COMMENTARY

The “Genocide” case:

Reflections on the ICJ’s Decision in Bosnia and Herzegovina v. Serbia

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This commentary provides some personal reflections regarding the recent decision by the International Court of Justice (ICJ) in the Application of the Convention on the Prevention and Punishment of the Crime of Genocide. The case originally was brought by the Republic of Bosnia and Herzegovina against the Republic of Serbia (formerly the Federal Republic of Yugoslavia) back in 1993. The comments which follow are made on the assumption that the reader has either read the Court’s decision, or at least, the summary of the decision issued by the Court’s Information Department on the same day. They are not intended to reproduce that summary or provide a full description and analysis of the Court’s decision or the procedural history and factual background of the case, which would be more suited for a full length article, rather than a commentary.

These comments will focus on three issues: the Court’s handling of the question of its jurisdiction and the nature of that jurisdiction; the Court’s rulings relating to Serbia’s (lack of) responsibility for violation of the Genocide Convention; and, finally, the broader significance of the decision.

Although questions of jurisdiction are “lawyer’s law” and to many may seem to be somewhat dry and academic, they are nevertheless of central importance in understanding the Court’s decision and the role of the Court, especially considering that the ICJ only exercises jurisdiction on the basis of the consent of the State parties to a given dispute.

This case took nearly fourteen years to be brought to a final decision. Even at the ICJ, where cases generally take years to reach conclusion, this was an exceptionally long case. There are a number of reasons for this; much has occurred since Bosnia initiated proceedings in March 1993, the Yugoslav conflict has ended: Yugoslavia’s government and name have changed, the question of

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Yugoslavia’s membership to the United Nations (and consequently as a party to the Court’s Statute) has gone through various stages of development and uncertainty, and the amount of factual evidence presented to the Court, in both the written and oral stages of the proceedings, was very large by any standard. These factors, together with the Court’s understandable and usual caution in handling the question of its jurisdiction whenever this is in dispute or in doubt, go a long way in explaining why the proceedings were so protracted. Still, fourteen years is an extraordinary length of time to decide a case and it is legitimate to pose the question whether the Court could and should have prevented the Respondent party from drawing out the procedure to such a length, especially in view of the fact that the Court had issued two previous decisions relating to its jurisdiction. The first of these, as far back as 11 July 1996, had rejected Yugoslavia’s (as it was still known) preliminary objections relating to the Court’s jurisdiction, and the second judgment issued on 3 February 2003 had rejected Yugoslavia’s attempt to have the Court revise its earlier decision on that issue on the basis of Article 61 of the Court’s Statute, relating to new facts not known at the time of the original decision. In the latter decision, the Court had rejected the request for revision and upheld its earlier decision establishing its jurisdiction.

Notwithstanding these decisions, Yugoslavia – later Serbia and Montenegro and finally Serbia – had kept the question of the Court’s jurisdiction alive by entering a request on 4 May 2001 to have the Court reconsider yet again its jurisdiction on the basis of another procedural mechanism. This request, put in the form of a procedural “Initiative to the Court to Reconsider Ex Officio Jurisdiction over Yugoslavia”, was substantially similar to its request a few weeks earlier to revise its original decision relating to preliminary objections. This “initiative” was, nevertheless, only ruled on in this latest and final decision relating to the merits. The Court found – for the third time – that it possessed jurisdiction on the basis of the principle of res judicata.

This seems to demonstrate an excess of procedural caution relating to Yugoslavia’s Status as a UN member and standing before the Court. These questions had been disposed of by the February 2003 decision on Yugoslavia’s request for revision, and there were no compelling reasons in my view to leave the question of jurisdiction undecided by not disposing of Yugoslavia’s “initiative” attempt to revise the decision on preliminary objections through another procedural mechanism until the final decision on the merits. This aspect of the Court’s decision came in for criticism from a number of the judges in their individual opinions, and almost certainly had the effect of extending the proceedings beyond what was strictly necessary. Part of the task of rendering justice lies in an expeditious handling of proceedings – at least as expeditious as possible – and one can question whether the Court’s handling of this issue, delicate and important as it may be, met this test successfully. At very least, one can say that there is definite room for improvement in this respect, despite all the attempts over the years to streamline the Court’s procedure.

On the other hand, the Court determined that the nature of the jurisdiction it possessed under Article IX of the Genocide Convention included determining whether Serbia – or any other State for that matter – could as a State be held
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Responsible for the commission, complicity in the commission, or failure to prevent the crime of genocide. This issue was crucial to Bosnia’s case and Serbia and many international legal experts have questioned the nature and scope of jurisdiction the Court might have under this provision. The Genocide Convention is clearly an instrument under international criminal law providing obligations on States to make genocide a criminal offence under primarily national penal law and cooperate with other States to bring suspected perpetrators to justice by means of extradition to try the suspected individual(s). However, Article IX also clearly states that the ICJ has competence to determine questions of State responsibility for genocide or the failure to prevent genocide. The Court’s decision has cleared away any remaining doubts relating to this question once and for all, and in doing so, has given Article IX of the Convention the significance it was, in my view, intended to have and deserves. Any other interpretation would have relegated the provision to having marginal importance at best. While State responsibility is distinct from criminal responsibility, there can be no doubt that a State can incur classical (civil) State responsibility by committing genocide, or failing to prevent genocide, for more than just failure to provide for domestic legislation making it a criminal offence, or for failure to cooperate in questions of extradition. This is clear from both the historical events that were behind the adoption of the Genocide Convention in 1948, as well as from more recent history.

Turning to the Court’s treatment of the merits and its rulings relating to Yugoslavia/Serbia’s (lack of) responsibility in the commission of and failure to prevent genocide, several things have to be borne in mind. Firstly, the Court was well aware that numerous, widespread and systematic violations of the corpus of international law relating to armed conflict had been perpetuated with the knowledge and assistance of the Yugoslav/Serbian Government and armed forces. The Court’s decision regarding the lack of responsibility of Serbia for the commission of genocide or complicity in the commission of genocide in relation to those events in no way exonerates it or denies its responsibility for its part in those crimes. However, the Court did not possess jurisdiction to pronounce on violations of the laws of war, whether derived from conventions or customary law, other than the crime of genocide. Consequently, it had no choice but to refrain from pronouncing on those issues.

Secondly, the Court rightly emphasized the special and specific nature of the crime of genocide requiring, as it does, a demonstrable specific intent (dolus specialis) to target and destroy as such an identifiable group in whole or in part. This requirement distinguishes genocide from other violations of the law relating to armed conflict and places a heavy burden of proof on the party alleging the occurrence of the crime of genocide. It is not enough to establish that widespread unlawful killings, mistreatment, rape or mass expulsion of civilians (euphemistically referred to as “ethnic cleansing”) have taken place; it must be proven beyond a reasonable doubt that such atrocities were perpetrated as part of a campaign to totally or partially wipe out a discrete ethnic, religious or national group as such. In view of this requirement and the special nature of genocide as “the crime of all crimes” under international law, the Court’s rulings relating to Serbia’s lack of responsibility in relation to most of Bosnia’s claims are
understandable and plausible. The Court’s treatment of the necessary standards of evidence and burden of proof, in relation to the specific nature of genocide, likewise seems consistent and persuasive. The reliance on the evidence examined and established in proceedings before the International Criminal Tribunal for the former Yugoslavia (ICTY) moreover serves the purpose of promoting unity and consistency of application of international law and makes good sense from both a legal and a policy perspective.

The Court found that, with regard to one notorious incident—the massacre of the Bosnian Muslim men and boys taken prisoner at Srebrenica in July 1995—there was evidence of the commission of genocide on the part of the Bosnian Serb armed forces and militias and that the Yugoslav/Serbian Government failed – indeed, did nothing – to attempt to prevent this crime. On this point, the Court did not follow the ICTY’s standard of “overall control” in relation to Yugoslavia/Serbia’s relationship to the Bosnian Serb armed forces and militias, instead it reiterated its own standard of “effective control” which it had first put forward in its 1986 Nicaragua decision. Yugoslavia’s responsibility was limited to its failure to (attempt to) prevent the massacre and did not encompass direct responsibility for either the commission of genocide or complicity in the commission of genocide. This was the only point on which the ICJ and ICTY seemingly parted ways in their respective interpretation and application of the law. The ICJ’s “effective control” standard in relation to the imputation of State responsibility for acts carried out by armed forces and groups to a government which assists and supports such forces, but does not exercise operational control over them, differs from the ICTY’s “overall control” standard in relation to imputation of (criminal) responsibility which the latter had put forward in its Tadić Appeals Chamber decision in 1995. Irrespective of what one thinks of the respective merits of these approaches, it is hardly surprising that the ICJ chose to uphold its own interpretation of the law in this respect, rather than adopt that of the ICTY, which, after all, purported to “reverse” the ICJ’s earlier Nicaragua decision on this point. Viewed in this light, the Court’s rulings in the present judgment relating to the extent of Yugoslavia/Serbia’s responsibility in connection with the events at Srebrenica make legal sense – whatever other doubts or questions they may give rise to.

Finally, a word is called for regarding the overall impact of this decision in relation to the form of reparation it found appropriate and, in a broader sense, in relation to the entire complex dispute as a whole.

The Court found that its declaratory rulings regarding Yugoslavia/Serbia’s failure to prevent genocide; failure to cooperate with the ICTY by rendering General Mladić into its custody; and failure to carry out fully the terms of its earlier orders on provisional measures, were sufficient and appropriate reparation under the circumstances. This has the obvious effect of precluding any Bosnian claims for financial compensation for its failure to prevent the massacre at Srebrenica. While this may seem to deny the Bosnian Government and more significantly the victims (and their families) a concrete remedy, it was on balance the least disadvantageous and most prudent decision on this issue which was available to the Court. Aside from the question whether any amount of financial compensation could adequately compensate the victims for what occurred, and
whether the Court could realistically be expected to calculate and assess an appropriate level of compensation which would do justice to the victims, there is another aspect of this which should not be lost sight of. What would such a ruling have meant in terms of settling the overall dispute and contributing to the normalization of relations between the parties? There is no doubt that another protracted round of proceedings would have resulted from any Court decision allowing for financial compensation. Whether this would have resulted in any meaningful compensation to the victims or contributed to an improvement in the relations between Bosnia Herzegovina and Serbia is debatable. Under the circumstances, it was – on balance – probably the wisest thing to put the case to rest after fourteen years of litigation and trust to future developments to provide any additional form of admission of responsibility and possible compensation as part of the process of reconciliation. The Court is, after all, in the business – first and foremost – of settling international disputes and under the circumstances this approach probably went farthest in promoting that objective.