**INTERNATIONAL COURT OF JUSTICE**

**Application of the Convention on the Prevention and**

**Punishment of the Crime of Genocide**

**(CROATIA v. SERBIA)**

* **KEY ISSUES OF THE JUDGMENT -**

The International Court of Justice (ICJ) delivered on 3 February 2015 its Judgment in the case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia). The Court delivering the Judgment was composed of 17 judges of which 15 are permanent judges of the ICJ elected for a nine-year term by the General Assembly and the Security Council of the United Nations and 2 *ad hoc* judges (Croatia nominated Judge Budislav Vukas and Serbia Judge Milenko Kreća).

**Key issues on which the Court had to make a decision:**

1. Does the Court’s jurisdiction extend to events prior to 27 April 1992?
2. Does the Court deem that genocide has been committed by Serbia against Croats in the Republic of Croatia?
3. Does the Court deem that Serbia’s counter-claim sustains claims of genocide against Serbs in the Republic of Croatia during and after Operation “Storm”?

**Conclusions of the Court to these issues:**

1. The Court rejected Serbia’s objection that the jurisdiction of the Court does not extend to events prior to 27 April 1992, by eleven votes to six. **By this decision the Court confirmed its jurisdiction to examine all events and evidence presented by Croatia. Hence, this confirmed the jurisdiction of the Court for events prior to 27 April 1992.**
2. The Court rejected Croatia’s claim, with a majority of 15 votes, while the remaining 2 judges deemed that genocide against Croats has been proven (Judge Vukas and Judge Cançado Trindade).
3. The Court **unanimously** rejected Serbia’s counter-claim.

Initially some fifty paragraphs offer a summary of the judicial proceedings, résumé of the break-up of the former Yugoslavia, legal issues regarding jurisdiction and admissibility of the claim, applicability of the Genocide Convention and questions of proof.

The Court examined Croatia’s claim in 242 paragraphs (paragraph 200-442) and Serbia’s counter-claim in 80 paragraphs (paragraphs 443-523).

**CROATIA’S CLAIM**

**Issue of jurisdiction regarding events before 27 April 1992**

After Croatia filed its Application, Serbia filed preliminary objections claiming that the Court has no jurisdiction in these proceedings. On this issue public hearings were held before the Court in 2008, after which the Court delivered its Judgment on 18 November 2008. The Court found that it had jurisdiction in this case, but would during the merit phase consider Serbia’s objection that the Court has no jurisdiction for events prior to 27 April 1992 (date on which Serbia came into existence as a separate State). The Court found that this is not a preliminary legal issue and that for this decision other evidence and facts needed to be considered.

In this Judgment the Court addressed several arguments presented by the Republic of Croatia in support of its claim that the Court does have jurisdiction for all events, even events prior April 1992 (possibility for retroactive application of the Genocide Convention provisions, Article 10 of the International Law Commission’s Articles on the Responsibility of States for Internationally Wrongful Acts, responsibility issue by succession). **Following the examination of all arguments presented, the Court found that events prior 27 April 1992 fall within the scope of the Genocide Convention and therefore the Court has jurisdiction to entertain Croatia’s claim in its entirety, including events prior to 27 April 1992.**

**Examination of Croatia’s claim**

Considering Croatia’s claim, the Court underlined that the following two constituent elements had to be established to prove genocide:

* *ACTUS REUS* – physical element of genocide, hence specific events that constitute the elements of genocide pursuant the definition contained in the Convention, and those are (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 and (e) forcibly transferring children of the group to another group
* *MENS REA* - mental element of genocide, second element necessary to prove genocide requires the intent to destroy, in whole or in part, a specific group (national, ethnical, racial or religious group) as such. Thus in order to prove genocide it is necessary to establish the *dolus specialis*, the special intent to destroy, in whole or in part, a protected group. The Court set the criteria that special intent will only be considered in the presence of direct proof of such intent (a State plan which contains the intent to commit genocide) or if the intent can be indirectly inferred from a pattern of conduct. However, in reference to indirect inference of genocidal intent, in its 2007 Judgment the Court already held that a pattern of conduct can be accepted as evidence of the existence of genocidal intent, and that it is necessary and sufficient that this is the *only* inference that could reasonably be drawn from the acts in question, not leaving room for alternative interpretations.

**Examination of Croatia’s claims relating to the *actus reus* of genocide**

The Court initially stated that it does not deem necessary to examine each event presented by Croatia separately (Croatia submitted evidence for over 100 cities and villages), nor to prepare a complete list of alleged crimes. For the purpose of the Judgment, the Court concentrated on certain areas, highlighted by Croatia as representative examples of systematic and far-reaching and wide-ranging crimes committed against Croats (protected group).

The Court examined **Article II (a) killing members of the group** of the Genocide Convention and within its meaning the killings of ethnic Croats in the Republic of Croatia between 1991-1995 by the JNA and other Serb forces (territorial defense, paramilitary formations, militia ...) in the regions of Eastern Slavonia, Western Slavonia, Banovina/Banija, Kordun, Lika and Dalmatia. When using the term “Serbs” or “Serb forces”, the Court refers to police and defense forces of the so-called Krajina and RSK territorial defense forces, units of the Ministry of the Interior of the Republic of Serbia and numerous paramilitary groups.

The Court concluded that killings of members of a group were committed and that the *actus reus* of genocide was established in **Vukovar and its surrounding area** (the Court reviewed Croatia’s evidence on the shelling of Vukovar; the killing of 1100 to 1700 Vukovar citizens of which 70% were civilians; events at Ovčara; events at Velepromet, and based on the examined evidence and judgments of the International Criminal Tribunal for the former Yugoslavia (ICTY), the Court found that the JNA and Serb forces committed the killings of Croats in Vukovar and surrounding areas during the siege of the city, as well as at Ovčara and Velepromet); **Bogdanovci** (the Court, taking into account the presented evidence and the statement of a witness who appeared before the Court, ruled that in Bogdanovci Croats were killed by the JNA and other Serb forces during the months of October and November 1991); **Lovas** (the Court examined Croatia’s evidence of the killings in Lovas where no resistance was offered and evidence of the “minefield massacre”. Since the crimes in Lovas were confirmed before the ICTY and Serbia did not dispute that killings took place, the Court found that the JNA and other Serb forces committed the killings in Lovas in late 1991); **Dalj** (in addition to the evidence presented by Croatia, the Court considered the facts in the Stanišić and Simatović case before the ICTY and concluded that members of the protected group in Dalj were killed in the period of September through November 1991 by Serb forces); **Joševica** (the Court took into account many pieces of evidence presented by Croatia – witness statements, Helsinki Watch Report etc. – cases before the ICTY and the testimony of a witness who appeared before the Court, concluding that Croatia has proven that Serb forces committed the killings in Joševica during November and December 1991); **Hrvatska Dubica and surrounding area** (considering the cases before the ICTY and witness statements submitted by Croatia, the Court established that Croats were killed by the JNA and Serb forces during the month of October 1991); **Lipovača** (the Court concluded from the evidence that at least three Croats were killed in Lipovača); **Saborsko** (the Court examined evidence and ICTY findings in the Martić case and the Stanišić and Simatović case and found that Croats were killed by the JNA and Serb forces in November 1991); **Škabrnja and surrounding area** (Croatia presented the Court evidence of the killings in Škabrnja and Nadin and a witness appeared before the Court to testify about these events. The Court concluded that killings were perpetrated by the JNA and Serb forces against members of the protected group between 18 November 1991 and 11 March 1992) and **Dubrovnik** (taking into account presented evidence and the Jokić and Strugar cases before the ICTY, the Court established that between October and December 1991 the JNA perpetrated killings of Croats).

**CONCLUSION:** Based on the evidence, the Court concluded that the JNA and Serb forces committed a large number of killings in several locations in Croatia. The Court also concluded that the large majority of victims were members of the protected group, from which can be deduced that they were systematically targeted. In addition the Court concluded that Serbia did not dispute the fact of the killings, although it contested the number of the persons killed and other circumstances. The Court found that conclusive evidence supports the claims that killings of members of the protected group were committed and that the *actus reus* of genocide has been established as specified in Article II (a) of the Genocide Convention.

The Court then examined Croatia’s evidence on physical injuries, ill-treatments and acts of torture, rape and sexual violence within the meaning of **Article II (b) causing serious bodily or mental harm to members of the group** of the Genocide Convention. The Court focused on the evidence for numerous locations and established such violations in: **Vukovar** (with emphasis on events at the Vukovar Hospital and transfer of prisoners to Ovčara and Velepromet, the Court gave particular weight to the statement of the witness who testified about these events before the Court), **Bapska, Tovarnik, Berak, Lovas, Dalj, Voćin, Đulovac. Knin** (with special emphasis on the detention of prisoners at the hospital in Knin and the JNA barracks). In the aforementioned locations the Court concluded that Croatia has proven that acts of torture and sexual violence were perpetrated.

**CONCLUSION:** The Court concluded that during the war in many locations in Eastern and Western Slavonia, and Dalmatia, the JNA and Serb forces injured members of the protected group, committing acts of ill-treatment, torture, sexual violence and rape, which contributed to the physical and biological destruction of the protected group, as a whole or in part, which establish the *actus reus* of genocide.

The Court also examined evidence of the deliberate infliction on the group conditions of life calculated to bring about its physical destruction in whole or in part, as well as evidence of imposed measures intended to prevent births within the group. Although the Court established that numerous committed crimes fall within this definition, it nonetheless concluded that they did not contribute to the physical or biological destruction of the group, in whole or in part, hence the *actus reus*of genocide could not be established.

**In the conclusion of the Court on the *actus reus* of genocide, the Court states that it is fully convinced that, in various localities in Eastern Slavonia, Western Slavonia, Banovina/Banija, Kordun, Lika and Dalmatia, the JNA and Serb forces perpetrated crimes against Croats (as members of the protected group), and that the *actus reus* of genocide has been established.**

**Examination of Croatia’s claims on genocidal intent *(dolus specialis)***

With a view to the fact that the Court established the *actus reus,* it examined the evidence in support of the claim of the special intent to commit genocide. To this effect, the Court found that the **Croats who lived in the targeted regions constitute a substantial part of the protected group and represented a substantial part of the Croats living in these regions.** In addition, the Court **established a pattern of conduct** during the commission of the crimes and concluded that a similar *modus operandi* is evident in various regions of Croatia. The Court also considered the **context** in which the crimes were committed, for which Croatia claimed that they occurred in the areas intended by Serbia for the creation of a “Greater Serbia”. It is of great importance that the **Court considered and explicitly agreed with ICTY findings, that the leadership of Serbia and that of the Serbs in Croatia, *inter alia*, shared the objective of creating an ethnically homogeneous Serb State, and that this was the context in which acts were committed that constitute the *actus reus* of genocide within the meaning of Article II (a) and (b) of the Convention.** However, **according to the conclusions of the ICTY,** those acts constituting the *actus reus* of genocide **were not committed with intent to destroy the Croats, but rather with that of forcing them to leave** the regions concerned so that an **ethnically homogeneous Serb State could be created.** The Court therefore could not conclude that genocidal intent is the only reasonable inference to be drawn from this context. The Court also considered the use of opportunities to commit acts of genocide against persons detained in camps and took into account the total number of persons killed. The Court drew the conclusion that the JNA and Serb forces did not kill all captured Croats and that 12500 Croat deaths represent a relatively small number of victims in relation to the size of the targeted part of the group. **Although the Court established a pattern of conduct during the commission of acts of genocide against the protected group, it is of the opinion that it cannot be concluded that the only reasonable inference that can be drawn from the pattern of conduct was the intent to destroy, in whole or in part, the Croat group from the commission of these genocidal acts.** Acts constituting the elements of genocide were not committed with the special intent required for them to be characterized as acts of genocide.

Pursuant to the Court’s conclusion that **special intent has not been established** by Croatia, an essential element of genocide, **Croatia’s claim must be dismissed in its entirety**.

**SERBIA’S COUNTER-CLAIM**

Examining Serbia’s counter-claim against Croatia, the Court sought to ascertain whether the *actus reus* of genocide could be constituted from the claims of killings of members of a group as a result of the indiscriminate shelling of the “Krajina” towns, forced displacement of the Serb population from the “Krajina”, killing of Serbs fleeing in columns from the towns under attack, killing of Serbs having remained in the liberated areas (United Nations protected areas – UNPAs ) after Operation “Storm” , infliction of ill-treatment and destruction and looting of Serb property.

The Court mainly examined the ICTY Judgment in the Gotovina case and concluded that it has not been shown that killings of members of the protected group were committed as a result of the artillery attacks. The Court stated that would only be in exceptional circumstances that it would depart from the findings reached by the ICTY on such issue. In addition, Serbia has drawn the Court’s attention to the controversy evoked by the Judgment of the Appeals Chamber in the Gotovina case, but the Court stated that no evidence was presented, neither prior or after the Judgment, irrefutably demonstrating the Croatian authorities’ deliberate intent to shell the civilian areas of towns inhabited by Serbs. Furthermore, no such intent is apparent from the Brioni Transcript, nor can such intent be regarded as incontrovertibly established on the basis of the statements by persons having testified before the ICTY Trial Chamber in the Gotovina case, and who are cited as witnesses by Serbia in the present case.

Serbia claimed that it came to forced displacement of Serbs as a result of a political plan of the Croatian authorities. Croatia disputed this claim, citing the findings from both ICTY Judgments in the Gotovina case (of the Trial Chamber and Appeals Chamber) and in addition to other claims argued that the ‘exodus’ of a majority of the Serb population was pursuant to a decision to evacuate taken by the so-called RSK Supreme Defense Council. The Court established that forced displacement, even if it had been established, cannot constitute the *actus reus* of genocide in this case. The Court concluded that, despite its inability to determine the number of victims, killings were committed during the flight of the refugee columns and that there is significant doubt as to whether they were carried out systematically. The Court furthermore found that from the lists drawn up by the Croatian Helsinki Committee for Human Rights and Veritas the number of persons who remained in the area after Operation “Storm” cannot be determined, but the Court confirmed that killings did take place which Croatia did not dispute during the proceedings. Hence the Court found that acts were committed against a number of Serb civilians who remained in the areas of which the Croatian army had taken control during Operation “Storm” and that those acts constitute the *actus reus* of genocide.

As of the issue of **genocidal intent**, the Court examined the Brioni Transcript and concluded that, even in the presence of all submitted evidence and with a view of the political and military context, the Court cannot establish the existence of special intent which characterizes genocide. In addition, the Court established the absence of a pattern of conduct indicating genocidal intent of the Croatian authorities before, during and after Operation “Storm”, and that the cases which have been presented were not committed on a scale such that they could only point to the existence of a genocidal intent. In conclusion, the Court found that Serbia did not prove genocidal intent, hence no genocide was committed during and after Operation “Storm” against the Serb population of Croatia, and other claims of the counter-claim are not proven, resulting in the **rejection of Serbia’s counter-claim in its entirety**.

In the context of Croatia’s claim and Serbia’s counter-claim, the Court underlined the necessity for both sides **to continue the cooperation with a view to resolving the issue of the fate of missing persons** **and offering appropriate reparation to the victims of such violations**. The Court recalls, furthermore, that its jurisdiction in this case is based on Article IX of the Genocide Convention, and its findings do not include questions regarding the Parties’ possible responsibility in respect of any violation of international obligations other than those arising under the Convention itself.

Link to the Judgment on the ICJ website:

<http://www.icj-cij.org/docket/files/118/18422.pdf>