Reflections on the Judgment of the International Court of Justice in Bosnia’s Genocide Case against Serbia and Montenegro

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On February 26, 2007, the International Court of Justice (ICJ or the Court) issued its opinion 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). In its first judgment interpreting the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), the Court held that that the massacre of Bosnian Muslims at Srebrenica in July 1995 amounted to genocide, but at the same time determined that there was not enough evidence to find Serbia directly responsible or even complicit in that genocide. Nevertheless, in its landmark ruling, the Court also found that Serbia had violated the Genocide Convention by failing to prevent the massacre and, later, by failing to punish those responsible for the killings in Srebrenica.

Initial reactions to the judgment were mixed. While one paper’s headlines characterized the Court’s ruling as having “clear[ed] Serbia of Genocide,” another summed up the judgment as “Court Declares Bosnia Killings Were Genocide.” Months later, at the first international genocide conference held in Sarajevo since the 1992–1995 conflict, the emotional intensity of the reactions to the judgment was palpable. While some characterized the verdict as another “betrayal” by the international community, others lauded the Court’s judgment, claiming it had finally to put to rest the question of whether Serbia had orchestrated the genocide. Still others expressed disappointment with the Court, noting that it failed to resolve many of the controversial questions raised in the case. The confusion over what the Court’s complex and lengthy judgment actually held, and the continuing controversy over whether the decision is a win or a loss for either side, highlights the need for a closer reading and more accurate understanding of the Court’s analysis.

**Background of the Case**

The case, filed by Bosnia and Herzegovina in 1993, alleged that during the 1992–1995 conflict, the Federal Republic of Yugoslavia (FRY) (which after 2001 became known as Serbia and Montenegro, and later as Serbia, following the secession of Montenegro in June 2006) was responsible for mass killings and other atrocities committed against Bosnian Muslims in violation of the Genocide Convention. Specifically, Bosnia alleged that “under the guise of protecting the Serbian population of Bosnia and Herzegovina, [Serbia] in fact conceived and shared with them the vision of a ‘Greater Serbia,’ in pursuit of which it gave its support to those persons and groups responsible for the activities which constitute the genocidal acts complained of.”

Although Serbia disputed certain facts, such as the actual number of deaths in Srebrenica, it did not deny that crimes were committed during the conflict. In fact, it conceded that certain acts could be “characterized as war crimes and certain even as crimes against humanity.” However, Serbia disputed the allegation that these acts had been committed with the requisite genocidal intent. More significantly, it claimed that the acts could not be attributed to Serbia, as they had been carried out by the army of the Republika Srpska (VRS), the Bosnian Serb entity that retained de facto control over a substantial part of territory after Bosnia and Herzegovina’s secession from the former Yugoslavia.

**Significance of the ICJ’s Opinion**

Aside from the Court’s complicated and controversial analysis of whether it had jurisdiction over Serbia, which has been extensively addressed by other commentators, several critical aspects of the Court’s judgment are worth mentioning from the outset. First, the Court was limited to assessing Serbia’s responsibility for alleged acts of genocide. Thus, the decision does not deal with Serbia’s responsibility for war crimes or crimes against humanity, which the Court was careful to suggest, in
convict any individual of committing (as opposed to aiding and
operations in Bosnia and Herzegovina in the years prior to the
FYR, along with the Bosnian Serb armed forces, in military
the Court’s judgment recognized that: 1) “there is much evi-
to conclude that Serbia could be held responsible for genocide,
Srebrenica.16 Although the Genocide Convention does not expressly
sible for genocide without an individual being convicted of the
the Court concluded that States’ obligation to prevent genocide
allowing the actions of the military, political and financial
relations, and, in particular, in the detention camps.”

Similarly, although the Court failed to find enough evidence
to conclude that Serbia could be held responsible for genocide,
the Court’s judgment recognized that: 1) “there is much evidence
direct or indirect participation by the official army of the
FYR, along with the Bosnian Serb armed forces, in military
and the events at Srebrenica”14 and, more significantly, 2) the “FYR was
in a position of influence, over the Bosnian Serbs who devised
and implemented the genocide in Srebrenica . . . owing to the
strength of the political, military and financial links between
FYR on the one hand and the Republika Srpska and the VRS on
the other, which, though somewhat weaker than in the preceding
period, nonetheless remained very close.”15 Thus, although
the Court’s decision falls short of finding Serbia responsible
for genocide, it leaves little room for doubt that Serbia was
involved in the events leading up to and during the genocide in
Srebrenica.

Third, the Court found that a State can be held responsi-
ble for genocide without an individual being convicted of the
crime.16 Although the Genocide Convention does not expressly
require States to refrain from committing genocide themselves,
the Court concluded that States’ obligation to prevent genocide
under the Convention implies that States, not just individuals,
are prohibited from committing genocide.17 This is significant
because the Court relied extensively on evidentiary findings
made by the International Criminal Tribunal for the former
Yugoslavia (ICTY or the Tribunal) in cases where individuals
had been charged with genocide,18 and that tribunal has yet to
convict any individual of committing (as opposed to aiding and
abetting) genocide.19

This leads to the final, and perhaps, most significant pre-
liminary observation about the Court’s judgment. Not only was
this the first time since the Genocide Convention was adopted
in 1948 that the ICJ heard and issued a judgment on a dispute
over an alleged violation of the Convention, but it was also the
first time a State was actually held responsible for violating the
Convention, in particular by failing to take the necessary steps
to prevent genocide. The import of this particular ruling cannot
be overstated. According to the majority, a State need not know
that genocide is underway or is about to occur in order for the
obligation to prevent to be triggered; rather it is sufficient that
the State knew that there “was a serious risk of genocide.”20
As another commentator has pointed out, the “Court put to rest
States’ all-too-familiar claim that it is unclear whether they must
act to prevent genocide in the face of ambiguous facts that are
unambiguously menacing: If they wait until it is legally certain,
they have waited too long to prevent it.”21

The Court’s Decision Not to Seek the Best Possible Evidence

The first issue relates to the question of why the Court chose
to not use, or even seek, the best possible evidence. On two sep-
unate occasions, Bosnia requested unedited copies of documents
containing minutes of the meetings of the Supreme Defence
Council of Serbia,22 the country’s highest decision-making body
at the time of the conflict, made up of Yugoslavia’s top political
and military leadership. The documents have been characterized
as “the best inside view of Serbia’s role in the Bosnian war of
1992–1995.”23 As the Vice-President of the Court Judge Awn
Shawkat al-Khasawneh noted in his dissent, “[i]t is a reasonable
expectation that those documents would have shed light on the
central questions” facing the Court.24

Under the ICJ Statute, the Court could have asked Serbia to
produce these documents in their entirety, or at the very least
officially noted Serbia’s failure to produce uncensored copies.25
Nevertheless, the Court chose to do neither,26 noting instead that
Serbia had “extensive documentation and other evidence available
in the case, especially from the readily accessible ICTY records”27
as if, in the words of one commentator, “having access to
a mountain of less probative evidence could compensate for
evidence withheld by Serbia precisely because it was crucial to
Bosnia’s case.”28 The Court’s failure to explain why it chose not
to pursue this evidence understandably raises questions about
whether the Court had before it all the evidence necessary to
make an accurate legal determination of Serbia’s responsibility
in this case.

The Court’s Decision to Apply a High Standard of Proof But Not to Undertake
A Cumulative Analysis of the Evidence

The second question raised by the judgment relates to the
standard of proof applied by the Court and its analysis of the
evidence under that standard. Genocide is difficult to prove,
primarily because in addition to the material act, a finding of
genocide requires proof of the specific intent to destroy the pro-
tected group.29 Specifically, “[i]t is not enough that the members
of the group 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 [the Genocide Convention]
must be done with intent to destroy the group as such in whole
or in part.”30

In terms of the level of proof required to meet that standard,
the Court rejected Bosnia’s suggestion that it merely had to
prove its case on the “balance of probabilities.” Instead, the
Court relied on its earlier jurisprudence to conclude that “claims
against a State involving charges of exceptional gravity must be
proved by evidence that is fully conclusive.”31 The Court stated
that it had to “be fully convinced” that allegations of genocide,
or complicity in genocide, have been “clearly established.”32
Although it added that “[t]he same standard applies to the proof

http://digitalcommons.wcl.american.edu/hrbrief/vol15/iss1/1
of attribution for such acts,” the Court appears to have adopted an even higher standard when reviewing the facts in support of Bosnia’s state responsibility claim, noting that it had “not been established beyond any doubt” that Serbia had supplied the Bosnian Serb army with aid and assistance at the time when Serbian authorities were “clearly aware that genocide was about to take place or was under way.”35 The question of whether this was an appropriate application of the standard is highlighted by the fact that four of the 15 judges dissented from the Court’s conclusion that there was not enough evidence to find Serbia complicit in the genocide at Srebrenica.36

A more troubling aspect of the Court’s decision is its apparent failure to consider the evidence in a cumulative manner, leading to a more limited use of inference than arguably required. For instance, although the Court was “fully convinced” that the evidence established the systematic mistreatment — including “beatings, rape, and torture causing serious bodily and mental harm” — of Bosnian Muslims in locations other than in Srebrenica, it concluded that demonstrating genocidal intent through the “very pattern of the atrocities committed over many communities, over a lengthy period, focused on Bosnian Muslims” is too broad a proposition, with which “the Court cannot agree.”37

Notably, the Court’s approach here appears to be at odds with the jurisprudence of the ICTY, which must apply the higher “beyond reasonable doubt” standard and yet has repeatedly held that in the absence of smoking gun evidence of intent, the Tribunal can derive genocidal intent from circumstantial evidence, including pattern evidence of abuses against the protected group.38 Although the ICTY has cautioned that when inferential evidence is relied upon to prove genocidal intent, the “inference must be the only reasonable inference available on the evidence,” it has nonetheless indicated a willingness to consider such evidence in its analysis of intent. For instance, in an early decision in the case of Prosecutor v. Karadžić & Mladić, the ICTY found that the means used to achieve the objective of what the Tribunal termed “ethnic cleansing,” including the systematic rape of women, tended to show that the acts were designed to reach “the very foundations of the group.”39 The Tribunal concluded that, in combination with other factors, the systematic rape of the kind perpetrated during the Bosnian conflict could provide circumstantial evidence of genocidal intent.40

A similar approach could have been used to analyze whether the massive mistreatment that the Court found had occurred in areas outside Srebrenica, particularly in the detention camps, could in itself have contributed to an analysis of genocidal intent. Likewise, the Court could have used its finding that there was “conclusive evidence of the deliberate destruction of the historical, cultural and religious heritage of the protected group during the period in question” as further evidence of intent. Indeed, earlier in the opinion, it endorsed the proposition made by the ICTY in the Kruščić case that although the destruction of cultural and religious property cannot be considered a genocidal act, such attacks may be considered as evidence of intent to physically destroy the group.41 The nature of these acts, combined with the massive scale of their destructive effect, as well as Serbia’s own statements,42 might have been sufficient to derive the requisite genocidal intent. However, the Court failed to undertake a cumulative analysis of such evidence, at least with respect to the atrocities that were committed in areas outside Srebrenica. The Court’s failure to consider the evidence in a holistic or collective manner is disconcerting, particularly in light of the fact that, as mentioned earlier, the Court also refused to draw any conclusions from Serbia’s failure to turn over unedited copies of the Supreme Defence Council documents. As Judge al-Khasawneh observed, “[i]t would normally be expected that the consequences of [the Court’s noting such a refusal] would be to shift the onus probandi or to allow a more liberal recourse to inference.” This, however, was not the position taken by the Court’s majority.

**The Court’s Reliance on the Jurisprudence of the ICTY**

The third question relates to the extent to which the Court was guided by the jurisprudence the ICTY. In assessing the parties’ claims, the Court examined a vast amount of evidence, including UN reports, submissions from States as well as from inter- and non-governmental organizations, newspaper articles, and expert witnesses.43 Significantly, the Court also considered findings of fact made by the ICTY, stating that “in principle [they would be] accepted as highly persuasive” and adding that the ICTY’s evaluation of intent based on those adjudicated facts was entitled to “due weight.”44

For instance, in arriving at its conclusions regarding the absence of genocidal intent with respect to the atrocities committed in areas outside Srebrenica, the Court appears to have been heavily influenced by judgments in which the ICTY found genocidal intent lacking.45 Yet, at the same time, the Court seems to have been reluctant to rely on other aspects of the ICTY’s jurisprudence, including, as noted above, the Tribunal’s use of circumstantial evidence to prove genocidal intent in the absence of smoking gun evidence of such intent.46 The Court’s inconsistent approach to the relevance of ICTY jurisprudence begs the question: if the Court did not feel persuaded to conduct the kind of cumulative analysis of circumstantial evidence endorsed by the ICTY, why did it fail to conduct its own analysis of the evidence instead of relying on ICTY judgments to support its conclusion that evidence of intent was lacking? In other words, if it found the ICTY’s approach to the evidence unpersuasive, why did the Court rely on the ICTY’s conclusions of fact?
Unfortunately, the inconsistency in the Court’s reliance on the ICTY’s findings and analysis can lend itself to the perception that the ICJ had reasons other than a strictly legal interpretation of the facts in coming to its conclusions.

Equally significant is the fact that the Court appears to have been selective when taking into account the difference in the nature of the cases that it and the ICTY are called upon to decide. For instance, whereas in justifying its rejection of the ICTY’s “overall control” test the Court highlights the difference between the nature of state involvement required to characterize a conflict as international and the nature of state involvement required to give rise to state responsibility, it fails to mention the distinction between the civil nature of its proceedings and the criminal nature of the ICTY’s proceedings when using the ICTY’s findings to support its conclusion regarding the absence of genocidal intent. Citing ICTY jurisprudence in support of its conclusion, the Court highlights the difference between the nature and context in which each of these courts functions threaten to undermine the soundness of the Court’s analysis.

**Conclusion**

Although others, including many present at the international genocide conference held in Sarajevo, have addressed various political and practical consequences of the ICJ’s judgment, a few final observations are worth highlighting. The first is that the ICJ’s ruling regarding Serbia’s violation of the obligation to punish perpetrators of genocide, including by failing to turn over ICTY indictee General Ratko Mladić to the Tribunal, clearly gives the ICTY additional leverage to request that States assist it in persuading Serbia to hand over to the Tribunal indictees who remain at large. This is significant, given that the Tribunal is expected to conclude its work by the year 2010.

The second observation concerns the practical implications of the evidentiary questions raised by the Court’s decision. In light of how critical accurate and complete evidence is to the adequate resolution of a case — as well as to the perception of the Court’s opinion as a fair and credible adjudication of the issues in controversy — it may be worth exploring the idea of a separate fact-finding chamber of the Court dedicated solely to seeking and conducting a preliminary analysis of the best available evidence.

The final observation relates to the much broader question of whether the judgment will contribute to reconciliation in the region. This is a question that will no doubt be debated for years to come. One thing is clear, however, and that is the need for a clear and precise explanation of the Court’s verdict. Although the judgment has evoked passionate reactions on all sides, the better understood this judgment becomes, the better the chances that — despite the legal questions it has raised — it will contribute to some sort of reconciliation in the region.

**Endnotes**: Reflections on the Judgment of the International Court of Justice in Bosnia’s Genocide Case Against Serbia and Montenegro


5 Organized by the International Association of Genocide Scholars (IAGS) and the Institute for Research of Crimes Against Humanity and International Law of the University of Sarajevo, the conference brought together 400 genocide scholars and experts from all over the world in Sarajevo from July 9 to 13, 2007.


9 Bosnian Genocide, 2007 I.C.J. at ¶ 147.

10 Bosnian Genocide, 2007 I.C.J. at ¶ 147.

11 See, e.g., Bosnian Genocide, 2007 I.C.J. at ¶ 277 (noting that while the evidence regarding killings committed in Sarajevo, the area of the Drina River valley, Prijedor, Banja Luka and Brčko did not support a finding of genocide, the evidence could amount to “war crimes and crimes against humanity”); id., ¶ 319 (coming to same conclusion with respect to evidence of acts causing serious bodily or mental harm).


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18 Bosnian Genocide, 2007 I.C.J. at ¶ 223 (“the Court concludes that it should in principle accept as highly persuasive relevant findings of fact made by the Tribunal…”).
19 Bosnian Genocide, 2007 I.C.J. at ¶ 374. Despite the Court’s interpretation of the Convention as requiring States to refrain from committing genocide, as noted earlier, the Court failed to find enough evidence to hold Serbia responsible for committing or being complicit in the commission of the genocide at Srebrenica. Id., operative ¶¶ 2, 4.
20 Bosnian Genocide, 2007 I.C.J. at ¶ 438. Additionally, it need not “be proven that the State concerned definitely had the power to prevent genocide; it is sufficient that it had the means to do so and that it manifestedly refrained from using them.” Id. at ¶ 438.
23 Marlise Simons, “Genocide Court Ruled for Serbia without Seeing Full War Archive,” NEW YORK TIMES, April 9, 2007 (noting that those who have seen the documents claim the redacted sections are “increditing”).
24 Bosnian Genocide, Dissenting Opinion of Vice-President Al-Khasawneh, 2007 I.C.J. at ¶ 35.
26 As Judge al-Khasawneh notes in his dissent, “no conclusions whatsoever were drawn from noting the Respondent’s refusal to divulge the contents of the unedited documents.” Bosnian Genocide, Dissenting Opinion of Vice-President Al-Khasawneh, 2007 I.C.J. at ¶ 35.
28 Orentlicher, On the ICJ Judgment, supra n. 21. The documents at issue had originally been provided by Serbia to the ICTY in the context of the case against former Serbian President Slobodan Milošević on the condition that the redacted portions of the documents not be made public. Notably, one commentator has suggested that in addition to the authority under its own Statute to request that Serbia turn over complete copies of the documents, the Court could have availed itself of a provision under the ICTY Rules of Procedure and Evidence that allows the ICTY to modify protective orders on the request of a party to another proceeding. Id. Although she notes that this Rule was intended for requests made by a party in other proceedings before the ICTY, she notes that another court, the War Crimes Chamber in Bosnia and Herzegovina, has “sought and received modifications of ICTY protective measures so that it can use previously protected evidence its own cases.” Id. As she notes, this begs the question of why the Court chose not to pursue this option. Id.
29 Genocide Convention, art. 2 (“genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group…”).
33 Bosnian Genocide, 2007 I.C.J. at ¶ 422 (emphasis added).
36 Bosnian Genocide, 2007 I.C.J. at ¶ 373.
40 Krstić, IT-98-33-A, at ¶ 41. Despite the civil nature of its jurisdiction, in contrast to the criminal jurisdiction of the ICTY, the ICJ has adopted a very similar standard. See Bosnian Genocide, 2007 I.C.J. at ¶ 373 (noting that “for a pattern of conduct to be accepted as evidence of the existence of [genocidal intent], it would have to be such that it could only point to the existence of such intent.”).
42 Bosnian Genocide, 2007 I.C.J. at ¶ 344.
43 Bosnian Genocide, 2007 I.C.J. at ¶ 344.
44 Notably, in its analysis of Serbia’s responsibility for the genocide at Srebrenica, the Court dismissed as “political” a statement made by the Serbian Council of Ministers condemning the crimes committed in Srebrenica after the release of a video-recording showing the execution of Bosnian Muslim prisoners by a paramilitary unit near Srebrenica. Bosnian Genocide, 2007 I.C.J. at ¶ 377.
45 Bosnian Genocide, 2007 I.C.J. at ¶ 211.
46 Bosnian Genocide, 2007 I.C.J. at ¶ 223. Notably, the Court also found certain actions by the ICTY’s Prosecutor as relevant to its inquiry. Bosnian Genocide, 2007 I.C.J. at ¶ 217.
47 Bosnian Genocide, 2007 I.C.J. at ¶¶ 374-75. In coming to this conclusion, the Court also appears to have found significant prosecutorial decisions to withdraw or exclude genocidal charges from certain indictments. Id.
48 Notably, the Court also squarely rejected the ICTY’s analysis of the standard required to prove state control over persons or entities not among its official organs. Bosnian Genocide, 2007 I.C.J. at ¶¶ 403-406 (rejecting the ICTY’s “overall control” test in favor of the “effective control” test announced in its earlier judgment in the case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), 1986 I.C.J. 14 (June 27, 1986)).

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The recent killings in Iraq have drawn private military forces around the world. States to regulate and control the use of entered into force in 2001 and obligates Training of Mercenaries (the Convention) against the Use, Recruitment, Financing and employees. The International Convention of ten Iraqi civilians by private security expressed serious concern over the killing of Mercenaries (the Working Group) for its expense. Critics also point out that using private firms to carry out traditional government functions carries an appearance of vigilantism and could foster a perception that the U.S. government pays contractors to do its job, whether by preference or necessity. This same perception pervades reactions to U.S. use of private forces in Iraq.

The recent killings in Iraq and the Working Group’s response focus international attention on this debate. The potential for human rights violations during conflict or natural disasters is high. The Working Group and other opponents of private forces assert that the lack of oversight and accountability of these forces makes them more likely to violate human rights than traditional government actors are. Opponents see stripping these forces of the immunity currently afforded them as one way to reduce this potential.

The Working Group’s statement expresses many major concerns related to the use of private security forces and exemplifies the international community’s desire to regulate their use. The statement criticizes the use of bilateral government agreements giving private forces immunity from prosecution for their actions. This immunity circumvents the Convention’s authority and weakens enforceability of its provisions. The Working Group calls on Member States to accede to the Convention, to avoid granting immunity to private forces, and to create internal monitoring mechanisms to ensure that these forces do not violate human rights.

The privatization of security and military forces is one of the most divisive and controversial developments associated with economic globalization. Even some proponents worry that the growing use of these forces represents a decline of traditional nation-state sovereignty. For years, private security forces have been involved in conflicts in Africa and Eastern Europe. Their reach has now increased, however. Private forces have even taken part in emergency relief programs in the United States.

The private security firm Blackwater is seeking to diversify its business by reaching out to U.S. state and local governments that may lack infrastructure or capacity to respond to natural disasters and terrorist attacks. Blackwater, which contracted to provide relief services in New Orleans following 2005’s Hurricane Katrina, was lauded for its effectiveness but condemned for its expense. Critics also point out that using private firms to carry out traditional government functions carries an appearance of vigilantism and could foster a perception that the U.S. government pays contractors to do its job, whether by preference or necessity. This same perception pervades reactions to U.S. use of private forces in Iraq.

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ENDNOTES: REFLECTIONS ON THE JUDGMENT OF THE INTERNATIONAL COURT OF JUSTICE IN BOSNIA’S GENOCIDE CASE AGAINST SERBIA AND MONTENEGRO continued from page 6

51 See supra n. 5.
53 Under Article 94(2) of the ICJ’s Statute, a prevailing State may request the Security Council's assistance in enforcing the Court’s orders. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, supra n. 25, art. 94(2). Thus, Bosnia and Herzegovina could also use the judgment in an effort to get the United Nations Security Council to enforce the ICJ’s order.