

# The Genocide Case Before the International Court of Justice

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**Abstract:** Genocide, the crime of crimes, will be introduced on the example of the Genocide Case between Serbia/Montenegro and Bosnia/Herzegovina. The International Court of Justice will be examined based on its duties and boundaries. The paper leads through the blueprint of a court trail. It will show how to gain access to the court then discuss one theoretical approach on the main subject: Genocide. As a logical conclusion the courts abilities to prevent and punish, genocide will be introduced though the question of reparations. The role of the International Court of Justice will be analyzed and critically scrutinized.

**Keywords:** International Court of Justice, International law, Genocide, Bosnia-Herzegovina, Serbia.

## 1. Introduction

Few judgments by international courts have been anticipated as eagerly as the ruling, on 26 February this year, by the International Court of Justice (ICJ) in the Bosnian Genocide case<sup>1</sup> between Bosnia and Herzegovina (»Bosnia«) on the one hand and Serbia and Montenegro (»Serbia«<sup>2</sup>) on the other. The great public interest was largely a result of the seriousness of the allegations at stake. In its suit, initially filed in 1993, Bosnia accused Serbia of having masterminded a genocide during the Bosnian war of 1992-1995. For obvious reasons, the lawsuit was of paramount importance to many survivors of the war as well as the Bosnian authorities, even though one constituent element of the Bosnian State, the Bosnian Serb-led Republika Srpska, did all it could to have it retracted. To many Bosnians, the proceedings even gained in significance after the trial of Slobodan Milosevic has shortcut by his death – this seemed the final chance to hold Serbia accountable for its involvement in the war and the many crimes committed against the Bosnian Muslim population. Serbia, rejecting Bosnia's allegations as unfounded, was horrified by the prospect of being the first State to be found guilty in court of having committed what has been labelled »the crime of crimes«.<sup>3</sup> Convicted of genocide, Serbia faced the prospect of having to compensate Bosnia and of seeing its chances to join the European Union deteriorate further.

In addition to the enormous political stakes, the Bosnian Genocide case raised a host of controversial legal issues which international lawyers were keen to see addressed by the United Nation's principal judicial organ. These included questions of access to Court, State responsibility for involvement in proxy wars, whether genocide had been committed in Bosnia

and finally whether there could be something like collective responsibility for genocide. The following article provides a concise overview of these legal issues.

## 2. General Comments on Role of the International Court of Justice

In order to achieve this goal, it is first necessary to make some introductory comments on the nature of proceedings before the ICJ. Unlike one might have expected, the Court did not pronounce on the Bosnian war as such; its mandate was much more limited. The Court was only asked, and could do no more than, to pronounce on one specific type of wrongful conduct – violations of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (»the Genocide Convention«).<sup>4</sup> It had no mandate to assess whether other rules of international law had been violated during the Bosnian war (which had evidently been the case<sup>5</sup>). This notably meant that there could be no ICJ ruling on whether crimes against humanity or violations of human rights or the laws of war had been committed. This strangely restricted scope of the ICJ review resulted from one of the basic features of international judicial dispute settlement: international courts and tribunals, unlike national courts, do not automatically have jurisdiction to decide cases. Their jurisdiction is based on consent, which means that States have to agree to judicial supervision.

Consent can be given in different forms, ranging from a case-specific agreement to entrust a certain dispute to a court to a general declaration that a state submits to judicial supervision for all disputes. Typically, however, jurisdiction is established through a third form of consensual agreement, so-called compromissary clauses in international treaties, which provide that treaty parties can sue each other in disputes concerning matters falling within the scope of the relevant treaty. This was also the scenario underlying the Bosnian Genocide case: the ICJ's jurisdiction was treaty-specific and depended on Article IX of the Genocide Convention. As there are no treaties providing for ICJ rulings on, e.g., war crimes or crimes against humanity, and as Serbia had not accepted the ICJ's jurisdic-

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1 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, 26 February 2007, available at [www.icj-cij.org](http://www.icj-cij.org).

2 The official respondent in the case was Serbia and Montenegro, even though Montenegro had separated from that State in 2006. The Court noted that while Montenegro might be responsible for Serbia and Montenegro's wrongful conduct prior to 2006, the operative parts of the judgment itself only had effect vis-a-vis Serbia (*ibid.*, para. 77).

3 Cf. International Criminal Tribunal for Rwanda, Prosecutor v. Kambanda, Judgment and Sentence, Case No. ICTR 97-23-S (4 September 1998), para. 16 (available at [www.icttr.org](http://www.icttr.org)).

4 78 U.N.T.S. 277.

5 For brief comments by the Court see e.g. paras. 277 and 319 of the judgment. The proceedings of the International Criminal Tribunal for the Former Yugoslavia and, more recently, the War Crimes Chamber in Bosnia, account to the scope of these massive violations of international humanitarian law.

tion in a general way, Bosnia had to formulate its claim in terms of a violation of the Genocide Convention. This in turn forced the ICJ to focus on one specific question of the Bosnian war – the issue of genocide.

Moreover, the Court's competence was limited in yet another way, namely as regarded the identity of the claimant and respondent in the case. The ICJ is competent to handle disputes between States only.<sup>6</sup> Non-state entities have no standing to appear before it in contentious proceedings. This again meant that the case before the ICJ could not mirror the conflict on the ground, which was primarily fought between different ethnic groups within Bosnia (some of them receiving significant support from outside). Before the ICJ, the Bosnian government could not sue the main perpetrator of the alleged genocide, i.e. the Bosnian Serbs. Instead, pursuant to the inter-state concept of dispute settlement governing ICJ proceedings, if it wanted to institute contentious proceedings, it had to, and could only, file its claim against Serbia. As a consequence, the Bosnian claim put the ICJ in a rather uncomfortable position. Restricted by its jurisdictional regime, it could only address very specific aspects of a much broader conflict. Under these circumstances, it hardly could do justice to the complex realities of the Bosnian war.

### 3. The Main Features of the Court's Judgment

The eventual judgment came almost 14 years after Bosnia instituted the proceedings. In 1996 the Court found that it had jurisdiction to entertain the claims, but the proceedings dragged on for another decade. This in turn put pressure on the Court, as expectations had grown, over the years, in particular after Milosevic's trial before the ICTY was aborted. The judgment delivered on 26 February 2007 is one of the longest in the Court's history, comprising no less than 171 pages and prompting a flurry of individual opinions. Of the many legal holdings, five stand out, and will be briefly treated in the following.

#### 3.1. Access to Court

Before addressing the substantive questions involving the Genocide Convention, the Court had to clarify whether Serbia could even be a party at all to the proceedings. On the surface, it seemed rather odd that such a basic matter (technically referred to as a question of »access to court«) should have to be dealt with after 14 years of litigation, including the 1996 jurisdictional judgment. Yet the matter was more complex than might appear at first sight. It reflected the complicated legal-political aftermath of ex-Yugoslavia's violent break-up, the shifting perception of the world community and the shifting viewpoints held by Serbia during and after the Milosevic regime regarding its relation to what once was the Socialist Federal Republic of Yugoslavia.

When the former Yugoslav republics of Slovenia, Croatia, Bosnia and Macedonia claimed independence, it was clear that in terms of international law they would be treated as new States. With Serbia and Montenegro, things were different. The Milosevic regime claimed that the Federal Republic of Yugoslavia (later to be renamed Serbia and Montenegro) was identical to former Yugoslavia and continued old Yugoslavia's UN membership as well as its status as party to international treaties. The new Yugoslav States denied this identity claim, not the least to force Serbia to apply anew for membership in international organisations, including the United Nations. The international community, while not taking an unequivocal position, also largely rejected the identity claim.<sup>7</sup> After the toppling of the Milosevic regime, the new Serbian government abandoned the old claim and did indeed apply to become a new UN member in 2000.<sup>8</sup>

These developments had important consequences for the ongoing proceedings before the ICJ, as under Art. 35 of the ICJ Statute, the question of access to court depends on participation in the ICJ Statute which in turn is linked to a State's membership in the UN.<sup>9</sup> This meant that if Serbia was identical to former Yugoslavia, it simply continued Yugoslavia's membership not only in the UN, but also as a party to the Statute of the ICJ, and hence could be a party to the proceedings. In contrast, if it had to apply for new UN membership, it was not a party to the ICJ Statute either, and arguably did not as such have access to the Court at the time Bosnia instituted the proceedings in 1993.

In the 2006 oral proceedings, Serbia made exactly this point. Its submission seemed the most plausible assessment of the legal status quo as of 2006 and was in line with the Court's decisions in similar cases.<sup>10</sup> Yet Bosnia relied on the Court's 1996 jurisdictional judgment, which it considered to have settled the question of access with binding force (so-called »res judicata«). In that judgment the Court had indeed affirmed that it had jurisdiction under the Genocide Convention. However, it had not expressly ruled on questions of access, as Serbia – in line with its »identity claim« which it then still maintained – had not raised the question.<sup>11</sup>

In its 2007 judgment, the Court therefore had to decide whether to follow Serbia's plausible assessment of the present legal situation or to emphasise legal stability and finality by following the 1996 judgment. It opted – with a number of judges dissenting – for the latter course, stating that when affirming its jurisdiction in 1996, it had implicitly decided the question of access.<sup>12</sup> This amounts to an ambitious interpre-

<sup>7</sup> See in particular General Assembly resolution 47/1 (1992), stating »that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the UN«, but falling short of an actual expulsion or suspension in the sense of Arts. 5, 6 UN Charter.

<sup>8</sup> General Assembly resolution 55/12 (2000).

<sup>9</sup> Cf. Art. 35 of the ICJ Statute pursuant to which the Court is open to State parties to the Statute, whereas non-parties only have access under the conditions set out in para. 2.

<sup>10</sup> Cf. notably the judgments of 15 December 2004 in the so-called NATO cases between Serbia and Montenegro on the one hand, and various NATO States on the other (available at [www.icj-cij.org](http://www.icj-cij.org)).

<sup>11</sup> For tactical reasons, Bosnia (while vigorously disputing the identity claim in political fora) had not brought up the matter either – else, it would have run danger that the Court dismissed the case altogether.

<sup>12</sup> Judgment (supra, note 1), paras. 114ff.

<sup>6</sup> Cf. Art. 34 (1) of the Court's Statute, which provides: »Only states may be parties in cases before the Court.«

tation which stretches the *res judicata* concept quite a bit.<sup>13</sup> However, on balance it seems acceptable, if only for political reasons, and as any other decision would have affected the Court's credibility. In fact, those looking to the ICJ as an instrument for justice would have been dismayed had the Court, 14 years after the institution of proceedings, dismissed the Bosnian claim for an allegedly »technical« reason such as access to court. The *res judicata* principle thus provided the ICJ with an elegant way out of the dilemma – a dilemma that resulted both from the international community's unprincipled approach to the question of state succession in the Yugoslav case as well as from the Court's diverging decisions since 1993. The problem of course is that international courts should not be pressured into construing jurisdiction where it does not exist. In the present case, the ICJ has come rather close to that fine red line.

### 3.2. The Question of Genocide

Having confirmed its jurisdiction, the Court proceeded to address the substantive questions raised by Bosnia's application: whether the crimes committed during the war in Bosnia 1992-1995 amounted to genocide; whether, if answered in the affirmative, this genocide could be attributed to Serbia; and, finally, if Serbia were found guilty of a violation of the Genocide Convention, what reparations Serbia owed to Bosnia.

For the Court, incidentally, this was the first time it was called upon to give a ruling concerning the substance of the Genocide Convention. Before applying the definition of the crime of genocide to the events in Bosnia, the Court therefore had to clarify the legal obligations of State parties to the Genocide Convention. It found that State parties have an obligation both to prevent genocide and to punish those committing genocide.<sup>14</sup> Somewhat surprisingly, the first question to address in more detail was whether State parties also were prohibited from committing genocide. What seems like an absurd question to ask was indeed an essential one, as the plain text of the Genocide Convention does not entail such an obligation for State parties; it focuses on the conduct of individuals and only mentions the State parties' obligation to punish individuals committing genocide. The Court decided that – by logic and implication – the Convention also had to include an obligation for states parties not to commit genocide.

The next issue was whether the events of the war in Bosnia 1992-1995 amounted to genocide in the legal sense.<sup>15</sup> The legal definition of genocide is set forth in Article 2 of the Genocide Convention and consists of two elements: (1) certain prohibited acts which are described in more detail, including killing members of the victims groups, and (2) the

intent to destroy the victim group in whole or in part.<sup>16</sup> It is the second requirement, the specific intent to destroy, which distinguishes genocide from other international crimes such as crimes against humanity or war crimes: the perpetrator of genocide aims not only at the victims as individuals, but at the same time at the group to which these individuals belong – the objective is to wipe out this group as such in whole or in part.

It is important to note that the Court was not the first judicial body to address this question, as the International Criminal Tribunal for the Former Yugoslavia (ICTY) was established in 1993 to prosecute individuals responsible for war crimes, crimes against humanity and genocide committed during the wars in the Balkans. The Office of the Prosecutor at the ICTY had in several cases charged Bosnian Serbs as well as Slobodan Milosevic with genocide, but only in two instances – both related to the killing of more than 7,000 Bosnian Muslim men and boys at Srebrenica in July 1995 – had the judges of the tribunal reached a verdict including the crime of genocide. The question was whether the ICJ would follow this jurisprudence of the ICTY or whether it would assess the situation differently.

In its judgment, the Court gave considerable weight to the ICTY's jurisprudence, agreeing with the ICTY's assessment of the evidence. In fact, the Court added very little reasoning on its own and concurred with the ICTY that the numerous crimes inflicted upon the Bosnian Muslim population were not committed with the specific intent required by the legal definition of genocide, i.e. the intent to destroy the Bosnian Muslim group in whole or in part. As a logical consequence of this rather passive approach to the case-law of the ICTY, the Court found that only the massacres at Srebrenica amounted to genocide, and – more particularly – that the leaders of the Bosnian Serb forces had decided to destroy the Muslim population of Srebrenica only in the days before the massacre. Thus the highest judicial UN organ has now also declared the mass killings at Srebrenica to constitute genocide.

In so doing, the Court displayed a cooperative approach to the ICTY as a separate international tribunal and avoided a ruling that could contribute to what is referred to as potential »fragmentation of international law«. At first glance, it seems as if the Court did the obvious when confirming the ICTY in its findings on Srebrenica and other crimes committed in Bosnia during the war. The ICTY is after all a specialised tribunal providing for criminal law procedures to confirm and question evidence, and has its mandate to do so directly from the UN Security Council. It would indeed have given rise to a lot of difficult questions if the Court had arrived at a different conclusion than the ICTY, for example by not calling

16 Article 2 of the Genocide Convention reads in full: »In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

13 Cf. the joint dissenting opinion of Judges Ranjeva, Shi and Koroma appended to the Court's judgment.

14 Judgment, paras. 161ff. More on the obligation to prevent genocide *infra*, at 3.4.

15 Cf. Eric Markusen and Martin Mennecke, *Genocide in Bosnia and Herzegovina*, in: Samuel Totten (ed.), *Genocide at the Millennium*, 2005, 20ff. for references to genocide scholars who have described the whole conflict in Bosnia as genocide, applying non-legal definitions of genocide.



Srebrenica a genocide or by labelling the whole conflict in Bosnia as genocidal.

This danger, however, cannot mend the fact that the Court basically chose not to critically engage with the ICTY's jurisprudence or, as it actually was called upon, the Genocide Convention and its definition of genocide. The mere recital of the ICTY's conclusions stands in sharp contrast to the importance attached to genocide as the so-called »crime of crimes«. It should also be noted that the ICTY's findings on genocide concerning Srebrenica and the Bosnian war as a whole have not remained uncontested in the literature.<sup>17</sup> Consequently, two of the dissenting opinions disagree sharply with the judgment and provide for – albeit contradicting – analyses of the legal definition of genocide which the judgment entirely lacks. This lack of engagement with some of the crucial evidence and the legal definition of genocide weakens the authority of the judgment. It will be recorded not only by international criminal lawyers, but also outside the legal sphere, for example among genocide scholars and, most importantly, among the people in Bosnia. The fact that only Srebrenica not the war in Bosnia as such has been labelled as genocide is not only a matter of international law, but carries great emotional value and amounts for many survivors to genocide denial. Of course, for a court of law this cannot be a relevant factor in its findings, but it should have served as a reminder to take the genocide question most seriously and not to limit its judgment to quotations of the ICTY case-law.

### 3.3. Attribution and Complicity

Having ruled that the Srebrenica massacres constitute genocide as defined in the Genocide Convention, the Court had to assess whether these genocidal acts could be imputed to Serbia. This was in legal terms a difficult issue, as the immediate perpetrators no doubt had been Bosnian Serbs. Generally, under international law, States are responsible for the conduct of their State organs only. The Court quickly (and uncontroversially) found that the Bosnian Serbs had not acted as official or de facto organs of Serbia. However, it is accepted that States are also responsible for conduct of persons who are neither official nor, de facto organs if the State in question directs and controls this conduct. The requirements of such a responsibility for acts of non-State organs have recently received much attention in the case-law of different international tribunals and academic writings. The traditional rule, set out in the ICJ's Nicaragua judgment, was relatively restrictive: pursuant to it, States are only responsible for conduct of those non-State organs they effectively control and direct.<sup>18</sup> What is more, attribution presupposes that the State directs and controls the specific conduct for which responsibility is alleged, i.e. in the present case the massacres at Srebrenica. In contrast, many have argued for a broadening of the rules of attribution to comprise the involvement of States that do not direct or control the specific conduct in question. In particular, the ICTY,

starting in its Tadic judgment, famously deviated from the ICJ's Nicaragua test and stated that States were responsible for conduct of non-State organs over which they exercised a general »overall control«.<sup>19</sup>

Unlike on the question of genocide, the ICJ's judgment on this point did not follow the ICTY's approach, but openly criticised it. The ICJ asserted that the ICTY's »overall control test«, as developed in the Tadic judgment, overstretched the limits of attribution. Having confirmed its restrictive position, the Court found that Serbia had not directed and controlled the Srebrenica massacres. Instead, it held that by 1995, the Bosnian Serbs had emancipated to some extent from Serbia. While still receiving logistic and financial support, the Court held that they were not acting under direct instructions from Belgrade. What is more, if indeed the leaders of the Bosnian Serbs forces at Srebrenica had genocidal intent only from about mid-July 1995 (as the Court had stated earlier, confirming findings of the ICTY<sup>20</sup>) there was little time for Belgrade to exercise control or direction.

On the basis of the Court's restrictive assessment of the rules of attribution, this result seems defensible. It is another question whether the restrictive position is convincing. It certainly provides a relatively clear yardstick against which State support for non-State actors can be assessed, and thus produces more predictable results. Yet one might argue that it allows States to fund and arm non-State actors and still escape responsibility for their conduct. It might thus be that the flexible »overall control test« would better suit the realities of international proxy wars. Realistically, however, the Court's clear confirmation of the restrictive test is likely to settle the debate and to put an end to the ongoing controversies. At the same time, it is interesting to note that while following the ICTY almost schematically on questions of genocide, the Court gave short shrift to the same tribunal's attempt to reformulate the rule of attribution – i.e. on an issue of general international law. The judgment's firm language seems to suggest that where general international law is concerned, the Court views itself as the main, if not sole interpreter of international law.

The relationship between Serbia and the Bosnian Serbs also was decisive for the Court's handling of Bosnia's claims that Serbia at least was responsible for complicity in genocide. The Court left open the (long controversial) question of whether an accomplice in genocide had to have the same specific intent required of the principal wrongdoer. It only found that it could not be established that Serbian authorities knew beforehand that the Bosnian Serbs intended to destroy the Bosnian Muslims of Srebrenica. Any finding on complicity at least required that the accomplice was aware of the wrongful act in question.

As a matter of law, this aspect of the decision seems convincing – to hold a State responsible for conduct of which it was not aware would indeed be hard to justify. However, the real question was not one of law, but one of evaluating the evi-

17 Cf. Markusen/Mennecke, supra note 15, 21ff. for further references.

18 Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), Judgment, 27 June 1986, paras. 109-115.

19 International Criminal Tribunal for the Former Yugoslavia, Prosecutor v. Tadic, Judgment, Case IT-94-I-A (15 July 1999), paras. 98ff., particularly paras. 116-145 (available at [www.un.org/icty](http://www.un.org/icty)).

20 Judgment, paras. 292-295, referring to relevant judgments of the ICTY, See also supra 3.2.

dence. On this point, the Court adopted a rather strict approach, requiring Bosnia to establish Serbia's knowledge in a fully conclusive way. This standard was difficult to meet, especially as Bosnia could not compel Serbia to disclose sensitive pieces of evidence. It remains to be seen whether in future fact-intensive cases, the Court will be more willing to accept reasoning based on inferences. In any event, the present judgment underlines the need to further develop the Court's regime of evidence.

### 3.4. The Duty to Prevent and to Punish Genocide

After having found that Serbia neither directly nor indirectly could be held accountable for the Bosnian Serb actions at Srebrenica, the Court turned to the other two Genocide Convention obligations for State Parties. Had Serbia violated the duty to prevent genocide or the duty to punish those who committed genocide at Srebrenica?

It was the first time that an international court pronounced on the scope of the obligation to prevent genocide – in the literature prevention was considered to form the weak spot of the Genocide Convention which by and large focuses on matters pertaining to the punishment of genocidaires.<sup>21</sup> The Court found that the duty to prevent is a distinct legal obligation, incumbent on all State Parties to the Genocide Convention, and that it requires states »to employ all means reasonably available to them, so as to prevent genocide so far as possible.«<sup>22</sup> According to the Court, this duty did not require State parties to actually prevent the genocide from happening, but »to take all measures [...] which were within [their] power and which might have contributed to preventing the genocide.«<sup>23</sup> The Court listed then a number of criteria to define the duty further, pointing amongst others to the geographical proximity of the looming genocide and »the capacity to effectively influence the actions of persons likely to commit, or already committing, genocide.«<sup>24</sup> Finally, the Court stated that while complicity requires full knowledge of the genocidal intent of the perpetrators, the duty to prevent becomes active when the State party is aware or should have been aware of this genocidal intent.<sup>25</sup>

Applying this newly discovered duty to prevent to Serbia's role towards the Srebrenica genocide, the Court found that Serbia was »in a position of influence«, in fact »unlike that of any of the other State parties« to the Genocide Convention.<sup>26</sup> Recalling that Serbia did not have knowledge of the genocidal intent – and therefore could not be found guilty as accomplice to the massacres – the Court still concluded that Serbia »could hardly have been unaware of the serious risk of it once the [Bosnian Serb forces] had decided to occupy the Srebrenica enclave.«<sup>27</sup> The Court held therefore Serbia in breach of the duty to prevent genocide.

The Court's ruling on the existence and in particular on the scope of a legal obligation to prevent genocide came – perhaps unlike the other findings in this judgment – as a great surprise to most observers. There was no State practice or case-law on this issue and most legal research had taken the position that the Genocide Convention did not entail a specific obligation to prevent, at least not one that could be adjudicated. It was assumed that the concept of prevention did not go further than State Parties having the option (i.e. not a duty) to engage relevant UN organs (Art. 8 Genocide Convention) or the obligation to enact legislation concerning the punishment of genocidaires which in turn could contribute to prevention by deterring potential perpetrators in the future. At first sight, mindful of atrocious conflicts such as in Darfur, it seems laudable that the Court elevated genocide prevention to a legal obligation for the currently 140 states parties to the Genocide Convention. This focus on the crime of genocide, however, also entails certain dangers such as less attention to non-genocidal conflicts and a renewed tendency among government to simply avoid calling a given crisis »genocide« in order to circumvent the legal obligation to prevent genocide.<sup>28</sup> This new obligation to prevent certainly requires more analysis.

Finally, the Court turned to the duty to punish those who have committed genocide. Article 6 of the Genocide Convention specifies that state parties shall prosecute perpetrators before their own national courts, if genocide was committed on their national territory, or before relevant international tribunals, if the state parties have agreed to this tribunal's jurisdiction. The Court found that the ICTY is such international tribunal and that Serbia by way of signing the Dayton peace agreement in 1995 and by becoming a UN member in 2000 had accepted the jurisdiction of the ICTY. Given that Serbia had not surrendered Ratko Mladic, the Bosnian Serb general suspected to have been behind the massacres at Srebrenica, to the ICTY – despite strong indications of Mladic hiding in Serbia – the Court found Serbia to have violated the duty to punish genocidaires. This part of the judgment did not come as a surprise, as it only confirmed earlier statements by the ICTY chief prosecutor, the European Union and the United States who all had called on Serbia to deliver any remaining fugitive in its reach to the ICTY.

### 3.5. Issues of Reparation

Having addressed Bosnia's claims based on the Genocide Convention, it remained for the Court to spell out the consequences of Serbia's wrongful conduct. As is often the case in ICJ proceedings, the question of reparation had received relatively little attention during the actual hearings. Still, in order to underline the potential impact of reparation, it is worth mentioning that according to statements of former Bosnian counsel, Bosnia might have claimed compensation of up to 100 billion US dollars.<sup>29</sup> As the Court had largely rejected Bos-

21 See only William A. Schabas, *Genocide in International Law*, 2000, 447ff.

22 Judgment, *supra* note 1, para. 430

23 Ibid.

24 Ibid.

25 Ibid., para. 432.

26 Ibid., para. 434.

27 Ibid., para. 436.

28 Cf. Martin Mennecke, *What Is In a Name? Reflections on Using, Not Using and Overusing the »g-word«*, *Genocide Studies and Prevention*, vol. 2, 2007, 57-72.

29 Cf. the information given at <http://listserv.buffalo.edu/cgi-bin/wa?A2=ind0404&L=twatch-l&D=1&P=16869>.

nia's claims, it seemed unlikely that it would award a major sum of this sort.

Even so, the Court's statements are noteworthy. Regarding Serbia's failure to punish perpetrators of genocide, matters were rather clear. There was sufficient evidence that this failure was on-going; hence Serbia was ordered to cease its wrongful conduct – i.e. to hand over those suspected of (and prosecuted for) genocide such as General Mladic.

Serbia's failure to prevent genocide raised more complex issues of reparation, and the Court's decision on this point can be seen as surprising. In particular, the Court expressly ruled out any Bosnian claim for compensation. In its view, compensation (of whatever amount) was not the appropriate remedy, as it could not be established that Serbia could have actually prevented the genocide. Instead, Serbia's failure to prevent merely triggered a duty to make satisfaction. In line with its established jurisprudence, the Court then found the judgment itself (declaring Serbia responsible) would amount to satisfaction.

There is a certain tension between the Court's progressive findings on the existence and scope of the duty to prevent, and its rather reluctant pronouncements on reparation. Having emphasised the importance of prevention as such (regardless of whether prevention actually prevents the genocide from being committed), it is curious that the Court ruled out compensation as a form of reparation. This seems a step back from the progressive finding on the duty to prevent. Yet in fairness, it must be admitted that there is little consensus on the consequences of wrongful omissions in international law. As a result, the Court's judgment seems to suggest that even where States are obliged to act (e.g. in order to prevent the commission of genocide), they need not necessarily fear the legal consequences of their wrongful omission.

#### 4. Conclusion

The 26 February judgment completed 14 years of litigation about violations of the Genocide Convention. On the surface, the results of this litigation seem rather meager. Bosnia obtained much less than it had hoped for given that only Srebrenica was found to fulfil the legal criteria for genocide (and not the remainder of the war in Bosnia) and that Serbia could not legally be held accountable for its support to the Bosnian Serbs – at least not directly. On the other hand, Serbia was not acquitted either: it was found to have breached its duty to prevent and punish genocide, and was chided for having supported the Bosnian Serbs, whose criminal conduct

was placed on record. Serbia has thus become the first State since the adoption of the Genocide Convention in 1948 held by the highest UN court to have breached this essential international treaty.

In the Balkans, responses to the judgment ranged from strong disappointment and dejection among Bosnian survivors to outright approval in Serbia, while more nuanced statements could also be heard. The preceding analysis suggests that neither side can claim to have »won« the case. Only time will tell whether the judgment does more than confirm the different sides in their respective narratives and whether it can function as a starting point for a new approach. Some of the international reactions to the judgment quickly pointed in that direction. The United States and the European Union reiterated their demands to Serbia to cooperate with the ICTY, but also labelled the judgment a chance »to move forward«. In fact, it cannot escape the discerning observer that the rather moderate judgment on Serbia's role concerning genocide in Bosnia coincided with international talks on granting Kosovo some degree of independence from Serbia. While the Court's President, Rosalyn Higgins denied that the judgment was part of a political compromise, it certainly fit Western efforts to strengthen pro-democratic and pro-Western forces in Serbia.<sup>30</sup>

Finally, from an institutional perspective, the proceedings shed light on the role of the ICJ in handling politically sensitive cases – cases with which it is increasingly charged. Here, the verdict on the Court's role is at best mixed. True, the Court rendered a cautious and balanced judgment and avoided major antagonisms among the judges. On the positive side, it also avoided a dismissal on technical grounds which would have alienated many States parties to its Statute. On the other hand, the 14 years of litigation show that when involved in major political disputes, the Court can only play a rather limited role: it can assess aspects of a legal situation retrospectively, but has few or no means at its disposal which would permit it to become actively engaged in on-going conflicts. The role of the »World Court« thus is much more limited than those believing in the virtue of settling international disputes judicially would hope. In light of this limited role (which in turn is largely a consequence of States' unwillingness to submit to judicial supervision) it is important to recall that true reconciliation only can come from the victims and over time; it cannot be imposed by a international court, not even the »World Court«.

<sup>30</sup> Cf. Higgins' remarks to the press, 26 February 2007: »That does not mean, of course, that the Court has been seeking a political compromise, still less any predetermined outcome.«