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World Court finds Serbia Responsible for Breaches of Genocide Convention, but Not Liable for Committing Genocide

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On February 26, 2007, the International Court of Justice issued its judgment in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*.[1] The case marked the first time that a country sued another country for breaches of the Convention on the Prevention and Punishment of the Crime of Genocide ("the Convention"). In a complex and lengthy judgment, the Court concluded that Serbia had violated its obligations under the Convention by failing to prevent the genocide of over 7,000 Bosnian Muslims at Srebrenica in July 1995, and by failing fully to cooperate with the International Criminal Tribunal for the former Yugoslavia ("the ICTY"). However, the Court ruled that Serbia was not directly responsible for the genocide in Srebrenica, and that other atrocities reviewed by the Court did not in fact constitute genocide.

Background

The case stems from the violent dissolution of the former Yugoslavia, starting in 1991. Bosnia and Herzegovina ("Bosnia") alleged that, in the course of this conflict, agents of the Federal Republic of Yugoslavia ("FRY", "Serbia-Montenegro" or "Serbia"[2]) had perpetrated mass killings and acts causing serious bodily or mental harm against Bosnian Muslims in violation of the Convention. Serbia did not deny that most of the events happened, and did not dispute that some of them amounted to war crimes or even crimes against humanity. Rather, Serbia contested the number of victims in specific cases and vigorously argued that it never had the requisite genocidal intent. Serbia also argued that these acts were not attributable to it because they were committed by the army ("VRS") of the Republika Srpska, the Bosnian-Serb entity that initially rejected Bosnia and Herzegovina's secession from the former Yugoslavia following a 1992 plebiscite.

I. Procedural History

The case was filed by Bosnia on March 20, 1993. That year, the ICJ, at the request of Bosnia, indicated provisional measures – a sort of interim relief – prohibiting potential further violations of the Convention.

In 1996, the Court found it had jurisdiction on the basis of Article IX of the Convention. In 1997, the Court accepted a counter-claim presented by Serbia. Merits hearings planned for February 2000 were postponed after an imbroglio was created when the Republika Srpska member of the Bosnian Presidency attempted to withdraw the case against the FRY.[3]

In January 2001, after a change in government in Belgrade, Serbia-Montenegro asked for suspension of the proceedings. In April of the same year, it withdrew its counterclaims,[4] and informed the Court it had changed its legal position on a fundamental aspect of the case: Because of its admission to the United Nations on November 1, 2000, Serbia-Montenegro asserted that it did not claim anymore to have been a UN member between 1992 and 2000, and that this change in position constituted a new fact requiring the Court to reverse its finding of jurisdiction. In February 2003, the Court rejected Serbia-Montenegro's Application for Revision of the 1996 Judgment on this basis. The Court conducted oral hearings between February 27 and May 9, 2006, in which it allowed reargument on questions of jurisdiction, heard arguments on the merits, and listened to witness testimony.

II. Parallel Proceedings

The case's procedural history is intertwined with several other ICJ cases relating to the dissolution of the former Yugoslavia, notably a group of cases filed by Serbia-Montenegro against ten NATO countries[5] and a case brought by Croatia against Serbia-Montenegro.[6]

The events in the former Yugoslavia also led to the creation of the ICTY by UN Security Council Resolution 827 on May 25, 1993. The ICTY was created to prosecute individuals for grave breaches of the 1949 Geneva Conventions, violations of the laws or customs of war, genocide, and crimes against humanity committed on the territory of the former Yugoslavia since 1991. To date, 48 persons have been sentenced, 5 have been acquitted, and 36 persons had their indictments withdrawn or have deceased. There are currently 13 accused persons before the appeals chamber, 23 at trial, 17 at the pre-trial stage, and 6 still at large.[7] With specific regard to genocide prosecutions

two persons have been convicted of aiding and abetting genocide, one judgment still being under appeal. In another thirteen cases, either the genocide charges were withdrawn, the accused were acquitted, or the accused died before the end of the proceedings, including notably former FRY president Slobodan Miloševic. There are also three pending cases where indictments have been made against accused who remain at large, including General Ratko Mladic, the former commander of the VRS, and Radovan Karadzic, the former President of the Republika Srpska.[8]

III. The Judgment of the Court

a. Identity of the Respondent

Because Montenegro seceded from Serbia in June 2006, the Court did not consider it a party to the case. However, the Court noted that responsibility for certain past events determined in the Judgment involved the State of Serbia-Montenegro and observed that Montenegro, as a party to the Convention, had undertaken the obligation to co-operate in order to punish the perpetrators of genocide.[9]

b. Jurisdiction

In reconfirming that it had jurisdiction solely on the basis of Article IX of the Convention, the Court found that its 1996 Judgment on Jurisdiction benefited from the "fundamental" principle of *res judicata*, which guarantees "the stability of legal relations" and fulfils the interest of each party "that an issue which has already been adjudicated in favor of that party be not argued again."[10] In 1996, both parties had refrained from raising the issue of the FRY's potential lack of access to the Court. The FRY's position at the time was that it continued automatically the international personality of the former Federal Socialist Republic of Yugoslavia, including its UN membership. Although the 1996 Judgment did not expressly address that question, the Court considered this element to be a "necessary implication" of the 1996 Judgment, which therefore had to be left undisturbed under *res judicata*.

The finding that the 1996 judgment is *res judicata* is particularly significant because in its 2004 judgment in the *Use of Force cases* concerning the NATO bombing campaign against the FRY in March-April 1999,[11] the Court found that the FRY was *not* a member of the United Nations on the date it instituted those proceedings, and therefore did not have access to the Court under Article 35 of the Court's Statute.

Five judges dissented on the jurisdictional finding, concluding that the case could not proceed to the merits. In their view, the question of access to the Court had not been settled by the 1996 Judgment on jurisdiction because it had not been specifically raised by the parties. Re-examining the question *de novo,* they concluded that the admission of Serbia-Montenegro to the UN in 2000, as well as the Court's *Use of Force* decisions, confirmed that the FRY had not been a UN member at the time the case was filed, and therefore had no access to the Court at the relevant time.[12]

c. Legal obligations under the Genocide Convention [13]

The Court noted that jurisdiction in the case was based solely on Article IX of the Genocide Convention, and that, as such, its jurisdiction was limited to disputes between contracting parties "relating to the interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III." The Court then recalled the specific elements of genocide, as defined in Article II:

> "In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
> *(a)* Killing members of the group;
> *(b)* Causing serious bodily or mental harm to members of the group;
> *(c)* Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> *(d)* Imposing measures intended to prevent births within the group;
> *(e)* Forcibly transferring children of the group to another group."

Article III defines the following acts as punishable under the Convention:

> *(a)* Genocide;

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

Articles IV-VII relate to the obligation of States to punish and extradite persons responsible of the above crimes. Article VIII gives jurisdiction to the UN’s political organs to act relating to genocide, Article IX gives jurisdiction to the ICJ to be seized of state to state disputes under the Convention, and the remaining articles relate to procedure.

The Court concluded that Article I of the Convention creates a direct obligation to prevent genocide and that the obligation to prevent genocide necessarily implies that States, not just persons, are prohibited from committing genocide and the other acts enumerated in Article III.[14] Several judges disagreed with this interpretation of Article I. For these judges, only individual persons could commit the “crime of genocide”. Some of these judges nevertheless agreed that a State can incur international responsibility for genocide if the genocidal acts committed by individuals are attributable to a State under international law,[15] while others maintained that the Convention provided for punishment of individuals in Article IV precisely “in order to avoid attributing genocide to the State itself”.[16]

In addition to the material act, the Court held that a finding of genocide requires specific intent, or *dolus specialis*, a very high standard:

> It is not enough that the members of the groups are targeted because they belong to that group, that is because the perpetrator has a discriminatory intent. Something more is required. The acts listed in Article II must be done with intent to destroy the group as such in whole or in part.[17]

The Court also distinguished genocide from “ethnic cleansing,” a term that was widely used to describe the nature and effect of the atrocities carried out in Bosnia. The Court concluded that, although ethnic cleansing may in some circumstances constitute genocide, the act of rendering an area ethnically homogeneous by use of force or intimidation to remove a given population, is not necessarily carried out with the requisite intent “to destroy, in whole or in part” a group.[18]

The Court also stated that the legal definition of the targeted “group” must be a positive and not a negative one, in other words “Bosnian Muslims” rather than “non-Serbs”. Finally, the Court noted that a finding of genocide required “substantial” destruction of the group, but concluded that genocide may be found where there is intent to destroy the group within a geographically limited area, for example the destruction of the Bosnian Muslims of Srebrenica.

d. Questions of proof[19]

On the *burden* of proof, the Court noted that it is well established in general that the applicant must establish its case and that a party asserting a fact must establish it.

As for the relevant *standards* of proof, the Court rejected Bosnia’s suggestion that it merely had to prove its case on the “balance of probabilities.” The Court invoked the 1949 *Corfu Channel* case for the “long recognized’ position that “claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive.” Thus, the Court required for allegations of the crime of genocide and other acts enumerated in Article III and attribution for such acts, that “it be fully convinced” that such acts have been “clearly established.” For the claims that Serbia breached its obligations to prevent genocide and to punish and extradite persons charged with genocide, the Court applied a slightly different standard, requiring “proof at a high level of certainty appropriate for the seriousness of the allegation.” In his dissenting opinion, Vice-President Al-Khasawneh argued that the refusal of Serbia to divulge documents should have led to a shifting of the burden of proof or to a more liberal recourse to inferences of fact and circumstantial evidence.

e. Analysis of the facts

In assessing the parties’ claims, the Court examined a vast amount of evidence in various forms, including UN reports, reports from States and NGOs, newspaper articles, and ICTY decisions.[20] The Court considered the fact-finding procedures of the ICTY trial chamber as “highly persuasive” and also accorded “due weight” to the evaluation

of intent by the ICTY based on those adjudicated facts.

The Court first analyzed incidents of mass killings in addition to the Srebrenica massacre, finding evidence of many large-scale killings, perhaps the worst of which was the horrific killing of 1000-3000 people in the Omarska camp. The Court thus found it established by conclusive evidence that massive killings of Bosnian Muslims occurred, and that the material element of Article II(a) of the Convention was satisfied. But the Court concluded that it had not been conclusively established that the massive killings were committed with the specific intent to destroy, in whole or in part, the targeted group as such.[21] By contrast, after extensive analysis of the killing of some 7,000 Bosnian Muslim men and forcible transfer of 25,000 women, children, and elderly in Srebrenica in July 1995, the Court concluded that these acts fell within Article II(a) and (b) of the Convention, were committed with the specific intent to destroy in part the group of Bosnian Muslims as such, and that these acts thus constituted acts of genocide.[22]

The Court then examined the evidence of prohibited acts under Article II (b) – (e) of the Convention. In the incidents other than Srebrenica, the Court found it had been conclusively established that Bosnian Muslims were systematically victims of massive mistreatment, beatings, rape and torture causing serious bodily and mental harm, and that terrible conduct was inflicted upon detainees of the camps. But in each case the Court found the evidence insufficient to establish that these acts were accompanied by the specific intent to destroy the protected group, in whole or in part.[23] The Court concluded that the facts placed before it did not establish that measures had been imposed to prevent births, or that there was any policy of forced pregnancy or transfer of children. The Court also found that the specific intent necessary to establish violations of Article II of the Genocide Convention in the other incidents could not be established through the existence of a consistent pattern of conduct. In sum, the Court concluded that genocide had been committed in Srebrenica in July 1995, but that genocide had not been committed in any of the other incidents reviewed.[24]

f. State responsibility

Having concluded that genocide was committed at Srebrenica, the Court then considered the three ways that responsibility for this genocide could be attributed to Serbia under the laws of State responsibility. First, on the basis of the internal law of the Republika Srpska, the Court concluded that neither the Republika Srpska nor the VRS were *de jure* organs of the FRY (as Serbia was then called).[25] Second, it also concluded that they could not be considered *de facto* State organs because they were not under such strict control of the State that responsibility for their wrongful acts should be attributed to the State.[26] Third, it concluded that the acts of genocide were not committed by persons who acted on the instructions of the FRY or under its direct control in the specific circumstances of the incident.[27] Because the acts of genocide at Srebrenica could not be attributed to the State of Serbia through any of these three tests, the Court concluded that the international responsibility of Serbia was not engaged.

The Court then examined the question of responsibility, in respect of Srebrenica, for conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide. The claim for attempt to commit genocide was not considered by the Court because it noted that Bosnia did not put forward such a claim in its final submissions. The Court easily dispensed with the claim for conspiracy along the same lines that it had found failure to attribute responsibility for genocide, because the persons or groups involved were not organs of Serbia nor were they acting under its effective control. It also dispensed with the public incitement claim based on lack of evidence. It found the complicity claim more complex, analogizing it to the concept of "aid or assistance" in Article 16 of the Articles on State Responsibility.[28] The Court found that the conduct of an organ or a person furnishing aid or assistance to a perpetrator of the crime of genocide cannot be treated as complicity in genocide unless at least that organ or person acted knowingly. This means the FRY would have had to be aware of the principal perpetrator's specific intent. The majority of the Court was not convinced that this condition was met, although four judges dissented on this point.[29] The Court thus concluded that Serbia's international responsibility was not engaged under Article III.[30]

The Court then turned to Serbia's obligation to prevent and punish genocide under Article I of the Convention, noting that the obligation to prevent genocide is one of conduct, not of result, for which the State must employ all means reasonably available to it. Moreover, a State can only be held responsible for breaching the obligation to prevent genocide if genocide was actually committed. In such a case the obligation comes into being when the State learns, or should normally have learned, of the existence of a serious risk that genocide will be committed.

The Court distinguished complicity in genocide from the obligation to prevent genocide on two grounds. First, the obligation to prevent can be violated by mere omission to act, while complicity requires some positive action in the

form of aid or assistance. Second, the obligation to prevent is triggered by a State's mere awareness that genocide might be committed, while complicity requires knowledge that genocide is about to be committed or is underway. After examining the evidence, the Court found that Serbia had violated its obligation to prevent the Srebrenica genocide, engaging its international responsibility.[31]

Concerning Serbia's obligation to punish genocide, the Court focused on whether Serbia was under an obligation to cooperate with the ICTY. It found that Serbia had such an obligation since at least December 14, 1995, the signing and entry into force of the Dayton Agreement, one annex of which required such cooperation. The Court noted that Serbia had made little effort to apprehend General Mladic since his indictment by the ICTY for genocide and complicity in genocide, despite his presence on Serbian territory. The Court therefore concluded that Serbia had failed to cooperate with the ICTY, and thus had failed to comply with its obligation to punish genocide, thereby engaging its international responsibility.[32]

Finally, the Court examined the question of responsibility for breach of the Court's Orders indicating provisional measures of April 8, 1993, and September 13, 1993. It concluded that, with respect to the massacres at Srebrenica in July 1995 Serbia had failed to fulfill its obligations contained in both orders, to "take all measures within its power to prevent commission of the crime of genocide" or "ensure that any … organizations and persons which may be subject to its … influence … do not commit any acts of genocide".[33]

g. Reparation

The Court's conclusions on reparations were premised on the fact that it had only found Serbia internationally responsible for breaching its obligations to prevent and punish genocide – but not the substantive obligation not to commit genocide, nor the ancillary obligations concerning complicity, conspiracy, and incitement. Therefore, the Court concluded that the appropriate reparation would be limited to a declaration in the operative clause of the Judgment that Serbia (1) has failed to comply with its obligation to prevent the crime of genocide, (2) has failed to comply with its obligation to punish genocide, and shall immediately take effective steps to ensure full compliance with this obligation by transferring accused individuals to the ICTY, and (3) has failed to comply with the Court's Orders indicating provisional measures.[34]

IV. Implications of the Judgment

The Court's judgment is of significance to the States involved, to institutions applying the Genocide Convention and to the development of international law generally. Although it is beyond the scope of this ASIL Insight to comment on all of these, two immediate effects are likely. First, another case alleging genocide, brought by Croatia against the FRY in 1999, remains on the docket of the Court. In that case, unlike here, there is no decision on jurisdiction which could be considered *res judicata*, and thus the jurisdictional hurdles may prove even greater. Second, Serbia might continue to be in violation of its obligation to punish genocide if there continues to be evidence that General Mladic is on the territory of Serbia. The transfer of General Mladic to The Hague also remains an important element in Serbia's negotiations for European Union membership.

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Footnotes

[1] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* merits, Judgment of February 26, 2007, available at: **http://www.icj-cij.org/icjwww/idocket/ibhy/ibhyjudgment/ibhy_ijudgment_20070226_frame.htm**.
[2] The named of the Respondent changed twice in the course of the proceedings. The case was initially filed against the Federal Republic of Yugoslavia (Serbia and Montenegro) ("the FRY"). In 2001, the name of the country changed to Serbia and Montenegro. After the secession of Montenegro in June 2006, the Respondent became Serbia.
[3] Judgment of February 26, 2007, *supra* note 1, at para. 18-24.
[4] The Court noted that it "does not overlook the evidence suggesting the existence of Muslim organizations involved

in the conflict, such as foreign Mujahideen, although as a result of the withdrawal of the Respondent's counter-claims, the activities of these bodies are not the subject of specific claims before the Court." *Id.* at para. 236.
[5] *Case Concerning Legality of Use of Force (Serbia and Montenegro* v *Belgium et al.),* jurisdiction, judgments of 15 December 2004. *See* ASIL Insight "The World Court Dismisses Serbia and Montenegro's Complaints Against Eight NATO Members" by Pieter Bekker, Judith Levine & Felix Weinacht, December 2004.
http://www.asil.org/insights/2004/12/insight041223.htm
[6] *See* Application instituting proceedings in the case of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Yugoslavia)* of 2 July 1999.
[7] *See* **http://www.un.org/icty/glance-e/index.htm** (last accessed Mar. 5, 2007).
[8] Judgment of February 26, 2007, *supra* note 1, at para. 374. *See* also Reuters report of February 1, 2007.
http://www.alertnet.org/thenews/newsdesk/L01924661.htm
[9] *Id.* at paras. 71-78.
[10] Judgment of February 26, 2007, *supra* note 1, at paras. 115-116.
[11] *See* AIL Insight "The World Court Dismisses Serbia and Montenegro's Complaints Against Eight NATO Members" by Pieter Bekker, Judith Levine & Felix Weinacht, December 2004.
[12] *See* Joint Dissenting Opinion of Judges Ranjeva, Shi and Koroma; Declaration of Judge Skotnikov; Separate Opinion of Jud *ad hoc* Kreca.
[13] Judgment of February 26, 2007, *supra* note 1, at paras. 142-201.
[14] *Id.* at paras. 142-79.
[15] See Separate Opinion of Judge Owada, paras. 40-45, 53; Separate Opinion of Judge Tomka, paras. 41, 42, 48, 56-57, 61(iv); Declaration of Judge Skotnikov, p. 4. See also Separate Opinion of Judge *ad hoc* Kreca, para. 135.
[16] See Joint Declaration of Judges Shi and Koroma, para. 4.
[17] Judgment of February 26, 2007, *supra* note 1, at para. 187.
[18] *Id.* para. 190.
[19] *Id.*, at paras. 209-224.
[20] In his dissenting opinion, Vice-President Al-Khasawneh argued that the Court should also have sought access to the papers of the Serbian Defence Council.
[21] *Id.* at paras. 245-77.
[22] *Id.* at paras. 278-97.
[23] *Id.* at paras. 298-354.
[24] *Id.* at paras. 355-76.
[25] *Id.* at para. 386.
[26] *Id.* at paras. 391-95.
[27] *Id.* at paras. 396-415. In this analysis, it is notable that the Court rejected the "overall control" test of the ICTY in the *Tadic* case, reaffirming the "effective control" test in the I.C.J.'s *Nicaragua* case. *Id.* at paras. 399-407 (citing *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), I.C.J. Reports 1986*, p. 65, para. 15; Prosecutor v. Tadic, Judgment, No. It-94-1-A, para. 145 (July 15, 1999)). Vice-President Al-Khasawneh questioned this conclusion in his dissenting opinion.
[28] Judgment of February 26, 2007, *supra* note 1, at para. 420.
[29] *See* Dissenting opinion of Vice-President Al-Khasawneh; Declaration of Judge Keith; Declaration of Judge Bennouna; Dissenting opinion of Judge *ad hoc* Mahiou.
[30] Judgment of February 26, 2007, *supra* note 1, at paras. 416-24.
[31] *Id.* at paras. 425-38.
[32] *Id.* at paras. 439-50.
[33] *Id.* at paras. 451-58.
[34] *Id.* at paras. 459-70.