances surrounding the cold war, new law continued to be developed to enhance state responsibility to protect individual human rights.<sup>13</sup> The human rights regime continued to take root and by the 1980s, the idea that the protection of individual rights is a cornerstone of international law had become well established.<sup>14</sup> In

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7. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention]; see Judgment, *supra* note 6, ¶ 1.

8. Judgment, *supra* note 6, ¶ 434.

9. *Id.* ¶ 471.

10. *Id.*

11. Universal Declaration of Human Rights, G.A. Res. 217A (III), at 71, U.N. Doc. A/810 (Dec. 10, 1948).

12. STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 6 (2d ed. 2001).

13. *Id.* at 8.

14. *Id.*

this “age of rights,”<sup>15</sup> a concern for individual, human dignity can be found at the center of international law and politics.

By the early 1990s, there was a significant revival of the pursuit of individual accountability for mass atrocities with the creation of the ad hoc tribunals<sup>16</sup> and, ultimately, the adoption of the International Criminal Court (ICC) in 1998, which entered into force in 2002.<sup>17</sup> The international legal community is now firmly convinced by talk of accountability grounded in the human rights culture that has grown up since 1945. A “rights based” approach, upon which accountability rests, affirms the idea that victims of mass atrocities have a “right to justice.”<sup>18</sup>

This “rights based” approach to accountability has extended also to the idea that victims of certain mass atrocities have a “right to reparations.”<sup>19</sup> Traditionally, reparations were “conceived in the context of State responsibility for . . . international wrongs, particularly at the end of a conflict,” with reparation owed to the injured state.<sup>20</sup> Owing to the development of international human rights law, reparations have expanded to include a right of victims, the positive implementation of which entails a “procedural right of access to the remedy as well as the substantive form of the relief.”<sup>21</sup> This development has led to an increase in cases demanding reparations for human rights abuses being brought before the ICJ,

15. LOUIS HENKIN, *THE AGE OF RIGHTS* (1990).

16. RATNER & ABRAMS, *supra* note 12, at 9.

17. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90. The Rome Statute took effect upon the ratification of sixty states on July 1, 2002. See International Criminal Court, Establishment of the Court, <http://www.icc-cpi.int/about/ataglance/establishment.html> (last visited Dec. 18, 2008).

18. Under this view, amnesty may never be granted for international crimes such as genocide, crimes against humanity, or other serious violations of international humanitarian law. For an exploration of the treaty and customary law obligations to punish individuals for a core set of human rights violations, see Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991). See generally U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity*, U.N. Doc. E/CN.4/2005/102/Add.1 (Feb. 8, 2005) (prepared by Diane Orentlicher) [hereinafter OCHR Updated Principles]; RATNER & ABRAMS, *supra* note 12 (discussing the possible breadth and limits of individual accountability for human rights violations).

19. See CLEMENS NATHAN RESEARCH CTR. & REDRESS, REPARATIONS FOR VICTIMS OF GENOCIDE, CRIMES AGAINST HUMANITY AND WAR CRIMES: SYSTEMS IN PLACE AND SYSTEMS IN THE MAKING (2007), <http://www.redress.org/conferences/CNRC%20Background%20Paper%201-2%20March%2007.pdf>. For a general description of the evolution of international justice, including criminal justice and reparations, see TEITEL, *supra* note 2.

20. CLEMENS NATHAN RESEARCH CTR. & REDRESS, *supra* note 19, at 2.

21. *Id.* at 3. Forms of reparations include restitution, compensation, rehabilitation, satisfaction, and guarantees of nonrepetition. *Id.*

the principle organ of the United Nations,<sup>22</sup> which has civil jurisdiction over cases brought between states and can offer civil remedies.<sup>23</sup> Adding to the ICJ's docket of cases, many of which involve boundary disputes, victim states are now filing claims alleging that other states bear legal responsibility for serious violations of international humanitarian law, human rights law, and international criminal law.

This paradigm of law and justice calls for perpetrators, both individuals and states, to answer for their crimes and be held responsible in a court of law. Justifications for international legal procedures as a response to mass atrocity include: establishing the rule of law in broken societies, punishing the perpetrators, creating an irrefutable history, and promoting reconciliation.<sup>24</sup>

The belief that international justice serves national reconciliation and peace is replete in the constitutive documents of the ad hoc tribunals. Security Council Resolution 827, establishing the International Criminal Tribunal for Yugoslavia (ICTY), explicitly states that "the restoration and maintenance of peace" is one of its goals.<sup>25</sup> In turn, the ICTY itself states in its 1994 annual report that "[t]he role of the Tribunal cannot be overemphasized. Far from being a vehicle for revenge, it is a tool for promoting reconciliation and restoring true peace."<sup>26</sup> For its part, Security Council Resolution 955, creating the International Criminal Tribunal of Rwanda (ICTR), is "[c]onvinced that in the particular circumstance of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would . . . contribute to the process of national reconciliation and to the restoration and maintenance of

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22. See, e.g., Application of Convention on Prevention and Punishment of Crime of Genocide (Croat. v. Serb.) (Nov. 18, 2008), <http://www.icj-cij.org/docket/files/118/14891.pdf>; Armed Activities on Territory of Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 168, 282 (Dec. 19) (ordering Uganda to pay reparations for its responsibility for armed activity, and massive human rights violations in DRC); Armed Activities on Territory of Congo (Dem. Rep. Congo v. Rwanda), 2002 I.C.J. 219 (July 10).

23. Statute of the International Court of Justice art. 36, June 26, 1945, 59 Stat. 1055, 3 Bevens 1179.

24. DRUMBL, *supra* note 2, at 194-96 (arguing in favor of state obligations for reparations); Fletcher & Weinstein, *supra* note 2, at 573-639 (examining the limitation of international criminal trials to social reconstruction); Turner, *supra* note 2, at 534-43 (examining the purpose of international criminal trials). For a general description of the evolution of international justice, see TEITEL, *supra* note 2.

25. S.C. Res. 827, at 1, U.N. Doc. S/RES/827 (May 25, 1993).

26. The Secretary-General, *Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, ¶ 16, delivered to the Security Council and the General Assembly, U.N. Doc. S/1994/1007, A/49/342 (Aug. 29, 1994).

peace.”<sup>27</sup>

The “truth seeking value” of international justice for mass atrocities is a part of the proponents’ claim that international justice is vital for the reconciliation process.<sup>28</sup> It is argued that trials promote reconciliation by creating a viable, durable historical record that can serve as a basis for national consensus. Proponents simply assume that the judicial record will outweigh individual and group rationalizations for a different understanding of the past.<sup>29</sup> Thus, a new national consensus can be built.<sup>30</sup>

This claim, and its implied assumptions, is particularly important to the international justice project in BiH. To this day, there is simply no common understanding about what happened in BiH during the war.<sup>31</sup> All sides to the conflict believe that they are the true victims. The Bosniak narrative reads genocide committed against the Bosnian Muslims by the Serbs; the Serb narrative reads, at a minimum, an unavoidable civil war and, at a maximum, a defense of the Serbian people.<sup>32</sup> In fact, to date, different history lessons are taught in the segregated schools in BiH.<sup>33</sup>

Thus, in line with current thinking about the power of the law to address episodes of mass atrocity, it is believed that the outcome of the *BiH v. Serbia* case is enormously important to the process of rebuilding BiH because it will aid in the establishment of a common “truth” about the conflict.<sup>34</sup> This, in turn, will help BiH come to terms with the past so it can move into the future. Unless there is some coming to terms with the past the people will not be able to move on and live together.<sup>35</sup> Or put another way, if states or groups do not

27. S.C. Res. 955, at 1, U.N. Doc. S/RES/955 (Nov. 8, 1994). Similarly, a U.N. General Assembly resolution aimed at establishing the Extraordinary Chambers in Cambodia “[r]ecogniz[ed] . . . that the accountability of individual perpetrators . . . is . . . a key factor in ensuring . . . , ultimately, reconciliation and stability within a State.” G.A. Res. 57/228, at 1, U.N. Doc. A/RES/57/228 (Dec. 18, 2002).

28. See MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 123-28 (1998); Ruti Teitel, *Bringing the Messiah Through the Law*, in HUMAN RIGHTS IN POLITICAL TRANSITIONS: GETTYSBURG TO BOSNIA 177, 181-83 (Carla Hesse & Robert Post eds., 1999).

29. See Fletcher & Weinstein, *supra* note 2, at 586-87.

30. *Id.*

31. Vojin Dimitrijević & Marko Milanović, *The Strange Story of the Bosnian Genocide Case*, 21 LEIDEN J. INT’L L. 65, 71-73 (2008).

32. *Id.*

33. Adila Pašalić Kreso, *The War and Post-War Impact on the Educational System of Bosnia and Herzegovina*, 54 INT’L REV. EDUC. 353, 359 (2008).

34. See Donald S. Hays, *The Effects of an Uncivil War: The Damage to Society Caused by Internal Conflict*, Paper Presented at Pathways to Reconciliation & Global Human Rights Conference, Sarajevo (Aug. 2005), <http://www.sourcesofinsecurity.org/events/abstracts/Hays%20Donald.pdf>.

35. *Id.*

accept responsibility then trust is impossible. And if trust does not exist at least on some level then the state cannot exist; there can be no reconciliation. What, however, do we mean by reconciliation?

*B. Reconciliation*

“It has almost become dogma in contemporary foreign policy that establishing the ‘truth’ about a state’s repressive past can lay the foundation for national reconciliation.”<sup>36</sup> Reconciliation is a term often used, yet rarely defined. In the context of the transition from identity-based atrocities, such as ethnic cleansing or genocide, to a new democratic state, the term is loosely used to mean people re-establishing prior connections “across ethnic, racial, or religious lines.”<sup>37</sup> It is not even clear whether scholars and practitioners refer to reconciliation as a process, a goal, or both.<sup>38</sup> To the extent the term is explored, there are minimalist and maximalist understandings of reconciliation. On a minimalist account, reconciliation means nothing more than simple coexistence, which means that former enemies obey laws rather than kill each other.<sup>39</sup> Babbitt defines coexistence as “[a] relationship between two or more identity groups living in close proximity to one another that is more than merely living side by side and includes some degree of communication, interaction, and cooperation.”<sup>40</sup>

The maximalist encompassing notion of reconciliation has often been attributed to the truth commissions of Chile and Argentina—reconciliation as mutual healing and mutual forgiveness.<sup>41</sup> Archbishop Desmond Tutu, the chair of the South African Truth and Reconciliation Commission, emphasized Christian forgiveness as an integral component of reconciliation.<sup>42</sup> In this sense, reconciliation is

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36. Teitel, *supra* note 28, at 181.

37. Harvey M. Weinstein & Eric Stover, *Introduction: Conflict, Justice, and Reclamation*, in *MY NEIGHBOR, MY ENEMY: JUSTICE IN THE AFTERMATH OF MASS ATROCITY* 1, 4 (Eric Stover & Harvey M. Weinstein eds., 2004).

38. Jens Meierhenrich, *Varieties of Reconciliation*, 33 *LAW & SOC. INQUIRY* 195-231 (2008) (prescribing modifications to clarify the concept of reconciliation).

39. See Aneelah Afzali & Laura Colleton, *Constructing Coexistence: A Survey of Coexistence Projects in Areas of Ethnic Conflict*, in *IMAGINE COEXISTENCE: RESTORING HUMANITY AFTER VIOLENT ETHNIC CONFLICT* 3, 3 (Antonia Chayes & Martha Minow eds., 2003).

40. Eileen F. Babbitt, *Evaluating Coexistence: Insights and Challenges*, in *IMAGINE COEXISTENCE: RESTORING HUMANITY AFTER VIOLENT ETHNIC CONFLICT*, *supra* note 39, at 102, 113. The book argues that “reconciliation [(undefined)] is certainly a worthy ultimate goal,” but coexistence must be the first and immediate goal in the process of stitching back the fabric of society torn apart by ethnic conflict. Antonia Chayes & Martha Minow, *Introduction*, in *IMAGINE COEXISTENCE: RESTORING HUMANITY AFTER VIOLENT ETHNIC CONFLICT*, *supra* note 39, at xvi, xix-xx.

41. See TEITEL, *supra* note 2, at 88-92.

42. Amy Gutman & Dennis Thompson, *The Moral Foundations of Truth*

understood as requiring forgiveness by the victims alongside the perpetrators' repentance.<sup>43</sup> Commentators have suggested that the idea of societal repentance and forgiveness is a utopian dream and, in fact, illiberal and undemocratic, as it expects an entire society to prescribe to a single comprehensive moral idea about the past.<sup>44</sup>

The moderate understanding of reconciliation lies between simple coexistence and complete repentance and forgiveness. The concept of reconciliation which Mark J. Osiel calls "liberal social solidarity" requires individuals to respect each other as fellow human beings and citizens.<sup>45</sup> Respect is a more political and inclusive notion of reconciliation than psychological or spiritual redemption and does not require love or understanding between former enemies. It simply requires that former enemies hear each other out, enter into a give-and-take about public policy, and forge consensus where possible on matters of common concern. According to the International Center for Transitional Justice, this civic view of reconciliation is "the condition under which citizens can once again trust one another as citizens."<sup>46</sup> That means that citizens are "sufficiently committed to the norms and values that motivate their ruling institutions; sufficiently confident that those who operate those institutions also do so on this basis; and sufficiently secure about their fellow citizens' commitment to abide by these basic norms and values."<sup>47</sup>

Reconciliation is so vague that some authors prefer to jettison the term for other terms, such as coexistence or social reconstruction.<sup>48</sup> That said, reconciliation is a concept often employed by public policymakers, academics, and the NGO community. Therefore, rather than discard the term, it is useful to endeavor to provide some definition.

One can look within the four corners of the General Framework Agreement for Peace (GFAP), which ended the war in 1995, for guidance on the intended meaning of reconciliation in BiH.<sup>49</sup> The

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*Commissions*, in TRUTH V. JUSTICE 22, 29 (Robert I. Rotberg & Dennis Thompson eds., 2000).

43. *Id.*

44. *Id.* at 32.

45. David A. Crocker, *Truth Commissions, Transitional Justice, and Civil Society*, in TRUTH V. JUSTICE, *supra* note 42, at 99, 108.

46. International Center for Transitional Justice, Reconciliation, <http://www.ictj.org/en/tj/784.html> (last visited Aug. 23, 2008).

47. *Id.*

48. See Afzali & Colleton, *supra* note 39, at 3; Weinstein & Stover, *supra* note 37, at 5; Edith Marko-Stöckl, My Truth, Your Truth—Our Truth? The Role of Truth Commissions and History Teaching for Reconciliation (unpublished MIRICO paper, on file with author).

49. See General Framework Agreement for Peace in Bosnia and Herzegovina, Bosn. & Herz.-Croat.-Yugo., Dec. 14, 1995, 35 I.L.M. 75 [hereinafter GFAP].

GFAP describes permanent reconciliation as one of its main goals.<sup>50</sup> It does not define reconciliation. But we can discern its meaning through the plethora of individual human rights protections and strong emphasis on the “right to return.”<sup>51</sup> In the GFAP’s BiH, reconciliation has been conceived as a process of returning individuals home in order to foster the pluralist society that existed before the war.<sup>52</sup> The GFAP did not, however, provide substantial socioeconomic infrastructure or protection (to ensure religious freedoms and protect against ethnic discrimination) through which the repatriation could succeed.<sup>53</sup> In this sense, the GFAP’s notion of reconciliation appears to be at best one of the most minimalist—coexistence. In spite of the GFAP’s failure to ensure that return of individuals who had been removed because of their ethnicity could be sustained by ensuring an environment free from intimidation and discrimination in civic rights and employment, it is clear that the GFAP was meant to achieve reconciliation through reintegration. For our purposes then, reconciliation is a moderate undertaking whereby processes are put in place that foster an atmosphere where former enemies can come to respect each other as citizens of BiH.

With these basic frameworks in mind, what can be said of the impact the *BiH v. Serbia* decision has had on fostering a common sense of history that can help to create sustainable return and promote mutual respect between Bosniaks and Serbs as civic members of BiH?

## II. THE LANDSCAPE OF BIH

### A. *The War of Ethnic Cleansing*

The heart of the *BiH v. Serbia* decision lies in what have been deemed the worst atrocities the European continent has seen since World War II.<sup>54</sup> “The profound changes in Yugoslav society,” which led to the dissolution of the former Socialist Federal Republic of

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50. *Id.* Annex 1-A art. 1, ¶ 2(c), Annex 4 pmb1.

51. The right to return is enshrined in the BiH Constitution, BOSN. & HERZ. CONST. art. II, [http://ccbh.ba/public/down/USTAV\\_BOSNE\\_I\\_HERCEGOVINE\\_engl.pdf](http://ccbh.ba/public/down/USTAV_BOSNE_I_HERCEGOVINE_engl.pdf), and Annex 7 to the GFAP specifically sets forth the right of refugees and displaced persons to return home free of discrimination, GFAP, *supra* note 49, Annex 7 art. 1.

52. *See* GFAP, *supra* note 49, Annex 7 art. 1.

53. *See* Sheri P. Rosenberg, *Promoting Equality After Genocide*, 16 TUL. J. INT’L & COMP. L. 329, 333-34 (2008).

54. Kofi Annan called the Srebrenica genocide “a massacre on a scale unprecedented in Europe since the Second World War.” Press Release, Kofi Annan, Secretary-General, United Nations, Srebrenica Tragedy Will Forever Haunt United Nations History, Says Secretary-General on Fifth Anniversary of City’s Fall, U.N. Doc. SG/SM/7489 (July 10, 2000).

Yugoslavia (SFRY) in the 1980s and early 1990s, “had a catastrophic effect on multiethnic BiH.”<sup>55</sup> As the former Yugoslavia disintegrated, so too did BiH. Following the death of Josip Broz Tito in 1980, the former SFRY faced significant economic and political turmoil that culminated in a crisis, which eventually tore the country apart.<sup>56</sup>

With Slovenia, Croatia, and Macedonia breaking away from Yugoslavia, Muslims and Croats [in BiH] feared becoming part of a Serb-dominated, undemocratic “rump Yugoslavia.” Indeed, the creation of a Serb-dominated Yugoslavia was precisely the goal of Serbian leadership both within and outside BiH. [57]

[As a reaction to the rapidly increasing ethnic nationalism throughout, and the splintering of, the former SFRY b]y 1990, three nationalist parties . . . were formed in BiH: The Party of Democratic Action (Stranka Demokratske Akcije—SDA (the Muslim party)); The Serb Democratic Party (Srpska Demokratska Stranka Bosne I Hercegovine—SDS); and The Croatian Democratic Union of Bosnia-Herzegovina (Hrvatska Demokratska Zajednica Bosne I Hercegovine—HDZ).[58] These three nationalist parties [“mobilized and politicized ethnic identities [“59 and the 1990 BiH elections] placed the country—on the [s]tate, municipal, and *opstine* (county) level—in the hands of the nationalists. The three separate nationalist parties partitioned the electorate in 1990, followed by the administration, which in turn led to a war to partition the territory.[60]

[However, BiH could not easily be partitioned on ethnic lines. I]n about one-third of the one hundred *opstine* (counties) [“no ethnic community had a strong majority or could claim a clear-cut numerical advantage.[61] The three ethnic communities were distributed in a pattern of disconnected ethnic majority areas that varied in character from nearly homogeneous to nearly evenly divided, resulting in what former U.S. Secretary of State Cyrus Vance called “leopard spots.”. . .

In spite of this demographic composition, and the fact that ethnic homogeneity could not be secured in BiH absent mass populations shifts, local Serbs unwilling to live in a BiH separate

55. Rosenberg, *supra* note 53, at 336; see STEVEN L. BURG & PAUL S. SHOUP, THE WAR IN BOSNIA-HERZEGOVINA: ETHNIC CONFLICT AND INTERNATIONAL INTERVENTION 56-57 (1999) (describing the corrupted results of the elections of 1990 and resultant ethnic polarization).

56. BURG & SHOUP, *supra* note 55, at 69-70.

57. See NORMAN CIGAR, GENOCIDE IN BOSNIA: THE POLICY OF “ETHNIC CLEANSING” 39-43 (1995) (noting Serb leaders’ vision of a “Greater Serbia” and instances of anti-non-Serb rhetoric).

58. BURG & SHOUP, *supra* note 55, at 46-48.

59. *Id.* at 48.

60. *Id.* at 92.

61. *Id.* at 29.

from Serbia and Montenegro—and claiming fear of Muslim domination—began in 1990 “to set up autonomous areas beyond the control of the Bosnian republic’s government.” This move was followed by the creation of Croat autonomous areas:<sup>62]</sup> . . . the hope for establishing a Bosnian State was slipping further away.<sup>63</sup>

In February 1992, Bosniaks and Bosnian Croats voted overwhelmingly for independence, via referendum, and BiH declared its independence in March 1992.<sup>64</sup> Bosnian Serbs boycotted the referendum.<sup>65</sup> In April of 1992 “BiH was recognized by members of the international community.”<sup>66</sup> Immediately thereafter, unwilling to live in the newly independent BiH, “the Serb paramilitaries and the Yugoslav National Army (JNA) began shelling Zvornik, a town” in eastern BiH then “comprised of sixty percent Muslims, which fell on April 10.”<sup>67</sup> “The war continued” in the most brutal fashion with the use of rape, torture, and other modes of terror, including ethnic cleansing.<sup>68</sup>

Ethnic cleansing was a goal of the war—not a consequence.<sup>69</sup> Though ethnic cleansing was committed by all parties to the conflict (Serb, Bosniak, and Croat), the majority of ethnic cleansing and its concomitant crimes were committed by the Bosnian Serbs, who had a well-documented plan to carve out an ethnically pure Serbian statelet and aspirations eventually to accede to the Serbian state.<sup>70</sup>

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62. *Id.* at 73.

63. Rosenberg, *supra* note 53, at 336-39 (footnotes omitted).

64. *Id.* at 339.

65. *Id.*

66. *Id.*

67. *Id.*; BURG & SHOUP, *supra* note 55, at 129.

68. Rosenberg, *supra* note 53, at 339.

69. See Mirsad Tokaca, Sarajevo Research and Documentation Ctr., Human Losses in Bosnia and Herzegovina 91-95, <http://www.idc.org.ba/presentation/Bosnia%20and%20Herzegovina.zip> (last visited Dec. 18, 2008). Slide 33 shows the number of deaths by ethnicity, and slide 34 demonstrates that, for the entire war, 65.88% of victims were Bosniaks, 25.62% were Serbs, and 8.01% were Croats. *Id.* This project, also called the “Bosnian Book of the Dead,” is the most comprehensive so far in establishing the number of victims of the war.

70. ECOSOC, Comm’n on Human Rights, *Report on the Second Special Session*, ¶ 3, U.N. Doc. E/1992/22/Add.2 (Dec. 1, 1992) (“Categorically condemns the ethnic cleansing being carried out . . . recognizing that the Serbian leadership in territories under their control in Bosnia and Herzegovina, the Yugoslav Army and the political leadership of the Republic of Serbia bear primary responsibility for this reprehensible practice.”). The Special Rapporteur on BiH said the following: “During the whole period of the Special Rapporteur’s mandate the policy of ‘ethnic cleansing’, initiated by the *de facto* Bosnian Serb authorities, has continued unabated. It is obvious that inadequate reaction to that policy prompted other sides, in particular the *de facto* Bosnian-Croat authorities to use the same methods.” ECOSOC, Comm’n on Human Rights, *Sixth Periodic Report on the Situation of Human Rights in the Territory of the*

The brutality and scale of the methods used to achieve ethnic cleansing and genocide knew no bounds.<sup>71</sup> The scope ranged from administrative acts, such as removing people of the “wrong” ethnicity from jobs and schools, passing discriminatory legislation, and finding various other means of making life unbearable, to outright terrorism, such as forced deportation, sexual violence, torture, and murder.<sup>72</sup> The objective of the conflict, indeed, was to establish ethnically homogeneous regions.

The damage inflicted upon Srebrenica and the Bosnian Muslims living there was particularly brutal. Srebrenica has become a symbol of the conflict in BiH—much like Auschwitz has come to symbolize Nazi brutality—and what unfolded there merits some reflection.

Srebrenica, a mountain valley in eastern Bosnia that borders Serbia, was of immense strategic importance to the Bosnian Serb leadership. It sits along the Serbian border that Bosnian Serbs hoped to dissolve. Without Srebrenica, the ethnically Serb state of Republika Srpska they wanted to create would be disconnected within BiH and cut off from Serbia proper.<sup>73</sup> As a result, Srebrenica suffered tremendously during the war. In 1991, before the outbreak of the conflict, the municipality of Srebrenica had a population of 37,000 people, “of which 73 percent were Muslim and 25 percent were Serb.”<sup>74</sup> After Bosnian Muslim and Bosnian Serb armies went back and forth in capturing the town, the U.N. Security Council declared Srebrenica a “safe area” in April of 1993, when it appeared that Serb forces were on the verge of recapturing the area.<sup>75</sup> The U.N. Security Council passed Resolution 819, granting Srebrenica “safe area” status,<sup>76</sup> and Resolution 824, granting neighboring Žepa and Gorazde “safe area” status.<sup>77</sup> This status mandated an enclave “free from any armed attack or any other hostile act,” but neither the manner in which these resolutions would be enforced, nor the specific

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*Former Yugoslavia*, ¶ 289, U.N. Doc. E/CN.4/1994/110 (Feb. 21, 1994) (prepared by Tadeusz Masowiecki).

71. See Rosenberg, *supra* note 53, at 330 n.3.

72. For a good discussion of the ethnic cleansing in BiH, see Drazen Petrovic, *Ethnic Cleansing – An Attempt at Methodology*, 5 EUR. J. INT’L L. 342 (1994).

73. Prosecutor v. Krstic, Case No. IT-98-33-T, Judgment, ¶ 17 (Aug. 2, 2001).

74. *Id.* ¶ 11.

75. *Id.* ¶ 18.

76. S.C. Res. 819, ¶ 1, U.N. Doc. S/RES/819 (Apr. 16, 1993).

77. S.C. Res. 824, ¶ 3, U.N. Doc. S/RES/824 (May 6, 1993). The Bosnian “safe areas” were modeled after a similar arrangement established in northern Iraq for the Kurds after the Gulf War. See S.C. Res. 688, ¶ 5, U.N. Doc. S/RES/688 (Apr. 5, 1991). However, the Kurds were granted a “safe haven,” which, under international law, does not require the consent of the warring parties. JAN WILLEM HONIG & NORBERT BOTH, *SREBRENICA: RECORD OF A WAR CRIME* 104 (1996). On the other hand, a “safe area” requires consent. *Id.*

boundaries of the territories the status would be applied to was made explicit.<sup>78</sup>

To further complicate matters, U.N. Protection Force (UNPROFOR) troops in Srebrenica were acting under a “peace-enforcing,” as opposed to a “peace-keeping,” mandate, only enabling those troops to *deter* attacks in the safe area rather than *defend* the safe area.<sup>79</sup> In other words, the troops could return fire only if they were under threat, but were powerless if unarmed civilians were the targets. Additionally, the Netherlands was the only U.N. member state to send troops to defend the Srebrenica safe area.<sup>80</sup> These Resolutions, along with absence of meaningful international support, left the Netherlands’ DutchBat forces shackled by an unclear military and legal mandate for action.<sup>81</sup> By 1995, the DutchBat forces consisted of 100 to 600 lightly armed soldiers manning outposts in and around the enclave.<sup>82</sup> In contrast, the Bosnian Serb army in the area had up to 2,000 well-equipped soldiers.<sup>83</sup>

As early as 1993, Serb forces had begun a slow encroachment on the Srebrenica enclave from virtually all sides.<sup>84</sup> The Serb advance drove several tens of thousands of Muslim refugees into Srebrenica from the surrounding areas.<sup>85</sup> Even more Bosnian Muslims flooded into Srebrenica after it was declared a safe area.<sup>86</sup> As the ICTY noted, “[b]ecause most of the Muslim inhabitants of the region had, by 1995, sought refuge within the Srebrenica enclave, the elimination of that enclave would have accomplished the goal of purifying the entire region of its Muslim population.”<sup>87</sup>

78. S.C. Res. 819, *supra* note 76, ¶ 1.

79. S.C. Res. 836, ¶ 5, U.N. Doc. S/RES/836 (June 4, 1993).

80. *Krstic*, Case No. IT-98-33-T, ¶¶ 20, 26.

81. Shashi Tharoor, Special Assistant to the U.N. Under-Secretary-General for Peacekeeping Operations, made the following comments about the Srebrenica Resolutions:

The Security Council Resolutions on the safe areas required the parties to treat them as ‘safe’, imposed no obligations on their inhabitants and defenders, deployed United Nations troops in them but expected their mere presence to ‘deter attacks’, carefully avoided asking the peacekeepers to ‘defend’ or ‘protect’ these areas, but authorised them to call in air-power ‘in self-defence’—a masterpiece of diplomatic drafting, but largely unimplementable as an operational directive.

Shashi Tharoor, *Should UN Peacekeeping Go ‘Back to Basics?’*, 37 SURVIVAL 52, 60 (1995-96) (single quotation marks in original).

82. *Krstic*, Case No. IT-98-33-T, ¶¶ 20, 26.

83. *Id.* ¶¶ 21, 27.

84. *Id.* ¶¶ 14, 17, 20.

85. *Id.* ¶ 14.

86. *Id.* ¶ 32.

87. *Prosecutor v. Krstic*, Case No. IT-98-33-A, Judgment, ¶ 15 (Apr. 19, 2004).

Finally, on July 9, 1995, Serb troops forced the Dutch forces to surrender and took thirty-two of them hostage.<sup>88</sup> The U.N. response came two days later: after hitting only two Serb tanks, U.N. forces halted their attack upon hearing that the Serbs had threatened the lives of the Dutchbat hostages.<sup>89</sup> Instead of protecting the population inside the safe area from their aggressors, the Dutchbat troops became human shields, protecting the advancing army from the rest of the world. By July 11, 1995, Srebrenica fell to Bosnian Serb forces.<sup>90</sup>

Muslim males of military age, although not exclusively, were separated from the rest of the Muslim population who were put on buses and sent to Serb-controlled territory.<sup>91</sup> In the ensuing days, the men were executed en masse in various locations in the municipality.<sup>92</sup> Those who attempted to flee were captured and faced the same fate.<sup>93</sup> Widespread acts of rape and other violent crimes were also reported.<sup>94</sup> The number of confirmed dead is currently at 8,372,<sup>95</sup> with an unknown number of missing persons yet to be found and identified.<sup>96</sup> The remains of victims from the Srebrenica genocide have since been found in forests, lakes, garbage dumps, natural caves, wells, and even floating in the Drina River separating Srebrenica from Serbia.<sup>97</sup> When it was all over, there were no more Bosniaks in Srebrenica.

It was this murder of some 8,000 Bosniak Muslim men and boys in July 1995 and a civilian massacre in a Sarajevo market that led to NATO intervention by means of air strikes against the Bosnian Serbs.<sup>98</sup> These air strikes, along with intense international pressure and Serb military losses in the field, helped bring the conflict to an

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88. Stephen Engelberg & Tim Weiner, *Massacre in Bosnia; Srebrenica: The Days of Slaughter*, N.Y. TIMES, Oct. 29, 1995, at A1.

89. *Id.*

90. *Krstic*, Case No. IT-98-33-T, ¶ 36. The “safe area” of Žepa was attacked by Serb forces on July 14, 1995, and captured late that July. *Id.* ¶¶ 89, 119.

91. *Id.* ¶¶ 53-57.

92. *Id.* ¶¶ 58, 66-69.

93. *Id.* ¶¶ 60-68.

94. *Id.* ¶¶ 45-46.

95. *Europe's Most Wanted*, TIMES ONLINE, July 12, 2008, [http://www.timesonline.co.uk/tol/comment/leading\\_article/article4318755.ece](http://www.timesonline.co.uk/tol/comment/leading_article/article4318755.ece).

96. *Id.*; see *Krstic*, Case No. IT-98-33-T, ¶ 81 (stating that “a minimum of 7,475 persons from Srebrenica” are missing and likely dead).

97. An unknown number of bodies are speculated to have sunk to the bottom of the River. Interview by Carmel Maseng and Shala Gafary with Amor Masovic, President, Fed. Comm'n of Missing Persons, in Sarajevo, Bosn. & Herz. (Jan. 4, 2008) (on file with author).

98. BURG & SHOUP, *supra* note 55, at 164-65.

end.<sup>99</sup> By the end of the purging, “over half of Bosnia’s pre-war population of 4.4 million” was forcibly displaced, an estimated 279,000 Bosnians were dead or missing, “nearly half of the country’s housing stock was damaged or destroyed[,] and most of its economic infrastructure was devastated.”<sup>100</sup>

*B. The General Framework Agreement for Peace*

The genocidal war raged from 1992 until December 1995 when the GFAP was signed in Dayton, Ohio.<sup>101</sup>

[At Dayton the] parties finally agree[d] that BiH would remain one country divided into two entities: [the] Republika Srpska [(RS)] comprising forty-nine percent of the “negotiable” territory and the Muslim-Croat Federation (Federation) comprising fifty-one percent of the territory. Th[e] agreement minimally satisfied the Serbs because they were, in a sense, given the “republic” for which they were fighting. The agreement satisfied the Muslims because it, in a sense, kept Bosnia whole. It offered little to the Croats, forcing them into an uneasy alliance with the Muslims. Nonetheless, it [at least] stopped the bloodshed by creating a compromise between contending visions of Bosnia: the first[,] . . . a single State [committed to multiculturalism;] the second[,] . . . an effective division into three ethno-nationally homogenous mini-states.<sup>102</sup>

The GFAP partitioned the separate ethnic power-bases into two entities, the Federation and the RS, thus institutionalizing ethnicity as the formulative principle<sup>103</sup> and essentially solidifying the ethnicity-based politics that gave rise to the genocide.<sup>104</sup>

“At the same time, . . . the GFAP [provides for] a mass program of returning individuals to their prewar homes, reintegration, and the institutionalization of human rights protections.”<sup>105</sup> With the simultaneous capitulation to the results of ethnic cleansing (the ethnic Entities) and the insistence upon reintegration and human rights the nature of the Bosnian state was and remains complex and convoluted.<sup>106</sup> “The result is a de facto divided Bosnia with a ghost of

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99. *Id.* at 355.

100. Elizabeth M. Cousens, *Making Peace in Bosnia Work*, 30 CORNELL INT’L L.J. 789, 792 (1997). The estimate of 200,000 killed is the most widely cited, although research published in 2005 by Mirsad Tokaca, head of the Sarajevo-based Investigation and Documentation Centre, put the number at around 100,000. Nedim Dervisbegovic, *Research Halves Bosnia War Death Toll to 100,000*, REUTERS, Nov. 23, 2005.

101. GFAP, *supra* note 49.

102. Rosenberg, *supra* note 53, at 340 (footnotes omitted).

103. GFAP, *supra* note 49, art. III.

104. Rosenberg, *supra* note 53, at 340 (footnotes omitted).

105. *Id.* at 340-41.

106. *Id.* at 341.

a federal government and [a sham] of return.”<sup>107</sup>

“The . . . principles of ethnic division [which have been] enshrined within the Bosnian Constitution[, an annex to the GFAP,] have been the subject of scrutiny for some time.”<sup>108</sup> In spite of agreement on some basic constitutional reforms in 2005, between the major political parties (Croat, Serb, and Bosniak), the House of Representatives failed to achieve the required two-thirds majority necessary to adopt the proposed package of constitutional amendments.<sup>109</sup>

In spite of the extraordinary human rights [and return] structures . . . established under the GFAP, BiH remains ethnically homogeneous. Though the rates of reclaiming property showed a marked increase since 2000, this merely describes completed legal procedures. Not a single authority in BiH has compiled statistics on the return of people, i.e., people who reclaim their property and remain there.

Local authorities suggest that actual return and resettlement is severely limited. Population statistics from municipalities in both entities, . . . released through the United Nations Development Programme's (UNDP) Rights-Based Municipal Assessment and Planning Project (RMAP), illustrate this point well. For example, Derventa, in Republika Srpska, was a mixed area in 1991 before the war; 40.6% Serb, 38.9% Croat, and 12.5% Bosniak. However, in 2002, 97% of the population was Serb; only very small minorities of Croats and Bosniaks call Derventa home. This is equally the case in Federation areas.<sup>110</sup>

In Srebrenica, the entire Bosniak population was erased during the genocide. Under the GFAP Srebrenica became part of the RS and at least 10,000 relocated to the Federation with approximately another 10,000 becoming refugees in other countries.<sup>111</sup> Today, it appears that between 2,500 and 5,000 of the 12,000 people currently residing in Srebrenica are Bosniak returnees.<sup>112</sup> However, these estimates do not reflect the fact that return fluctuates seasonally. Additionally, many residents of Srebrenica are unregistered, which further complicates the accounting process. While 5,000 returns represents a vast improvement in Bosniak return, which as recently

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107. *Id.*

108. *Id.*

109. *Id.* at 341-42.

110. *Id.* at 344-45 (footnotes omitted).

111. Interview by Carmel Maseng and Shala Gafary with Abdurahman Malkic, Mayor of Srebrenica, in Sarajevo, Bosn. & Herz. (Jan. 6, 2008) (on file with author).

112. *Id.* Mayor Malkic puts the number at 5,000 returnees. Monika Nalepa states that Srebrenica has one of the lowest rates of return, with only 2,884 returnees. See Monika Nalepa, *Why Do They Return? Evaluating the Impact of ICTY Justice on Reconciliation* 16 (2008) (unpublished paper, on file with author).

as 2002 saw virtually no return, it nevertheless constitutes only a fraction of the prewar Bosniak population. Not unlike in the rest of BiH, during the twelve years since the war's end, many former Srebrenica residents have chosen to settle where they found refuge and constitute a majority.

"Although the human rights situation in BiH has significantly improved, intolerance and discrimination continue to permeate every level of society."<sup>113</sup> Nationalist politicians continue generally to represent the dominant ethnic group in a given territory, thus fostering an environment that permits intolerance and discrimination.<sup>114</sup> In Srebrenica, acts of incitement and provocation occur almost on a daily basis, including Serb nationalist protestors bearing offensive shirts, threatening graffiti, and a bomb threat made at the memorial center on the tenth anniversary of the genocide in 2005.<sup>115</sup>

### III. THE *BIH* V. *SERBIA* DECISION

On March 20, 1993, BiH sued the Federal Yugoslav Republic (subsequently Serbia and Montenegro, subsequently Serbia) alleging violations of the Genocide Convention.<sup>116</sup> The Genocide Convention provides that genocide is a crime under international law that states "undertake to prevent and to punish."<sup>117</sup> The operative Article VIII of the Convention provides that states "may call upon the competent organs of the United Nations to take such action under the Charter . . . as they consider appropriate for the prevention and suppression of acts of genocide."<sup>118</sup> Under Article IX, states may bring claims of genocide to the ICJ "relating to the interpretation, application or fulfilment" of the Convention.<sup>119</sup>

In April 1993, the ICJ ordered provisional measures requiring that Serbia "immediately . . . take all measures within its power to prevent commission of the crime of genocide," and "should in

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113. Rosenberg, *supra* note 53, at 346.

114. *Id.*

115. Interview by Carmel Maseng and Shala Gafary with Amra Celebic, Special Assistant to the High Representative's Envoy for the Srebrenica Region, in Sarajevo, Bosn. & Herz. (Jan. 6, 2008) (on file with author).

116. Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Yugo. (Serb. & Mont.)), 1993 I.C.J. 3, 3-4 (Apr. 8). When the government of BiH instituted these proceedings before the ICJ against Serbia (then FRY), the war in BiH was in its second year. Indeed, by 1994 the Bosnian Serbs and the Bosnian Croats had established separatist entities. BURG & SHOUP, *supra* note 55, at 294-95. When the case was decided in 2007, BiH, though the same legal personality, was a very different place.

117. Genocide Convention, *supra* note 7, art. I.

118. *Id.* art. VIII.

119. *Id.* art. IX.

particular ensure that any” military or paramilitary organization under its control or influence, or supported by it, “do not commit any acts of genocide” against Bosnian Muslims.<sup>120</sup>

The final decision was not rendered until February 26, 2007, some twelve years after the end of the conflict.<sup>121</sup> In fairness to the ICJ, the delay was in some part due to unusual procedural maneuvers (including one in 1999 where the Bosnian co-agent, of Serb ethnicity, without knowledge or support of the agent of the state, withdrew the case before the ICJ—as Vojin Dimitrijević and Marko Milanović note, “injecting a whiff of the Balkans into the halls of the Peace Palace”).<sup>122</sup>

In its 170 page decision that includes over ten separate opinions, the ICJ found that: 1) states may be responsible for committing genocide, thus confirming that individual criminal responsibility under the Convention does not supplant state responsibility;<sup>123</sup> 2) genocide was committed in Srebrenica by the Bosnian Serbs,<sup>124</sup> confirming the ICTY *Krstic* decision;<sup>125</sup> 3) Serbia is responsible *for failing to prevent*<sup>126</sup> and to *punish*<sup>127</sup> genocide in Srebrenica, thus making it clear that states may be responsible for actions outside their borders; and 4) that this judgment is satisfaction of the claim.<sup>128</sup> It did not order compensation.<sup>129</sup> Though this decision has been roundly criticized, many would agree that the rich conclusions have important implications for future situations both in terms of genocide prevention and punishment.<sup>130</sup>

The decision’s impact on BiH’s reconciliation process, on the other hand, is paradoxical at best. On the one hand, the Bosniak and Serb communities are no closer to a unified version of the truth, nor are the Bosnian Serb leaders genuinely ready to accept responsibility. On the local level in Srebrenica, victims feel betrayed

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120. Application of Convention on Prevention and Punishment of Crime of Genocide, 1993 I.C.J. at 24.

121. Judgment, *supra* note 6.

122. Dimitrijević & Milanović, *supra* note 31, at 74.

123. Judgment, *supra* note 6, ¶ 166.

124. *Id.* ¶ 434.

125. Prosecutor v. Krstic, Case No. IT-98-33-T, Judgment (Aug. 2, 2001).

126. Judgment, *supra* note 6, ¶ 438.

127. *Id.* ¶ 450.

128. *Id.* ¶ 471.

129. *Id.*

130. See Marko Attila Hoare, *The International Court of Justice and the Decriminalisation of Genocide*, BOSNIA REP., Jan.-July 2007, [http://www.bosnia.org.uk/bosrep/report\\_format.cfm?articleid=3170&reportid=173](http://www.bosnia.org.uk/bosrep/report_format.cfm?articleid=3170&reportid=173); Marlise Simons, Op-Ed., *Serbia’s Darkest Pages Hidden from Genocide Court*, INT’L HERALD TRIB., Apr. 8, 2007, <http://www.iht.com/articles/2007/04/08/news/Serbia.php.7>.

by the legal system, and their disillusion with the court of law has only been deepened. The decision also has served to reignite a renewed sense of fear among Bosniak returnees, of all of the perpetrators walking the streets of Srebrenica.

At the state level, this decision has been instrumentalized by Bosniak and Croat politicians to strengthen their calls for dismantling the RS Entity as a genocidal entity. Of course, this has caused the Serbian politicians to increase their threats to secede and to seek further decentralization of the state. That said, the genocide finding has sparked renewed interest in Srebrenica by international and local actors that may have some lasting results (this however seems to have less to do with the positive influence of the rule of law than it does with the emotive reaction to the word genocide).

#### A. *Group Responses*

Local reaction to the February 26, 2007, decision was swift. To the Bosnian Muslims, claiming that genocide occurred in only one small part of the country but not in the rest of the country is ludicrous.<sup>131</sup> It is like saying that genocide occurred in Hitler's Germany in the Buchenwald concentration camp, but not in Munich some miles away.<sup>132</sup> Further, they are baffled at how the ICJ can say that Serbia was responsible for failing to prevent and punish genocide, but those failures do not require any sort of monetary compensation.<sup>133</sup> For Bosniaks, a finding of genocide that is limited to one small municipality, for which no one must pay a price, is perceived as a miscarriage of justice.<sup>134</sup> The decision has not aided in instilling popular faith in the legal system in general, at least not on the part of the Bosniak population.<sup>135</sup> It is widely seen as purely political, with the court avoiding a finding of genocide except where it was compelled to do so.<sup>136</sup> The Serbs in Serbia, for the most part, feel vindicated; they have not committed genocide. In the RS, the Prime Minister, Milorad Dodik, "although conceding that what happened in Srebrenica had been a 'horrific crime', rejected the judgment of

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131. See *Some Local Reactions to the ICJ Verdict*, BOSNIA REP., Jan.-July 2007, [http://www.bosnia.org.uk/bosrep/report\\_format.cfm?articleid=3169&reportid=173](http://www.bosnia.org.uk/bosrep/report_format.cfm?articleid=3169&reportid=173).

132. *Id.*

133. See generally *id.* (recounting how Serbia has not been held accountable for its actions).

134. Interview by Carmel Maseng and Shala Gafary with Professor Smail Cekic, Director, Institute for the Research of Crimes Against Humanity, Univ. of Sarajevo, in Sarajevo, Bosn. & Herz. (Jan. 4, 2008) (on file with author).

135. Hoare, *supra* note 130; *Some Local Reactions to the ICJ Verdict*, *supra* note 131.

136. Hoare, *supra* note 130.

genocide.”<sup>137</sup> The goal of creating a unified historical truth in order to provide consensus has not been furthered.<sup>138</sup>

It must be kept in mind that this case was brought by a State where almost one-half of the population is implicated in the crimes alleged<sup>139</sup> and where the Court found that the Bosnian Serbs committed genocide.<sup>140</sup> The very structure of the Bosnian state begs substantial inquiry into the possibility of creating a unified history and reconciliation through the judicial process where each decision is seen as a means simply to bolster one group's version of history.

The ICJ decision also “awoke a sense of psychological insecurity among Bosniak returnees,” which politicians exploited to the maximum.<sup>141</sup> Many Srebrenica Bosniaks are disturbed by the daily confrontation with war criminals.<sup>142</sup> Local “small” criminals, those

137. Tim Judah, *Bosnia: The Future on Hold?*, REAL INSTITUTO ELCANO, Mar. 28, 2007, <http://www.realinstitutoelcano.org/analisis/1114.asp> (the author covers the Balkans for the *Economist* magazine).

138. Hoare, *supra* note 130. This is not to say that the failure lies in the outcome of this decision or any other decision rendered by an international court. Nor does it implicate the debates about collective versus individual responsibility. Any decision would simply have been utilized by each group to bolster that group's version of the past. In this way, international court decisions, generally, are simply being instrumentalized by all three groups trying to validate their collective narratives about the nature of the conflict. Speculation about why and how the court came to this compromise decision abounds. Some argue that it had no choice due to its dubious procedural ruling on admissibility. Andrea Gattini, *Evidentiary Issues in the ICJ's Genocide Judgment*, 5 J. INT'L CRIM. JUST. 889 (2007). Others argue that it was bound by the ICTY to find genocide in Srebrenica in order to prevent fragmentation of international law. See Christian Leathley, *An Institutional Hierarchy to Combat the Fragmentation of International Law: Has the ILC Missed an Opportunity?*, 40 N.Y.U. J. INT'L L. & POL. 259, 264-65 (2007); David Turns, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide: Bosnia and Herzegovina v. Serbia and Montenegro*, 8 MELB. J. INT'L L. 398, 425-27 (2008). Still others argue that it was simply a political decision to appease, just a little, all parties to the dispute. See Ante Cuvalo, *The ICJ Decision and its Effects*, WORLD FEDERALIST MOVEMENT, May 12, 2007, <http://www.wfm.org/site/index.php?module=uploads&func=download&fileId=291>; Martin Shaw, *The International Court of Justice: Serbia, Bosnia, and Genocide*, OPENDEMOCRACY, Feb. 28, 2007, [http://www.opendemocracy.net/globalization-yugoslavia/icj\\_bosnia\\_serbia\\_4392.jsp](http://www.opendemocracy.net/globalization-yugoslavia/icj_bosnia_serbia_4392.jsp). Regardless of which justification one accepts for the court's ruling, it can only be said that the goal of creating a unified historical truth in order to provide consensus has not been achieved by this ruling.

139. Judah, *supra* note 137.

140. *Id.*

141. Raffi Gregorian, Principal Deputy High Representative, Office of the High Representative, Testimony at the Helsinki Commission Hearing, U.S. Commission on Security and Cooperation in Europe, Bosnia-Herzegovina: Outstanding Issues in Post-Conflict Recovery and Reconciliation (Nov. 9, 2007), [http://csce.gov/index.cfm?FuseAction=ContentRecords.ViewWitness&ContentRecord\\_id=893&ContentRecordType=D&ParentType=H&CFID=18849146&CFTOKEN=53](http://csce.gov/index.cfm?FuseAction=ContentRecords.ViewWitness&ContentRecord_id=893&ContentRecordType=D&ParentType=H&CFID=18849146&CFTOKEN=53).

142. Interview by Carmel Maseng and Shala Gafary with Amra Celebic, *supra* note

whom the victims personally recognize, are as menacing to them as the “big” cases, some of which are tried in the ICTY.<sup>143</sup> Their fear of these perpetrators has only been heightened by the ICJ decision.<sup>144</sup>

*B. The Unsettling of BiH: An Unexpected Gift to Srebrenica*

The *BiH v. Serbia* decision came down in February of 2007, at a time when political tensions were already high in BiH.<sup>145</sup> The new BiH government had assumed office that same month after a highly contested election that had sunk deep into ethno-political campaigning and rhetoric.<sup>146</sup> Bosniak presidency member Haris Silajdzic essentially ran on a platform of abolishing the Entities (which in effect meant gaining Bosniak control over the state), and Milorad Dodik threatened an RS referendum that would lead to secession.<sup>147</sup> The new government, a product of extreme ethno-nationalism, was immediately faced with the ICJ decision.<sup>148</sup>

On March 24, 2007, the Municipal Assembly of Srebrenica, citing the genocide finding, passed a resolution demanding a “special status” for Srebrenica apart from the RS.<sup>149</sup> The Office of the High Representative (OHR), the primary international institution in BiH, immediately reacted by declaring the resolution “unconstitutional,” and threatening that if the Assembly were to act on the resolution, the High Representative would take “robust action,”<sup>150</sup> pointing out that the initiative was an illegal act, which exceeded the responsibilities of the Assembly.<sup>151</sup>

Nevertheless, the major non-Serb parties quickly stated their support for the initiative. Haris Silajdzic publicly declared, as he had

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143. *See id.*

144. *See id.*

145. *See* Judah, *supra* note 137.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Bosniak Municipal Councillors in Srebrenica Adopt Resolution for Special Status*, SE. EUR. TIMES, Mar. 25, 2007, [http://www.setimes.com/cocoon/setimes/xhtml/en\\_GB/features/setimes/newsbriefs/2007/03/25/nb-06](http://www.setimes.com/cocoon/setimes/xhtml/en_GB/features/setimes/newsbriefs/2007/03/25/nb-06).

150. Mario Brkic, Office of the High Representative [OHR], European Union Special Representative in Bosn. & Herz., Transcript of the International Agencies’ Joint Press Conference, (Mar. 27, 2007), <http://www.eusrbih.eu/media/pc/1/?cid=948,1,1> [hereinafter OHR Transcript]. The High Representative’s office is established by Annex 10 of the GFAP to oversee civil implementation of the peace agreement. GFAP, *supra* note 49, Annex 10; *see* Judah, *supra* note 137. Over time, the High Representative garnered extensive powers, including the power to dismiss government officials believed to be thwarting the objectives of the GFAP. *See* Judah, *supra* note 137.

151. OHR Transcript, *supra* note 150.

in the past, that the RS is the result of genocide and should not be recognized as an Entity.<sup>152</sup> Silajdzic and Croat presidency member Zeljko Komsic called on the international community to re-examine BiH's constitutional structures in light of the ICJ ruling confirming genocide by Bosnian Serbs.<sup>153</sup> Silajdzic and Komsic stated that "[t]he territory of the Srebrenica municipality needs to have the status of district and as such to be taken out from the jurisdiction of the Serb Republic institutions."<sup>154</sup> According to a Swiss conflict prevention think-tank, the Bosniak politicians probably even incited the initiative for Srebrenica's special status.<sup>155</sup> In response to increasing demands for Srebrenica's special status and calls for the abolition of the RS Entity, Bosnian Serb leader Dodik stressed that BiH should be even more decentralized and arranged as a confederation.<sup>156</sup> Sulejman Tihic, head of the leading Bosniak Party of Democratic Action, SDA, "denounced any further decentralization, saying it would cement the ethnic cleansing and genocide that took place during [the war]."<sup>157</sup> Ongoing talks between the parties concerning constitutional reforms collapsed thereafter.

"[R]eacting to the developments in Srebrenica and the calls for the abolition of the Serb Republic . . . the Serb movement 'The Choice is Ours' organized a rally to demand independence of the Serb Republic from [BiH]."<sup>158</sup> The movement justifies its demand by claiming that it is "acting in response to calls" from those who call for the abolition of the RS.<sup>159</sup> "[T]hey do not want to live in a state ruled by people who wish to abolish their entity."<sup>160</sup> Following these events and a failure at police reform,<sup>161</sup> the Peace Implementation Council

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152. See Judah, *supra* note 137.

153. *Bosnian Leaders Debate the Present Ethnic Split-State*, ISLAMTODAY, June 20, 2007, [http://www.islamtoday.com/showme2.cfm?cat\\_id=38&sub\\_cat\\_id=1245](http://www.islamtoday.com/showme2.cfm?cat_id=38&sub_cat_id=1245).

154. Nedim Dervisbegovic, *Bosnia Split on Srebrenica Request for Self-Rule*, REUTERS, Mar. 12, 2007, <http://www.reuters.com/article/latestcrisis/idUSDER261608>.

155. *FAST Update: Bosnia and Herzegovina: Trends in Conflict and Cooperation*, SWISSPEACE, Mar.-Apr. 2007, [http://www.swisspeace.ch/typo3/fileadmin/user\\_upload/pdf/FAST/Updates/2007/Bosnia\\_Update\\_2\\_2007.pdf](http://www.swisspeace.ch/typo3/fileadmin/user_upload/pdf/FAST/Updates/2007/Bosnia_Update_2_2007.pdf) [hereinafter *FAST Update No. 2*].

156. Srecko Latal, *RS Leader Clashes with Western Diplomats over Reforms*, BALKAN INVESTIGATIVE REPORTING NETWORK, Aug. 29, 2007, <http://www.birn.eu.com/en/101/10/39721>. In BiH, recognition of a federalist system has a double meaning. First, it implies the idea of a Croat "third-entity," and second, within the Yugoslav context, federalism gives the right to self-determination to the then republics, which in the current Dayton structure of BiH the RS does not have. See Judah, *supra* note 137.

157. Latal, *supra* note 156.

158. *FAST Update No. 2*, *supra* note 155.

159. *Id.*

160. *Id.*

161. See *id.* Currently, there is no unified police force in BiH. See Judah, *supra* note 137. Integrating the police force is a key issue for Bosnian succession to the EU. See

declared “severe deterioration” in the political situation.<sup>162</sup> E.U. Force (EUFOR) Commander in BiH, Hans-Jochen Witthauer, stated “that the EU would keep sufficient troops in the country to maintain its capacity to intervene ‘if war breaks out again.’”<sup>163</sup> This was the first time since 1996 that a EUFOR commander has suggested that if instability resumes, military force might be necessary.<sup>164</sup> This was, in short, a “perfect storm.”

The special status initiative had been on the table since at least 2004, primarily pushed by Abdurahman Malkic, the mayor of Srebrenica, for economic reasons.<sup>165</sup> For at least three years, it failed to gain support even within the Bosniak majority in the Municipal Assembly.<sup>166</sup> This was further complicated by the fragmentation of Srebrenica survivor groups who had not presented a united front.<sup>167</sup> Immediately following the ICJ decision, Mayor Malkic once again presented the initiative, this time as a vehicle for giving meaning to the court’s limited recognition of genocide.<sup>168</sup> This time the Assembly overwhelmingly adopted the resolution.<sup>169</sup> All national Bosniak—and even Croat—parties immediately backed the initiative, as have survivor groups, both local and in Sarajevo, all citing the finding of genocide.<sup>170</sup>

The ICJ’s genocide finding limited to one small geographic area coupled with the political maelstrom described above instantaneously caused the international community to focus intensely on that area. Soon after the decision, a Special Envoy to Srebrenica, Clifford Bond, former U.S. Ambassador to Sarajevo, was appointed by the High

Int’l Crisis Group, *Bosnia’s Stalled Police Reform: No Progress, No EU*, at 3, Europe Report No. 164 (Sept. 6, 2005), <http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Bosnia%20ICG%20Report.pdf>.

162. Peace Implementation Council, *Declaration by the Steering Board of the Peace Implementation Council* (June 19, 2007), [http://www.ohr.int/pic/default.asp?content\\_id=39997](http://www.ohr.int/pic/default.asp?content_id=39997).

163. *FAST Update: Bosnia and Herzegovina: Trends in Conflict and Cooperation*, SWISSPEACE, Sept.-Oct. 2007, [http://www.swisspeace.ch/typo3/fileadmin/user\\_upload/pdf/FAST/Updates/2007/Bosnia\\_Update\\_5\\_2007.pdf](http://www.swisspeace.ch/typo3/fileadmin/user_upload/pdf/FAST/Updates/2007/Bosnia_Update_5_2007.pdf) [hereinafter *FAST Update No. 5*].

164. *See id.*

165. Interview by Carmel Maseng and Shala Gafary with Abdurahman Malkic, *supra* note 111.

166. *Id.*

167. Interview by Carmel Maseng and Shala Gafary with Amra Celebic, *supra* note 115.

168. Interview by Carmel Maseng and Shala Gafary with Abdurahman Malkic, *supra* note 111.

169. *Id.*

170. *See generally id.* (discussing the achievement of the Special Status Initiative in Srebrenica).

Representative.<sup>171</sup> Both national and international efforts to develop Srebrenica ensued, having largely been abandoned prior to these events.<sup>172</sup> The Envoy's mandate, however, was only for one year, and it was a part-time job.<sup>173</sup> He was brought in primarily to calm political tension. The Principal Deputy High Representative has stated that only a concerted effort by OHR and U.S. officials could calm this volatile situation "before threatened secession or an exodus of Bosniak returnees materialized."<sup>174</sup>

On a national level, the response to Srebrenica's special status demand was followed by calls from some national politicians for the abolition of the Entities and a stronger central government.<sup>175</sup> These calls only hardened the RS position demanding further decentralization of the state.<sup>176</sup> However, the RS response to the special status initiative in Srebrenica itself has been positive, and the RS has removed some obstacles to the municipality's development.<sup>177</sup> This is likely in a bid to calm tensions and respond to heightened international pressure. Of course, the Special Envoy's part-time job ended in July 2008.<sup>178</sup>

The ICJ decision, therefore, must be seen as an element of BiH's serious setback in 2007, the worst for interethnic relations since the end of the war. It provided a spark to a flammable situation, and while Srebrenica itself benefited from the extreme localization of the dispute, BiH did not.<sup>179</sup> Far from bringing repose, the ICJ judgment was instrumental in BiH's worst year since 1995.<sup>180</sup>

These developments beg the question of what would have

171. Press Release, OHR, Schwarz-Schilling Appoints Clifford Bond Srebrenica Envoy (May 3, 2007), [http://www.ohr.int/ohr-dept/preso/pressr/default.asp?content\\_id=39661](http://www.ohr.int/ohr-dept/preso/pressr/default.asp?content_id=39661).

172. The Special Assistant to the Envoy, as well as the Political Department in the OHR, expressly stated that Srebrenica was "forgotten" before the events of 2007. Interview by Carmel Maseng and Shala Gafary with Amra Celebic, *supra* note 115.

173. Cliff Bond, *Srebrenica: Confronting the Past, While Embracing the Future*, HELSINKI COMMISSION DIG., July 24, 2008, [http://csce.gov/index.cfm?FuseAction=ContentRecords.ViewDetail&ContentRecord\\_id=143&Region\\_id=5&Issue\\_id=0&ContentType=R,G&ContentRecordType=G&CFID=5549507&CFTOKEN=74185067](http://csce.gov/index.cfm?FuseAction=ContentRecords.ViewDetail&ContentRecord_id=143&Region_id=5&Issue_id=0&ContentType=R,G&ContentRecordType=G&CFID=5549507&CFTOKEN=74185067).

174. Gregorian, *supra* note 141.

175. See *Bosnian Leaders Debate the Present Ethnic Split-State*, *supra* note 153.

176. See *id.*

177. "[Six] months ago the situation began to get better. We will make it possible to produce clean water, and RS stopped disrupting our initiatives to do something." Interview by Carmel Maseng and Shala Gafary with Abdurahman Malkic, *supra* note 111.

178. Bond, *supra* note 173.

179. See Interview by Carmel Maseng and Shala Gafary with Amra Celebic, *supra* note 115. The author benefitted from numerous conversations with Carmel Maseng.

180. See *id.*

happened had the ICJ found that genocide occurred statewide? The result may well have been a broader call for the abolition of the RS as a genocidal entity, an outcome that would be impossible and would likely cause either RS secession or renewed conflict. The ICJ decision sheds some light on two pending ICTY cases where significant findings could have such an impact. Two indictments handed down by the ICTY in 1995 involve the legitimacy of the RS in the most fundamental way. Radovan Karadzic, RS leader during the war,<sup>181</sup> and Ratko Mladic, his military chief of staff, were charged with sixteen counts of genocide, crimes against humanity, and violation of the laws of war in BiH between April 1992 and July 1995, particularly in Srebrenica.<sup>182</sup> Ratko Mladic is considered a fugitive from justice, and Radovan Karadzic was just recently apprehended on July 21, 2008.<sup>183</sup> Since the war, both have become heroes or symbols for many Serbs, and in contradistinction—villains—for Bosniaks.<sup>184</sup> Although both were believed to have lived in Serbia until recently, if not to this day, little action had been taken by the state until recently.<sup>185</sup>

Trying and convicting either of these men would provide substantial backing for the Bosniak and Croat claim that the RS is an illegitimate genocidal entity that should be dissolved. While any assessment of the consequences is purely speculative, one needs only to look at the situation following the ICJ's finding of genocide in Srebrenica. These trials would directly involve the very driving forces of the RS in its campaign to gain its own territory and would necessarily detail each and every major action in that campaign. The legitimacy of the RS would suffer greatly. If a genocide finding in Srebrenica alone has had the destabilizing effect it has, one can only

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181. At the time, the RS was self proclaimed and not recognized by any state other than Serbia-Montenegro. BURG & SHOUP, *supra* note 55, at 193-94.

182. See Prosecutor v. Karadzic & Mladic, Case No. IT-95-5-I, Indictment, ¶¶ 17-48 (July 24, 1995). These charges also allege crimes committed during the siege of Sarajevo. *Id.* ¶ 46.

183. Dan Bilefsky & Marlise Simons, *Bosnian Serb Under Arrest in War Crimes*, N.Y. TIMES, July 22, 2008, at A1.

184. Both initially lived openly, disregarding the indictments. See Nicholas Kulish & Graham Bowley, *The Double Life of an Infamous Serbian Fugitive*, N.Y. TIMES, July 23, 2008, at A1; *Profile: Ratko Mladic*, BBC NEWS, July 31, 2008, <http://news.bbc.co.uk/2/hi/europe/1423551.stm>. It appears that Mladic had continued receiving a pension from Serbia for a full decade after his becoming an indicted fugitive. See *The Hunt for Karadzic and Mladic*, BBC NEWS, July 23, 2008, <http://news.bbc.co.uk/2/hi/europe/4079642.stm>. Graffiti glorifying his name is commonplace in the RS. Aleksander Vasovic, *Serbia May 'Trade' Mladic for Concessions in Kosovo*, BALKAN INVESTIGATIVE REPORTING NETWORK, June 19, 2007, <http://www.birn.eu.com/en/88/10/3354/>.

185. See, e.g., *U.N. Office: Karadzic in Belgrade*, CNN, Feb. 11, 2004, <http://www.cnn.com/2004/WORLD/europe/02/11/bosnia.karadzic/index.html>.

imagine the possible deleterious effect convicting either of these two men would have on the peace and reconciliation process in BiH. In fact, since Karadzic's arrest, nationalist tensions have risen across BiH, and there have already been calls for the abolition of the RS.<sup>186</sup>

#### CONCLUSION

A close investigation of the impact of the *BiH v. Serbia* decision within BiH reveals that proponents of international justice overstate their claim about the relationship between international justice and reconciliation. The impact of the *BiH v. Serbia* decision belies the claim that the "authoritative" power of the law will dismantle locally held versions of the truth about what happened during conflict and lead to reconciliation. Locally held versions of the "truth" remain strong in BiH, entrenched as they are in a very particular sense of ethnic identification. It is a fallacy to think that abstracted, arguably western notions of the value of the "rule of law" will displace these deep feelings.<sup>187</sup> Rather, in this case, international justice was disappointing to the victims, who only feel further victimized, and was instrumentalized by the political actors, almost bringing the state to its knees.

BiH was on the brink after the ICJ decision. Of course, tension in BiH in 2007 was profound to begin with, but the immediate impact of the decision brought it to the precipice. This illustrates how decisions of international tribunals can produce short-term deterioration, potentially followed by long-term benefits. In the Bosnian context, however, long-term stability may not yet be certain enough to withstand that short-term deterioration.<sup>188</sup> The *limited* finding by the ICJ, however, while producing shock waves felt throughout the country, proved to be within BiH's ability to withstand and provided unexpected positive results. It is unclear whether BiH could withstand a broader finding of culpability for atrocious crimes—including genocide—throughout a greater swath of

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186. *Bosnia Leaders 'Childish' over Karadzic*, BALKAN INSIGHT, July 25, 2008, <http://www.balkaninsight.com/en/main/news/12068/?tpl=299&ST1=Text&ST-T1=Article>; Nick Thorpe, *Karadzic Casts Shadow over Bosnia's Fate*, BBC NEWS, July 30, 2008, <http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/europe/7531572.stm>.

187. This is especially true in a former communist country where the role of courts played a very different and far less significant role in persons' lives. See generally Interview by Carmel Masseng and Shala Gafary with Amra Celebic, *supra* note 115.

188. See *id.*; see also Paddy Ashdown, *Europe Needs a Wake-up Call, Bosnia Is on the Edge Again*, OBSERVER (London), July 27, 2008, at 27; Dan Bilefsky, *Fears of New Ethnic Conflict in Bosnia*, N.Y. TIMES, Dec. 14, 2008, at A6; *Lajcak Sees Threat of BiH Partition*, SE. EUR. TIMES, Sept. 25, 2008, [http://www.setimes.com/cocoon/setimes/print/en\\_GG/features/setimes/features/2008/09/25/feature-01](http://www.setimes.com/cocoon/setimes/print/en_GG/features/setimes/features/2008/09/25/feature-01).

BiH.

These conclusions do not suggest a return to the days of impunity. The fact that judicial opinions cannot readily be seen to assist in building trust between formerly warring groups in the generation in which the conflict occurred does not, of course, mean it will not be of historical truth-telling value for future generations.<sup>189</sup> As it has often been noted, German public opinion immediately following the Nuremberg trials was negligible to negative. It was only a generation later where the lessons apparently took root.<sup>190</sup> It is common sense that psychologically it may be that only the next generation, which is not directly implicated in the crimes, can absorb these facts.

Rather, this exploration reveals that there are risks and consequences involved in postconflict international justice, and as a result, claims about international justice should be tempered to match the reality of what it can achieve in any given context. Moreover, this examination shows that it is simply a myth to believe that the judicial process will readily displace individual group attachments to their narrative of what occurred during the conflict. Perhaps international justice cannot achieve this goal in all contexts. BiH may be a context where it will not work. BiH is a very different context from postwar Germany. In BiH, there are three competing groups with different versions of the past trying to live together, all of whom claim to be the true victims. International justice may not be able to mediate these claims. To claim that international justice will aid in reconciliation by providing a unified sense of what happened during the conflict for peoples involved will only serve to disappoint them.

Moreover, that these claims on justice and reconciliation are overstated apply equally outside the BiH context in similar and different ways. Mark Drumbl, for example, forcefully argues that ICTR trials may not only harm the reconciliation process in Rwanda, they may even aggravate ethnic identity politics, thereby threatening Rwanda's long-term stability.<sup>191</sup> Usta Kaitesi, a law professor at the University of Butare Law Faculty in Rwanda, has said that Rwanda needs the ICTR for international recognition of Rwanda's history and for the precedents it has set for international criminal law. At the local level, the ICTR has not done much.<sup>192</sup>

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189. The fact, also, that an international justice decision may force a fragile state back into conflict means it was likely not a viable state to begin with.

190. See TINA ROSENBERG, *THE HAUNTED LAND: FACING EUROPE'S GHOSTS AFTER COMMUNISM* 314 (1995).

191. See Mark A. Drumbl, *Punishment Postgenocide: From Guilt to Shame to Civis in Rwanda*, 75 N.Y.U. L. REV. 1221, 1288-90 (2000).

192. Usta Kaitesi, Univ. of Butare, Presentation to Cardozo Law students and the

It is dangerous to the entire international justice project for proponents to promise more than international justice can deliver. It should be satisfying simply to state that international justice is necessary to remove perpetrators from roles of political power and to provide some sense of justice to victims. Ultimately, if “the right to justice” is derivative of international human rights law, then there must be a balance between the right to international justice and other human rights imperatives. However, we will not get the balance right if we do not understand the role that international justice plays generally and in specific contexts.

If we appreciate that international justice does not necessarily promote reconciliation in the following ways: 1) a shared sense of history will not happen for a very long time, if at all; 2) high level prosecutions of a very limited number of people will not calm victims’ fears of living alongside perpetrators; 3) court decisions may be utilized to reinforce existing group narratives; and 4) court decisions may have a destabilizing effect, then international lawyers and policymakers may begin to allocate resources to other ways of achieving these goals of reconciliation.

A proper balance can only be struck between different mechanisms to achieve reconciliation and human rights protections if we critically challenge some of the basic assumptions upon which international justice stands.