

## DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE INVOLVING BOSNIA AND HERZEGOVINA AND SERBIA AND MONTENEGRO

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### I. INTRODUCTION

In a landmark judgment,<sup>1</sup> delivered on 26 April 2006 by the International Court of Justice (ICJ or the Court), it was found that Serbia violated the obligation to prevent genocide that occurred in Srebrenica in July 1995. This historical ruling of the ICJ came after 14 years of the filing of application before the ICJ by the Government of the Republic of Bosnia and Herzegovina on 20 March 1993. Bosnia and Herzegovina invoked the jurisdiction of the Court by referring to Article IX of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention),<sup>2</sup> the Universal Declaration of Human Rights,<sup>3</sup> the four Geneva Conventions of 1949, their Additional Protocol I of 1977, the customary international laws of war including the Hague Regulations on Land Warfare of 1907 and other fundamental principles of humanitarian law by the Federal Republic of Yugoslavia (Serbia and Montenegro) and with effect from 3 June 2006, Republic

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1. Decisions of the International Court of Justice Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) of 26 February 2007, <http://www.icj-cij.org>; R. GeiB, and B.Noemie, "International and Internationalized Criminal Tribunals: a Synopsis", *International Review of the Red Cross*, vol. 88, no. 861, (2006), pp. 49-64; L.Gradoni, "International Criminal Court and Tribunals: Bound by Human Rights Norms...or Tied Down?", *Leiden Journal of International Law*, vol. 19, no. 3 (2006), pp. 847-873; P. Hazan, "Measuring the Impact of Punishment and Forgiveness: a Framework for Evaluating Transitional Justice", *International Review of the Red Cross*, vol. 88, no. 861, (2006), pp. 19-48; S.R.S. Bedi, *The Development of Human Rights Law by the Judges of the International Court of Justice* (Hart Publishing, Oxford, 2007).
2. Federal Republic of Yugoslavia had violated the following provisions of the 1948 Genocide Convention under Articles I, II (a), II (b), II (c), II (d), III (a), III (b), III (c), III (d), III (e), IV and V.
3. Articles 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26 and 28.

of Serbia.<sup>4</sup> The Declaration on the Independence of the Republic of Montenegro was passed on 3 June 2006 by the Parliament of Montenegro after the national referendum held on 21 May 2006.<sup>5</sup> On 28 June 2006, the General Assembly by its resolution 60/264, admitted Montenegro as a new Member of the United Nations.

Bosnia and Herzegovina invoked additional bases of jurisdiction in the case by relying on the Treaty between the Allied and Associated Powers and the Kingdom of the Serbs, Croats and Slovenes on the Protection of Minorities, signed at *Saint-Germain-en-Laye on 10 September 1919*, and customary and conventional international laws of war and international humanitarian law.<sup>6</sup> In its application, the Bosnian government had sought measures for interim relief according to Article 41 of the Statute of the Court.<sup>7</sup> On 8 April 1993, the Court ordered that provisional measures<sup>8</sup> be taken by the Federal Republic of Yugoslavia to deter and stop the act of genocide. A new request for provisional measures was again filed on 27 July 1993 by Bosnia and Herzegovina.<sup>9</sup> After hearing the Parties, the Court reaffirmed the measures indicated in its order of 8 April 1993 and stated that those measures should be immediately and effectively implemented.<sup>10</sup> Bosnian government requested the Court to declare that Yugoslavia had violated the Genocide Convention, order the Yugoslavian government to cease the acts constituting such violations and declare that Yugoslavia had international responsibility for which it must make appropriate reparation, and stated that Bosnia-

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4. Decisions, note 1, paras. 67-68. On 3 June 2006, the President of the Republic of Serbia informed the Secretary-General of the United Nations that, after the adoption of the Declaration of Independence by the National Assembly of Montenegro on 3 June 2006, “the membership of the State Union Serbia and Montenegro in the United Nations, including all organs and organizations of the United Nations system, [would be] continued by the Republic of Serbia on the basis of Article 60 of the Constitutional Charter of Serbia and Montenegro”. It was further stated that “in the United Nations the name ‘Republic of Serbia’ [was] to be henceforth used instead of the name ‘Serbia and Montenegro’” and added that the Republic of Serbia “remain[ed] responsible in full for all the rights and obligations of the State Union of Serbia and Montenegro under the UN Charter”.

5. General Assembly Resolution, A/60/PV.91, Sess. 60th, 28 June 2006, pp. 5-6.

6. *Ibid.*, para. 7.

7. Article 41(1) of the ICJ Statute states that, “The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.”

Article 41(2), “Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.”

8. Provisional measures was requested in pursuant to the Article 73 of the Rules of the Court.

9. ICJ Decision, note 1, Para. 7.

10. *Ibid.*, para. 8.

Herzegovina had the right to self-defence under Article 51 of the UN Charter.<sup>11</sup> Yugoslavia sought to dismiss the case on the ground that the Application was not admissible because of the lack of an international dispute and the lack of authority of the President of Bosnia at the time the Application was filed.<sup>12</sup> The Court in its Judgment of 11 July 1996, dismissed the preliminary objections and found that it had jurisdiction to adjudicate on the dispute on the basis of Article IX of the Genocide Convention and that the Application was admissible.<sup>13</sup> After more than three years of provisional measures and preliminary objections procedures, the ICJ has paved the way for determination of the case on the merits of the case. The significance of this judgment lies predominantly in the Court's decision that it has jurisdiction *rationae materiae* over a dispute between two sovereign nations concerning alleged breaches of the Genocide Convention.<sup>14</sup>

## II. HISTORY OF THE STATUS OF THE FRY WITH REGARD TO THE UNITED NATIONS

In the early 1990s the Socialist Federal Republic of Yugoslavia (SFRY) a founding Member State of the United Nations, made up of Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia, began to disintegrate.<sup>15</sup> On 25 June 1991, two of its constituents, Croatia and Slovenia declared independence, followed by Macedonia on 17 September 1991 and Bosnia and Herzegovina on 6 March 1992. Bosnia and Herzegovina was recognized by the European Community on 7 April 1992. On 27 April 1992, the Constitution of the Federal Republic of Yugoslavia was adopted consisting of the Republic of Serbia and the Republic of Montenegro. Montenegro declared its independence on 3 June 2006. All three States have been admitted to membership of the United Nations.<sup>16</sup>

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11. Peter H. F. Bekker & Paul C Szasz, "Application on the Prevention and Punishment of the Crime of Genocide (Bosnia- Herzegovina v. Yugoslavia), Preliminary Objections, Judgment. International Court of Justice, 11 July 1996" *American Journal of International Law*, vol. 91(1997), pp. 121-26.

12. *Ibid.*

13. *Ibid.*, para.12.

14. *Ibid.*, p.126.

15. A. Z. Rubinstein, *Yugoslavia and the Non Aligned World* (Princeton University Press, New Jersey, 1970).

16. *Bosnia and Herzegovina, Croatia and Slovenia* were admitted as members of the United Nations on 22 May 1992; Serbia and Montenegro, under the name of the Federal Republic of Yugoslavia on 1 November 2000; and the Republic of Montenegro on 28 June 2006.

The Assembly of the Socialist Federal Republic of Yugoslavia at its session held on 27 April 1992, promulgated the Constitution of the Federal Republic of Yugoslavia (FRY). The SFRY was transformed into the Federal Republic of Yugoslavia, consisting of the Republic of Serbia and the Republic of Montenegro.<sup>17</sup> FRY expressed its willingness to respect the continuity of the international personality of Yugoslavia. However, the Security Council, in its resolution 713 (1991)<sup>18</sup> and all subsequent relevant resolutions, clearly observed that the State formerly known as the SFRY had ceased to exist and could not assume automatically the membership of the former SFRY and therefore recommended the General Assembly to decide that FRY should apply for membership in the United Nations.<sup>19</sup> However, this situation came to an end with a new development in 2000, when Koštunica was elected President of the FRY. In that capacity, on 27 October 2000 he sent a letter to the Secretary-General requesting admission of the FRY to membership in the United Nations. Acting upon this application by the FRY for membership in the United Nations, the Security Council on 31 October 2000 recommended to the General Assembly that the FRY be admitted to membership in the United Nations.<sup>20</sup> On 1 November 2000, the General Assembly<sup>21</sup> received the recommendation of the Security Council of 31 October 2000 and FRY was admitted to membership in the United Nations.

### III. JURISDICTIONAL ASPECTS DEALT BY THE COURT

On 24 April 2001 Serbia and Montenegro filed an Application instituting proceedings seeking revision, under Article 61 of the Statute,<sup>22</sup> of the 1996 Judgment on jurisdiction in this case. The contention of the FRY was that its admission to membership in 2000 necessarily implied that it was not a Member of the United Nations and thus not a party to the Statute in 1993, when the proceedings in the present case were instituted, so that the Court would have had no jurisdiction in the case.

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17. M. K. Sinha, *Humanitarian Intervention by the United Nations* (Manak Publications, New Delhi, 2000)

18. Security Council Resolution 713 of 25 September 1991.

19. Security Council Resolution 752 of 1992.

20. Security Council Resolution 1326 of 31 October 2000.

21. General Assembly Resolution of 55/12.

22. Article 61 of Statute of the International Court of Justice states that, "An application for the revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was due to negligence."

According to Bosnia and Herzegovina, the Court should, at this late stage of the proceedings, decline to examine the questions raised by the Respondent as to the status of Serbia and Montenegro in relation to Article 35 of the Statute, and its status as a party to the Genocide Convention, because the questions raised by the Respondent had already been resolved by the 1996 Judgment, with the authority of *res judicata*.<sup>23</sup> There are two important purposes, underlie the principle of *res judicata*, internationally as well as nationally. First, the stability of legal relations requires that litigation come to an end. The Court's function, according to Article 38 of its Statute, is to "decide", that is, to bring to an end, "such disputes as are submitted to it". Secondly, it is in the interest of each party that an issue which has already been adjudicated in favour of that party be not argued again.<sup>24</sup> Article 60 of the Statute articulates this finality of judgments.<sup>25</sup>

The Court, in its Judgment of 25 March 1999 on the request for interpretation of the Judgment of 11 June 1998 in the case of the *Land and Maritime Boundary between Cameroon and Nigeria*, had expressly recognized that the 1998 Judgment, given on a number of preliminary objections to jurisdiction and admissibility, constituted *res judicata*, so that the Court could not consider a submission inconsistent with that judgment.<sup>26</sup> Similarly, in its Judgment of 3 February 2003 in the *Application for Revision* case, the Court, when it began by examining whether the conditions for the opening of the revision procedure, laid down by Article 61 of the Statute, were satisfied, undoubtedly recognized that an application could be made for revision of a judgment on preliminary objections; this could in turn only derive from a recognition that such a judgment is "final and without appeal."<sup>27</sup>

The Court in its Judgment of 3 February 2003, found the Application for revision inadmissible.<sup>28</sup> The Court concluded that Contracting Parties to the Genocide Convention were bound not to commit genocide, through the actions of their organs or persons or groups whose acts are attributable to them. This also applies to other acts enumerated in Article

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23. Decisions, note 1, para.139.

24. *Ibid.*, para.140.

25. Decisions, note 1, para. 116.

26. I.C.J. Reports 1999 (I), p. 39, para. 16; World Court Digest, *Summaries of the Decisions Land and Maritime Boundary (Cameroon v. Nigeria)*, Max Planck Institute, Germany, available at, <http://www.mpil.de/ww/en/pub/research/details/publications/institute/wcd.cfm?dec0301.cfm>, visited on 27 April 2007.

27. *Ibid.*, para 117.

28. *I.C.J. Reports 2003*, p. 31, para. 71.

III of the Genocide Convention.<sup>29</sup> Those acts are forbidden along with genocide itself in the list included in Article III. They are referred to equally with genocide in Article IX and without being characterized as “punishable”; and the “purely humanitarian and civilizing purpose” of the Convention may be seen as being promoted by the fact that States are subject to that full set of obligations, supporting their undertaking to prevent genocide.<sup>30</sup>

#### IV. THE ENTITIES INVOLVED IN THE EVENTS COMPLAINED OF

On the one side, the FRY, which was composed of the two constituent republics of Serbia and Montenegro; on the other, the Republic of Bosnia and Herzegovina, later to be called the Republika Srpska. Both parties recognized that there were a number of entities at a lower level involved in the activities of which have formed part of the factual issues in the case, though they disagreed as to the significance of those activities.<sup>31</sup> There were five types of armed formations involved in Bosnia in 1992: first, the Yugoslav People’s Army (JNA), subsequently the Yugoslav Army (VJ); second, volunteer units supported by the JNA and later by the VJ, and the Ministry of the Interior (MUP) of the FRY; third, municipal Bosnian Serb Territorial Defence (TO) detachments; and, fourth, police forces of the Bosnian Serb Ministry of the Interior. The MUP of the Republika Srpska controlled the police and the security services, and operated, according to the Applicant, in close co-operation and co-ordination with the MUP of the FRY. On 15 April 1992, the Bosnian Government established a military force, based on the former Territorial Defence of the Republic, the Army of the Republic of Bosnia and Herzegovina (ARBiH), merging several non-official forces, including a number of paramilitary defence groups, such as the Green Berets, and the Patriotic League, being the military wing of the Muslim Party of Democratic Action.<sup>32</sup> All JNA troops who were not of Bosnian origin were withdrawn from Bosnia-Herzegovina. However, JNA troops of Bosnian Serb origin who were serving in Bosnia and Herzegovina were transformed into, or joined, the army of the Republika Srpska (the VRS) which was established on 12 May 1992, or the VRS Territorial Defence. Moreover, Bosnian Serb

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29. According to Article 3, “The following acts shall be punishable: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d ) Attempt to commit genocide; (e) Complicity in genocide.”

30. Decisions, note 1, para. 167.

31. *Ibid.*, para. 236.

32. Decisions, note 1, para. 36.

soldiers serving in JNA units elsewhere were transferred to Bosnia and Herzegovina and subsequently joined the VRS. The remainder of the JNA was transformed into the Yugoslav army (VJ) and became the army of the Federal Republic of Yugoslavia. On 15 May 1992 the Security Council, by its resolution 752, demanded that units of the JNA in Bosnia and Herzegovina “be withdrawn, or be subject to the authority of the Government of Bosnia and Herzegovina, or be disbanded and disarmed”. On 19 May 1992, the Yugoslav army was officially withdrawn from Bosnia and Herzegovina.

The Applicant contended that from 1993 onwards, around 1,800 VRS officers were “administered” by the 30th Personnel Centre of the VJ in Belgrade; this meant that matters like their payment, promotions, pensions, etc., were handled, not by the Republika Srpska, but by the army of the Respondent. According to the Respondent, the importance of this fact was greatly exaggerated by the Applicant: the VRS had around 14,000 officers and thus only a small number of them was dealt with by the 30th Personnel Centre; this Centre only gave a certain degree of assistance to the VRS. The Applicant maintained that all VRS officers remained members of the FRY army only the label changed; according to the Respondent, there was no evidence for this last allegation.

## V. EXAMINATION OF FACTS BY THE COURT

The Court examined as to whether the facts alleged by Bosnia and Herzegovina fell within the scope of Article II of the Genocide Convention. Article II (a) of the Convention deals with acts of killing members of the protected group. The Court considered the facts alleged in the light of the question whether there was persuasive and consistent evidence of a pattern of atrocities, as alleged by the Applicant, which would constitute evidence of *dolus specialis* on the part of the Respondent.<sup>33</sup> The Applicant made a number of allegations with regard to killings that occurred in the area of Drina River Valley and various camps.<sup>34</sup> The Court examined the evidence of killings of members of the protected group in the principal areas of Bosnia and in the various detention camps, and ascertained whether there was evidence of a specific intent (*dolus specialis*) in one or more of them. The Applicant referred repeatedly to killings, by shelling and sniping, perpetrated in

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33. Decisions, note 1, para. 244.

34. Sušica camp, Foča Kazneno-Popravni Dom camp, Batkoviæ camp, Kozarac and Hambarine, Omarska camp, Keraterm camp, Trnopolje camp, Manjača camp and Luka camp, for detailed information, see Decisions, note 1, paras 250-77.



Sarajevo, and this allegation was further supported by the United Nations Special Rapporteur in his various reports.<sup>35</sup>

## VI. DECISIONS OF THE COURT

The Court reached the conclusion that it was established by overwhelming evidence that massive killings in specific areas and detention camps throughout the territory of Bosnia and Herzegovina were perpetrated during the conflict.<sup>36</sup> Furthermore, the evidence presented showed that the victims were in large majority members of the protected group, which suggests that they might have been systematically targeted for killing. The Court thus found that it had been established by conclusive evidence that massive killings of members of the protected group occurred and that therefore the requirements of the material element, as defined by Article II (a) of the Convention were fulfilled.<sup>37</sup> However, the Court was not convinced, on the basis of the evidence before it, that the massive killings of members of the protected group were committed with the specific intent (*dolus specialis*) on the part of the perpetrators to destroy, in whole or in part, the group as such.<sup>38</sup> The Court carefully examined the criminal proceedings of the International Criminal Tribunal of Yugoslavia (ICTY)<sup>39</sup> and the findings of its Chambers, and observed that none of those convicted were found to have acted with specific intent (*dolus specialis*). The killings might amount to war crimes and crimes against humanity, but the Court had no jurisdiction to determine whether this was so. In the exercise of its jurisdiction under the Genocide Convention, the Court found that it had not been established by the Applicant that the killings amounted to acts of genocide prohibited by the Convention.

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35. Fifth periodic report on the situation of human rights in the territory of the former Yugoslavia submitted by Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to paragraph 32 of Commission resolution 1993/7 of 23 February 1993, General, E/CN.4/1994/47, 17 November 1993.

36. Decisions, note 1, paras 276.

37. *Ibid.*

38. *Ibid.*

39. N. Kandic, "The ICTY Trials and a Transitional Justice in Former Yugoslavia", *Cornell International Law Journal*, vol. 38, no. 3 (2005), pp. 789-92; A. Sridhar, "The International Criminal Tribunal for the Former Yugoslavia's Response to the Problem of Transnational Abduction", *Stanford Journal of International Law*, vol. 42, no. 2 (2006), pp. 343-64; L. Gradoni, "International Criminal Court and Tribunals: Bound by Human Rights Norms...or Tied Down?", *Leiden Journal of International Law*, vol. 19, no. 3 (2006), pp. 847-73.



## VII. THE MASSACRE AT SREBRENICA

The events surrounding the Bosnian Serb take-over of the United Nations (UN) ‘safe area’ of Srebrenica in Bosnia and Herzegovina, in July 1995, have become well known to the world. Despite a UN Security Council resolution declaring that the enclave was to be ‘free from armed attack or any other hostile act’, units of the Bosnian Serb Army (‘VRS’) launched an attack and captured the town. Within a few days, approximately 25,000 Bosnian Muslims, most of them women, children and elderly people who were living in the area, were uprooted and, in an atmosphere of terror, loaded onto overcrowded buses by the Bosnian Serb forces and transported across the confrontation lines into Bosnian Muslim-held territory. As thousands of them attempted to flee the area, they were taken prisoner, detained in brutal conditions and then executed. More than 7,000 people were never seen again.<sup>40</sup>

The Court concluded that the acts committed at Srebrenica, falling within Article II (a) and (b) of the Convention, were committed with the specific intent to destroy in part the Muslims of Bosnia and Herzegovina as such; and accordingly those were acts of genocide, committed by members of the VRS in and around Srebrenica from about 13 July 1995.<sup>41</sup>

## VIII. CAUSING SERIOUS BODILY OR MENTAL HARM TO MEMBERS OF THE PROTECTED GROUP

The Applicant contended that besides the massive killings, systematic serious harm was caused to the non-Serb population of Bosnia and Herzegovina. The Applicant highlighted the practice of terrorizing the non-Serb population, the infliction of pain and the administration of torture as well as the practice of systematic humiliation into this category of acts of genocide. Furthermore, the Applicant put a particular emphasis on the issue of systematic rapes of Muslim women, perpetrated as part of genocide against the Muslims in Bosnia during the conflict.<sup>42</sup> The Court noted that there was no dispute between the Parties that rapes

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40. *Ibid.*, 278.

41. The Court by twelve votes to three, found that Serbia has violated the obligation to prevent genocide, under the Convention on the Prevention and Punishment of the Crime of Genocide, in respect of the genocide that occurred in Srebrenica in July 1995. In favour; *President Higgins*; *Vice-President Al-Khasawneh*; *Judges Ranjeva, Shi, Koroma, Owada, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna*; and *Judge ad hoc Mahiou*. The following Judges were against; *Judges Tomka, Skotnikov and Judge ad hoc Kreća*.

42. Decisions, note 1, para.300.

and sexual violence could constitute acts of genocide, if accompanied by a specific intent to destroy the protected group. It noted also that the ICTR, in its Judgment of 2 September 1998 in the *Akayesu* case, had addressed the issue of acts of rape and sexual violence as acts of genocide in the following terms: “Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of inflicting harm on the victim as he or she suffers both bodily and mental harm.”<sup>43</sup> The ICTY, in its Judgment of 31 July 2003 in the *Stakiæ* case, recognized that: “Causing serious bodily and mental harm in subparagraph (b) [of Article 4 (2) of the Statute of the ICTY] is understood to mean, *inter alia*, acts of torture, inhumane or degrading treatment, sexual violence including rape, interrogations combined with beatings, threats of death, and harm that damages health or causes disfigurement or injury. The harm inflicted need not be permanent and irremediable.”<sup>44</sup>

The Court noted further that number of Security Council and General Assembly resolutions were explicit in referring to sexual violence. These resolutions were in turn based on reports before the General Assembly and the Security Council, such as the Reports of the Secretary-General, the Commission of Experts,<sup>45</sup> the Special Rapporteur for Human Rights, Tadeusz Mazowiecki, and various United Nations agencies in the field.<sup>46</sup>

The Applicant also claimed that rape was used “as a way of affecting the demographic balance by impregnating Muslim women with the sperm of Serb males” or, in other words, as “procreative rape”. It was argued by the applicant that children born as a result of these “forced pregnancies” would not be considered to be part of the protected group and considers that the intent of the perpetrators was to transfer the unborn children to the group of Bosnian Serbs.<sup>47</sup> However, the Court, failed to find that there was any form of policy of forced pregnancy, nor that there was any aim to transfer children of the protected group to another group within the meaning of Article II (*e*) of the Convention.<sup>48</sup>

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43. ICTR-96-4-T, Trial Chamber Judgment, 2 September 1998, para. 731.

44. IT-97-24-T, Trial Chamber Judgment, 31 July 2003, para. 516.

45. Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780(1992), Chairman, M.Cherif Bassiouni, S/1994/674/Add.2 (Vol. I) 28 December 1994.

46. Decisions, note 1, para.301; M. Frulli, “Advancing the Protection of Cultural Property Through the Implementation of Individual Criminal Tribunal for the Former Yugoslavia”, *The Italian Yearbook of International Law*, vol. 25 (2005), pp. 195-216.

47. Decisions, note 1 para. 362.

48. *Ibid.*, para. 367.

Having carefully examined the evidence presented before it, and taken note of that presented to the ICTY, the Court considered that it had 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. The requirements of the material element, as defined by Article II (b) of the Convention were thus fulfilled. The Court found, however, on the basis of the evidence before it, that it has not been conclusively established that those atrocities, although they too may amount to war crimes and crimes against humanity, were committed with the specific intent (*dolus specialis*) to destroy the protected group, in whole or in part, required for a finding that genocide has been perpetrated.<sup>49</sup>

#### IX. DESTRUCTION OF HISTORICAL, RELIGIOUS AND CULTURAL PROPERTY

The Applicant claimed that throughout the conflict in Bosnia and Herzegovina, Serb forces engaged in the deliberate destruction of historical, religious and cultural property of the protected group in an attempt to wipe out the traces of their very existence.<sup>50</sup> In the *Tadic* case, the ICTY found that “[n]on-Serb cultural and religious symbols throughout the region were targeted for destruction” in the Banja Luka area.<sup>51</sup> The Commission of Experts also found that religious monuments especially mosques and churches had been destroyed by Bosnian Serb forces.<sup>52</sup> In its report on the Prijedor region, the Commission found that at least five mosques and associated buildings in Prijedor town had been destroyed and noted that it was claimed that all 16 mosques in the Kozarac area had been destroyed and that not a single mosque, or other Muslim religious building remained intact in the Prijedor region.<sup>53</sup> The Special Rapporteur found that, during the conflict, many mosques, churches and other religious sites, including cemeteries and monasteries, have been destroyed or profaned.<sup>54</sup>

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49. Decisions, note 1, para. 319.

50. P. Ishwara Bhat, “Protection of Cultural Property Under International Humanitarian Law,” *ISIL Yearbook of International Humanitarian and Refugee Law*, vol. I (2001), pp. 47-71; N. Chadha, “Protection of Cultural Property During Armed Conflicts: A Case Study of Kosovo” *ISIL Yearbook of International Humanitarian and Refugee Law*, vol. I (2001), pp. 219-229.

51. *Tadic*, IT-94-1-T, Trial Chamber Judgment, 7 May 1997, para. 149.

52. Report of the Commission of Experts, note 46, Vol. I, Ann. IV, pp. 5, 9 & 21.

53. *Ibid.*, p. 106.

54. Report of 17 November 1992, note 36, para. 26.

Bosnia and Herzegovina appointed an expert, András J Riedlmayer, who had carried out a field survey on the destruction of cultural heritage in 19 municipalities in Bosnia and Herzegovina for the Prosecutor of the ICTY in the *Milošević* case and had subsequently studied seven further municipalities in two other cases before the ICTY.<sup>55</sup> In his report Riedlmayer documented 392 sites, 60 per cent of which were inspected first hand while for the other 40 per cent, his assessment was based on photographs and information obtained from other sources judged to be reliable and where there was corroborating documentation.<sup>56</sup> The report found that: “the damage to these monuments was clearly the result of attacks directed against them, rather than incidental to the fighting. Evidence of this included signs of blast damage indicating explosives placed inside the mosques or inside the stairwells of minarets; many mosques [were] burnt out. In a number of towns, including Bijeljina, Janja (Bijeljina municipality), Foča, Banja Luka, Sanski Most, Zvornik and others, the destruction of mosques took place while the area was under the control of Serb forces, at times when there was no military action in the immediate vicinity.”<sup>57</sup>

The Court found that archives and libraries were also subjected to attacks during the war in Bosnia and Herzegovina. On 17 May 1992, the Institute for Oriental Studies in Sarajevo was bombarded with incendiary munitions and burnt, resulting in the loss of 200,000 documents including a collection of over 5,000 Islamic manuscripts.<sup>58</sup> Riedlmayer’s findings constituted persuasive evidence as to the destruction of historical, cultural and religious heritage in Bosnia and Herzegovina albeit in a limited geographical area.

In light of the foregoing, the Court considered 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>59</sup> However, in the Court’s view, the destruction of historical, cultural and religious heritage cannot be considered to constitute the deliberate infliction of conditions of life calculated to bring about the physical destruction of the group. Although such destruction may be highly significant inasmuch as it was directed at the elimination of all traces of the cultural or religious presence of a group, and contrary to

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55. András J Riedlmayer, *Destruction of Cultural Heritage in Bosnia and Herzegovina, 1992-1996: A Post-war Survey of Selected Municipalities, Milošević* (Cambridge, Massachusetts, USA, 2002), available at <http://hague.bard.edu/reports/BosHeritageReport-AR.pdf>, visited on 25 April 2007, pp.1-31.

56. *Ibid.*, p.5.

57. *Ibid.*, p.11.

58. *Ibid.*, p.18.

59. Decisions, note 1. para. 344.

other legal norms, it did not fall within the categories of acts of genocide set out in Article II of the Convention. In this regard, the Court observed that, during its consideration of the draft text of the Convention, the Sixth Committee of the General Assembly decided not to include cultural genocide in the list of punishable acts. Moreover, the ILC subsequently confirmed this approach, stating that: “As clearly shown by the preparatory work for the Convention ..., the destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group.”<sup>60</sup> Furthermore, the ICTY took a similar view in the *Krstić* case, finding that even in customary law, “despite recent developments”, the definition of acts of genocide was limited to those seeking the physical or biological destruction of a group.<sup>61</sup> The Court concluded that the destruction of historical, religious and cultural heritage cannot be considered to be a genocidal act within the meaning of Article II of the Genocide Convention.

#### X. THE OBLIGATION TO PREVENT GENOCIDE

As regards the obligation to prevent genocide, the court observed that the Genocide Convention is not the only international instrument providing for an obligation on the States parties to it to take certain steps to prevent the acts it seeks to prohibit. There are other instruments include a similar obligation, in various forms.<sup>62</sup> The content of the duty to prevent varies from one instrument to another, according to the wording of the relevant provisions, and depending on the nature of the acts to be prevented.<sup>63</sup> The decision of the Court does not, in this case, purport to establish a general jurisprudence applicable to all cases where a treaty instrument, or other binding legal norm, includes an obligation for States to prevent certain acts. The Court stated that the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the

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60. Report of the International Law Commission on the work of its Forty-eighth Session, *Yearbook of the International Law Commission 1996*, Vol. II, Part Two, pp. 45-46, para. 12. Decisions, note 1, para.344.

61. *Krstić*, IT-98-33-T, Trial Chamber Judgment, 2 August 2001, para. 580.

62. For example, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (Article 2); the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, of 14 December 1973 (Art. 4); the Convention on the Safety of United Nations and Associated Personnel of 9 December 1994 (Art. 11); the International Convention on the Suppression of Terrorist Bombings of 15 December 1997 (Art. 15).

63. Decisions, note 1, para. 429.

circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible. A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide.<sup>64</sup> In this area the notion of “due diligence”, which calls for an assessment *in concreto*, is of critical importance. The Court observed that a State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed. It is at the time when commission of the prohibited act listed in Article III of the Genocide Convention begins that the breach of an obligation of prevention occurs. In this respect, the Court referred to a general rule of the law of state responsibility, stated by the ILC in Article 14, paragraph 3, of its Articles on State Responsibility.<sup>65</sup>

According to the Court, a State to be held responsible for breaching its obligation of prevention, 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. In view of the foregoing, the Court concluded that the Respondent violated its obligation to prevent the Srebrenica genocide in such a manner as to engage its international responsibility.<sup>66</sup>

#### **XI. BREACH OF THE COURT’S ORDERS INDICATING PROVISIONAL MEASURES**

The Court observed that its “orders on provisional measures under Article 41 of the Statute have binding effect.”<sup>67</sup> Although the Court only had occasion to make such a finding in a judgment subsequent to the Orders that it made in the present dispute, this did not affect the binding nature of those Orders, since in the Judgment referred to by the Court did no more than give the provisions of the Statute the meaning and scope that they had possessed from the outset. It noted that provisional measures were aimed at preserving the rights of each of the parties pending the final decision of the Court. The Court’s Orders

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64. *Ibid.*, para 430.

65. Article 14(3) states, that “the breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.”

66. *Ibid.*, para. 438.

67. *Ibid.*, para. 452, LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001, p. 506, para. 109.

of 8 April and 13 September 1993 indicating provisional measures created legal obligations which both Parties were required to satisfy.<sup>68</sup> It was clear that in respect of the massacres at Srebrenica in July 1995 the Respondent failed to fulfill its obligation indicated in paragraph 52 A (1) of the Order of 8 April 1993 and reaffirmed in the Order of 13 September 1993 to “take all measures within its power to prevent commission of the crime of genocide.”<sup>69</sup> Nor did it comply with the measure indicated in paragraph 52 A (2) of the Order of 8 April 1993, reaffirmed in the Order of 13 September 1993, insofar as that measure required it to “ensure that any ...organization and persons which may be subject to its ... influence ... do not commit any acts of genocide.”<sup>70</sup>

The Court found that in respect of the massacres at Srebrenica in July 1995, the Respondent failed to take steps which would have satisfied the Court’s interim order. However, the Court considered that, for purposes of reparation, the Respondent’s non-compliance with the provisional measures ordered is an aspect of, or merges with, its breaches of the substantive obligations of prevention and punishment imposed upon it by the Convention. The Court did not therefore find it appropriate to give effect to the Applicant’s request for an order for symbolic compensation in this respect. However, the Court included in the operative clause of the present Judgment, by way of satisfaction, a declaration that the Respondent had failed to comply with the Court’s Orders indicating provisional measures.<sup>71</sup>

## XII. CONCLUSION

In the light of its review of the factual evidence before the Court of the atrocities committed in Bosnia and Herzegovina in 1991-1995, the Court concluded that, save for the events of July 1995 at Srebrenica, the necessary intent required to constitute genocide had not been conclusively shown in relation to each specific incident. The Applicant however relies on the alleged existence of an overall plan to commit genocide, indicated by the pattern of genocidal or potentially acts of genocide committed throughout the territory, against persons identified everywhere and in each case on the basis of their belonging to a specified group. The judgement of the International Court of Justice (ICJ) concerning Serbia’s involvement in the massacre of Bosnian Muslims (Bosniaks) at Srebrenica in 1995 should be greeted with considerable ambivalence.

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68. *Ibid.*, para. 452.

69. *Ibid.*, para. 456

70. *Ibid.*

71. Decisions, note 1, *Ibid.*, para. 469.



On the one hand, the International Tribunal for Yugoslavia has pronounced that the responsibility of a State in the matter of genocide is an undeniably positive development. On the other hand, however, the Court's decision is one of those judicial pronouncements that attempts to give something to everybody and leave everything as it was.<sup>72</sup> Having "absolved" Serbia from the principal crime, the ICJ offered a sort of "consolation prize" to Bosnia, affirming that the killings in Srebrenica had the character of genocide - a conclusion already reached by the ICTY.<sup>73</sup>

The fundamental problem with the ICJ's decision is its unrealistically high standard of proof for finding Serbia to have been legally complicit in genocide. After all, one can also be guilty of complicity in a crime by not stopping it while having both the duty and the power to do so, and when, through one's inaction, one decisively contributes to the creation of conditions that enable the crime to take place. The survivors of Srebrenica, for whom Bosnia was seeking damage awards, will receive nothing from Serbia. And if former Serbian President Slobodan Milosevic were alive, he would be absolved of the charge of genocide.

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72. Antonio Cassese, "ICJ Ruling, Bosnia vs. Serbia, Dangerous Precedent", <http://srebrenica-genocide.blogspot.com>, visited on 19 April 2007.

73. *Ibid.*