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

By Susana SáCouto\*

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ON FEBRUARY 26, 2007, THE INTERNATIONAL COURT OF JUSTICE (ICJ or the Court) issued its opinion in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro).<sup>1</sup> In its first judgment interpreting the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention),<sup>2</sup> the Court held that the massacre of Bosnian Muslims at Srebrenica in July 1995 amounted to genocide, but at the same time determined that there was not enough evidence to find Serbia directly responsible or even complicit in that genocide. Nevertheless, in its landmark ruling, the Court also found that Serbia had violated the Genocide Convention by failing to prevent the massacre and, later, by failing to punish those responsible for the killings in Srebrenica.

Initial reactions to the judgment were mixed. While one paper's headlines characterized the Court's ruling as having "[c]lear[ed] Serbia of Genocide,"<sup>3</sup> another summed up the judgment as "Court Declares Bosnia Killings Were Genocide."<sup>4</sup> Months later, at the first international genocide conference held in Sarajevo since the 1992–1995 conflict,<sup>5</sup> the emotional intensity of the reactions to the judgment was palpable. While some characterized the verdict as another "betrayal" by the international community, others lauded the Court's judgment, claiming it had finally to put to rest the question of whether Serbia had orchestrated the genocide. Still others expressed disappointment with the Court, noting that it failed to resolve many of the controversial questions raised in the case. The confusion over what the Court's complex and lengthy judgment actually held, and the continuing controversy over whether the decision is a win or a loss for either side, highlights the need for a closer reading and more accurate understanding of the Court's analysis.

## BACKGROUND OF THE CASE

The case, filed by Bosnia and Herzegovina in 1993, alleged that during the 1992–1995 conflict, the Federal Republic of Yugoslavia (FRY) (which after 2001 became known as Serbia and Montenegro, and later as Serbia, following the secession of



Photo courtesy of the author

7,000 Muslim men and boys were killed in the 1995 massacre at Srebrenica.

Montenegro in June 2006) was responsible for mass killings and other atrocities committed against Bosnian Muslims in violation of the Genocide Convention. Specifically, Bosnia alleged that "under the guise of protecting the Serbian population of Bosnia and Herzegovina, [Serbia] in fact conceived and shared with them the vision of a 'Greater Serbia,' in pursuit of which it gave its support to those persons and groups responsible for the activities which constitute the genocidal acts complained of."<sup>6</sup>

Although Serbia disputed certain facts, such as the actual number of deaths in Srebrenica, it did not deny that crimes were committed during the conflict. In fact, it conceded that certain acts could be "characterized as war crimes and certain even as crimes against humanity."<sup>7</sup> However, Serbia disputed the allegation that these acts had been committed with the requisite genocidal intent.<sup>8</sup> More significantly, it claimed that the acts could not be attributed to Serbia, as they had been carried out by the army of the Republika Srpska (VRS), the Bosnian Serb entity that retained *de facto* control over a substantial part of territory after Bosnia and Herzegovina's secession from the former Yugoslavia.<sup>9</sup>

## SIGNIFICANCE OF THE ICJ'S OPINION

Aside from the Court's complicated and controversial analysis of whether it had jurisdiction over Serbia, which has been extensively addressed by other commentators, several critical aspects of the Court's judgment are worth mentioning from the outset. First, the Court was limited to assessing Serbia's responsibility for alleged acts of genocide.<sup>10</sup> Thus, the decision does not deal with Serbia's responsibility for war crimes or crimes against humanity, which the Court was careful to suggest, in

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\* Susana SáCouto is Director of the War Crimes Research Office at American University, Washington College of Law. The opinions expressed are those of the author alone. This is an expanded version of remarks presented at a conference on "Responding to Genocide Before It's Too Late: Genocide Studies and Prevention," hosted by the International Association of Genocide Scholars and the Institute for the Research of Crimes against Humanity and International Law of the University of Sarajevo, in Sarajevo, Bosnia and Herzegovina from July 9–13, 2007.

## QUESTIONS RAISED BY THE COURT'S OPINION

several parts of its opinion, might be established on the basis of the evidence before it.<sup>11</sup>

Second, although the Court was not fully convinced that the acts of violence that took place in parts other than Srebrenica were committed with the specific intent to destroy, in whole or in part, members of a protected group under the Genocide Convention,<sup>12</sup> the judgment eliminates any doubt about whether Bosnian Muslims suffered atrocious harms during the war. The Court affirmed 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.”<sup>13</sup>

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

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

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

Despite the landmark nature of the decision, the Court’s analysis raises a number of critical questions which merit further discussion. Although the judgment will likely be the subject of much commentary in years to come, three issues in particular stand out as worthy of note.

### THE COURT’S DECISION NOT TO SEEK THE BEST POSSIBLE EVIDENCE

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

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

### THE COURT’S DECISION TO APPLY A HIGH STANDARD OF PROOF BUT NOT TO UNDERTAKE A CUMULATIVE ANALYSIS OF THE EVIDENCE

The second question raised by the judgment relates to the standard of proof applied by the Court and its analysis of the evidence under that standard. Genocide is difficult to prove, primarily because in addition to the material act, a finding of genocide requires proof of the specific intent to destroy the protected group.<sup>29</sup> Specifically, “[i]t is not enough that the members of the group are targeted because they belong to that group, that is because the perpetrator has a discriminatory intent. Something more is required. The acts listed in [the Genocide Convention] must be done with intent to destroy the group as such in whole or in part.”<sup>30</sup>

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



The International Court of Justice recently ruled that the Srebrenica massacre amounted to genocide, but declined to find Serbia responsible for the event.

of attribution for such acts,” the Court appears to have adopted an even higher standard when reviewing the facts in support of Bosnia’s state responsibility claim, noting that it had “*not been established beyond any doubt*” that Serbia had supplied the Bosnian Serb army with aid and assistance at the time when Serbian authorities were “clearly aware that genocide was about to take place or was under way.”<sup>33</sup> The question of whether this was an appropriate application of the standard is highlighted by the fact that four of the 15 judges dissented from the Court’s conclusion that there was not enough evidence to find Serbia complicit in the genocide at Srebrenica.<sup>34</sup>

A more troubling aspect of the Court’s decision is its apparent failure to consider the evidence in a cumulative manner, leading to a more limited use of inference than arguably required. For instance, although the Court was “fully convinced” that the evidence established the systematic mistreatment — including “beatings, rape, and torture causing serious bodily and mental harm”<sup>35</sup> — of Bosnian Muslims in locations other than in Srebrenica, it concluded that demonstrating genocidal intent through the “very pattern of the atrocities committed over many communities, over a lengthy period, focused on Bosnian Muslims” is too broad a proposition, with which “the Court cannot agree.”<sup>36</sup>

Notably, the Court’s approach here appears to be at odds with the jurisprudence of the ICTY, which must apply the higher “beyond reasonable doubt” standard<sup>37</sup> and yet has repeatedly held that in the absence of smoking gun evidence of intent, the Tribunal can derive genocidal intent from circumstantial evidence, including pattern evidence of abuses against the protected group.<sup>38</sup> Although the ICTY has cautioned that when inferential evidence is relied upon to prove genocidal intent, the “inference must be the only reasonable inference available on the evidence,”<sup>39</sup> it has nonetheless indicated a willingness to consider such evidence in its analysis of intent. For instance, in an early decision in the case of *Prosecutor v. Karadžić & Mladić*, the ICTY found that the means used to achieve the objective of what the Tribunal termed “ethnic cleansing,” including the systematic rape of women, tended to show that the acts were designed to reach “the very foundations of the group.”<sup>40</sup> The Tribunal concluded that, in combination with other factors, the systematic

rape of the kind perpetrated during the Bosnian conflict could provide circumstantial evidence of genocidal intent.<sup>41</sup>

A similar approach could have been used to analyze whether the massive mistreatment that the Court found had occurred in areas outside Srebrenica, particularly in the detention camps, could in itself have contributed to an analysis of genocidal intent. Likewise, the Court could have used its finding that there was “conclusive evidence of the deliberate destruction of the historical, cultural and religious heritage of the protected group during the period in question”<sup>42</sup> as further evidence of intent. Indeed, earlier in the opinion, it endorsed the proposition made by the ICTY in the *Krstić* case that although the destruction of cultural and religious property cannot be considered a genocidal act, such attacks may be considered as evidence of intent to physically destroy the group.<sup>43</sup> The nature of these acts, combined with the massive scale of their destructive effect, as well as Serbia’s own statements,<sup>44</sup> might have been sufficient to derive the requisite genocidal intent. However, the Court failed to undertake a cumulative analysis of such evidence, at least with respect to the atrocities that were committed in areas outside Srebrenica. The Court’s failure to consider the evidence in a holistic or collective manner is disconcerting, particularly in light of the fact that, as mentioned earlier, the Court also refused to draw any conclusions from Serbia’s failure to turn over unedited copies of the Supreme Defence Council documents. As Judge al-Khasawneh observed, “[i]t would normally be expected that the consequences of [the Court’s noting such a refusal] would be to shift the *onus probandi* or to allow a more liberal recourse to inference.” This, however, was not the position taken by the Court’s majority.

#### THE COURT’S RELIANCE ON THE JURISPRUDENCE OF THE ICTY

The third question relates to the extent to which the Court was guided by the jurisprudence of the ICTY. In assessing the parties’ claims, the Court examined a vast amount of evidence, including UN reports, submissions from States as well as from inter- and non-governmental organizations, newspaper articles, and expert witnesses.<sup>45</sup> Significantly, the Court also considered findings of fact made by the ICTY, stating that “in principle [they would be] accept[ed] as highly persuasive” and adding that the ICTY’s evaluation of intent based on those adjudicated facts was entitled to “due weight.”<sup>46</sup>

For instance, in arriving at its conclusions regarding the absence of genocidal intent with respect to the atrocities committed in areas outside Srebrenica, the Court appears to have been heavily influenced by judgments in which the ICTY found genocidal intent lacking.<sup>47</sup> Yet, at the same time, the Court seems to have been reluctant to rely on other aspects of the ICTY’s jurisprudence, including, as noted above, the Tribunal’s use of circumstantial evidence to prove genocidal intent in the absence of smoking gun evidence of such intent.<sup>48</sup> The Court’s inconsistent approach to the relevance of ICTY jurisprudence begs the question: if the Court did not feel persuaded to conduct the kind of cumulative analysis of circumstantial evidence endorsed by the ICTY, why did it fail to conduct its own analysis of the evidence instead of relying on ICTY judgments to support its conclusion that evidence of intent was lacking? In other words, if it found the ICTY’s approach to the evidence unpersuasive, why did the Court rely on the ICTY’s conclusions of fact?

Unfortunately, the inconsistency in the Court's reliance on the ICTY's findings and analysis can lend itself to the perception that the ICJ had reasons other than a strictly legal interpretation of the facts in coming to its conclusions.

Equally significant is the fact that the Court appears to have been selective when taking into account the difference in the nature of the cases that it and the ICTY are called upon to decide. For instance, whereas in justifying its rejection of the ICTY's "overall control" test the Court highlights the difference between the nature of state involvement required to characterize a conflict as international and the nature of state involvement required to give rise to state responsibility,<sup>49</sup> it fails to mention the distinction between the civil nature of its proceedings and the criminal nature of the ICTY's proceedings when using the ICTY's findings to support its conclusion regarding the absence of genocidal intent.<sup>50</sup> Citing ICTY jurisprudence in support of its own conclusions without careful and consistent consideration of the nature and context in which each of these courts functions threatens to undermine the soundness of the Court's analysis.

### CONCLUSION

ALTHOUGH OTHERS, including many present at the international genocide conference held in Sarajevo,<sup>51</sup> have addressed various political and practical consequences of the ICJ's judgment, a few final observations are worth highlighting. The first is that

the ICJ's ruling regarding Serbia's violation of the obligation to punish perpetrators of genocide, including by failing to turn over ICTY indictee General Ratko Mladić to the Tribunal,<sup>52</sup> clearly gives the ICTY additional leverage to request that States assist it in persuading Serbia to hand over to the Tribunal indictees who remain at large.<sup>53</sup> This is significant, given that the Tribunal is expected to conclude its work by the year 2010.<sup>54</sup>

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

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

## ENDNOTES: REFLECTIONS ON THE JUDGMENT OF THE INTERNATIONAL COURT OF JUSTICE IN BOSNIA'S GENOCIDE CASE AGAINST SERBIA AND MONTENEGRO

1 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), 2007 I.C.J. 140 (February 26, 2007), available at [http://www.icj-cij.org/icjwww/idocket/ibhy/ibhyjudgment/ibhy\\_ijudgment\\_20070226\\_frame.htm](http://www.icj-cij.org/icjwww/idocket/ibhy/ibhyjudgment/ibhy_ijudgment_20070226_frame.htm) (last visited Nov. 4, 2007) [hereinafter *Bosnian Genocide*].

2 Convention on the Prevention and Punishment of Genocide, done Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) [hereinafter Genocide Convention].

3 Mike Corder, *U.N. Court Clears Serbia of Genocide; State Faulted for Not Stopping '95 Massacre of Bosnian Muslims*, WASHINGTON POST, February 27, 2007, at A12.

4 Marlise Simons, *Court Declares Bosnia Killings Were Genocide*, NEW YORK TIMES, February 27, 2007, available at <http://www.nytimes.com/2007/02/27/world/europe/27hague.html> (last visited Nov. 5, 2007).

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

6 *Bosnian Genocide*, 2007 I.C.J. at ¶ 237.

7 *Bosnian Genocide*, 2007 I.C.J. at ¶ 249. Notably, following the public airing on Belgrade television of a video-recording of the

murder by a paramilitary unit of six Bosnian Muslims prisoners near Srebrenica, the Serbian Council of Ministers issued a statement "condemning" the crimes committed at Srebrenica. *Bosnian Genocide*, 2007 I.C.J. at ¶ 377.

8 See, e.g., *Bosnian Genocide*, 2007 I.C.J. at ¶ 278.

9 *Bosnian Genocide*, 2007 I.C.J. at ¶ 278.

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

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

12 *Bosnian Genocide*, 2007 I.C.J. at ¶¶ 277, 319.

13 *Bosnian Genocide*, 2007 I.C.J. at ¶ 319 (emphasis added).

14 *Bosnian Genocide*, 2007 I.C.J. at ¶ 386.

15 *Bosnian Genocide*, 2007 I.C.J. at ¶ 434.

16 *Bosnian Genocide*, 2007 I.C.J. at ¶¶ 166-169, 182.

17 *Bosnian Genocide*, 2007 I.C.J. at ¶¶ 166-169.

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- 18 *Bosnian Genocide*, 2007 I.C.J. at ¶ 223 (“the Court concludes that it should in principle accept as highly persuasive relevant findings of fact made by the Tribunal...”).
- 19 *Bosnian Genocide*, 2007 I.C.J. at ¶ 374. Despite the Court’s interpretation of the Convention as requiring States to refrain from committing genocide, as noted earlier, the Court failed to find enough evidence to hold Serbia responsible for committing or being complicit in the commission of the genocide at Srebrenica. *Id.*, operative ¶¶ 2, 4.
- 20 *Bosnian Genocide*, 2007 I.C.J. at ¶ 438. Additionally, it need not “be proven that the State concerned definitely had the power to prevent genocide; it is sufficient that it had the means to do so and that it manifestly refrained from using them.” *Id.* at ¶ 438.
- 21 Diane Orentlicher, *On the ICJ Judgment (II): Proving Genocide*, Puls demokratije — zajednica neistomišljenika, May 10, 2007, available at [www.pulsdemokratije.net/clanak.php?sifra=070410002&lang=en](http://www.pulsdemokratije.net/clanak.php?sifra=070410002&lang=en).
- 22 *Bosnian Genocide*, 2007 I.C.J. at ¶ 206.
- 23 Marlise Simons, “Genocide Court Ruled for Serbia without Seeing Full War Archive,” *NEW YORK TIMES*, April 9, 2007 (noting that those who have seen the documents claim the redacted sections are “incriminating”).
- 24 *Bosnian Genocide*, Dissenting Opinion of Vice-President Al-Khasawneh, 2007 I.C.J. at ¶ 35.
- 25 STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 49, available at [http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER\\_III](http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER_III), (providing that the Court may “call upon [counsel to the parties] to produce any document... Formal note shall be taken of any refusal”).
- 26 As Judge al-Khasawneh notes in his dissent, “no conclusions whatsoever were drawn from noting the Respondent’s refusal to divulge the contents of the unedited documents.” *Bosnian Genocide*, Dissenting Opinion of Vice-President Al-Khasawneh, 2007 I.C.J. at ¶ 35.
- 27 *Bosnian Genocide*, 2007 I.C.J. at ¶ 206.
- 28 Orentlicher, *On the ICJ Judgment*, *supra* n. 21. The documents at issue had originally been provided by Serbia to the ICTY in the context of the case against former Serbian President Slobodan Milošević on the condition that the redacted portions of the documents not be made public. Notably, one commentator has suggested that in addition to the authority under its own Statute to request that Serbia turn over complete copies of the documents, the Court could have availed itself of a provision under the ICTY Rules of Procedure and Evidence that allows the ICTY to modify protective orders on the request of a party to another proceeding. *Id.* Although she notes that this Rule was intended for requests made by a party in other proceedings before the ICTY, she notes that another court, the War Crimes Chamber in Bosnia and Herzegovina, has “sought and received modifications of ICTY protective measures so that it can use previously protected evidence its own cases.” *Id.* As she notes, this begs the question of why the Court chose not to pursue this option. *Id.*
- 29 Genocide Convention, art. 2 (“genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group...”).
- 30 *Bosnian Genocide*, 2007 I.C.J. at ¶ 187.
- 31 *Bosnian Genocide*, 2007 I.C.J. at ¶ 209.
- 32 *Bosnian Genocide*, 2007 I.C.J. at ¶ 209.
- 33 *Bosnian Genocide*, 2007 I.C.J. at ¶ 422 (emphasis added).
- 34 *Bosnian Genocide*, 2007 I.C.J. at ¶ 471, operative ¶ 4.
- 35 *Bosnian Genocide*, 2007 I.C.J. at ¶ 319.
- 36 *Bosnian Genocide*, 2007 I.C.J. at ¶ 373.
- 37 International Criminal Tribunal for the former Yugoslavia, Rules of Procedure and Evidence, U.N. Doc. IT/32/REV.17, adopted 11 February 1994, R. 87.
- 38 *Prosecutor v. Brđjanin*, Case No. IT-99-36-T, Judgment, ¶ 704 (Trial Chamber) (Sept. 1, 2004), citing *Prosecutor v. Stakic*, Case No. IT-97-24-T, Judgment, ¶ 526 (Trial Chamber) (July 31, 2003). See also *Prosecutor v. Krstić*, Case No: IT-98-33-A, Judgment, ¶¶ 33-34 (Appeals Chamber) (Apr. 19, 2004); *Prosecutor v. Jelisić*, Case No. IT-95-10-A, Judgment, ¶ 47 (Appeals Chamber) (July 5, 2001).
- 39 *Krstić*, IT-98-33-A, at ¶ 41. Despite the civil nature of its jurisdiction, in contrast to the criminal jurisdiction of the ICTY, the ICJ has adopted a very similar standard. See *Bosnian Genocide*, 2007 I.C.J. at ¶ 373 (noting that “for a pattern of conduct to be accepted as evidence of [the] existence [of genocidal intent], it would have to be such that it could only point to the existence of such intent.”).
- 40 *Prosecutor v. Karadžić & Mladić*, Case nos. IT-95-5-R61 & IT-95-18-R61, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, ¶ 94 (Trial Chamber) (July 16, 1999) [hereinafter *Karadžić & Mladić* Rule 61 Decision].
- 41 *Id.* at ¶¶ 94-95.
- 42 *Bosnian Genocide*, 2007 I.C.J. at ¶ 344.
- 43 *Bosnian Genocide*, 2007 I.C.J. at ¶ 344.
- 44 Notably, in its analysis of Serbia’s responsibility for the genocide at Srebrenica, the Court dismissed as “political” a statement made by the Serbian Council of Ministers condemning the crimes committed in Srebrenica after the release of a video-recording showing the execution of Bosnian Muslim prisoners by a paramilitary unit near Srebrenica. *Bosnian Genocide*, 2007 I.C.J. at ¶ 377. Arguably, some weight could have been attached to this statement, particularly when considered in light of the other evidence submitted to the Court. However, the Court apparently dismissed the statement entirely, noting that it did “not find the statement ... of assistance to it in determining the issues before it in the case.” *Id.* at ¶ 378.
- 45 *Bosnian Genocide*, 2007 I.C.J. at ¶ 211.
- 46 *Bosnian Genocide*, 2007 I.C.J. at ¶ 223. Notably, the Court also found certain actions by the ICTY’s Prosecutor as relevant to its inquiry. *Bosnian Genocide*, 2007 I.C.J. at ¶ 217.
- 47 *Bosnian Genocide*, 2007 I.C.J. at ¶¶ 374-75. In coming to this conclusion, the Court also appears to have found significant prosecutorial decisions to withdraw or exclude genocidal charges from certain indictments. *Id.*
- 48 Notably, the Court also squarely rejected the ICTY’s analysis of the standard required to prove state control over persons or entities not among its official organs. *Bosnian Genocide*, 2007 I.C.J. at ¶¶ 403-406 (rejecting the ICTY’s “overall control” test in favor of the “effective control” test announced in its earlier judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, 1986 I.C.J. 14 (June 27, 1986)).
- 49 *Bosnian Genocide*, 2007 I.C.J. at ¶ 405.

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and political suppression is relaxed. He also encouraged sustained regional involvement with the UN to address the root causes of unrest. The Security Council has responded by urging the Myanmar government and its opposition to work quickly towards reconciliation. To help with this process, the UN dispatched Mr. Gambari to several regional states, including China, to continue developing a consensus committed to working for peace in Burma. Mr. Gambari was also invited to return to Burma this November. Additionally, the UN independent human rights expert on Myanmar will visit Burma to verify and report on alleged abuses during the government crackdown. The effectiveness of such steps remains to be seen, but the currently the UN appears to have put its faith in diplomacy rather than sanctions to encourage Burmese liberalization and reconciliation.

### **WORKING GROUP CRITICIZES BLACKWATER SHOOTINGS IN IRAQ**

The UN Working Group on the Use of Mercenaries (the Working Group) expressed serious concern over the killing of ten Iraqi civilians by private security employees. The International Convention against the Use, Recruitment, Financing and Training of Mercenaries (the Convention) entered into force in 2001 and obligates states to regulate and control the use of private military forces around the world. The recent killings in Iraq have drawn

attention to the increased use of private security forces.

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

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

The private security firm Blackwater is seeking to diversify its business by reaching out to U.S. state and local governments

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

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

*Brent D. Hessel, a J.D. candidate at the Washington College of Law, covers the United Nations for the Human Rights Brief.*

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

50 *Bosnian Genocide*, 2007 I.C.J. at ¶¶ 374-375.

51 *See supra* n. 5.

52 *Bosnian Genocide*, 2007 I.C.J. at ¶¶ 447-449.

53 Under Article 94(2) of the ICJ's Statute, a prevailing State may request the Security Council's assistance in enforcing the Court's orders. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, *supra* n.

25, art. 94(2). Thus, Bosnia and Herzegovina could also use the judgment in an effort to get the United Nations Security Council to enforce the ICJ's order.

54 *See* United Nations Security Council Resolution 1503, S/RES/1503, operative ¶ 7, 28 August 2003.