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 26 February 2007, General List No. 91

The *Genocide Convention Case*: Confusion or Clarity?

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Abstract

This article analyzes the judgment of the International Court of Justice delivered on 26 February 2007 dealing with the *1948 Convention on the Prevention and Punishment of the Crime of Genocide* and State responsibility. It highlights the important aspects of the judgment, and refers to the history of the proceedings before the court. This article is meant to serve as a comprehensive reference point to the issues that arose in the judgment, but is not exhaustive in its analysis on all issues.

Introduction

On 26 February 2007, the International Court of Justice ('ICJ') rendered its judgment in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Merits)*,[1] which had been pending for over a decade. The judgment dealt with many issues, revisiting aspects of the jurisdiction of the ICJ in the case, an assessment of obligations under the *1948 Convention on the Prevention and Punishment of the Crime of Genocide* ('*Genocide Convention*')[2] and the attribution of State responsibility in this regard. Also of interest is the interaction between the ICJ, a tribunal for the adjudication of disputes between states, and the International Criminal Tribunal for the Former Yugoslavia ('ICTY'), an international tribunal adjudicating matters of individual criminal responsibility for crimes perpetrated in the former Yugoslavia.

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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 26 February 2007, General List No. 91 ('*Genocide Convention Case (Merits)*').

2 Opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) ('*Genocide Convention*').

1. Challenges to Jurisdiction

In the proceedings relating to the merits of this case, the jurisdiction of the ICJ was challenged by Serbia in the *Initiative to the Court to Reconsider Ex Officio Jurisdiction over Yugoslavia* ('*Initiative*') filed on 4 May 2001.[3] While the ICJ had issued a decision asserting jurisdiction in 1996,[4] the *Initiative* brought up further grounds to challenge jurisdiction. In brief, the contention of the respondent was that due to a change in circumstances, it could not be considered a member of the United Nations ('UN') when proceedings were initiated and, therefore, the ICJ did not have jurisdiction over it. The counter to this was that since the 1996 decision related to jurisdiction, as per the principle of *res judicata,* the court was prevented from reopening this issue and was bound by its previous decision.

In order to assess the argument and response of the ICJ, it is relevant to examine briefly the circumstances surrounding the disintegration of the former Yugoslavia and the history of proceedings before the ICJ, and then the merits of the argument.

A. Disintegration of the Socialist Federal Republic of Yugoslavia

The Socialist Federal Republic of Yugoslavia ('SFRY') consisted of the entities of Bosnia and Herzegovina, Croatia, Slovenia, Macedonia, Montenegro and Serbia. Due to civil conflict, the break-up of the SFRY commenced in 1991 with the declaration of independence of Slovenia and Croatia. By 1993, the constituent regions of the SFRY had declared independence. However, the Federal Republic of Yugoslavia ('FRY', now known as Serbia) asserted its claim as a continuation of the SFRY, and hence also claimed a continuation of membership of the UN. This claim was contested by the other republics of the former Yugoslavia, and the Security Council[5] and the General Assembly[6] denied the right of the FRY to take the place of the SFRY in proceedings before these organs. However, the status of the FRY remained unclear, with the UN Under-Secretary-General for Legal Affairs asserting that this was a suspension but not termination of membership.[7]

Ultimately, there was a great deal of confusion regarding the status of the FRY before the UN. However, in November 2000 Serbia was formally admitted as a member of the UN.[8]

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3 Federal Republic of Yugoslavia, *Initiative to the Court to Reconsider* Ex Officio *Jurisdiction over Yugoslavia* (3 May 2001) <www.icj-cij.org/docket/files/91/10509.pdf> ('*Initiative*') accessed 17 August 2008.

4 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia) (Preliminary Objections)* [1996] ICJ Rep 595 ('*Genocide Convention Case (Preliminary Objections)*').

5 *Resolution on the Federal Republic of Yugoslavia*, SC Res 777, UN SCOR, 47th sess, 3116th mtg, UN Doc S/RES/777 (1992). The Security Council denied the FRY the right to succeed to the SFRY seat at the UN and also recommended that the General Assembly disallow the FRY from participating in the work of the General Assembly. Further, the Arbitration Commission of the Conference on Yugoslavia also declared that FRY could not be treated as the sole successor to the SFRY: *Yugoslavia Peace Conference Opinion No. 10* (1992) 92 *International Law Reports* 206.

6 UNGA Resolution 47/1(1992).

7 *Letter addressed to the permanent representatives to the United Nations of Bosnia-Herzegovina and Croatia*, UN Doc A/47/485, 29 September 1992.

8 UNGA Resolution 55/12(2000).

B. Background of Proceedings

In order to assess the merits of the *Initiative*, the background to the proceedings and the past decisions of the ICJ are relevant.

On 20 March 1993, Bosnia filed a case against Serbia alleging violations of the *Genocide Convention*, requesting the court for interim measures. These were granted by the court in its order for provisional measures of 8 April 1993,[9] which unanimously directed the parties to take measures to prevent the commission of genocide.

Subsequent to the filing of preliminary objections by the respondent, the court in its order of 11 July 1996 found that it had jurisdiction on the basis of art IX of the *Genocide Convention*.[10] This judgment will be analyzed in relation to the *Genocide Convention Case (Merits)* to assess claims of lack of jurisdiction and *res judicata*.

On 24 April 2001, Serbia filed an application for revision of the 1996 judgment, contending that its admittance as a member of the UN in November 2000 was a new fact requiring revision of the judgment. However, the court in 2003 found that the application for revision did not have merit, as the strict requirements for a revision proceeding under the *Statute of the International Court of Justice* ('the *Statute*')[11] had not been met.[12]

Simultaneously, but in separate proceedings, Serbia had petitioned the ICJ claiming responsibility of North Atlantic Treaty Organization ('NATO') countries for the bombing of Belgrade. The court issued a judgment on preliminary objections regarding jurisdiction in 2004.[13] Significantly, the ICJ found that Serbia was in fact *not* a continuator state of the SFRY from 1992 to 2000 and that therefore it did not have access to the court by virtue of non-membership of the UN.[14] Hence, the court lacked jurisdiction and proceedings were dismissed.

C. Issues for Determination

There were many inter-related, though distinct issues for consideration, in assessing the reopening of the jurisdiction question. At the heart of the challenge was whether Serbia's membership of the UN would affect the case before the ICJ. Serbia argued that as it was accepted for membership to the UN only in 2000, in the period between 1992 and 2000 it was not a party to the *Statute* or the *Genocide Convention*. By virtue of this, the ICJ should not have jurisdiction over the proceedings.[15] In response, Bosnia stressed that as this

9 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro)) (Provisional Measures)* [1993] ICJ Rep 3 at [24], [52] ('*Genocide Convention Case (Provisional Measures)*').

10 *Genocide Convention Case (Preliminary Objections)* [1996] ICJ Rep 595.

11 *Statute of the International Court of Justice* ('*Statute*'), art 60.

12 *Application for the 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)* [2003] ICJ Rep 7 ('*Application for Revision Case*').

13 *Legality of Use of Force (Serbia and Montenegro v Belgium, (Preliminary Objections)* [2004] ICJ Rep 279 ('*Legality of Use of Force Case*').

14 *Legality of Use of Force Case* [2004] ICJ Rep 279 at [78]–[79].

15 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91 at [80].

issue was not argued previously, Serbia was estopped from bringing it up. Bosnia also contended that these matters had been decided in the *Genocide Convention Case (Preliminary Objections)* and were *res judicata*.[16] The court emphasised that the suggested acquiescence of the party did not preclude the court from addressing the matter.[17]

The approach of the majority was *first* to determine whether the question of membership had been decided previously, and if so, then whether the principle of *res judicata* would prevent the court from going into the matter. If it had not been decided, only then would it be open to the court to make its determination of the matter. This approach involved an appreciation of the ambit and scope of *res judicata,* as well as the potential impact of the question of membership upon the standing of the party.

The findings on the issue of jurisdiction came in for severe criticism by many other members of the court. The decision regarding jurisdiction had five members of the court dissenting, in no uncertain terms.[18]

(i) Ius Standi, Jurisdiction and the Res Judicata Principle

(a) Position of the Court

At the outset, the court emphasised that the question was one of *access* to the ICJ, by virtue of capacity to be party to proceedings. This was distinct from *consent* of the parties to jurisdiction, and was a step preceding a determination on that point.[19]

The court then proceeded to assess the application of the *res judicata* principle to questions of jurisdiction brought up in decisions of the court. The court located the *res judicata* principle in arts 59, 60 and 61 of the *Statute*.[20] The court elaborated on the reasons for the use of the *res judicata* doctrine as primarily twofold: the stability of legal relations and the finality of judgments as between the parties themselves.[21] The majority also held that there was no distinction between judgments on merit and those relating to jurisdiction by way of preliminary objections in applying the *res judicata* principle.[22] In elaborating upon the situations in which *res judicata* might apply, the court emphatically stated that when an issue had not been decided upon 'expressly or by necessary implication', then it will not have the force of *res judicata*.[23] *Res judicata* needed to be assessed by keeping the context of the judgment in mind.[24] More illuminating was the application of this principle to previous decisions of the court.

16 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91 at [85].
17 *Genocide Convention Case (Merits),* Judgment of 26 February 2007, General List No. 91 at [102].
18 The judges who did not agree with the finding on jurisdiction were: Judges Shi, Koroma, Ranjeva, Skotnikov and Judge *ad hoc* Kreća.
19 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91 at [102]–[103] referring to the *Legality of Use of Force Case* [2004] ICJ Rep 279 at 295.
20 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91 at [115].
21 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91 at [115]–[117].
22 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91 at [117].
23 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91 at [126].
24 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91 at [125].

With regard to the preliminary orders of 1993, the court held that there was no question of *res judicata* applying as the question of membership was neither raised, nor determined. Further, the *Application for Revision Case* had dismissed the request for revision as it reasoned that non-membership of the UN was not a new fact at the time of the judgment, ie in 1996. As a result, according to the court, the issue of membership was also not discussed in the *Application for Revision Case*. Hence, *res judicata* did not apply by virtue of these decisions, thus not barring the court from assessing this matter.

The determination of the court with respect to *res judicata* regarding the *Genocide Convention Case (Preliminary Objections)* was pivotal. The majority emphasised that the ability to seize the court was distinct from that of the jurisdiction of the court. However, it held that as the *Genocide Convention Case (Preliminary Objections)* had found that the court had jurisdiction under art IX of the *1948 Genocide Convention*, there was a 'necessary implication' regarding capacity of the parties to approach the court.[25] The ICJ held that it was therefore barred by *res judicata* from looking into whether the respondent had standing to approach the court.[26] The majority held that the operative part of the judgment was *res judicata*.[27] The court also relied upon the statement in the *Genocide Convention Case (Provisional Measures)* that the status of the FRY was not 'without legal difficulties' in order to conclude that the court had therefore by necessary implication, in its decision on jurisdiction, assessed that the party could indeed approach the court. The court also distinguished previous cases before the ICJ where issues of jurisdiction had been reopened, on the basis that, in those cases, a later decision on jurisdiction would not have contradicted the earlier judgment.[28]

In sum, the majority assessed that impliedly the court had decided on the issue of membership by virtue of making a favourable decision on jurisdiction, and therefore neither capacity to approach the court nor the jurisdiction over the matter could be re-opened, barred by reason of application of *res judicata*.

The main criticism of the majority by Judge Skotnikov was that, by using the principle of *res judicata*, it has created 'parallel realities' in relation to the actual status of Serbia and Montenegro.[29] In so creating this situation, Judge Skotnikov elaborated that the majority's determination of jurisdiction in incidental proceedings was 'absolute and exhaustive', which was erroneous.[30] This was further belied by the fact that the Registrar of the court informed the respondent that further submissions relating to jurisdiction would be considered by the court and that the court would not close the matter unless it was satisfied that it did have the ability to adjudicate the case.[31] Further, Judge Skotnikov assessed the court's decision as a departure from judicial reasoning. The Declaration also

25 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91 at [132], [136]–[138].

26 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91 at [132], [136].

27 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91 at [123] referring to the *Genocide Convention Case (Preliminary Objections)* [1996] ICJ Rep 595 at [47].

28 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91 at [128].

29 *Genocide Convention Case (Merits)* Judgment of 26 February 2007, General List No. 91, Declaration of Judge Skotnikov at 1.

30 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91 Declaration of Judge Skotnikov at 3.

pointed out that the *Genocide Convention Case (Preliminary Objections)* was decided in the context of only the *Genocide Convention*, unlike the *2004 -Legality of Use of Force Case* which also took into account arts 35(1) and 35(2) of the *Statute*.[32]

Taking a similar stance in a Separate Opinion, Judge *ad hoc* Kreća pointed out that there was a difference between the finality of preliminary judgments and those on the merits, unlike as determined by the majority. Further, he maintained that the majority in the court took a narrow view of the principle of *res judicata* and that there were other challenges to jurisdiction which belied this finality of *res judicata*.[33] These included non-preliminary challenges in the form of revision applications and also the principle of *competence de la competence* which was necessary for the ICJ to assess a case before it.[34] This was an inherent power of the ICJ and a narrow interpretation of *res judicata* would affect this power. Further, according to Judge *ad hoc* Kreca, there was a fundamental difference between *ius standi* and questions of jurisdiction. While both were procedural conditions to be taken into account, though jurisdiction depended also on consent, *ius standi* of parties was dependent on statutory requirements. It was these statutory requirements that needed to be met before standing could be conferred on the parties. This clear distinction has not been adhered to by the finding of the majority, which conflated the two separate concepts, leading to the analysis finding for jurisdiction of the FRY.[35]

The Joint Dissenting Opinion of Judges Ranjeva, Shi and Koroma assessed that the majority erred with respect to *res judicata*, as this issue was not one that was 'definitively' adjudicated upon.[36] Further, *res judicata* was not an absolute principle.[37]

(b) Analysis

It must be emphasised that the majority as well as the separate and dissenting opinions fundamentally differ in respect of the jurisdiction of the court, and the impact of membership status of the SFRY.

The majority opinion seems to employ somewhat circular logic in arriving at the conclusion regarding jurisdiction. In the first instance, there is excessive reliance upon, and a rather strict construction of, the principle of *res judicata,*. The majority refers to the three categories that permit the application of the *res judicata* principle, and explicitly states that when an issue has not been discussed it would not fall in the ambit of the *res*

31 *Genocide Convention Case (Merits),* Judgment of 26 February 2007, General List No. 91, Declaration of Judge Skotnikov at 3(referring to a letter of 3 June 2003 from the Registrar of the ICJ (Philippe Couvreur) to the respondent).

32 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91, Declaration of Judge Skotnikov at 2.

33 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91, Separate Opinion of Judge *ad hoc* Kreća at [21]–[22].

34 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91, Separate Opinion of Judge *ad hoc* Kreća at [22].

35 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91, Separate Opinion of Judge *ad hoc* Kreća at [39]–[41].

36 *Genocide Convention Case (Merits)* Judgment of 26 February 2007, General List No. 91, Joint Dissenting Opinion of Judges Ranjeva, Shi and Koroma ('Joint Dissent') at [2], [6], [8].

37 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91, Joint Dissent at [4].

judicata rule.[38] The court holds that as a matter of 'logical construction' the findings of the court in 1996 extend to a finding regarding capacity and hence *res judicata* applies.[39] The use of the *res judicata* principle essentially avoids the question of whether the respondent would have standing before the court, though this was determined *not* to be the case in the *2004 Legality of Use of Force Case* before the ICJ.

As the dissenting judges have pointed out, this escapes the more important issue of the status of the respondent and the ability of the court to assess claims against it by the applicant. This is all the more troubling, due to the use of a legal fiction or 'judicial assumption' in the words of Judge *ad hoc* Kreća, that the court had made a determination on the issue of membership in the *Genocide Convention Case (Preliminary Objections)*. In such a situation, the line of reasoning adopted by the court appears unconvincing. Instead, perhaps the ICJ should have asserted that it did not in fact wish to embark on the question of membership.

The larger question is whether, regardless of the fact that court addressed it previously, the ICJ should have revisited the issue of capacity of the parties in light of new facts at hand as well as its own judgment in 2004. Is *res judicata* meant to be sacrosanct and immutable in all respects? The overly restrictive view of *res judicata* in this situation is problematic.

(ii) Membership of the UN and the 2004 Legality of Use of Force Case

(a) Position of the Court

The court, finding that membership had been decided upon impliedly in the *Genocide Convention Case (Preliminary Objections)*, found no reason to examine the impact of the change in membership status or to pronounce on membership with respect to Serbia.

The majority dealt with the *2004 Legality of Use of Force Case* in passing, and did not tackle the issue of the legal findings in the judgment.[40] Also the ICJ distinguished this case stating that it did not deal with the issue of *res judicata* related to the *Genocide Convention Case (Preliminary Objections)* at the time.[41] As a result, the court in 2004 did not need to go into the 'unstated foundations' of the *Genocide Convention Case (Preliminary Objections)*.[42] The court further emphasised that as it was part of separate proceedings, the *2004 Legality of Use of Force Case* would not apply as *res judicata* in this case. The majority concluded that the *2004 Legality of Use of Force Case* made no finding regarding whether the respondent was a party to the *Genocide Convention*.[43] Hence, the ICJ did not go into the actual findings of the 2004 judgment, namely the issue of membership, but instead limited itself to the narrow use of the *res judicata* doctrine.

38 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91 at [126].
39 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91 at [136].
40 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91 at [83].
41 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91 at [135].
42 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91 at [135].
43 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91 at [83].

In the strongly-worded Joint Dissent, Judges Ranjeva, Shi and Koroma criticised the assumption made by the court that membership was decided impliedly, especially in light of the obligation placed on the court to make reasoning clear and transparent as per the *Statute*.[44] The Joint Dissent criticised the use of the *res judicata* principle by the court and assessed that the court should have dealt with the crucial issue, i.e. whether the respondent was a member of the UN and as a result, whether it had access to the court. The issue of access to the court was one of 'constitutional and statutory requirements', which had not been fulfilled in this case.[45] According to the Joint Dissent, the majority 'sidestepped' the substantive issue related to jurisdiction and instead took refuge behind the veil of *res judicata*. The *sui generis* status of the FRY was not one that was determined by the ICJ and was still an amorphous situation, given the lack of legal assessment by the organs of the UN. However, in light of the *2004 Legality of Use of Force Case*, judicial consistency required that the court respond in the same manner.[46]

With regard to the principle of *res judicata*, the Joint Dissent emphasised that the ICJ in the *2004 Legality of Use of Force Case* referred to the *Genocide Convention Case (Preliminary Objections)*, holding that the issue of the status of FRY under art 35(2) had in fact *not* been raised or decided in that case.[47]

(b) Analysis

The status of Serbia attained significance due to the lack of clarity that existed until 2000, at which time it was admitted to membership of the UN. Despite the ICJ adjudicating on the matter in the *2004 Legality of Use of Force Case*, in the present case, the court avoided the issue of membership of the UN and its impact on the proceedings.

The Court in the *2004 Legality of Use of Force Case* held that Serbia and Montenegro had in fact not had access to the court due to non-membership of the UN until 2000. Further, while a treaty within the purview of art 35(2) of the *Statute* might confer standing to the party, the *Genocide Convention* was not within this category as it had come into force in 1951, which was not prior to the formulation of the *Statute* as per the requirement of art 35.[48] Hence, there was no need for the court to decide whether Serbia was or was not a party to the *Genocide Convention* in 1999, at the time of the institution of the proceedings. It is important to note that the court did not rule that Serbia was *not* a party to the *Genocide Convention*, but rather, found that this was not required to be addressed.

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44 *Genocide Convention Case (Merits)* Judgment of 26 February 2007, General List No. 91, Joint Dissent at [3].

45 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91, Joint Dissent at [17].

46 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91, Joint Dissent at [17].

47 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91, Joint Dissent at [6] (referring to *Legality of Use of Force Case* [2004] ICJ Rep 279 at 311, [82]). See also, *Legality of Use of Force Case* [2004] ICJ Rep 279 at 313–314, [88], referring to the fact that the court in the *Genocide Convention Case (Preliminary Objections)* [1996] ICJ Rep 595 did not make a finding on the status of membership.

48 *Legality of Use of Force Case* [2004] ICJ Rep 279, 323–324; [113]–[114]. Article 35(2) of the *Statute* states, '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 position of inequality before the Court.'

In the *Genocide Convention Case (Preliminary Objections)*, the court relied upon undertakings by the FRY in 1992 regarding adherence to international obligations, to find that this included obligations under the *Genocide Convention*, which was not contested.[49] The Joint Dissent to the *Genocide Convention Case (Merits)* analyzed this to be in the nature of estoppel, which is different from *res judicata*, serving a different function.[50] Further, the question at hand was whether these undertakings would actually *confer* jurisdiction or allow the parties standing before the ICJ. This is a separate question from that of the international obligations that the party undertakes.

Related is the question relating to the position of Serbia itself and its claims initially of being a member of the UN and a successor of the SFRY. How should this be dealt with? It may be tempting to apply the doctrine of estoppel, as mentioned by the Joint Dissent, but this is belied by the actual change in circumstances as well as a judicial pronouncement regarding this change by the ICJ in 2004.

Clearly, the *2004 Legality of Use of Force Case* would not apply as *res judicata* in this case given that there were different proceedings involving separate parties.[51] However, it must be emphasised that the facts and the assessment of access of parties in that case related to the same substantive question that was brought up in the *Initiative* and should have been addressed by the court in this case also. This is also highlighted in the Separate Opinion of Judge *ad hoc* Kreća, where he stated that the impact of a decision may be felt on third parties, despite art 59 of the *Statute*. He also emphasised that the question at hand had been determined by the same judicial body in the *2004 Legality of Use of Force Case*. While other cases adjudicated before the ICJ may not have an impact beyond the parties in question, there have been cases in which the impact is calculated to go beyond merely parties *inter se*.[52]

2. Application of the Genocide Convention

This section examines the application of the *Genocide Convention* to this particular case as well as appreciation of facts. Given the factual detail involved, this section highlights the important points of law and gives an overview of the methodology of the court in its assessment of the facts, and does not delve into each of the allegations.

A. Existence of a Dispute Under the Genocide Convention

The first issue related to the requirements of art IX of the *Genocide Convention*, which stipulates that there must be a dispute in existence between parties to the *Convention*.[53] It

49 *Genocide Convention Case (Preliminary Objections)* [1996] ICJ Rep 595 at 610.

50 *Genocide Convention Case (Merits)* Judgment of 26 February 2007, General List No. 91, Dissent at [14].

51 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91 at [82]–[83].

52 *Genocide Convention Case (Merits)* Judgment of 26 February 2007, General List No. 91, Separate Opinion of Judge *ad hoc* Kreća at [58]–[59].

53 Article IX of the *1948 Genocide Convention* states, 'Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.'

was held that a dispute existed in relation to the application of the *Genocide Convention* to the States concerned, and also the substance of the obligations under the *Convention*. More specifically, the dispute concerned whether the obligations on States were restricted to legislation and prevention, or whether the *Convention* encompasses to the obligation to prosecute and extradite.[54]

The next question related to the territorial limitations on the application of the *Genocide Convention*. The court referred to the *Genocide Convention Case (Preliminary Objections)*, indicating that this issue was not dealt with and hence the *res judicata* principle did not apply.[55] However, this reading of the court with regard to the *Genocide Convention Case (Preliminary Objections)* in this regard is open to interpretation: while undoubtedly the *Genocide Convention Case (Preliminary Objections)* did not go into each provision of the *Genocide Convention* to assess the territorial limitations, it did refer to the *erga omnes* nature of the rights and obligations under the *Convention*.[56] The court came to the conclusion that while arts I and III of the *Convention* were not limited territorially, the obligation to prosecute under art VI was subject to a territorial limit.[57]

B. Obligations Under the Genocide Convention

As regards the extent of obligations on a state with respect to the *Genocide Convention*, the question was whether this was limited to punishing individuals, or included an obligation on the state *itself* not to commit genocide. The court assessed the drafting history and the *travaux preparatoires* of the *Genocide Convention*, keeping in mind the object and purpose of the treaty elaborated upon by the ICJ in the *Reservations to the Convention on Genocide Advisory Opinion*.[58] It noted that the 'undertaking' to prevent and punish genocide was moved from the preamble to art I, in order to specifically place distinct obligations on the States signing up to the *Convention*.[59] While acknowledging that the *Convention* did not expressly stipulate that States were not to commit genocide, it held that it would be 'paradoxical' if while States were under an obligation to prevent genocide, they were allowed to commit such acts.[60]

Judges Shi and Koroma issued a Joint Declaration with respect to this particular issue, stating that the majority had severed art I from the rest of the *Convention*, and that reading these together meant that the obligation was to hold individuals responsible for acts of genocide.[61] They also opined that the interpretation of the majority was at odds with art 31 of the *1969 Vienna Convention on the Law of Treaties*.[62] If this had been the intention of the drafters of the *Genocide Convention*, then such a provision would have been

54 *Genocide Convention Case (Merits)* Judgment of 26 February 2007, General List No. 91 at [151]–[152].

55 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91 at [153].

56 *Genocide Convention Case (Preliminary Objections)* [1996] ICJ Rep 595 at 615–616.

57 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91 at [184].

58 [1951] ICJ Rep 15, 26, referred to in the *Genocide Convention Case (Merits)* Judgment of 26 February 2007, General List No. 91 at [160]–[161].

59 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91 at [164]–[165].

60 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91 at [166].

61 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91, Joint Declaration of Judges Shi and Koroma ('Joint Declaration') at [4].

expressly stipulated given that criminal responsibility of a State is unknown in international law.[63] While this argument has merit, it is also pertinent to note that State responsibility for acts is a recognised concept in international law and that imputing responsibility on individuals does not prevent the State from being held responsible.

The majority also stated that while the obligations under art III were more conducive to the criminal responsibility of individuals, this did not preclude responsibility of States.[64] Duality of the responsibility — of the State and the individual — is clearly acceptable under international law with reference to the *Rome Statute of the International Criminal Court*[65] as well as the *Draft Articles on Responsibility of States for Internationally Wrongful Acts*.[66] According to the court, it was also possible for a State to be held responsible *without* the conviction of an individual.[67] It would seem that this assessment would not necessarily follow from the acceptance of duality of responsibility. The court's justification was that in many situations there is a lack of prosecution of State officials. However, while agreeing that this could be the case in many instances, the difficulty of attributing responsibility to a State without a conviction or records from a criminal proceeding must not be underestimated.

The Separate Opinion of Judge Owada agreed that international law recognised duality of responsibility but emphasised that this was not found in the context of the *Genocide Convention*, which was the source of jurisdiction of the court.[68] Examining the *travaux preparatoires* of the *Convention*, Judge Owada found it to be inconclusive in shedding light on the scope of responsibility under the *Convention*.[69]

In assessing elements of the crime of genocide, the court while referring to the jurisprudence of the ICTY reiterated the *mens rea* requirement of specific intent or *dolus specialis*.[70] The characteristics of the 'group', as per art II of the *Genocide Convention*, meant positive characteristics and not negative characteristics.[71] If the assessment was with regard individuals who were a part of a group, then this must impact the group as a whole, with the substantiality criteria of great importance.[72]

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62 Opened for signature on 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980). Article 31(1) stipulates that a treaty is to be 'interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.

63 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91, Joint Declaration at [4].

64 *Genocide Convention Case (Merits)* Judgment of 26 February 2007, General List No. 91 at [167].

65 Opened for signature on 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002) ('*Rome Statute*').

66 International Law Commission ('ILC'), *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (2001) ('*Draft Articles on State Responsibility*'), referred to in the *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91 at [173]–[174].

67 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91 at [182].

68 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91, Separate Opinion of Judge Owada at [55].

69 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91, Separate Opinion of Judge Owada at [71].

70 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91 at [188].

71 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91 at [191]–[195], referring to *Prosecutor v Stakić* [IT-97-24-A] (Appeals Chamber) (22 March 2006).

72 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91 at [198]–[201].

C. *Evidential Issues*

The ICJ embarked upon a discussion related to the burden of proof, the standard of proof and weight to be given to the evidence. This is relevant to note as herein lies a fundamental difference between the ICJ, which has limited powers and history of weighing evidence, as opposed to international tribunals such as the ICTY and the International Criminal Tribunal for Rwanda ('ICTR'). Further, while one assesses State responsibility, the other type of tribunal looks at criminal responsibility of individuals. As the case necessitated the weighing of evidence and making determinations on facts, the court laid out its methodology with regard to the evidence.[73] The ICJ also highlighted the importance of documents originating from proceedings in the ICTY and held that most reliance was to be afforded to final judgments.[74] Moreover, the UN report on Srebrenica was to be given much consideration.[75]

The ICJ went through the acts stipulated under art II of the *Genocide Convention* in detail, assessing the factual situation of each element. Heavy reliance was placed on ICTY judgments in all these instances. While the court did not find evidence of genocide related to atrocities at many locations, it did, however, find evidence of *dolus specialis* in relation to crimes at Srebrenica, thereby assessing them to be genocide. In arriving at this conclusion, the ICJ relied on ICTY decisions such as *Krstić* and *Blagojević*.[76] It would be of interest to assess the impact, if any, of the reversal of the finding on genocide in the recent Appeals Chamber decision of the ICTY, in *Blagojević*.[77] However, this is beyond the scope of this article.

3. Attribution of State Responsibility for Genocide

The court dealt with the submission that the respondent had accepted State responsibility for genocide due to statements that were made in the aftermath of the genocide. The court held that this did not amount to the acceptance of legal responsibility and that the statements made were political in nature.[78]

Subsequent to the finding of genocide in Srebrenica, in order to establish responsibility, the court examined arts 4 and 8 of the *Draft Articles on State Responsibility* as well as art I of the *Genocide Convention*.

Article 4 of the *Draft Articles on State Responsibility* requires that the organs are attributable to the State in question, ie the FRY.[79] As per the court, the test to be taken into account was whether there was 'complete dependence' of the entity involved on the State in question.[80] This test emanated from the previous decision of the court in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*

73 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91 at [202]–[210].

74 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91 at [220]–[223].

75 *Report of the Secretary-General pursuant to General Assembly Resolution 53/55: The Fall of Srebrenica*, UN GAOR, 54th sess, Agenda Item 42, UN Doc A/54/549 (1999).

76 *Prosecutor v Krstić* [IT-98-33-T] (Trial Chamber) (2 August 2001); *Prosecutor v Blagojević* [IT-02-60-T] (Trial Chamber) (17 January 2005).

77 *Prosecutor v Blagojević* [IT-02-60-A] (Appeals Chamber) (9 May 2007).

78 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91 at [377]–[378].

(Merits).[81] In this case, the court found that while there had been a great degree of cooperation between the Army of the Republika Srpska ('VRS') and the FRY, this could not be characterised as a relationship of complete dependence as per the test laid down in *Nicaragua*.

The court then inquired into whether individuals who participated in the genocide could be found to be acting under the directions or instructions of the FRY, as per art 8 of the *Draft Articles on State Responsibility*. The test of attribution for art 8 stipulates the relationship between the individual and the State needs to be one of 'effective control', and this extended to *each* operation that was undertaken.[82] The court distinguished between this test in *Nicaragua* and that in *Prosecutor v Tadić*,[83] a decision of the ICTY Appeals Chamber that established the test of 'overall control'.[84] According to the court, the *Tadić* test related to individual criminal responsibility, and was for the assessment of an international armed conflict, and not State responsibility. Further, the ICJ also stipulated that if applied to cases of State responsibility, the *Tadić* test would 'stretch' State responsibility too far.[85] In regard to these two tests, while the differences pointed out by the court are valid, it would seem that the *Tadić* test is the more appropriate one to follow. The *Tadić* test was elaborated upon in the context of individual *criminal* responsibility, which follows a high threshold in keeping with the criminal law context, and it seems to be unnecessary for the court to follow a different standard as laid down in *Nicaragua*.

In examining the theoretical framework of genocide and State responsibility, the ICJ elaborated on the relationship between complicity in genocide (under art III(e) of the *Genocide Convention*) and art 16 of the *Draft Articles on State Responsibility*, relating to aiding or assisting in the commission of an internationally wrongful act.[86] The court held that complicity in genocide would be similar to the facilitation of the crime of genocide, by way of provision of substantial resources, as well as the knowledge of intention of the perpetrators. In this case, the court found that there was insufficient evidence to reach such a finding. However, Judge Keith disagreed with the court's assessment of complicity, as well as the factual analysis in the case.[87]

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79 Article 4 of the *Draft Articles on State Responsibility* provides:
Conduct of State organs
1. The Conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

80 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91 at [397].

81 [1986] ICJ Rep 14 *('Nicaragua')*.

82 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91 at [399]–[400].

83 [IT-94-1-A] (Appeals Chamber) (15 July 1999) (*'Tadić'*).

84 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91 at [402]–[406].

85 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91 at [406].

86 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91 at [418]–[424].

The next issue that the ICJ tackled related to the obligation to 'prevent' genocide arising from art I of the *Genocide Convention*. It was emphasised that this was distinct from the obligation to punish, and was a separate component of the positive obligations placed on States.[88] It was also held that this was an obligation of conduct, and not of result.[89] It would need to be established that the State had undertaken efforts to prevent genocide and that these reached the standard of due diligence. Also, in order to hold a State responsible for failure to undertake its obligations to prevent genocide, it would naturally need to be established that genocide had indeed occurred.[90] The court also assessed that there was a distinction between the failure to prevent genocide (which is primarily by omission) and complicity in genocide as per art III(e), (which would require positive acts).[91] Whereas complicity requires full knowledge, the failure to prevent genocide would require that the State was either aware, or should have been aware, of the danger of genocidal acts.[92]

The court further said that there must be a serious risk of genocide, and that if the State is in a position of responsibility, then this risk must be taken into account while assessing the responsibility of the State.[93] Given the circumstances, it held that Serbia neglected to prevent genocide.

With respect to the obligation to punish for commission of genocide, the court held that in keeping with art VI of the *Genocide Convention*, the actual commission of genocide did not take place in the territory of Serbia.[94] Hence, there was no obligation on Serbia to confer jurisdiction on its courts for the punishment of genocide.[95] However, it was incumbent on Serbia to accept the jurisdiction of the ICTY as an international tribunal, as well as the obligation to cooperate with it.[96] The ICJ found that there was a lack of cooperation with the ICTY, and that this violated its obligations under art VI of the *Genocide Convention*.

In sum, the ICJ concluded that while Serbia was not responsible for the commission of genocide, it failed to prevent the genocide or cooperate with the tribunal, thereby incurring responsibility in international law.

87 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91 Declaration of Judge Keith at [1].
88 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91 at [427].
89 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91 at [430].
90 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91 at [430].
91 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91 at [432].
92 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91 at [432].
93 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91 at [435]–[438].
94 Article VI of the *1948 Genocide Convention* states, 'Persons charged with genocide or any of the other acts…'.
95 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91 at [442].
96 *Genocide Convention Case (Merits)*, Judgment of 26 February 2007, General List No. 91 at [444]–[446].

Conclusion

The *Genocide Convention Case (Merits)* has brought up a number of issues that require further thought and examination. This article has been but an attempt to highlight the most significant of these.

An important issue is the relationship of the ICJ with other judicial bodies, as well as the idea of *stare decisis* in international law. The ICJ has made reference to the cases before the ICTY and the ICTR, having laid down principles in international law as well as for factual analysis. What is the relationship between these bodies, and should this be clarified? While there are fundamentally different purposes for the existence of each of these adjudicatory bodies, there is a great deal of cross-fertilization of legal principles and concepts between them. This illustrates the dilemma of the greater fragmentation of international law (a topic recently taken up by the ILC in 2006)[97] and the impact of this on the assessment of legal principles. Also important in this case is the greater engagement of the ICJ in factual analysis, its ability to undertake such an exercise and its reliance on the jurisprudence of the ICTY in this regard.

The ICJ in this case makes detailed reference to the *2004 Legality of Use of Force Case*, which, while separate, involved substantially similar questions in regard to jurisdiction. While it is undeniable that the ICJ is not under any obligation to follow its previous decisions, there is extensive reliance on its past jurisprudence. In this case, it seems even more pertinent to refer to the *2004 Legality of Use of Force Case*. The larger issue relates to the harmonisation of judgments and the impact that this will have on the legitimacy of the ICJ as a judicial arbiter itself. There seems to be an inherent contradiction in the approach of the court in the *2004 Legality of Use of Force Case* and the *Genocide Convention Case (Merits)*. Whether this is a problem inherent in the system of judicial adjudication itself needs to be examined.

In the assessment of issues decided by the case, the first and most problematic is the jurisdiction of the court, and its avoidance of the membership issue. Further, on merits, the most problematic is the court's reliance on the *Nicaragua* test, rather than the *Tadić* test for the assessment of responsibility. Of significance is the finding of responsibility with regard to the obligation to prevent genocide, which should serve as a warning to other States that are turning a blind eye to genocide. This is an indirect form of responsibility referring more to omissions, and would incur the responsibility of a greater number of States.

The ICJ has taken a significant amount of time to come to the conclusion reached by this case. While there is much to be critical of, it is hoped that this finding of responsibility will serve as a warning to States in the future. However, there are also many troubling issues that this case has brought into stark relief, which need to be resolved.

97 Martti Koskenniemi, *Report of the Study Group of the International Law Commission on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc A/CN.4/L.682 (2006).