

The International Court of Justice: Serbia, Bosnia, and genocide

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The ruling by the International Court of Justice (ICJ) in the case brought by Bosnia-Herzegovina against Serbia, delivered on 26 February 2007 [1], is a compromise judgment, giving something to the Bosnian victims but largely denying the Bosnian genocide and exonerating the Serbian state of its role. Although seen by some western media as a progressive judgment, it has largely been greeted with dismay by Bosnians and welcomed by apologists for the most reactionary Serbian forces, including those who seem to occupy the comment pages of the Guardian [2] whenever Yugoslav war issues return to the headlines.

This was the major remaining opportunity for an authoritative legal ruling on the Bosnian genocide and Serbia's role, since former Serbian and Yugoslav president Slobodan Milosevic's death [2] deprived the International Criminal Tribunal for Former Yugoslavia (ICTY) of the possibility of ruling on his responsibility. Although the ICTY has found that genocide was committed in Bosnia, especially at Srebrenica in 1995 (when over 7,000 Bosnian Muslim men and boys were massacred), and has convicted individuals for their roles in this crime, the ICJ ruling concerned the responsibility of the Serbian state for genocide [3] committed in Bosnia against Muslims and others over the entire period of the Bosnian conflict (1992-95).

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A policy of war crimes

The Bosnian genocide began in spring 1992 when Bosnian-Serbian nationalists, led by Radovan Karadzic (today a fugitive from the [ICTY](#) [15]), taking over units and weapons from the Serbian-dominated Yugoslav national army, backed by Milosevic (who was then president of Serbia), and supported by murderous Milosevic-funded militia from Serbia proper, launched their violent [campaign](#) [16] against the non-Serb (primarily Muslim and Croat) populations. Serbian forces burned villages, killed community leaders, incarcerated and murdered men in concentration camps, and raped women and girls - thus terrorising 90% of the non-Serb population into leaving the areas of Bosnia-Herzegovina that they controlled or conquered.

This so-called "ethnic cleansing" (the term entered the international vocabulary as a result of this campaign) was a deliberate policy of Belgrade and Bosnian-Serbian nationalists to destroy the Muslim and Croat communities in these areas. It thus clearly fell within the scope of the United Nations [genocide convention](#) [17] of 1948, comprising killing and other acts committed with "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". The Bosnian government first brought its case to the ICJ in 1993, when the most extensive murder and brutality against civilians had already taken place, and two years before the Srebrenica massacre in the closing stages of the war.

There were therefore two fundamental issues that the ICJ had to deal with: whether genocide was committed, and whether and how Serbia, as a state, was responsible. The court has managed to get them both significantly wrong.

The evidence vs the conclusion

First, while recognising that the Bosnian Muslims constituted a "protected group" in the terms of the convention, it denies the genocidal character of the Serbian campaign against them. True, the judges find it "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."

However the court was "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."

This reasoning is maintained when the [ICJ](#) [18] considers actions other than killing, "causing serious bodily or mental harm to members of the protected group" and "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part", which also constitute genocide according to the convention. Once again, the court accepts that "it has been established by fully conclusive evidence that members of the protected group were systematically victims of massive mistreatment, beatings, rape and torture causing serious bodily and mental harm, during the conflict and, in particular, in the detention camps." Yet it finds that "it has not been conclusively established that those atrocities, although they too may amount to war crimes and crimes against humanity, were committed with the specific intent ... to destroy the protected group, in whole or in part."

Yet in relation to the [Srebrenica](#) [19] massacre, the ICJ "sees no reason to disagree" with the finding of the ICTY that these acts constituted genocide. Here "the specific intent to destroy in part the group of the Muslims of Bosnia and Herzegovina as such" which was apparently lacking in all the events of the years from 1992, is suddenly manifested in the eyes of the court.

This judgment is perverse: Srebrenica was a particularly murderous culmination of all that went before, but there is no good reason to think that it was only at this point that Serbian state leaders, the Bosnian-Serbian nationalists and the Bosnian-Serbian army developed an ambition to destroy the Muslim community. On the contrary, it is difficult to understand most of their actions over the previous three years without taking into account precisely this kind of intention.

It is true that such criminal intentions are not always publicly proclaimed. They often need to be read from a combination of avowed aims and evidence of actions. Yet as the court's vice-president, Judge Al-Khasawneh [20], pointed out in a dissenting opinion: "the Court ... refused to infer genocide from a 'consistent pattern of conduct' disregarding in this respect a rich and relevant jurisprudence of other courts."

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The matter of responsibility

The second major issue for the ICJ was the nature of Serbian responsibility for genocide. The court, once having narrowed the scope of genocide itself to Srebrenica, is able to conclude that Serbia was neither its author nor an accomplice: "It has not been shown that the FRY [the then Federal Republic of Yugoslavia, dominated by Serbia] army took part in the massacres, nor that the political leaders of the FRY had a hand in preparing, planning or in any way carrying out the massacres."

Yet the court immediately adds: "It is true that there is much evidence of direct or indirect participation by the official army of the FRY, along with the Bosnian Serb armed forces, in military operations in Bosnia and Herzegovina in the years prior to the events at Srebrenica." If those operations did not involve genocide, as the court rules, the Serbian-Yugoslav army and state could not have been guilty of participation in it.

The court therefore limits Serbia's guilt to its failure to try to prevent the genocidal massacre taking place, and to help apprehend the perpetrator, Ratko Mladic [26], indicted by the ICTY. The former is a curious finding, since if Serbian leaders were really in a position to influence the Bosnian-Serbian army not to massacre the Muslim men of Srebrenica, that implies a degree of knowledge and influence that suggests complicity in the massacre - something which the Court denies. The condemnation of Serbia for failing to deliver Mladic to The Hague is predictable but it is a secondary rebuke for a state which has escaped the charge of committing, or complicity in, genocide.

Why has the ICJ reached such a disappointingly limited verdict? Three, maybe four, things seem to be going on.

First, the ICJ is sticking to a narrow understanding of genocide; thus failing, as Judge Al-Khasawneh says, "to appreciate genocide as a complex crime and not a single murder."

Second, the court is building conservatively on the most strongly established conclusions of the ICTY's much more extensive deliberations, although ignoring other jurisprudence that would have opened the way for a more radical finding.

Third, the court is finding a consensus [27] among its own members - while some like Al-Khasawneh wanted a more pro-Bosnian judgment, others were reluctant to make any strong condemnation of Serbia at all.

Fourth, less certainly, there must be a suspicion that the court is paying some attention to the political situation [28] in and around Serbia, where the Radical Party (headed by indicted war criminal Vojislav Šešelj) remains a formidable force, and the prospect of conditional independence for Kosovo [28] is making for renewed turbulence. It is true that a tougher verdict would have exacerbated these short-term problems in Serbia, making it more difficult for the European Union to incorporate it peacefully into the fold. But this would hardly be a reason to deny justice - one must hope that this, at least, was not behind the ICJ's timid verdict.

While we should welcome the secondary indictments of Serbia in this ruling, we should not ignore the fact that, once again, an international legal institution has failed to deal fully and effectively with a case of genocide. Genocide [29] is widely acknowledged to be the supreme international crime, but for this very reason courts seem reluctant to recognise it, despite overwhelming evidence. It is not too strong to say that in this case, the International Court of Justice has engaged in systematic denial of the Bosnian genocide.

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