



The Boğaziçi Law Review

ISSN: 3023-4611

Journal homepage: <https://dergipark.org.tr/tr/pub/blr>

Srebrenica Genocide and Lessons for Prevention of Genocide

Srebrenica Soykırımı ve Soykırımın Önlenmesine Yönelik Dersler

Harun Halilović

To cite this article: Harun Halilović, ‘Srebrenica Genocide and Lessons for Prevention of Genocide’ (2025) 3(1) The Boğaziçi Law Review 64.

Submission Date: 1 December 2024

Acceptance Date: 27 June 2025

Article Type: Research Article



© 2025 Harun Halilović. Published with license by Boğaziçi University Publishing



Published online: June 2025



Submit your article to this journal [↗](https://dergipark.org.tr/tr/pub/blr)

Full Terms & Conditions of access and use can be found at
<https://dergipark.org.tr/tr/pub/blr>

SREBRENICA GENOCIDE AND LESSONS FOR PREVENTION OF GENOCIDE

SREBRENİCA SOYKIRIMI VE SOYKIRIMIN ÖNLENMESİNE YÖNELİK DERSLER

Harun Halilović 

Dr., Assistant Professor, International University of Sarajevo, Faculty of Law.

ABSTRACT

The Srebrenica genocide stands as a stark and enduring reminder of the international community's failure to prevent genocide, despite existing legal frameworks intended to safeguard populations from such atrocities. This event continues to raise pressing concerns regarding the effectiveness of international mechanisms and the actual extent of state obligations under international law. A central legal development in this context is the judgment rendered by the International Court of Justice (ICJ) in the Bosnia and Herzegovina v. Serbia and Montenegro case, which has been widely scrutinized for the ambiguity it presents. Rather than delivering clear and definitive answers, the judgment has, in many respects, generated further questions, particularly concerning the obligations of states to prevent genocide as stipulated in the 1948 Genocide Convention. The ICJ's approach to the interpretation of the duty to prevent genocide is notably inconsistent. In certain paragraphs, the judgment appears to adopt a relatively expansive understanding of state obligations, hinting at a broader responsibility to act against the threat of genocide. However, in other parts of the ruling, the Court takes a more restrictive stance, narrowing the scope of this obligation and potentially limiting its enforceability or applicability in practical terms. As a result, the judgment offers only limited and sometimes conflicting guidance for states seeking to understand the nature and extent of their responsibilities under the Genocide Convention. This inconsistency within the ruling has led to considerable uncertainty regarding the legal contours of the obligation to prevent genocide. While the judgment does provide some degree of clarification, it ultimately leaves unresolved critical aspects of how the duty should be interpreted and implemented in practice. The case, therefore, remains a subject of ongoing debate in both legal scholarship and international political discourse, highlighting the continuing need for greater precision in defining states' preventive obligations under international law.

Keywords: Srebrenica, Bosnia, genocide, ICJ, genocide prevention, state responsibility, state obligations, duty to prevent genocide

ÖZET

Srebrenica soykırımı, uluslararası toplumun mevcut yasal düzenlemelere rağmen soykırımı önlemedeki başarısızlığının çarpıcı ve kalıcı bir hatırlatıcısı olarak durmaktadır. Bu olay, uluslararası mekanizmaların etkinliği ve devletlerin uluslararası hukuk kapsamındaki yükümlülüklerinin gerçek boyutu konusunda günümüzde dahi ciddi endişeler uyandırmaktadır. Bu bağlamda önemli bir hukuki gelişme, Uluslararası Adalet Divanı'nın Bosna-Hersek v. Sırbistan ve Karadağ davasında verdiği karardır ve bu karar, sunduğu belirsizlik nedeniyle geniş çapta eleştirilmiştir. Karar, net ve kesin cevaplar vermek yerine, 1948 Soykırım Sözleşmesi uyarınca devletlerin soykırımı önleme yükümlülükleri konusu başta olmak üzere; birçok açıdan daha fazla soru doğurmuştur.

UAD'nin soykırımı önleme yükümlülüğünün yorumlanmasına yönelik yaklaşımı dikkat çekici biçimde tutarsızdır. Kararın bazı paragraflarında, mahkeme devlet yükümlülüklerine dair görece geniş bir anlayışı benimsemekte ve soykırım tehdidine karşı daha kapsamlı bir sorumluluğa işaret etmektedir. Ancak kararın diğer bölümlerinde mahkeme daha dar bir bakış açısı benimseyerek bu yükümlülüğün kapsamını sınırlamaktadır. Bu durum, yükümlülüğün uygulanabilirliğini veya pratikteki geçerliliğini azaltabilmektedir. Sonuç olarak karar, Soykırım Sözleşmesi kapsamındaki devlet sorumluluklarını anlamak isteyenler için yalnızca sınırlı ve zaman zaman çelişkili bir rehberlik sunmaktadır. Karardaki bu tutarsızlık, soykırımı önleme yükümlülüğünün hukuki sınırlarına ilişkin ciddi bir belirsizlik yaratmıştır. Karar belli ölçüde bir netlik sunsa da, bu yükümlülüğün nasıl yorumlanması ve uygulamaya geçirilmesi gerektiği konusunda kritik bazı noktaları nihai olarak çözüme kavuşturmamaktadır. Bu dava, bu nedenle, hem hukuki literatürde hem de uluslararası siyaset alanında süregelen bir tartışma konusu olmaya devam etmektedir ve devletlerin uluslararası hukuk kapsamındaki önleyici yükümlülüklerinin daha açık biçimde tanımlanmasına yönelik süregelen ihtiyacı gözler önüne sermektedir.

Anahtar Kelimeler: Srebrenica, Bosna, soykırım, UAD, soykırımı önleme, devlet sorumluluğu, devlet yükümlülükleri, soykırımı önleme yükümlülüğü

1. INTRODUCTION

The goal of the article is to analyze the obligation of the States to prevent genocide, as defined by the 1948 UN Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), and the practice of the International Court of Justice (ICJ). The wording of the Genocide Convention can be at times described as vague and dated, therefore the legal practice of the ICJ is of utmost importance. However, there are not many cases related to genocide, and the only one case where genocide and the responsibility of the State for failure to prevent it were established is the Bosnia v Serbia case. In this article, the general concept of genocide will be presented followed by an in-depth analysis of the ICJ Judgment in the Bosnia v Serbia case, especially related to the obligations of the States to prevent genocide. Specifically, the questions of the bearers of the responsibility to prevent genocide and the content of such obligation. Especially important are the issues of responsibility of the bodies of international organizations, primarily the United Nations (UN). During the analysis, certain contradictions are pointed out which result in further misunderstanding of the obligation to prevent genocide. The Srebrenica genocide serves as a stark reminder of the structural inadequacy of the UN system and its inability to prevent genocide. The article uses a case study approach and legal content analysis, together with other legal methods where appropriate, and offers certain recommendations.

2. GENOCIDE AS A CRIME IN INTERNATIONAL LAW

The General Assembly of the United Nations, in its Resolution 96(1) declared that genocide “*is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings.*”¹ The nature of genocide is such that it affects not only individual victims and the group they belong to directly but also the entire humanity and human diversity as its hallmark.

¹ United Nations General Assembly Resolution 96 of 11 December 1946.

The concept of genocide as a crime under international law is defined by the 1948 UN Genocide Convention, which sets the main legal elements of the crime of genocide. In legal theory and practice of international tribunals, primarily the International Court of Justice (ICJ), as well as tribunals dealing with the individual criminal responsibility such as International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR), there is an overarching understanding that the Convention, and obligations put forth in it, due to the gravity of the crime of genocide and the widespread acceptance of the Convention, have attained the level of *ius cogens*.²

Throughout human history, there have been numerous instances of committed acts that could fall under the scope of the crime of genocide, however, the Genocide Convention represents an understanding on a global level and the point in time from which the commission of acts described in the Genocide Convention are characterized with a specific criminal label of genocide, thus, precluding retroactive labeling and setting legal prerequisites for future characterization of acts as genocide.

The elements required for legal characterization of certain acts as genocide, as defined by the Convention can be divided into *actus reus* and *mens rea* elements. The elements are contained in the definition of the crime of genocide, found in article II of the Genocide Convention, which states that “...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.”³

The *actus reus* as physical elements of the crime include the commission of any of the acts enumerated in Article II, however, it is the *mens rea* element that sets the crime of genocide apart from other crimes in international law. The specific requirements that differentiate genocide from other crimes are found in the intent of the perpetrator and in the characteristics of the targeted group. The targeted group is defined as a national, ethnic, or religious group, excluding other types of groups.⁴ Thus, certain atrocities, even though leaving a staggering number of victims, such as crimes of the *Khmer Rouge* in general were not deemed as genocide⁵, since the targeted group was defined as a social or economic group and not as ethnic or religious. It must be noted that in the example of Cambodia, the Special Tribunal for the prosecution of the crimes of the *Khmer Rouge*, the Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia (ECCC) did find individual Nuon Chea responsible for genocide against the Muslim Cham minority and Vietnamese minority in

² Reservations to the Convention on Genocide and Punishment of the Crime of Genocide, Advisory Opinion, ICJ Reports (1951) 15.

³ Convention on the Prevention and Punishment of the Crime of Genocide (signed 9 December 1948) 78 UNTS 277.

⁴ Melanie Klinkner, ‘Proving Genocide’ (2008) 6(3) Journal of International Criminal Justice 447, 463.

⁵ Robert Cryer, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press 2010) 203.

Cambodia.⁶ However, those crimes, even though temporally and spatially parallel are to be differentiated from the crimes of *Khmer Rouge* against the general population of Cambodia, which was targeted based on the socio-economic and political distinction and not on national, ethnic, or religious one.

In addition to a targeted group, genocide is characterized by the special mental element, the so-called “genocidal intent” to destroy in whole or in part, the protected national, ethnic, or religious group, as such. The practice of international courts casts light on the “in whole or in part” expression, concluding that the destruction of the part of the group refers to the part which is vital for the survival of the group as a whole.⁷

The Genocide Convention in its Article III criminalizes acts of commission of genocide, as well as conspiracy to commit genocide; direct and public incitement to commit genocide; attempt to commit genocide, and complicity in genocide.⁸

The specific feature of the Genocide Convention is that it creates certain obligations, or more precisely prohibitions that affect both individuals and thus create individual criminal liability, but on the other hand, creates certain obligations on the part of the States as primary subjects of international law. The precise obligations of the states under the Genocide Convention were points of contention in the cases before the International Court of Justice⁹. The Genocide Convention itself enumerates specifically the obligations of legislative action on the national level aimed at the criminalization of the crime of genocide, its acts, and modes of its commission. In addition to criminalization through national legislation, the Genocide Convention requires the States to prosecute and punish individuals for the commission of acts of genocide. However, the obligations of the states are not only limited to the criminalization of genocide and prosecution of the individuals but also refer to the very prevention of genocide. The very name of the Genocide Convention refers specifically to prevention, which is a major obligation of the States.

The Genocide Convention itself sets out certain rules, however, for better understanding, further clarifications in judicial practice are necessary. The legal practice of ICJ is particularly relevant, since, although scarce, it gives us the main elements needed for understanding the Genocide Convention itself. Not many cases are brought before the ICJ related to genocide, and only one case, with an establishment of occurrence of genocide and some level of state responsibility for the breach of the Genocide Convention, has been completed to date.

3. OBLIGATIONS OF THE STATES IN THE PREVENTION OF GENOCIDE

The ICJ in its Judgment in the case of Application of the Convention on the Prevention and Punishment of the Crime of Genocide (also known as the Bosnia v Serbia case or

⁶ Case 002/02, Case File No. 002/19-09-2007/ECCC/TC E465, Judgment, Trial Chamber ECCC (Nov. 16, 2018).

⁷ Cryer (n 5) 204.

⁸ See further: Paola Gaeta, *The UN Genocide Convention: A Commentary* (Oxford University Press 2009).

⁹ Cases such as: *Bosnia and Herzegovina v Serbia and Montenegro* (2007) ICJ 2 and Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia).

Bosnian genocide case), concluded in Paragraph 162 of the Judgment that the obligation to prevent genocide is a distinct obligation from other ones defined in the Convention, namely prohibition of commission of genocide and obligation to punish the perpetrators.¹⁰

The issue of obligation to prevent genocide raises several important questions, such as when does failing to prevent lead the State to a status of accomplice, or aid in the commission of genocide? The ICJ, through its decision, indicated that the test is about awareness of the genocidal intent, which is crucial in determining the level of responsibility. The ICJ, in its Judgment concluded in Paragraph 422, that even though Serbia did supply material support to the Army of the Republic of Srpska, which was determined to be the one committing genocide in Srebrenica, and even though some of that material was determined to be used during the commission of the acts of genocide, the lack of proof for the awareness that genocide is about to take place or underway on the part of Serbia, was crucial to deny the existence of complicity or responsibility for aiding in commission of genocide.¹¹ Such ruling was criticized, both for non-application of the “overall control test” established by ICTY¹² as well as for the decisions on dismissing request for reparations¹³.

The ICJ concluded that the main difference between the obligation to prevent genocide and the obligation, or prohibition not to commit or be an accomplice to genocide is in its definition. The obligations, or prohibitions listed in Article III, point out to a negative obligation of the state ... “while *duty to prevent places States under positive obligations, to do their best to ensure that such acts do not occur.*”¹⁴ Therefore, the level of awareness of possible or ongoing genocide is different between those two obligations. In the case of failure to prevent, the State needs to be “*aware of or should normally be aware of the serious danger that acts of genocide would be committed*”,¹⁵ while complicity requires that some action has been taken to aid or assist the commission of genocide, implying the awareness of the intent, and not mere awareness of the danger of occurrence of genocide.

The questions related to the obligation to prevent genocide are not limited to an issue of distinction between prevention and complicity. The most important questions are related to the extent of the obligation to prevent and who are the bearers of those obligations.¹⁶ The ICJ partially answered some of these questions, leaving certain issues open to interpretation.¹⁷

¹⁰ *Bosnia and Herzegovina v Serbia and Montenegro* (n 9) 2 para 163.

¹¹ *ibid* para 422.

¹² See further: Antonio Cassese, ‘The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia’ (2007) 18(4) *The European Journal of International Law*.

¹³ See further: Andrea Gattini, ‘Breach of the Obligation to Prevent and Reparation Thereof in the ICJ’s Genocide Judgment’ (2007) 18(4) *European Journal of International Law* 695, 713.

¹⁴ *ibid* para 432.

¹⁵ *ibid* para 431.

¹⁶ Roger S Clark, ‘State Obligations under the Genocide Convention in Light of the ICJ’s Decision in the Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide’ (2008) 61 *Rutgers Law Review* 75.

¹⁷ See further: Federica Paddeu ‘Ghosts of Genocides Past? State Responsibility for Genocide in the Former Yugoslavia’ (2015) 74(2) *The Cambridge Law Journal* 198, 201.

When it comes to the content of the obligation to prevent, as said, it is to be understood as a separate obligation from the prohibition of commission and obligation to punish the perpetrators, as the ICJ said the obligation to prevent “...*is not merged with the duty to punish, nor can it be regarded as simply a component of that duty. It has its own scope...*”¹⁸ The punishment of perpetrators, in criminal legal theory and practice, does serve individual and collective prevention and deterrence, however, the obligation to prevent genocide is a stand-alone obligation with a much larger scope. Such point presented by the ICJ Judgment represents an important event in the development of international law related to genocide, however, the ICJ fell short of giving more guidance on the specific content of that obligation, and especially on the scope of bearers of that obligation.¹⁹

When it comes to bearers of the obligation to prevent, the primary duty holders are the states themselves, however, it is open to interpretation on what is the extent of the obligation of bodies of international organizations.²⁰ The ICJ and the Genocide Convention and its Article VIII hint at the possibility of the responsibility of the bodies of the United Nations (UN), primarily of the Security Council, but without a concrete constitution of a duty.

In its Advisory Opinion on the Reservations to the Genocide Convention, the ICJ concluded that the “... *principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation.*”²¹ Such understanding points to the States as primary holders of obligation and points to the prohibition of genocide as *ius cogens* norm, independent of any convention, understanding prohibition of genocide as a part of general principles of law, as one of the recognized sources of law. On the other hand, the term “*principles underlying the Convention*” is vague and open to interpretation.

Does this position of the ICJ lead to the obligation of prevention of genocide as *in abstracto*, in the sense of the permanent obligation of every state to prevent every genocide, or is the obligation of prevention of genocide triggered by certain circumstances? The practice of the ICJ points to the latter. ICJ has further developed conditions under which the obligation of genocide prevention can be triggered. Those criteria can point to specific situations when states are individual bearers of an obligation to prevent genocide and are primarily related to the question of the existence of knowledge or awareness and the power or ability to prevent genocide from happening in the concrete case.

The condition of awareness is defined more broadly and can include certain behaviors on the part of the state that can be described as “negligent”. In its 2007 Judgment, the ICJ found that the obligation of the State to prevent genocide, and its duty to act accordingly is created “*the instant that the State learns of, or should normally have learned of the existence of*

¹⁸ *Bosnia and Herzegovina v Serbia and Montenegro* (n 9) 2 para 427.

¹⁹ William A. Schabas, ‘Genocide and the International Court of Justice: Finally, a Duty to Prevent the Crime of Crimes’ (2007) 2(2) *Genocide Studies and Prevention: An International Journal* 19.

²⁰ See further: Mark Gibney, ‘State Responsibility and the Object and Purpose of the Genocide Convention’ (2007-2008) 4(2-3) *International Studies Journal* 141, 150.

²¹ Reservations to the Convention on Genocide and Punishment of the Crime of Genocide, Advisory Opinion, ICJ Reports 1951 15.

serious risk that genocide will be committed".²² Therefore, it is not required, as in the cases of complicity, that a level of certainty is required on the part of the State that genocide is taking place/about to take place. Instead, the State is under an obligation to prevent at the moment it knows or normally should have known about the very risk of commission of genocide.

That leads us to the second condition, as defined by the ICJ, one of power, which poses more questions than answers. Firstly and less controversially, the ICJ recognized the obligation to prevent genocide, to include not just the territory of the State, but also "*outside the sphere of territorial sovereignty, when it exercises – whether legally or illegally – effective control outside its borders*"²³ This understanding is in line with the concept of extraterritorial responsibility of the States, especially in exercise of effective control over territory or persons, which is generally known in the theory and practice of international law.

However, the second position of ICJ concerning the obligation to prevent is a bit more puzzling. In Paragraph 461, the ICJ concludes that the obligation to prevent genocide "... is imposed by the Genocide Convention on any State party which, in a given situation, has it in its power to contribute to restraining in any degree the commission of genocide."²⁴ Such understanding leaves a lot of room for interpretation. It refers to power, or the ability to "contribute" not just to achieve the goal of stopping genocide, and regarding effects achieved, the required effect is one of "restraining in any degree".

Such wording may imply a very broad obligation and include not just the situations of the States concerned. Moreover, it may imply the obligation of the international community as a whole. Indeed, as mentioned, the issue of obligations of the bodies of international organizations can be linked to this widely cast obligation of individual States as defined by the ICJ, since it is the States that contribute to the work and decision-making of the international organizations. Following that, not all states contribute in the same degree to the work of international organizations, and in the example of the UN, the Permanent Members of the Security Council certainly have "*in any given situation*" more "*power to contribute to restraining in any degree the commission of genocide*".

Article VIII of the Genocide Convention does foresee certain obligations of the bodies of the UN, but its wording can be described as vague. Article VIII of the Convention states: "*Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.*"²⁵ The seemingly strong obligation is somewhat diluted by the wording "*as they consider appropriate*". Such formulation sanctions a wide area of discretion to the States.

States, especially members of crucial bodies of the UN like the Security Council, and particularly their permanent members are the first ones in the line to decide on actions to

²² *Bosnia and Herzegovina v Serbia and Montenegro* (n 9) 2 para 431.

²³ *ibid* para 12.

²⁴ *ibid* para 461.

²⁵ Convention on the Prevention and Punishment of the Crime of Genocide (signed 9 December 1948) 78 UNTS 277.

counter serious breaches of international law. As per the UN Charter, the Security Council is the body responsible for the authorization of the use of force and decisions on actions in response to serious threats to peace and security. Since permanent members of the Security Council are the ones with greater decision powers and the ability to use veto powers to halt proposals, their actions are more consequential.

However, the ICJ decided not to venture “too far” into the possibility of the responsibility of the actions of States done through the organs of the UN. The ICJ held in Paragraph 159 of the Judgment that: “*Article VII about the competent organs of the United Nations taking action, may be seen as completing the system by supporting both prevention and suppression, in this case, at the political level rather than as a matter of legal responsibility*”²⁶. By concluding this, the ICJ practically exonerated Member States of the Security Council of “*legal responsibility*” by pushing the “*prevention and suppression*” actions to the “*political level*” confirming the already stated wide area of discretion of the states, to act “*as they consider appropriate*”, as stated in the Genocide Convention.

One might say that the wording of the Judgment is contradictory since on one hand it establishes the obligation of the states to “*contribute to restraining in any degree the commission of genocide*”. The degree to which each state can contribute to restraining genocide is not equal, since certain countries have more ability, not just politically or militarily, but institutionally, through recognized powers given to them by virtue of membership of the UN Security Council, especially permanent membership. Nevertheless, the ICJ absolved the organs of the UN from “*legal responsibility*”, and thus the States comprising those organs, precluding any possibility of “*piercing the veil*” of the actions of the UN institutions to seek the responsibility of the States involved in the decision-making process within those institutions.

When it comes to the content of the obligations to prevent genocide, the ICJ gave points on what is considered as the ability, in the concrete case to influence the commission of genocide, thus concluding in Paragraph 430 of the Judgment that the ability to influence the actions of persons involved in the commission of genocide “*depends among other things, on the geographical distance of the State concerned from the scene of events and on the strength of political links as well as all other links between the authorities of that state and main actors of the event*”.²⁷ The requirement of the political and other links is of course important, however, the geographical distance requirement can be considered as dated, especially in the modern globalized world of today, where one State can exert influence over distant state or non-state actors through different official and unofficial means and channels. Further criteria related to the ability of the actions of the state is the legal assessment, which mandates that the states cannot act illegally, and must confine its actions to the limits permitted by international law.

Therein we can spot another contradiction. Since the UN Charter mandates the Security Council as the only body authorized to sanction the use of force, any use of force unsancti-

²⁶ *Bosnia and Herzegovina v Serbia and Montenegro* (n 9) para 159.

²⁷ *Bosnia and Herzegovina v Serbia and Montenegro* (n 9) para 430.

oned by the Security Council, would be considered legally contested. However, the Security Council itself, and its Member States, are not under any “*legal obligation*” and may take actions “*as they consider appropriate*” with the goal of genocide prevention.

This points out to one of the many flaws of the architecture of the UN system, which has proven to be unfit to deliver the promise of genocide prevention, as we have seen in the instances of genocide occurring since the establishment of the UN system under the UN Charter. Since then, genocide has been legally proven in the instances such as Rwanda and Bosnia and Herzegovina. Such a situation shows the inability of the current UN system to prevent genocide, as it is seen in the example of Srebrenica.

The reform of the UN system, primarily of the Security Council, its composition, decision-making process, and powers is crucial. Politically and legally, it is an extremely difficult task, but academics and activists need to continually advocate for action that will bring about change. The clarification of the Genocide Convention as to what are the precise obligations of the States in the prevention of genocide is also necessary. A step in that direction could be made through the adoption of the Resolution in the UN General Assembly, which would, if given widespread support, serve as a supplementing tool in demanding more responsibility from the States and international community in the actions toward genocide prevention. Such a potential resolution, if it would gain widespread support, even though not legally binding, could be used as an argument of emerging customary law and understanding of the international community.

4. FAILURE TO PREVENT GENOCIDE: EXAMPLE OF SREBRENICA

The dysfunction of the United Nations system, which is often made ineffective due to competing geopolitical interests, creates a “global paralysis”, even in the case of most fundamental issues, crucial for all humanity, such as the prevention of genocide. The prohibition of genocide is considered as one of the most important norms of international law and has reached the level of *ius cogens*. Unfortunately, since the adoption of the 1948 UN Genocide Convention, the international community has not learned the basic lessons in genocide prevention and has failed to keep up with its most basic obligation. The decisions of international bodies, such as the Security Council, even in the situations when they are adopted, are often left without proper means of implementation, as tragically portrayed in the case of Srebrenica.

The UN Security Council in 1993 adopted Resolution No. 819, establishing the “safe area” of Srebrenica, and bringing UN protection forces to safeguard the enclave. However, there was no adequate protection of the so-called “safe area”, and no support for the weak battalion of UN forces on the ground. Following the adoption of the UN Security Council Resolution the Bosnian Army forces were required to surrender their weapons in exchange for the promised protection by UN forces on the ground, which were supposed to be supported by air forces. The forces of the Republic of Srpska continued with their attacks aiming to probe for the response of the UN forces. Emboldened by the lack of any

response, they continued with their attacks, culminating in the takeover of the undefended town. After the takeover of Srebrenica, a series of massacres were organized, together with the cover-up of the atrocities in various mass graves.²⁸ Those were subsequently characterized by the international courts²⁹ such as ICJ and the International Criminal Tribunal for the former Yugoslavia (ICTY) as genocide³⁰, most notably in the cases such as highest ranking wartime political and military leaders of the Republic of Srpska: Radovan Karadžić³¹ and Ratko Mladić.³² As stated, the ICJ in its judgment in the Bosnia genocide case found Serbia responsible for failing to prevent genocide in Srebrenica.

Furthermore, the Judgment of the Supreme Court of the Netherlands determined the partial responsibility of the UN Dutch Battalion and the State of the Netherlands.³³ However, no UN official, state official, or military commander was held criminally responsible for not providing protection and for failing to execute the UN Security Council Resolution. The Court established responsibility, albeit limited to approximately 350 persons found within the UN Dutch Battalion compound, and deemed to be under their immediate control, before they were evicted from the compound into the hands of Army of Republic of Srpska.

People in Bosnia and Herzegovina learned the bitter lesson of the inefficiency of the UN system and the indifference of the international community, which, with a few exceptions, left Bosnian Muslims completely alone. Moreover, that very UN Security Council imposed in 1992 an embargo on arms sales to Bosnia and Herzegovina, and Bosnians were left without means to defend themselves.³⁴

The genocide in Srebrenica is an established legal fact, proven in front of international courts such as the ICJ and ICTY. Yet it faces a strong campaign aimed at denial and relativization. In the theory of genocide studies, the denial itself can be described as the final stage of genocide, opening the doors to new cycles of genocide.³⁵

To counter that, and to foster the prevention of genocide through keeping the memory of it, actions aimed at memorialization of genocide are of utmost importance. Aiming to keep the memory of the Srebrenica genocide the Resolution was put to vote in front of

²⁸ See Sakib Softić, 'Genocid i njegove posljedice u Bosni i Hercegovini' (2008) 1 *Pregled - Časopis Za Društvena Pitanja* 103.

²⁹ See Vedad Gurda, 'The Prosecution of Genocide in Bosnia and Herzegovina Before International, Domestic and National Courts of Other Jurisdictions' (2015) 4 *Monumenta Srebrenica* 35, 69.

³⁰ Berglind Halldorsdottir Birkland, 'Reining in Non-State Actors: State Responsibility and Attribution in Cases of Genocide' (2009) 84 *NYU Law Review* 1623.

³¹ See Case IT-95-5/18, case information available at ICTY via: <<https://www.icty.org/en/case/karadzic>>.

³² See Case IT-09-92, case information available at ICTY via: <<https://www.icty.org/en/case/mladic>>.

³³ Kristen Boon, 'The State of the Netherlands v. Respondents Stichting Mothers of Srebrenica' (2020) 114(3) *American Journal of International Law* 479, 486.

³⁴ Martin Binder, *The Security Council and the War in Bosnia, The United Nations and the Politics of Selective Humanitarian Intervention* (Palgrave Macmillan 2017) 100.

³⁵ Meldijana Arnaut Haseljić, 'Genocid – poricanje, negiranje, minimiziranje' (2006) 1 *Godišnjak Bošnjačke Zajednice Culture* 333.

the UN General Assembly. The public in Bosnia and Herzegovina, as well as neighboring countries, was focused on the vote in the UN General Assembly, which on the 23rd of May adopted Resolution A/78/L.67.³⁶ The resolution, among other provisions, established the 11th of July as the International Day of Remembrance of the Srebrenica Genocide. Such recognition, although belated, is welcome and will contribute to the reconciliation process. The Resolution reaffirms the facts established by the judgments of national and international courts, such as the International Court of Justice, as a permanent court, and the ICTY, the International Criminal Tribunal for the former Yugoslavia. It should be noted that neither the Resolution itself nor its co-sponsors place any hint of collective guilt on any people, as it was alleged by some. Surviving families of the victims of the Srebrenica genocide are grateful for all the countries that supported and co-sponsored the Resolution, one of them being the Republic of Türkiye. Also, the victims were saddened by some votes of abstention, among which there were several Muslim and Arab countries.³⁷

The international recognition of the genocide in Srebrenica is of great importance. The Bosniak population suffered the same crimes during the Second World War, but these crimes were never recognized nor talked about, which led to them being repeated in the 1990s.³⁸ Establishing a culture of memory and awareness of the historical context is one of the key elements of genocide prevention. In Srebrenica, painful memories must be revisited again and again, to learn new lessons every time, even when, at the same time, the convicted perpetrators of the Srebrenica genocide are celebrated and venerated as national heroes by those who deny the facts established by international courts.

5. FAILURE OF GENOCIDE PREVENTION: BEYOND SREBRENICA

One of the biggest problems of genocide prevention is the failure to detect “red flags” and the unwillingness to call the events by their true names. Especially in the case of Gaza, evidence and facts are dismissed as politically motivated and anti-Semitic, while many Jews themselves oppose and protest the actions of the State of Israel.³⁹ The inefficiency of the UN system leaves tragic results, which we saw in Srebrenica. Unfortunately, this paralysis and unwillingness to act only emboldens those who violate the basic norms of international law.

The lack of international recognition of the historical context of the tragedy in Palestine, and the unwillingness to use mechanisms to stop the perpetrators, also lies in deep-rooted

³⁶ United Nations General Assembly Resolution A/78/L.67, <<https://documents.un.org/doc/undoc/ltd/n24/140/80/pdf/n2414080.pdf>> accessed 10 November 2024.

³⁷ UN, press release, Seventy-eighth Session, 82nd Meeting (AM) GA/12601 23 May 2024 General Assembly Adopts Resolution on Srebrenica Genocide, Designating International Day of Reflection, Commemoration, <<https://press.un.org/en/2024/ga12601.doc.htm#:~:text=The%20resolution%20%28document%20A%2F78%2FL.67%2FRev.1%29%2C%20adopted%20by%20a%20recorded,crimes%2C%20crimes%20against%20humanity%20and%20genocide%20by%20internati>> accessed 10 November 2024.

³⁸ Noel Malcolm, *Bosnia A Short History* (NYU Press 1996) 331.

³⁹ Among others the voices of Holocaust survivors are exemplary in their gravity, see further: “Ten Holocaust survivors condemn Israel’s Gaza genocide” available at: <<https://www.jewishvoiceforlabour.org.uk/article/ten-holocaust-survivors-condemn-israels-gaza-genocide/>>.

Islamophobia that needs to be called out and eradicated. Just as the widespread anti-Semitism in the early twentieth century was a precursor to the horrors of the Holocaust, so is the widespread and normalized Islamophobia, the driving force behind many crimes, including Srebrenica. The public can witness biased narratives and distorted media coverage that only reinforce the Islamophobic attitudes fueled by right-wing political groups that are gaining more and more influence in Western countries.⁴⁰ Recognizing the context and removing prejudices is critical to ensure that dialogue leading to peaceful solutions begins.

The international community is largely failing in the duty to prevent genocide, which is defined in the Article I of the Convention on the Prevention and Punishment of the Crime of Genocide. Duty to prevent genocide is especially reaffirmed in the ICJ 2007 Judgment in the case of *Bosnia v Serbia*. Although the Judgment can be regarded as contradictory, as pointed out in some previously cited Paragraphs, it has some points which could be described as broad in their definition of the obligation to prevent genocide. The ICJ states in Judgment, in Paragraph 430: *„...a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible. A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide.“*⁴¹ The ICJ states further in the paragraph 431 of the Judgment: *“... This ... does not mean that the obligation to prevent genocide only comes into being when perpetration of genocide commences; that would be absurd, since the whole point of the obligation is to prevent, or attempt to prevent, the occurrence of the act. In fact, a State’s obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed“*⁴²

Another ongoing case of potentially great significance is the case initiated by Nicaragua against Germany. Nicaragua instituted proceedings before ICJ in March 2024, for the alleged violations by Germany, of its obligations, primarily related to the duty to prevent genocide. The Application claims that *“since October 2023, there has been a recognized risk of genocide against the Palestinian people, directed first of all against the population of the Gaza Strip”*. It is the argument of the Nicaragua that, by providing long term *“political, financial and military support to Israel and by defunding the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), Germany is facilitating the commission of genocide and, in any case has failed in its obligation to do everything possible to prevent the commission of genocide”*.⁴³

⁴⁰ See UN, Office of Human Rights High Commissioner: „UN experts warn Islamophobia rising to “alarming levels”, available via: <<https://www.ohchr.org/en/statements-and-speeches/2024/03/un-experts-warn-islamophobia-rising-alarming-levels>>.

⁴¹ *Bosnia and Herzegovina v Serbia and Montenegro* (n 9) para 430.

⁴² *Bosnia and Herzegovina v Serbia and Montenegro* (n 9) para 431.

⁴³ See Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany), ICJ, available at: <<https://www.icj-cij.org/case/193>> accessed 19 May 2025.

This case can have far reaching implications, for the understanding of the duty to prevent genocide, especially in light with the previously established understanding of the ICJ, expressed in the cited paragraphs of the Judgment in *Bosnia v Serbia* case. The case also carries a great significance for Palestine, and especially Gaza and may determine the conduct of other countries towards the actions of the state of Israel.

6. CONCLUSION

The obligation of the States to prevent genocide is defined as a stand-alone obligation under international law and following the Judgment of the ICJ in the *Bosnian Genocide Case* (2007), every State should contribute its best effort to restrain the commission of genocide. The wording of the Genocide Convention and the Judgments of the ICJ are however at times contradictory and open to interpretation.

The seemingly wide cast obligation to prevent is somewhat reduced by additional qualifications of awareness and ability to affect the commission of genocide. That is especially visible when it comes to the issue of legal responsibility of the bodies of the UN, and especially of the conduct of States done through the institutions of the UN, such as Security Council. The responsibility of UN bodies, including the ones that are authorized to deal with serious threats to peace, is reduced, due to the understanding of a wide margin of discretion.

The obligations of international community and individual States are well established in international law. The case of *Nicaragua v Germany*, instituted in front of ICJ, claiming the breach of duty to prevent genocide, through the support provided by Germany to Israel, can potentially leave far-reaching consequences.

Genocide prevention, although defined as the most fundamental obligation of the international community, proves to be a difficult task. As mentioned, the reasons for this can primarily be identified in the structural deficiencies of the UN system itself. The reform of the UN system is long overdue and needed, regardless of it being a difficult task. A decision-making process that leads to paralysis and nonexistent or inefficient enforcement mechanisms leads to tragic and irreversible outcomes, leaving a permanent scar on the consciousness of humankind. Under the current UN system, humanity cannot deliver on its promise of genocide prevention, as seen by past experiences. That inaction in some cases is fueled by widespread racism and Islamophobia. The subsequent recognition offers some historical closure, but it means nothing to the victims and their pain and cannot reverse the consequences. More clarity and stronger stance on the understanding of obligation of genocide prevention borne by individual States is needed.

BIBLIOGRAPHY

References

- Arnaut Haseljić M., 'Genocid – poricanje, negiranje, minimiziranje' (2006) 1 Godišnjak Bošnjačke Zajednice Culture.
- Binder M., *The Security Council and the War in Bosnia, The United Nations and the Politics of Selective Humanitarian Intervention* (Palgrave Macmillan 2017).
- Boon K., 'The State of the Netherlands v. Respondents Stichting Mothers of Srebrenica.' (2020) 114(3) *American Journal of International Law* 479.
- Cassese A., 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia' (2007) 18(4) *The European Journal of International Law*.
- Clark R.S., 'State Obligations under the Genocide Convention in Light of the ICJ's Decision in the Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide' (2008) 61 *Rutgers Law Review* 75.
- Cryer R., *An Introduction to International Criminal Law and Procedure* (Cambridge University Press 2010).
- Gaeta P., *The UN Genocide Convention: A Commentary* (Oxford University Press 2009).
- Gattini A., 'Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment' (2007) 18(4) *European Journal of International Law* 695.
- Gibney M., 'State Responsibility and the Object and Purpose of the Genocide Convention' (2007-2008) 4(2-3) *International Studies Journal* 141.
- Gurda V., 'The Prosecution of Genocide in Bosnia and Herzegovina Before International, Domestic and National Courts of Other Jurisdictions' (2015) 4 *Monumenta Srebrenica* 35.
- Halldorsdottir Birkland B., 'Reining in Non-State Actors: State Responsibility and Attribution in Cases of Genocide' (2009) 84 *NYU Law Review*.
- Klinkner M., 'Proving Genocide' (2008) 6(3) *Journal of International Criminal Justice* 447.
- Malcolm N., *Bosnia A Short History* (NYU Press 1996).
- Paddeu F., 'Ghosts of Genocides Past? State Responsibility for Genocide in the Former Yugoslavia' (2015) 74(2) *The Cambridge Law Journal* 198.
- Schabas W.A., 'Genocide and the International Court of Justice: Finally, a Duty to Prevent the Crime of Crimes' (2007) 2(2) *Genocide Studies and Prevention: An International Journal*.
- Softić S., 'Genocid i njegove posljedice u Bosni i Hercegovini' (2008) 1 *Pregled - Časopis Za Društvena Pitanja* 103.

Cases and Legislation

- Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany), ICJ <<https://www.icj-cij.org/case/193>> accessed 19 May 2025.
- Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia v. Serbia). *Bosnia and Herzegovina v Serbia and Montenegro* (2007) ICJ 2.
- Case 002/02, Case File No. 002/19-09-2007/ECCC/TC E465, Judgment, Trial Chamber ECCC (Nov. 16, 2018).
- Convention on the Prevention and Punishment of the Crime of Genocide (signed 9 December 1948) 78 UNTS 277.
- ICTY Case IT-09-92, case information available at ICTY <<https://www.icty.org/en/case/mladic>> accessed 19 May 2025.

ICTY Case IT-95-5/18, case information available at ICTY <<https://www.icty.org/en/case/karadzic>> accessed 19 May 2025.

Reservations to the Convention on Genocide and Punishment of the Crime of Genocide, Advisory Opinion, ICJ Reports 1951.

United Nations General Assembly Resolution 96 of 11 December 1946.

United Nations General Assembly Resolution A/78/L.67 of 23 May 2024 <<https://documents.un.org/doc/undoc/ltd/n24/140/80/pdf/n2414080.pdf>> accessed 10 November 2024.