

Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro), Judgment of 26 February 2007, General List No. 91

Catching the Conscience of Judges

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Introduction

Earlier this year, on 27 February, a mass demonstration was held in Sarajevo, where 10,000 victims of the Srebrenica genocide expressed their disillusionment with the judgment of the International Court of Justice (‘ICJ’) handed down a day earlier. On 26 February 2007, the ICJ had delivered its decision in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (*‘Genocide Convention Case (Merits)’*).¹ One of the victims in the demonstration carried a banner where it was ironically written that 8,000 Bosnian Muslim men were killed by ‘aliens’.² This is just one indication that the ICJ’s decision will have far-reaching consequences regarding the stability of this troubled region.

In this case, the ICJ was able to revisit one of the most enduring conundrums of international law. The rendered decision was the first time a State brought a case against another State for breaches of the *Convention on the Prevention and Punishment of the Crime of Genocide* (*‘Genocide Convention’*).³ It comes as no surprise that the ICJ’s decision was welcomed differently in the countries concerned. After the decision, representatives of Bosnia and Herzegovina noted that they ‘did not get everything we wanted’ but stressed ‘we got quite a lot’.⁴ Serbian agents noted that the ICJ accepted ‘our argument that no one could prove that the Serbian people had the intent to destroy the Muslim people’.⁵ One commentator even described the ruling as ‘a judicial massacre’.⁶ This short note examines the decision from a substantive point of view and attempts to shed new understanding on the decision.

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1 *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment of 26 February 2007, General List No. 91 (*‘Genocide Convention Case (Merits)’*)

2 Miting, “‘Asocijacije žrtava genocida’ povodom presude”, *Oslobodjenje* (28 February 2007).

3 *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature on 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) (*‘Genocide Convention’*).

4 ‘Karika Koja Je Nedostajala’ <www.sense-agency.com/ba/stream.php?sta=3&pid=9271&kat=6> accessed 10 August 2007.

5 Ibid.

I. Facts

Between 6 and 11 July 1995 more than more 25,000 Bosnian Muslims, most of them women, children and elderly people living in and around town of Srebrenica, were forced to leave the town. In addition, 7,000 Bosnian Muslim men and boys were massacred by the Republika Srpska army in and around Srebrenica.⁷ It was the largest single-death toll on European soil since the end of Second World War II. Bosnia maintained that in the course of the conflict in Bosnia and Herzegovina, agents of Serbia⁸ had committed mass killings and acts causing serious bodily or mental harm against Bosnian Muslims in violation of the *Genocide Convention*. In this regard, 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. It only contested the number of victims in specific cases and argued that it never had the requisite genocidal intent. Serbia also argued that these acts were not attributable to Serbia because they were committed by the army of the Republika Srpska in the Bosnian-Serb region of Bosnia and Herzegovina.

2. Decision

The ICJ affirmed it had jurisdiction and found, by thirteen votes to two, that Serbia had not conspired to commit genocide nor had it incited the commission of genocide in violation of its obligations under the *Genocide Convention*. The ICJ also found, by eleven votes to four, that Serbia had not been complicit in genocide. However, the ICJ did find that Serbia had violated its obligation under the *Genocide Convention* to prevent genocide in Srebrenica, and that it had also violated its obligations under the *Genocide Convention* by having failed to co-operate fully with the International Criminal Tribunal for the former Yugoslavia ('ICTY'). The ICJ held that the genocide in Srebrenica was committed by the Republika Srpska army under the command of its VRS⁹ Main Staff, which did possess the specific 'genocidal intent'.

No financial compensation was awarded. Point 8 of the *dispositif* provides that Serbia must take effective steps to discharge its obligations under article I of the *Genocide Convention*, transferring 'individuals accused of genocide or any of those other acts for trial by the International Criminal Tribunal for the former Yugoslavia ('ICTY'), and to co-operate fully with that Tribunal'.¹⁰

6 Antonio Cassese, 'A Judicial Massacre' *The Guardian* (27 February 2007) <www.guardian.co.uk/commentisfree/2007/feb/27/thejudicialmassacreofsrebr> accessed 6 September 2008 and Sandesh Sivakumaran, 'Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v Serbia and Montenegro*)' (2007) 56 *International and Comparative Law Quarterly* 695.

7 *Prosecutor v Krstić* [2001] ICTY IT-98-33-T at [1].

8 The case was initially brought 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.

9 Military Structure of the Army of the Republika Srpska (VRS).

10 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91 at [170].

A. **Can a State Commit the Crime of Genocide?**

The ICJ held that States can commit the crime of genocide. In paragraph 166, the ICJ delivered what is probably the strongest argument of the decision. It held that the effect of article I of the *Genocide Convention* 'is to prohibit states themselves from committing genocide'¹¹ which follows from the categorisation of genocide as a crime against international law. It noted that such an obligation requires States 'to prevent persons or groups not directly under their authority from committing an act of genocide or any of the other acts mentioned in Article III'.¹² It then held that the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide.¹³

B. **Rules of Attribution**

To find that Serbia committed genocide in Srebrenica, the ICJ would need to attribute the acts of the Republika Srpska army to the state of Serbia. The ICJ acknowledged the crimes in Srebrenica 'were committed, at least in part, with the resources which the perpetrators of those acts possessed as a result of the general policy of aid and assistance pursued towards them by the FRY'.¹⁴

The ICJ did not find attribution. It rejected the overall control standard of the ICTY's *Tadić Appeals Judgment*¹⁵ and applied the effective control test from its *Nicaragua* decision. According to the latter, 'it would in principle have to be proved that [the] State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed'. According to the former:

[A]cts committed by Bosnian Serbs could give rise to international responsibility of the FRY on the basis of the overall control exercised by the FRY over the Republika Srpska and the Republika Srpska army, without there being any need to prove that each operation during which acts were committed in breach of international law was carried out on the FRY's instructions, or under its effective control.¹⁶

Curiously, the ICJ did not explain why the 'overall control' standard from *Tadić* is not appropriate in this instance. This is especially perplexing given that the ICJ has considered several principles from different ICTY jurisprudence. The Court also failed to explain why it is just or fair to require Bosnia to prove that Serbia exercised effective control over the army of Republika Srpska, which committed the genocide in Srebrenica.

11 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91 at [166].

12 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91 at [166]. The Court added that: 'It would be paradoxical if States were thus under an obligation to prevent, so far as within their power, commission of genocide by persons over whom they have a certain influence, but were not forbidden to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law. In short, the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide'.

13 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91 at [166].

14 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91 at [422].

15 *Prosecutor v Tadić* [1999] ICTY IT-94-1-A.

16 *Prosecutor v Tadić* [1999] ICTY IT-94-1-A.

It ruled that the Republika Srpska military did not act on instructions from Belgrade authorities and that responsibility for the Srebrenica massacre cannot be attributed to the Serbian state.

C. *Burden of Proof Standard*

Concerning the burden of proof, the ICJ held that it is well established in general law that the applicant must establish its case and that the party asserting a fact must establish it. It then, however, applied the criminal law standard of ‘beyond reasonable doubt’ and held that the Respondent did not prove that Belgrade authorities supplied and continued to supply the military of the Republika Srpska.¹⁷ Whether it was apt to apply a higher criminal standard in this case remains under discussion. In this regard, the ICJ held that in the argument between the parties it was not established beyond reasonable doubt that the authorities of the FRY supplied and continued to supply the VRS leaders who decided upon and carried out those acts of genocide with their aid and assistance. That said, the ICJ did not endeavour to obtain evidence from primary sources, which may have indicated that a working relationship existed between FRY’s authorities and leaders of Republika Srpska army. The ICJ then held that Bosnia and Herzegovina had not proved that instructions were issued by the federal authorities in Belgrade, or by any other organ of the FRY, to commit the massacres. In contrast, it held that the decision to kill the adult male population of the Muslim community in Srebrenica was taken by some members of the VRS Main Staff, but without instructions from, or effective control by, the FRY.¹⁸ It appears unfair that Bosnia should produce documents that were in the control of Serbia.

Although the ICJ accepted that it must make its own determination of the facts,¹⁹ almost all the evidence in this section of the decision is second-hand and drawn from the decisions of others or from the decisions rendered by ICTY. Some reports suggested that the ICJ omitted to consider some important facts. To this end, the *New York Times* suggested that the ICJ did not consider several thousand documents from the Belgrade archive before it delivered the judgment.²⁰ Those documents include minutes of meetings between political and military leaders of Yugoslavia and leaders of Republika Srpska and may have given insight into the Bosnian war of 1992-1995. To this end, the ICJ’s Vice President, Awn Shawkat al-Khasawneh of Jordan, noted in his Dissenting Opinion that ‘regrettably the court failed to act’ and added that ‘it is a reasonable expectation that those documents would have shed light on the central questions.’²¹ It is not suggested that these ‘missing’ documents would present new facts or that they would bring forth any new information, but an underlying conclusion must be that the

17 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91 at [422].

18 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91 at [413].

19 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91 at [212].

20 Marlise Simons, ‘Genocide Court Ruled for Serbia Without Seeing Full War Archive’, *New York Times* (9 April 2007) <http://www.nytimes.com/2007/04/09/world/europe/09archives.html?_r=1&scp=1&sq=Genocide%20court%20ruled%20for%20serbia&st=cse&oref=slogin> accessed 9 September 2008.

21 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91 at [35] (Dissenting Opinion of Vice-President Al-Khasawneh).

documents should have been considered. Then the ICJ could have compared them with other documents. The fact that those documents were not considered may imply that they would have shed different light on the events between 1992 and 1995. Even though the parties were responsible for discharging their duty and presenting all the relevant facts to make their case in a confrontational manner, the ICJ could have considered sending its own fact-finding mission to Belgrade to document and gather relevant evidence. In this regard, it is doubtful whether charging a State with genocide would require proof that corresponds to the criminal law standard of ‘beyond reasonable doubt’.

Considering the relationship between the VRS and Belgrade authorities another observation comes to mind. It appears that the *Prosecutor v. Perišić*²² case before ICTY may shed light on the roles that the Yugoslav Army, Serbian police, paramilitary and Serbian volunteer groups played in the war in BiH. The indictment in *Prosecutor v. Perišić* includes details concerning the role of Yugoslav Army in Republika Srpska. It alleges that the Yugoslav army’s VJ officers from the Užice Corps took part in the planning and preparation of the attack on Srebrenica. It is further alleged that on 13 July 1995 Perišić issued a command to 30 VJ officers ordering them to report to the VRS Main Staff and take up their duties in BiH, including the Srebrenica area. If these allegations prove correct, they may, together with Belgrade documents, put ICTY decision in a very different light. However, it is noted that mere indictment should never be used as evidence of guilt.

D. Reparations

The ICJ’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 for breaching the substantive obligation not to commit genocide nor the ancillary obligations concerning complicity, conspiracy, and incitement. Therefore, the ICJ concluded that the appropriate reparation would be limited to a declaration, and the ICJ considered that a declaration of this kind is ‘in itself appropriate satisfaction.’²³ Victims of Srebrenica have so far not received any compensation.

Conclusion

Some States are more reticent than others in their commitment to observe their international legal obligations, but that the Serbian government, after more than a year since the delivery of the judgment, has not yet complied with the finding of the ICJ to transfer Ratko Mladić to the ICTY cannot be welcome. It is still not clear if General Mladić will ever be surrendered to the ICTY. This reluctance to act sheds new light on the occurrences as they took place from 1992 to July 1995.

The strong ties of solidarity between the Serbian leadership on the one hand and the Republika Srpska on the other come to light quite clearly. The Bosnian government may

22 *Prosecutor v Perišić* [2008] ICTY IT-04-81-PT.

23 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91 at [463].

consider an application to the ICJ 'for revision of a judgment', under article 61 of the Statute of the International Court of Justice. The victims of Srebrenica, for whom Bosnia and Herzegovina was seeking reparation, must now take different avenues to seek damages resulting from the massacre.

Furthermore, it does not appear believable that the Belgrade authorities were not involved with the leadership of Bosnian Serbs in planning the crimes that took place in Srebrenica. That said, it is highly unlikely that Serbia did not give military, financial and political assistance to Mladić in committing genocide in Srebrenica. Observations that missing documents may have shed a different light on the whole case cannot be easily brushed aside.

Some commentators argue that had the ICJ decided that Serbia committed the crime of genocide, it would have deepened hatred and resentment between Serbs and Bosnian Muslims, thereby undercutting attempts to reconcile the still hostile sides. By refusing to find Serbia liable for genocide itself, the ICJ may have avoided attaching collective responsibility to the Serbian nation, but it also may have contributed to potential long-term instability of the region. In contrast, it is noted that the ICJ decision has brought even greater turmoil and sadness to the troublesome region. The current political situation in Bosnia and Herzegovina and in Serbia shows that the ICJ's decision in *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* has not contributed to reconciling the different nations in the region.