

HAGUE INTERNATIONAL TRIBUNALS

INTERNATIONAL COURT OF JUSTICE

Introduction to the Mini-Symposium on *Croatia v. Serbia*

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Abstract

On 3 February 2015, the International Court of Justice delivered its Judgment on the merits of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* case. This Judgment concludes the Court's involvement with allegations of state responsibility for genocide in the Balkans, which has spanned more than two decades since Bosnia brought a case against Serbia under the Genocide Convention in 1993. The many judgments and separate and dissenting opinions in the *Bosnia* and *Croatia* genocide cases have not only addressed the elements of the crime of genocide itself and the obligations imposed by the Genocide Convention, but have also considered jurisdictional questions, matters of state succession, and the relationship between the International Court of Justice and the work of the ad hoc tribunals, in particular the International Criminal Tribunal for the former Yugoslavia.

The *Leiden Journal of International Law* has organized a mini-symposium about the *Croatia* Judgment in order to address this important decision. The six articles in this symposium address several of the main issues raised by the judgment. A brief summary of the judgment follows.

I. JURISDICTION

Croatia filed its Application on 2 July 1999, and the Court issued a judgment on Serbia's preliminary objections on 18 May 2008. That judgment dismissed two of Serbia's preliminary objections, but found that the objection concerning the Court's jurisdiction *ratione temporis* did not possess an exclusively preliminary character, and so the Court reserved its decision on that objection for the merits phase. Serbia had argued that the Court lacked jurisdiction under Article IX of the Genocide Convention for events prior to 27 April 1992, when the Socialist Federal Republic of Yugoslavia (SFRY) was dissolved and the Federal Republic of Yugoslavia (FRY) was formed. It argued that the Convention's obligations could not be binding on the FRY before the FRY became party to the Convention.

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The Court found in paragraph 95 of the 2015 Judgment that:

[l]ogic, as well as the presumption against retroactivity of treaty obligations ... thus point[] clearly to the conclusion that the obligation to prevent genocide can be applicable only to acts that might occur after the Convention has entered into force for the State in question.

However, it did conclude that the SFRY was bound by the obligations of the Genocide Convention before 27 April 1992.¹ Paragraph 112 of the Judgment then identified three contested points in order to determine whether or not Serbia could be held responsible for violations of the Genocide Convention: First, whether acts occurred contrary to the Convention; second, whether those acts were attributable to the SFRY at the time they occurred; and third, whether the FRY succeeded to the responsibility of the SFRY. The Court concluded that the third question was itself a dispute falling within Article IX of the Convention and thus within the Court's jurisdiction.² The Court rejected Serbia's jurisdictional objection by eleven votes to six.³

2. INTERPRETATION OF THE GENOCIDE CONVENTION

The Court then explained the relationship between a finding of state responsibility for genocide and findings of individual criminal responsibility for genocide. The Court affirmed its observation in the 2007 *Bosnia* Judgment⁴ that a finding of state responsibility for genocide under Article IX of the Genocide Convention first requires finding that genocide as defined in the Convention has been committed and is attributable to the state.⁵ While the Court explained that it would take account of the findings of the ICTY, it would not determine individual criminal responsibility itself.⁶

Article II of the Genocide Convention defines genocide in terms of an exhaustive list of the *actus reus* and the *mens rea* of specific intent 'to destroy, in whole or in part, a national, ethnical, racial or religious group, as such'. In paragraph 139, the Court explained that such intent would be difficult to prove 'on the basis of isolated acts', but could instead be proven by 'evidence of acts on a scale that establishes an intent not only to target certain individuals because of their membership of a particular group, but also to destroy the group itself in whole or in part'.

The parties disputed the standard of proof required to infer the *dolus specialis* from a pattern of conduct. Serbia relied on the statement from the 2007 *Bosnia* Judgment that 'for a pattern of conduct to be accepted as evidence of [the existence of *dolus specialis*], it would have to be such that it could only point to the existence of such intent',⁷ while Croatia invoked the 2012 ICTY *Tolimir* Judgment, which permitted

1 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Merits, Judgment of 3 February 2015, at 40, para. 84, and at 50, para. 113.

2 *Ibid.*, at 50–51, paras. 113–15.

3 *Ibid.*, at 145, para. 524.

4 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Merits, Judgment of 26 February 2007, [2007] ICJ Rep. 43.

5 *Croatia v. Serbia* case, *supra* note 1, at 55, para. 128.

6 *Ibid.*, para. 129.

7 *Ibid.*, at 59–60, paras. 145 and 147.

such inference if it was ‘the only reasonable [one] available on the evidence’.⁸ The Court found the two standards substantively identical.⁹

The Court clarified the *actus reus* of genocide, particularly concerning ambiguities in the acts described in Article II(b), (c), and (d) of the Genocide Convention. Article II(b) addresses acts ‘causing serious bodily or mental harm to members of the group’. Recalling the *chapeau* of Article II, the Court stated that serious bodily or mental harm under the Convention ‘must be such as to contribute to the physical or biological destruction of the group, in whole or in part’.¹⁰ Rape and other sexual violence can meet this standard and therefore constitute the *actus reus* of genocide.¹¹ The infliction of psychological suffering can also in principle constitute the *actus reus* so long as it contributes to the physical or biological destruction of the group.¹²

Article II(c) addresses acts ‘deliberately inflicting on the group conditions of life calculated to bring about its physical destruction’. The Court considered whether forced displacement can constitute an act of genocide. It recalled its 2007 *Bosnia* Judgment to explain that while forced displacements are not, in themselves, acts of genocide, they could amount to acts of genocide if calculated to bring about the physical destruction of the group.¹³

Article II(d) addresses ‘measures intended to prevent births within the group’. Recalling the *Akayesu* Judgment of the International Criminal Tribunal for Rwanda, the Court stated that rape and sexual violence may constitute the *actus reus* of genocide under this sub-paragraph when the capacity of members of the group to procreate is affected.¹⁴

As regards the standard of proof, the Court followed its 2007 *Bosnia* Judgment in stating that it would find ‘highly persuasive relevant findings of fact’ made by the ICTY.¹⁵ The Court also found probative value in the Prosecutor’s decision to include or exclude charges of genocide.¹⁶ While such decisions would not be dispositive, they would be taken into consideration.

3. CROATIA’S CLAIM

The Court analysed the *actus reus* of genocide alleged by Croatia by considering the elements of Article II of the Genocide Convention at the various sites identified by Croatia. The Court found that there was conclusive evidence of killings targeting Croats, satisfying the *actus reus* specified in Article II(a).¹⁷ The Court also found that ill-treatment, torture, rape, and other acts of sexual violence were committed against

8 Ibid., at 60, para. 146.

9 Ibid., para. 148.

10 Ibid., at 62–63, para. 157.

11 Ibid., at 63, para. 158.

12 Ibid., paras. 159–60.

13 Ibid., at 64–65, paras. 162–3.

14 Ibid., at 65, paras. 164–6.

15 Ibid., at 68, para. 182.

16 Ibid., paras 184–7.

17 Ibid., at 91, para. 295.

Croats, satisfying the *actus reus* specified in Article II(b).¹⁸ However, for purposes of Article II(b), the Court deemed that the mental harm of individuals whose family members and loved ones disappeared did not, in the present case, rise to the level of contributing to the physical or biological destruction of the group.¹⁹

With respect to Article II(c), the Court did not find that any acts alleged by Croatia satisfied this form of *actus reus*. It found evidence of forced displacement, restrictions on movement, and the forced wearing of insignia of ethnicity, but concluded that they did not contribute to the destruction of the group.²⁰ However, the Court explained that these factors may be relevant in proving intent. Evidence of rapes also failed to constitute the *actus reus* of genocide under Article II(d), because the Court did not find that they were committed in order to prevent births within the group.²¹

Overall, the Court found that the *actus reus* of genocide was established under Articles II(a) and (b) of the Genocide Convention.²²

To satisfy the requirement of *dolus specialis*, the Court examined seventeen factors claimed by Croatia to create a pattern of conduct that demonstrates intent. Croatia argued that the context of those acts and the opportunity of Serb forces to destroy the Croat population made the *dolus specialis* the only reasonable inference from the pattern of conduct.²³ However, the Court concluded that the context of the various acts demonstrated the intent to force the Croats out of the region, rather than to exterminate them.²⁴ Furthermore, the Court found that Serb forces had not availed themselves of every opportunity to exterminate the Croat group.²⁵ Consequently, intent to destroy the Croat population was not the only reasonable inference.²⁶ Accordingly, the *dolus specialis* was not proven, and no genocide took place under the definition in Article II of the Genocide Convention.²⁷ Because no genocide occurred, the Court found no need to address the question of the FRY's succession to SFRY's responsibility. The Court rejected Croatia's claim by fifteen votes to two, with Judge Cançado Trindade and Judge *ad hoc* Vukas opposed.²⁸

4. SERBIA'S COUNTERCLAIM

The Court then considered Serbia's counterclaim that Croatia was responsible for breaches of the Genocide Convention through Operation 'Storm' of 1995. Much of this analysis built upon the ICTY's *Gotovina* case, and the Court stated in paragraph 469 that it would 'give the greatest weight to factual findings by the Trial Chamber which were not reversed by the Appeals Chamber, and ... give due weight to

18 Ibid., at 102, para. 360.

19 Ibid., at 101, para. 356.

20 Ibid., at 106–7, paras. 376–82.

21 Ibid., at 109–10, paras. 397–400.

22 Ibid., at 110, para. 401.

23 Ibid., at 112, paras. 408–9.

24 Ibid., at 118, para. 435.

25 Ibid., at 119, para. 437.

26 Ibid., at 120, para. 440.

27 Ibid., at 120, para. 441.

28 Ibid., at 145, para. 524.

the findings and determinations of the Appeals Chamber'. It concluded that the shelling of Krajina towns could not be considered killing under Article II(a) of the Convention, though it did find that the killing of Serbs fleeing towns under attack and the killing of Serbs in the UN protected areas could satisfy Article II(a).²⁹ Forced displacement was insufficient to meet the requirements of Article II(b), but other acts of ill-treatment did fall within that provision. Accordingly, the *actus reus* was met.³⁰

Serbia argued that the *dolus specialis* could be proven through explicit statements in the Brioni Transcript of a meeting of military leaders with the President of Croatia, as well as through Croatia's pattern of conduct.³¹ The Court agreed with the ICTY that the particular statements in the Brioni Transcript demonstrated military objectives and an intent to expel Serbs from the Krajina, but did not demonstrate the *dolus specialis*.³² The Court also rejected the argument based on the pattern of conduct, because the acts that the Court found proven 'were not committed on a scale such that they could only point to the existence of a genocidal intent'.³³ The *dolus specialis* was not proven, and so no genocide occurred as defined in Article II of the Genocide Convention.³⁴ The Court unanimously rejected Serbia's counterclaim.³⁵

5. OVERVIEW OF THE MINI-SYMPOSIUM

The articles in this mini-symposium address the varied issues raised by the case. Payam Akhavan contrasts the Court's narrow reading of jurisdiction *ratione temporis* under Article IX of the Genocide Convention in the present case with the 'high ideals' attributed to the Convention by the Court in its 1951 Advisory Opinion. Andrea Gattini and Giulio Cortesi examine the Court's treatment of evidence, and offer a thoughtful critique of the ICJ's reliance on ICTY fact-finding, and more generally of the relationship between the evidence needed to prove state responsibility for genocide versus individual criminal responsibility. Caroline Fournet considers the Court's treatment of *actus reus* from the perspectives of the public and of families of the victims, in light of the Court's ultimate finding that no genocide was committed. Paul Behrens analyses the Court's treatment of genocidal intent as a matter of state responsibility, contrasting the Court's use of 'pattern' and 'scale' as proof of intent against the individualized nature of intent in international criminal law. Martin Steinfeld focuses on the Court's treatment of ethnic cleansing, arguing that while the Court had further circumscribed the extent to which ethnic cleansing could be treated as a part of the *actus reus* of genocide under the Convention, it ultimately treated the ethnic cleansing allegations as a sort of defence in its examination of

29 Ibid., at 130, para. 475, at 133, para. 485, and at 135, para. 493.

30 Ibid., at 136, para. 496, and at 137, para. 499.

31 Ibid., at 137–8, paras. 500–2, and at 141, para. 508.

32 Ibid., at 139–40, paras. 504–7.

33 Ibid., at 142, paras. 511–14.

34 Ibid., para. 515.

35 Ibid., at 145, para. 524.

the *dolus specialis* of genocide. Giulia Pecorella considers the Court's strict threshold requirements that rape and sexual violence contribute to the physical destruction of the group in order to satisfy the *actus reus* of the Genocide Convention, finding that the judgment opens up new ambiguities in the relationship between sexual violence and genocide. These contributions deftly explore the many dimensions of this important judgment.