The 'Srebrenica Genocide': A Totem for the New World Order

By John Laughland

The events at Srebrenica in July 1995 enjoy a special status in international criminal law. Uniquely among the many clashes which occurred during the violent break-up of Yugoslavia, those events have been formally characterised as genocide by both the ICTY and the ICJ at The Hague.

It is notable that no court, not even the ICTY Prosecutor, has ever characterised the events in Kosovo in 1999 as genocide, even though it was precisely on the basis that genocide was occurring there that NATO attacked Yugoslavia that spring.[1]

The history of this accusation of genocide is important. It was first levelled formally on 20 March 1993, when the Republic of Bosnia and Herzegovina initiated proceedings at the ICJ against the Federal Republic of Yugoslavia for the application of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948. The case was eventually ruled on in 2007 but the timing of the initial filing is key: it came within weeks of the vote of UN Security Council Resolution 808 (22 February 1993) which had called for the creation of an international criminal tribunal to prosecute war crimes in the former Yugoslavia. The ICTY at The Hague was indeed quickly brought into being with a further Security Council resolution, 827, passed on 25 May 1993. This use of the criminal law to intervene in the wars of Yugoslav succession was unprecedented. Never before had an international criminal tribunal been created with such intrusive powers, or as a peace-keeping measure. American judges at Nuremberg in 1947, acting under the terms of the Charter of the original International Military Tribunal at Nuremberg, had specifically ruled out such judicial interventionism. Their own power, they said, flowed only from the fact that Germany had no government of her own because she had surrendered unconditionally in May 1945:

Within the territorial boundaries of a state having a recognised, functioning government presently in the exercise of sovereign power throughout the territory, a violator of the rules of international law could be punished only by the authority of the officials of that state… In Germany an international body has assumed and exercised the power to establish judicial machinery for the punishment of those who have violated the rules of the common international law, a power which no international authority without consent could assume or exercise within a state having a national government presently in the exercise of its sovereign powers.[2]

This lack of either precedent or consent by the states concerned did not bother the advocates of a new world order. The ICTY was itself only one part of an intense and general UN interventionism in the Yugoslav wars. In the 18 months following the outbreak of fighting in Bosnia on April 2, 1992, no fewer than 47 Security Council Resolutions were adopted; 42 statements were issued by the President of the Council. No issue in the UNSC has ever generated so many resolutions and statements over a comparable period.

The interventionism was both judicial and military. The UN force, UNPROFOR, having been despatched in 1992, the spring of 1993 also saw the adoption of Security Council Resolution 819 (on 16 April 1993) which proclaimed the creation of a UN protected “safe area” around the town of Srebrenica. At that time the military balance of power had shifted in favour of the Bosnian Serbs and the area controlled by Muslims around Srebrenica had been greatly reduced. Srebrenica linked the northern and southern parts of Serb controlled territory and thus had a great strategic importance.

The creation of a “safe area” there – which, as even the ICTY admits,[3] the Muslims then used as a base for launching three years of raids on the surrounding Serb villages – was key to preventing the Serbs from realising their goal of seceding from Bosnia-Herzegovina with a viable state. The same status of “safe area” was later accorded to a number of other Muslim-held towns in Bosnia by Security Council Resolution 824, passed on 6 May 1993. In other words, the accusation of genocide formally lodged with the ICJ in March 1993 was made at a critical time. The Bosnian Muslims had suffered heavy military defeats and were on the point of losing the war. Their international strategy was to seek foreign moral and military support on the basis that Yugoslavia was practising genocide against them.[4]

When the International Court of Justice finally ruled on the Bosnian suit in 2007, it threw out every single accusation of genocide except where Srebrenica was concerned. This was partly its own reading of events and partly that of the ICTY, whose rulings it felt it could not disregard. In the intervening 14 years, the ICTY had entered convictions for genocide in Srebrenica against Radislav Krstic in 2001 and Vidoje Blagojevic in 2005.

The original suit used the most inflammatory language to argue that genocide was being committed.[5] This makes it all the more perplexing that the original claims of a vast genocide allegedly perpetrated against an entire people have been whittled down so far that only Srebrenica remains. In the ordinary meaning of the word, genocide is a massive state-sponsored programme. The Nazis’ persecution of the Jews provides the paradigm: certainly, it was with the Nazi genocide in mind that the father of the Genocide Convention, Raphael Lemkin, proposed the original draft and the authors drew up the final version.

In contrast to the Nazi program of extermination which involved massive logistical planning, huge amounts of manpower and materials, more than a decade of ideological racism, and implementation over a period of several years, the mass executions which occurred after the fall of Srebrenica took place in little over a week in July 1995, and in a sporadic and impromptu fashion. Whereas Hitler’s anti-Semitism had been publicly expressed in Mein Kampf, published in 1925, and whereas he had threatened “the destruction of the Jewish race in Europe” in a speech to the Reichstag on 30 January 1939, i.e. nearly three years before he finally gave the order physically to murder the Jews[6], the ICTY judges say that the genocidal plan at Srebrenica did not come into being until on or around 13 July 1995, i.e. spontaneously in the heat of battle.[7] And whereas the Nazis targeted all Jews, the genocidal plan supposedly conceived by the Bosnian Serbs did not target the Bosnian Muslims as a whole but only, according to the ICTY, “the Bosnian Muslim population of Srebrenica”.[8]

There have been complaints about this ruling, largely on the basis that the findings are exaggerated and unsubstantiated, that the figure of 7-8,000 is far too high, that most of the victims of executions were combatants. These arguments fail to grasp that we are dealing not so much with an anti-Serb bias in the practice of international criminal justice, but rather with a program of international interventionism, based on dangerously weak legal reasoning and disregard for due process, of which the Serbs happen to be the guinea-pigs.

Srebrenica has been raised to the legal status it now enjoys partly because the town’s fall in 1995 to Bosnian Serb forces represented a defeat not only for the Bosnian Muslims but also for the international community as a whole – not only its policy of creating safe areas but also, and more generally, of the interventionism practised by various parts of the “international community” ever since the EU interposed itself between the parties to the conflict in July 1991. Srebrenica was important – at least for the supporters of interventionism - because the UN was there, not just because it was a Muslim enclave. The United Nations as an institution, it must be remembered, had embarked in the 1990s on an aggressive policy of military, political and judicial interventionism in both Iraq and Yugoslavia; it continued to apply the

highly intrusive sanctions regime against Iraq throughout the decade and into the 21st century, and of course was happy to become the administrator of Kosovo after 1999. Its own credibility, and that of the states which dictated its policies, was destroyed when the enclave fell.

The activists of judicial and military supranationalism are therefore determined to make the genocide charge stick somewhere. Perhaps they want revenge for the military defeat of 1995. Genocide offers two key legal advantages in pursuit of the goal of creating a new international system no longer based on state sovereignty. These advantages are in addition to the rhetorical advantage which derives from putting the Bosnian Serbs into the same category as the Nazis.

The first legal usefulness of the genocide charge is that, according to the questionable way in which international criminal law is currently formulated, the threshold of proof required to secure a conviction for genocide is lower than it is for crimes against humanity. To secure a conviction for crimes against humanity the Prosecution must prove that the acts were "widespread or systematic".[9] No such condition applies for genocide. Moreover, crimes against humanity can be committed only against civilians, whereas genocide can include the killing of military personnel as well.[10] In other words, spontaneous or disparate acts involving the killing of military personnel can be classified as "genocide"; this is exactly what has happened in the case of Srebrenica.

The second legal advantage of genocide - from the point of view of the project of creating a system of supranational coercive criminal law which can constrain states and convict their leaders - is that genocide, unlike crimes against humanity, is the subject of a binding international treaty, the 1948 Genocide Convention. To be sure, the normal rules of international behaviour have been severely distorted in recent years by the antics of the Security Council and the United Nations in general in creating international criminal tribunals which, in the case of the ICTY, the ICTR and the ICC, have all indicted heads of state or government who would normally enjoy sovereign immunity. This is especially the case with President Omar Al-Bashir of Sudan, a country which has not signed the Rome Statute but who was nonetheless indicted by the ICC in March 2009. International judicial activists can more or less do what they like these days. However, they are on stronger ground when there is actually a treaty in existence which forbids genocide and requires states to prevent and punish it.

The importance of the existence of a treaty, as opposed to the existence of a norm in mere "customary international law" – i.e. whatever judges or even academics say they think the law is – was illustrated with the landmark ruling in the British House of Lords against General Pinochet, issued on 24 March 1999 (the day the bombs started raining down on Yugoslavia). Activists for universal jurisdiction ratione materiae were very excited by this ruling because it seemed to confirm that even heads of state could be put on trial when certain kinds of crimes were alleged against them. However, their victory was less decisive than they sometimes pretend. It is true that the House of Lords overruled the principle of sovereign immunity, but it did so only on the basis that Chile itself – which claimed the immunity for Pinochet – had in fact consented, in 1988 when Pinochet was himself head of state, to the terms of the 1985 UN Convention by signing and ratifying it. The noble Lords deduced from this that Chile had earlier revoked its own immunities in this area and that its revocation remained in force because it had never subsequently denounced the Convention.

The status of genocide as a crime prohibited by treaty law, rather than customary international law, was also raised in the ruling given by the ICJ in the Bosnia v. Serbia case in February 2007. Article 9 of the Genocide Convention gives the ICJ the power to rule on whether it is being respected or not. This part of the Genocide Convention was extensively discussed in the ruling, specifically the question whether the responsibility of states could be incurred under its terms. The Court concluded that the responsibility of states could be so incurred, a finding which represents a departure from the classical rules of international law according to which

states are the upholders of the criminal law and, as such, not the subjects of it.[11] Many states derogated from this provision, Article 9, when they ratified the Genocide Convention. They entered reservations saying they did not accept the jurisdiction of the ICJ. However, Bosnia has entered no such reservation and although Yugoslavia did, it agreed to litigate the case before the ICJ in 1993. In other words, the principle is now established that genocide can be litigated at international level in Bosnia, and that the responsibility of states can be engaged.

There is a final point, weaker than the previous two. Some international lawyers argue that there is no right of secession for states which have committed massive violations of human rights. They also claim that there does exist a right of secession when self-determination is violently suppressed. Such arguments may obviously be invoked against Republika Srpska which could be branded un État génocidaire if it tried to secede, or to resist fresh attempts to dissolve its autonomy.

The positive law on this is thin, as it is indeed on secession in general: the only real text which can be adduced is Resolution 2625 adopted at the 25th General Assembly of the United Nations on 24 October 1970.[12] The reference is vague and indirect; consequently some authors deny that it exists as a principle of customary international law. But it is a feature of recent international legal practice that the pronouncements of law lecturers are invoked as sources of law itself. Moreover, as the abuses of due process often committed by the ICTY and other tribunals show[13], international criminal law is currently in a dangerously fluid state. The first conviction under the Genocide Convention was that of Jean Kambanda, the former Prime Minister of Rwanda, in 1998: this is all very recent law, as is shown by the quotation by the ICTY of very new precedents in its rulings on Srebrenica.[14] It can be easily pressed this way or that according to the political imperatives of the day, and according to the institutional self-interest of international judges, who take decisions free of any meaningful oversight.

The convictions for ‘genocide’ at Srebrenica may be used as a stick with which to beat Republika Srpska. The ICTY has declared an explicit link between the July 1995 events in Srebrenica and the existence of RS itself. In 2004, the Appeals Chamber upheld the Trial Chamber’s 2001 finding that, “without Srebrenica, the ethnically Serb state of Republica Srpska they (the Bosnian Serbs) sought to create would remain divided into two disconnected parts, and its access to Serbia proper would be disrupted”:

The capture and ethnic purification of Srebrenica would therefore severely undermine the military efforts of the Bosnian Muslim state to ensure its viability, a consequence the Muslim leadership fully realized and strove to prevent. Control over the Srebrenica region was consequently essential to the goal of some Bosnian Serb leaders of forming a viable political entity in Bosnia…[15]

This paragraph is specifically a justification for the Appeal Chamber’s finding that genocide did occur: the judges are seeking to justify their ridiculously baroque finding that a massacre of a tiny percentage of a “protected group” (the Bosnian Muslims) can be proof of genocidal intent. Aware that their rulings on genocide appear to cheapen the concept so far that it becomes nugatory, they say that the importance of the Muslim community of Srebrenica “is not captured solely by its size” but instead by this strategic importance and by the fact that the town was a UN protected safe haven for Muslims. It is for this reason, argue the judges, that the destruction of the “Bosnian Muslim population of Srebrenica” was “emblematic”[16] of the Bosnian Muslims as a whole and therefore evidence of full genocidal intent.

Srebrenica, then, is an existential issue, not as much for Republika Srpska as for those activists who seek to consolidate once and for all that outcome which the former ICTY Prosecutor,

Louise Arbour, said she had achieved in 1999: “We have passed from an era of cooperation between states to an era in which states can be constrained.”[17]

[1] Prime Minister Tony Blair said, “It is no exaggeration to say that what is happening in Kosovo is racial genocide.” My pledge to the refugees, BBC News Online, 14 May 1999.

[2] Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, Volume III, “The Justice Case” (1947), Washington DC, 1951, pp. 970-971.

[3] ICTY, Prosecutor v. Radislav Krstic, Trial Chamber Judgement, 2 August 2001, par. 24.

[4] The claim of genocide was supported by various academics in the West. See Norman Cigar, Genocide in Bosnia, The Policy of “Ethnic Cleansing”, (Texas A&M University Press, 1995), reviewed by Noel Malcolm in The Sunday Telegraph on 11 June 1995: “If you want just one work which explains the real nature of this war, you should read this one.” Yet Srebrenica is nowhere mentioned in that book because the events of July 1995 still lay in the future: the accusation of genocide, once again, long pre-dated them.

[5] The opening paragraph of the Application (20 March 1993) reads: “Not since the … revelations of the horrors of Nazi Germany's ‘Final Solution’ has Europe witnessed the utter destruction of a People, for no other reason than they belong to a particular national ethnical, racial, and religious group as such. The abominable crimes taking place in the Republic of Bosnia-Herzegovina at this time can be called by only one name: genocide. Genocide is the most evil crime a State or human being can inflict upon another State or human being. The sheer enormity of this crime requires that the nations of the world stand together as one, and with a single voice stop the destruction of the Bosnian People.”

[6] Edouard HUSSON, “Nous pouvons vivre sans les juifs”, Novembre 1941, Quand et comment ils décidèrent de la solution finale (Paris: Perrin, 2005).

[7] ICTY Trial Chamber, Prosecutor v. Radislav Krstic, 2 August 2001, par. 573.

[8] ICTY Appeals Chamber, Prosecutor v. Radislav Krstic, Judgement, 19 April 2004, par 19, and Trial Chamber Judgement, 2 Auust 2001, pars 560 and 561.

[9] The phrase “widespread or systematic” appears in Article 7 of the Rome Statute of the International Criminal Court. The relevant Article 5 of the ICTY Statute does not contain the phrase but the Trial Chamber determined in its very first trial that the acts “must be undertaken on widespread or systematic basis and in furtherance of a policy”. See Trial Chamber judgement in Prosecutor v. Dusko Tadic, 7 May 1997, par. 626.

[10] Article 5 of the ICTY Statute specifies that crimes against humanity are directed “against any civilian population”, a phrase repeated in the relevant Article 7 of the Rome Statute of the ICC. See also John Quigley, The Genocide Convention, An International Law Analysis, (London: Ashgate, 2006), p.12.

[11] See paragraphs 155 – 182 of the ICJ ruling, 27 February 2007.

[12] “Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations,” esp. provisions in the section entitled “The Principle of Equal Rights and Self-Determination of Peoples”.

[13] See my books Travesty: the Trial of Slobodan Milosevic and the Corruption of International Justice (London: Pluto Press, 2007) and A History of Political Trials from Charles I to Saddam Hussein (Oxford: Peter Lang, 2008).

[14] ICTY Trial Chamber judgement, Prosecutor v; Radislav Krstic, 2 August 2001, par 571.

[15] ICTY Appeals Chamber, Prosecutor v. R. Krstic, Judgement, 19 April 2004, par.15.

[16] par. 16.

[17] Le Monde, 6 August 1999.