

Application of the Convention on the Prevention and Punishment of the Crime of Genocide
(Bosnia and Herzegovina v. Serbia and Montenegro)
International Court of Justice
February 26, 2007

The Republic of Bosnia and Herzegovina (“Bosnia”) alleged various violations of the Convention on the Prevention and Punishment of the Crime of Genocide (“CPPCG”) by the Federal Republic of Yugoslavia (“FRY”) for atrocities committed by the military forces of the self-proclaim Republik of Srpska in the territory of Bosnia with the assistance of the FRY after the breakup of the state of Yugoslavia.

The Court first addressed the issue of the identification of the Respondent party because of the separation of the Republic of Montenegro from Republic of Serbia in June 2006. It concluded that Serbia is the only Respondent at the date of judgment. However, the Court determined that any responsibility incurred for past events falls on both Serbia and Montenegro.

Turning to the jurisdiction of the Court over the parties, the Court stated that, although Serbia was not a member of the United Nations from 1992 to 2000, and thus not a party to the Statute of the Court when the case was filed, it had in previous decisions determined that it had jurisdiction over the parties and would not entertain further questions of jurisdiction under the general principle of *res judicata*. Furthermore, the Court found that it had jurisdiction over the claim under Article IX of the CPPCG, but that it had no authority over other breaches of international law not covered by the CPPCG, including various other human rights violations and other preemptory norms of international law.

The Court stated that, contrary to Respondent assertions, the obligation of States under Article I of the CPPCG to prevent genocide “necessarily implies” a prohibition against States themselves committing genocide or related acts. In this respect, States can be held responsible for genocide and complicity in genocide, even if no individual has previously been convicted of the crime.

The Court then defined the term genocide. It stated that in order for acts to qualify as genocide, the perpetrator must possess intent to destroy a protected group, in whole or in part. The Court differentiated between genocide and “ethnic cleansing,” which can be carried out by the mere displacement of a particular group from a specific area. Furthermore, the Court stated that a target group of genocide can only be defined by positive characteristics - national, ethnic, or religious - and not merely by a negative definition (i.e. non-Serbs).

Addressing the required standard of proof, the Court stated that, given the seriousness of the crimes in Article III, the evidence must be “fully conclusive” in order to establish of violation. Concerning breaches of the obligations to prevent genocide and to punish or extradite perpetrators of genocide, the Court required proof at a “high level of certainty.”

The Court further stated that it will make its own determinations of fact from the evidence, but it will give highly persuasive weight to the findings of the International Criminal Tribunal of the former Yugoslavia (ICTY).

After reviewing the background of the case, the Court set forth two issues: (1) whether the alleged atrocities occurred and (2) whether the facts establish the existence of intent to commit genocide against Bosnian Muslims.

The Court found that the evidence clearly established massive killings of Bosnian Muslims throughout Bosnia, but it found no evidence that these killings were perpetrated with the specific intent to commit genocide (to destroy in whole, or in part) against Bosnian Muslims.

However, turning more specifically to the atrocities at Srebrenica in July 1995, the Court concluded that the leaders of the army of the Republik Srpska had possessed the necessary specific intent to destroy the Bosnia Muslims of Srebrenica, and therefore acts of genocide had been committed.

The Court then discussed acts “causing serious bodily or mental harm to members of a protected group (Article II(b)) and acts “deliberately inflicting on the group conditions of life

calculated to bring about its physical destruction...” (Article II (c)), but found, although the evidence establishes that these acts were committed, the evidence did not establish the specific intent that these act bring about the destruction of Bosnian Muslims.

The Court rejected the claim of the Petitioner that the very pattern of atrocities committed throughout the country over a long period of time, focused only towards Bosnian Muslims, establishes the necessary intent to destroy in whole or it part a protected group.

As for responsibility under Article III(a), the Court found acts of genocide were committed by the army of the Republika of Srpska, but that these act could not be attributed to the Respondent, because such acts were not committed by entities or persons of the Respondent nor under the direction or control of the Respondent. Furthermore, under Article III(e) for complicity in genocide, the Court has little doubt that such acts were committed with resources provided by the Respondent, but it found that the Respondent is not responsible, because the evidence did not establish that, at the time resources were provided, the Respondent was fully aware such resources would be used to committee genocide.

Turing to the question of responsibility under Article I, the obligation to prevent and punish genocide, the Court stated that a State must “manifestly fail” to take all measures to prevent genocide in order to be held responsible. Furthermore, genocide must actually have occurred in order for a State to be held responsible. Thus, only conduct in connection with the atrocities at Srebrenica was considered. Finally, it is sufficient that a State was aware, or should have been aware, of the potential that acts of genocide would be committed.

The Court found that the Respondent did have political, military, and financial influence over the individuals and entities that committed acts of genocide in Srebrenica and that the Respondent could hardly been unaware that acts of genocide were potential. In the view of the Court, the Respondent and its agents should have made the “best efforts within their power” and influence to prevent the events that occurred in Srebrenica, but it made none. Because the Respondent did nothing to prevent the conduct that occurred at Srebrenica, it had violated its obligation to prevent genocide under Article I.

The Court further noted that the Respondent has violated its obligations under Article VI to co-operate with international tribunals with jurisdiction over crimes under Article III. The evidence clearly establishes that the Respondent has failed in its duty to co-operate with the ICTY through its continuing failure to hand over General Mladic (a principle perpetrator at Srebrenica) to the ICTY despite overwhelming evidence that he remains in the territory of the Respondent.

Finally, the Court examined the question of reparations. As for its responsibility under Article I to prevent genocide, the Court stated that financial compensation is not appropriate, since it was not shown that the acts would have in fact been prevented if the Respondent had acted. As for its responsibility under Article VI, the Court stated that the appropriate compensation would be the fulfillment of its obligations under this article by transferring accused persons to the ICTY for trial.

Written by: Kenneth Stutts, Chicago-Kent College of Law, Spring 2007

Case Available at: http://www.icj-cij.org/icjwww/idocket/ibhy/ibhyjudgment/ibhy_ijudgment_20070226_frame.htm

Convention Available at: http://www.unhcr.ch/html/menu3/b/p_genoci.htm