

## Genocide and the International Court of Justice: Finally, a Duty to Prevent the Crime of Crimes

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The International Court of Justice is the principal judicial organ of the United Nations.<sup>1</sup> It hears disputes between States, and issues advisory opinions about legal issues at the request of other bodies within the United Nations system. All Member States of the United Nations are parties to the Statute of the Court, which is integrated within the Charter of the United Nations, and they are eligible to nominate judges. But the Court does not have automatic jurisdiction to hear cases involving those States. A State can only be sued by another State before the Court if it has formally accepted the jurisdiction of the Court. States may do this by making a general declaration, pursuant to article 36(2) of the Statute of the International Court of Justice, but only about one-third of

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the members of the United Nations have done this. Some 300 specific treaties also provide that the International Court of Justice is the venue for settlement of disputes concerning those treaties. Of these, perhaps the best known is the Convention for the Prevention and Punishment of the Crime of Genocide. Article IX of the Convention states:

Disputes between the Contracting Parties relating to the interpretation, application or fulfilment 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 3, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute. Invoking Article IX of the Convention, on 20 March 1993, as war raged on the territory of the former Yugoslavia, Bosnia and Herzegovina filed an application before the Court against what was then known as the Federal Republic of Yugoslavia. Bosnia and Herzegovina charged that Yugoslavia 'had breached, and is continuing to breach, its legal obligations toward the People and State of Bosnia and Herzegovina under Articles I, II (a), II (b), II (c), II (d), III (a), III (b), III (c), III (d), III (e), IV and V of the Genocide Convention...' Article IX had been invoked only once before, by Pakistan against India following the secession of Bangladesh, but the suit was dropped following negotiations between the parties.<sup>2</sup> Since the Bosnian application of 1993, there have been several attempts to apply Article IX, but none has led to a final judgment involving interpretation of the substantive

provisions of the Genocide Convention. Consequently, the judgment of the International Court of Justice of 26 February 2007 in the case of *Bosnia and Herzegovina v. Serbia and Montenegro* constitutes a seminal event in the evolving law of genocide.

In its February 2007 ruling,<sup>3</sup> the Court adopted a relatively narrow and conservative approach to the scope of the crime of genocide. It clearly distinguished genocide from the cognate concept of 'ethnic cleansing', following the general approach taken by the International Criminal Tribunal for the former Yugoslavia in its practice and judicial determinations. The International Criminal Tribunal for the former Yugoslavia, another United Nations judicial institution, was established by the Security Council in 1993 to deal with war crimes, crimes against humanity and genocide committed on the territory of the former Yugoslavia since 1991.<sup>4</sup> Although rejecting the charge that there was a general genocidal pattern during the conflict, for which Belgrade bore responsibility, the Court acknowledged, in accordance with findings of the Yugoslavia Tribunal, that the July 1995 Srebrenica massacre deserved the label 'genocide'. Many observers were dismayed by the Court's relatively restrictive approach. It resulted in the dismissal of most of the allegations made by Bosnia and Herzegovina, a painful setback for the Bosnian Muslims, who had suffered so terribly during the conflict. Some have tried to put a brave face on things, but for the Bosnians, if there was any victory here it was Pyhric in nature.

Because the Court's jurisdiction was based solely on the Genocide Convention, it had no residual authority to make determinations that other violations of international law, such as crimes against humanity (within which 'ethnic cleansing' is easily subsumed), had been committed. But this cloud had a silver lining. The Court made a major pronouncement on the duty to prevent genocide, declaring that this obligation, set out in exceedingly laconic terms both in the title and in Article I of the 1948 Convention, requires States to take action when genocide is threatened outside their own territory to the extent they may be able to exercise some influence. It is a powerful message, with tremendous implications going well beyond the narrow finding that Serbia might have done more to avert the 1995 Srebrenica massacre. The Court's approach to the duty to prevent genocide dovetails neatly with recent developments in the political bodies of the United Nations recognising a 'responsibility to protect', and provides further support for the entrenchment of this doctrine within customary international law.

### **Procedural Background to the Judgment**

Bosnia and Herzegovina had been a component republic of the Socialist Federal Republic of Yugoslavia since the latter's creation, in 1945, following the Second World War. The other republics were relatively homogenous in terms of ethnic composition, although they

all had significant minority populations. In Bosnia and Herzegovina, on the other hand, there was no dominant ethnic group. Its multi-ethnic population consisted of large numbers of Serbs, Croats and Muslims, although the Muslims were the largest. As Yugoslavia was disintegrating, in the early 1990s, its large Serb minority favoured amalgamation of the Serb-dominated parts of Bosnia's territory with Serbia itself, so as to create a 'Greater Serbia'. This was opposed by the other two ethnic groups as well as by the European Union and other elements in the international community. Bosnia and Herzegovina seceded from Yugoslavia in April 1992, and armed conflict between the ethnic groups began almost immediately. The war was characterised by campaigns of what was soon labelled 'ethnic cleansing', aimed at driving the various ethnic groups from their ancestral homes.

Bosnia and Herzegovina's application to the International Court of Justice was filed on 20 March 1993.<sup>5</sup> When the application to the International Court of Justice was initiated, Bosnia also sought provisional measures, pursuant to Article 41 of the Statute of the International Court of Justice, asking '[t]hat Yugoslavia (Serbia and Montenegro), together with its agents and surrogates in Bosnia and elsewhere, must immediately cease and desist from all acts of genocide and genocidal acts against the People and State of Bosnia and Herzegovina...' Yugoslavia (Serbia and Montenegro) replied with a request that the Court order provisional measures against Bosnia and

Herzegovina, including directions to leave alone Serb towns, cease destruction of Orthodox churches and places of worship and of other Serb cultural heritage, and that the government of Bosnia 'put an end to all acts of discrimination based on nationality or religion and the practice of "ethnic cleansing", including the discrimination related to the delivery of humanitarian aid, against the Serb population in the "Republic of Bosnia and Herzegovina"'. On 8 April 1993, the Court ordered provisional measures against Yugoslavia (Serbia and Montenegro), and indicated that neither party should take action that might aggravate or extend the dispute. The Court held that article IX of the Genocide Convention appeared 'to afford a basis on which the jurisdiction of the Court might be founded to the extent that the subject-matter of the dispute relates to "the interpretation, application or fulfilment" of the Convention, including disputes "relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III of the Convention"'. The Court's order said that 'there is a grave risk of acts of genocide being committed'.<sup>6</sup>

On 27 July 1993, Bosnia and Herzegovina applied once again to the Court for additional provisional measures. The application focussed on issues arising from the arms embargo placed upon the entire region by the United Nations Security Council. Bosnia and Herzegovina asked the Court to declare '[t]hat in order to fulfil their obligations under the Genocide Convention under the current circumstances, all Contracting

Parties thereto must have the ability to provide military weapons, equipment, supplies and armed forces (soldiers, sailors, airpeople) to the Government of Bosnia and Herzegovina at its request'. Yugoslavia again answered with its own request for provisional measures, seeking an order against the 'so-called Republic of Bosnia and Herzegovina' that it 'take all measures within its power to prevent commission of the crime of genocide against the Serb ethnic group'. The Court concluded, unanimously, that Yugoslavia (Bosnia and Herzegovina) 'should immediately, in pursuance of its undertaking in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, take all measures within its power to prevent commission of the crime of genocide' and more specifically that it should 'ensure that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity in genocide, whether directed against the Muslim population of Bosnia and Herzegovina or against any other national, ethnical, racial or religious group'. The Court refused the applicant's request that it also consider the Treaty between the Allied and Associated Powers and the Kingdom of Saint-Germain-en-Laye of 10 September 1919, as well as the customary and conventional international laws of war and international humanitarian

law, as a basis for the litigation.<sup>7</sup>

Shortly after the issuance of the second provisional measures order, Bosnia declared its intention to institute proceedings against the United Kingdom, based on the latter's obligation to prevent genocide. Its statement charged the United Kingdom was 'jointly and severally liable for all of the harm that has been inflicted upon the People and State of Bosnia and Herzegovina because the United Kingdom is an aider and abettor to genocide under the Genocide Convention and international criminal law'.<sup>8</sup> The United Kingdom replied, on 6 December, that the application was without foundation, and on 17 December 1993 Bosnia and Herzegovina informed the Security Council of its decision not to proceed against the United Kingdom.

Litigation before the International Court of Justice typically has two phases. The first addresses preliminary objections from the defendant or respondent State. Serbia and Montenegro contested the Court's authority to rule on the Bosnian application. Its preliminary objections were dismissed by the Court on 11 July 1996.<sup>9</sup> After resolving the preliminary issues, the case should then have proceeded to a ruling on the merits of the application within a reasonable time. In fact, it would take more than a decade for the Court to issue its final judgment, an extraordinary delay even for an institution that is accustomed to working at a leisurely pace. The primary reason for this was division within the government of Bosnia and Herzegovina about

whether to proceed with the case. Following the December 1995 Dayton Peace Agreement, representatives of the Serb entity within Bosnia and Herzegovina have participated in the national government. When they were in positions of responsibility within the foreign ministry, there were attempts to withdraw the case. Although ultimately unsuccessful, these initiatives did not contribute to normal progress of the case for hearing and judgment. Other issues also contributed to delaying the case. After the 1996 admissibility ruling, Serbia and Montenegro filed what is known as a counter-claim, in effect arguing that Bosnia, too, had committed genocide against Serb populations. Although the counter-claim was eventually withdrawn, valuable time was devoted to addressing issues that it raised.<sup>10</sup> More important was a dispute about whether or not Serbia and Montenegro was actually a member of the United Nations during the relevant period. This had not been properly addressed in the early stages of the case, and only came to a head after 2000, when Serbia and Montenegro was admitted to the United Nations as a new Member State.

When States break up, normally one of the component parts is recognized as the 'continuator' of the legal personality of its predecessor. Thus, when the Soviet Union collapsed in the early 1990s, Russia, rather than, say, Kazakhstan or Latvia, retained the legal rights and obligations of the Soviet Union. Russia, and not Kazakhstan or Latvia, took on the permanent seat in the Security Council, for

example. When Yugoslavia collapsed, many assumed that Serbia and Montenegro would continue the legal personality of the previous State. But unlike the case of the Soviet Union, the situation was muddled by the suspension of Yugoslavia from the United Nations as a sanction for its belligerent conduct. If the Belgrade regime was not a member of the United Nations, then it was also excluded from the International Court of Justice, and was not a party to the Genocide Convention. And this meant that the Court could not validly exercise its jurisdiction.

In 2001, following its admission to the United Nations, Serbia and Montenegro asked the Court to revise its 1996 judgment on admissibility, on the grounds that at the time it had not been a member of the United Nations and therefore could not have been a party to the Statute of the International Court of Justice. Moreover, Serbia and Montenegro argued that it only became a party to the Genocide Convention on 8 March 2001 and, moreover that its accession to the Convention included a reservation to article IX. By judgment of 3 February 2003, the Court ruled the application for revision to be inadmissible. It said it could only revise an earlier judgment, in accordance to Article 61(1) of its Statute, 'based upon the Discovery' of some fact which, 'when the judgment was given', was unknown. Serbia had argued that its admission to the United Nations in 2000 was such a 'new fact'. The Court said that '[a] fact which occurs several years after a judgment has been given is not a "new" fact within the meaning of

Article 61; this remains the case irrespective of the legal consequences that such a fact may have.’<sup>11</sup> Nevertheless, the Court returned to this question in its February 2007 judgment on the merits of the case. By then, the matter had been further complicated as a result of a ruling by the International Court of Justice in a totally separate case. In 1999, as bombs fell on Belgrade, Serbia and Montenegro invoked article IX of the Genocide Convention and sued several NATO States before the International Court of Justice. Belgrade’s argument on the substance of the claim bordered on the frivolous, but it had a good claim with respect to another aspect of the application, namely that the NATO States had breached the Charter of the United Nations by using force in the absence of any Security Council authorisation. The Court never ruled on the merits, dismissing the entire claim because it said that Serbia and Montenegro had not been a member of the United Nations in 1999: ‘at the time of filing of its Application to institute the present proceedings before the Court on 29 April 1999, the Applicant in the present case, Serbia and Montenegro, was not a Member of the United Nations, and consequently, was not, on that basis, a State party to the Statute of the International Court of Justice. It follows that the Court was not open to Serbia and Montenegro’.<sup>12</sup>

But in its February 2007 judgment, the Court rejected Serbia’s argument on this point. On the surface, at least, it looks like a blatant example of double standards. When Serbia sues, it doesn’t exist, but

when it is sued, it exists. The Court said it could not dismiss the Bosnian application on the grounds that Serbia and Montenegro had not been a member of the United Nations during the 1990s because it had already decided the contrary in its 1996 decision on preliminary objections in the case. The Court invoked a Latin maxim, *res judicata*, which means that once a matter has been litigated and resolved between two parties, it cannot be reopened.<sup>13</sup> A corollary of the concept, known by the term 'double jeopardy', is well-known to non-specialists. The *res judicata* determination is one of the profoundly unsatisfactory elements of the judgment, and it will hardly enhance the credibility of the Court's ruling among the Serbs, for whom it can only bolster the sentiment of victimisation by hypocritical international institutions. The blow is softened by the fact that Serbia fared rather well on the merits of the case. Several judges on the Court were plainly embarrassed by the *res judicata* argument, and they appended individual opinions indicating that it would have been preferable to dismiss the Bosnian application outright and for the same reasons that the Court had earlier rejected Serbia's claim against the NATO States.<sup>14</sup>

### **The Scope of Article IX of the Genocide Convention**

Article IX of the Genocide Convention gives the International Court of Justice jurisdiction over disputes between States about 'the interpretation, application or fulfilment' of the Convention.

Whether this provision encompasses charges that a State has actually committed genocide has been a matter of some dispute over the years. It is part of an even larger debate about whether States can actually commit crimes, such as genocide. At Nuremberg, the judges of the International Military Tribunal famously said: 'Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.'<sup>15</sup> The International Law Commission, which is a subsidiary organ of the United Nations General Assembly with responsibility for the codification and progressive development of international law, has declined to resolve the issue as to whether so-called 'State crimes' fell within the broader rubric of 'State responsibility'.<sup>16</sup>

The Court settled this dispute by concluding that States could indeed commit the crime of genocide, and that charges on this basis fell within the scope of Article IX of the Convention. Here it distinguished between the general proposition, in Article I of the Convention, that States 'undertake to prevent and to punish' the crime of genocide, and obligations set out in Articles V, VI and VII concerning the prosecution of genocide, the adoption of effective legislation, and cooperation in extradition. The Court said that Article I was 'not merely hortatory or purposive'.<sup>17</sup> Thus, in addition to the obligation to punish, to which several more specific provisions of the Genocide Convention are

addressed, there is also an obligation to prevent. Nevertheless, the Court conceded that the Convention did not expressly impose an obligation upon States not to commit genocide.<sup>18</sup> It concluded that such an obligation existed as a necessary corollary of the obligation to prevent:

Under Article I the States parties are bound to prevent such an act, which it describes as “a crime under international law”, being committed. The Article does not expressis verbis require States to refrain from themselves committing genocide. However, in the view of the Court, taking into account the established purpose of the Convention, the effect of Article I is to prohibit States from themselves committing genocide. Such a prohibition follows, first, from the fact that the Article categorizes genocide as “a crime under international law”: by agreeing to such a categorization, the States parties must logically be undertaking not to commit the act so described. Secondly, it follows from the expressly stated obligation to prevent the commission of acts of genocide. That obligation requires the States parties, inter alia, to employ the means at their disposal, in circumstances to be described more specifically later in this Judgment, 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. 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.<sup>19</sup>

The Court next examined whether the Parties to the Convention are also under an obligation, by virtue of the Convention, not to commit genocide themselves. It must be observed at the outset that such an obligation is not expressly imposed by the actual terms of the Convention. The Court reviewed the drafting history and other materials to support its conclusion that States are under an obligation not to commit the crime of genocide, and that they incur their state responsibility should they violate this duty. '[I]f an organ of the State, or a person or group whose acts are legally attributable to the State, commits any of the acts proscribed by Article III of the Convention, the international responsibility of that State is incurred', it concluded.<sup>20</sup> The Court itself seemed to acknowledge that the answer is not obvious. Some judges also dissented on this issue, further evidence of the difficulty the question raises.<sup>21</sup> Thus, the Court concluded that Parties to the Genocide Convention 'are bound not to commit genocide, through the actions of their organs or persons or groups whose acts are attributable to them'.<sup>22</sup> This conclusion applied both to the crime of genocide itself, which is defined in Article II of the Convention, and



the four other punishable acts listed in Article III, namely conspiracy, attempt, direct and public incitement and complicity. Replying to the argument that international law did not recognize the concept of State crimes, the Court said that it was ruling on issues of State responsibility, not State criminality. It referred to what it called 'duality of responsibility',<sup>23</sup> and noted Article 25(4) of the Rome Statute of the International Criminal Court, which declares: 'No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under law.'<sup>24</sup> Support was also found in the drafting history of the Convention for the position taken by the Court. The arguments submitted by Serbia were not devoid of any merit, and they spoke to a legitimate controversy in the interpretation of the Convention. The Court's analysis helpfully clarifies the matter and should largely resolve any disputes on this point in the future.

### **The Burden of Proof**

Cases before the International Court of Justice usually involve facts that are largely uncontested. The hearings are generally not trials, at which evidence is produced and disputed. *Bosnia v. Serbia* was an exception. As a preliminary matter, the Court made some important and controversial determinations about principles and rules of evidence. There was a particular debate about Serbia's production of documents emanating from its Supreme Defence Council. These

materials had been 'redacted', that is, portions of them had been blacked out. Serbia's justification for failing to provide the Court with the entire documents was protection of its national security interests. Theoretically, the Court was empowered to order the production of these materials, in accordance with Article 49 of its Statute.<sup>25</sup> But it did not exercise these powers against Serbia. Furthermore, Bosnia invited the Court to draw negative inferences from Serbia's refusal, and one of the judges, in a dissenting opinion, agreed with this proposal.<sup>26</sup> To the dismay of the applicants, however, the Court did not attach any special and pejorative significance to the Serbian position. The Court's reticence may have been driven by concern about the long-term policy implications of demanding that States produce evidence over and above their national security concerns, a matter of great sensitivity. In an early ruling, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia insisted that international judges, not governments, would be the arbiters of national security concerns.<sup>27</sup> The ruling terrified many States, and several months later, when they were drafting the Rome Statute of the International Criminal Court, they made sure that no such power of judges was recognised.<sup>28</sup> Were the Court to set a precedent in a case involving confidential documents in the archives in Belgrade, the same rule approach would have to apply to the CIA, and MI6, and the Sûreté, at least theoretically. Wise judges often rule not so much on the basis of the situation immediately

before them as in contemplation of the eventual consequences rulings may have on imagined future disputes.

The Court's discussion of the standard or burden of proof reveals the complexity of the issues, which seem to straddle an unclear distinction between State responsibility for international crimes and individual criminal responsibility. One aspect of this difficulty has already been discussed, namely, whether or not a State could commit genocide. In a compromise formulation, the Court said that a State could violate the Genocide Convention by perpetrating genocide, although it said that by so doing it engaged its responsibility in a classic international law sense rather than saying that it committed a 'State crime'. With respect to evidence, Bosnia and Herzegovina argued that because the matter was one of State responsibility and not criminal liability, the Court should apply the ordinary standard of proof, usually described as 'balance of probabilities' or 'preponderance of evidence'. This means that the Court must accept the applicant's version of the facts to the extent that it is more likely to be true than the respondent's. Serbia and Montenegro argued, on the contrary, that because of the nature of the litigation, involving charges of State responsibility for what is arguably the crime of crimes, the applicant should be required to prove its case beyond a reasonable doubt, which is the standard of proof normally used in criminal proceedings.<sup>29</sup> For example, Article 66(3) of the Rome Statute says that '[i]n order to

convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt'.<sup>30</sup>

Without expressly adopting either formulation, the Court definitely favoured the approach proposed by Serbia. It said: 'In respect of the Applicant's claim that the Respondent has breached its undertakings to prevent genocide and to punish and extradite persons charged with genocide, the Court requires proof at a high level of certainty appropriate to the seriousness of the allegation.'<sup>31</sup> This conclusion was of crucial importance, to the extent that the Bosnians were relying upon evidence presented to the International Criminal Tribunal for the former Yugoslavia, where the 'beyond reasonable doubt' norm applies,<sup>32</sup> but asking the Court to draw different conclusions pursuant to a lower standard of proof. To the extent that the Court adopted a standard of proof analogous to the 'reasonable doubt' requirement of criminal tribunals, this would enhance the likelihood that it would also reach the same conclusions on issues of fact. And this is indeed what happened. The 'high level of certainty appropriate to the seriousness of the allegation' standard of proof is an innovation in the jurisprudence of the Court. In December 2005, it ruled on charges by the Democratic Republic of Congo against Uganda that were framed within human rights law language, rather than that of international criminal law. The Court then said it had 'credible evidence sufficient to conclude' that Ugandan forces had

committed various human rights violations, although these might well also have been described as international crimes. They included acts of killing, torture and other forms of inhumane treatment of the civilian population, destruction villages and civilian buildings, failure to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants, incitement of ethnic conflict and training of child soldiers.<sup>33</sup> In fact, the terminology in both cases is novel; arguably, the Court raised the burden of proof when it moved from 'credible evidence sufficient to conclude' in *Congo v. Uganda* to a 'high level of certainty' in *Bosnia v. Serbia*. The distinction is unfamiliar to lawyers and probably mystifyingly semantic to others.

There is some merit on both sides of this debate, but ultimately the Court's approach seems wise, albeit frustrating for those who seek to invoke the Genocide Convention in non-criminal proceedings. The rationale in criminal justice for such a high burden of proof is the gravity of the consequences. A finding of genocide against a State, although it cannot result in a loss of liberty as is the case with an individual defendant, brings with it a terrible stigma, not to mention potentially enormous financial liabilities. It makes sense, then that a comparable high standard of proof be imposed when a finding of genocide is sought against a State. The other benefit of this approach is to bring a degree of coherence to litigation concerning genocide. It

seems hardly desirable that criminal courts would acquit upon charges of genocide yet those tribunals addressing State responsibility for genocide reach the opposite result, essentially on the basis of technical legal distinctions that would be poorly understood by non-specialists. The dichotomy between levels of proof is familiar to lawyers trained in the common law, where apparently contradictory rulings based on different standards of proof are well-known (recall O.J. Simpson's acquittal for murder, but his condemnation, before a civil court, for 'wrongful death'). In legal systems based on continental models, civil and criminal justice is often joined in one proceeding, precisely to ensure a single ruling on the core issue. Although indirectly, this seems to be what the International Court of Justice has done, too.

### Distinguishing Ethnic Cleansing and Genocide

So-called 'ethnic cleansing' and genocide should not be confounded, says the Court. It observes that 'ethnic cleaning' has often been used to describe the events in Bosnia and Herzegovina, referring, for example, to the Final Report of the United Nations Commission of Experts<sup>34</sup> and to a General Assembly resolution.<sup>35</sup> The Court might have added a reference to one of the individual opinions accompanying its provision measures ruling issued in 1993, when the application was first filed.<sup>36</sup> According to the Court, the expression 'is in practice used, by reference to a specific region or area, to mean "rendering an area

ethnically homogeneous by using force or intimidation to remove persons of given groups from the area"<sup>37</sup>. The Court notes that not only is the term not used in the Genocide Convention; a proposal during the drafting aimed at including 'measures to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment'<sup>38</sup> was not accepted. Accordingly, said the Court, '[n]either the intent, as a matter of policy, to render an area "ethnically homogeneous", nor the operations that may be carried out to implement such policy, can as such be designated as genocide: the intent that characterizes genocide is "to destroy, in whole or in part" a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement'<sup>39</sup>.

Once again, the Court's position is consistent with pronouncements of the International Criminal Tribunal for the former Yugoslavia, which are referred to in the judgment. For example, in Krstić, the Trial Chamber said that although 'there are obvious similarities between a genocidal policy and the policy commonly known as "ethnic cleansing"',<sup>40</sup> '[a] clear distinction must be drawn between physical destruction and mere dissolution of a group. The expulsion of a group or part of a group does not in itself suffice for genocide.'<sup>41</sup> It cannot be gainsaid, however, that views have been

expressed within both case law and academic writing<sup>42</sup> supporting a more liberal interpretation by which genocide and 'ethnic cleansing' are merged. In Krstić, Judge Shahabuddeen of the Appeals Chamber leaned in this direction.<sup>43</sup> His views were subsequently echoed and indeed amplified in a ruling of one of the Trial Chambers, in which the judges argued that 'ethnic cleansing' should be subsumed within the crime of genocide.<sup>44</sup> Indeed, it is precisely because this debate persists that the Court's ruling is so helpful. It should largely resolve the debate.

### **Establishing the Intent to Commit Genocide**

Much of the attention of the International Court of Justice was taken up with establishing the mental element of the crime of genocide. The Court explained that the crime of genocide involves not only the intent to commit the underlying act, such as killing, but also that it be done with the intent to destroy the group. It is not enough, says the Court, that the perpetrator possess a discriminatory intent. The Court compares genocidal intent with that of the related crime against humanity of persecution,<sup>45</sup> These statements are not particularly controversial, to the extent that they are largely based on familiar pronouncements in the case law of the International Criminal Tribunal for the former Yugoslavia.

The literature on this subject is enormous, as are the statements



of the ad hoc tribunals. The difference, though, is that the Court was looking for the mental element through the lens of state responsibility. It was asking the question whether Serbia (or the Republika Srpska) had the 'mental element' for the commission of genocide rather than whether this was the case for any particular individual. The closest we have come in the past to such analysis is the report of the Darfur Commission, mandated by the Security Council of the United Nations to consider whether genocide was being committed in Sudan.<sup>46</sup> But can a State have a 'mental element'? Certainly, the analogy with individuals, where concepts of knowledge and intent are relatively well understood in national criminal law and easily transposable to an international context, is only very approximate. In practice, what we look for is not a 'mental element' but rather a 'plan or policy'. In the judgment, the International Court of Justice observed that the material element of the crime of genocide may be present, but that it had not been 'conclusively established that the massive killings of members of the protected group were committed with the specific intent (*dolus specialis*) on the part of the perpetrators to destroy, in whole or in part, the group as such'.<sup>47</sup> But in reality, the Court was looking for evidence of a plan or policy. Otherwise, it would be required to consider the hypothesis that a single individual, acting alone, might have committed one of the acts with a genocidal specific intent. The Court does not indulge in such inquiry, but the question has engaged others who have asked the

question whether genocide was committed, such as the International Criminal Tribunal for the former Yugoslavia.<sup>48</sup> Similarly, the Darfur Commission does not exclude the possibility of lone perpetrators.<sup>49</sup> But both the Darfur Commission and the International Court of Justice have looked, in practice, to State policy. Absent evidence of such a policy, they conclude that genocide was not committed. A similar debate has taken place with respect to crimes against humanity. After noting that '[t]here has been some debate in the jurisprudence of this Tribunal as to whether a policy or plan constitutes an element of the definition of crimes against humanity', the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia has said that practice 'overwhelmingly supports the contention that no such requirement exists under customary international law'.<sup>50</sup> One justification for its position was the earlier conclusion that a plan or policy is not required to establish the crime of genocide.

Article II of the Genocide Convention doesn't say anything about a policy element, and this has led many commentators and judges to the conclusion that it is not an element of the crime. With respect to crimes against humanity, the question is a bit more complicated: although the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia ruled, in *Kunarac*, that this was not part of customary law, the Chamber did not mention article 7(2)(a) of the Rome Statute, which suggests the opposite. It states that "Attack

directed against any civilian population” means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack’. Along somewhat the same lines, the Elements of Crimes of the Rome Statute require that genocidal acts ‘took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction’.<sup>51</sup> This component of the Elements was adopted in reaction to a ruling from a Trial Chamber of the Yugoslavia Tribunal that an individual, acting alone, could perpetrate genocide.

Cherif Bassiouni has argued, in my view quite persuasively, that we have got the definition of crimes against humanity upside down. He says that the ‘widespread or systematic’ elements, set out in article 7(1) of the Rome Statute and well established in customary law, are better viewed as means of proving the State plan or policy. In other words, the truly distinguishing element of crimes against humanity is the fact that they are part of a State plan or policy rather than that they are widespread or systematic.<sup>52</sup> This makes perfect sense when one realises that crimes against humanity were originally designed to capture crimes of State that went unpunished precisely because the State was complicit in them. It was a way of addressing State crimes, and not perverse individuals, although it was premised on judging and punishing the individuals who were responsible for such policies.

## **Was Genocide Committed in Bosnia?**

The judgment of the International Court of Justice concludes that genocide was not committed during the conflict in Bosnia and Herzegovina between 1992 and 1995, with the exception of the Srebrenica massacre in mid-July 1995. At Srebrenica, Bosnian Serb military units directed by General Ratko Mladić were responsible for the summary execution of approximately 7,000 Muslim men and boys over the course of several days. On the non-Srebrenica charges, the Court said:

[I]t is established by overwhelming evidence that massive killings in specific areas and detention camps throughout the territory of Bosnia and Herzegovina were perpetrated during the conflict. Furthermore, the evidence presented shows that the victims were in large majority members of the protected group, which suggests that they may have been systematically targeted by the killings. The Court notes in fact that, while the Respondent contested the veracity of certain allegations, and the number of victims, or the motives of the perpetrators, as well as the circumstances of the killings and their legal qualification, it never contested, as a matter of fact, that members of the protected group were indeed killed in Bosnia and Herzegovina. The Court thus finds that it has been established by conclusive evidence that massive killings of members of the protected group occurred and

that therefore the requirements of the material element, as defined by Article II (a) of the Convention, are fulfilled...

The Court is however not convinced, on the basis of the evidence before it, that it has been conclusively established that the massive killings of members of the protected group were committed with the specific intent (*dolus specialis*) on the part of the perpetrators to destroy, in whole or in part, the group as such. The Court has carefully examined the criminal proceedings of the ICTY and the findings of its Chambers, cited above, and observes that none of those convicted were found to have acted with specific intent (*dolus specialis*). The killings outlined above may amount to war crimes and crimes against humanity, but the Court has no jurisdiction to determine whether this is so. In the exercise of its jurisdiction under the Genocide Convention, the Court finds that it has not been established by the Applicant that the killings amounted to acts of genocide prohibited by the Convention.<sup>53</sup>

These findings should come as no surprise to anyone familiar with the case law and the practice of the International Criminal Tribunal for the former Yugoslavia. In two cases concerning Srebrenica, the Tribunal has convicted defendants of aiding and abetting genocide. It has held that while the accused, General Radislav Krstić and Colonel Vidoje Blagojević, did not themselves intend to commit genocide, they assisted the units controlled by General Ratko Mladić knowing of his genocidal plans.<sup>54</sup> Otherwise, the Tribunal has consistently

acquitted persons charged with genocide with respect to the 'ethnic cleansing' and the atrocities perpetrated in concentration camps during the conflict. The accused were invariably convicted of crimes against humanity instead.<sup>55</sup> Moreover, the Office of the Prosecutor had often indicated its ambivalence on the subject, by declining to charge genocide in many cases, or withdrawing genocide indictments in exchange for a guilty plea.<sup>56</sup>

Bosnia and Herzegovina had presented indictments alleging genocide in support of its claim, but the Court quite correctly noted that the fact the Prosecutor might charge genocide was of little real weight. What mattered, said the Court, was the Prosecutor's decision not to include a genocide charge, or to remove it by amendment subsequently if it had been included initially.<sup>57</sup> She declined charging Milosevic with genocide with respect to Kosovo.<sup>58</sup> Even more striking was the decision to withdraw genocide charges against Biljana Plavšić, who had been one of the Bosnian Serb leaders at the height of the conflict.<sup>59</sup> If she hadn't been responsible for genocide, then who had? When all of this was added up, it should have been clear to the lawyers for Bosnia that their case sat on a fragile footing. One detail of prosecutorial practice that escaped the Court's attention, although it only confirmed its general vision, was the failure of the Prosecutor to appeal a genocide acquittal, evidence once again of the ambiguities of its approach.<sup>60</sup> Perhaps there was a forlorn but ultimately misguided hope

that the International Court of Justice would 'correct' its neighbour, the International Criminal Tribunal for the former Yugoslavia. But it did nothing of the sort, instead showing great respect for the expertise of the institution on issues of both fact and law.

Certainly, the International Court of Justice endorsed the conclusion that genocide had been perpetrated at Srebrenica. Here too, though, it followed the analysis of the Yugoslavia Tribunal, treating the massacre as an isolated and ultimately idiosyncratic event within a broader conflict whose essence was not fundamentally genocidal, a devastating and destructive attack on the Muslims of Srebrenica that was improvised at the last minute by General Mladić. That made the link much harder to draw between the Bosnian Serb soldiers in Srebrenica and President Milošević, far away in the Serb capital. Not only has nobody found the smoking gun to link Belgrade with the crime, it seems unlikely and implausible that one existed. The unfinished trial of Milosevic never succeeded in joining up the dots to link him to Srebrenica.<sup>61</sup> In fact, much of the evidence in that proceeding pointed to a rift between Belgrade and the Bosnian Serb leaders, rather than to the fabled conspiracy. Counsel for the Bosnians relied heavily upon the findings of the Yugoslavia Tribunal, yet at the same time asked the Court to go beyond these. For example, whereas the Tribunal had convicted General Stanislav Galić for crimes against humanity and war crimes with respect to the shelling and sniping of

Sarajevo, Bosnia wanted it to go further and characterise such acts as genocide. This the Court refused to do. On the point, the Court noted that Serbia had conceded that crimes were committed during the siege of Sarajevo that 'could certainly be characterized as war crimes and certain even as crimes against humanity'.<sup>62</sup>

The Court took an exceedingly deferential approach to the findings of the Yugoslavia Tribunal, in effect acknowledging its expertise on issues both of fact and of law. Only when the Tribunal ventured beyond the parameters of international criminal law and into the realm of State responsibility did the International Court of Justice graciously rebuke it.<sup>63</sup> Counsel for Serbia and Montenegro seemed to appreciate this, for they quietly changed their attitude towards the findings of the International Criminal Tribunal as the litigation advanced. Initially, the Serbs had been dismissive of the Yugoslavia Tribunal, but they became more comfortable with the case law as they realised that judges in The Hague were failing to convict for genocide. This evolution in the position of Serbia and Montenegro did not escape the notice of the Court.<sup>64</sup>

The deferential approach to the International Criminal Tribunal for the former Yugoslavia is a welcome development in terms of clarifying the relationship between the two bodies. It addresses recent concerns about a 'fragmentation' of international law resulting from a proliferation of courts, tribunals and similar institutions.

Yet by adopting virtually uncritically the findings in fact and law of the Tribunal, the International Court of Justice also perpetuates contradictions within that very jurisprudence. That the International Court of Justice was not unaware of some of the difficulties with the Yugoslavia Tribunal case law is perhaps revealed in its somewhat equivocal concluding remark on the Srebrenica genocide issue: 'The Court sees no reason to disagree with the concordant findings of the Trial Chamber and the Appeals Chamber.'<sup>65</sup> Perhaps a more affirmative statement might have been expected under the circumstances.

The inconsistencies in the case law of the Yugoslavia Tribunal are apparent from an examination of the two important Trial Chamber judgments adopted in the wake of the Appeals Chamber's April 2004 ruling in Krstić, which dealt with Srebrenica. One Trial Chamber, in Blagojević, took an exceedingly large and liberal approach to the concept of genocide, one capable of including a range of acts of 'ethnic cleansing'.<sup>66</sup> The other, in Brđanin, hewed to the more restrictive approach and dismissed a charge of genocide.<sup>67</sup> It may well be argued that Brđanin is consistent with the majority in Krstić, whereas Blagojević follows the dissent of Judge Shahabuddeen in Krstić. But that this diversity in the case follows what should have been a definitive ruling of the Appeals Chamber reveals uncertainty within the Tribunal itself about what Krstić resolved. Of interest in this regard are statements from the Presiding Judge in the Popović et

al. case, a multi-defendant trial concerning the Srebrenica massacre currently underway before the Yugoslavia Tribunal. At the sister institution in Arusha, judges of the International Criminal Tribunal for Rwanda have taken 'judicial notice' of the Rwandan genocide, in effect making its proof unnecessary in future cases.<sup>68</sup> But in Popović even after the International Court of Justice ruling the Tribunal resisted the temptation to declare that there would be no further debate as to whether genocide had been committed at Srebrenica in July 1995.

The Appeals Chamber judgment is Krstić is indeed problematic, and its internal contradictions reveal major differences among the judges themselves. It did not, after all, convict General Krstić of genocide. It endorsed a vision of the Srebrenica 'genocide' by which this was not planned and organised, but rather improvised in the course of a few days by General Mladić. Even then, of course, Srebrenica was accompanied by the evacuation of women and children. This was, in fact, the responsibility of General Krstić. At its best, the evacuation was a humanitarian gesture; taken at its worst, it amounted to ethnic cleansing. But was it genocide? Don't those who seek to destroy an ethnic group ensure that the women and children, above all, do not survive. That, at least, is how génocidaires behaved in Nazi Germany and in Rwanda. As for the massacre of the men of military age, the so-called genocidal act at the heart of the Srebrenica atrocities, this too is an act shrouded in ambiguity. Murdering prisoners of war is

of course an atrocious and unpardonable war crime. But it does not unequivocally reveal an intent to destroy an ethnic group.

The Krstić Appeals Chamber seemed to reach an unsatisfactory compromise, rejecting the idea that 'ethnic cleansing' could amount to genocide, but then concluding that acts that might well be described as 'ethnic cleansing' should be labelled genocide. The way the Gordian knot was cut was for the Appeals Chamber to contend that the intent was to destroy Muslim life in Srebrenica. But surely the evacuation of a population, i.e., ethnic cleansing, does precisely this. There were implausible suggestions that by killing the men this would prevent the community from reproducing itself. But if this was really the intent of the Serbs, why did they spare the boys? Certainly contemporary history has shown that if the Serbs believed they could physically destroying the Muslims of Srebrenica in this manner, this was a gross miscalculation. According to recent reports, Muslim life in Srebrenica is more vital and dynamic than ever.

None of this should be taken as an attempt to diminish the horror of the Srebrenica massacre. The summary execution of the men in a community, coupled with the expulsion of the women and children, is a horrific crime against humanity. Nevertheless, if the theoretical construct of the crime of genocide proposed by the International Criminal Tribunal for the former Yugoslavia and endorsed by the International Court of Justice is to be sustained, it would have been

more consistent and coherent to conclude that Srebrenica, too, was not an act of genocide. Both the Yugoslavia Tribunal and the International Court of Justice seem to want to have their cake and to eat it too, espousing a rigorous legal analysis of the elements of the crime but nevertheless bowing to the crowd by acknowledging the most outrageous act in the entire war to rise to the level of genocide.

### **Failure to Prevent Genocide**

Still – and it is the most important and positive contribution of the International Court’s judgment – Belgrade should have seen the massacre coming, yet it did nothing to prevent it. As the Court recalls, the 1948 Genocide Convention calls upon States to prevent genocide:

In view of their undeniable influence and of the information, voicing serious concern, in their possession, the Yugoslav federal authorities should, in the view of the Court, have made the best efforts within their power to try and prevent the tragic events then taking shape, whose scale, though it could not have been foreseen with certainty, might at least have been surmised. The FRY leadership, and President Milošević above all, were fully aware of the climate of deep-seated hatred which reigned between the Bosnian Serbs and the Muslims in the Srebrenica region. As the Court has noted in paragraph 423 above, it has not been shown that the decision to eliminate physically the whole of the adult male population of the

Muslim community of Srebrenica was brought to the attention of the Belgrade authorities. Nevertheless, given all the international concern about what looked likely to happen at Srebrenica, given Milošević's own observations to Mladić, which made it clear that the dangers were known and that these dangers seemed to be of an order that could suggest intent to commit genocide, unless brought under control, it must have been clear that there was a serious risk of genocide in Srebrenica. Yet the Respondent has not shown that it took any initiative to prevent what happened, or any action on its part to avert the atrocities which were committed. It must therefore be concluded that the organs of the Respondent did nothing to prevent the Srebrenica massacres, claiming that they were powerless to do so, which hardly tallies with their known influence over the VRS. As indicated above, for a State to be held responsible for breaching its obligation of prevention, it does not need to be proven that the State concerned definitely had the power to prevent the genocide; it is sufficient that it had the means to do so and that it manifestly refrained from using them.<sup>69</sup> And so, Serbia failed to honour this obligation. But because Serbia could not necessarily have prevented the crimes, no reparation or damages were assessed. According to the Court, a required nexus for an award of compensation could only be considered 'if the Court were able to conclude from the case as a whole and with a sufficient degree of certainty that the genocide at Srebrenica would in fact have

been averted if the Respondent had acted in compliance with its legal obligations. However, the Court clearly cannot do so.<sup>70</sup>

This fascinating conclusion seems pregnant with potential for the promotion of human rights and the prevention of atrocities. As the Court explains, '[t]he obligation to prevent the commission of the crime of genocide is imposed by the Genocide Convention on any State party which, in a given situation, has it in its power to contribute to restraining in any degree the commission of genocide. [T]he obligation to prevent genocide places a State under a duty to act which is not dependent on the certainty that the action to be taken will succeed in preventing the commission of acts of genocide, or even on the likelihood of that outcome.'<sup>71</sup> Do these powerful words not also apply to France and Belgium, and even the United States, with respect to Rwanda in 1994? And what of Darfur, in 2007? As for Srebrenica itself, there is much support within the judgment for the view that if Belgrade should have anticipated the impending atrocities in Srebrenica in July 1995, then so too should others. As Judge Keith noted in his individual opinion, Coming closer to the time of the atrocities, not just the leadership in Belgrade but also the wider international community was alerted to the deterioration of the security situation in Srebrenica by Security Council resolution 1004 (1995) adopted on 12 July 1995 under Chapter VII of the Charter. The Council expressed grave concern at the plight of the civilian population "in and around the safe area of Srebrenica".

It demanded, with binding force, the withdrawal of the Bosnian Serb forces from the area and the allowing of unimpeded access for international humanitarian agencies to the area to alleviate the plight of the civilian population.<sup>72</sup>

Certainly the Serbs in Belgrade were not the only ones who might have done more to protect the Muslims of Srebrenica. On this important point, the International Court of Justice reinforced the 'responsibility to protect' set out in the 2005 Outcome Document of the Summit of Heads of State and Government.<sup>73</sup> But it went further, elevating the duty to a treaty obligation, and one that is actionable before the International Court of Justice for those States that have ratified the Genocide Convention without reservation to Article IX.<sup>74</sup> But although this development of the law is extremely welcome, the refusal of the Court to award damages is likely to discourage future recourse based upon this obligation to prevent genocide. Rather, the Court's pronouncement strengthens arguments in the political sphere, which is where genocide prevention really belongs. To the extent that we quarrel about whether genocide has taken place after the atrocities have been committed, it is already too late.

## Conclusion

For decades, human rights lawyers have looked to article IX of the Genocide Convention as a tool with great potential. It has been cited countless times in NGO briefs, and held up to cautious States as a remedy they might invoke. There have been several applications, but always by States directly involved in a conflict rather than by those acting *erga omnes*. None has led to a very productive result. The *Bosnia v. Serbia* case has gone the farthest. It generated two provisional measures requests in 1993 that arguably helped the situation. But the final result, in February 2007, was really a setback for the Bosnian victims, whose lawyers should have convinced the State to discontinue the case. They probably could have obtained useful political considerations from Belgrade in exchange, but they have now, obviously, lost that chance. In a general sense, the International Court of Justice opted for a restrictive and conservative construction of the definition of genocide set out in article II of the 1948 Convention. Here it goes against the grain of much of the academic writing, characterised by pleas to expand the categories of groups protected by the Convention, to reduce the threshold for destruction 'in part', and to enlarge the number of punishable acts. Some have argued this can be done by interpretation, while others have called for amendment.<sup>75</sup> It was always striking that State practice showed little or no inclination to follow these appeals. The most dramatic example of this was the



Rome Conference of June-July 1998. There, the definition of genocide drawn from the 1948 Convention<sup>76</sup> was incorporated into article 6 of the Rome Statute of the International Criminal Court with virtually no objection. Only one State, Cuba, suggested that this might be an opportunity to 'improve' upon the old definition.<sup>77</sup>

The refusal of the Rome Conference to amend the classic definition of genocide might seem inconsistent with its general approach to subject matter jurisdiction. The Rome Conference effected a dramatic rewrite and expansion of international crimes. For example, it changed the concept of war crimes so as to include internal armed conflict.<sup>78</sup> Two decades earlier, in adopting Additional Protocol II to the Geneva Conventions,<sup>79</sup> a Diplomatic Conference had intentionally rejected the concept of war crimes in internal armed conflict. As recently as 1995, distinguished scholars as well as the International Committee of the Red Cross continued to argue that there was no individual criminal liability under international law for war crimes committed in internal armed conflict.<sup>80</sup> Four judges of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia disagreed, in the first major ruling of that institution.<sup>81</sup> Astonishingly, the Rome Conference agreed with them, and the law changed forever.

The same amazing transformation occurred with respect to crimes against humanity, the second of the three categories over which the International Criminal Court may exercise jurisdiction. Since the

concept of crimes against humanity had been first set out in positive law, at Nuremberg, it had been dogged by the need to link such crimes with aggressive war. As recently as 1993, the United Nations Security Council reaffirmed the link between crimes against humanity and armed conflict, in the text of article 5 of the Statute of the International Criminal Tribunal for the former Yugoslavia.<sup>82</sup> Here too, the Tribunal's innovative judges moved the goalposts by declaring that there was no such nexus under customary law.<sup>83</sup> On this point, too, the Rome Conference accepted the new approach.

Why, then, did the Rome Conference respond so differently with respect to genocide? Many factors may contribute to an explanation, but the most plausible one is the fact that there was no need to amend the definition of genocide anymore. Once crimes against humanity had been cured of its great shortcoming, the link with armed conflict, it quickly occupied the territory that had been reserved to genocide since 1948, namely attacks on minorities committed during peacetime. Moreover, crimes against humanity also adequately covered all of those atrocities that lay on the fringes of 'pure' genocide, such as ethnic cleansing. Thus, nobody saw any practical need for reform, and the Rome Conference's confirmation of the enduring nature of the 1948 genocide definition was little more than perfunctory. History helpfully explains why the distinction between genocide and crimes against humanity was once so important, and why it is no longer so.<sup>84</sup>



Today, there is only one difference of any significance in terms of the legal effects of describing acts as genocide or as crimes against humanity: the 1948 Genocide Convention gives jurisdiction to the International Court of Justice in the event of disputes between States parties. No comparable treaty provision exists for crimes against humanity. Theoretically, even States that have not ratified the Genocide Convention but that have accepted the general jurisdiction of the International Court of Justice may be sued in that forum for serious violations of international humanitarian law and human rights law, as the 19 December 2005 judgment in the case of Democratic Republic of Congo v. Uganda demonstrated.<sup>85</sup> But since the February 2007 decision in Bosnia v. Serbia, most States will understand that a suit before the International Court of Justice will only succeed in the clearest of cases. The Court seems to be saying that international criminal tribunals are the better forum for these debates. □

**Footnotes:**

1. Charter of the United Nations, arts. 92, 93.
2. Trial of Pakistani Prisoners of War (Pakistan v. India), Pleadings, Oral Arguments, Documents. Accusations of State responsibility for genocide are as old as the Convention itself. Even during drafting of the Genocide Convention, during 1948, Pakistan accused India of genocide, notably by Sikhs and Hindus directed against Moslems: UN Doc. A/C.6/SR.63 (Ikramullah, Pakistan). See India's response (UN Doc. A/C.6/SR.64 (Sundaram, India)) and Pakistan's diplomatic refusal to reply (UN Doc. A/C.6/SR.65 (Bahadur Khan, Pakistan)).
3. Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections (Yugoslavia v. Bosnia and Herzegovina), Judgment, 26 February 2007.
4. UN Doc. S/RES/827 (1993). See: William A. Schabas, *The UN International Criminal Tribunals: The former Yugoslavia, Rwanda, Sierra Leone*, Cambridge: Cambridge University Press, 2006.
5. See: Peter H. F. Bekker, Paul C. Szasz, 'Casenote: Application of the Convention on the Prevention and Punishment of the Crime of Genocide', (1997) 91 *American Journal of International Law* 121; Laurence Boisson de Chazournes, 'Les ordonnances en indication de mesures conservatoires dans l'affaire relative à l'application de la convention pour la prévention et la répression du crime de génocide', (1993) 39 *Annuaire français de droit international* 514; Ben Gaffikin, 'The International Court of Justice and the Crisis in the Balkans: Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia, 32 I.L.M. 1599 (1993)', (1995) 17 *Sydney Law Review* 458; Thomas D. Grant, 'Territorial Status, Recognition, and Statehood: Some Aspects of the Genocide Case (Bosnia and Herzegovina v. Yugoslavia)', (1997) 33 *Stanford Journal of International Law* 305; Christine Gray, 'Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))', (1994) 43 *International and Comparative Law Quarterly* 704; William L. Hurlock, 'The International Court of Justice: Effectively Providing a Long Overdue Remedy for Engaging State-Sponsored Genocide (Bosnia-Herzegovina v. Yugoslavia)', (1997) 12 *American University Journal of International Law & Policy* 299; Rafaëlle Maison, 'Les ordonnances de la Cour internationale de justice dans l'affaire relative à l'application de la Convention pour la prévention et la répression du crime de génocide', (1994) 3 *European Journal of International Law* 381; Sandrine Maljean-Dubois, 'L'affaire relative à l'application de la Convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Yougoslavie), Arrêt du 11 juillet 1996, exceptions préliminaires', (1996) 42 *Annuaire français de droit international* 357. Two members of the original Bosnian legal team have published materials relating to the case: Francis A. Boyle, *The Bosnian People Charge Genocide: Proceedings at the International Court of Justice Concerning Bosnia v. Serbia on the Prevention and Punishment of the Crime of Genocide*, Amherst, Massachusetts: Aletheia Press, 1996; John Quigley, *The Genocide Convention, An International Law Analysis*, Aldershot, Hampshire: Ashgate, 2006.
6. Application of the Convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), Requests for the Indication of Provisional Measures, 8 April 1993, [1993] ICJ Reports 16.
7. Application of the Convention on the prevention and punishment of the crime of

genocide (*Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)*), Further requests for the Indication of Provisional Measures, 13 September 1993, [1993] ICJ Reports 325.

8. 'Statement of Intention by the Republic of Bosnia and Herzegovina to Institute Legal Proceedings Against the United Kingdom Before the International Court of Justice, Nov. 15, 1993', UN Doc. A/48/659-S/26806, 47 United Nations Yearbook 465 (1993).

9. Application of the Convention on the prevention and punishment of the crime of genocide (*Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)*), Preliminary Objections, [1996] ICJ Reports 595.

10. Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Counter-claims, Order of 17 December 1997, [1997] ICJ Reports 243.

11. Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Yugoslavia*), Preliminary Objections (*Yugoslavia v. Bosnia and Herzegovina*), 3 February 2003, para. 67.

12. Case Concerning Legality of the Use of Force (*Serbia and Montenegro v. Belgium et al.*), Preliminary Objections, 15 December 2004, para. 91.

13. Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Yugoslavia*), Preliminary Objections (*Yugoslavia v. Bosnia and Herzegovina*), Judgment, 26 February 2007, paras. 114-139.

14. *Ibid.*, Joint Dissenting Opinion of Judges Ranjeva, Shi and Koroma; *ibid.*, Declaration of Judge Skotnikov; *ibid.*, Separate Opinion of Judge ad hoc Kreča.

15. *France et al. v. Göring et al.*, (1946) 22 IMT 203, 13 ILR 203, 41 American Journal of International Law 172, p. 221.

16. James Crawford, *The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries*, Cambridge: Cambridge University Press, 2002, pp. 16-20.

17. Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Yugoslavia*), Preliminary Objections (*Yugoslavia v. Bosnia and Herzegovina*), Judgment, 26 February 2007, para. 162.

18. *Ibid.*, para. 166.

19. *Ibid.*, para. 166.

20. *Ibid.*, para. 179.

21. *Ibid.*, Separate Opinion of Judge Tomka; *ibid.*, Joint Declaration of Judges Shi and Koroma; *ibid.*, Separate Opinion of Judge ad hoc Kreča, paras. 126-129.

22. *Ibid.*, para. 147.

23. *Ibid.*, para. 173.

24. *Ibid.*, citing: Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9.

25. See: Christian J. Tams, 'Article 49', in Andreas Zimmermann, Christian Tomuschat and Karin Oellers-Frahm, *The Statute of the International Court of Justice, A Commentary*, Oxford: Oxford University Press, 2006, pp. 1099-1108.

26. *Ibid.*, Dissenting Opinion of Vice-President Al-Khasawneh.

27. *Prosecutor v. Blaškić (Case No. IT-95-14-AR108bis)*, Objection to the Issue of Subpoenae Duces Tecum, 29 October 1997.

28. Art. 72 of the Rome Statute provides that States will determine whether production of evidentiary materials may conflict with national security concerns. If they so judge, the Court is without authority to compel production, although it may draw evidentiary inferences from the refusal to produce the materials. See: William A. Schabas, 'National Security Interests and the Rights of the Accused', in H. Roggemann and P. Sarcevic, eds., *National Security and International Criminal Justice*, The Hague: Kluwer Law International, 2002, pp. 105-113.

29. Although the formulation varies, depending upon the legal system. French law, for example, requires that the judge be convinced of guilt according to his or her intime conviction. But in practice, the standard is about the same.

30. Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9.

31. Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Yugoslavia*), Preliminary Objections (*Yugoslavia v. Bosnia and Herzegovina*), Judgment, 26 February 2007, para. 210.

32. Rules of Procedure and Evidence [of the International Criminal Tribunal for the former Yugoslavia], UN Doc. IT/32, Rule 87(A).

33. Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), 19 December 2005, para. 211.

34. S/1994/674/Add.2.

35. A/RES/47/121.

36. Application of the Convention on the prevention and punishment of the crime of genocide (*Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)*), supra note 165, Separate Reasons of Judge ad hoc Lauterpacht, pp. 431-432, paras. 68-70.

37. Interim Report by the Commission of Experts, S/35374 (1993), para. 55,

38. A/C.6/234

39. Para. 190.

40. Krstić, IT-98-33-T, Trial Chamber Judgment, 2 August 2001, para. 562

41. Stakić, IT-97-24-T, Trial Chamber Judgment, 31 July 2003, para. 519

42. Drazen Petrovic, 'Ethnic Cleansing - An Attempt at Methodology', (1994) 5 E.J.I.L. 342, p. 343; Catherine A. Mackinnon, 'Rape, Genocide and Women's Human Rights', (1994) 17 *Harvard Women's L.J.* 5, p. 8; Lori Lyman Bruun, 'Beyond the 1948 Convention - Emerging principles of genocide in customary international law,' (1993) 17 *Maryland J. Int'l L. & Trade* 193, p. 200. Also: John Webb, 'Genocide Treaty - Ethnic Cleansing - Substantive and Procedural Hurdles in the Application of the Genocide Convention to Alleged Crimes in the Former Yugoslavia', (1993) 23 *Georgia J. Int'l Comp. L.* 377, pp. 402-403.

43. Krstić, Partial Dissenting Opinion of Judge Shahabuddeen, paras.45-57.

44. Blagojevic, paras. 659-666.

45. Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Yugoslavia*), Preliminary Objections (*Yugoslavia v. Bosnia and Herzegovina*), Judgment, 26 February 2007, paras. 186-188.

46. 'Report of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur', UN Doc. S/2005/60.

47. Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and*

Montenegro), 26 February 2007, para. 277. Also, *ibid.*, para. 319.

48. *Prosecutor v. Jelisić* (Case No. IT-95-10-T), Judgment, 14 December 1999, para. 100; *Prosecutor v. Jelisić* (Case No. IT-95-10-A), Judgment, 5 July 2001, para. 48. And crimes against humanity too: *Prosecutor v. Kunarac et al.* (Case No. IT-96-23/1-A), Judgment, 12 June 2002, para. 98, fn. 114. The law has evolved so far in recent years that the even mere serial killers, not to mention the Hells Angels and the Mafia, now fit within the parameters of crimes against humanity as interpreted by the ICTY Appeals Chamber. The Darfur Commission cites the famous pronouncement in *Kunarac*, noting, with respect to its discussion of crimes against humanity, at p. 52, that '[i]t is not necessary, but it may be relevant, to prove the attack is 'the result of the existence of a policy or plan'.'

49. 'Report of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur', UN Doc. S/2005/60, para. 520.

50. *Prosecutor v. Kunarac et al.* (Case No. IT-96-23/1-A), Judgment, 12 June 2002, para. 98, fn. 114.

51. 'Elements of Crimes', ICC-ASP/1/3, p. 108.

52. M. Cherif Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis and Integrated Text*, Vol. I, Ardsley, New York: Transnational Publishers, 2005, pp. 151-152. Also: M. Cherif Bassiouni, *Crimes Against Humanity*, 2nd ed., The Hague: Martinus Nijhoff, 1999, pp. 243-281.

53. Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Yugoslavia*), Preliminary Objections (*Yugoslavia v. Bosnia and Herzegovina*), Judgment, 26 February 2007, paras. 276-277. Also, paras. 319, 334, 344, 354, 361, 367.

54. *Prosecutor v. Krstić* (Case No. IT-98-33-A), Judgment, 19 April 2004; *Prosecutor v. Blagojević* (Case No. IT-02-60-T) Judgment, 17 January 2005.

55. *Prosecutor v. Jelisić* (Case No. IT-95-10-T), Judgment, 14 December 1999; *Prosecutor v. Sikirica et al.* (Case No. IT-95-8-T), Judgment on Defence Motions to Acquit, 3 September 2001; *Prosecutor v. Stakić* (Case No. IT-97-24-T), Judgment, 31 July 2003; *Prosecutor v. Brđanin* (Case No. IT-99-36-T), Judgment, 1 September 2004.

56. Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Yugoslavia*), Preliminary Objections (*Yugoslavia v. Bosnia and Herzegovina*), Judgment, 26 February 2007, para. 374.

57. *Ibid.*, paras. 217, 374.

58. *Prosecutor v. Milošević et al.* (Case No. IT-99-37-PT), Indictment, 22 October 1999

59. *Prosecutor v. Plavšić* (Case No. IT-00-39&40/1), Sentencing Judgment, 27 February 2003.

60. *Prosecutor v. Brđanin* (Case No. IT-99-36-A), Prosecution Notice of Appeal, 30 September 2005.

61. *Prosecutor v. Milošević* (Case No. IT-02-54-T), Decision on Motion for Judgment of Acquittal, 16 June 2004.

62. Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Yugoslavia*), Preliminary Objections (*Yugoslavia v. Bosnia and Herzegovina*), Judgment, 26 February 2007, para. 249.

63. Case concerning Application of the Convention on the Prevention and Punishment

of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections (Yugoslavia v. Bosnia and Herzegovina), Judgment, 26 February 2007, paras 403-406.

64. *Ibid.*, para. 215.

65. *Ibid.*, para. 296.

66. Prosecutor v. Blagojević (Case No. IT-02-60-T) Judgment, 17 January 2005.

67. Prosecutor v. Brđanin (Case No. IT-99-36-T), Judgment, 1 September 2004, especially paras. 969-991.

68. Prosecutor v. Karamera et al. (Case No. ICTR-98-44-AR73(C)), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006.

69. Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 26 February 2007, para. 438.

70. *Ibid.*, para. 462.

71. *Ibid.*, para. 461.

72. *Ibid.*, Declaration of Judge Keith, para. 11.

73. 'Outcome Document of the 2005 World Summit', UN Doc. A/RES/60/1, paras. 138-139.

74. Convention on the Prevention and Punishment of the Crime of Genocide, (1951) 78 UNTS 277.

75. For various proposals of amendment, see, e.g., Benjamin Whitaker, 'Revised and updated report on the question of the prevention and punishment of the crime of genocide', UN Doc. E/CN.4/Sub.2/1985/6. For a recent academic example of an expansive approach, see: John Quigley, *The Genocide Convention, An International Law Analysis*, Aldershot, Hampshire: Ashgate, 2006.

76. Convention on the Prevention and Punishment of the Crime of Genocide, (1951) 78 UNTS 277, art. II.

77. UN Doc. A/CONF.183/C.1/SR.3, para. 100. See also: Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, U.N. Doc. A/50/22, pp. 12-13, paras. 59-72. Virtually all States who spoke at the Diplomatic Conference urged incorporation of the Convention definition without modification: UN Doc. A/CONF.183/C.1/SR.3, paras. 2, 18, 20 (Germany), 22 (Syria), 24 (United Arab Emirates), 26 (Bahrain), 28 (Jordan), 29 (Lebanon), 30 (Belgium), 31 (Saudi Arabia), 33 (Tunisia), 35 (Czech Republic), 38 (Morocco), 40 (Malta), 41 (Algeria), 44 (India), 49 (Brazil), 54 (Denmark), 57 (Lesotho), 59 (Greece), 64 (Malawi), 67 (Sudan), 72 (China), 76 (Republic of Korea), 80 (Poland), 84 (Trinidad and Tobago), 85 (Iraq), 107 (Thailand), 111 (Norway), 113 (Côte d'Ivoire), 116 (South Africa), 119 (Egypt), 122 (Pakistan), 123 (Mexico), 127 (Libya), 132 (Colombia), 135 (Iran), 137 (United States of America), 141 (Djibouti), 143 (Indonesia), 145 (Spain), 150 (Romania), 151 (Senegal), 153 (Sri Lanka), 157 (Venezuela), 161 (Italy), 166 (Ireland), 172 (Turkey), 174.

78. Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, art. 8(2)(c-f).

79. Protocol Additional to the 1949 Geneva Conventions and Relating to The Protection of Victims of Non-International Armed Conflicts, (1979) 1125 UNTS 609.

80. 'Preliminary Remarks on the Setting-up of an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia', DDM/

JUR/442 b, 25 March 1993, para. 4; Theodor Meron, 'War Crimes in Yugoslavia and the Development of International Law', (1994) 88 *American Journal of International Law* 78, at p. 80.

81. *Prosecutor v. Tadić* (Case No. IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 137.

82. Statute of the International Criminal Tribunal for the former Yugoslavia, UN Doc. S/RES/827 (1993), annex, art. 5. See the Secretary-General's report: 'Crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character.' 'Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)', UN Doc. S/25704 (1993), para. 47.

83. *Prosecutor v. Tadić* (Case No. IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 141. Also: *Prosecutor v. Tadić* (Case No. IT-94-1-A), Judgment, 15 July 1999, para. 251; *Prosecutor v. Kordić et al.* (Case No. IT-95-14/2-T), Judgment, 26 February 2001, para. 23.

84. On this point, the reader is referred to my recent article in this journal, William A. Schabas, 'Semantics or Substance? Professor Scheffer's Welcome Proposal to Strengthen Criminal Accountability for Atrocities', \*\*\* *Genocide Studies and Prevention* \*\*\*.

85. Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), International Court of Justice, 19 December 2005. Also: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, International Court of Justice, 9 July 2004.