

Reflections on the Case Law of the International Court of Justice in the Disputes Arising from the Armed Conflicts in the former Yugoslavia

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Outline

- General overview of cases arising from the armed conflicts in the former Yugoslavia;
- ICJ's role in interpreting and developing:
 - Issues of proof;
 - Crime of genocide (group; *mens rea*; *actus reus*; *dolus specialis* of the crime);
 - The law on State responsibility.
- Dispute-settlement and furthering peace and reconciliation in the region.
- Concluding remarks and relevant additional sources.



Cases brought at the ICJ

- *Application of the Genocide Convention (Bosnia and Herzegovina v. Serbia; 1993-2007)*
- *Legality of Use of Force cases (Serbia v. 10 NATO countries; 1999-2004)*
- *Application of the Genocide Convention (Croatia v. Serbia; 1999-2015)*
- *Kosovo's Declaration of Independence (2008-2010)*
- **Total: 13 cases**



Issues of Proof (1)

- Important findings:
 - Party alleging a fact must prove it;
 - Charges of such exceptional gravity must be proved by evidence which is *fully conclusive* (Court must be *fully convinced*);
 - Ample use made of evidence used by the ICTY and ICTY judgments;
 - Findings of fact by trial chambers highly persuasive, unless reversed on appeal (*Gotovina* – position of Serbia);
 - Charges of genocide brought with regard to the conflict in Bosnia, but not in Croatia (despite high rank of accused) .



Issues of Proof (2)

- Value of reports from official or independent bodies depends, among others, on:
 1. The sources of the item of evidence;
 2. The process by which it has been generated;
 3. The quality of character of the item.
- No evidential weight given by the ICJ to individual statements which were not signed or confirmed (see also Judge Donoghue).



Development of IL

- Aspects of the crime of genocide:
 - Definition of group and group membership;
 - *Actus reus* and *mens rea*;
 - *Dolus specialis* – specific intent.
- Law of State responsibility
 - *Overall* versus *effective* control – State responsibility for actions of third parties;
 - Duty to prevent (after Convention enters into force);
 - Duty to investigate and prosecute (retroactive application possible; eg, UN and CoE on Non-Statutory Limitations for WC and CAH);
 - Duty to cooperate with international courts (Mladic).
- Shared responsibility: joint and several liability of Serbia and of Montenegro? Other aspects of shared responsibility...



Genocide (1)

- Normative developments:
 - Positive definition of group and group membership;
 - No *cultural* genocide (2007 judgment);
 - *Actus reus* – physical element, acts of genocide – scale of destruction of the group (not isolated acts);
 - Destruction in part: substantial part/ also within a limited geographical area/ prominence of the targeted group within the group as a whole;
 - Rape and sexual violence are capable of constituting the *actus reus* of genocide.
 - *Actus reus* of genocide proved for Article II(a) and (b), but not for Article II(c) and (d) (for both Parties).



Genocide (2)

- *Mens rea* – mental element, inquiry into intent ;
- *Dolus specialis* – specific intent – is the essential characteristic of genocide, which distinguishes it from other crimes (pattern of conduct, as only inference which can be drawn).
- Main factors for establishing the genocidal intent from a pattern of conduct by the JNA and Serb forces (from 17 submitted by Croatia):
 - scale and systematic nature of the attacks;
 - casualties and damages in excess of what justified by military necessity;
 - specific targeting of Croats;
 - nature, extent and degree of injuries caused to the Croat population;
 - findings in *Mrksic et al* and *Martic* (2007).
- **Context and opportunity** for destroying the Croat population.



Genocide (3)

- ICTY prosecutor has never charged any individual on account of genocide against the Croat population in the context of the armed conflict which took place in the territory of Croatia in the period 1991-1995 (see objection by Judge Sebutinde);
- Procedural issues:
 - Claims limited only to violations of the Genocide Convention and not to other serious violations of human rights and humanitarian law (although peremptory norms owed *erga omnes*);
 - Jurisdiction under Art. IX does not extend to allegations of violations of CIL on genocide (separate existence; separate obligations?)



Law on State Responsibility (1)

- Affirming control threshold
 - *Overall* versus *effective* control – State responsibility for actions of third parties;
- Duties of States under the Genocide Convention
 - Duty to prevent (after Convention enters into force);
 - Duty to investigate and prosecute (retroactive application possible; eg, UN and CoE on Non-Statutory Limitations for WC and CAH);
 - Duty to cooperate with international courts (Mladic).
- Shared responsibility: joint and several liability of Serbia and of Montenegro? A missed chance?
- Article 10(2) ILC ASR – concerned only with attribution of acts to a new State.



Law of State Responsibility (2)

- Individual criminal responsibility and State responsibility separate, different regimes;
- Indispensable third party principle (*Monetary Gold* and *East Timor*) not applicable to States which no longer exist;
- As a general rule, a particular act may be perfectly lawful under one body of legal rules (IHL) and unlawful under another.



Effect on Peace and Reconciliation?

- Effect on peace:
 - Conflict continued in the case of Bosnia!
 - Provisional measures order not complied with; ICJ Reports 2007, paras. 451-458.
- Potential effect on reconciliation:
 - Recognition of genocide in Srebrenica;
 - Subsequent surrender of Karadzic and Mladic to the ICTY;
 - Recommendation to investigate and prosecute persons responsible for war crimes;
 - Agreement August 2014 to cooperate in finding missing persons (Bosnia, Croatia, Serbia – facilitated by OSCE);
 - Historical record!



Concluding Remarks (1)

- Contribution of the ICJ:
 - Development of international law;
 - Mainstreaming human rights into PIL;
 - Peace and reconciliation (framing acts as genocide?);
 - Establishing a historical record.
- **Context** supports the characterization of the crimes committed in Croatia as ‘ethnic cleansing’ – forced displacement, not as genocide;
- Genocide construed along the lines of ‘**denial of quarter**’ – court citing examples of prisoners of war and evacuated civilians;
- Put to rest the claim that there can be genocide even if that is committed against one person (asserted 12,500 Croat deaths deemed small in relation to the **size of the targeted group**);



Concluding Remarks (2)

- Value of recommendations?
 - Requests both Parties to continue their co-operation with a view to settling as soon as possible the issue of the fate of missing persons;
 - Encourages the Parties to continue their co-operation with a view to offering appropriate reparation to the victims of such violations, thus consolidating peace and stability in the region.
- Problematic issues:
 - High threshold for State responsibility for actions of third parties – effective control;
 - Devaluation of obligations *erga omnes*, even of a *jus cogens* character;
 - Reparations: certain causal link between the wrongful act and the violation *vs* contribution to wrongdoing.



Additional Sources (1)

- N.H.B. Jørgensen, *The Responsibility of States for International Crimes* (Oxford University Press, 2003);
- Symposium : Genocide, Human Rights and the ICJ; *European Journal of International Law* 18(4) (2007)
- B.I. Bonafè, *The Relationship Between State and Individual Responsibility for International Crimes* (Leiden: Brill, 2009);
- A. Ollivier, 'International Criminal Responsibility of the State', in J. Crawford, A. Pellet and S. Olleson (eds.), *The Law of International Responsibility* (Oxford University Press, 2010).



Additional Sources (2)

- P.A. Nollkaemper and H. van der Wilt (eds.), *System Criminality in International Law* (Cambridge University Press, 2009);
- T. Isaacs and R. Vernon (eds.), *Accountability for Collective Wrongdoing* (Cambridge University Press, 2011);
- Gentian Zyberi (ed), *An Institutional Approach to the Responsibility to Protect* (Cambridge University Press, 2013);
- Alex J. Bellamy, *The Responsibility to Protect: A Defence* (Oxford University Press, 2014).

