
Holding States Accountable for the Ultimate Human Right Abuse: A Review of the International Court of Justice's Bosnian Genocide Case

by Scott Shackelford*

What is genocide? Can a state be held responsible for its commission? What affirmative obligations do states have to prevent genocide? The International Court of Justice (ICJ) offered new answers to these perennial questions on February 26, 2007, in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro) (*Bosnian Genocide*). The *Bosnian Genocide* Court held that: (1) Serbia violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention)¹ to prevent genocide in Srebrenica² (the largest mass murder in Europe since World War II), but did not have the requisite specific intent to commit genocide; and (2) Serbia must fully cooperate with the International Criminal Tribunal for the Former Yugoslavia (ICTY).³ While clarifying state accountability, the decision has raised fundamental questions regarding the proliferation of tribunals in international law, and the extent to which states now have affirmative obligations to prevent genocide.⁴

Despite its strengths, the ICJ decision seems at odds with previous jurisprudence on the following points: (1) its focus on specific intent to the detriment of context; (2) its strict requirements of state operational control; and (3) its expansive language as to state duties to prevent genocide. This Article will first explore the evidentiary requirements set forth by the ICJ for establishing specific intent. Next, it will specifically analyze the Court's decision to use the "effective control" standard from the *Nicaragua* case⁵ instead of the "operational control" standard from the *ICTY* in *Prosecutor v. Tadic*.⁶ Finally, it will address the broad language of the ICJ opinion as to the requirement that states take "all measures" to prevent genocide, interpreting it in light of continuing United Nations Security Council (UNSC) responsibilities. Given the strong persuasive authority of ICJ decisions, the Court being the principal judicial organ of the United Nations, this case could in turn increase the affirmative responsibility of states to prevent genocide through humanitarian intervention.

SYNOPSIS AND PROCEDURAL HISTORY OF BOSNIAN GENOCIDE

On March 20, 1993, the Government of Bosnia and Herzegovina filed an application with the ICJ instituting proceedings against the Federal Republic of Yugoslavia in respect to a dispute concerning alleged violations of the Genocide Convention.⁷ The Application invoked Article IX of the Genocide Convention as the basis of the Court's jurisdiction.⁸ At issue in the case was whether the state of Serbia had committed genocide against the Bosniaks at Srebrenica, and during subsequent war and peacetime

atrocities. Although the parties to the suit changed after its filing due to the dissolution of the former Yugoslavia, the ICJ ruled that through the principle of *res publica* it still had jurisdiction to render a decision in the case consistent with its previous determination.⁹ In the nearly fourteen years following the initial filing, the Court has ruled on provisional measures from all parties, memorials, counter-memorials, and the admissibility of expert testimony. Oral arguments were finally held beginning on February 27, 2006, with a final judgment issued on February 26, 2007.

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Public hearings of the ICJ presided over by Judge Rosalyn Higgins (UK) in March 2006.

DIFFERENCES BETWEEN THE ICJ STANDARD FOR STATE RESPONSIBILITY AND THE ICTY STANDARD FOR INDIVIDUAL RESPONSIBILITY HAVE LEAD TO INCONSISTENT RESULTS IN GENOCIDE CASES

The Genocide Convention, which recognizes genocide as an international crime,¹⁰ is concerned with the prosecution of individuals who perpetrate genocide, as well as with states' implementation of legislation to punish genocide.¹¹ Article II of the Convention defines acts of genocide as "any...acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group."¹² The Convention does not quantify the proportion of a population that must be destroyed before genocide can legally be said to have occurred. Beyond including ICJ jurisdiction to hear disputes specifically "relating to the responsibility of a state for genocide,"¹³ Article IX imposes extensive obligations on states to prevent or be held accountable for genocide. Moreover, Article V requires that the Contracting Parties enact legislation that would impose penalties on *individuals* found guilty of genocide, while Article VIII allows states to ask the UN to take action to prevent and suppress genocide.¹⁴ Yet the standard for state responsibility for genocide remained unclear until *Bosnian Genocide*.

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STATES MAY BE HELD RESPONSIBLE FOR COMMITTING GENOCIDE UNDER INTERNATIONAL LAW

For the first time in legal history, and of the four genocide cases that have come before the ICJ, the Court unequivocally held in *Bosnian Genocide* that, rather than simply having to punish individual perpetrators, states can be found responsible for genocide.¹⁵ Ultimately, however, the Court found that Serbia had not committed genocide since it was not conclusively proved that it had the requisite specific intent.¹⁶ In common law terms, Serbia's *actus reus* was present, but without the mandatory *mens rea*.¹⁷ Consequently, the ICJ did not require the payment of reparations, electing instead to issue a declaration and require compliance with ICTY rulings.¹⁸ The ICJ opinion exclusively dealt with genocide in the narrow legal sense of the term incorporating *dolus specialis* (specific intent). This stands in contrast to the colloquial meaning of "genocide," which at times has been used by the media and policymakers to classify crimes against humanity as genocide with the hope of rallying public opinion behind intervention. Legally, however, it is specific intent that distinguishes genocide from other crimes against humanity and human rights abuses generally. Thus, it was insufficient to merely establish that Serbian forces deliberately and unlawfully killed Bosnian Muslims. Rather, the Court required proof that the killings were committed with the intent to destroy the group, the Bosniaks of Srebrenica.¹⁹

The end result of the *Bosnian Genocide* case is that for the first time genocide is a crime for which states should be held responsible.²⁰ But the Court did not stop there, further determining that "the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide."²¹ Thus, the ICJ has taken one step forward in holding states accountable for genocide. In the final analysis, however, the ICJ took another step back in setting the evidentiary bar impossibly high to prove state intent. The core difficulty remains: "The [Genocide] Convention definition of genocide requires proof of specific intent. It is hard to conceive of a state with specific intent."²² Without evidence proving that a state's leaders possessed the specific intent at the crucial time, it is impossible to prove genocide.²³ This intent requirement is what defeated Bosnia's Article IX claim that Serbia had committed genocide.²⁴

REQUIRING DIRECT EVIDENCE TO ESTABLISH SPECIFIC INTENT MAKES GENOCIDE IMPOSSIBLE TO PROVE WITHOUT UNEQUIVOCAL DOCUMENTATION AND HAS THE EFFECT OF REDUCING POLITICAL PRESSURE ON GENOCIDAL REGIMES

By applying the specific intent requirement in such a stringent manner, the ICJ has arguably limited prosecution of genocide to situations where there is "smoking-gun" evidence or its equivalent.²⁵ Unlike in World War II, there was no Wannsee Conference in Belgrade to decide on the implementation of a "final solution" for Bosnia's Muslims.²⁶ Indeed, the ICJ's decision makes it extremely difficult to prove state-sponsored genocidal intent. The state is a nebulous and multifaceted entity; doubtless various leaders at various times had competing rationales for their actions. The standard laid down by the Court is fully conclusive and beyond *any* doubt, not beyond a *reasonable* doubt.²⁷ A state may then commit all of the objective elements of genocide, but could legitimate them on the basis of military strategy, or even ethnic cleansing.²⁸ As long as its officials kept incomplete records that raise doubt as to actual intent, the state will likely not be held accountable for genocide. The ICJ reasoned that this high-level of certainty is com-

miserate with the seriousness of the allegation.²⁹ Yet, this requirement also has the effect of setting an extraordinarily high bar for finding states responsible by essentially mandating discovery from suspect regimes.

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To illustrate this effect, consider the example of the ICJ's holding that the "six strategic aims of the Serb people," which were adopted by the Bosnian Serb Parliament on May 12, 1992 and included the goal of "separat[ing] [the] Serbian people [into] two national communities."³⁰ This did not constitute evidence of state-sponsored genocidal intent,³¹ and is consistent with ICTY precedent, which exclusively addresses individual responsibility for genocide.³² However, the decision not to hold the six strategic goals tantamount to state-sponsored genocide will make genocide exceedingly challenging to prove in future cases involving states, and has the effect of undermining the object and purpose of the Genocide Convention itself.

Publicly holding states accountable for genocide increases the political pressure on genocidal regimes for change. By using an impossibly high standard measuring subjective intent at the expense of any objective indicia, the *Bosnian Genocide* decision will mean that the stigma of genocide will most likely be unavailable as a tool to exert pressure. This occurred when the UN Commission in Darfur concluded that the atrocities were not genocide because there was no evidence of specific intent to destroy only the non-Arab "black tribes."³³ The ICJ's holding in *Bosnian Genocide* serves to solidify the requirement of uncontroverted, complete evidence to establish specific state intent. A pattern of abuses, or even effective control by the state or an official organ, is insufficient to prove genocide without direct evidence of the state's intent to commit genocide.

The Court's refusal to infer intent from a pattern of abuse ultimately defeated Bosnia's arguments. Serbia's notorious backing

of a proxy army, the Army of Republika Srpska (VRS), has been conclusively documented by the ICTY. Serbia's connection with the VRS also appears to be confirmed by evidence which Serbia was permitted by the ICTY to keep classified due to purported national security concerns. The *New York Times* has reported that these files, including minutes of the Supreme Defense Council (SDC), a top decision-making body in Yugoslavia during the 1992-1995 Bosnian conflict, address Serbia's control and direction, "revealing in new and vivid detail how Belgrade financed and supplied the war in Bosnia, and how the Bosnian Serb army, though officially separate after 1992, remained virtually an extension of the Yugoslav Army."³⁴ Portions of the SDC records that have been made public suggest that Belgrade was paying the salaries of VRS officers as late as 1998.³⁵ Rosalyn Higgins has refused to comment on the Court's decision not to subpoena the full records, saying that the "findings speak for themselves," though the dissent of Judge Khasawneh notes that several unconvincing reasons had been given for not considering the records, such as a fear of taking sides, state sovereignty, or embarrassment if Serbia refused the Court's order.³⁶ Regardless of the motivation, the Court's refusal to consider these records and ultimate holding creates a loophole in the Genocide Convention system that states with genocidal ambitions may exploit.³⁷ In the future, states with genocidal ambitions may similarly be successful in withholding evidence, if it exists in the first place, that would be dispositive of specific intent. Such an outcome would further frustrate the Court's evidentiary requirements and ultimately the effectiveness of the Genocide Convention. The legacy of the case is that "if Serbia's actions don't amount to State complicity in genocide, it is hard to envision what would."³⁸

Scholarly commentary is divided on the specific intent analysis from *Bosnian Genocide*. An illustration of the ongoing debate is the contrast between Eric Posner, who supports the ICJ's decision in the name of political reconciliation in the former Yugoslavia,³⁹ and David Luban who derides the ICJ's reluctance to infer genocidal intent from a pattern of continuous abuses and war crimes.⁴⁰ The Court ruled that a pattern of conduct will only be accepted as evidence of its existence if genocide is the *only* possible explanation for the conduct.⁴¹ Judge Antonio Cassese, the first President of the ICTY, has attacked the *Bosnian Genocide* judgment as demanding an "unrealistically high standard of proof."⁴²

Neither side of the debate is entirely satisfied with the ICJ's opinion.⁴³ A Bosnian legal victory has been seen by commentators as a political impasse that would only further polarize an already volatile region.⁴⁴ Posner argues that if Serbia were found to have committed genocide, then Serbian nationalists could use collective war guilt for their fanatical ends, reminiscent of how the Nazis used popular discontent with the Treaty of Versailles.⁴⁵ The President of the ICJ, Rosalyn Higgins, has firmly asserted that the *Bosnian Genocide* opinion was not a political compromise.⁴⁶ Even so, it remains an open question, as Posner has argued, whether the Bosnia-Serbia proceedings "may end up illustrating the limits of international law, rather than vindicating its ideals."⁴⁷

APPLYING THE ICTY STANDARD FOR STATE CONTROL WOULD HAVE LEAD THE COURT TO A DIFFERENT OUTCOME

The ICJ overwhelmingly held that the acts of "those who committed genocide" at Srebrenica cannot be attributed to Serbia due to a lack of effective control over the operations.⁴⁸ The Court concluded that the decision to kill the adult male Muslim popula-



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Building in Sarajevo in May 1996, shortly after the Siege of Sarajevo was lifted.

tion of Srebrenica was taken by some members of the VRS Main Staff, but without instructions from the Federal Republic of Yugoslavia (FRY).⁴⁹ The Court relied on Article VIII of the International Law Commission's Draft Articles on the Responsibility of States for International Wrongful Acts,⁵⁰ which considers the issue of state control through the lens of official organs that are being directed by the state.⁵¹ An exact definition of "control," however, has been left to the courts to interpret. The ICJ relied on the *Nicaragua* effective "operational control"⁵² standard in making this determination.⁵³ *Nicaragua* requires that a country's control over paramilitaries or other non-state actors can only be established if the actors in questions act in "complete dependence" on the state.⁵⁴ The ICJ found that the requisite level of dependency did not exist between Serbia, the VRS, and paramilitary forces.⁵⁵

The ICTY has also considered the questions of attribution and control in its prosecution of individuals accused of perpetrating genocide. For example, in the *Krstić and Blagojević* cases, the ICTY found that Bosnian Serb forces killed over 7,000 Bosnian Muslim men following the takeover of Srebrenica in July 1995.⁵⁶ In its reasoning, the ICTY relied on the *Tadić* "overall control" standard. The ICTY held that where a state has a role in organizing and coordinating, in addition to providing support for a group, it has sufficient overall control, and the group's acts are attributable to the state.⁵⁷ In sum, the ICTY accords a different and more

flexible standard of attribution than the ICJ, as made clear in the following passage:

[T]he Appeals Chamber holds the view that international rules do not always require the same degree of control over armed groups or private individuals for the purpose of determining whether an individual not having the status of a State official under internal legislation can be regarded as a *de facto* organ of the State. The extent of the requisite State control varies.⁵⁸

The ICTY relied on this analysis to rule that that: “The acts committed at Srebrenica ... were committed with the specific intent to destroy in part the group of the Muslims of Bosnia-Herzegovina ... these were acts of genocide.”⁵⁹ In so finding, the majority interpreted the decision of the ICJ in *Nicaragua* as requiring the government of a state to exercise “effective” control over the operations of a military force in order for the acts of that force to be imputed to the state.⁶⁰ In contrast, the ICJ in *Bosnian Genocide* required unequivocal proof of “full awareness” and complicity in the commission of genocide.⁶¹

The distinction between the *Nicaragua* and *Tadic* standards is whether or not the state must be in direct control of operational planning. Dr. Marc Weller, Director of the European Centre for Minority Issues, argues that the *Nicaragua* standard relates to the specific case of the trigger point for self-defense, and attribution in relation to the use of force. In the *Bosnian Genocide* case, “we are dealing with the implementation of an obligation positively to prevent genocide, where a different standard of attribution should apply.” In essence, Weller argues that the *Caroline* criterion for self-defense is not an appropriate standard to use in genocide cases. The Court used the restrictive *Nicaragua* test of state control so as not to create an exception to UN Charter Article 2(4), which permits the use of force in self-defense. Without such a stringent standard, states would be permitted to use force in self-defense against other states regardless of whether the attacking state had absolute control over the forces attacking the defending state. While this makes sense to limit the use of force in international relations and international law generally, applying the same logic to cases of genocide makes it easier, not harder, for states to use force, albeit not against a foreign aggressor, but against their own population.⁶² Thus, the *Tadic* test is better-suited to deal with allegations of genocide than *Nicaragua*. This distinction is significant enough to potentially decide the case’s outcome.

The key to the Court’s decision is its focus on Srebrenica, rather than the entire VRS campaign against Bosnian Muslims.⁶³ This decision does not sufficiently consider the coordinated campaign by the VRS that occurred throughout the war. Specifically, the ICJ did not give an exhaustive account of other acts potentially established a pattern of offenses from which a Serbia’s genocidal intent could be logically inferred. In its June 16, 2004 decision, the ICTY trial chamber said that “there is sufficient evidence that genocide was committed in Brcko, Prijedor, Sanski Most, Srebrenica, Bijeljina, Kljuc and Bosanski Novi.”⁶⁴ In so doing, the ICJ has missed the forest (patterns of ongoing genocide) for a tree (Srebrenica). In its argument, the Court emphasized that, at the time the decision to commit genocide was made, the connection between Belgrade and the Srebrenica massacre did not conclusively demonstrate intent “to eliminate physically the adult male population of the Muslim community.”⁶⁵ In other words, the Court held that it could not be conclusively established that, “at the crucial time, the FRY supplied aid to the perpetrators of the genocide in full awareness that the aid supplied would be used to commit

genocide.”⁶⁶ Had the Court used the *Tadic* “effective control” test in an analysis of the entire Yugoslav war, rather than exclusively focusing on whether or not there was complete operational control at the “crucial time,” it would likely have reached a different outcome. The ICJ’s juxtaposition of influence and control are also difficult to distinguish; there is no legal yardstick to be applied. Although there is no guarantee that applying *Tadic* would have changed the Court’s final decision, it does seem likely that, given the extensive documentation of Serbia’s links with the FRY, the ICJ would have held Serbia accountable as the ICTY has held individual defendants responsible for the genocide at Srebrenica.⁶⁷

“By using an impossibly high standard measuring subjective intent at the expense of any objective indicia, the Bosnian Genocide decision will mean that the stigma of genocide will most likely be unavailable as a tool to exert pressure.”

THE ICJ BOSNIAN GENOCIDE OPINION SETS A HIGH DUTY ON STATES TO PREVENT GENOCIDE

DEFINING THE LIMITS OF THE “ALL MEASURES” DOCTRINE

The ICJ held in *Bosnian Genocide* that the FRY leadership, including President Milošević, was fully aware that there was a *serious risk of genocide* in Srebrenica. This activates the obligation to prevent genocide enshrined in Article I of the Genocide Convention.⁶⁸ The legal issue then is whether Serbia took all the measures which were within its power to prevent the genocide. The Court held it did not, finding that Serbia could, and should, have acted to prevent the genocide.⁶⁹ It therefore violated its Article IX obligations under the Genocide Convention.⁷⁰

More broadly, and boldly, however, the ICJ held that States Parties must employ *all* means at their disposal 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.⁷¹ This obligation is one of conduct and not of result: “responsibility is not incurred simply because genocide occurs but rather if the state manifestly failed to take *all* means to prevent genocide which was within its power, and which might have contributed to preventing the genocide.”⁷² Thus, for a state to be held responsible for breaching its obligation to prevent genocide, 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.”⁷³ This holding puts the U.S., the UNSC, and other states with the means (military and otherwise) to prevent genocide in an awkward situation — exactly how far does this new doctrine of aggressively stamping out genocide reach?

BOSNIAN GENOCIDE FORTIFIES THE EMERGING RIGHT OF HUMANITARIAN INTERVENTION IN CASES OF STATE-SPONSORED GENOCIDE

The prohibition on genocide has long been regarded as one of the few undoubted examples of *ius cogens*,⁷⁴ a peremptory norm from which no derogation is permitted, and is also an *erga omnes* (towards all) obligation of states.⁷⁵ Article I of the Genocide Convention classifies genocide as “a crime under international law,” which entitles a state with no direct interest to sue for failure to prevent and punish the crime.⁷⁶ This treaty language arguably makes humanitarian intervention legally permissible without UNSC authorization. In the aftermath of the *Bosnian Genocide* case, this debate reached a new pitch with the apparent endorsement by the ICJ of a more aggressive role for states to take *all measures* necessary to actively prevent genocide.⁷⁷

In 1947, referring to the General Assembly Resolution 96(I), which would become the Genocide Convention, Raphael Lemkin wrote that: “[b]y declaring genocide a crime under international law ... the right of intervention on behalf of minorities slated for destruction has been established.”⁷⁸ Nowhere, however, does the Genocide Convention recognize that individual states or the international community may or must intervene to prevent genocide.⁷⁹ Only in the late 1980s did humanitarian intervention begin to win acceptance in the international community.⁸⁰ In 1991, the UNSC authorized military action to prevent atrocities directed against the Kurdish minority in Iraq, establishing a non-binding precedent that would apply in cases of genocide.⁸¹ The question of using humanitarian intervention to prevent genocide, up to and including military intervention, vexed the UNSC in 1994 as genocide raged in Rwanda. In the aftermath of its failed intervention in Somalia, the U.S. and other Security Council members, primarily for domestic political reasons, resisted efforts to deploy additional peacekeepers.⁸²

By the outbreak of war in Bosnia, Judge *ad hoc* Elihu Lauterpacht, wrote that “the duty to prevent genocide is a duty that rests upon all parties.”⁸³ More controversial is the question of preventing genocide wherever it may occur. To test the limits of the *all measures* doctrine, Judge Lauterpacht analyzed the Whitaker report on the prevention and punishment of genocide. He concluded with the observation that “[t]he limited reaction of the parties to the Genocide Convention in relation to these episodes suggests the permissibility of inactivity.”⁸⁴ On the other hand, the UNSC was reluctant to apply the term “genocide” to the Rwandan crisis. This suggests that it had been determined that the use of the word ‘genocide’ would impose an obligation to act to prevent the crime. The ICJ’s holding in the *Bosnian Genocide* case lends new weight to this argument while leaving unclear the extent of affirmative state obligations to prevent genocide.

The expansive language of the *Bosnian Genocide* opinion seems to open the door for individual state initiatives to prevent genocide, potentially with or without UNSC authorization. This resolution ends up pitting two responsibilities against one another: the obligation of states to refrain from the use of force, and the emerging state obligation of preventing genocide that has to this

point only applied to prosecuting individual perpetrators. Holding that the obligation to prevent genocide through humanitarian intervention seems consonant with the argument that customary international law must evolve to provide a legal justification for humanitarian intervention in rare cases and in light of concrete circumstances recognized by states and the UNSC.⁸⁵ The resultant chaos, however, if such logic were followed to its extreme would be “potentially as serious of a threat to international law as any genocide.”⁸⁶ Consequently, in the words of Professor Thomas Franck, “there cannot be an absolute priority either for the claim of sovereignty (in the name of peace) or of humanity (in the name of justice).”⁸⁷ A balance must be struck between the important interest of preventing genocide with the international moratorium on the use of force except in those situations allowed for under the UN Charter. It is this delicate line that the ICJ has not defined by its use of overly-broad language holding that any state with the means to prevent genocide has the responsibility to do so. This issue will continue to illicit not only scholarly debate, but potentially radically divergent state practice, as a result.

CONCLUSION

The differing standards of specific intent, state control, and the emerging state obligation to prevent genocide largely determined the ICJ’s decision in *Bosnian Genocide*. First, the requirement of direct evidence to solidify the amorphous concept of state intent will make genocide exceedingly difficult to prove in future cases. This holding highlights the inherent jurisprudential disconnections in the horizontally hierarchical international tribunal system that not only reduces certainty in international law, but, in the case of genocide, has reduced political pressure on genocidal regimes and curtailed the effectiveness of the Genocide Convention. Second, on the issue of state control the *Nicaragua* and *Tadic* standards have led to contradictory results as seen through the analysis of the Srebrenica massacre in *Bosnian Genocide*. The ICJ’s reliance on *Nicaragua* was both inappropriate and a setback for state responsibility to prevent genocide. Finally, the expansive but ill-defined *all measures* standard put forth by the ICJ has the potential for crystallizing the emerging obligation of humanitarian intervention. In the short-term, the *Bosnian Genocide* judgment could affect future trials at the ICTY.⁸⁸ The ICTY will either follow the ICJ’s ruling, or distinguish its cases. Judges will be faced with the fact that the Tribunal is deferential to, though not bound by, ICJ precedent, and may therefore apply the *Nicaragua* standard for state control. Though there is the possibility that *Tadic* may still be appropriate in differentiating ICTY cases dealing with individuals as opposed to states. This accommodation would maintain deference to the ICJ while ensuring that the perpetrators of genocide do not escape justice.

The ICJ broke new ground in *Bosnian Genocide* by unambiguously holding that states can be held responsible for committing genocide. It has, however, simultaneously handicapped its holding by ignoring objective evidence pointing to a systematic pattern of genocide and instead requiring proof of direct specific state intent. That being said, in critiquing *Bosnian Genocide*, it is important to recall that, despite its significant drawbacks, for the first time since 1948 when the Genocide Convention was adopted a country has been put on trial before the ICJ for genocide. In the convoluted history of state accountability for human rights abuses, this represents a step forward, one which could, in time, overshadow the shortcomings in the Court’s final ruling in *Bosnian Genocide*.⁸⁹ HRB

ENDNOTES: Holding States Accountable for the Ultimate Human Right Abuse

- 1 Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, available at http://www.unhcr.ch/html/menu3/b/p_genoci.htm.
- 2 The “Srebrenica Massacre” refers to the July 1995 killing of an estimated 8,000 Bosniak males, ranging in age from young teens to the elderly, in the region of Srebrenica in Bosnia and Herzegovina. The massacre was perpetrated by Army of Republika Srpska (VRS) units under the command of General Ratko Mladić.
- 3 The key holdings of the ICJ opinion may be summarized as follows: (1) Serbia did not commit genocide since the government lacked the specific intent to commit genocide under art. IX of the Genocide Convention; (2) Serbia did not conspire, nor was it complicit, in committing genocide; (3) Serbia violated its obligations under art. I of the Genocide Convention by having failed to transfer General Ratko Mladić, indicted for genocide and complicity in genocide, for trial by the ICTY; and (4) Serbia is in continuing breach of the Genocide Convention and is required to transfer individuals accused of genocide to the ICTY, but is not required to pay reparations.
- 4 The Application of the Genocide Convention Case (*Bosnia and Herzegovina v. Serbia and Montenegro*), 2007 I.C.J. 140 (Feb. 26, 2007) (hereinafter “the *Bosnian Genocide case*”).
- 5 Case Concerning the Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), 1986 I.C.J. Rep. 392 (Jun. 27, 1986).
- 6 *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, ¶ 69 (Appeals Chamber, July 15, 1999).
- 7 ICJ Press Release No. 2006/9, http://www.icj-cij.org/icjwww/ipresscom/ipress2006/ipresscom_2006-09_bhy_20060227.htm (Feb. 27, 2006).
- 8 Accusations of alleged Serbian war crimes were not addressed by the ICJ, despite substantial evidence of their commission, as such determinations would have fallen outside its jurisdiction. Beth Van Schaack, *The Crime of Political Genocide: Repairing the Genocide Convention’s Blind Spot*, 106 Yale L. J. 2259 (1997).
- 9 By a letter dated February 5, 2003, the Federal Republic of Yugoslavia informed the Court that, following the adoption and promulgation of the Constitutional Charter of Serbia and Montenegro by the Assembly of the Federal Republic of Yugoslavia on 4 February, 2003, the name of the State had been changed from the “Federal Republic of Yugoslavia” to “Serbia and Montenegro.” ICJ Press Release, *supra* note 7.
- 10 William A. Schabas, *Genocide in International Law: The Crimes of Crimes* 418 (Cambridge University Press 2000).
- 11 Lawrence J. Leblanc, *The ICJ, the Genocide Convention, and the United States*, 6 Wis. Int’l. L.J. 43, 52 (1987).
- 12 Under Article II, genocide includes the following acts: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children to another group. Genocide Convention, *supra* note 1, art. II.
- 13 Genocide Convention, art. IX. Article I of the Convention necessarily implies a prohibition against States themselves committing genocide. *Bosnian Genocide*, 2007 I.C.J. at 166.
- 14 Genocide Convention, art. V; Genocide Convention, art. VIII.
- 15 Trial of Pakistani Prisoners of War (*Pakistan v. India*) 1973 I.C.J. Rep. 328 (Dec. 15, 1973); *Bosnian Genocide*; Legality of the Use of Force Case (*Yugoslavia v. United Kingdom*) 1999 I.C.J. 124, 132 (June 2, 1999); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Yugoslavia*) 2002 I.C.J. Order 118 (Nov. 19, 2002).
- 16 *Bosnian Genocide*, 2007 I.C.J. at 421.
- 17 In civil law countries, it is not usually necessary to prove subjective intent to establish liability; however, if the act is intentionally committed, this may increase the measure of damages payable to compensate the plaintiff.
- 18 The ICJ refused to find a causal nexus between Serbia’s violation of its obligation of prevention and the damage resulting from the genocide at Srebrenica. Consequently, financial compensation is not the appropriate form of reparation. *Bosnian Genocide*, 2007 I.C.J. at 438. Instead, as in the *Corfu Channel* case, the Court decided that a declaration is “in itself appropriate satisfaction,” and it included such a declaration in the operative clause of the present Judgment. *Corfu Channel (U.K. v. Albania)* 1949 I.C.J. 1 (Dec. 15, 1949).
- 19 Press Statement, H.E. Judge Rosalyn Higgins, President of the International Court of Justice, http://www.icj-cij.org/icjwww/ipresscom/ipress2007/ipresscom_2007-8_bhy_20070202026.htm (Feb. 26, 2007) [hereinafter “Higgins Press Release”].
- 20 Malcolm N. Shaw, “Genocide in International Law” in Yoram Dinstein, ed., *International Law at a Time of Perplexity* 797 (1989); Jeremy Bransten, *Radio France Europe*, “ICJ Bosnia Ruling Sets Important Precedents” (Feb. 28, 2007).
- 21 *Bosnian Genocide*, 2007 I.C.J. at 166.
- 22 Schabas at 418.
- 23 Paul C. Szasz and Peter F. Bekker, *International Decision: Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, 91 Am. J. Int’l L. 121 (1997).
- 24 *Bosnian Genocide*, 2007 I.C.J. at 413, 421-4.
- 25 David Luban, Slate, “Timid Justice: The ICJ should have been harder on Serbia” <http://www.slate.com/id/2160835/> (Feb. 15, 2007).
- 26 The Wannsee Conference was a meeting of senior Nazi officials held in the Berlin suburb of Wannsee on January 20, 1942, to inform them of the “Final solution to the Jewish question”: the killing of all 11 million European Jews.
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ENDNOTES: Holding States Accountable for the Ultimate Human Right Abuse *continued from page 26*

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