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The Strange Story of the Bosnian *Genocide* Case

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Abstract
The article explores the political context of the Bosnian *Genocide* case recently decided by the International Court of Justice. It strives to show that an appreciation of the larger disputes within Bosnia and Herzegovina and Serbia is necessary for understanding the Court's judgment properly, particularly when it comes to the litigation strategies of the two parties which shaped the final outcome of the case, and, above all, for understanding how the judgment was perceived by the general public of the former Yugoslavia.

Key words
Bosnia and Herzegovina; genocide; International Court of Justice; Serbia; Yugoslavia

1. Prologue

In February 2007 the International Court of Justice (ICJ) rendered its judgment on the merits of the *Genocide* case,[1] thereby writing the final chapter to a story which had been pending before it for some 14 years. This judgment will certainly prove to be one of the ICJ's most significant, both legally and politically. In brief, the Court concluded that genocide was perpetrated in Bosnia and Herzegovina (BiH) by the Bosnian Serb armed forces, but that, solely in the town of Srebrenica in July 1995. Moreover, according to the Court, Serbia was neither responsible for the commission of that genocide nor complicit in it, but was responsible for failing to prevent it and for failing to punish its perpetrators.

The purpose of this article is not to parse the paragraphs of the judgment in meticulous legal analysis, worthy endeavour though that might be.[2] This article will instead try to explore the context and the multifaceted peculiarity of this case, which is at least as great as its importance, and the examination of which is absolutely necessary for a proper understanding of its outcome. Almost every

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1. *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 27 February 2007 (not yet published) (hereinafter *Genocide* judgment).
2. See, e.g., the articles in the current and forthcoming issues of this journal, and forthcoming symposia on the *Genocide* judgment in (2007) 18-4 EJIL and (2007) 5-4 *Journal of International Criminal Justice*.

aspect of the *Genocide* case is odd. At one level, it was never really about genocide, or at least genocide as international lawyers think of the term. Moreover, while the case was pending both parties underwent a series of crucial transformations. Even if, formally speaking, their legal personality remained the same, the parties were anything but the same in 1993, when the application was submitted, in 1996, when the Court decided on its jurisdiction, and in 2007, when the final judgment was rendered. The ICJ was also, probably for the first time in its history, faced with a case in which the principal, underlying dispute was actually within the applicant state itself, between the Bosniaks (Bosnian Muslims) and the Bosnian Serbs, whose army committed the Srebrenica genocide, and who actively tried to obstruct the progress of the *Genocide* case at every turn. The case is also notorious for a number of unprecedented procedural manoeuvres.

But what makes the *Genocide* case truly distinctive is that it was, perhaps more than any other ICJ case, from its beginning to its end at the mercy of political considerations outside the courtroom. Particularly after the war in BiH ended, two years after the application was filed with the Court, the Bosnian lawsuit became a device through which both parties attempted to validate their broader, collective narratives as to the character of the Bosnian conflict, especially as to who were its heroes and who were its villains. In that sense neither of the parties before the Court was particularly interested in presenting their best legal case, but rather in telling their *story* of the Bosnian war. The *Genocide* case was therefore a true judicial drama, at the same time an exercise in storytelling and in legal argumentation. It was also a play within a play, in which the actors in the courtroom were taking their cues from the larger, political play taking place outside it. And it was the actors in this larger play – the intellectuals and politicians stoking the fires of nationalism as a vehicle for keeping or obtaining power – who first discovered a concept, a word, that they could easily manipulate to their own ends. That word was 'genocide'.

The first manipulative use of the word in Yugoslav public discourse came in 1986, when a document, called the Memorandum, was leaked to the press from the Serbian Academy of Arts and Sciences (SANU) while still in draft form.[3] The SANU Memorandum, written by a number of Serbian nationalist intellectuals, was basically a lament on the suffering of Serbs due to the existing constitutional and economic structure of Yugoslavia. Even though it did not explicitly argue for the dissolution of Yugoslavia and the creation of a Greater Serbia, it produced an intensely negative reaction outside Serbia proper, and was widely seen as the point at which the dominant Serbian elites abandoned the preservation of Yugoslavia as if it were the best way of resolving the 'Serbian national question'. It is, however, important for the purposes of the present article because it also inaugurated the new malignant grand theme of Serbian nationalism – self-victimization – and because, among other numerous exaggerations and outright lies, it contained the prominent claim that

3. Generally on the Memorandum see L. J. Cohen, *Serpent in the Bosom: The Rise and Fall of Slobodan Milošević* (2001), at 59 et seq.; S. P. Ramet, *Balkan Babel: The Disintegration of Yugoslavia from the Death of Tito to Ethnic War* (1996), at 198 et seq.

the Serbs of Kosovo were victims of genocide by the Albanian majority.[4] The Memorandum was followed by a stream of atrocity propaganda during which the Serbian state media continuously reminded the Serbian public of the crimes perpetrated against Serbs during the Second World War,[5] while the same work was being done with a somewhat higher degree of sophistication by nationalist intellectuals.[6] As the International Criminal Tribunal for the former Yugoslavia (ICTY) established in the *Tadić* case, self-victimization and propaganda were the fuel for the fires of nationalism,[7] which was on the rise not just in Serbia, but in Croatia and BiH as well. So began the wars for the Yugoslav succession.

2. Exposition: the war in Bosnia and Herzegovina, the application and provisional measures

When the government of the Republic of Bosnia and Herzegovina instituted proceedings before the ICJ against the Federal Republic of Yugoslavia (FRY) on 20 March 1993, the war in BiH was in its second year. By the end of 1991 and the beginning of 1992, both the Bosnian Serbs and the Bosnian Croats had established their own separatist entities, the Republika Srpska[8] and Herzeg-Bosnia. Since the Bosnian Serbs were armed and organized by the FRY and the remnants of the Yugoslav National Army (JNA), their forces were vastly superior to those of either the BiH government or the Bosnian Croats. Indeed, as 1992 drew to a close, the Bosnian Serbs were in control of some 70 per cent of the territory of BiH. The internationally recognized government, with some exceptions, commanded the allegiance of Bosnian Muslims alone, while its capital, Sarajevo, was besieged by the Serbs. By October 1992 conflict had finally erupted between the Bosniaks and the Croats as well. The initial year of the war was also its bloodiest, due to the ethnic cleansing being perpetrated chiefly by Bosnian Serb forces. Recent research shows that about half of all of the civilian victims of the war, the vast majority of whom were Muslims, lost their lives in the period from May to August 1992.[9]

4. 'The physical, political, legal and cultural genocide perpetrated against the Serbian population of Kosovo and Metohija is the greatest defeat suffered by Serbia in the wars of liberation she waged between Orasac in 1804 and the uprising of 1941.' Excerpts from the Memorandum in English are available at http://www.haverford.edu/relg/sells/reports/memorandumSANU.htm.
5. See generally D. B. MacDonald, *Balkan Holocausts? Serbian and Croatian Victim-Centred Propaganda and the War in Yugoslavia* (2002); M. Thompson, *Forging War: The Media in Serbia, Croatia and Bosnia-Hercegovina*, (1999).
6. Among the many pseudo-scientific treatments of Serbian suffering, pride of place is given to the massive, 4-volume work by M. Bulajić, *Ustaški zločini genocida i suđenje Andriji Artukoviću I-IV* (1988 and 1989) (*Ustashe crimes of genocide and the trial of Andrija Artukovic*, in Serbian).
7. *Prosecutor v. Tadić*, Case No. IT-94–1, Opinion and Judgement, 7 May 1997, para. 53 et seq.
8. An archaic way of saying 'The Serb Republic'.
9. See the results of the BiH population losses project of the Sarajevo Research and Documentation Centre, led by Mirsad Tokaca, which are available at http://www.idc.org.ba/presentation/Bosnia%20and%20Herzegovina.zip, in PowerPoint format. Slide 11 shows the number of deaths during 1992, which peaked in June of that year with 10,546 people killed. The total number of deaths in 1992 is 45,110, while the total number of deaths in the entire war is 97,207 (Slide 2). Slide 34 shows the number of deaths by ethnicity, and demonstrates that of the 45,110 deaths in 1992, 30,442 were Bosniaks. Slide 33 shows that, for the entire war, 65.88 per cent of victims were Bosniaks by ethnicity and 25.62 per cent were Serbs, while 8.01 per cent were Croats. This project, also called 'the Bosnian Book of the Dead', is the most comprehensive so far in establishing the number of victims of the war. It is not based on estimates, but on actual data and records of

The position of the internationally recognized BiH government in the months preceding the filing of the application with the Court was precarious indeed. In that regard, besides advancing a legal case before the ICJ and provoking international outrage, the Bosnian application had one additional, more immediate, goal. Namely, while the Republika Srpska was provided with heavy arms and personnel by the JNA, the UN Security Council through its Resolution 713 (1991) imposed an arms embargo on the former Yugoslavia which made it impossible for BiH government forces to overcome their military inequality in relation to the Serbs. In its application, therefore, the BiH government asked the Court to adjudge and declare that this resolution of the Security Council should not be construed in a manner that would impair the right of BiH to individual and collective self-defence.[10] In essence, BiH requested the Court to engage in judicial review of a Security Council decision made under Chapter VII of the UN Charter. It moreover did so not only in its application, but also in its request to the Court for the indication of provisional measures.

What stood in way of BiH, however, were not 'just' the incredibly complex legal and policy implications that any judicial review of Security Council decisions would have, but also some severe jurisdictional defects. From the very beginning BiH could invoke only Article IX of the Genocide Convention as the basis of the ICJ's jurisdiction,[11] since the FRY made no declaration accepting the ICJ's compulsory jurisdiction pursuant to Article 36(2) of the Statute, and there were no other treaties which could offer a jurisdictional basis. On the other hand, in its submissions to the Court, BiH swept far more broadly, asking the Court to decide on the FRY's responsibility for breaching, *inter alia*, the Hague and the Geneva Conventions, the UN Charter, the Universal Declaration on Human Rights, and general international law.[12] Indeed, of the eighteen submissions made by BiH in its application, only one fell prima facie within the Court's jurisdiction under the Genocide Convention.

What BiH did, therefore, was to equate with genocide all the possible violations of international law in relation to the then ongoing conflict, most notably the violations of the *jus ad bellum*. It took the same approach in its request for the indication of provisional measures, submitted jointly with its application.[13] Such an approach

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people killed. For brief overviews, see, e.g., N. Ahmetasevic, 'Bosnia's Book of the Dead', Balkan Investigative Reporting Network (BIRN), 21 June 2007, available at http://www.birn.eu.com/en/88/10/3377/.

10. *Genocide* case, Application Instituting Proceedings, 20 March 1999, esp. para. 135(m)–(o).
11. Ibid., paras. 88–101.
12. Ibid., para. 135.
13. *Genocide* case, Request for the Indication of Provisional Measures of Protection submitted by the Government of the Republic of Bosnia and Herzegovina, 20 March 1993. BiH asked the Court to indicate, *inter alia*,

    4. That under the current circumstances, the Government of Bosnia and Herzegovina has the right to seek and receive support from other States in order to defend Itself and its People, including by means of immediately obtaining military weapons, equipment, and supplies.

    5. That under the current circumstances, the Government of Bosnia and Herzegovina has the right to request the immediate assistance of any State to come to its defence, including by means of immediately providing weapons, military equipment and supplies, and armed forces (soldiers, sailors, airpeople, etc.).

    6. That under the current circumstances, any State has the right to come to the immediate defence of Bosnia and Herzegovina – at its request – including by means of immediately providing weapons, military equipment and supplies, and armed forces (soldiers, sailors, and airpeople, etc.).

ultimately proved to be fruitless, both when it came to incidental proceedings and when it came to the merits.

In its first order on provisional measures, the Court indicated only those measures which fell within the scope of the Genocide Convention.[14] Regrettably, these measures were not heeded by the parties to the conflict, and the ethnic violence continued unabated. However, the Court refused, on jurisdictional grounds, to involve itself in the delicate issue of the arms embargo. This prompted further requests from BiH for the indication of provisional measures, but this time with a linguistic twist: no longer was the embargo unlawful because BiH had to have the means to defend itself, but because it had to have the means to *defend itself from genocide*.[15] In its second order on provisional measures, the Court again refused to indicate the measures sought, for the same basic reason – lack of jurisdiction – and reaffirmed its previous order.[16]

From its inception, therefore, the BiH application before the ICJ was predicated on equating the entirety of the FRY's involvement in the BiH conflict with genocide. This was done both at the purely legal level, for the initial motive of circumventing the arms embargo imposed by the Security Council, and – much more importantly for the final outcome of the case on the merits – at the level of public discourse. That the principal object of the BiH *Genocide* application was somehow to undermine the arms embargo is confirmed by the letter from BiH to the UN General Assembly and the Security Council stating its intent to file proceedings before the ICJ against the United Kingdom, alleging that the United Kingdom and other permanent members of the Security Council had 'illegally imposed and maintained an arms embargo' against BiH, and that consequently the United Kingdom was 'both jointly and severally liable for all the harm that has been inflicted upon the People and State of Bosnia and Herzegovina because [it] is an aidor and abettor to genocide under the Genocide Convention and international criminal law'.[17] After probably realizing the legal

14. *Genocide* case, Order of 8 April 1993, paras. 35 and 52.
15. BiH's second request asked the Court to indicate, *inter alia*:

    4. That the Government of Bosnia and Herzegovina must have the means 'to prevent' the commission of acts of genocide against its own People as required by Article 1 of the Genocide Convention.

    5. That all Contracting Parties to the Genocide Convention are obliged by Article 1 thereof 'to prevent' the commission of acts of genocide against the People and State of Bosnia and Herzegovina.

    6. That the Government of Bosnia and Herzegovina must have the means to defend the People and State of Bosnia and Herzegovina from acts of genocide and partition and dismemberment by means of genocide.

    7. That all Contracting Parties to the Genocide Convention have the obligation there under 'to prevent' acts of genocide, and partition and dismemberment by means of genocide, against the People and State of Bosnia and Herzegovina.

    8. That in order to fulfil its obligations under the Genocide Convention under the current circumstances, the Government of Bosnia and Herzegovina must have the ability to obtain military weapons, equipment, and supplies from other Contracting Parties.

    9. That in order to fulfil their obligations under the Genocide Convention under the current circumstances, all Contracting Parties thereto must have the ability to provide military weapons, equipment, supplies and armed forces (soldiers, sailors, airpeople) to the Government of Bosnia and Herzegovina at its request.

16. *Genocide* case, Order of 13 September 1993.
17. UN Doc. A/48/659 and S/26806, 26 November 1993.

futility of any such lawsuit, not to mention the political harm to its own interests, BiH desisted from this action and dismissed its erstwhile Co-Agent before the Court.[18]

At the same time, on the other side of the Drina river, the other party to this case was constructing its own collective account. The FRY, comprising the republics of Serbia and Montenegro, was under the unquestioned political leadership of the then president of Serbia, Slobodan Milošević. The FRY was established by the rump federal parliament of the former Socialist Federal Republic of Yugoslavia (SFRY), consisting only of the deputies from Serbia and Montenegro elected under the one-party system. This rump parliament immediately declared that the FRY was not to be considered as a mere successor of the SFRY, but as a continuator, a state identical with the former SFRY.[19] According to the official dogma of the Milošević government, the FRY *was* the SFRY, albeit with some parts missing, and was still a founding member of the United Nations. It must be noted that this legal position announced by the newly consolidated FRY was not the product of some grand legal theory of state succession. No, it was rather an unfortunate by-product of the party line of the day. Even though no person contributed more to the violent break-up of the SFRY than did Milošević, his official stance was always that he was actually fighting to preserve Yugoslavia. And, one may ask, what better way to preserve Yugoslavia than to pretend that it has never ceased to exist?[20]

The 'preserving Yugoslavia' line was furthermore but one aspect of the collective narrative being constructed in the FRY and in Serbian society. The other aspects related specifically to the conflicts in BiH and Croatia – these were seen as tragic civil wars, tragic not only by being bloody, but also in the more classical sense of somehow being unavoidable. These were, moreover, civil wars in which the Serbian people fought defensively, to protect themselves from the horrors of the Second World War being revisited on them by reincarnated Ustaše and Ottoman Turks.[21] And, finally, even though the Serbian people in BiH and Croatia allegedly fought valiantly against their oppressors, Serbia itself was not at war, but was a

18. The statement of intent to file proceedings against the United Kingdom, the joint Bosnia and Herzegovina–UK statement that proceedings would not be instituted, and the letter dismissing Francis Boyle as co-agent are reproduced in F. Boyle, *The Bosnian People Charge Genocide* (1993), at 365–9. In its Postscript (371–3), Boyle states that before he was dismissed, he phoned the Registrar of the ICJ and asked him to convey to the Court that the BiH decision not to institute proceedings against the United Kingdom 'was made under duress, threats, and coercion perpetrated by the British government and the governments of several other European states', and thus the agreement to 'withdraw the lawsuit' was void *ab initio* and he reserved the right of BiH to denounce this agreement at any time and institute the proceedings. He also stated that the United Kingdom had demanded that he be fired as BiH's Agent, since '[t]he British government knew full well that I was the one responsible for the Bosnian strategy at the Court' (ibid., at 371). We are most grateful to Iain Scobbie for providing us with this information.

19. The rump parliament declared that the FRY '*continuing* the state, international legal and political personality of the SFRY shall strictly abide by all the commitments that the SFRY assumed internationally'. The intention of the FRY to continue the personality of the SFRY was communicated to the Secretary-General of the United Nations by a diplomatic note the same day. See UN Doc. A/4615, Annexes I and II, emphasis added.

20. This is not to say that the FRY had no other motives in formulating its claim to continuity, such as the desire to keep all the SFRY's assets and diplomatic premises abroad, etc. However, the importance of these interests, which were offset in large part by the SFRY external debt and other unresolved issues, paled in comparison to the Milošević regime's need to reinforce its version of the facts surrounding the disintegration of the SFRY.

21. One of the hallmarks of the nationalist propaganda in the former Yugoslavia was the dehumanization of one's erstwhile neighbours by using derogatory epithets from the past. So, for instance, Serb nationalists refer to the Croats as Ustaše, while Croat nationalist refer to the Serbs as Chetniks. See generally O. Bartov,

purportedly peace-loving member of the international community, guilty of nothing but providing its compatriots in BiH with some much needed humanitarian aid.

Back in BiH, as the war entered its third year, the United States grew increasingly weary of the European Union's inability to put an end to the conflict. In early 1994 it managed to pressure Bosniaks and Croats into ending their hostilities and forming an alliance against the Serbs. The first metamorphosis of the applicant thereby occurred in March 1994, when the Bosniaks and Croats signed the Washington Agreement which established the Federation of Bosnia and Herzegovina.[22]

As foreseen by the Bosniak leadership, circumventing the arms embargo proved to be necessary for overcoming the Serbs' stranglehold on BiH. This was done secretly by the United States and several other powers, thereby enabling the joint Bosniak and Croat forces to push back Bosnian Serb forces in 1995. Added to this was the offensive of the Croatian army against the separatist Serb republic in Croatia, in operations 'Flash' and 'Storm'. Finally, a Bosnian Serb counter-offensive against the UN-protected area of Srebrenica, which culminated in the murder of some 8,000 Bosniak men and boys in July 1995 and a massacre of civilians in a Sarajevo marketplace, led to a series of intense air strikes by NATO against the Bosnian Serbs.[23] Strong international pressure, coupled with Serb military losses in the field, finally achieved the end of the war in BiH.

With the mediation of the United States and other powers, the warring parties, the FRY, and Croatia had no choice but to agree to the Dayton–Paris Peace Accords,[24] which affirmed the joint state of Bosnia and Herzegovina, consisting of two entities, the Bosnian Federation and the Republika Srpska, and created an incredibly complex constitutional structure at whose apex sat the High Representative of the international community. Crucially, the Dayton Accords effected the second metamorphosis of the applicant state in the *Genocide* case: it now included both the alleged perpetrators of genocide and its victims.

3. Post-conflict conflict: jurisdiction, counterclaims and dirty tricks

This, then, was the final outcome of the war in BiH: one hundred thousand people dead,[25] a country under international tutelage, and, as we shall see, an applicant

Mirrors of Destruction: War, Genocide and Modern Identity (2000), at 140; K. Kurspahić, *Zločin u 19:30, Balkanski mediji u ratu i miru* (2003) (in Bosnian).

22. Available at http://www.usip.org/library/pa/bosnia/washagree_03011994.html.
23. Operation Deliberate Force, conducted from 30 August to 20 September 1995. See at http://www.afsouth.nato.int/factsheets/DeliberateForceFactSheet.htm.
24. General Framework Agreement for Peace in Bosnia and Herzegovina, initialled in Dayton on 21 November 1995 and signed in Paris on 15 December 1995.
25. It is important to note that the manipulation with numbers was an essential component of the collective narratives of all parties of the Yugoslav conflict, as a way of inducing self-victimization and greater sympathy in the international community. When it comes to the BiH conflict in particular, the Bosniak side has consistently maintained that the number of deaths during the war was in the 200,000–250,000 range. This number was advanced by BiH in its written pleadings – see *Genocide* case, Memorial, at 14, para. 2.1.0.8, which speaks of 'around a quarter of a million . . . mainly Muslim but also Croat' victims. It was also widely accepted in public discourse outside BiH. See, for example, a recent statement of the US

before the ICJ suffering from a severe case of multiple personality disorder. The end of the war also saw the hardening of the two established narratives: the Bosniak side saw the conflict almost exclusively in terms of genocide and Serbian aggression, while the Serbs saw it essentially as an unavoidable civil war. Probably too preoccupied with maps even to remember that they were litigating a case before the ICJ, the negotiators at Dayton somehow managed not to dispose of the BiH lawsuit in the accords. The case before the ICJ therefore continued.

The FRY submitted a number of preliminary objections to the ICJ's jurisdiction, but these were all rejected by the Court in its judgment of 11 July 1996,[26] which found that it did in fact have jurisdiction, but solely under Article IX of the Genocide Convention.[27] The one objection which was not raised by the FRY, however, was that it had no access to the Court pursuant to Article 35 of its Statute, since it was not a member of the United Nations, nor did it contest that it was a state party to the Genocide Convention.[28] This objection, which will later prove to be the pivot of the FRY's strategy before the ICJ, was not made simply because it ran counter to one of the principal components of the political narrative of the Milošević regime, that of 'saving Yugoslavia.' The Court itself managed to avoid deciding on the difficult issue of the FRY's UN membership, even though it was certainly aware of it, remarking in 1993 that it was 'not free from legal difficulties'.[29]

Indeed, the objections that the FRY did make were fully in accord with its then-dominant political narrative. It thus claimed, for example, that the conflict in BiH was internal in scope, a civil war, and that the BiH government lacked the legitimacy to file the application with the Court, since it represented only the Muslim part of the Bosnian population.[30] The ultimate expression of this account of the BiH

Under-Secretary of State, Nicholas Burns, at a conference in Washington, DC, on 21 November 2005, available at http://www.state.gov/p/us/rm/2005/57189.htm, who put the number of dead in BiH at 250,000. Comprehensive estimates done by the ICTY demographics unit, however, show that the actual number of deaths is in the 100,000–110,000 range – see E. Tabeau and J. Bijak, 'War-related Deaths in the 1992–1995 Armed Conflicts in Bosnia and Herzegovina: A Critique of Previous Estimates and Recent Results', (2005) 21 *European Journal of Population* 187. This reduced figure is confirmed by the population losses study of the Research and Documentation Centre in Sarajevo (RDC), *supra* note 9, which puts the number of deaths at 97,207, with this number potentially growing, due to new research, by a maximum of 10,000. See also BBC News, 'Bosnia war dead figure announced', 21 June 2007, available at http://news.bbc.co.uk/2/hi/europe/6228152.stm.

The inflation of numbers was, of course, not confined solely to the Bosniak side. In the run-up to the Yugoslav conflict, Serb nationalists even more egregiously manipulated the numbers of Serbs killed at the Jasenovac extermination camp during the Second World War by the Ustaše – for an example of such manipulation, see Bulajić, *supra* note 6 – while Croat nationalist did the same with the so-called Bleiburg massacre. See also MacDonald, *supra* note 5, at 160–82. Serbian nationalists are also attempting to relativize the magnitude of the Srebrenica genocide, in which Bosnian Serb forces killed some 8,000 Bosnian Muslims, by asserting that some 3,000 Serb civilians were killed by the Bosniaks in the surroundings of Srebrenica, specifically in the Bratunac municipality, and that Srebrenica was consequently a tit-for-tat crime of revenge. See, e.g., B. Ivanisevic, 'Oric's Two Years', Human Rights Watch, 12 July 2006, available at http://hrw.org/english/docs/2006/07/12/serbia13761.htm. The RDC study dispels this Serbian narrative as a myth, showing that in the Bratunac area 119 Serb civilians and 424 Serb soldiers were killed during the conflict. See at http://www.idc.org.ba/project/the_myth_of_bratunac.html.

26. *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections, Judgment of 11 July 1996, [1996] ICJ Rep. at 595.
27. Ibid., para. 41.
28. Ibid., para. 17.
29. *Genocide* judgment, *supra* note 1, para. 130.
30. Ibid., paras. 43 and 44.

conflict as a civil war, and at that a defensive war on the part of the Serb people, was the counterclaim which the FRY filed with the Court in its 1997 Counter-Memorial, arguing that it was the Serbs in BiH who were in fact victims of genocide.[31]

For the parties, therefore, the *Genocide* case was a continuation of their wartime politics by other means, each pushing its own story as to what had actually happened during the conflict. When the parties submitted their final written pleadings on the merits at the beginning of 1999, the case was well on its way to being heard by the Court in February 2000,[32] unless something were to stand in the way. And something did. Namely, in BiH itself, the situation was and remains far from monolithic. The Bosnian Serbs, the alleged perpetrators of genocide (and not just the genocide in Srebrenica, but, according to the Bosniaks, genocide everywhere in BiH), were not just physically present in the applicant state – they formed, and they continue to form, an integral part of its government and institutions.

As a product of a compromise necessary to bring an end to the conflict, the Dayton constitutional framework of BiH creates a government structure which is by design easily prone to paralysis. It allows the representatives of each of the three peoples in the BiH state institutions to declare an act of an institution to be 'destructive of a vital interest' of that people, thereby establishing an ethnic-based veto power for most major decisions.[33] By way of example, if the BiH application in the *Genocide* case had been filed after the Dayton Peace Agreement, the representatives of each of the Bosniaks, the Croats, and the Serbs would have had to have given their consent. Since the application was filed before Dayton, while the war was still ongoing, the Bosnian Serbs saw it as illegitimate, since it had been lodged without their approval.

Furthermore, as the years went by, the word 'genocide' in BiH political discourse became used more and more often as a way of saying that the Republika Srpska is fundamentally illegitimate, a 'genocidal creation' which should be abolished in favour of a unitary state of BiH. Regardless of any merits or demerits of this argument, it is easy to see why the political elites of the Republika Srpska saw the BiH lawsuit before the ICJ as a threat; it was a threat to the joint narrative they had created with Serbia, and it was an even more direct threat to their own political survival. Therefore, as soon as the Republika Srpska leadership realized the potential significance of any genocide judgment by the International Court, they spared no effort in obstructing the progress of the BiH lawsuit. Besides general political hostility and obstruction,

31. *Genocide* case, Counter-Memorial, 22 July 1997. See, e.g., at 1079–82, esp. para. 8.1.1:

> The reasons for establishing the Republic of Srpska do not lie in the 'ideology of a Greater Serbia', or in any plan created in Belgrade, but rather in the objective threats that the Serb people is under and in the religious and ethnic discrimination it is being subjected to in the territory under the Applicant's control. The creation of the Republic of Srpska has been motivated by the historical memory of the Serbs in Bosnia and Herzegovina, especially that of the genocide suffered in World War II, as well as in the political events in Bosnia and Herzegovina in 1990 and later, which culminated in armed attacks and genocide against the Serbs.

32. *Genocide* judgment, *supra* note 1, at para. 22.

33. See, e.g., Art. V(2) of Annex IV of the General Framework Agreement, which is the Constitution of Bosnia-Herzegovina.

this sabotage of the *Genocide* case from within the applicant state itself took place in three different forms, all of which remain quite unprecedented.

The first was an ambush attempt to discontinue the case, whose magnitude is shown even in the Court's own dry *qualités*, and which was made possible by the dysfunctional constitutional system of BiH. That is to say, BiH has a collective head of state – the presidency – which is composed of three members, one for each BiH major ethnic group, with the chairmanship of that presidency rotating on a periodic basis. On 9 June 1999, the then chairman of the BiH presidency, Živko Radišić, a Bosnian Serb by ethnicity, appointed a co-agent for the *Genocide* case without consulting the other two members of the presidency. One day later, that new co-agent informed the Court that BiH wished to discontinue the case, an assertion which the actual Agent subsequently denied. That, of course, did not prevent the then agent of the FRY from declaring that his government accepted the discontinuance of the proceedings.[34] After a year-long flurry of correspondence during which the Bosnian Serb and FRY officials continuously maintained that the proceedings before the ICJ were terminated, while the Bosniaks claimed that they were not,[35] the Court found that Bosnia and Herzegovina had not demonstrated its will to withdraw its application in an unequivocal manner, and that therefore there had been no discontinuance of the case.[36] Besides presumably bewildering the Court and injecting a whiff of the Balkans into the halls of the Peace Palace, this sabotage attempt from within the applicant state clearly shows how the usual applicant–respondent paradigm in an international dispute did not conform to the real fault lines of the dispute at hand in the *Genocide* case. The Court was moreover forced to postpone the beginning of the oral hearings in the case,[37] which were then further delayed after the regime change in Belgrade in October 2000.[38]

Second, there was the problem of funding. From its very beginning during the war, the details of how the BiH lawsuit before the ICJ was being funded were far from clear. Indeed, the former BiH ambassador to the United Nations, agent before the ICJ during the 1990s, and later Foreign Minister, Muhamed Sacirbegovic (Sacirbey) has been charged before the cantonal court in Sarajevo for the alleged misuse of government funds, possibly including funds allocated for the *Genocide* case, and is currently awaiting extradition to BiH from the United States.[39] When the issue of the lawsuit's funding finally came before the BiH presidency in 2002, the Bosnian Serb and, under somewhat unexplained circumstances, the Croat member of the presidency voted

34. *Genocide* judgment, *supra* note 1, at para. 18.
35. Ibid., paras. 19–23.
36. Ibid., para. 24.
37. Ibid., para. 20.
38. Ibid., para. 25.
39. See Voice of America News, 'US Court Rules Former Bosnian Foreign Minister Eligible for Extradition', 13 September 2006, available at http://www.voanews.com/english/archive/2006–09/2006–09-13-voa31.cfm?CFID=174511198&CFTOKEN=11209683. See also BETA News Agency, 'Pronevera ili zaštita državnih interesa', at http://ssla.oneworld.net/article/view/94819/1/2298?PrintableVersion=enabled (in Serbian), stating that Sacirbegovic himself defended his actions by saying that a part of the missing money was spent on the funding of the BiH legal team before the ICJ.

against further funding for the case.[40] This, in effect, meant that the funding for the lawsuit from state funds was cut off. For the next four years, money for the funding of the case came from private sources alone, mainly from the contributions of citizens and the Bosniak diaspora through several different foundations.[41] Even though there have been cases in which indigent states received the equivalent of legal aid through the ICJ Trust Fund,[42] this is probably the only example in the Court's history that a state was politically unwilling, not economically unable, to fund its own counsel.

Finally, in late 2005, the then Serb member of the BiH presidency, Borislav Paravac, lodged with the Constitutional Court of BiH a request for the review of the constitutionality of the Bosnian lawsuit before the ICJ, arguing that the filing of the application with the ICJ without the consent of the Bosnian Serb representatives was contrary to the Dayton constitution of BiH. Now it is not entirely uncommon for there to be domestic proceedings in relation to a decision of the ICJ – such as the decisions of the US Supreme Court in *Sanchez-Llamas* v. *Oregon*,[43] which followed the ICJ's *LaGrand*[44] and *Avena*[45] judgments, or the Israeli Supreme Court's ruling in the security barrier cases[46] after the ICJ's *Wall* Advisory Opinion.[47] There is, however, no instance in domestic judicial practice in which the actual legality of the filing of a case before the ICJ has been at stake. The BiH Constitutional Court wisely managed to avoid deciding on this issue by simply waiting for the ICJ to deliver its *Genocide* judgment, and then ruling that it would not be expedient for it to pronounce on an issue which has already been decided by the International Court, even though, of course, the ICJ said absolutely nothing about this issue of BiH domestic law.[48]

Although the Bosnian Serb attempts to obstruct the *Genocide* case ultimately proved to be futile, they were not inconsequential. Not only did they show that the principal dispute lay not between BiH and Serbia, but within BiH, they also managed to cast doubts in Serbian public discourse about the legitimacy of the lawsuit and, consequently, the legitimacy of the judgment. Needless to say, they also forced the

40. Radio Free Europe, 'ICJ: Tužba za agresiju i genocid visi o koncu' (ICJ: The aggression and genocide lawsuit hanging by a thread, in Bosnian), 23 May 2002, available at http://www.danas.org/programi/haaska/2002/05/20020523104350.asp; 'Tužba BiH protiv Jugoslavije: Tuženje na rate' (Bosnian lawsuit against Yugoslavia: Suing in instalments, in Bosnian), *Dani*, 25 October 2002, available at http://www.bhdani.com/arhiva/280/t28011.shtml.
41. See, for instance, the websites of two such private foundations (in Bosnian) at http://www.pravdazabih.ba and http://www.hdmagazine.com/Fond/Naslovna.htm.
42. See generally P. Bekker, 'International Legal Aid in Practice: The ICJ Trust Fund', (1993) 87 AJIL 659; C. Romano, 'International Justice and Developing Countries (Continued): A Qualitative Analysis', (2002) 1 *Law and Practice of International Courts and Tribunals* 539.
43. *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006).
44. *LaGrand (Germany v. United States of America)*, Judgment of 27 June 2001, [2001] ICJ Rep. 466.
45. *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment of 31 March 2004, (2004) 43 ILM 128, at 581.
46. *International Legality of the Security Fence and Sections near Alfei Menashe*, HCJ 7957/04, 15 September 2005.
47. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, (2004) 43 ILM 1009.
48. The Constitutional Court's decision to strike the case from its docket was delivered in March 2007. The case number is U 19/05, and the decision should become available shortly on the Court's website, at www.ccbh.ba. The Court's decision has been reported (in Bosnian) at http://www.nesradio.com/vijesti.php?vijest=11774&rub=1.

BiH counsel to spend a lot of time and energy dealing with these issues, which could have been used more productively elsewhere.

In late 1998 the Kosovo crisis in Serbia was in full swing, with the Milošević regime using excessive military force to quell the Kosovo Albanian insurrection against Serbian rule. The crisis culminated in the failure of the Rambouillet peace negotiations in March 1999, after which NATO forces launched massive air strikes against Serbia. That conflict – the last of the wars of the Yugoslav succession – produced several new bouts of litigation before the ICJ, all of which managed to become related to the *Genocide* case. On 29 April 1999 the FRY submitted an application to the ICJ against ten NATO member countries, in the so-called *Legality of the Use of Force*, or NATO cases,[49] coupled with a request for the indication of provisional measures. Then, in July 1999, capitalizing both on the lowest ebb of the reputation of the Milošević regime and Serbia in the international community and on any possible success of the BiH *Genocide* case, Croatia filed its own application against the FRY, stating that the latter was responsible for genocide committed during the 1991–5 war in Croatia.[50] Both the NATO cases and the Croatian genocide case will be discussed further below.

4. Peripety: the fall of the Milošević régime in Serbia, *Revision* and NATO cases

A true reversal of circumstances in the *Genocide* case came with the fall of the regime of Slobodan Milošević in the FRY and Serbia proper. On 24 September 2000 Milošević was defeated in the FRY presidential elections by the candidate of the Democratic Opposition of Serbia, Vojislav Koštunica. After initially trying to subvert the electoral decision, to which the population reacted by massive demonstrations on 5 October 2000, Milošević was forced to concede defeat and was replaced by Koštunica as the new president of the FRY. The Serbian general election in December 2000 removed most, but not all, of the vestiges of the rule of Milošević and his political alliance in government institutions and power structures.

These democratic changes also led to a partial shift in the collective Serbian narrative regarding the BiH conflict and other post-Yugoslav wars, with some readiness finally emerging for at least a partial acceptance of Serbia's responsibility for some of the evils of the conflicts and the many lives lost. The new government of the FRY abandoned its predecessor's insistence on the FRY as a continuation of the SFRY, and submitted an application for membership of the United Nations as a new state. The FRY was duly admitted on 1 November 2000, while the other problems raised by the succession of the former SFRY were eventually solved in direct negotiations between the FRY and the other successor states.[51]

49. Even though all of the cases raised substantially the same issues, the Court decided not to join them but deal with them separately. The judgments are, however, virtually identical. For the sake of simplicity, all citations herein will be to *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Application of 29 April 1999.
50. *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Yugoslavia)*, Application of 2 July 1999.
51. Agreement on Succession Issues of the Former SFRY, 29 June 2001, (2002) 41 ILM 3.

This period of political flux gave some much needed flexibility to the new set-up in the FRY Ministry of Foreign Affairs, which decided to change fundamentally its approach to the *Genocide* case. There was not just a simple change of personnel, even if the difference in competence alone was by several orders of magnitude. What occurred was a total change in litigation strategy, enabled by the partial change in the dominant collective narrative. The new approach of the FRY was to try to avoid an ICJ judgment on the merits of the *Genocide* case by using two prongs of attack; the first was to initiate novel jurisdictional manoeuvres, which were made possible by the FRY's thoroughly peculiar status in the United Nations, while the second was to make a serious attempt at negotiating some sort of settlement with BiH. The principal policy justification that the Serbian team put forward in favour of its strategy was that the legal position of the parties in dispute before the ICJ did not reflect reality, as the applicant state included both the alleged perpetrators and the victims of genocide, while the respondent state included both those who supported Milošević and those who fought against him. Coupled with what was seen as a Versailles-like approach to reparations by BiH and its conflation of the entire conflict with genocide, the new team and their policy masters felt that an adverse judgment by the ICJ would result in an unfair, collective punishment of Serbia, which would foster only resentment rather than reconciliation in the region.[52]

Whatever the merits of this policy rationale behind the FRY's new strategy, its attempts to negotiate a settlement with BiH were unsuccessful from their very beginning. While the change in the dominant narrative in Serbia after the fall of Milošević made the FRY's position more flexible, as the years went by the BiH narrative only hardened, mostly due to the widespread Bosniak dissatisfaction with the Dayton constitutional arrangements and the continued existence and influence of the Republika Srpska. For the Bosniaks, genocide was simply not negotiable, and the case before the ICJ served the ultimate purpose of validating their own view of the war as genocidal Serbian aggression. Nothing other than an outright and complete acceptance of this version of the truth on the part of Serbia would have sufficed for the Bosniak side. In the words of a Bosniak member of the presidency of BiH, Sulejman Tihić,

> [T]he present proceedings [before the ICJ] are of a kind in which no compromise could be envisaged, and Serbia and Montenegro must acknowledge that it participated in aggression and genocide in BiH and Herzegovina. That would be the only acceptable compromise.[53]

Coupled with the extremely high expectations of what the *Genocide* judgment would bring, and an over-enthusiastic belief among the BiH public that the case was already won, there was simply no Bosniak politician who could have accepted anything less. However, even if this version of reality was not as biased and as misguided as the 'it was all a civil war' one, it would still have been politically impossible for Serbia to accept.

52. See, e.g., *infra* note 54, the letter of FRY's Agent, Professsor Varady, withdrawing the FRY's counterclaims.
53. Quoted in *Genocide* case, CR 2006/12, at 12.

When it came to the various jurisdictional challenges which were part and parcel of the FRY's new litigation strategy, the FRY first withdrew the counterclaims against BiH submitted under the Milošević regime,[54] as these would not only hinder any attempt at negotiations but would also run counter to the FRY's main argument that it was neither a member of the United Nations nor a state party to the 1948 Genocide Convention in 1993, when the BiH application was filed. As the FRY was not a continuator but a successor of the SFRY, and was admitted into the United Nations in November 2000, so the argument went, it could not legally and logically have been a member before that date, nor could it have succeeded to the Genocide Convention.[55] Just to be sure, the FRY made this argument in duplicate. It first filed an application for revision of the Court's 1996 judgment on jurisdiction in the *Genocide* case, pursuant to Article 61 of the ICJ Statute.[56] The application for revision was treated by the Court as a new case, giving the parties the opportunity to appoint judges ad hoc, with one of the present authors (Dimitrijević) serving in that capacity on behalf of Serbia. The FRY then also submitted to the Court an 'initiative' to reconsider ex officio its jurisdiction at the merits stage of the *Genocide* case,[57] an instrument which had never before been used in the Court's practice, and which was intended as a sort of back-up in the event that the *Revision* case failed.

The crux of the FRY's new jurisdictional challenge in the *Genocide* case was therefore the FRY's anomalous, *sui generis* position in the United Nations prior to November 2000. The status of the FRY's membership was indeed a complete and abject mess, and at that a mess which was to a large extent of the United Nations' own making. During the 1990s, the United Nations' political organs, the Security Council and the General Assembly, had to make compromises and were sending mixed messages.[58]

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54. *Genocide* case, Withdrawal of Counter-claims by the Federal Republic of Yugoslavia, 20 April 2001.
55. Indeed, the FRY deposited a declaration of accession to the Convention on 8 March 2001, but with a reservation to Article IX which deals with the jurisdiction of the ICJ.
56. *Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Application of 24 April 2001.
57. *Genocide* case, Initiative to the Court to Reconsider *ex officio* jurisdiction over Yugoslavia, 4 May 2001.
58. The UN Security Council adopted on 30 May 1992 its Resolution 757 (1992) stating that the claim by the FRY 'to continue automatically the membership of the former SFRY in the UN was not generally accepted'. This statement was reiterated in the Security Council's Resolution 777 (1992) of 19 September 1992, coupled with the finding that the SFRY had 'ceased to exist'. The Council then recommended to the General Assembly to decide that the FRY 'should apply for membership in the UN and that it shall not participate in the work of the General Assembly'.

    The latter adopted on 22 September 1992 its Resolution 47/1, where the UN organ considered that the FRY 'cannot continue automatically the membership of the former SFRY in the UN' and decided that the FRY 'should apply for membership in the UN and that it shall not participate in the work of the General Assembly'. The General Assembly did not repeat the statement of the Security Council that the SFRY had ceased to exist.

    After deciding, seven months later, in its Resolution 47/229 that the FRY shall not participate in the work of the Economic and Social Council, the General Assembly adopted on 20 December 1993 Resolution 48/88, where it referred to its Resolution 47/1 and urged 'Member States and the Secretariat in fulfilling the spirit of that resolution, to end the de facto *working status* of Serbia and Montenegro' (emphasis added). The Security Council returned to that subject in its Resolution 1022 (1995) of 22 November 1995, where it referred to 'the successor States to the State formerly known as the SFRY' and to 'the fact that that State has ceased to exist'.

    As interpreted by the United States at the occasion of the adoption of Resolution 777 (19 November 1992), this resolution 'recommends that the General Assembly take action to confirm that the membership of the SFRY *has expired* and that because Serbia and Montenegro *is not the continuation* of the SFRY it must apply

As Vitucci notes, the approach by the Security Council in particular was more of a part of the entire package of sanctions against the FRY for its misbehaviour, than it was an unequivocal statement on the FRY's continuity with the SFRY, or the lack thereof.[59] The Secretariat, on the other hand, being perpetually starved of money, had no qualms about either asking the FRY to pay its membership dues or issuing legal opinions which did nothing but create more ambiguity, in essence by keeping the SFRY alive as some sort of a legal zombie.[60] The FRY under Milošević, for its part, refused to pay the allotted dues, but not on account of its not being a member, but because it was denied membership rights.

There have not been many instances of the disintegration of a state, but in all such cases the general response regarding the continuity of the international community has depended primarily on the attitude of the other states which emerged on the territory of the state which had ceased to exist. If there was an agreed arrangement, other members of the international community would generally follow suit. In the case of the SFRY there was no agreement: the claim of the FRY to continuity was contested by all the other states which had emerged from the former SFRY: Croatia, the Former Yugoslav Republic of Macedonia, Slovenia, and even Bosnia and

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for membership if it wishes to *participate in the UN*'. The US representative said further that the provision in the resolution that the FRY should not participate in the work of the General Assembly '*flows inevitably* from the determination of the Council and the General Assembly that Serbia and Montenegro is not the continuation of the former Yugoslavia' (UN Doc. S/PV.3116, 12 (emphasis added)). This interpretation was supported by the delegates of some other States in the Security Council. The representative of the United Kingdom stated that 'as regards the need to submit an application for membership' the FRY was 'in precisely the same position as other components of the former SFRY' (UN Doc. A/47/PV.7).

Conversely, there were statements by representatives of other member states, which explicitly or implicitly supported the claim of the then government of the FRY that the latter was identical with the SFRY. The representative of the Russian Federation interpreted the latter as not implying the exclusion of the FRY from the '*membership* of the UN, formally or de facto' (UN Doc. S/PV.3116, at 3). The delegate of China shared the interpretation according to which the adoption of the resolution did not amount to the expulsion of 'Yugoslavia' and referred to the situation created by the decision as a 'transitory arrangement' (ibid., at 14).

59. Vitucci, 'Has Pandora's Box Been Closed? The Decisions on the *Legality of Use of Force* Cases in Relation to the Status of the Federal Republic of Yugoslavia (Serbia and Montenegro) within the United Nations', (2006) 19 LJIL 105, at 110–11.

60. The UN Under-Secretary-General for Legal Affairs issued his opinion on GA Resolution 47/1 of 29 September 1992, in which he found that 'the only practical consequence that the resolution draws is that the Federal Republic of Yugoslavia . . . shall not participate in the work of the General Assembly,' but that 'the resolution neither terminates nor suspends Yugoslavia's membership in the Organization. Consequently, the seat and the nameplate remain as before . . . Yugoslav missions in the United Nations Headquarters and offices may continue to function and may receive and circulate documents . . . the Secretariat will continue to fly the flag of old Yugoslavia as it is the last flag of Yugoslavia used by the Secretariat. The resolution does not take away the right of Yugoslavia to participate in the work of organs other than the Assembly bodies. The admission to the United Nations of a new Yugoslavia under Article 4 of the Charter will terminate the situation created by resolution 47/1.' UN Doc. A/47/485.

It is unclear to which 'Yugoslavia' the opinion refers when not using the official title 'the Federal Republic of Yugoslavia' and when determining that the representatives of the latter can 'no longer' participate in the work of the General Assembly and not sit behind the sign 'Yugoslavia', although 'Yugoslavia's' membership in the United Nations has neither been terminated nor suspended. It is therefore conceivable that some sort of 'Yugoslavia' went on existing as a state. In view of the instruction to fly the flag of the SFRY (the *old* Yugoslavia) and the fact that this flag had no symbolic meaning having been abolished by the makers the FRY Constitution proclaimed in 1992, it appears that some kind of fiction was maintained that a state existed, which was neither the SFRY nor the FRY, or, alternatively, that the SFRY still existed. Such a 'common roof' theory (*Dachtheorie*) tallies with the opinion of the delegate of China that the adoption of Resolution 47/1 did not amount to the expulsion of 'Yugoslavia' and his qualification of the arrangement as 'transitory', as well as with the statement of Romania that this resolution did not provide for 'either the suspension or the exclusion of *Yugoslavia* from the UN.' UN Doc. A/47/PV.7, at 192 (emphasis added).

Herzegovina, which disputed the FRY's UN membership in all fora but before the ICJ. By admitting the FRY to UN membership on 1 November 2000, the Security Council and the General Assembly finally determined the outcome of the debate on the legal status of the FRY in the United Nations; before that date the FRY was not a UN member, since it could not have been admitted as a member if it already was one.[61] The only possible explanation for the FRY's dreadful *sui generis* status in the United Nations up to that date is a political one; it was the result of a series of compromises between the leading world powers, and of the latter with the regime of Slobodan Milošević. As aptly described by Treves,

> [T]he general need to maintain channels for negotiations with Belgrade at the United Nations and the need (bi-polarism redivivus?) of the Russian Federation not to go beyond a certain limit in pressuring Belgrade explain the limited survival after death through continuity by the FRY . . . of the former Yugoslavia at the UN.[62]

As is often the case, it was up to the Court to pick up the pieces once the politicians had had their say. In its judgment in the *Revision* case,[63] the ICJ first had to decide whether the FRY's request for revision was admissible, that is, whether the FRY's admission into the United Nations in November 2000 was a new fact within the meaning of Article 61 of the Statute.[64] More specifically, the FRY argued that its admission into the United Nations in 2000 revealed a fact – that the FRY was until then actually not a member – that fact being unknown to the parties and to the Court in 1996, when the judgment on jurisdiction was delivered.[65] The Court ruled against the FRY by ten votes to three and did so, first, on the basis of a restrictive interpretation of the term 'fact' and, second, by holding that the FRY's admission into the United Nations in 2000 could not have changed its position retroactively.[66]

We believe, with respect, that the Court's reasoning in this regard was and is unpersuasive, and that the best solution warranted by the law was that the request for revision was admissible and that the FRY lacked access to the Court, it not being a UN member in 1993.[67] We do, however, recognize that even though it was not the *best* legal solution, the solution that the Court itself opted for was still not unreasonable. It was furthermore supported by sound policy considerations: it upheld the authority of the Court in the face of the inconsistent, even if not entirely unjustified, behaviour of the FRY, and it affirmed the stability of its jurisprudence

61. See further V. Dimitrijević, 'What was "Yugoslavia" between 27 April 1992 and 1 November 2000?', in P. Hänni (ed.), *Mensch und Staat: Festgabe der Rechtswissenschaftlichen Fakultät der Universität Freiburg für Thomas Fleiner zum 65. Geburtstag* (2003), 17.
62. T. Treves, 'The Expansion of the World Community and Membership of the UN', (1995) 6 *Finnish Yearbook of International Law* 278.
63. *Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections (Yugoslavia v. Bosnia and Herzegovina)*, Judgment of 3 February 2003, [2003] ICJ Rep. 7 (hereinafter the *Revison* judgment).
64. A 'fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence' – ICJ Statute, Art. 61(1).
65. *Revision* judgment, *supra* note 63, at para. 65.
66. Ibid., paras. 65–72.
67. See *Revision* judgment, *supra* note 63, at 53 (Dissenting Opinion Judge Dimitrijević).

and the strategy of avoidance that the Court adopted in 1993 and in 1996 when it refused to pronounce itself on the issue of the FRY's UN membership.

Coincidentally, one day after the Court delivered its judgment in the *Revision* case, the Constitutional Charter of Serbia and Montenegro was promulgated, transforming the FRY into a somewhat weaker federation which changed its name to Serbia and Montenegro. Then, in 2004, came the NATO cases, which dealt with the legality of the use of force by several NATO countries against the FRY in 1999. Despite failing to achieve their desired result in the *Revision* proceedings, the legal team of Serbia and Montenegro saw the preliminary objections phase of the NATO cases as another opportunity for strategic litigation which might have an impact on the *Genocide* case. That is to say, as there was very little chance of the NATO cases being decided in favour of Serbia and Montenegro on the merits,[68] and since the cases burdened its relations with the West, Serbia and Montenegro decided to make the best of the NATO cases by attempting to induce the Court to declare itself without jurisdiction on the basis of the FRY's lack of UN membership in 1999. In another first, the applicant in a case before the ICJ actually *wanted* the Court to say that it did not have jurisdiction.

Bearing in mind the Court's reluctance in the *Revision* case to say just that, the Court's judgment in the NATO cases came as a bolt from the blue. In a seemingly unanimous decision,[69] the Court ruled that Serbia and Montenegro was not a UN member in 1999 and that it therefore had no access to the Court under Article 35(1) of the Statute.[70] The Court also ruled that the applicant had no access under Article 35(2) of the Statute[71] – even though the applicant in fact did not rely on this provision – by interpreting it restrictively and holding that it applies only to those treaties which were already in force by the time the Statute was enacted.[72]

The Court's legal conclusions were, in our view, fundamentally correct, with the possible exception of its interpretation of Article 35(2) of the Statute. That does not mean, however, that the road the majority took was either wise or appropriate, most importantly because it created a rather disquieting split within the Court itself. The judgment was unanimous only deceptively, because of the neutral way in which the *dispositif* was framed.[73] Although all the judges felt that the case should not proceed to the merits phase for lack of jurisdiction, it was only the barest majority who thought that the case should be dismissed due to lack of jurisdiction *ratione personae*, because of the FRY's UN membership status. Indeed, the actual tally of the votes in the case was eight to seven. The minority believed that the Court should have dismissed the case on grounds of lack of jurisdiction *ratione temporis* and *ratione materiae*, just as

68. This was so, *inter alia*, because despite their name, the only readily available jurisdictional basis in the NATO cases was again the Genocide Convention, and the NATO armed actions against the FRY could in no conceivable terms be qualified as genocide.
69. *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Judgment of 15 December 2004, [2004] ICJ Rep. 279.
70. Ibid., paras. 45–91.
71. Which reads: '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, but in no case shall such conditions place the parties in a position of inequality before the Court.'
72. *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, paras. 92–114.
73. See S. Olleson, '"Killing Three Birds with one Stone"? The Preliminary Objection Judgment of the International Court of Justice in the *Legality of Use of Force* Cases', (2005) 18 LJIL 237, at 238.

the Court dismissed the FRY's request for the indication of provisional measures in the same case.[74] The Court's approach was furthermore completely at odds with its previous strategy of avoidance in respect of the thorny issue of the FRY's status in the United Nations, which it consistently applied in the *Genocide* and *Revision* cases.

Why, then, did the Court reverse its course from *Revision*? The only possible explanation for the Court's change of heart is that a majority had formed in 2004 within the Court which wanted to use the NATO cases to sink the *Genocide* case, as was noted in a somewhat more diplomatic form by the dissenting judges.[75] This explanation is further supported by the Court's restrictive pronouncements of Article 35(2) of the Statue, on which the FRY as an applicant did not at all rely in the NATO cases, but which was a possible basis for the FRY's access to the Court as a respondent in the *Genocide* case. As stated by Judge Higgins in her dissent, the only relevance of this exercise was to another pending case[76] – the *Genocide* case.

How is it that the Court was willing to jeopardize the *Genocide* case in 2004, when it was clearly unwilling to do so in the 2003 *Revision* case? The only answer to that question is that the Court which sat in 2004 was not the same Court which sat in 2003. Not counting judges ad hoc, the bench in the 2004 NATO cases included three judges who had not sat in the 2003 *Revision* case, while one judge recused himself.[77] The Court also had a new president. Moreover, even though the respondent NATO states which did not have a judge of their nationality on the bench availed themselves of the opportunity under Article 31(3) of the Statute to appoint judges ad hoc, the Court decided that, taking into account the presence on the bench of judges of British, Dutch, and French nationality, the judges ad hoc chosen by the respondent states should not sit during the preliminary objections phase of the NATO cases.[78] The Court so decided even though Serbia and Montenegro withdrew its initial objection to the presence of these other judges ad hoc on the bench.[79]

Bearing in mind that the judgment was actually delivered by eight votes to seven, this meant that the cases were in the end decided by the single, crucial vote of the Serbian judge ad hoc, who was in a position to give Serbia and Montenegro exactly what it wanted from the NATO cases. The sheer oddity of this situation is further compounded by the fact that the judge ad hoc in the 2004 NATO cases, who also

74. *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Order of 2 June 1999, [1999] ICJ Rep. 124.
75. *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Judgment of 15 December 2004, [2004] ICJ Rep. 330, at 334 (Joint Declaration of Vice-President Ranjeva, Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal, and Elaraby):

> We have referred also to the care that the Court must have, in selecting one among several possible grounds for a decision on jurisdiction, for the implications and possible consequences for other cases. In that sense, we believe that paragraph 40 of the Judgment does not adequately reflect the proper role of the Court as a judicial institution. The Judgment thus goes back on decisions previously adopted by the Court, whereas it was free to choose the ground upon which to base them and was under no obligation to rule in the present case on its jurisdiction *ratione personae*. Moreover, this approach appears to leave some doubt as to whether Yugoslavia was a party, between 1992 and 2000, to the United Nations Genocide Convention. Such an approach could call into question the solutions adopted by the Court with respect to its jurisdiction in the case brought by Bosnia-Herzegovina against Serbia and Montenegro for the application of the Genocide Convention. We regret that the Court has decided to take such a direction.

76. Ibid., at 341 (Judge Higgins, Separate Opinion).
77. Ibid., para. 16.
78. Ibid., para. 18.
79. Ibid., para. 17.

continued to sit in the *Genocide* case, was appointed by the Milošević regime. The counsel for Serbia and Montenegro, on the other hand, were people who had actively fought against the Milošević regime, yet they were by virtue of their position forced to defend, at least in part, the policies of the some.[80]

Be that as it may, despite the setback it suffered in the *Revision* case, the Court's decision in the NATO cases gave Serbia and Montenegro new hope that it might dispense with the *Genocide* case on jurisdictional grounds. It therefore pursued its initiative to the Court to reconsider its jurisdiction in that case with new vigour, and the Court allowed it to argue jurisdiction anew in the oral hearings, scheduled for 2006.

5. Resolution: the 2007 *Genocide* judgment

The oral hearings in the *Genocide* case, which were held from 27 February to 9 May 2006, were of particular importance for two separate reasons. First, because of the great time lapse between the oral hearings and the last written pleadings on the merits, which were filed with the Court in 1998 and 1999. Second, because of the many political developments in the intervening period and, even more importantly, because of the enormous amount of work produced by the ICTY, due to which the written pleadings were quite simply horribly outdated.

The parties' oral pleadings before the Court were long and complex, and will not be dealt with here in detail.[81] The Court delivered its judgment in February 2007, some ten months after the close of the oral hearings. During the intervening period the respondent underwent its final transformation, that from Serbia and Montenegro to Serbia alone.

The first issue that the Court had to address was Serbia's renewed jurisdictional challenge: which road would it follow, the path of avoidance of 1993, 1996, and 2003, or the one much more favourable to Serbia of 2004? The Court held, by ten votes to five, that its 1996 judgment had the force of *res judicata*, which extended even to those questions which the Court did not address explicitly in 1996, but which it logically must have dealt with by necessary implication, namely the issues of Serbia's status in the United Nations and as a party to the 1948 Genocide Convention.[82] In the words of the Court, '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. That element is not one which can at any time be reopened and re-examined.'[83]

This part of the 2007 judgment, which was supported by its smallest majority, is in our view certainly its weakest. The Court's assessment that issues which were not decided by it, yet which were raised in later litigation, can actually be covered by

80. This was in fact stated before the Court by the Serbian Agent in the case. See *Genocide* case, CR 2006/12, at 12.
81. For an overview of some of the issues raised during the oral arguments, see A. Riddell, 'Report on the Oral Proceedings in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*: Selected Procedural Aspects', (2007) 20 LJIL 405–40.
82. *Genocide* judgment, *supra* note 1, at paras. 121–40.
83. Ibid., para. 135.

the *res judicata* principle as somehow being decided on implicitly has little support in international jurisprudence.[84] Again, as in the 2003 *Revision* case, the best legal solution was that the Court lacked jurisdiction *ratione personae* over Serbia. But, again as in 2003, we must concede that the Court's chosen solution, creative though it might be, is not beyond the limits of reasonableness and judicial propriety. It was obviously motivated by considerations of sound administration of justice, and by a desire to avoid a blow to the Court's authority that a dismissal on solely jurisdictional grounds of an exceptionally delicate case after 14 years of litigation would produce, in a potential repeat of the *South West Africa* fiasco.

Saying that still does not explain, however, the Court's reversal from its position in the 2004 NATO cases, as the same policy rationales applied then as well as now. The explanation of the Court's 2007 decision is again simple; as the Court which sat in 2004 was not the Court which sat in the 2003 *Revision* case, so the Court in 2007 was not the same as the one in 2004. There were, again, a new president and no fewer than five new judges on the bench. No other explanation would seem to suffice, and the formal consistency of the Court's 2007 judgment with the NATO cases is no more than superficial.

Having thus finally disposed of the seemingly endless games of jurisdiction played by the respondent, the Court pronounced itself on the merits of the *Genocide* case: genocide was in fact perpetrated in BiH, but 'only' in the town of Srebrenica in July 1995.[85] Serbia was not responsible for the commission of that genocide, lacking either complete control or effective control over the forces of the Republika Srpska,[86] but was responsible for failing to prevent and punish the genocide.[87] The Court furthermore decided that the appropriate form of reparation for Serbia's breach of its duty to prevent genocide would not be compensation, but a formal declaration by the Court itself that a violation occurred.[88]

Although Serbia got off lightly by any objective assessment, the one reason it did so was not some half-baked political compromise, but the Court's restricted jurisdiction, which was limited to genocide and genocide alone. If the Court had had jurisdiction over the various violations of the *jus ad bellum*, humanitarian law, and human rights law, the overall picture of the case would have been different. The Court itself has shown that it indeed has the courage to deal with such issues, as recently as in the *Congo* v. *Uganda* case.[89] In the *Genocide* case, however, the Court lost jurisdiction whenever it established that a particular atrocity, no matter how heinous, could not be qualified as genocide, but solely as a war crime or a crime against humanity.[90] The Court was therefore forced by law, by the cardinal principle that it can exercise its jurisdiction only when a state consents to it, to reach

84. See further S. Wittich, 'Permissible Derogation from Mandatory Rules? The Problem of Party Status in the *Genocide* Case', (2007) 18 EJIL 591.
85. *Genocide* judgment, *supra* note 1, at paras. 291–297.
86. Ibid., paras. 391–415.
87. Ibid., paras. 425–50.
88. Ibid., para. 463.
89. *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment (merits) of 19 December 2005.
90. See the *Genocide* judgment, *supra* note 1, paras. 147, 277, 319, 328, 334, 354.

a conclusion which appears to be Solomonic or somehow overly lenient towards Serbia.

Our agreement with the Court's end result does not mean that we consider the judgment to be perfect. As one of us argued elsewhere, the judgment has four principal weak points.[91] These are the issue of Serbia's possible responsibility for the acts of the Scorpions paramilitary group, the Court's reluctance to request certain redacted documents from Serbia, some aspects of the Court's analysis of complicity in genocide, and, most importantly, the Court's decisions to grant only a declaratory remedy as a form of satisfaction to BiH due to Serbia's breach of its obligation to prevent genocide.[92] These flaws notwithstanding, in its methodology regarding state responsibility and in its basic result the judgment is unimpeachable, and represents a significant contribution to international law.

That, unfortunately, is not at all how the *Genocide* judgment was perceived either in BiH or in Serbia, or, for that matter, in any of the other countries of the former Yugoslavia. Due to a particularly malignant combination of near-total ignorance of international law in the general public and the media, the disparity between the lay concept of genocide and the legal notion of genocide, and many years of political manipulation through the lens of their respective narratives, the people of BiH and Serbia did not understand the ICJ's judgment for what it was. Paradoxically, that part of the judgment which is the least legally problematic, namely the Court's conclusions that Srebrenica alone is genocide[93] and that Serbia is not directly responsible for it,[94] is the one which is the most controversial in the general public in BiH, and it became so from the moment that President Higgins finished the reading of the judgment.

Both Bosniaks and Serbs saw the judgment as a judicial absolution of Serbia for its participation in the BiH war. For example, as soon as the Court rose, a prominent Bosniak intellectual tore to shreds a freshly printed copy of the judgment at the gates of the Peace Palace.[95] That sort of disrespect towards the Court has indeed been rare. Yet so much emotion and so much moral and political capital have been invested by Bosniaks in this validation of their views of the war through the *Genocide* case that anything but a total win for BiH would have been, and is perceived by them as, a travesty of justice.

In BiH, the atmosphere after the judgment was one of total incredulity. 'I am stunned,' said Hedija Krdzic, who lost many loved ones in the Srebrenica genocide. 'I saw with my own eyes who started this war and who kept up the aggression. It was the Serbs.'[96] 'We know that Serbia was directly involved', stated Fadila Efendic,

91. See M. Milanović, 'State Responsibility for Genocide: A Follow-Up', (2007) 18 EJIL 669.
92. See also A. Gattini, 'Breach of the Obligation to Prevent and the Reparation Thereof in the ICJ's *Genocide* Judgment', (2007) 18 EJIL 695.
93. See, however, C. Kreß, 'The International Court of Justice and the Elements of the Crime of Genocide', (2007) 18 EJIL 619.
94. See, e.g., W. Schabas, 'Whither Genocide? The International Court of Justice Finally Pronounces', (2007) 9 *Journal of Genocide Research* 183.
95. See N. Bogovic, 'Presuda za cepanje ili uramljivanje', *Danas*, 3–4 March 2007, available (in Serbian) at http://www.danas.co.yu/20070303/vikend2.html.
96. 'Genocide ruling sparks anger', *Star*, 27 February 2007, available at http://www.thestar.com/article/186004.

also a Srebrenica survivor. 'We saw Serbian troops shell us and kill our sons and husbands. We saw them commit genocide here.'[97]

The mood in BiH is even more poignantly captured in this statement by Zeljko Komsic, the Croat member of the BiH presidency:

> Privately speaking, I will maybe abuse this right to say that the greatest genocide was committed in Bosnia-Hercegovina in 1992. All of us who lived here are clear about it. Everybody who interprets it in a different way simply is afraid of the truth. I would like to repeat that we have to respect this decision of the court, but I know what I will teach my child.[98]

The general public in both BiH and Serbia at no point in time realized that the case before the ICJ was legally never about the aggression or the war or any other crime committed in it, but solely about genocide. In Serbia, in the days following the judgment, euphoric headlines flooded the press.[99] An editorial in *Politika*, the most influential Serbian daily, started with the lines, 'We are not guilty. We have been found innocent by the highest court of the United Nations.'[100] While politicians in Serbia generally expressed relief, those in the Republika Srpska were practically jubilant. In the words of Milan Jelic, the president of the Republika Srpska, 'This [judgment] sends a message, it defines the character of the war taking place in the former [*sic*] Bosnia and Herzegovina, as it is clear that it was just an unfortunate conflict which happened in 1992.'[101] Adds Igor Radojičić, the Speaker of Republika Srpska's parliament, 'I consider that an important message of today's decision is that the survival and further development of the Republika Srpska can no longer be doubted.'[102]

How the judgment was received in BiH is well demonstrated by the results of a recent opinion poll: 68 per cent of the citizens of the Republika Srpska think that the judgment was just, while 83 per cent of the citizens of the Bosniak–Croat Federation believe that it was not.[103] Again, in neither the BiH nor the Serbian public was there ever the realization that the only reason why the judgment turned out the way it did was the Court's limited jurisdiction, or the recognition of just how narrowly defined 'genocide' is in international law,[104] or the understanding of the fact that, although the Court could not pronounce on Serbia's responsibility for intervention in BiH or

97. N. Wood, 'Bosnian Muslims View Ruling as Another Defeat', *New York Times*, 27 February 2007.
98. 'Judgments on a verdict', *BBC Monitoring*, 27 February 2007, available at http://www.tol.cz/look/TOL/article.tpl?IdLanguage=1&IdPublication=4&NrIssue=207&NrSection=1&NrArticle=18369.
99. See, e.g., A. Roknic, 'Serbia Has No Reason to Celebrate', *IWPR Tribunal Update*, No. 491, 2 March 2007, available at http://iwpr.net/?p=tri&s=f&o=333776&apc_state=henftri333778.
100. D. Matovic, 'Prošlost pred nama' (The past before us – in Serbian), *Politika*, 4 March 2007.
101. D. Stegic, 'Banja Luka – Presuda Međunarodnog suda pravde u Hagu pretpostavka za bolje odnose u regionu', *Voice of America*, 26 February 2007, available (in Serbian/Bosnian) at http://www.voanews.com/bosnian/archive/2007–02/2007–02-26-v0a4.cfm.
102. Ibid.
103. See 'Najviše građana RS za izručenje', *B92*, 23 July 2007, available at http://www.b92.net/info/vesti/index.php?yyyy=2007&mm=07&dd=23&nav_category=167&nav_id=256395.
104. Art. II of the Genocide Convention defines genocide as '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.' See generally W. Schabas, *Genocide in International Law: The Crime of Crimes* (2000).

for any other crimes but Srebrenica, it does not mean that such responsibility does not exist. As the Court itself exhorted repeatedly in its jurisprudence, most recently for *Serbia*'s benefit in the NATO cases,

> Finally, the Court would recall, as it has done in other cases and in the Order on the request for the indication of provisional measures in the present case, the fundamental distinction between the existence of the Court's jurisdiction over a dispute, and the compatibility with international law of the particular acts which are the subject of the dispute. Whether or not the Court finds that it has jurisdiction over a dispute, the parties 'remain in all cases responsible for acts attributable to them that violate the rights of other States'. When, however, as in the present case, the Court comes to the conclusion that it is without jurisdiction to entertain the claims made in the Application, it can make no finding, nor any observation whatever, on the question whether any such violation has been committed or any international responsibility incurred.[105]

Judges of the ICJ often refuse to comment on a judgment by saying that a judgment speaks for itself. That it does, but in a language that most ordinary people do not understand – and by that we, of course, do not mean either English or French. The *Genocide* judgment's true content, and the Court's legal finesse and the great care it took in limiting its findings to genocide alone, without however diminishing in any way the gravity of other mass crimes committed during the BiH war, were completely lost in the translation. When the Court says that

> It has no power to rule on alleged breaches of other obligations under international law, not amounting to genocide, particularly those protecting human rights in armed conflict. That is so even if the alleged breaches are of obligations under peremptory norms, or of obligations which protect essential humanitarian values, and which may be owed *erga omnes*.[106]

– no lay person will understand what that means, even if the import of the words such as 'peremptory norms' or 'erga omnes' is perfectly clear to any international lawyer. The word 'genocide', on the other hand, has been inflated so much, that the notion of crimes against humanity, a term originally coined to describe the horrors of the Holocaust,[107] has been consequently so devalued that Bosniaks perceive its use by the Court in lieu of genocide as an insult, a denial of their suffering – witness the previously mentioned tearing-up of the Court's judgment on its very doorstep. The Court seems to have been aware of this disparity between the legal and lay notions of genocide, and the legally unwarranted inflation of genocide. President Higgins even held a press conference after the reading of the judgment at which she tried to explain the limits of the Court's jurisdiction[108] – to unfortunately very little avail.

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105. *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Judgment of 15 December 2004, para. 128 (citations omitted).
106. *Genocide* judgment, *supra* note 1, para. 147.
107. See generally M. Cherif Bassiouni, *Crimes against Humanity in International Criminal Law* (1999).
108. In the words of the President,

> [T]he Court has no authority to rule on alleged breaches of obligations under international law other than genocide, as defined by the Genocide Convention. This is important to understand because in this case we were confronted with substantial evidence of events in Bosnia and Herzegovina that may amount to war crimes or crimes against humanity – but we had no jurisdiction to make findings in

This phenomenon of genocide inflation is of course not confined to BiH and to the *Genocide* judgment alone, as exactly the same thing happened in relation to Darfur.[109] In a combination of good intentions and guilt over Rwanda, an enormous number of actors, from the global human rights community to the Bush administration, started labelling the still ongoing crimes in Darfur, which already took some 200,000 lives, as genocide.[110] Then came the Report of the UN Commission of Inquiry on Darfur, chaired by Professor Cassese, which concluded that there is insufficient evidence that the crimes were committed with genocidal intent.[111] Just as in the *Genocide* case, the Report's authors took every possible precaution by saying that the qualification of these atrocities as crimes against humanity in no way diminishes their magnitude or impinges on the dignity of the victims.[112] Yet, the very next day, these were only some of the headlines in the world press: 'U.N. Finds Crimes, Not Genocide in Darfur' (*New York Times*), 'U.N. Panel Finds No Genocide in Darfur but Urges Tribunals' (*Washington Post*), 'Horrors Short of Genocide' (*Herald Sun*), 'UN Clears Sudan of Genocide in Darfur' (*Herald*), 'UN Confusion as Sudan Conflict Is No Longer "Genocide"' (*Daily Telegraph*).[113] Even though in the *Genocide* case it was not only the former Yugoslav media that misunderstood the Court's judgment,[114] this was where the effects of these distortions were most felt. The Court's more subtle message that crimes other than genocide were indeed committed, and that Serbia might indeed be responsible for some of them, was never heard.

While the final outcome of the judgment was determined, on the one hand, by the Court's limited jurisdiction, it was on the other seriously affected by the BiH litigation strategy, by its assertion that the totality of all the crimes committed during the war amount to genocide. That strategy was legally misguided simply because it was extremely improbable that BiH could furnish the required proof of specific intent, as is shown by the ICTY's inability to establish genocide anywhere in BiH except in Srebrenica, and even there with great difficulty.[115] The overly ambitious

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> that regard. We have been concerned *only* with genocide – and, I may add, genocide in the legal sense of that term, not in the broad use of that term that is sometimes made. (Statement to the Press by H.E. Judge Rosalyn Higgins, President of the International Court of Justice, 26 February 2007, available at http://www.icj-cij.org/court/index.php?pr=1898&pt=3&p1=1&p2=3&p3=1)

109. See also C. Kress, 'The Crime of Genocide under International Law', (2006) 6 *International Criminal Law Review* 461, at 463.
110. See, e.g., D. Luban, 'Calling Genocide by Its Rightful Name: Lemkin's Word, Darfur and the UN Report', (2006–2007) 7 *Chicago Journal of International Law* 303, at 304–6.
111. Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Geneva, 25 January 2005, available at http://www.un.org/News/dh/sudan/com_inq_darfur.pdf.
112. See, e.g., ibid. at para. 642:

> The conclusion that no genocidal policy has been pursued and implemented in Darfur by the Government authorities, directly or through the militias under their control, should not be taken as in any way detracting from the gravity of the crimes perpetrated in that region. Depending upon the circumstances, such international offences as crimes against humanity or large scale war crimes may be no less serious and heinous than genocide. This is exactly what happened in Darfur, where massive atrocities were perpetrated on a very large scale, and have so far gone unpunished.

113. All quoted according to Luban, *supra* note 110, at 304.
114. See, e.g., M. Corder, 'U.N. Court Clears Serbia of Genocide', *Washington Post*, 27 February 2007.
115. The difficulty with proving genocidal intent in BiH is well evidenced, for example, by the ICTY's acquittal on the charge of genocide of Momcilo Krajisnik, the wartime Speaker of the Bosnian Serb parliament and of

character of the BiH case is shown, *inter alia*, by the fact that until the end of the case BiH maintained in its submissions that Serbia also committed genocide in its own territory and against its own Bosniak citizens, even though there was simply no evidence of something of that sort even prima facie.[116] The expansive approach of BiH had several adverse consequences.

First, BiH was unable to overcome the Court's passivity in fact-finding, which is long-standing and structurally exists by default, as it is generally the responsibility of the parties to provide the Court with evidence. The BiH failure to emphasize the importance of pro-active fact-finding manifested itself most of all in its, and consequently the Court's, over-reliance on the ICTY. Indeed, the ICTY proved to be a double-edged sword for BiH. While, on the one hand, its work allowed BiH to prove an enormous number of facts that it would in all likelihood not have managed to do otherwise, on the other hand it had at least two detrimental consequences for the BiH case.

The first, which was mentioned above, was that the ICTY found genocidal intent only in Srebrenica. BiH had four options for dealing with this obstacle. First, and obviously, BiH could have tried narrowing its case and arguing that genocide was limited to Srebrenica and possibly a few other instances in the war.[117] This option, however, was politically unacceptable, for reasons already given. Second, BiH could have claimed that the ICTY was wrong in assessing the evidence which was presented before it and that in regard to certain crimes, such as the horrible Prijedor prison camps, where the ICTY found insufficient proof of genocidal intent,[118] such proof did in fact exist. The problem with this approach, of course, is that it would require the ICJ to gainsay the ICTY on the facts, which would have been very unlikely due to considerations of policy and comity between the two courts. Indeed, in the *Genocide* judgment the ICJ contradicted the ICTY only once, on an issue of general international law, the applicable tests of state responsibility,[119] while it deferred to the ICTY on issues of international criminal law, in which the latter undoubtedly has great expertise – not to mention that the ICTY's fact-finding mechanisms are

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the highest officials of the Republika Srpska – see *Prosecutor v. Krajisnik*, Case No. IT-00–39, Trial Chamber Judgement of 27 September 2006, and by the ICTY's recent reversal of the trial chamber judgment in the *Blagojevic* case, on the point that the defendant was aware of the genocidal intent of the VRS leadership in Srebrenica and was guilty of aiding and abetting genocide – see *Prosecutor v. Blagojevic*, Case No. IT-02–60, Appeals Chamber Judgement of 9 May 2007. The finding of genocide was made by the ICTY in *Prosecutor v. Krstić*, Case No. IT-98–33, Appeals Chamber Judgement of 19 April 2004, but even Krstić was finally convicted only as an aider and abettor. See also Schabas, 'Was Genocide Committed in Bosnia and Herzegovina? First Judgments of the International Criminal Tribunal for the Former Yugoslavia,' (2001) 26 *Fordham International Law Journal* 907.

116. *Genocide* judgment, *supra* note 1, at paras. 368–369.

117. One of us has argued before that the best starting point for BiH and the ICJ would have been the Decision on the Motion for Judgement of Acquittal of 16 June 2004 of the ICTY Trial Chamber in the *Milošević* case, Case No. IT-02–54, paras. 117 et seq., which lists several municipalities in which a reasonable trial chamber could find that genocide was committed, and do so beyond reasonable doubt. See M. Milanović, 'State Responsibility for Genocide', (2006) 17 EJIL 553, at 596 n. 243. This approach would have probably worked best if the case were further narrowed, to the period of May–August 1992, during which, as previously stated, the Bosniak community sustained more than half of all civilian casualties of the entire war. See *supra* note 9.

118. *Prosecutor* v. *Milomir Stakić*, Case No. IT-97–24-T, Trial Chamber Judgement of 31 July 2003; Appeals Chamber Judgement of 22 March 2006.

119. *Genocide* judgment, *supra* note 1, paras. 399–407.

by design far superior to those of the ICJ. Third, BiH could have claimed that there was a difference, *as a matter of law*, in establishing genocide in a proceeding on state responsibility compared with proving genocide in individual criminal proceedings. This BiH did argue, as this was the easiest road for it to take. BiH claimed, for example, that the standard of proof before the ICJ should be lower than before the ICTY, that the burden of proving specific intent should be reversed, and that the pattern of all committed crimes evidenced genocidal intent.[120] The ICJ quite correctly rejected all these arguments, as they were for the most part as unsupported by law as they were inventive.[121] The final option that BiH could have pursued was to try to find *new* evidence of genocidal intent, which had *not* been produced before the ICTY. That did not happen.

The ICTY's second detrimental effect on the BiH case was by virtue of the fact that, to date, the ICTY has not sufficiently explored the relationship between the FRY/Serbian authorities in Belgrade and the leadership of the Republika Srpska. This is so not only because of the aborted Milošević trial, but also because the proceedings against Jovica Stanišić and Franko Simatović, the chief and deputy chief of the Serbian secret police, and Momčilo Perišić, the FRY army chief of staff, are still at pre-trial stages.[122] The facts that will hopefully be established in these proceedings would have been relevant for establishing attribution of the acts of the Republika Srpska to Serbia in the *Genocide* case. In that sense, as one of us has argued before, even though the *Genocide* case was pending before the ICJ for some 14 years, it actually came prematurely for BiH.[123]

The only avenue left open for BiH to win its case was for it and for the Court to engage in fact-finding *independent* of the ICTY, and that, again, did not happen. Indeed, there is, to our knowledge, not a single important factual finding in the *Genocide* judgment which was not previously established either by the ICTY or by some other secondary source. The over-reliance on the ICTY by BiH in particular was quite obviously caused by the fact that its counsel before the ICJ had to deal with the entire morass of the four-year BiH war, instead of focusing on just a few specific situations in addition to Srebrenica which might have amounted to genocide. As the BiH counsel had to deal with everything from the siege of Sarajevo to Prijedor to Srebrenica, they did not have the time, energy, or resources to run a true fact-finding case before the ICJ. Regurgitating ICTY judgments simply occurred by default.

In that regard, BiH called only two witnesses before the Court, and at that two experts: General Sir Richard Dannatt, who did offer some valuable expertise to the Court regarding the organization of the Bosnian Serb military, but no new, hard data,[124] and Andras Riedlmayer, whose testimony on the destruction of the cultural

120. See, e.g., *Genocide* case, CR 2006/2, at 28 et seq.; CR 2006/4, at 21 et seq.; CR 2006/5, at 19–20, 33 et seq.; Reply of Bosnia and Herzegovina, 23 April 1998, at 77–373.
121. *Genocide* judgment, *supra* note 1, paras. 202–210, 370–376.
122. *Prosecutor v. Stanišić and Simatović*, Case No. IT-03–69; *Prosecutor v. Perišić*, Case No. IT-04–81.
123. Milanović, *supra* note 117, at 603.
124. *Genocide* case, CR 2006/23.

heritage of BiH was by no means irrelevant, but was not particularly helpful either.[125] BiH also produced no witnesses, nor had it asked the Court to call any, in relation to the activities of the Scorpions paramilitary group, but relied solely on a few inconclusive documents in attempting to prove the attribution of their acts to Serbia.[126] We do realize that it is not the usual practice in ICJ litigation to summon witnesses or engage in other direct forms of fact-finding, but that is exactly the point – the *Genocide* case was not an ordinary case.[127]

The excessive weight of the BiH case did not extend only to fact-finding. Parties in a case before the ICJ usually strive to make a layered submission, a principal argument with several alternatives. In the *Genocide* case, however, BiH played a game of all or nothing, and made no allowance in the (more than likely) event that their primary argument, that all of the crimes are genocide and that Serbia is responsible for all of them, should fail. Serbia's responsibility for failing to prevent genocide in particular was, in the words of BiH's own counsel, 'eclipsed' by their primary argument,[128] nothing more than an afterthought. Indeed, although we stated that we consider the Court's unsatisfactory approach to reparations for the breach of the duty to prevent genocide to be the single greatest flaw of the *Genocide* judgment, it was the BiH counsel themselves who explicitly averred before the Court that a declaratory judgment would be an appropriate remedy for this violation.[129] Even assuming that the Court was not barred by the *ne ultra petita* rule from awarding a different remedy than that asked by BiH, and that it indeed could have decided on a different form, of just satisfaction, it must be admitted that the Court lacked any incentive from the parties to do so.[130] If the BiH counsel had not been bound by politicians to pursue a maximalistic case, but had instead presented a much more focused argument, the *Genocide* case might have produced a markedly different result.

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125. Ibid., CR 2006/22.
126. See further Milanović, *supra* note 91.
127. See also R. Teitelbaum, 'Recent Fact-Finding Developments at the International Court of Justice', (2007) 6 *Law and Practice of International Courts and Tribunals* 119.
128. *Genocide* judgment, *supra* note 1, para. 155.
129. *Genocide* case, CR 2006/11, p. 36, para. 20 (trans. I. Pellet):

> Of course, this does not however mean that Serbia and Montenegro is free of any obligation to provide satisfaction to Bosnia and Herzegovina in other forms. Given the judicial context of the present case, the most natural mode of satisfaction, that which springs to mind immediately, also the most common in such circumstances, *is obviously a formal declaration by this Court* that Serbia and Montenegro has breached its obligations under Articles I to V – inclusive – of the Convention. *This is also what Bosnia and Herzegovina asked of you in its Reply and what it continues to request you to decide in this regard* . . . (emphasis added, footnotes omitted)

130. Professor Tomuschat argues that the Court's reasoning on reparations is one of the most serious faults of the *Genocide* judgment, and that is a sentiment with which we entirely agree – see C. Tomuschat, 'Reparation in Cases of Genocide', (2007) 5 *Journal of International Criminal Justice* 905. We disagree with him, however, when he says that the Court was 'fairly misleading' in claiming that the applicant itself suggested a formal declaration as an appropriate remedy (ibid., text at notes 16 and 17). Even though Professor Tomuschat correctly states that the applicant's formal submissions to the Court contained a generic claim to compensation, which did not exclude any form of satisfaction, the applicant's own counsel did actually propose a declaratory remedy for a breach of the duty to prevent genocide, as recounted in the preceding footnote.

6. Epilogue

With all the things that stood in the Court's way, it is remarkable that the *Genocide* judgment turned out as well as it did, even if it is far from perfect. This, of course, is a tribute to the Court's integrity and expertise. But what a strange case it truly was – pursued by a changing applicant against a changing respondent before a changing Court. It is certainly true that every case before an international court has a broader context, that many a proceeding is but a facet of a larger dispute, and that politics will always play a part. The *Genocide* case, however, is *special*. There is no other ICJ case which meant so much to so many people, no other ICJ case in which internal politics so manifestly prevented an applicant from arguing its best legal position, and no other ICJ judgment which has been so badly misinterpreted, again due to politics.

Although the play is now over and the reviews are coming in, its epilogue is yet to be written. In BiH, speculation continues about a possible request for revision of the judgment.[131] Though it is clear to any objective international lawyer that such a request would have a hard time in succeeding, especially if the ICTY produces no new evidence, that does not mean that a request for revision would be politically unlikely. The *Genocide* judgment has now become just one more pawn in the great political play about the post-Dayton constitutional arrangements in BiH.

And so, even though the Bosniak side in the case did not get what it wanted from the ICJ's judgment, it is already trying to get the best from it – best, of course, when viewed from its own perspective. The Bosniak and Croat members of the BiH presidency have made many public statements in which they claim that the *Genocide* judgment has as its basic implication the 'annulment of all results of genocide', by which they of course mean the abolishment of the Republika Srpska.[132] To that effect they even sent a joint letter to the UN Secretary-General, asking him to use his authority to ensure 'that all efforts are made to eliminate the results of genocide in Bosnia-Herzegovina'.[133]

Another chapter of the epilogue of the BiH *Genocide* case will be the fate of the Croatian one. Its prospects after the Court's judgment are obviously rather dismal – it is likely to falter on two separate hurdles. The first is jurisdiction, as Serbia's argument, based as it is on its bizarre UN status, would in all likelihood succeed in the Croatian case, since, unlike in the BiH one, the Court has never pronounced itself on its jurisdiction in the Croatian case, and the only legal reason for Serbia's failure in the BiH case was the Court's reliance on the principle of *res judicata*. Second, proving genocide would be absolutely impossible for the Croatian party, as the ICTY has not come close to qualifying as genocide even the worst crimes of the Croatian conflict. The Croatian lawsuit, simply put, has no chance of succeeding.

131. See, e.g., at http://www.javno.com/en/world/clanak.php?id=24340, http://www.24sata.info/3971.
132. See, e.g., 'Londonski susreti dr. Harisa Silajdžića', *Oslobodjenje*, 6 June 2007.
133. See '2 Bosnian Presidents Ask U.N. to Help Eliminate Bosnia's Ethnic Division', *International Herald Tribune*, 28 June 2007. See also BIRN, 'Bosnian Presidency Members Call for Abolition of Entities', 18 June 2007, available at http://www.birn.eu.com/en/87/15/3335/; 'Zbog haške presude ponovo razdor u Predsjedništvu', *Oslobodjenje*, 20 July 2007.

Yet, just like the BiH one, it is a slave of politics, and it serves the purpose of validating the Croatians' own nationalistic collective narrative about Serbian aggression and the glory of Croatia's 'Patriotic War'. And, again, as with the BiH case, the Croatian lawsuit is overly ambitious. It claims, for example, that Serbia is responsible not only for the purported genocide against Croats by the Croatian Serbs, but also for genocide *against* the Croatian Serbs in 1995, as it forced these people to flee to Serbia, when they would have in fact been perfectly safe in their Croatian homeland. Although Croatia has subsequently desisted from this claim, this still shows very well how a nationalistic construct of reality works – these Croatian Serbs simply could not be the victims of ethnic cleansing by the Croatian army, which was victoriously bringing its just war to an end. Even though the Croatian elites are perfectly aware that their case before the ICJ is doomed to failure, a recent poll showed that 91 per cent of Croatian citizens were against the withdrawal of the application.[134] With such public opinion, there is no politician in Croatia who could do the rational thing and discontinue the case, but things might change after the general election in Croatia, scheduled for November 2007, is over.

As explained above, the *conditio sine qua non* for the political manipulation of the concept of genocide, and consequently of the *Genocide* case, is the fact that the ordinary, lay notion of genocide is significantly wider than the legal notion of genocide. Indeed, the legal definition of genocide is much narrower than that originally given by Raphael Lemkin,[135] and genocide would certainly not be described by any regular person in the terms in which it is defined by Article II of the Genocide Convention. This is, again, a global phenomenon, but it is especially prevalent and damaging in its consequences in the former Yugoslavia. There are, furthermore, but two ways out of this situation, neither of which seems very likely to succeed.

The first would be to bring the legal definition of genocide into conformity with the lay one. David Luban, for instance, proposes that the legal notion of genocide be extended to include the crime against humanity of extermination, for which one would not need to prove genocidal intent.[136] The elegance of that solution notwithstanding, it just seems unrealistic that a proposal to revise the Genocide Convention would gather any momentum among states, and it is only the states who can change that treaty.

The other possible solution would be to stop talking about 'genocide' as the greatest of all crimes, one which is somehow morally unique. Genocide is not 'the crime of crimes', and what labelling it as such does is to trivialize crimes against humanity in public discourse, as is evident in the case of Darfur. The only other palpable effect of this glorification of the concept of genocide is to make it susceptible to political manipulation. On the one hand, the stigma of the word 'genocide' serves to simplify a politically and morally complex situation and paint a picture in black

134. See B92, 'Anketa: Ne odustati od tužbe', 27 April 2007, available at http://www.b92.net/info/vesti/index.php?yyyy=2007&mm=04&dd=27&nav_category=167&nav_id=244148.
135. See R. Lemkin, *Axis Rule in Occupied Europe* (1944). See also S. Power, *A Problem from Hell: America and the Age of Genocide* (2002), at 1–85; Luban, *supra* note 110, at 309–18.
136. See Luban, *supra* note 110.

and white, for good motives or for bad.[137] On the other, all victims of the many atrocities in the former Yugoslavia now *want* to be called victims of genocide, as that makes their suffering *special*, comparable in quality, if not in quantity, to the Holocaust.[138] This is something that, in our view, must be avoided at all costs, or we will, at the very least, see a repeat elsewhere of the aftermath of the *Genocide* case in the BiH and the Serbian public. What, for instance, will the new hybrid court for Cambodia do? Will it say that the million and more people who died there were victims of genocide,[139] as that is the only word which can capture the horror of the killing fields in the minds of the public, or will it apply the law faithfully, and rule these murders to be 'only' crimes against humanity? Time will tell, but one thing is certain – Lemkin's word is just too good a word for any politician to pass up.

137. Mamdani persuasively argues, for instance, that this is the principal reason for using the word 'genocide' to describe the Darfur conflict. See M. Mamdani, 'The Politics of Naming: Genocide, Civil War, Insurgency', (2007) 29 *London Review of Books*, available at http://www.lrb.co.uk/v29/n05/mamd01_.html.

138. See further MacDonald, *supra* note 5, at 39–62, 160–82. In the Serbian context see also J. Byford, 'When I Say "the Holocaust" I Mean "Jasenovac"', (2007) 37 *East European Jewish Affairs* 51.

139. Strangely enough, a possible expansive interpretation of the crime of genocide by the court for Cambodia may be facilitated by the fact that when the Genocide Convention was implemented in domestic Cambodian law, the 'as such' clause of Article II (*supra* note 104), which refers to the protected group and calls for a restrictive interpretation as an element of *mens rea*, has been translated as 'such as', i.e. as referring by way of example to the five criminal acts which comprise the *actus reus* of genocide. See the Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), available at http://www.eccc.gov.kh/english/cabinet/law/4/KR_Law_as_amended_27_Oct_2004_Eng.pdf. See also this listserve post by Craig Etcheson, dated 10 October 2001, at http://listserv.buffalo.edu/cgi-bin/wa?A2=indo110&L=justwatch-l&D=1&O=D&P=27391. A stand-alone interpretation of this provision could be much more expansive than that of Article II of the Convention by the international courts and tribunals. Coincidentally, the Criminal Code of the former SFRY (Art. 141), which was in force in both BiH and Serbia during the BiH conflict, actually omitted the 'as such' clause altogether from the definition of genocide, with this fault persisting in the Criminal Code of Bosnia and Herzegovina which is currently in force (Art. 171), while it was rectified in the new Criminal Code of Serbia (Art. 370).