CURRENT ISSUES

UDC: 341.91:341.485](497.6)
Biblid 0543-3657, 58 (2007)
Vol. LVIII, No. 1125–1126, pp. 5–15
Original Scientific Paper
March 2007

A Comment on the Judgement of the International Court of Justice in the Case Concerning the Application of the Genocide Convention

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ABSTRACT

The paper provides a detailed analysis of the International Court of Justice's judgement in the Case Concerning the "Application of the *Convention on the Prevention and Punishment of the Crime of Genocide*" (Bosnia-Herzegovina *vs*. Serbia). It points to the main contradictions in the legal reasoning related to the issue of the Court's jurisdiction and its interpretation of the definition of the crime of genocide. For the first thing, the jurisdiction of the Court is based on the simplistic application of the *res judicata* principle to the 1996 Judgement. Secondly, the interpretation of the definition of genocide given by the Court and its application are profoundly incoherent. Those legal contradictions can be explained both by the historical importance of the case and the constraining media and political context of the Bosnian war. Therefore, the Court's decision seems equally politically balanced and legally arguable.

Key words: the *res judicata* principle, accessibility of the court, inconsistency, genocidal intent, the notion of the group and its part, legal qualification of an act, the Srebrenica massacre, political factors.

On February 26, 2007, the International Court of Justice (ICJ) brought to a conclusion the fourteen-year long dispute over the charges of Bosnia and Herzegovina against Serbia. This is a very important verdict since it was the first time in the history of the International Court of Justice that it had to decide on a state's responsibility for the crime of genocide. The charges for the violation of the *Convention on the Prevention and Punishment of the Crime of Genocide* (1948) were raised against the Federal Republic of Yugoslavia (FRY) in 1993, while the civil war in Bosnia and Herzegovina was in the full swing.[1] Bosnia and Herzegovina's charges raised two fundamental questions, which the ICJ had to supply with answers. The first question is: is the crime committed in Bosnia and Herzegovina genocide. In case of a positive answer, the Court would have to answer another question: is the Respondent guilty of the committed crime and, if established so, to what degree it is guilty.

The ICJ's answer to the first question was positive. It has been established that the crime of genocide was indeed committed in Srebrenica in summer 1995, which has raised the issue of Serbia's responsibility for it. Serbia has been found responsible for the charges set out in three paragraphs of the indictment. According to Paragraph 4, Serbia has been found responsible for the failure to act in compliance with the obligation to

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The paper is a result of the research carried out within a project funded by the Ministry of Science of the Republic of Serbia.

[1] Since the establishment of the proceedings, the Respondent State changed its name three times: Federal Republic of Yugoslavia, State Union of Serbia and Montenegro and, finally – Serbia. In the paper, we will use its official name at the moment in question.

prevent the commission of genocide (it is an obligation of conduct, not of results – in other words, it is found responsible for not attempting to prevent the Srebrenica crime); according to Paragraph 5, it has been found responsible for not acting in compliance with the obligation to punish the crime of genocide, and, finally, according to Paragraph 7, for the breach of the provisional measures rendered by the ICJ in April and September 1993. The charges set out in other paragraphs of the indictment – the most serious of which include commission of genocide, complicity in genocide, and incitement to commit genocide – were dismissed. Serbia has not been *de facto* punished for the breach of the above-mentioned international obligations; according to the ICJ's Judgment, it is only obliged to establish, as soon as possible, full cooperation with the International Criminal Tribunal for the former Yugoslavia (ICTY) and to transfer accused individuals to ICTY.

The Judgment of the ICJ elicited adverse reactions in the countries parties to the dispute. While in Bosnia and Herzegovina the feeling of disappointment was apparent, Serbia was overwhelmed by the feeling of relief and satisfaction. However, both Bosnia's disappointment and Serbia's satisfaction are objectively unfounded. In fact, the reactions of both parties arise from subjective reasons, i.e. perceptions which are quite far from reality. Bosnian Muslims are dissatisfied because they believe that the perception of the war created by their war propaganda is an historical truth. On the other hand, Serbia, being accustomed to negative experiences with the Great Powers, anticipated the worst possible outcome: that the Court might find Serbia responsible for genocide. The satisfaction on the part of the Serbian party because of the "mild" judgement is the result of that fear. But, perceived from a relevant standpoint – against the background of facts, i.e. factual situation and legal theory, this satisfaction inevitably gets relativized. Namely, the crime of genocide is principally a legal category: any court, and particularly the ICJ, must remain immune to both the overall political context and the political connotation of the notion of genocide. However, we will show that the legal construct presented in the Judgement was to a certain extent modified by political imperatives. A politically balanced judgement is the result of this modification. In terms of legal theory, the Judgement is problematic in several respects. In the first section of the paper, we will deal with the issue of the ICT's jurisdiction, whereas in the second, the issues of genocide and responsibility of the State will be discussed.

The issue of jurisdiction: an inevitable inconsistency?

As a consequence of a rather peculiar course of events in this case, the ICJ had to face the issue of jurisdiction, which had arisen in an unusual and rather complex way. The Court established its jurisdiction *prima facie* in 1993. After that, the Federal Republic of Yugoslavia raised preliminary objections concerning the Court's jurisdiction: these objections were dismissed in 1996 by the Court's decision. It should be pointed out that in those objections concerning the Court's jurisdiction, the FRY did not question its own capacity as a party to a dispute before the Court. The submitted *ratione personae* objections challenged the capacity of Bosnia and Herzegovina, not that of the FRY. Reasonably enough, since the Federal Republic of Yugoslavia maintained that it was the legal successor of the Socialist Federal Republic of Yugoslavia (SFRY). FRY's (re)admission to membership in the United Nations (UN) in November 2000, gave rise to a new situation, which resulted in an important decision of the ICJ in 2004, in the case concerning the "Legality of Use of Force" in which the Court held that it had no jurisdiction to entertain the claims made in the Application of the FRY against Member States of NATO. Having in mind that the FRY was admitted to membership in the UN in November 2000, the Court rightly concluded that before the admission the FRY could not have been a UN Member State. It clearly stated that between 1992 and 2000 it did not have access to the Court under Article 35 of the Statute of the International Court of Justice, since it was not a UN Member State. Consequently, in the case concerning the "Application of the Genocide Convention" the Court was in a delicate position which could result in contradictions concerning the issue of jurisdiction. By the 1996 Judgement, the Court confirmed its jurisdiction in a case in which one of the parties was the FRY. On the other hand, the same Court claimed that it had no jurisdiction in another case in which one of the parties was also the FRY. Therefore, it had to devise a solution that would ensure a certain level of consistency in legal reasoning and, in the same time, be theoretically founded. In an article discussing the same subject in 2006, we argued that it was possible to devise a consistent legal construction in favour of both arguments – that the Court had jurisdiction and that it did not have it – but that the arguments denying its jurisdiction were much better founded and that the ICJ must have acted in compliance with them.[2] Although the ICJ claimed its jurisdiction, feeble arguments by which it supported its claims actually affirmed the position that it did not have jurisdiction in the case concerning the "Application of the Genocide Convention".

[2] Miloš Jovanović, „Tužba BiH za genocid pred Međunarodnim sudom pravde: pravna razmatranja i političke posledice", *Međunarodna politika*, Vol. LVII, No. 1123, 2006, p. 8.

a) "Injudiciously" delivered Judgement concerning the jurisdiction of the Court gave rise to a contradiction that could have been avoided...

In resolving the issue of jurisdiction in this case, the ICJ has chosen a rather simple method, disregarding important and powerful argumentation which, paradoxically, it itself devised in the case concerning the "Legality of Use of Force", and which led it to the conclusion that it did not have jurisdiction in that case.

1. The argumentation of the ICJ in favour of the position that it had jurisdiction – the 1996 Judgement: *res judicata*

"The Court accordingly concludes that, in respect of the contention that the Respondent was not, on the date of filing of the Application instituting proceedings, a State having the capacity to come before the Court under the Statute, the principle of *res judicata* precludes any reopening of the decision embodied in the 1996 Judgment. [...] The Court thus concludes that, as stated in the 1996 Judgment, it has jurisdiction, under Article IX of the Genocide Convention, to adjudicate upon the dispute brought before it by the Application filed on 20 March 1993."[3]

The International Court of Justice claimed that it had jurisdiction because, according to its explanation, it was not possible to reconsider the 1996 Judgement concerning jurisdiction. The issue of jurisdiction was definitely settled by the 1996 Judgement. In our opinion, such an approach is entirely problematic.

"I do not believe that the issue can be resolved so simply" – says Judge Tomka in his Separate Opinion.[4] The explanation offered by the Court is indeed too simple and lacking in theoretical elaboration to be considered a sound basis for the establishment of Court's jurisdiction. Such a decision of the ICJ failed to provide answers to very powerful arguments in favour of the position challenging its jurisdiction.

The Serbian party has attempted to show, by principled argument, that a distinction must be drawn between the effect of the judgements determining the Court's jurisdiction and the judgements given on the merits of a case. Accordingly, compared to the effect of judgements given on the merits of the case, that of the judgements determining the Court's jurisdiction should be weaker. Maintaining that the Court must always be sure of its own jurisdiction, the Serbian party suggested that the Court's jurisdiction could be reconsidered, regardless of the 1996 Judgement by which the Court established its jurisdiction in this case. However, the ICJ dismissed the contention.[5] As far as possible distinction in the effect of judgements is concerned, the attitude of the ICJ is justified. Although different in substance, the judgements given on the merits of the case are by no means more important than those concerning jurisdiction, which is also confirmed by this case. After all, as the ICJ pointed out in the Judgement, in accordance with Article 36, Paragraph 6, of the ICJ's Statute, *in the event of a dispute as to whether the Court has the jurisdiction, the matter shall be settled by the decision of the Court*. According to Article 60 of the Statute, a (any) judgement of the Court is final. There is no reason to make a distinction in the application of the *res judicata* principle to the Court's judgements – no matter whether these are judgements given on the merits of a case or those concerning jurisdiction. Nevertheless, equally founded and logical is the approach according to which the Court must always be sure of its own jurisdiction. Generally speaking, the mentioned approaches are not opposed. Any judgement of the Court – either given on the merits of a case or concerning the jurisdiction – is a *res judicata,* and may only be subject to revision provided for in Article 61 of the Statute. A judgement concerning jurisdiction in a case means that the Court is sure of its own jurisdiction. In the most part of cases the problem we have here will never appear. Its peculiarity lies in changed circumstances which gave rise to the ICJ's Judgement establishing that the Court had no jurisdiction in the case concerning the "Legality of Use of Force", in which one of the parties to the dispute was the FRY. The 2004 Judgement, in which the ICJ held that it did not have jurisdiction because the FRY, not having been a UN Member State between 1992 and 2000, did not have the capacity to appear before the Court – i.e. it did not have access to it – gave rise to the principal difficulty in the dispute on the issue of jurisdiction in the case concerning the "Application of the Genocide Convention".

2. An inconsistent legal practice

In 2004, the ICJ established that in 1999 the FRY could have not appeared before the Court because it had not been a UN Member State at that time; accordingly, the Court had no jurisdiction in the case brought

[3] See: "Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007", Internet, http://www.icj-cij.org/docket/files/91/13685.pdf, 01/03/ 2007, par. 140.

[4] "Separate opinion of Judge Tomka", Internet, http://www.theICJ-cij.org/docket/files/91/13699.pdf, 02/03/2007, p. 4, par. 9.

[5] "Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007", op. cit., par. 117.

by the FRY against Member States of NATO. In 2007, the ICJ holds that in 1993 the FRY could appear before the Court as a Respondent, and claims that it has had jurisdiction. There is an obvious and serious contradiction. Of course, it is true that, according to Article 59 of the Statute of the ICJ, "[…] decision of the Court has no binding force except between the parties and in respect of that particular case". In other words, the 2004 Judgement was not binding on the Court in the case concerning the "Application of the Genocide Convention". However, it would be wrong to arrive at the conclusion that the arguments presented by the ICJ in 2004 in favour of its jurisdiction can be – as Judge Tomka has said in his Separate Opinion – so "simply" disregarded. In his Separate Opinion, Japanese Judge Owada posed the right question: "While obviously this judgment [the Judgement of the ICJ in the case concerning the 'Legality of Use of Force'] does not technically constitute a *res judicata* for other cases including the present one [the case concerning the 'Application of the Genocide Convention'], [...] what is relevant for the consideration of the Court is the question of whether and to what extent the legal reasoning enunciated by the Court in arriving at its conclusion in that judgment [the Judgement according to which the Court had no jurisdiction in the case concerning the ['Legality of Use of Force'] is applicable to the present case.[6] The answer to the first part of the question is indisputably positive. The contradiction is too serious to be disregarded. We have the same Court, the same period of time and the same party to two different disputes. Having in mind these facts, as well as the fact that it is supported by powerful argumentation, the 2004 Judgement cannot be disregarded. To what extent it may be taken into consideration, it is a separate issue. The solution to that issue depends on the interpretation of the *res judicata* principle and its application to the 1996 Judgement.

b) ...By declaring that the Court had no jurisdiction

The equation to which the International Court of Justice had to devise the solution was not a simple one. In the first place, there was the 1996 Judgement by which the Court confirmed its jurisdiction in the case brought by Bosnia and Herzegovina against Serbia. In 2004, in another case, the same Court delivered a judgement according to which it had no jurisdiction, which contradicts the 1996 Judgement. In order to come to a legally coherent and intellectually satisfactory solution, we have to start from irrefutable elements.

1. The FRY had no access to the ICJ between 1992 and 2000

According to Article 35 of the Statute of the ICJ, "the Court shall be open to the states parties to the present Statute". Article 35, Paragraph 2 reads as follows: "The conditions under which the Court shall be open to other states shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council [...]". In the 2004 Judgement, delivered in the case concerning the "Legality of Use of Force" and backed by powerful argumentation, the court declared that it had no jurisdiction. For a rather long period of time, the relations between the FRY and the UN had been ambiguous. However, in November 2000, the FRY was admitted to the UN. The ICJ rightly concluded that, *a contrario*, before that date, the FRY could not have been a UN Member State. What can be unmistakably deduced from the Judgement is that between 1992 and 2000 the FRY was not a UN Member State; accordingly, it was not a party to the Statute of the ICJ and, in compliance with Article 35, Paragraph 1, it did not have access to the Court. Since the *Convention on the Prevention and Punishment of the Crime of Genocide* (1948) is not a "treaty in force" in the sense of Article 35, Paragraph 2, the "compromise" clause in its Article IX remains without effect. The ICJ's conclusion presented in the 2004 Judgement is clear: between 1992 and 2000, the Federal Republic of Yugoslavia did not have access to the International Court of Justice. It could neither submit applications instituting proceedings, nor could appear before the Court as a Respondent. More precisely, the ICJ could not have jurisdiction in a case to which one of the parties was the FRY. If it had no jurisdiction in the proceedings instituted by the FRY's Application filed in 1999, it is logical that it could not have jurisdiction in the proceedings against the FRY instituted by the Application of Bosnia and Herzegovina, filed in 1993. Recalling the terms of the 1996 Judgement delivered in the case the "Application of the Genocide Convention", the Court arrived at an adverse conclusion. Such an attitude is logically untenable. Having in mind that legal reasoning is closely related to formal logic, it is no wonder that the legal construction supporting the conclusion concerning the Court's jurisdiction in the Judgement in question, seems feeble and unsatisfactory.

2. The principle *res judicata* is only applicable to decided cases

As we have seen, the Court dismissed the argument that the effect of judgements determining the Court's jurisdiction is weaker. Consequently, it also

[6] "Separate opinion of Judge Owada", Internet, http://www.the ICJ-cij.org/docket/files/91/13697.pdf, 02/03/2007, par. 8.

dismissed the argument that the issue of jurisdiction in certain cases can be subject to revision if there is a prior judgement on jurisdiction. Such an attitude seems reasonable. Of course, having in mind the peculiar character and the complexity of this particular case, the Court could have made an exception. Under changed circumstances, the Court could have moderated and relativized the absolute character of the principle of the effect of judgement. However, it could have devised a more logical method to avoid the mentioned contradiction. At this point, we come to the second argument of the Serbian party. As the application of the *res judicata* principle to the 1996 Judgement on jurisdiction is beyond dispute, we must now raise the following question: to what issues is the principle of *res judicata* applicable. To the general conclusion – in this particular case it is the conclusion that the Court has jurisdiction? Or only to precisely defined issues decided by particular judgements? The argument of the Serbian party rested upon the attitude that a judgement could be delivered only on issues that were raised. No judgement could be delivered on the issue whether the FRY had access to the Court for the very fact that the issue was never raised. Paragraph 126 of the 2007 Judgement confirms that the Court did not dismiss the argument:

[…] in respect of a particular judgment it may be necessary to distinguish between, first, the issues which have been decided with the force of *res judicata*, or which are necessarily entailed in the decision of those issues; secondly any peripheral or subsidiary matters, or *obiter dicta*; and finally matters which have not been ruled upon at all. […] If a matter has not in fact been determined, expressly or by necessary implication, then no force of *res judicata* attaches to it; and a general finding may have to be read in context in order to ascertain whether a particular matter is or is not contained in it.[7]

However, it is in a rather disputable manner that the Court puts forward the attitude that the issue whether the FRY had access to the Court must have been implicitly decided. This is explained in Paragraphs 132–140 of the 2007 Judgement:

Since […] the question of a State's capacity to be a party to proceedings is a matter which precedes that of jurisdiction *ratione materiae* […] this finding [the Judgement of 1996 on jurisdiction] must as a matter of construction be understood, by necessary implication, to mean that the Court at that time perceived the Respondent as being in a position to participate in cases before the Court. On that basis, it proceeded to make a finding on jurisdiction which would have the force of *res judicata* [Paragraph 132].

In the view of the Court, the express finding in the 1996 Judgment that the Court had jurisdiction in the case *ratione materiae*, on the basis of Article IX of the Genocide Convention, seen in its context, is a finding which is only consistent, in law and logic, with the proposition that, in relation to both Parties, it had jurisdiction *ratione personae* in its comprehensive sense, that is to say, that the status of each of them was such as to comply with the provisions of the Statute concerning the capacity of States to be parties before the Court [Paragraph 133].

That the FRY had the capacity to appear before the Court in accordance with the Statute was an element in the reasoning of the 1996 Judgment which can – and indeed must – be read into the Judgment as a matter of logical construction [Paragraph 135].

The Court thus considers that the 1996 Judgment contained a finding […] which was necessary as a matter of logical construction, and related to the question of the FRY's capacity to appear before the Court under the Statute. The force of *res judicata* attaching to that judgment thus extends to that particular finding [Paragraph 135].

Although the issue of the FRY's capacity to appear before the ICJ was not raised in the 1996 Judgement, the Court finds the following conclusion logical: the fact that the Court declared that it had jurisdiction inevitably means that, in accordance with Article 35 of the ICJ's Statute, it was accessible to both parties. This argument does not seem acceptable. The Court inverts a logical sequence and threads a way through the labyrinth by starting from its exit. Using an artificial construction, it arrives at the conclusion that the issue which had not been raised in any instance must have been decided by some implicit logic. Furthermore, such a position is in collision with another legal principle: *sententia non fertur de rebus non liquidis* – sentence is not given upon a thing which is not clear. At that moment, the status of the FRY in the UN had not been determined, i.e. it was not clear. Accordingly, the issue whether the FRY had access to the ICJ was unclear, too.

By providing a simple explanation of the judgement on jurisdiction, the Court merely reinforced the arguments in favour of the position that it had no jurisdiction. The proper train of reasoning must have run as follows:

- the 1996 Judgement is a *res judicata*;
- the 1996 Judgement did not raise the issue whether the FRY had access to the Court;

[7] "Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007", *op. cit*., par. 126.

- consequently, this issue has not been settled and it should be resolved;
- it is logical that the solution to that issue should be in accordance with legal reasoning applied in the case concerning the "Legality of Use of Force";
- between 1992 and 2000, the FRY did not have access to the Court, which inevitably leads to the conclusion that the Court had no jurisdiction.

Such a solution would provide basis for a coherent legal construction and would harmonize the judgements of 1996, 2004 and 2007.

Endeavouring to demonstrate that the Court had no jurisdiction, the Serbia's legal team showed excellence, skill and precision in argument.[8] It should be pointed out that the issue of jurisdiction caused much disagreement among the judges of the ICJ: ten judges voted in favour of the position that the Court had jurisdiction, whereas the remaining five were against it. Of all the issues in this case, this one was decided by the smallest majority. What is particularly important is the fact that two out of the ten judges who voted in favour of the position that the Court had jurisdiction, Owada and Tomka, presented separate opinions; they considered the argumentation put forward in favour of this position too simple. Finally, it should be borne in mind that the work that was excellently done in this case by Serbia's legal team could be of great use in the dispute with Croatia. In that dispute, no prior judgement concerning jurisdiction has been delivered and in case Croatia does not withdraw the charges against Serbia it is highly probable that the Court would decide that it has no jurisdiction.

The issue of responsibility: a problematic balance?

Having decided that it had jurisdiction, the Court proceeded to the issue of Serbia's responsibility. Having in mind that Serbia was charged with the violation of the Genocide Convention, it was necessary to affirm commission of the crime of genocide in order to establish its responsibility.

a) The presence of the crime of genocide: (too) broad interpretation of the notion of "genocide"

In this case, the ICJ had the opportunity to clear up certain ambiguities arising from the interpretation of the definition of genocide. In our opinion, the definition itself is quite clear, but there are numerous issues raised in the case law of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), arising from the ideology of human rights, typical of the Post-Cold-War period. Generally speaking, the ICJ has confirmed that the interpretation of the definition of genocide is not problematic if we bear in mind the purpose of the 1948 Genocide Convention. However, owing to uncritical adoption of the case law of the International Criminal Tribunal for the Former Yugoslavia, the ICJ arrived at the conclusion that the crime of genocide was indeed committed in Srebrenica.

1. From a precise definition of genocide and its consistent interpretation...

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.

(Article II of the Genocide Convention)[9]

Genocide includes two elements: the objective one, i.e. the acts specified in the cited article of the Convention, and the subjective one which represents the specific difference of the crime of genocide. The intent to destroy, in whole or in part a national, ethnical, racial or religious group, as such – *dolus specialis* – is the subjective element. If we keep to the definition of genocide, certain problems concerning its interpretation seem pointless. The destruction of cultural heritage may by no means be considered genocide.[10] It should be reiterated that genocide implies the intent of physical destruction. The same applies to ethnic cleansing. It is clear that the expulsion of people cannot be identified with their physical

[8] Professor Tibor Varadi, Attorney at Law Vladimir Đerić and, to a lesser extent, Professor Zimmermann dealt with the issue whether or not the ICJ had jurisdiction.

[9] See the text of the *Convention on the Prevention and Punishment of the Crime of Genocide*: Vidan Hadži-Vidanović, Marko Milanović (eds), *Međunarodno javno pravo – Zbirka dokumenata*, Beogradski centar za ljudska prava, Beograd, 2005, p. 169.

[10] Even if we assumed that a nation could not exist without its specific culture, we could not establish the presence of the crime of genocide solely on the basis of destruction of tangible cultural heritage since culture is also transferred through oral tradition, whereas the language is a specific feature of an ethnic or national group.

destruction – on the contrary, these two acts are mutually exclusive. It thus renders pointless any dispute attempting to establish whether ethnic cleansing, such as performed in Bosnia and Herzegovina, is genocide. The mere fact that it is a matter of discussion, let it be a didactic one, like Antonio Cassese's in his book *International Criminal Law*, is a result of modern world's (in)sincere concern (ideological in character) for human rights.[11] However, the insisting that certain acts should be qualified as the crime of genocide is surprising. The fact that ethnic cleansing as such is not genocide does not mean that the phenomenon in question is positive and kind. It remains a crime against humanity! The insisting that it should be qualified as genocide can thus be explained solely by political and ideological reasons. Of course, in certain cases, ethnic cleansing may be an objective element of genocide. For example, in case a group of people is deported to a desert providing no conditions for their physical survival, ethnic cleansing is an objective element of genocide. Such a possibility has already been included in the definition of genocide under paragraph *c*: "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part". In the 2007 Judgement, the ICJ rightly concluded that ethnic cleansing as such is not an objective element of the crime of genocide.[12] After all, the presence of an objective element of genocide is not a sufficient for establishing the crime of genocide. The ICJ underlined the quintessence of genocide: "It is not enough that the members of the group are targeted because they belong to that group, that is because the perpetrator has a discriminatory intent. Something more is required. The acts listed in Article II must be done with intent to destroy the group as such in whole or in part. The words "as such" emphasize that intent to destroy the protected group".[13]

According to the Court, a protected group must be defined positively. In this particular case, the group cannot be defined negatively – as a "non-Serb" group; the "protected group" is the group of Muslims in Bosnia and Herzegovina. As far as the destruction "in part" is concerned, the destroyed part must make a substantial part of the group. According to the ICJ: "[…] That is demanded by the very nature of the crime of genocide: since the object and purpose of the Convention as a whole is to prevent the intentional destruction of groups, the part targeted must be significant enough to have an impact on the group as a whole. That requirement of substantiality is supported by consistent rulings of the ICTY and the International Criminal Tribunal for Rwanda (ICTR) […]".[14] The quoted paragraph embodies the quintessence of the notion of genocide, which must not be forgotten!

The attitude of the ICJ is clear and it is deduced from a consistent interpretation of the definition of genocide. For the first thing, a protected group must be defined positively. In this particular case, the protected group is the group of Muslims in Bosnia and Herzegovina. Secondly, whether a particular crime is described as genocide depends on the presence of an objective element – the above-mentioned acts, and a subjective element – an intent do destroy in whole or in part a national, ethnical, racial or religious group. Finally, the destroyed part of the group must make a substantial part of the whole, so that its destruction puts in question the survival of the group as a whole. The only logical and reasonable conclusion that can be drawn from these premises is that genocide inevitably implies destruction on a massive scale (in proportion to the overall size of the group).

2. ...To an arbitrary introduction of the geographic element and rendering the notion of "genocide" senseless

The ICJ appended this position, the only correct one, with an arbitrary reasoning taken over from the case law of the ICTY: "[…] the Court observes that it is widely accepted that genocide may be found to have been committed where the intent is to destroy the group within a geographically limited area. In the words of the ILC, 'it is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe". The area of the perpetrator's activity and control are to be considered. As the ICTY Appeals Chamber has said […] the opportunity available to the perpetrators is significant […]. This criterion of opportunity must however be weighed against the first and essential factor of substantiality."[15]

Such an attitude paves the way for rendering the notion of "genocide" senseless. It is logical that the

[11] In that respect, very interesting is Antonio Cassese's wording presented in the opening lines of his discussion on that issue: "It *seems* that Article II [of the Genocide Convention] does not include the acts nowadays called 'ethnic cleansing'". It is quite *obvious* what the mentioned article includes and what it does not include. Something that is "obvious" may not "seem to be". (*See*: Antonio Cassese, *International Criminal L*aw, Oxford University Press, 2003; cited edition: Antonio Kaseze, *Međunarodno krivično pravo*, Beogradski centar za ljudska prava, Beograd, 2005, p. 113).

[12] "Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007", op. cit., par. 190.

[13] Ibid., par. 187.

[14] Ibid., par. 198.

[15] Ibid., par. 199.

crime of genocide may also be established in case the perpetrators commit the crime only within the area in which they have the opportunity for physical destruction of members of a protected group. As the ICJ rightly concluded, even in that case, the criterion of substantiality, i.e. the number of victims in relation to the overall size of the group, must be taken into account. The problem arises with the introduction of the geographic component, which leads to the following logical fallacy: instead of being taken merely as a consequence, i.e. an element of the opportunity available to the perpetrators, who have the intent to destroy as many members of the protected group as possible, and who, logically, do it only in the area accessible to them, the geographic factor somehow acquired an autonomous character, changing the original scheme underlying the definition of genocide. The two-level construction implying a protected group and its part has been replaced by a multilevel construction in which, through the introduction of the territorial factor, increasingly smaller units of the whole are taken into consideration. This, at least theoretically, renders the number of victims irrelevant.[16] We will show that such a fallacy underlies the legal qualification of the Srebrenica crime.

In Paragraphs 276 and 277 of the 2007 Judgement, the ICJ has concluded that the massive killings of Muslims, which were committed in Bosnia and Herzegovina, do not constitute the crime of genocide because the genocidal intent – *dolus specialis* – a necessary precondition for the establishment of genocide, could not be proved. According to the Court, with the exception of Srebrenica, no crime of genocide was committed in Bosnia and Herzegovina. This attitude is contradictory in itself and it is surprising that hardly anybody in the domestic and international audience drew attention to this elementary logical contradiction. If for the majority of committed crimes against the protected group in Bosnia and Herzegovina the presence of genocidal intent could not be established, then there was no crime of genocide! A single crime cannot be selected and qualified as the crime of genocide. In terms of logic, it is nonsense. If the protected group is that of Muslims in Bosnia and Herzegovina, then the area under consideration in which the crime of genocide was committed or was not committed must be Bosnia and Herzegovina. It would have been different had Srebrenica been the only opportunity to destroy a part of the protected group. Only in that case it would be reasonable to talk about the crime of genocide. The geographic component is taken into account only as a consequence of perpetrators' limited opportunities. However, in this case, there were many opportunities to destroy the protected group – from Srebrenica in which the inhabitants of the enclave were not physically destroyed in whole – only a part of them were killed (according to ICTY, a fifth), mostly arms-bearing males – to various war camps that existed throughout Bosnia and Herzegovina, in which no systematic destruction of members of the protected group, i.e. Bosnian Muslims, was carried out.

The best example of the above-mentioned illogicalities and contradictions to the definition of genocide is provided by the ICTY's Judgement in the Krstić case, widely cited by the ICJ.[17] The Court refers to the following conclusions of the Trial Chamber of the ICTY: "By seeking to eliminate a part of the Bosnian Muslims, the Bosnian Serb forces committed genocide. They targeted for extinction the forty thousand Bosnian Muslims living in Srebrenica, a group which was emblematic of the Bosnian Muslims in general. […]The Bosnian Serb forces were aware, when they embarked on this genocidal venture, that the harm they caused would continue to plague the Bosnian Muslims". The ICJ proceeds with the quotation from the Judgement delivered by the Trial Chamber as follows: "In this case, having identified the protected group as the national group of Bosnian Muslims, the Trial Chamber concluded that the part the VRS Main Staff and Radislav Krstić targeted was the Bosnian Muslims of Srebrenica, or the Bosnian Muslims of Eastern Bosnia", to conclude with the following statement: "The Court sees no reason to disagree with the concordant findings of the Trial Chamber and the Appeals Chamber".[18]

However, the reasons to dismiss the cited argument can be found. The Judgement of the Appeals Chamber of the ICTY in the Krstić case is highly arbitrary, inaccurate, and even terminologically inadequate. The ICTY's statement that Bosnian Serb forces targeted for extinction the forty thousand Bosnian Muslims living in Srebrenica, gives rise to a confusion between ethnic cleansing and physical destruction. These notions are by no means interchangeable. The Muslims from Srebrenica did not "disappear" since more that thirty thousand people were deported to Central Bosnia. The fact that those people are not in Srebrenica any more, that is to say that they "disappeared" from Srebrenica, is not

[16] See Miloš Jovanović, „Tužba BiH za genocid pred Međunarodnim sudom pravde: pravna razmatranja i političke posledice", op. cit., 10–11.

[17] "Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007", *op. cit*., par. 293–297.

[18] Ibid., par. 296.

relevant in terms of the establishment of the crime of genocide. Whether the Srebrenica crime would "continue to plague" the Bosnian Muslims or not is also absolutely irrelevant in terms of the establishment of genocide. The only relevant question is: did the destroyed part of the group make a substantial part of the whole, so that its destruction would put in question the survival of the group as a whole. The answer to that question is definitely negative.

We are not attempting to minimize, let alone deny the Srebrenica crime; we are merely trying to arrive at its adequate legal qualification. What happened in Srebrenica must be condemned as a war crime and a crime against humanity. However, its legal qualification as a crime of genocide is highly problematic.

The explanation of the ICJ's decision should be sought for in non-legal sphere. In the West, the Srebrenica crime is paradigmatic. It is a symbolically charged event which is often, though unjustifiably, compared to holocaust. It should be also pointed out that had the Court not established the crime of genocide, the case would have become pointless. It is obvious that it was a kind of political minimum under which the Court did not dare go. The case law of the ICTY made its task easier and provided an alibi for the judgement maded. Nevertheless, in legal terms, the Judgement delivered by the ICJ is poorly argumented and disputable.

b) The responsibility of the state: strict criteria

Having established the crime of genocide, the Court had to provide answer to the following question: is the FRY responsible for the committed crime and, if established so, to what extent is it responsible. As for this question, the ICJ did not adopt solutions ensuing from the case law of the ICTY but kept to its own decisions, i.e. the criteria presented in the case concerning "Military and Paramilitary Activities in and against Nicaragua" (Nicaragua vs. the United States of America), 1986. Although in full compliance with customary international law on responsibility of states and the codification work done by the International Law Commission, the applied criteria are very strict.[19]

1. The issue of attributability of illicit acts

In order to decide whether the FRY is guilty of the crime of genocide committed in Srebrenica or not, the ICJ had to answer the following three questions: was the crime committed by organs *de jure* of the FRY; was the crime committed by organs *de facto* of the FRY, and, finally, was the crime committed by organs which were neither *de jure* nor *de facto* organs of the FRY but were acting under its control, so that the violation of international law by these organs can be attributed to the FRY. To provide the answer to the first question was a rather easy task since it is obvious that the perpetrators of the Srebrenica crime were not state organs of the FRY.[20] Were they *de facto* organs of the FRY? In order to supply this question with an answer, the Court applied the "total dependence" criterion, taken over from the case concerning "Military and Paramilitary Activities in and against Nicaragua". Although the Court established the presence of a close relationship between the authorities in Belgrade and those in Pale, i.e. the FRY Army and the Army of the Republic of Srpska, it arrived at the conclusion that the relationship between the Republic of Srpska and the FRY was not that of complete dependence.[21]

After the Court had established that the organs that perpetrated the Srebrenica crime were neither *de jure* nor *de facto* organs of the FRY, it had to proceed with answering the last unresolved question: did the perpetrators of the crime act under the control of the FRY, so that it is responsible for their acts. The Court put forward Article 8 of the Draft Articles on Responsibility of States for Internationally Illicit Acts, a document by the International Law Commission as the relevant rule. According to the cited article, "the conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct". The ICJ has specified that the disposition must be interpreted in relation to the case concerning "Military and Paramilitary Activities in and against Nicaragua".[22] In other words, the Court applied the *Nicaragua test* of effective control. According to the test, it is necessary to prove that there was an effective control or that instructions were given in each operation in which the alleged violations were perpetrated and not generally, with respect to overall actions conducted by

[19] "Draft Articles on Responsibility of States for Internationally Illicit Acts": text adopted by the International Law Commission at its fifty-third session (2001): (extract from the Report of the International Law Commission on the work of its Fifty-third session, *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10* (A/56/10), chp.IV.E.1): the document was published in the Yearbook of the International Law Commission 2001 Vol. II, No. 2, Internet, http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf, 15/04/2007.

[20] "Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007", op. cit., par. 387–388.

[21] Ibid., par. 394.

[22] Ibid., par. 399.

individuals or groups of people who perpetrated the alleged violations. Since it could not be proven either that the FRY was issuing instructions while the operations in Srebrenica were in the course, or that the operation was carried out under its effective control, the Court dismissed the allegations concerning the FRY's responsibility. It should be pointed out that the comment to Article 8 of the International Law Commission referrs both to the *Nicaragua test* of effective control and the less rigorous *Tadić test* of overall control. The Court has concluded that in each particular case it is necessary to established whether the State in question had control of the illicit act and whether the control was such as to justify the attribution of the act to the State.[23] However, the ICJ chose to apply the *Nicaragua test*, i.e to keep to very rigorous criteria of attributability of illicit acts.

Such a solution may seem unsatisfactory. The proven relationship between the FRY and the Republic of Srpska was so close and strong that it may rightly be said that without Respondent's support the Republic of Srpska could not survive. In that context, the dismissal of the allegations concerning the FRY's responsibility for the Srebrenica crime, committed by the Army of the Republic of Srpska, may seem inappropriate. Professor Thomas M. Franck, a legal advisor of the Bosnian party presented during the oral proceedings a banal, though rather efficient argument, according to which those who provide financial support (FRY) actually make decisions and should, accordingly, be responsible for the committed wrongful acts. The Court has replied that decisions are made not by those who provide financial support but by those who command. The adoption of strict criteria applied in the case concerning "Military and Paramilitary Activities in and against Nicaragua" was not an imperative for the Court. It could have also applied milder criteria of attributability of illicit acts. One of the reasons that could justify the decision of the Court rests in the very nature of the crime of genocide. The qualitative difference between the crime of genocide and other crimes is constituted by the presence of genocidal intent – *dolus specialis*. The second reason lies in the fact that the crime of genocide was established in a single instance. It is for these reasons that the criteria of attributability in this particular case had to remain rigorous. The FRY cannot be guilty of genocide if it happened only in Srebrenica, in an operation that was not under its effective control. It would be equally unfounded to state that the overall support provided by the FRY to the Republic of Srpska was imbued and motivated with genocidal intent, particularly when we have in mind that the genocide was established in a single instance.

2. Complicity in and failure to prevent and punish acts of genocide

For the very same reasons the Court dismissed the allegations concerning the responsibility of the FRY as an accomplice in the crime of genocide. According to the Court, the notion of complicity actually implies the aid or assistance furnished for the commission of a wrongful act, i.e. it must imply a positive action. The Court has also concluded that it is necessary that an accomplice is at least aware of the genocidal intent of the organ to which it provides aid or assistance, i.e. that it provides aid or assistance to an organ with knowledge of its intent.[24] Having in mind the nature of the crime of genocide, this attitude seems correct. Since it has not been proven that the FRY had knowledge of the intent of the Army of the Republic of Srpska at the time when it took Srebrenica, the allegations of complicity must be rejected even if there were some positive actions by the FRY, i.e. even if it supplied aid or assistance to the perpetrators of the crime. Namely, the FRY is responsible neither as the perpetrator, nor as an accomplice in the Srebrenica crime.

However, the Court has established that the FRY is responsible for two allegations related to the Srebrenica crime. The first allegation is clear and beyond dispute: the FRY did violate its obligation to punish the perpetrators of the crime. The facts that it failed in its duty to fully cooperate with the ICTY and that, at least until 2002, it was involved in the hiding of General Mladić, an officer of the Army of the Republic of Srpska, indisputably engage its international responsibility. The Court has also found the FRY responsible for the failure to act in compliance with the obligation to prevent the crime of genocide. As opposed to the establishment of responsibility for complicity, which implies a positive action, in order to establish responsibility concerning the prevention of crime it suffices to confirm the presence of a negative action, i.e. the absence of action. According to the Court, it is true that the FRY did nothing to prevent the Srebrenica crime. One wonders in what way an action can be prevented from happening by somebody who has no knowledge that it would happen. The Court has based its argument on a disputable assumption that, under the circumstances, the FRY could (must?) have known what was to happen in case the forces of the

[23] "Draft Articles on Responsibility of States for Internationally Illicit Acts", op. cit., p. 112.

[24] "Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007", op. cit., par. 419–423.

Republic of Srpska took the enclave.[25] Nevertheless, this attitude seems problematic having in mind that the Court has found that Bosnian Serbs had not planned the crime before they took Srebrenica. It is hardly believable that anybody, including the FRY, could have had knowledge of something of which the very perpetrators of the crime had not been aware until the moments immediately preceding the commission of the crime. The key to this issue is a matter of estimation, which may not be necessarily accurate. The reason why the Court has made such a decision can probably be sought for in psychologically political motives: the fact that it found the FRY responsible for the failure to prevent the crime of genocide makes the Judgement more balanced. Otherwise, the FRY would have been found responsible solely for the failure to fully cooperate with the ICTY.

The influence of non-legal reasons in dealing with legal issues is not necessarily negative – for example, when it is motivated by the pursuit of certain kind of balance and particularly if it does not lead to misreading and misinterpretation of legal norms. Our opinion is that in this particular case, the influence of non-legal considerations did affect the respect and interpretations of legal norms in dealing with the issues of responsibility and with those concerning the legal qualification of the Srebrenica crime.

[25] Ibid., par. 436–438.

Summary

Among numerous legal issues raised within the scope of the case concerning the "Application of the Genocide Convention", there are two specific questions, which the International Court of Justice had to supply with answers, that should be pointed out; these are: the issue of the Court's jurisdiction and the interpretation of the definition of genocide. In both issues, the ICJ failed to support its decisions with a consistent legal construction and founded argumentation. The ICJ established its jurisdiction by reference to the 1996 Judgement, by which, according to the Court, the issue of jurisdiction was definitely decided. The Court thus did not take into consideration its own argument presented in the case concerning the "Legality of Use of Force", according to which the FRY did not have access to the ICJ between 1992 and 2000. As far as the interpretation of the definition of genocide is concerned, the ICJ adopted rather disputable case law of the International Criminal Tribunal for the Former Yugoslavia, qualifying the Srebrenica crime as the crime of genocide.