

The law and genocide: Bosnia, Serbia, and justice

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Created 2007-03-02 00:00

In the world of international law it is hard to think of a more highly charged step that one country can take against another than a formal accusation of genocide. Genocide is routinely said to be the "crime of crimes" and the idea that a state might be responsible for this ultimate act multiplies the horror of the crime by the emotive associations of the notion of collective guilt. Small wonder then that both critics and supporters of the International Court of Justice (ICJ [1]'s) decision in the *Bosnia vs Serbia* genocide case on 26 February 2007 have attached such symbolic importance to the verdict - as if the court's judgment was to stand as the definitive statement of Serbia's culpability for the multiple atrocities committed during the Bosnian war.

It does international law a disservice to see the court's decision [2] in this light. Despite the emotional investment in the case made by supporters and opponents of the Bosnian Muslim cause, it was never going to provide the forum for a full and authoritative accounting of the part played by Serbian authorities in the disintegration of Bosnia-Herzegovina and the ethnic cleansing that followed. This is a result both of the narrow remit of the court's jurisdiction in this case, and of the highly specific definition of genocide in international law. Together, these two factors meant that the court's decision turned not on any sweeping evaluation of moral responsibility but on some relatively narrow questions [3] of fact and legal interpretation.

Also in openDemocracy on the International Court of Justice ruling:

Martin Shaw, "The International Court of Justice: Serbia, Bosnia, and genocide [4]" (28 February 2007)

A matter of law

The ICJ exists [5] to adjudicate legal disputes between states. It is not a criminal court and cannot hear cases about possible violations of international law without the consent of the countries involved. In this case, its jurisdiction was based solely on the fact that both Bosnia and Serbia (formerly the Federal Republic of Yugoslavia) are parties to the United Nations genocide convention [6] of 1948, which gives the court the power to decide whether states are responsible for genocide or genocide-related crimes.

Therefore, as the court's decision noted, despite "overwhelming evidence that massive killings in specific areas and detention camps throughout the territory of Bosnia-Herzegovina were perpetrated during the conflict", the court was not able to assess whether these constituted international crimes other than genocide - in other words, war crimes or crimes against humanity - and if so, whether Serbian forces or authorities were responsible for or complicit in them.

As for the crime of genocide, as numerous commentaries have explained, it involves both a material element (that mass killings or other actions be carried out) and a specific intent (that the victims should be targeted as part of an attempt to destroy at least a substantial section of a

particular national, racial, ethnic or religious group). It is by no means clear - despite what [Martin Shaw](#) [7] writes in **openDemocracy** - that the Bosnian Serbs' policy of "cleansing" those parts of Bosnia they controlled of their Muslim population through murder, terror and forced displacement, abhorrent as it was, constituted an attempt to destroy a substantial part of the Bosnian Muslim population (see "[The International Court of Justice: Serbia, Bosnia, and genocide](#) [7]", 27 February 2007). If the campaign was at its core an attempt to remove the Bosnian Muslims from a particular patch of territory, rather than eradicate all or many of them, it was not genocide in the terms of the 1948 convention.

Also in openDemocracy on Serbia, Bosnia and international justice:

Alix Kroeger, "[Bosnia's war of memory](#) [8]"
(21 August 2002)

Dusan Velickovic, "[Belgrade: war crimes in daily life](#) [9]"
(28 June 2005)

Ed Vulliamy, "[Srebrenica: ten years on](#) [10]" (6 July 2005)

Tom Gallagher, "[Understanding Slobodan Milosevic: between the cold war and Iraq](#) [11]"
(13 March 2006)

Julie A Mertus, "[Slobodan Milosevic: myth and responsibility](#) [12]" (16 March 2006)

At any rate, that is the way the law has been interpreted by the war-crimes tribunals for the former Yugoslavia and Rwanda, surely now the most authoritative sources for the interpretation of genocide in international criminal law. The ICJ followed the International Criminal Tribunal for the Former Yugoslavia (ICTY [13]) closely in determining that of the crimes committed in Bosnia only the Srebrenica massacre met the threshold for genocide. Therefore the operative question in the court's decision in the Bosnia vs Serbia case was whether Serbian authorities could be closely enough tied to what happened at [Srebrenica](#) [14] to be legally responsible for it. The court said they could not, because the genocidal killings were not carried out by prior agreement with Belgrade or under Serbian direction or control, but that the Serb authorities should have done more to avert the possibility that genocide might take place.

You can argue with this conclusion - as the Italian legal scholar [Antonio Cassese](#) [15], a former president of the Yugoslav war-crimes tribunal, [does](#) [16] - but the more important point is surely that the technical dispute with respect to this incident hardly captures the much bigger question of how far Serbia was responsible for the inferno of [violence](#) [16] that overtook Bosnia in the years 1992-95. On this question, the court observes repeatedly that Serbian authorities and forces were heavily involved in Bosnia, stating that there is "much evidence of direct and indirect participation" by the federal Yugoslav army in Bosnia and that Bosnian Serb forces received "quite substantial aid of a political, military and financial nature" from Serbia throughout the course of the war. It also refers to the "known influence" of Serbian authorities over the Bosnian Serb army. For this reason, the French lawyer [Alain Pellet](#) [17] (who acted for Bosnia in the case) described the decision as a "moral victory" if not a legal one.

It is therefore misleading to argue - as for instance the British writer John Laughland has done - that the ICJ "by implication" [cleared](#) [18] Serbia of responsibility for any war crimes in Bosnia, or that its decision posthumously exonerated Slobodan Milosevic, whose war-crimes trial was halted by his [death](#) [18] in March 2006. Milosevic might in the end have been acquitted of genocide - as a number of commentators had predicted before his death - but there is nothing in the ICJ's decision to suggest he would have been cleared of involvement in war crimes and

crimes against humanity. The ICJ's decision in Bosnia vs Serbia should not be seen as a shadow continuation of Milosevic's criminal trial in another forum.

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Also by Anthony Dworkin in openDemocracy:

"The trial of Milosevic: global law or war?" [21]" (13 February 2002)

"The trials of global justice [22]"
(15 June 2005)

"The Hague tribunal after Milosevic [23]"
(14 March 2006)

"Saddam's trial: questions of justice [24]"
(20 November 2006)

Law's limit, justice's scope

Notwithstanding the differences between the procedures of the ICJ and criminal tribunals like the Yugoslav war-crimes court, it is worth noting that the two processes may be complementary. The ICJ is an interstate body, yet it ruled that Serbia's obligation to punish genocide involved cooperating with the Yugoslav war-crimes court, and it called on Serbia to make a greater effort to find and transfer General Ratko Mladic [25], the military leader of the Bosnian Serbs, to the tribunal.

There is something unique about genocide [26], a crime that involves the partial or total destruction of a group of people on the basis of their identity. But it is not clear that it is always on a different level of horror from other international crimes such as crimes against humanity. Some of the worst atrocities of the last century, like the mass killings, imprisonment and torture carried out by Stalin or Pol Pot [27], cannot easily be captured by the concept of genocide since they were primarily directed at political or social groups rather than racial or ethnic ones. But they were unquestionably international crimes [28] of the gravest kind.

More recently, in the case of Darfur [28], we have seen that debates about whether a particular situation constitutes genocide can seem to translate over into an argument about how terrible the events in question really are. We should be careful not to lose our sense of perspective about the relative gravity of genocide and other crimes, and to make genocide alone the trigger for the highest level of international concern. The exceptional moral force that the notion of genocide has acquired should not lead us to forget that it is in legal terms a precisely defined and limited crime and that atrocities that do not satisfy its criteria may still challenge the conscience of humanity.

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