# Gresham College Main logo

1 April 2015

Srebrenica: Genocide and Trial

Professor Sir Geoffrey Nice qc

This year will mark – on July 11th - the 20th anniversary of the killings at Srebrenica in Bosnia, the worst atrocity committed in conflict since WWII. A genocide. There will be many events, in Bosnia and at Srebrenica and with lectures around the world. This is another – or two – because having some special knowledge I could not let the event pass

Through what lens should we look at Srebrenica? Must it be through the lenses of law and legal process?

I think not and in preparing this lecture I have found my own opinions changing in unforeseen ways that set this view.

Tonight we will consider the events and the crime of genocide generally. The next lecture will consider the role of individuals and of the international community who, despite the way things may seem, may have known in advance that Srebrenica would be taken.

The Srebrenica history: In the breakup of Yugoslavia Serbs in Bosnia – ‘Bosnian Serbs’ – formed their own entity Republika Srpska that had its own government and army. It wanted to gain independence from Bosnia and join Serbia with which to form a contiguous state. To achieve this it needed to take corridors of land some parts of which did not have natural Serb majorities and it took them by force. Three enclaves of non-Serbs - Srebrenica, Zepe and Gorazde – were protected by the UN from 1993 until 1995 when Srebrenica and Zepe fell. Serbia proper was actively involved with the Bosnian Serb Army which it supported; it paid and pensioned the officers of the army at ‘overtime ‘ rates (up to 3 X normal pay and pension) for being in this war that Serbia has always maintained it was not engaged in. When Srebrenica fell to Serb forces in July 2011 some 8,000 men and boys were killed without reason by Serb forces.

Genocide became a crime that could be charged in indictments against ‘war criminals’ almost by accident. Its role in our lives may be much broader than simply as a defined crime.

Victims and the bereaved of the Srebrenica massacre think of it as a genocide, something found as established against the army of Republika Srpska and its officers by the international Court of Justice (ICJ) in a case brought by Bosnia against Serbia proper and as against its officers in the International Criminal tribunal for the Former Yugoslavia (ICTY).

Victims and the bereaved probably cannot accept – and maybe barely understand - the judgment of the International Court of Justice that said that Serbia itself was not responsible for genocide, only for not having done more to stop the genocide once it was underway.

And that is where we are with the Srebrenica genocide: No one from Serbia proper convicted; some from Republika Srpska convicted, including of genocide; a couple of cases still to be completed, a couple on appeal.

Twenty years after the killings, this year’s anniversary events will have many ‘never again’ expressions of hope and many apologies or near apologies from those whose conduct cannot altogether be overlooked. It will possibly show – again - the disappointment in judicial processes and the law itself of those who mourn the 8,000 fathers, husbands, brother, sons who perished.

Raphael Lemkin. Rather than weary you too much with detail about genocide law, I will argue that genocide is a concept – invaluable to us all – that is owned by the people not the lawyers. A consequence of this is that what the law provides for crimes such as happened at Srebrenica may disappoint people. To make good this point I should start with a little more about Raphael Lemkin who coined the term ‘genocide’ in the 1940s.

Lemkin was a Polish Jew, some 49 of whose family members died in the Holocaust.[[1]](#footnote-1) His concern with control of conflict by law was apparent from an early stage of his career as a Polish State prosecutor, a position from which he had to resign when, in 1933, he started a public campaign to establish the crime of ‘barbarism / vandalism’, terms he later changed to become genocide. His campaigning was driven by his study of the Armenia Genocide (as now often so described that happened 100 years ago this year), the [Assyrians](http://en.wikipedia.org/wiki/Assyrian_people)massacred in [Iraq](http://en.wikipedia.org/wiki/Iraq) during the 1933 [Simele massacre](http://en.wikipedia.org/wiki/Simele_massacre) and the starvation of the Ukrainians by the Soviet Union occurring at about the same time.

Although his concern was to get legal instruments which could outlaw certain acts commonly performed by states, he saw things in a way somewhat differently from how genocidal acts are construed today. In particular he proposed a definition of genocide that embraced non-physical means of destruction of communities, not just the immediate *violent* destruction of a nation or part of a nation by mass killings. He conceived of genocide as signifying:

……different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves…… disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the

individuals belonging to such groups.

Genocide, he conceived, is directed against a national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group.

Genocide, he thought, has two phases: one, destruction of the national pattern of the oppressed group; the other, the imposition of the national pattern of the oppressor. This imposition, in turn, may be made upon the oppressed population which is allowed to remain or upon the territory alone, after removal of the population and the colonization by the oppressor's own nationals."[[2]](#footnote-2)

The account of his determination to get a genocide convention passed and ratified should be inspiring. He lobbied country after country to get the convention passed by the General Assembly, working tirelessly in his shabby, stained suit, not eating properly and seemingly with few real friends - for only 7 attended his funeral when he died of a heart attack aged 59. But it is worth recognising that this somewhat tragic man has changed the way every reasonably educated man and woman in every land of the planet can and does think and speak about the very heart of darkness that lies within us once we become packs not people. Our language – that so often determines not just what we say but what we can think – has been enriched by understanding *in one word* what from well before the Armenian massacre had been the experience of countless victims of a crime without a name. [[3]](#footnote-3)

He was driven, lawyer though he was, by recognition of what the non lawyer understands and fears quite as well – that we humans will go on doing what we have done so regularly unless we can find a way to stop us. And he proposed that we used the law. He had the citizen’s hope to end war.

Ferencz. Another man who has followed somewhat in the footsteps of Lemkin. Ben Ferencz is the last surviving prosecutor from the Nuremberg Trials; he prosecuted not the main trial but one of follow-on trials of the [*Einsatzgruppen*](http://en.wikipedia.org/wiki/Einsatzgruppen) who were [*Schutzstaffel*](http://en.wikipedia.org/wiki/Schutzstaffel) (SS) mobile [death squads](http://en.wikipedia.org/wiki/Death_squad), operating behind the front line in Nazi-occupied Eastern Europe. From 1941 to 1943 alone, they murdered more than one million Jews and tens of thousands of "partisans", [Romani](http://en.wikipedia.org/wiki/Romani_people), [disabled](http://en.wikipedia.org/wiki/Disabled) persons, political [commissars](http://en.wikipedia.org/wiki/Commissars), and others. The 24 defendants in this trial were all officers of these *Einsatzgruppen* and faced [mass murder](http://en.wikipedia.org/wiki/Mass_murder) charges.

In his opening speech to the judges Ferencz used the term ‘genocide’ although it was not yet a law that could be broken.

Ben Ferencz was for many years a tireless proponent of the International Criminal Court and of the inclusion in the Statute of that court of a provision outlawing ‘aggression’. That law is on its way to full enactment although the timetable set at a Conference in Kampala means there is no chance of the law coming into effect until 2017. Ferencz has also argued – more controversially that:

“Any person responsible for the illegal use of armed force in violation of the United Nations Charter, which unavoidably and inevitably results in the death of large numbers of civilians”, should be subject to punishment for crimes against humanity.

This radical development would require some States to adapt their respective legislation to this effect, and / or the prosecutors and judges – domestic or international – to adopt such an interpretation of the definition of crimes of humanity.

Ferencz says

“The precise character of ‘other inhumane acts’ as crimes against humanity was left to interpretation by courts and judges. The door was deliberately left open to possible inclusion of other unforeseeable major inhumanities that might otherwise have escaped judicial scrutiny. Nuremberg correctly condemned aggression as ‘the supreme international crime’ because it included all the other crimes. Even if the appellation ‘aggression’ is not used, the consequences of the illegal use of armed force may be equally reprehensible and should not be allowed to escape criminalization because of nomenclature.”

So there are two campaigns under way - ratification of the law against aggression and the Ferencz approach to expansion of Crimes against Humanity each directed at bringing closer the outlawing of war itself, something that always starts with unlawful violence.

We can share the Ferencz hope and when aggression becomes a crime or when Ferencz’s approach becomes accepted the law, the thinking of non-lawyers will have been reflected in law in much the same way, perhaps, as Lemkin’s new term caught the sentiment of the non-lawyer and lawyer alike.

It is here that my view has changed a bit. The public will label events as genocide when to lawyers they may not be genocide and when they will never be found to be genocide in courts under the present law. The public can sense or feel a genocide when they experience it or learn about it. They are, I now think, fully entitled to fix the label even if the consequences are sometimes unfortunate. In the long run the view of the public – supported or not by detailed law – may be more important.

This background brings us to the law that applies to Srebrenica.

The relevant modern law, from the ICC Statute:

Article 8 bis: For the purpose of this Statute, “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations…………….

[The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations. [[4]](#footnote-4)]

**Article 6: Genocide**

For the purpose of this Statute, "genocide" means any of the following acts **committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such**:

 (a)     Killing members of the group;

            (b)     Causing serious bodily or mental harm to members of the group;

(c)     Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

            (d)     Imposing measures intended to prevent births within the group;

            (e)     Forcibly transferring children of the group to another group.

**Article 7: Crimes against humanity**

For the purpose of this Statute, "crime against humanity" **means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:**

            (a)     Murder;

            (b)     Extermination;

            (c)     Enslavement;

            (d)     Deportation or forcible transfer of population;

(e)     Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

            (f)     Torture;

(g)     Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

(h)     Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

            (i)     Enforced disappearance of persons;

            (j)     The crime of apartheid;

(k)     Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

**Article 30 Mental element**

Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court **only if the material elements are committed with intent and knowledge.**

For the purposes of this article, a person has **intent** where:

(a)  In relation to conduct, that person **means to engage in the conduct**;

(b)  In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

For the purposes of this article, "**knowledge"** means awareness that **a circumstance exists or a consequence will occur in the ordinary course of events**. "Know" and "knowingly" shall be construed accordingly.

Under the ICTY Statute

**Article 6 Personal jurisdiction**

The International Tribunal shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.

**Article 7**

**Individual criminal responsibility**

1A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

The words of such statutes can be argued over by lawyers and judges. But the broad and essential contours are very clear. For any crime you have to know what you are doing and what the likely outcome may be. For genocide you have to be proved to have that additional element the ‘**intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such’.**

Intention features regularly enough in countries like ours and in terms to similar effect in the laws of countries subject to other criminal codes. In the UK, e.g., the ‘ladder’ of assault crimes from common assault to assault occasioning actual bodily harm to wounding to wounding with intent to wound or cause serious bodily harm requires different mental states as well as assaults of different gravities to be proved. At the top the intent to be proved ids that the defendant really intended to wound or cause really serious bodily harm. Not difficult to understand.

In genocide once the concept and the intent are understood complexities of all kinds can be imagined. President / Prime Minister A of country X leads Field Marshal B; General C and General D, Brigadiers, Colonels, Majors, Captains, Lieutenants, NCOs. In their conduct of a battle against the armed force of country B they might all obey the laws of war and take care of prisoners and civilians. Or they might all be fuelled with genocidal intent and slaughter the wholly innocent. But what if A and B want to conduct the war properly as does General C but General D is filled with genocidal intent for citizens of Y? Does his intention – reflected in orders he may make – characterise his part of the battle? What about if people further down the chain of command have genocidal intent and he does nothing to stop them? What about if the worthy General A has subordinates who harbour genocidal intent and he does nothing about it? And suppose an international body hints to A that blind eyes will bet turned to whatever is done in the interests of seeing the conflict over and some controversial map sorted out. Suppose A tells B who thinks things will be over quicker with D in charge (A guessing and B knowing or believing D has genocidal internet that will speed the process) and sends C on leave who reckons he is being got out of the way for D to do his worst. May A, B or C now be caught?

Unraveling criminal responsibility for Srebrenica has taken a very long time partly because it has been necessary - in trial after trial - to explore intent of individuals and of the state of Serbia and to unravel exactly this kind of difficulty. This would not have happened to the same extent had it only been possible to charge events as crimes against humanity or war crimes. The time taken to explore genocide at many trials may not have served the victims well but if the victim and the bystander are entitled – as I believe they are – to say or have said on their behalf ‘this was a genocide’ then the consequence will follow and may have to be accepted.

The facts about Srebrenica were known of very early.

I found a reprint of an article in the New York Time of 29 October 1995 – so 3 ½ months after the start of the killing.[[5]](#footnote-5) Like other papers and news media it was able to set out in great detail what had happened, including how:

* It was known in advance that genocide of the people of Srebrenica could happen and how rockets of the Bosnian Serb Army forced thousands of Bosniaks into the enclave.
* The UN force – Dutchbat – we deliberately weakened by General Mladic’s forces.
* How that process was completed when General Janvier refused to bomb the Serb forces to protect the people (against all advice).
* How UN hostages were taken again by the Serbs to keep the UN off.
* How the Dutch retreate to their base camp, at a factory in a small town called Potocari. Some 20,000 terrified people joined them.
* At nightfall General Mladic met with Colonel Karremans no more air strikes, or the refugees huddled at Potocari would be shelled and shot and illustrated his plans, according to eyewitnesses, the general ordered one of his men to slit the throat of a pig and declared, "This is what we're going to do the Muslims."
* 15,000 people not willing to trust their lives to the United Nations or to the Serbs. Safety started a three-day trek through Serb-held territory.
* 25,000 jammed into the Dutch camp in Potocari, were seized with panic. Women were abducted by Serbian soldiers and raped. On the night of the 11th, United Nations soldiers heard screams and gunshots. Later, they found the bodies of at least nine men, shot in the back of the head. The killings had started
* Muslim men were herded by the thousands into trucks, delivered to killing sites near the Drina River, lined up four by four and shot.
* A Serbian soldier surveyed the stony, moonlit field piled with bodies and merrily declared: "That was a good hunt. There were a lot of rabbits here."
* Serbian civilians confirmed for the first time the mass killings carried out in their midst.
* An American reconnaissance satellite photographed hundreds of Muslim men held in fields at gunpoint on July - two weeks later of freshly turned earth in the same fields
* Thousands more men and boys captured by the Serbs in and around the town of Banja Luka disappeared.
* General Mladic arrived at Potocari on the morning of Wednesday, July 12, with a convoy of 40 trucks and buses and a video crew. His soldiers ordered the refugees aboard, separating the men from the women. The peacekeepers stood by. “No panic, please," the general said, smiling, handing a child a candy bar, in a video clip broadcast around the world. "Don't be afraid. No one will harm you."
* About 7 P.M., General Mladic appeared. "Good day, neighbors," he said cordially. The men demanded to know why they were being held. The general said he was going to trade them to the Bosnian Government for Serbian soldiers who had been captured.
* The men were loaded onto buses again. They went to Bratunac, on the border with Serbia. There they were put into a dilapidated warehouse, about 50 feet by 25, with a dirt floor. Several more busloads of men arrived, until about 400 men were crammed in. Then the beatings and killings started again.
* Men were taken out 10 at a time not to return
* Early in the evening, General Mladic appeared again. "We yelled at him, 'Why are you holding us here, why are you killing us?' " Mr. Suljic recalled. The Serbian military leader replied that it had taken him a while to reach an agreement on the exchange of prisoners, but that it had been arranged.
* The men were taken into the gymnasium. Soon another vehicle came and more men were shoved into the gym. They kept coming -- perhaps 2,500 in all, Mr. Suljic said.
* About noon on the 14th, General Mladic came again. He told the men that he had not been able to work out a deal with their Government to trade them for Serbian prisoners. He left, and soldiers began taking the men out of the gymnasium in groups, blindfolding them as they were led out. Mr. Suljic was taken out at nightfall. He was the last of the 25 or 30 men to board his truck. They were put in rows four abreast. From behind, the Serbian soldiers began shooting. Men fell on top of Mr. Suljic, who escaped being hit. As he lay on the grassy field under the bodies, trucks kept coming, each with 25 or 30 more men. The men were taken out, lined up and shot. Mr. Suljic said he had seen it all clearly under the full moon.
* General Mladic returned, stood by while a fresh truckload of men was shot, and left, Mr. Suljic said. More groups of men were brought and killed. Finally, Mr. Suljic said he heard some Serbs saying, "Everything is finished; nobody is left."
* Then he saw heavy machines working. They were backhoes, digging big graves.
* The column of refugees that fled Potocari on foot stretched for mile after mile through Serbian-held land. They were hunted like game in the woods, ambushed, shelled and shot. They were captured, and their throats were slit. Uncounted numbers died in the woods and fields.
* Mr. Avdic was taken form the column to a building from which during the day, the Serbs took men out of the rooms, sometimes two at a time, sometimes 5 or 10. The appropriate number of shots were then heard. That night, the soldiers tossed him into a truck with 100 or more other men, drove down a dirt road, and yanked them out, five at a time. Shots. Another five, and more firing. Then it was Mr. Avdic's turn. He emerged and saw, under the full moon, a field covered with dead bodies. The men were told to lie down. With his hands tied, Mr. Avdic found it difficult to do so. As he was falling the shooting started. He felt a terrible pain in his right arm and right side of his stomach. He had been shot.
* Hakija Huseinovic, also in the long column was ambushed the next day by the Serbs at a hill called Bulje. Scores of men were killed and wounded -- "nobody counted," Mr. Huseinovic said. Then they were ambushed near Konjevic Polje, when he believes that at least 1,000 men were killed or wounded. The Serbs called for them to surrender, and about 2,000 did, Mr. Huseinovic among them. They were marched to a big valley at Lolici, where the Serbs robbed them. On the 13th, General Mladic came. "You know it's not pleasant to make war with Serbia," Mr. Huseinovic quoted the general as saying. Then a Serbian commander marched the men, in a column about a third of a mile long, toward Bratunac. At Kravica, near Mr. Huseinovic's village, they were jammed into an agricultural warehouse. Then the Serbs began shooting through the windows, with automatic rifles, and firing shoulder-held grenade launchers.
* The next morning, the 14th, the Serbs called into the warehouse and said that anybody who was not wounded should come out and would become part of the Bosnian Serb army. Some men did go out. They were put on trucks. The Serbs then said the wounded should come out, and they would be taken to a hospital. Some men did. "I heard shooting," Mr. Huseinovic said. "I heard screaming. Then it was silent. They killed them all."
* American intelligence analysts estimate the number at between 5,000 and 8,000.
* Bratislav Grubacic, editor in chief of the VIP Daily News Report in Belgrade, said he was in Bratunac and Potocari in mid-July. "It is common knowledge in eastern Bosnia about what happened," he said Friday. His reporters said there were as many as 10 mass graves in the area, each containing several hundred bodies. He said the public reaction to the killings was "shock, fear and shame."
* On Aug. 8, as the Serbs streamed out of Croatia, Ms. Albright stood before a closed session of the Security Council and told the story of Srebrenica. She said the photos and the accounts by witnesses were "compelling evidence that the Bosnian Serbs had systematically executed people who were defenseless" -- thousands of them -- "with the direct involvement of high-level Bosnia Serb officials."

How much more evidence of barbarity / vandalism / genocide do you need? What should we have done – what should we do the next time – when a full story is available so soon after the event is over?

Nena Tromp, who is not a lawyer but who worked on the Milosevic case as principle researcher and can bring the non-lawyers perspective to what is important and will point a few bits of evidence to show how easy the case might have seemed with or without what, investigators researchers and lawyers added to what was already so well known. Her views on genocide and its value to the process may differ from mine and she explains that there are eight steps of Genocide as articulated by Gregory H. Stenton which are very helpful for understanding the genocidal process:

1. CLASSIFICATION:

2. SYMBOLIZATION:

3. DEHUMANIZATION:

4. ORGANIZATION:

5. POLARIZATION:

6. PREPARATION:

7. EXTERMINATION:

8. DENIAL.[[6]](#footnote-6)

The legal process has led to revealing and very helpful evidence: a large parts of the evidence came from the open sources; some evidence was created for the purposes of the trial (OTP’s demographic unit); some documents have been seized by the ICTY’s investigators from a state archive; some documents have been received from a state upon a request; most importantly a certain amount of documents has not surfaced yet despite a strong indication and leads to their existence.

It is also important to make a distinction between the evidence and signs of genocidal process before, during and after the Srebrenica take over.

* The key for understanding of the genocidal crimes in BiH lies in the comparison of the ethnic make- up before and after the war.
* These changes did not come spontaneously and were not caused by animosity between three principle ethnic groups.
* **BEFORE:** The pre-conceived nature of the violence against the Bosnian Muslim population is revealed through written documents originated by the RS political and military leadership with full support and guidance from Belgrade (a term meaning the political center with Slobodan Milošević as a de facto leader of all Serbs)………
* The full geo-strategic plan was revealed in May 1992, some two months after BiH declared independence.
* The word genocide fell in April 1993 in UN Resolution 819. FRY was directed to do everything to prevent genocide in BiH.
* Karadžić issue in March 1995 Directive 7 for Srebrenica
* After Srebrenica, the Serbs estimated that nobody would make fuss about conquest of Žepa. On 25 July Žepa fell as well.
* **DURING**. Milošević talks to Mladić during the takeover.
* **AFTER** Scorpion killings weeks after the takeover.
* Jovanović’s letter to UN – insinuating that the Muslims were killing themselves.
* Milošević praises the conquests in BiH and formation of the Republica Srpska.

There is a mass of evidence; all of it adds to the picture of genocide. None of it detracts from it. There is no Serb general rising from a table to dissociate himself from an unlawful attack although *some* evidence of disaffection of officers being paid by Serbia for what they were asked to do. The 8,000 dead from Srebrenica died from a killing machine that was turned to a purpose. To very many people the purpose was absolutely clear.

[There are, by the way, many – me included – who find the material unforgettable and unmemorable because so great in quantity and have to rely on tools to help memory. Anyone interested should go to the very easy-to-use ICTY website and look for the interactive map on the page about the cases –<http://www.icty.org/sections/TheCases/InteractiveMap> - from where everything of detail can be found. Locate Srebrenica on the map once magnified and ‘click on it]

There have been many decisions about Srebrenica by courts, some surprising. What have they added to what the citizen and in particular the victim knew from very early on? And what is this tragedy really about? The failure of western democracy? The villainous Serbs and their state project? The victims?

VICTIS The Mothers of Srebrenica and other victim groups have got almost no compensation for the loss of their fathers, husbands, brother, sons even where financially dependent on them at the time they were killed. The UN has no compensation fund for them despite the President of the ICTY (Judge Robinson) pleading for one. The individual offenders have never been pursued for compensation. One political entity that should be held responsible – the Republika Srpska – is part of the Bosniak’s own state of Bosnia Hercegovina by dint of the Dayton Accords and cannot be pursued.

Reaction by victims was initially positive to the ICTY judgments that included findings of genocide. Over time they became negative about length of trials, excessive rights of accused where there seemed to be no parallel rights for victims. Pomp of western style justice was initially accepted but probably no longer. Some assess that 50% of those who were witnesses might now refuse to give evidence. Convicted Prisoners being freed to live cheek by jowl with victims before the Tribunal has finished its trials of Karadjic and Mladic is unacceptable. The 2004 deadline date for indictments, meaning that offenders not charged by then have nothing to fear from the tribunal and can act in their home environment with apparent impunity, causes bitterness and distress.

Most disappointing of all for victims and bereaved was the case brought against Serbia proper at the International Court of Justice resulted in a judgment that Serbia was not directly responsible for the genocide – that it was accepted happened – and could only be held responsible for failing to stop the genocide after a certain date and failing to hand over Mladic.

The Court concluded that the acts committed at Srebrenica falling within Article II *(a)* and *(b)* of the Convention were committed with the specific intent to destroy in part the group of the Muslims of Bosnia and Herzegovina as such and accordingly that these were acts of genocide, committed by members of the VRS in and around Srebrenica from about 13 July 1995.

The finding against Bosnia revolved around the failure of Bosnia to prove that Serbia was sufficiently in control of the army of Republika Srpska (who officers they paid and pensioned at 2 and 3 times the standard rate for being at war). The Scorpion paramilitary group answerable to Belgrade was not shown to be an ‘organ’ of Serbia as defined. And when it came to compensation for the proved failure to do enough to stop genocide and the failure to hand over Mladic (despite a 1993 order to do so) well there would be no compensation because it was only so late in the day that Serbia could have acted.

However the then Vice-President of the Court, [Awn Shawkat Al-Khasawneh](http://en.wikipedia.org/wiki/Awn_Shawkat_Al-Khasawneh), dissented on the grounds that Serbia's involvement, as a principal actor or accomplice, in the genocide that took place in Srebrenica was supported by massive and compelling evidence. He disagreed with the Court’s methodology for appreciating the facts and drawing inferences therefrom. The Court should have required the Respondent to provide unedited copies of its Supreme Defense Council documents, failing which; the Court should have allowed a more liberal recourse to inference……. The Court's refusal to infer genocidal intent from a consistent pattern of conduct in Bosnia and Herzegovina is inconsistent with the established jurisprudence of the ICTY. The FRY's knowledge of the genocide set to unfold in Srebrenica was clearly established. The Court should have treated the Scorpions as a de jure organ of the FRY. The statement by the Serbian Council of Ministers in response to the massacre of Muslim men by the Scorpions amounted to an admission of responsibility.

Para 40. *Thirdly*, the Court has refused to infer genocidal intent from the consistent pattern of conduct in Bosnia and Herzegovina. In its reasoning, the Court relies heavily on several arguments, each of which is inadequate for the purpose, and contradictory to the consistent jurisprudence of the international criminal tribunals.

At para 41 of his judgments he said. The Court first considers whether the Strategic Goals of the Serbian goals “were capable of being achieved by the displacement of the population and by territory being acquired” (Judgment, para. 372).

The Court further notes that the motive of creating a Greater Serbia “did not necessarily require the destruction of the Bosnian Muslims and other communities, but their expulsion” *(ibid.)*. The Court essentially ignores the facts and substitutes its own assessment of how the Bosnian Serbs could have hypothetically best achieved their macabre Strategic Goals. The Applicant is not asking the Court to evaluate whether the Bosnian Serbs were efficient in achieving their objectives. The Applicant is asking the Court to look at the pattern of conduct and draw the logically necessary inferences.

If the only objective was to move the Muslim population, and the Court is willing to assume that the Bosnian Serbs did only that which is strictly necessary in order to achieve this objective, then what to make of the mass murder?

Note also what Marlise Simons most senior and respected of New York Times writes about the International Tribunals said following the decision[[7]](#footnote-7):

She deals with the blacked out documents that Nena Tromp has covered and the general conclusion of the judgment.

She reports me explaining to her how a team from Belgrade made it clear in letters to the tribunal and in meetings with prosecutors and judges, that they wanted the documents expurgated to keep them from harming their case at the International Court of Justice.

She explains how confidentiality rules to protect ‘national security interests’ have often been invoked at the tribunal, including by the United States, which has privately provided intelligence like intercepts and satellite images to assist prosecutors not hen available as evidence.

A member of the Serbian team handling the documents, she explained, told lawyers there that ‘we could not believe our luck.’ Djeric, now a private lawyer in Belgrade, said by telephone that he could not discuss his former duties at the Foreign Ministry

A recent book, Unspoken Defense, by former President Momir Bulatovic of Montenegro, who attended many sessions of the Defense Council, said that in 1994, when more than 4,000 men on Serbia’s payroll were fighting in Bosnia, the council discussed abolishing the 30th personnel center because its discovery might cause political problems. Yugoslav officers were also objecting to their service in Bosnia, the book said.

Following the massacre there, the council met three times, with Mladic attending at least one session. Verbatim transcripts of those days are missing even from the secret archives, lawyers said.

Bosnia’s team at the World Court was convinced that the archives and the military personnel files were central to their case. Before hearings opened in 2006, Bosnia asked the court to request that Serbia provide an uncensored version of the documents. The court refused, saying that ‘extensive evidence’ was already available from public records at the war crimes tribunal. When Bosnia pressed during hearings, the court ignored the request.

In an interview, Rosalyn Higgins, a Briton who is president of the World Court, declined to say why the judges refused to subpoena the uncensored archives. She said it was the practice of the court not to discuss its findings. ‘The ruling speaks for itself,’ she said.

But the dissents from Khasawneh, of Jordan, and another judge criticized the court’s refusal to seek the evidence. The second dissent, by Ahmed Mahiou of Algeria, said that judges had given several reasons, ‘none of them sufficiently convincing,’ including a fear of creating the impression that the court was taking sides, that it might intrude on the sovereignty of a state, or that it might be embarrassed if Serbia refused.

Phon van den Biesen, a lawyer on the Bosnian team, said that the unexpurgated documents most likely would have demonstrated that the Bosnian Serb forces were agents of Serbia, controlled by Belgrade. ‘This would have made Serbia liable for the Srebrenica genocide,’ van den Biesen said. ‘We believe all this can be found in the documents. The cuts are made whenever the agenda turns to financing and to personnel matters. That’s why Serbia went to such lengths to hide them from us.’

Antonio Cassese, a former president of the war crimes tribunal in The Hague and now a law professor in Italy, said: ‘I was rather taken aback that the judges didn’t see the documents. But this is not an aggressive criminal court, but a very traditional civil court. They gave something to everybody.’’

The director of the Humanitarian Law Centre in Belgrade said ‘It was well known in the Serbian government that the archives spelled out the responsibility of the state.’

After the verdict a leading member of the Serbian team, a scholar, whom she promised not to identify by name was confronted him was confronted with the suggestion that the Serbian team at eth ICJ had not told the truth; he replied: ‘It’s normal. Every country will do everything possible to protect the state. Bosnia wanted a lot of money for damages.’ When told that one day the truth will come out he said: ‘But that’s the future. Now it’s important to protect the state.’

With the vice president of the World’s court at complete odds with the majority and with another member unable to understand why the court declined to seek available evidence for fear of causing itself embarrassment why should the victims respect the law that much, why should they not follow their own judgment in their use of the word Lemkin made available to them?

But if they do other responsibilities follow and they follow because, as I explained in an earlier lecture, law can be used and abused to write or rewrite history. It remains possible - just - for this Bosnian Government to seek revision of the unsatisfactory judgment that causes Bosniacs so much dissatisfaction and unhappiness. If it does not even try then the words of the majority of the judges, however wrong, may prevail and they may be impossible ever to correct, even by future historians. Today’s Bosnians should not seek reasons *not* to try – for example because both Serbia and Croatia failed in their tit-for-tat applications to the same court for genocide verdicts against each other. They should recognise that the Bosnian case for genocide against Serbia is perhaps the strongest of any genocide allegations arising from the conflicts in the former Yugoslavia[[8]](#footnote-8) and that it should honour its dead and its living by seeking to correct a record that may be wrong.

 © Sir Geoffrey Nice QC, 2015

1. [↑](#footnote-ref-1)
2. 1. He lost 49 family member and only his brother, sister in law and their two children survived.
	2. Raphael Lemkin's *Axis Rule in Occupied Europe: Laws of Occupation - Analysis of Government - Proposals for Redress*, (Washington, D.C.:  Carnegie Endowment for International Peace, 1944), p. 79 – 95: "Generally speaking, genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups. Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group.""Genocide has two phases: one, destruction of the national pattern of the oppressed group; the other, the imposition of the national pattern of the oppressor. This imposition, in turn, may be made upon the oppressed population which is allowed to remain or upon the territory alone, after removal of the population and the colonization by the oppressor's own nationals." [↑](#footnote-ref-2)
3. It is said Lemkin was stimulated to name the unnamed crime in part by Winston Churchill’s 1941 speech

that followed his receipt of intelligence about the nature of the massacres in Ukraine and Russia, details of which he knew about although he could not spell them out without compromising intelligence:

"The aggressor ... retaliates by the most frightful cruelties. As his Armies advance, whole districts are being exterminated. Scores of thousands - literally scores of thousands - of executions in cold blood are being perpetrated by the German Police-troops upon the Russian patriots who defend their native soil. Since the Mongol invasions of Europe in the Sixteenth Century, there has never been methodical, merciless butchery on such a scale, or approaching such a scale.

And this is but the beginning. Famine and pestilence have yet to follow in the bloody ruts of Hitler's tanks.

**We are in the presence of a crime without a name**. " [↑](#footnote-ref-3)
4. The Handbook on Ratification etc by *Christian Wenaweser* Ambassador, Permanent Representative of the Principality of Liechtenstein to the United Nations and *Donald m. Ferencz* Convenor, The Global Institute for the Prevention of Aggression explains:’Activation of the ICC’s jurisdiction over the crime of aggression requires at least 30 ratifications (in addition to a one-time activation decision by States Parties). Once activated, the amendments will, for the first time in the history of mankind, establish a permanent system of international criminal accountability aimed at enforcing the most fundamental rule governing the peaceful coexistence of nations: the prohibition of the illegal use of force. The crime of aggression is the supreme violation of the *jus ad bellum,* which relates to the legitimacy of using force in the first place. Activating the Court’s jurisdiction over this crime will help deter illegal uses of force, as leaders will have to take the Court’s jurisdiction into account when taking relevant decisions. Ratifying States will thus make a highly visible contribution to the rule of law at the international level and to international peace and security. They will do their part to help fulfil the promise of Nuremberg that never again would those who dare to commit the crime of aggression do so with impunity. [↑](#footnote-ref-4)
5. New York Times 28 October 1995, article by Stephen Engelberg and Tim Weiner with further reporting from Raymond Bonner in Bosnia and Jane Perlez in Serbia. [↑](#footnote-ref-5)
6. See: http://www.genocidewatch.org/aboutgenocide/8stagesofgenocide.html [↑](#footnote-ref-6)
7. International Herald Tribune, 9 April 2007 at https://srebrenicamassacre1995.wordpress.com/tag/marlise-simons/ [↑](#footnote-ref-7)
8. It is worth noting that Hasim Thaci of Kosovo has recently said that Kosovo is considering bringing a genocide allegation at the ICJ against Serbia. This, too, might be a very strong case that it has not yet been possible fully to articulate for reasons arising from the practical realities of Kosovo establishing its full independence in recent years. [↑](#footnote-ref-8)