However, the judgment does not affect the position of the much bigger categories of people who seek work, who were formerly working, or who are working in a Member State and seek benefits. If the Court follows the *Alimanovic* opinion, it will confirm again that the legal position of the former two categories of people is regulated by the Treaty, not only the EU legislation. As for those who are currently working, the Treaties given them an express right to equal treatment (Article 39(2) TFEU). So for all three categories of people, and undoubtedly the third category, a Treaty amendment would be necessary to reduce the level of benefits which they currently enjoy under EU law. While the CJEU has ruled out the most flagrant cases of "benefit tourism", other aspects of the access of EU citizens to benefits which upset some people in host Member States, and which the UK seeks to amend, are unaffected by this judgment – and cannot be altered without Treaty amendment.

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GHOSTS OF GENOCIDES PAST? STATE RESPONSIBILITY FOR GENOCIDE IN THE FORMER YUGOSLAVIA

IN *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, the International Court of Justice ("ICJ" or "Court") dealt with a claim by Croatia that Serbia was responsible for the commission of genocide against ethnic Croatians in contravention of the Convention on the Prevention and Punishment of the Crime of Genocide ("the Convention"), and with Serbia's counter-claim that Croatia had committed genocide against ethnic Serbs also in breach of the Convention. In its judgment of 3 February 2015, the Court dismissed both the claim and counter-claim. While many of the acts complained of constituted the actus reus of genocide, there was no evidence that they had been perpetrated with the required mens rea, namely the intention to destroy, in whole or in part, the targeted group as such.

The judgment is the last of a long list of ICJ cases concerning legal issues arising from the break-up of the Socialist Federal Republic of Yugoslavia ("SFRY") during the early 1990s. The judgment touches upon numerous questions of international law but, as with many of the previous cases, some of its most interesting aspects concern the legal consequences of the sovereignty change in the territory of the former SFRY. In the present case, this issue concerned the responsibility of Serbia for events occurring prior to its coming into existence, namely events occurring before 27 April

1992, the date upon which the Federal Republic of Yugoslavia ("FRY"), now renamed "Serbia", became an independent State.

It may be useful to recall briefly the events surrounding SFRY's dissolution. Throughout 1991 and 1992, SFRY disintegrated and five new States were created. FRY, one of the resulting States, claimed to be the continuator of the international legal personality of SFRY through a declaration dated 27 April 1992, in which it also pledged to maintain the international obligations of SFRY including the Convention. The claim of continuity was not generally accepted by other States and FRY remained in an uncertain legal status, a status which the ICJ had previously described – in a triumph of litotes – as being "not free from legal difficulties" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v Yugoslavia (Serbia and Montenegro))*, Provisional Measures, Order of 8 April 1993, ICJ Reports 1993, para. 18). FRY's status was finally resolved in 2000, when it relinquished its claim of continuity and accepted its position as a successor to SFRY. In that same year, FRY changed its name to Serbia-Montenegro and was admitted as a UN member. Serbia-Montenegro's independence was dated to 27 April 1992, the day of the notification of continuity with SFRY. SFRY had thus ceased to exist, and FRY/Serbia-Montenegro had emerged as a new State (Montenegro subsequently seceded from Serbia-Montenegro in 2006). Not without some irony, Croatia, which had strenuously objected to FRY's claim of continuity with SFRY, found itself trying to build continuities between FRY/Serbia and SFRY to support its case.

The jurisdiction of the ICJ was based on Article IX of the Convention, to which FRY/Serbia had succeeded on 27 April 1992. In 2008, ruling on Serbia's preliminary objections, the Court had upheld jurisdiction over events after 27 April 1992. However, the Court joined Serbia's objection in relation to events prior to this date to the merits (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* Preliminary Objections, Judgment, ICJ Reports 2008, p. 460; [2009] C.L.J. 6.) The Court thus returned to this objection in its 2015 judgment, and addressed it in relation to what it described as Croatia's "principal" and "alternative" claims.

In its principal claim, Croatia maintained that FRY/Serbia was responsible for acts prior to 27 April 1992. The argument rested on two bases: that the Convention was applicable retroactively and, in the alternative, that the acts of the Serbian leadership prior to 27 April 1992 were attributable to FRY/Serbia pursuant to Article 10(2) of the Articles on State Responsibility ("ARS"). The ICJ dismissed both arguments because neither the text of the Convention nor its preparatory work suggested that the parties intended the Convention to apply retroactively. Moreover, attribution under Article 10(2) was of no help: even if the acts were attributed to Serbia, they could not

constitute breaches of the Convention, since the Convention was not in force for Serbia at the time. The ICJ thus excluded its jurisdiction on this ground.

The decision on this point is legally correct, though it may be regretted that the ICJ missed an opportunity to clarify the customary status of Article 10(2) ARS about which the parties had presented opposing views. Pursuant to this provision, the acts of an insurrectional movement which is successful in establishing a new State are attributable to that State (and therefore may engage the new State's responsibility). The rule, while largely counting with doctrinal approval, remains controversial due to the limited amount of practice to support it. Indeed, the Commentary to the ARS does not refer to any instance in which the rule has unequivocally been endorsed: all the cases cited there concern insurrectional movements successful in establishing a new *government* in an existing State – a situation covered by Article 10(1) ARS. The ICJ's reasoning may nevertheless be instructive as to the (limited) circumstances in which attribution under Article 10(2) may engage the new State's responsibility. Article 10(2) provides for attribution, but the conduct of the insurrectional movement must also breach an international obligation. Logically, the conduct of the movement cannot breach an obligation of the new State: the movement operates *before* the State is created, but the State acquires international obligations only at the moment of, or after, its creation. By implication – unless the rules apply retroactively – responsibility for the conduct of a successful insurrectional movement will be incurred only for the breach of obligations binding on the movement itself at the relevant time. As a non-State actor, the movement will likely be bound by a restricted number of international obligations, considerably reducing the practical significance of Article 10(2).

Croatia's alternative claim relied on the law of State succession. According to Croatia, by succeeding to the Convention, FRY/Serbia had succeeded to the responsibility of SFRY for the conduct in question which constituted, at the time, a breach of the Convention. The ICJ upheld jurisdiction on this basis, explaining that Article IX of the Convention extended to questions of responsibility without limitation as to the manner in which responsibility was incurred. How responsibility was incurred was determined by the rules of "general international law" – rules which, alongside the rules on interpretation and State responsibility, included those on State succession.

That rules on succession belong to the "same category" as those on interpretation and responsibility (at [115]) was not a unanimous view. At least six judges – Tomka, Owada, Skotnikov, Xue, Sebutinde, and ad hoc Kreća – expressed doubts and voted against upholding jurisdiction on this ground. The ICJ's holding is especially troubling, as it is indeed not clear that general international law contains any rules or presumptions on succession to responsibility. For a long time, it was held that international law recognized a rule of non-transmissibility of responsibility of defunct

States to new States. This (near dogmatic) assumption has, however, been called into question in practice and doctrine, though this has not led to the recognition of the opposite view (i.e. a principle or presumption of automatic succession). Existing precedents only support the view that whether a new State succeeds to its predecessor's responsibility depends on the circumstances of each case (e.g. *Lighthouses Arbitration* (1956) 23 I.L.R. 81, 91–92). In the few instances of practice in which States have been found responsible for acts of their predecessors, this finding of responsibility was usually the result of an agreement between the parties concerned or of the assumption of that responsibility (implicitly or expressly) by the new State (e.g. *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, ICJ Reports 1997, p. 7). Beyond these cases, it is unclear whether there are other circumstances in which the new State will be responsible for the acts of its defunct predecessor.

The ICJ, despite upholding jurisdiction over the claim of succession, ultimately made no pronouncement on this point. Whether international law recognized succession to responsibility was not a matter that needed decision at the jurisdictional stage and on the merits the ICJ based its decision on another ground. Three elements were needed to establish Serbia's responsibility, which the Court proposed to address sequentially: (1) breach of the Convention; (2) attribution to SFRY; and (3) succession by FRY (para. 112). Since there were no breaches of the Convention (due to the absence of mens rea), the ICJ found it unnecessary to address the subsequent point of succession. Pursuant to the principle of judicial economy, the Court is free to choose the basis of its judgment, so the dismissal of the claim due to absence of breach cannot be faulted from a legal standpoint. Even though the Court did not pronounce on the matter of succession, its acceptance of jurisdiction on this claim is, at the very least, a hint of its willingness to entertain the possibility of succession and can thus be seen as a further nail in the coffin of the age-old assumption of non-succession to State responsibility.

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THE AMENDED DIMINISHED RESPONSIBILITY PLEA

IN *R. v Golds* [2014] EWCA Crim 748, the Court of Appeal was asked to clarify the meaning of "substantially impaired" in the partial defence of diminished responsibility in murder cases. By virtue of s. 2(1) of the Homicide Act 1957, as amended by the Coroners and Justice Act 2009, s. 52, diminished responsibility is made out where: