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The International Court of Justice and the Decriminalisation of Genocide

By Marko Attila Hoare, 9th March 2007

If anyone had still been dreaming that international courts might deliver justice to the victims of genocide, the decision of the International Court of Justice (ICJ) on 26 February, which found Serbia not guilty of genocide in the case brought against it by Bosnia-Hercegovina, should have been a final wake-up call. Ignoring what ICJ Vice-President Al-Khasawneh describes as **'overwhelming evidence of massive killings systematically targeting the Bosnian Muslims'**, the Court bent over backwards, split every hair possible and employed multiple and demonstrable logical contradictions in its efforts to avoid finding Serbia guilty of the most serious charges – genocide, conspiracy to commit genocide, incitement to genocide and complicity in genocide. This travesty of justice requires a serious re-evaluation of

international law concerning genocide, as well as our attitude to it.

Admittedly, the ICJ's decision is very far from the 'exoneration' of Milosevic that his apologists claim it to be. The Court found that Serbia was guilty of violating its obligation to prevent genocide from taking place at Srebrenica, which it could have done through its considerable influence over the Bosnian Serb perpetrators. The Court ruled that Serbia, even if it had not known that genocide would take place at Srebrenica, had sufficient reason to suspect that it might, therefore should have taken steps to ensure it did not. The Court also found Serbia guilty for failing to hand over Bosnian Serb commander Ratko Mladic, indicted for his role in the genocide, to the ICTY.

Furthermore, according to the ICJ's judgement **'it is 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'** and that **'the victims were in large majority members of the protected group [the Muslims], which suggests that they may have been systematically targeted by the killings.'** Moreover, **'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.'** The Court accepted that these actions, on the part of the Serb forces, were consistent with genocide; the only thing lacking, in the Court's eyes, was conclusive evidence of intent to destroy the Muslims as a group in whole or in part. This includes the period up to 19 May 1992, when Bosnian Serb forces were under the formal control of Milosevic's Serbia and Montenegro / Federal Republic of Yugoslavia.

The Court however accepted that Bosnian Serb forces were guilty of genocide at Srebrenica in July 1995, but by that time Serbia-Montenegro / the FRY was no longer in formal command of the Bosnian Serb forces, even though it was continuing to finance and supply them and exercised considerable influence over them. In other words, for the spring of 1992 there was conclusive evidence of the guilt of Milosevic's Serbia for massive

and systematic killings of Muslims and other crimes consistent with genocide, but not enough evidence to convince the ICJ of actual genocidal intent; and for the summer of 1995, there was conclusive evidence of genocide, but not enough evidence to convince the Court of Serbia's control over the perpetrators.

Bosnia's case against Serbia thus fell between two stools. But this was not because Bosnia did not have a strong case, merely that the Court chose to interpret the evidence in that manner. If we are to believe the Court's version of events, and accept that Serbia was not guilty of genocide, we must assume the following:

> Serbia, under Milosevic's leadership, militarily conquered large parts of its neighbour's territory, in the process of which it carried out massive, systematic massacres of Muslim civilians across the whole of Bosnian territory, coupled with additional crimes including the massive and systematic murder, torture and abuse of Muslim civilians in concentration camps, the mass rape of Muslim women and the systematic destruction of the Bosnian Muslim cultural and religious heritage. These actions resembled genocide in every respect, but there was no genocidal intent – merely the intent to carry out massive killings of a particular ethnic group.
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> These actions were carried out using the regular forces of Serbia and Montenegro (from 27 April 1992 the "Federal Republic of Yugoslavia") – the "Yugoslav People's Army" (JNA). In the course of planning and executing these actions, the Serbian leadership (Serbian President Milosevic, Yugoslav defence secretary Veljko Kadijevic, Yugoslav chief-of-staff Blagoje Adzic, and Serbian and Montenegrin members of the Yugoslav Presidency Borisav Jovic and Branko Kostic), organised Bosnian Serb JNA troops into a distinct body within the JNA, with Ratko Mladic as commander. On 19 May 1992 – after massive crimes had already been committed across Bosnia - these Bosnian Serb JNA forces formally became an independent Bosnian Serb army under Mladic, no longer under Serbian control, even though Serbia continued to finance and supply them, pay the salaries of Bosnian Serb officers and provide additional assistance to them through its regular military and police forces. These Serbian-supported Bosnian Serb forces continued their systematic, massive massacres of Muslim civilians, as a result of which the Serb-occupied areas of Bosnia were mostly emptied of Muslim civilians. But there is still no genocidal intent.
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> In July 1995, however, or some time shortly before, Mladic – the Bosnian Serb commander handpicked by Belgrade – suddenly acquired a genocidal intent. Forces under his command – still armed and financed by Serbia – carried out an indisputably genocidal massacre of 8,000 Muslim civilians at Srebrenica. The Serbian regime – the same one that organised the Bosnian Serb forces, commanded them in the systematic large-scale massacring of Muslim civilians across Bosnia in a manner that resembled genocide, and continued to finance and supply them after they became 'independent' and continued systematically to massacre Muslims "independently" – nevertheless did not intend something like Srebrenica to occur, even though they had sufficient reason to suspect that it might. The same Serbia which intended Bosnian Serb forces systematically to massacre Muslim civilians on a massive scale,

> did not intend Bosnian Serb forces to massacre them with a specifically genocidal intent; i.e. with the intent to destroy the Muslims as a group, in whole or in part. At this point, Serbia draws the line, and is therefore guilty of nothing more than a failure to prevent genocide.

The acquittal of Serbia thus rests on the Court's distinction between genocidal massacres – massacres carried out with an intent to destroy a specific group in whole or in part – and massacres that resemble genocidal massacres, but without the intent being proved.

This distinction begs several awkward questions. The Court found Serbia guilty of failing to prevent the crime of genocide, on the grounds that **'although it has not found that the information available to the Belgrade authorities indicated, as a matter of certainty, that genocide was imminent (which is why complicity in genocide was not upheld above), they could hardly have been unaware of the serious risk of it once the VRS forces had decided to occupy the Srebrenica enclave. In view of their undeniable influence and of the information, voicing serious concern, in their possession, the Yugoslav federal authorities should, in the view of the Court, have made the best efforts within their power to try and prevent the tragic events then taking shape, whose scale, though it could not have been foreseen with certainty, might at least have been surmised.'** But why should Belgrade have had reason to fear that genocide was about to be carried out, when all the massacres that both it, and the Bosnian Serbs, had organised up till then, had fallen short of the threshold of genocide ? Belgrade could reasonably respond to its conviction for failing to prevent genocide, by arguing that it had merely assumed that the Bosnian Serbs would simply carry out a 'regular' massacre of Muslim civilians. If there was no genocidal intent behind the pre-Srebrenica massacres, then how could Belgrade possibly have suspected that there was a 'serious risk' of such a genocidal intent having emerged prior to Srebrenica?

The Court claims that Belgrade was not in possession of any evidence to suggest that genocide was being planned at Srebrenica, merely that it 'might at least have been surmised'. The Court specifically states that **'The FRY [Federal Republic of Yugoslavia] leadership, and President Milošević above all, were fully aware of the climate of deep-seated hatred which**

reigned between the Bosnian Serbs and the Muslims in the Srebrenica region. Yet the Respondent has not shown that it took any initiative to prevent what happened, or any action on its part to avert the atrocities which were committed.' In other words, Serbia was expected to have 'surmised' that there was a 'serious risk' of genocide on the basis of the 'deep-seated hatred' of the Bosnian Serbs toward the Muslims. But why should this 'deep-seated hatred' have raised suspicions in Belgrade of a possible 'genocidal intent', when – in the view of the Court – the deep-seated Serb hatred of Muslims, manifested in countless acts of murder, torture, rape and cultural destruction at Omarska, Keraterm, Trnopolje, Foca, Brcko, Zvornik, Visegrad and elsewhere, did not indicate any genocidal intent?

In sum, the Court has condemned Serbia for failure to prevent genocide at Srebrenica, on the grounds that it should have predicted the possible 'genocidal intent' of the Bosnian Serb forces in 1995, while at the same time absolving Serbia of genocide in 1992, on the grounds that the mass killings, torture and rape of Muslims carried out by the Bosnian Serb forces under its command did not indicate any genocidal intent.

What precisely was the intent of the Serb forces in 1992, when they were carrying out what the Court described as their 'massive killings in specific areas and detention camps throughout the territory of Bosnia and Herzegovina', which 'systematically targeted' the Muslims, and their 'massive mistreatment, beatings, rape and torture causing serious bodily and mental harm, during the conflict and, in particular, in the detention camps.' ? The Court does not deny that Serbia's forces were guilty of 'ethnic cleansing'. However:

> Neither the intent, as a matter of policy, to render an area "ethnically homogeneous", nor the operations that may be carried out to implement such policy, can as such. be designated as genocide. However, this does not mean that acts described as "ethnic cleansing" may never constitute genocide, if they are such as to be characterized as, for example, "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part", contrary to Article II, paragraph (c), of the Convention, provided such action is carried out with the necessary specific intent (dolus specialis), that is to say with a view to the destruction of the group, as distinct from its removal from the region.

The Court therefore justified its acquittal of Serbia on the grounds that: **'The**

Applicant's [Bosnia's] argument does not come to terms with the fact that an essential motive of much of the Bosnian Serb leadership – to create a larger Serb State, by a war of conquest if necessary – did not necessarily require the destruction of the Bosnian Muslims and other communities, but their expulsion.'

In other words, the Court acquitted Serbia on the grounds that the systematic, massive killings, torture and rape of Muslims its forces were guilty of, while they may have constituted 'ethnic cleansing' and may have been carried out with the intent to render the Serb-held areas of Bosnia 'ethnically homogenous' through the removal of the Muslim population, did not constitute genocide, since this quest for ethnic homogeneity through mass killings may not have been motivated by an actual desire to destroy the Muslims as a group, in whole or in part, as an end in itself.

Genocide, as defined by the UN Convention on the Prevention and Punishment of the Crime of Genocide, does not necessarily have to involve the intent to destroy an entire ethnic group, merely the intent to destroy a group 'in whole or in part'. This, of course, was the definition that the ICJ employed. Thus, a campaign of atrocities involving the intent to destroy part of a group and expel another part from their land would constitute genocide. Serbia's campaign in Bosnia in the spring of 1992 involved the destruction of part of the Bosnian Muslims and the expulsion of another part from their land. Since the Court is not suggesting that the killings occurred accidentally (it admits that the Muslims were probably systematically targeted for mass killings across Bosnia), then its conclusion that Serbia did not intend to destroy part of the Muslims appears contradictory – how was it possible for Serbia to carry out the destruction of a part of the Muslims as a group, through systematic massacres, if that was not its intent ? The Court appears to be arguing that although Serbia intentionally carried out massacres to destroy part of the Muslims as a group, this intention was merely instrumental to the primary intention, which was to render the Serb-held parts of Bosnia 'ethnically homogenous' – therefore the intention was not genocidal.

A Court that achieves this level of hair-splitting in its efforts to avoid calling a spade a spade is one that has abandoned objectivity and ceased to pursue justice. It has been pointed out that the ICJ set its standard of proof too high, but this is the least of the problems with its judgement. The ICJ has, in fact, made the definition of genocide so restrictive that the phenomenon of genocide effectively disappears altogether. If genocide ceases to be genocide provided the deliberate destruction of a group in whole or in part can be excused through reference to a 'higher' aim, such as 'rendering an area ethnically homogenous', then even large parts of the Nazi Holocaust cease to be genocide. On the basis of the ICJ's logic, the Nazi perpetrators of the Holocaust could have pleaded that they did not intend to destroy the Jews as such, merely 'to render the Reich racially homogenous'.

The Nazis initially tried to create a Jew-free Reich through pressurising the Jews to emigrate, and this policy overlapped with the policy of extermination. Jewish emigration from the Reich was not prohibited until late October 1941, by which time the mass extermination of the Jews was already very much in progress. Even the minutes of the Wannsee meeting of January 1942, the closest thing that exists to a blueprint for the Holocaust, uses the word 'evacuation' as a euphemism for 'extermination'. And the Nazis could have come up with a whole string of other 'excuses' to satisfy the ICJ's new exemption clause: on the basis of the ICJ's logic, they could have argued that their massacres of Jews were intended merely as reprisals for partisan activities among the occupied populations of Eastern Europe; as a means of lessening the burden on food supplies; or as a means of containing epidemics in the ghettoes. They could have argued that the working to death of Jewish slaves at Auschwitz was motivated by the desire to provide munitions for the German armed forces. They could even have argued that their extermination of Jews in the death camps was motivated by the desire to acquire the raw materials to produce lamp-shades, bars of soap, dolls' hair and other consumer goods for the German civilian population. The ICJ's decision has opened up whole new vistas for the acquittal of states and individuals for genocide.

The ICJ's acquittal of Serbia for genocide and all related charges except for

failure to prevent and punish, is a travesty of justice, one that will serve to make future acts of genocide more rather than less likely. We can only speculate on the political or ideological considerations that may have motivated the judges to reach their decision, the controversial nature of which, even among legal experts, is indicated by the fact that three of the thirteen judges considered Serbia guilty of complicity in genocide, while one – the vice-president – considered Serbia guilty of genocide in full.

This travesty has not occurred in isolation, but follows on from the failure of the International Criminal Tribunal of the former Yugoslavia (ICTY) to indict or try the principal war-criminals of the wars in the former Yugoslavia. As the present author has written elsewhere, almost nobody of importance from Serbia has been or is being prosecuted for war-crimes in Bosnia-Hercegovina and Croatia by the ICTY. Milosevic's death last year robbed the ICTY of its only significant indictee for these crimes. The people of Croatia and Bosnia will have to rest content with the prosecution of a handful of Serbian officials of secondary importance, of which only one – Jovica Stanisic – can reasonably described as one of the architects of the war. Meanwhile, the principal surviving Serbian culprits (Jovic, Kostic, Adzic, Kadijevic and others) have not been indicted, while the two principal Bosnian Serb war-criminals, Radovan Karadzic and Ratko Mladic, have still not been arrested. With the ICJ's decision, international justice has definitely failed over the former Yugoslavia.

For practical purposes, there are two lessons that can be drawn from the ICJ's verdict. The first is that international law, as it now stands, is inadequate for the prevention and punishment of the crime of genocide, and should be changed. The second lesson flows naturally from the first: so long as international law remains as it is, the victims of genocide cannot rely upon it to seek redress from the perpetrators. The international community colluded with the Bosnian genocide in the early 1990s, and has since failed to face up to the injustice this involved. The more resolute international action in the late 1990s and early 2000s to halt the bloodshed in the former Yugoslavia, to punish the perpetrators and to provide redress for the victims – involving NATO intervention in Kosovo, the indictment of Milosevic and

other senior figures by the ICTY and the virtual separation of Kosovo from Serbia – now appear more than ever as merely a hiatus in the sordid story of international appeasement of aggression and genocide, which has always justified itself through reference to international law, UN mandates, multilateralism, the need for consensus and the like. Wherever genocide may occur – whether in Darfur or anywhere else – we need to take immediate action to stop it. Failure to prevent will never be mitigated by an international punishment on which nobody should rely.