INTERNATIONAL COURT OF JUSTICE

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Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)

The Court rejects Croatia's claim and Serbia's counter-claim

THE HAGUE, 3 February 2015. The International Court of Justice (ICJ), the principal judicial organ of the United Nations, today delivered its Judgment in the case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia).

In its Judgment, which is final, without appeal and binding for the Parties, the Court

(1) Rejects, by eleven votes to six, the second jurisdictional objection raised by Serbia and finds that its jurisdiction to entertain Croatia's claim extends to events prior to 27 April 1992;

(2) Rejects, by fifteen votes to two, Croatia's claim;

(3) Rejects, unanimously, Serbia's counter-claim.

Procedural history

The Court recalls that, on 2 July 1999, the Republic of Croatia filed an Application instituting proceedings against the Federal Republic of Yugoslavia ("FRY") in respect of a dispute concerning alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 ("Genocide Convention" or "Convention") committed between 1991 and 1995. On 18 November 2008 the Court delivered a Judgment partially rejecting the preliminary objections raised by the Respondent (which had then become Serbia). Serbia subsequently filed a counter-claim.

Public hearings on one of the objections (which had been found in 2008 not to be of an exclusively preliminary character), as well as on the merits of Croatia's claim and Serbia's counter-claim, were held from 3 March to 1 April 2014.

The Court's reasoning

1. Historical and factual background

The Court begins by giving a brief account of the historical and factual background to the case. It recalls, first, that both Parties are sovereign States which emerged from the break-up of the Socialist Federal Republic of Yugoslavia ("SFRY") and outlines the events that resulted in their establishment as such.

The Court further describes the main events that took place in Croatia between 1990 and 1995. It notes in particular that, shortly after the latter's declaration of independence on 25 June 1991, an armed conflict broke out between, on the one hand, Croatia's armed forces and, on the other, forces opposed to its independence (namely forces created by part of the Serb minority within Croatia and various paramilitary groups, to which the Court refers collectively as "Serb forces", irrespective of the issue of attribution of their conduct) and — at least from September 1991 — the Yugoslav National Army ("JNA"). By late 1991, these Serb forces and the JNA controlled around one-third of Croatian territory within its boundaries in the SFRY, a situation which lasted until 1995. It was during this conflict that the genocide alleged by Croatia is claimed to have been committed. Finally, the Court describes how, during the spring and summer of 1995, Croatia succeeded, as a result of a series of military operations, in re-taking the greater part of the territory of which it had previously lost control. It was during Operation "Storm", in August 1995, that the genocide alleged by Serbia in its counter-claim is claimed to have taken place.

2. Jurisdiction and admissibility

The Court then turns to the question of the scope of its jurisdiction. It recalls that the latter is founded exclusively on Article IX of the Genocide Convention. That Article clearly states that jurisdiction thereunder is confined to disputes concerning the interpretation, application or fulfilment of the Convention itself, and the Court accordingly concludes that it has no power to rule on a dispute concerning alleged breaches of obligations in respect of genocide imposed by customary international law, or of other international obligations (for example, those arising under international humanitarian law or international human rights law).

(a) Jurisdiction and admissibility of Croatia's claim

(i) The Court finds that it has jurisdiction to entertain Croatia's claim in its entirety

The Court recalls that, in its Judgment of 18 November 2008, it found that it had jurisdiction to rule on Croatia's claim in respect of acts committed as from 27 April 1992 (the date when the FRY came into existence as a separate State and became party, by succession, to the Genocide Convention), but reserved its decision on its jurisdiction in respect of breaches of the Convention alleged to have been committed before that date.

After examining the Parties' arguments on this second question, the Court finds that it has jurisdiction to rule on the whole of Croatia's claim, including that part of it relating to events prior to 27 April 1992. In this regard, the Court begins by stating that the FRY could not have been bound by the Genocide Convention before 27 April 1992, which is the main argument of Croatia. It takes note, however, of an alternative argument relied on by the Applicant, namely that the FRY (and subsequently Serbia) could have succeeded to the responsibility of the SFRY for breaches of the Convention prior to that date. The Court states that, in order to determine whether Serbia is responsible on this basis for breaches of the Convention, it would have to decide:

(1) whether the acts relied on by Croatia took place; and, if they did, whether they were contrary to the Convention;

(2) if so, whether those acts were attributable to the SFRY at the time that they occurred and engaged its responsibility; and

(3) if the responsibility of the SFRY had been engaged, whether the FRY succeeded to that responsibility.

Noting that the Parties are in disagreement on these questions, the Court considers that there is a dispute between them falling within the scope of Article IX of the Convention ("disputes . . . relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III"), and that it accordingly has jurisdiction to rule on it. The Court explains that, in reaching that conclusion, it is not necessary to decide on the above questions, which are matters for the merits.

(ii) The Court need not decide the questions of admissibility raised by Serbia before considering the merits of Croatia's claim

The Court notes that Serbia argues that Croatia's claim is inadmissible because the FRY cannot be held responsible for acts alleged to have taken place before it came into existence as a State on 27 April 1992. The Court observes, however, that this argument involves questions of attribution, on which it is not necessary to rule before considering on the merits the acts alleged by Croatia.

The Court further notes Serbia's alternative argument that Croatia's claim is inadmissible because it relates to events prior to 8 October 1991, the date when Croatia came into existence as a State and became party to the Convention. The Court observes, however, that Croatia has not made discrete claims in respect of the events before and after 8 October 1991; rather, it has advanced a single claim alleging a pattern of conduct increasing in intensity throughout the course of 1991. In this context, the Court considers that what happened prior to 8 October 1991 is, in any event, pertinent to an evaluation of whether what took place after that date involved violations of the Genocide Convention. In these circumstances, the Court considers that it is not necessary to rule upon Serbia's argument before it has examined and assessed the totality of the evidence advanced by Croatia.

(b) <u>The Court finds that Serbia's counter-claim is admissible</u>

The Court recalls that, to be admissible, a counter-claim must satisfy two conditions (Rules of Court, Article 80). First, it must come within the jurisdiction of the Court, which is the case here, since Serbia's claim falls within the scope of the Court's jurisdiction under Article IX of the Genocide Convention. The Court finds that the second condition is also satisfied, in as much as the counter-claim is directly connected with the subject-matter of the main claim, both in fact and in law. The Court accordingly finds that Serbia's counter-claim is admissible.

3. Applicable law: the Convention on the Prevention and Punishment of the Crime of Genocide

The Court recalls that, under the terms of Article II of the Convention, "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". The Court observes that genocide thus contains two constituent elements, namely the physical element or actus reus (the acts perpetrated), and the mental element, or mens rea (the intent to destroy the group as such).

First, regarding the mental element, the Court indicates that it is the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such" which is the essential characteristic of genocide, and which distinguishes it from other serious crimes. It is regarded as a dolus specialis, that is to say, a specific intent which, in order for genocide to be established, must be present in addition to the intent required for each of the individual acts involved. The Court explains that what must be intended is the physical or biological destruction of the protected group, or of a substantial part of that group. Evidence of that intent is to be sought, first, in the State's policy (although such intent will seldom be expressly stated), but it can also be inferred from a pattern of conduct, where such intent is the only reasonable inference to be drawn from the acts in question.

Secondly, regarding the physical element, the Court analyses the scope and meaning to be given to the prohibited acts listed in subparagraphs (a) to (d) of Article II of the Convention.

4. Questions of proof

In this part of the Judgment, the Court addresses questions of the burden of proof, the standard of proof and the methods of proof applicable in the present case. It recalls in particular that it is, in principle, for the party alleging a fact to demonstrate its existence, and that claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive. The Court further lays down certain principles governing consideration of the evidence submitted by the Parties (documents from the International Criminal Tribunal for the former Yugoslavia, various types of reports, written statements of witnesses).

5. Consideration of the merits of Croatia's claim

(a) The Court finds that the actus reus of genocide has been established

The Court considers whether acts constituting the actus reus of genocide, within the meaning of subparagraphs (a) to (d) of Article II of the Convention, were committed by the JNA or Serb forces against members of the national or ethnical Croat group (ethnic Croats) between 1991 and 1995. Following an analysis of the evidence in the case file, the Court concludes that, in the regions of Eastern Slavonia, Western Slavonia, Banovina/Banija, Kordun, Lika and Dalmatia, the JNA and Serb forces perpetrated both killings of members of the national or ethnical Croat group and acts causing serious bodily or mental harm to members of that group. The Court finds that these acts constitute the actus reus of genocide within the meaning of subparagraphs (a) and (b) of Article II of the Convention. On the other hand, the Court is not persuaded that acts capable of constituting the actus reus of genocide have been proved in relation to subparagraphs (c) and (d) of Article II of the Convention.

(b) The Court finds that the intentional element of genocide (dolus specialis) is lacking, and accordingly rejects Croatia's claim in its entirety

Having found that the actus reus of genocide is established, the Court then addresses the question of whether the acts perpetrated reflect a genocidal intent. In the absence of direct evidence of such intent (for an example an express policy to that effect), it considers whether a pattern of conduct has been established from which the only reasonable inference to be drawn is an intent on the part of the perpetrators of those acts to destroy a substantial part of the group of ethnic Croats. The Court concludes, however, that this is not the case. It notes in particular that the crimes committed against ethnic Croats appears to have been aimed at the forced displacement of the majority of the Croat population from the regions concerned, and not at its physical or biological destruction.

In the absence of proof of the necessary intent, the Court finds that Croatia has failed to substantiate its allegation that genocide or other breaches of the Convention were committed. It accordingly rejects Croatia's claim in its entirety and considers that it need not rule on other matters, such as the attribution of the acts found to have been committed, or succession to responsibility.

6. Consideration of the merits of Serbia's counter-claim

(a) The Court finds that the actus reus of genocide is established

On the basis of the evidence before it, the Court concludes that, during and after Operation "Storm", in August 1995, forces of the Republic of Croatia perpetrated acts falling within subparagraphs (a) and (b) of Article II of the Convention: (i) killings of members of the national or ethnical Serb group who were fleeing or had remained within the areas of which Croatian forces had taken control; and (ii) acts constituting serious bodily or mental harm to members of the group. On the other hand, the Court considers that, for the rest of its allegations, Serbia has either failed to substantiate them (in particular, the indiscriminate shelling of various towns by Croatian forces) or has not shown that the acts in question constitute the actus reus of genocide.

(b) The Court finds that the intentional element of genocide (dolus specialis) is lacking, and accordingly rejects Serbia's counter-claim in its entirety

After considering both the transcript of the meeting held on the island of Brioni under the chairmanship of the President of the Republic of Croatia, Franjo Tudjman, in order to prepare Operation "Storm", as well as the overall course of the military operations conducted by Croatia during the period 1992-1995, the Court considers that the existence of an intent to destroy, in whole or in part, the national or ethnical group of the Serbs in Croatia has not been proved in this case. In particular, while acts constituting the actus reus of genocide were committed, they were not perpetrated on a scale such that they could only reasonably demonstrate the existence of a genocidal intent. The Court finds that neither genocide nor other violations of the Genocide Convention have been proved. It accordingly rejects Serbia's counter-claim in its entirety.

Composition of the Court

The Court was composed as follows: President Tomka; Vice-President Sepúlveda-Amor; Judges Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari; Judges ad hoc Vukas and Kreća; Registrar Couvreur.

President TOMKA appends a separate opinion to the Judgment; Judges OWADA, KEITH and SKOTNIKOV append separate opinions to the Judgment; Judge CANÇADO TRINDADE appends a dissenting opinion to the Judgment; Judges XUE and DONOGHUE append declarations to the Judgment; Judges GAJA, SEBUTINDE and BHANDARI append separate opinions to the Judgment; Judge ad hoc VUKAS appends a dissenting opinion to the Judgment; Judge ad hoc KREĆA appends a separate opinion to the Judgment.

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A summary of the Judgment appears in the document "Summary No. 2015/1". This press release, the summary of the Judgment and its full text can be found on the Court's website (www.icj-cij.org), under the heading "Cases".

Note: The Court's press releases do not constitute official documents.

The International Court of Justice (ICJ) is the principal judicial organ of the United Nations. It was established by the United Nations Charter in June 1945 and began its activities in April 1946. The seat of the Court is at the Peace Palace in The Hague (Netherlands). Of the six principal organs of the United Nations, it is the only one not located in New York. The Court has a twofold role: first, to settle, in accordance with international law, legal disputes submitted to it by States (its judgments have binding force and are without appeal for the parties concerned); and, second, to give advisory opinions on legal questions referred to it by duly authorized United Nations organs and agencies of the system. The Court is composed of 15 judges elected for a nine-year term by the General Assembly and the Security Council of the United Nations. Independent of the United Nations Secretariat, it is assisted by a Registry, its own international secretariat, whose activities are both judicial and diplomatic, as well as administrative. The official languages of the Court are French and English. Also known as the "World Court", it is the only court of a universal character with general jurisdiction.

The ICJ, a court open only to States for contentious proceedings, and to certain organs and institutions of the United Nations system for advisory proceedings, should not be confused with the other — mostly criminal — judicial institutions based in The Hague and adjacent areas, such as the International Criminal Tribunal for the former Yugoslavia (ICTY, an ad hoc court created by the Security Council), the International Criminal Court (ICC, the first permanent international criminal court, established by treaty, which does not belong to the United Nations system), the Special Tribunal for Lebanon (STL, an independent judicial body composed of Lebanese and international judges, which is not a United Nations tribunal and does not form part of the Lebanese judicial system), or the Permanent Court of Arbitration (PCA, an independent institution which assists in the establishment of arbitral tribunals and facilitates their work, in accordance with the Hague Convention of 1899).
