APPLICATION OF THE GENOCIDE CONVENTION (CROATIA V. SERBIA)

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ABSTRACT

The Balkans have a history of domination by many multinational empires, based on the unification of many different groups of population of the region. Yugoslavia State was formed by States of Slovenes, Croats and Serbs. During the World War II, Nazis turned Yugoslavia into a Greater Croatia, a Greater Albania and a Greater Bulgaria, trying to balance and to punish the dominant Serbia. In this way, after the end of the Second World War, Tito’s Partisans helped to defeat the Germans and established dominance in the region. The country remained united until his death, when it was gradually driven to its dissolution. In this scenario, Slobodan Milošević entered in the Serbian political scene, bringing the nationalism. Croatia stated its pursuit for its independence causing many tensions in this area. These tensions turned into a serious conflict where more than 20,000 people died, and more than 600,000 people were displaced. After unfruitful diplomatic negotiations, Croatia filed an application against Federal Republic of Yugoslavia in 1999 presented to the International Court of Justice. Among its claims, Croatia requested the Court to adjudge and declare that FRY has violated the Convention of Prevention and Punishment of the Crime of Genocide and, for violating its responsibilities, that FRY should repair for the damages caused in the conflict. By that, the ICJ judges must decide if Federal Republic of Yugoslavia, Serbia nowadays, breached its obligations under the Genocide Convention and if the State has responsibility for the crimes committed during the period of conflict.

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1 HISTORICAL BACKGROUND

The Balkans have been shaped by a unique history. Like no other part of the continent, southeastern Europe was ruled for two millennia by a series of multinational empires. The region straddles the dividing line between Western and Eastern Christianity, and it is at a crossroads where Christianity meets Islam and where the great trading routes from the Middle East and Africa enter Europe. Over the millennia, these multiethnic empires – ruled by Constantinople or Vienna – produced a mosaic of peoples, cultures, and languages that could not be found in any other part of Europe. All of the region’s major cities were truly multinational, and even though the rural areas were less cosmopolitan, cultural diversity defined the entire Balkan region (Bildt 2001).

a. Pre-World War II Period

The World War I (1914-1918) brought, among its consequences, the ceasing of the long-term disputes involving the Ottoman and Austro-Hungarian Empires. The collapse of these two major empires that had engulfed the Balkans region for years led to important political outcomes, which left their mark on contemporary history. The conflicts set there in the last century, mainly raised as a result of ethnic contrasts, evolved to such an extent that granted the Balkans the unpleasant nickname of “European powder keg”.

Following the worldwide revolutionary idea of the nation-state, backed on the doctrine of self-determination enunciated by U.S. president Woodrow Wilson, many new nations were formed out of the ancient imperial territory. In 1917, fearing German cultural domination and the ambitions of Italy over Slovene and Croat-speaking territories, Croatia and Slovenia accepted to join the Serbian government, calling for a democratic, constitutional “Kingdom of Serbs, Croats, and Slovenes”, to be ruled by the House of Karadjordjević, the Serb royal family (Prpa-Jovanović 2000). Croatian historians argue, nevertheless, that while the majority of Croats favored either to remain inside Austria or even declare independence confirming

3 “The new state was recognized by the great powers at Versailles on July 28, 1919. (...) To the former Serbian monarchy were added Slovenia, Croatia, Bosnia-Hercegovina, Montenegro, and Vojvodina, the latter being an area, formerly part of Hungary, with a considerable Serbian population and rich in Serbian tradition. (...) The new state, under the rule of Regent Aleksandar in Belgrade, did not constitute an equal partnership. A new constitution described Serbs, Croats, and Slovenes as “three tribes” of the same nation. The Montenegrins, however, were not recognized as a separate tribe because their parliament had voted on the eve of the new state’s creation to incorporate themselves into Serbia. The Macedonians were not recognized as a nation because they had been part of the Kingdom of Serbia since the Balkan Wars and were treated as Serbs. The Muslims were recognized as a religiously separate entity and were allowed to have political parties, but, like the Montenegrins and the Macedonians, were not recognized either as a separate tribe or as a nation. The large Albanian minority in Kosovo was simply ignored” (Prpa-Jovanović 2000, 49-50).
Croatian statehood, the elite (which consisted of a high proportion of Serbs) opted for the union with the Serbs and Slovenes, without consulting the will of the people or the Croatian Parliament, the Sabor (Bellamy 2003).

As it turned out, the proposed nation-state consisted of nothing more than a geographic framework, while politically it remained the cockpit of conflicting Serbian, Croatian, and Slovenian national interests (Prpa-Jovanović 2000, 50-51). Due to its heterogeneity, as soon as the newborn kingdom was established, a flow of divergences on its political structure took place, polarized between Serbian desire to form the “Greater Serbia” and Croat, Slovene and Bosniak wishes to establish a decentralized federation and, thus, to give a great deal of freedom to each individual nation within the kingdom. As a response to such divergences – which were leading to instability and violence –, King Aleksandar I imposed, in 1929, a “royal dictatorship” and renamed the country the “Kingdom of Yugoslavia”4. He abolished the Constitution, the National Assembly and all the former constituent entities (Croatia, Slovenia, Bosnia and Herzegovina, and Serbia) (Alves 2013, Bellamy 2003).

The false nature of monarchical Yugoslavism tumbled down in 1934, when King Aleksandar was murdered, in France, by Croatian and Macedonian extremists. The King’s death brought about a regrouping of political forces and, as a result, fostered Croatian demands for independence. By 1939, Serb Prince Paul Karadjordjević started talks regarding Serbian-Croatian relations, and eventually reached an agreement, the Sporazum, granting Croatia substantial autonomy (Prpa-Jovanović 2000). With this agreement, internal politics largely stagnated, as the government focused more and more on the course of World War II, which had just broke out and came to impose drastic changes to Yugoslavia’s political organization.

b. World War II and its consequences to the region

For Yugoslavia, World War II was not simply the destruction of a conquered state by the Nazi-fascist coalition. It was also a civil war of complex dimensions, as some fought against the Germans who occupied the country, others allied the intruder, some fought to bring back the royal family that had fled to London, and others fought to establish a new government. A trend towards extremism was prompted, fostering the emergence of both fascist and communist political movements, such as the fascist Ustaša, led by Ante Palević, and the communist Partisans led by Josip Broz – popularized by the nickname of Tito (Bellamy 2003). During the conflict, the Nazis dismembered Yugoslavia into a Greater Croatia, a Greater Albania, and a Greater Bulgaria in order to balance and to punish a dominant Western-leaning Serbia, what temporarily resolved the issue of centralism versus federalism (Johnsen 1995). These nationalist feelings, though,

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4 “Yugoslavia” means “the country of the southern Slavs”, a king Aleksandar’s attempt to foster a better sense of cultural unity.
erupted into bloody conflicts. Pro-Axis forces, including the Ustaša, the extremist wing of the Croatian nationalist movement, emerged to rule the ruined South Slav state, setting up a puppet Independent State of Croatia which absorbed Bosnia and Herzegovina. The Ustaša promoted a brutal repression of communists, as well as an outright genocide against Serbian population within the “independent state”. In addition, the Ustaša enthusiastically fulfilled Nazi demands for the extermination of the historic Jewish and Gypsy communities of Croatia and Bosnia and Herzegovina (Prpa-Jovanović 2000).

By the end of World War II, Tito’s Partisans prevailed by helping to defeat the Germans and by establishing dominance over the many other groups fighting for the control of Yugoslavia. Tito then imposed a communist government based on the Soviet Union. In developing the new Yugoslav constitution, Tito attempted to settle a political scenario that would preclude ethnic and political tensions that had previously stained Yugoslavia in the inter-war era (Johnsen 1995). As it was called, the “Social Federal Republic of Yugoslavia” (SFRY) was divided into six federate republics – Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia, and Slovenia – and two autonomous regions – Kosovo and Vojvodina, both located within Serbia (Auty 1966).

Although republics within the new Yugoslav state were granted many constitutional prerogatives whilst the state retained few exclusive functions, reality turned out to be different, as Belgrade maintained a tight control over all aspects of Yugoslav society from the first years of communism (Johnsen 1995). That changed in 1948, when Yugoslavia surprisingly broke away from the Stalinist bloc, and the republics’ powers over internal issues increased (McClellan 1969). Conditions continued to improve in 1963, when Tito promulgated a new constitution that further decentralized government establishing considerable legislative independence at the republic level (Auty 1966).

In spite of the growing autonomy gained by the republics, separatist movements from Croatia and Slovenia still resented the reinstitution of centralized control of the party from Belgrade, and reinforced their claims for greater decentralization. By 1971, as James Gow (1992) points out, Yugoslavia verged on disintegration and only Tito’s prestige held the country together. Tito deepened his efforts to maintain unity: he proclaimed a new constitution in 1974 and the continuing demands for autonomy were appeased. In 1980, however, Tito died, and Yugoslavia was gradually driven to its end (Gow 1992, Jelavich 1983).

c. Tito’s death and the rise of the nationalist movements

Post-Tito Serbia’s response to the unravelling process of Yugoslavia was a strong nationalism, personalized in the figure of Slobodan Milošević, who had just entered the Serbian political scene. Milošević professed an unrestrained Serbian
nationalism that sought to overturn the existing system in order to restore Serbia and the Serbs to their “rightful place”. The idea of setting a Greater Serbia was then strengthened: “throughout 1989, Serbian nationalists argued that internal republic boundaries artificially divided the Serb nation, and that Serbia reserved the right to speak for all Serbs, not just those living within Serbia” (Johnsen 1995). Milošević seized control over the Serbian Communist Party organization and gained support from the Yugoslav Army. In 1986, he was elected president and, in a short period of time, he overthrew the governments of Kosovo, Vojvodina and Montenegro, attaching these territories to Serbia. He also eliminated all the provisions that guaranteed a reasonable independence for autonomous regions. Due to the violent Kosovar reaction to the loss of autonomy, the Federal Yugoslav Army (also known as “Yugoslav’s People Army“, the “JNA”) occupied Kosovo in 1990, establishing the benchmark of using the army against a fellow Federal member (Magas 1991).

The results of Milošević’s centralizing tendencies naturally caused fear to the other Yugoslav republics. By the end of 1990, the disintegration of Yugoslavia accelerated: Yugoslav republics held elections that resulted in non-communist governments in Bosnia and Herzegovina, in Croatia and in Slovenia. Furthermore, Croatia and Slovenia expressed interest in coordinating their defense and security policies, which resembled a mutual defense pact against Serbia (Johnsen 1995). It eventually led to the Croatian and Slovene declarations of independence on 25 June 1991.

Prior to the independence, however, Serbs living in the Croatian borders with Bosnia and Herzegovina and with Vojvodina illegally self-proclaimed the so-called “Republic of Serbian Krajina” on 21 December 1990. This republic was allegedly encouraged and supported by Belgrade with the intention of overthrowing Croatian sovereignty and territorial integrity. Shortly after, on 28 February 1991, rebel leaders called for the union of the “newborn republic” with the Serbs in Serbia, in Montenegro and in Bosnia and Herzegovina, cooperating to bring about the “Greater Serbia” fostered by Milošević’s Serbia (ICJ 1999).

The tensions between Croatia and the Federal Republic of Yugoslavia (FRY) soon turned into serious conflict: from March 1991 onwards Serb insurgent groups linked to the FRY propagated massive attacks onto Croatia, which resulted in the destruction of 59 out of Croatia’s 102 municipalities by the middle of the year. With approximately 100,000 members, these armed paramilitary groups led to the death of 20,000 people and the displacement of more than 600,000 (ICJ 1999).

5 The Socialist Republic of Serbia kept the votes of Vojvodina, Kosovo, and Montenegro within the collective Federal Presidency, what meant Serbia was given effective control of four of the eight votes in the collective Yugoslav Presidency (ICJ 1999).

6 On 28 February 1989, the Croatian Democratic Union was formed under the leadership of Dr. Franjo Tuđman, who would lead Croatia to restore its political independence as a sovereign State (ICJ 1999). With independence in 1991, Tuđman became Croatia’s first president.
After one-third of the Croatian territory had been seized by rebels and taken under the control of FRY’s officials, a ceasefire agreement between Croatia and the FRY was signed in Sarajevo in January 1992. In February of the same year, a resolution from the United Nations Security Council established peacekeeping missions in four different sectors of Croatia, designated as United Nations Protected Areas (“UNPA”), responsible for putting an end to the armed conflicts within Croatia (ICJ 1999).

Alleging unsuccessful peace negotiations with Serbs and the FRY, and responding to the mentioned abuses, the Croatian Army and police forces launched the “Medak Pocket”, “Flash” and “Storm” Operations in order to quickly recover the Serb-occupied areas seized from the Croatia. Immediately prior to the ultimate operation, “Operation Storm”, Serb officials, backed by the FRY, encouraged Serbs to leave the Knin area, professing their belief that safety would not be promoted for the Serb people under Croatian domain. Croatia denied such allegations, stating that the FRY’s was in violation of the Genocide Convention due to its underlying intentions to promote ethnic cleansing (ICJ 1999).

Reporting many unsuccessful attempts of diplomatic negotiations with the Yugoslavs, Croatia filed an application against the FRY on 2 July 1999 claiming reparations for the damages caused in the conflict. As the case review progressed, however, Yugoslavia submitted preliminary objections that led the ICJ to suspend the proceedings on the merits of the case and assess whether it had competence or not to run such proceedings. After public sittings held from 26 May to 30 May 2008 and final submissions on behalf of both the Parties and the ICJ, on 18 November 2008, found it had jurisdiction over the case (ICJ 1999).

On January 4, 2010, it was Serbia’s round to submit, through a counter-memorial, its genocide lawsuit against Croatia. The referred submission contains a historical account of Serbo-Croatian relations, with a focus on World War II. In this context, they mentioned the massive extermination, expulsions and forced religious conversions of large numbers of ethnic Serbs in the Independent State of Croatia’s puppet state of Nazi Germany employed by the aforementioned “Ustaša”. The application also comprises murder of Serbs who tried to return to their homes within Croatian territory after the end of World War II, as well as the more recent murders of Serbs in the Croatian War of Independence from 1991 to 1995, in the locations of Gospić, Sisak, Pakračka Poljana, Karlovac, Osijek, Paulin Dvor, and due to the Medak Pocket, Flash and Storm Operations.

The nowadays Republic of Serbia7 has attempted repeatedly to negotiate a mutual withdrawal with Croatia on the genocide matter, under the belief that

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7 With the transformation of the Federal Republic of Yugoslavia into Serbia and Montenegro and the dissolution of that country in 2006, Serbia is considered its legal successor, remaining responsible in full for all the rights and obligations of the State union of Serbia and Montenegro under the UN Charter.
such conflict would be better solved through peaceful but extrajudicial procedures. Croatia, however, maintains that its main goal, in former Foreign Minister Vuk Jeremic’s words, “is to cooperate on the road towards EU integration, to build good neighbourly relations, to solve problems which we [both Croatia and Serbia] have inherited”, therefore “it would be better for Croatia for it to never come to this [extrajudicial] process”. In 2014, the Court announced it would hold public hearings from 3 March to 1 April at the Peace Palace in The Hague.

2 STATEMENT OF THE ISSUE

In view of the abovementioned facts, on July 2, 1999, the Republic of Croatia filed an application against the Federal Republic of Yugoslavia, nowadays Serbia, before the International Court of Justice (ICJ), claiming that Yugoslavia had violated the Genocide Convention, on the following grounds:

the Federal Republic of Yugoslavia, its officials, agents, and surrogates, have violated Articles II (a)-(d) and III (u)-(e) of the Genocide Convention with respect to the Republic of Croatia and its people. In particular, the Republic of Croatia will demonstrate that the Federal Republic of Yugoslavia violated the Genocide Convention by seizing control of the Knin region and eastern Slavonia from 1991 to 1995, shelling and attacking portions of Dalmatia, and driving Croat (and other non-Serb) citizens from these areas with the intent to “ethnically cleanse” these regions, and to unite them with the Federal Republic of Yugoslavia to form a “greater” Serbian State,

and, secondly, that:

The Federal Republic of Yugoslavia has not punished individuals who committed acts of genocide, or other acts described in Article III, and it has not provided for effective penalties for such persons. Indeed, it has on many occasions given refuge to such persons within its territory. The Federal Republic of Yugoslavia has, therefore, also violated its obligations under Article IV and Article V of the Genocide Convention (International Court of Justice, 1999).

2.1 CROATIA’S ALLEGATIONS

2.1.1 AS TO THE JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE

In its Application, Croatia invokes Article 36(1) of the ICJ Statute, according to which “the jurisdiction of the Court comprises all cases which the parties refer to
it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force (International Court of Justice, 1945).

Croatia declares that both States involved are successor States of the previous Socialist Federal Republic of Yugoslavia, which signed the Genocide Convention of 1948 and ratified it on 29 August 1950. Thus, under the presumption, based on general principles and rules of International Law, that a successor State continues to be part of a treaty or convention, Croatia and Serbia continue to be bound by the Genocide Convention.

Moreover, the Applicant invokes Article 9 of the Genocide Convention, which states that the ICJ has jurisdiction to resolve disputes between States parties of the Convention in cases of State responsibility for genocide, as alleged by Croatia. The article reads as following:

Disputes between the Contracting Parties 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, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

On these grounds, Croatia sustains that the ICJ has jurisdiction to entertain the present dispute.

2.1.2 AS TO YUGOSLAVIA’S VIOLATIONS TO THE 1951 GENOCIDE CONVENTION

In its Application, Croatia contends that Yugoslavia, through its officials, agents and surrogates, has violated the “Convention on the Prevention and Punishment of the Crime of Genocide”, particularly Article 2 (a)-(d), Article 3 (a)-(e), Article 4 and Article 5.

Article 2 (a)-(d) of the abovementioned Convention provides:

In the present 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; (…)

(UNGA, 1948).

8 Genocide Convention of 1948.
This article specifies which acts are contained within the definition of genocide under the Convention. Additionally, Croatia invokes Article 3 (a)-(e), that lists genocide-related actions that lead to punishments, whether they are direct or indirect violent acts:

The following acts shall be punishable:
(a) Genocide;
(b) Conspiracy to commit genocide;
(c) Direct and public incitement to commit genocide;
(d) Attempt to commit genocide;
(e) Complicity in genocide (UNGA, 1948).

According to Croatia, Serbia is accused of genocide since, through state agents and surrogates, it has committed acts provided in the convention. So, by seizing control of the Knin Region and eastern Slavonia from 1991 to 1995, shelling and attacking portions of Dalmatia, and driving Croat (and other non-Serb) citizens from these areas with the intent to “ethnically cleanse” these regions (…) (ICJ 1999, p. 16, §32),

the Respondent would have violated the aforementioned articles.
Furthermore, Croatia alleges that the Serbia violated the 1951 Convention before “Operation Storm”, as it “instigated and coerced the Serb population living in the Knin region to evacuate the area, thus creating a second ‘ethnic cleansing’ of the area” (ICJ 1999, p.18, §33).

Moreover, Croatia mentions violations to Articles 4, which stands against immunity of constitutionally protected persons, as it “persons committing genocide or any of the other acts enumerated in Article 3 shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals” (United Nations General Assembly, 1948).

Also, Article 5 states that signatories are legally bound to give effect to the Convention’s provisions and to punish those who commit genocidal acts:

Article 5
The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article 3 (UNGA, 1948).

Croatia therefore claims that Serbia violated the Convention on the Prevention

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9 The “Operation Storm” was the main battle of the Croatian Independence War, in 4th August 1995, that targeted and killed Serb minorities in the city of Knin, Croatia (Phenyo Keiseng Rakate, 2000).
and Punishment of the Crime of Genocide, through acts of its officials, agents and surrogates, which violated Article 2 and 3. Moreover, in not prosecuting these individuals for their crimes, Serbia also violated its obligations present in Articles 4 and 5 of the Genocide Convention.

2.2 YUGOSLAVIA’S ALLEGATIONS

During Public Hearings on Preliminary Objections, Yugoslavia held that the Court does not have jurisdiction over the Federal Republic of Yugoslavia, because the State only became a Contracting Party to the Genocide Convention on 10 June 2001, with an exception clause to Article IX of the Convention (ICJ 2002, p. 15, §1.4.). Additionally, the FRY contended that the State cannot be held responsible for acts and omissions that occurred before 27 April 1992, simply because there was no Federal Republic of Yugoslavia before that date. For that reason, the Application would be inadmissible while regarding facts prior to the date when the State was formed. Furthermore, the Respondent defended that the claims of Croatia regarding submitting to trial people like Slobodan Milošević, providing information related to the whereabouts of missing Croatians and the returning of cultural possessions were inadmissible or controversial.

2.3 DECISION OF THE COURT CONCERNING PRELIMINARY OBJECTIONS

After Croatia duly filed its Memorial within the time-limit, Yugoslavia raised preliminary objections regarding the Court’s jurisdiction to judge the case and the admissibility of the Application. Under Article 31, § 3, of ICJ Statue, both countries exercised their right, choosing a judge ad hoc each, as it “if the Court includes upon the Bench no judge of the nationality of the parties, each of these parties may proceed to choose a judge as provided in paragraph 2 of this Article” (International Court of Justice statue, 2014). Following the change in the country’s name from “Federal Republic of Yugoslavia” to “Serbia and Montenegro”, on 4 February 2003, and the declaration of independence of the Republic of Montenegro on 3 June 2006, Serbia assumed as Respondent12.

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12 Regarding the principle of continuity, there is a presumption that normally the following State
After oral proceedings, during which Serbia, as Respondent succeeding Yugoslavia, argued that the Court did not have jurisdiction to entertain the case firstly because Serbia would lack capacity to be party of the dispute, and secondly due to the temporal lapse of the actions and the independence of Serbia. In addition, if the Court found that it had jurisdiction, the State contended that Croatia’s claims were beyond the Court’s jurisdiction.

In its decision, due to the need to identify the Respondent party after the independence of Montenegro, the Court referred to the letter sent by the President of the Republic of Serbia to the Secretary-General of the United Nations. In this letter, the President stated that the Republic of Serbia would still be utterly responsible for the former Serbia and Montenegro’s rights and obligations under the UN Charter. Furthermore, the Court attended to the fundamental principle that no State may be subject to its jurisdiction without consenting (ICJ 2008, 3). At this point, Montenegro clarified, in a letter of 29 November 2006, that it did not consent to the jurisdiction of the Court in this dispute. For all that matters, the Court concluded that Serbia was the Respondent in the case.

The Court, by ten votes to seven, rejected the first preliminary objection submitted by Serbia, regarding its capacity to participate in the proceedings; by twelve votes against five, the Court rejected Serbia’s preliminary objection in relation to the jurisdiction ratione materiae of the Court under Article 9 of the Convention; by ten votes to seven, the ICJ found that it had jurisdiction to judge the case, according to said Article 9(4); by eleven votes to six, it established that the second preliminary objection did not characterize exclusively as such; and, by twelves votes to five, the Court rejected the third preliminary objection submitted by the Republic of Serbia (ICJ 2008).

2.4 LEGAL THESIS INVOLVED IN THE MERITS

2.4.1 States Succession

In respect of sovereignty over a given territory, concerning international law, “state succession arises when there is a definitive replacement of one State by another” (BROWNLIE, 2008, pg. 649). However, whenever on a territory a State replaces another one, the problem is whether the rights and obligations of the former State are transferred to the new State (CASESSE, 2005, pg. 78).

continues to be legally bound for treaties in which the antecessor was party. Yet, in human rights treaties there’s a general rule that new States must respect them, because this category of treaties intend to protect individuals in face to central authorities, and this protection should be continued even “after a change of sovereignty over a particular territory” (CASSSE, 2005).
The Vienna Convention on Succession of States in respect of Treaties, done in 1983 and entered into force in 1996, is a codification of customary rules in this matter of state succession regarding the obligations resultant of international treaties. Its article 2.1. (e) and (f) is very important, since discuss the problem of retroactivity:

Article 2:
1. For the purposes of the present Convention:
   (…) 
   (e) “Date of the succession of States” means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates;
   (f) “Newly independent State” means a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible; (Vienna Convention, 1983).

The issue of state succession was present in the judgment of the preliminary objections of the present case, Croatia v. Serbia, since it was introduced by the question whether or not the ICJ has jurisdiction to judge the Serbian State (ICJ, 2008). In fact, in their counter-memorial, Serbia defends that the State can’t be blamed by acts committed before their independence day, because it didn’t even exist by the time (ICJ, 2001).

Yet, in the judgment of the similar case Bosnia Herzegovina v. Yugoslavia of 1996, the ICJ recalled the fact that since the end of the SFRY, the Yugoslavian State, under a formal declaration, “expressed the intention to remain bound by the international treaties to which the former Yugoslavia was party” (ICJ, 1996). Also, the judgment of 2007 took the same direction, while the Court, in the matter of succession, regarded the history of the Respondent and the United Nations during the period that initiated with the break-up of the SFRY (ICJ, 2007, §87), when Yugoslavia (Serbia and Montenegro) claimed to be the successor of SFRY.

2.4.2 Jurisdiction of the International Court of Justice

In this case, the jurisdiction of the Court was held by the Croatian State, in their application to the ICJ, under article 36 of the ICJ Statue by the argument that both Croatia and Federal Republic (by the time) were successors of the former Socialist Federal Republic of Yugoslavia, signatory of the Genocide Convention (ICJ, 1999).

In contrast, in the counter-memorial of Serbian State, it argued that the Court does not have jurisdiction under the article IX of the Genocide Convention (ICJ, 2001), where it’s written that disputes between the contracting parties of this
convention are submitted to the International Court of Justice (UNGA, 1948), because the facts took place before the existence of the Serbian state (ICJ, 2001).

In the case of dispute between Bosnia and Herzegovina and Serbia and Montenegro, due to the allegations of the Serbian State related to the lack of jurisdiction of the Court, the ICJ recalled the fact that, since the break-up of the Socialist Federal Republic of Yugoslavia, Serbia claimed to be the continuator of the SFTY (ICJ, 2007). For that reason, the Court decided that is has jurisdiction over the case (ICJ, 2007).

2.4.3 Genocide

Genocide, according to the General Assembly Resolution 96(1) “is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings” (Cryer, 2010). In other words, is the destruction or extermination of members of a national, ethical, racial or religious group, through the performance of specific acts, with a specific intent to destroy said group (Cassese 2008, 127). At first, genocide was considered a category of crime against humanity, not having been prosecuted as a special crime by the Nuremberg Tribunal. However, due in large part to the advocacy of Raphael Lemkin, genocide obtained autonomy as a specific crime with the drafting of the Genocide Convention in 1948 by the General Assembly of the United Nations.

Article 2 of the Genocide Convention defines this unlawful act as follows:

In the present 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 (UNGA, 1948).

The first important fact about the definition is that it selects the groups which can be the sole target of genocide. Some authors defends that categories such as political and cultural groups have deliberately been withdrawn from the definition, and are thus not protected by the Convention (Cassese 2005, 443). The ICJ in the case Bosnia and Herzegovina v. Yugoslavia stated that “for purposes of establishing genocide, the target group must be defined positively, and not as a ‘non-Serb’ group” (ICJ, 2007). Then, there is the doubt of the necessity of a collective plan of genocide,
which is demystified in Jelisić, when an ICTY Trial Chamber expressed that killings committed by a single perpetrator are enough “to establish the material element of the crime of genocide and it is a priori possible to conceive that the accused kept in secret the plan to exterminate an entire group without this intent having been supported by any organization in which other individual participated” (Cryer, 2010). A second important fact present in the definition is the difference between crimes against humanity and genocide, in which the first requires a “systematic and widespread” conduct, whereas the latter does not (Cassese 2005, 444). There are two elements of the special intent requirement of genocide: first, the act or acts must target a national, ethnical, racial or religious group; second, the act or acts must seek to destroy all or part of that group (Aydin, 2014), which is the dolus specialis (Cassese 2005, 445), according to the article 4 of International Criminal Tribunal for the former Yugoslavia statue. So, by the second requirement, there must be proof that the intent of the perpetrating state goes beyond the mere direct intent to order the crimes are listed as amounting to genocide: there must be the specific intent to destroy the protected group (Cassese 2005, 445).

2.4.4 Convention on Prevention and Punishment of the Crime of Genocide

In 1947, the Resolution 180 (II) of the UN General Assembly recognized genocide as an international crime, adopting it as the Convention on Prevention and Punishment of the Crime of Genocide in 1948. The Convention was a response to the atrocities committed during the World War II. It aimed to constitute a source of obligation for the contracting parties to criminalize genocide, to prosecute the perpetrators within national legal systems and to create a judicial cooperation system between the parties, aiming at the eradication of the “crime of crimes” (Cassese 2008).

The Convention set out a careful definition of the crime and contemplated other acts related to genocide, such as complicity and incitement. Although primarily directed at state parties to ensure the complicity of states with the prohibition of genocide, the Convention also imposes on states the obligation to prosecute perpetrators of genocidal acts (Cassese 2005, 443).

Although some might consider the the Convention as ineffective at the inter-state level, its Article 4 has been used extensively in international and national prosecutions, having contributed substantially to the development of the law in the area. This led to the statement that the Convention had gradually developed into customary international law. The importance given to the prohibition of genocide has led to the consideration of the obligations set forth in the Convention as erga omnes, which entitles any member of the international community to impose these legal duties on other states (Cassese, 2005, 444).
2.4.5 Obligations Imposed by the Convention on the Contracting Parties

Article 1 of the Convention asserts two main obligations: the obligation to prevent genocide and the obligation to punish genocide acts. Likewise, Article 3 contributes to the obligation to punish, since it imposes on the parties the duty to punish conducts related to genocide (Cassese 2008). The need to prohibit genocide became an *erga omnes* obligation, as the duty to protect people from genocide belongs to all the States of the international community (Knorr 2011).

2.4.5.1 Obligation to Prevent Genocide

Although the Convention does not specifically impose the obligation not to engage in or to prevent other Parties from committing genocide, it is explicit with regards to the duty to prevent genocide and to punish individuals who commit it (Clark 2008). Nevertheless, Article 9, of the Genocide Convention, suggests that there is an implicit obligation directed to all the Contracting Parties to prevent genocide whether it happens in its own territory or not.

When the Convention states, in Article 1, that States must prevent genocide acts, it is understood that the States must take all the actions to avoid genocide, as it said that “the Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish” (UNGA, 1948).

The International Court of Justice, in the case judgment of the case Bosnia and Herzegovina v. Serbia and Montenegro, defined that not only was genocide prevented because of the deterrent effects of punishment, the duty to prevent genocide had its own autonomous scope which was both “normative and compelling” (Schabas, 2008). By this path, the Court confirmed that the Genocide Convention not only imposes on States a duty to prevent and punish genocide, but also an obligation to refrain from genocide (Cryer, 2010).

2.4.5.2 Obligation to Prosecute the Author of Genocide Acts

Article 4 of the Convention stands that “Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals” (United Nations General Assembly, 1948).

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13 Latin term designated to describe that juridical effects of an act or a norm are for everyone and that the States owes this obligation on the way to the international community as a whole.
The punishment of the authors of genocide acts or actions related to genocide takes place through their prosecution. Due to arguments on the relationship between prosecution and deterrence, i.e. the use of criminalization to deter people from engaging in certain conduct, submitting perpetrators to trial is considered part of the obligation to prevent genocide (Knorr 2011). According to Article 6 of the Convention, individuals charged with genocide or related acts must be tried by competent tribunal, regarding the territoriality of the facts, or by an international tribunal with jurisdiction.

2.4.6 The Duality of Responsibility for Genocide – ICJ

The International Court of Justice in Bosnia v. Serbia, established that there is a “duality of responsibility” under international law, which means that “the same acts may give rise both to individual criminal liability and state responsibility” (Cassese 2008, p. 129).

According to this concept adopted by the ICJ, in an extensive interpretation of Article 1 of the Convention, the Parties do not have the obligation only to prevent and to punish acts of genocide, but also to refrain from participating in genocidal actions. In addition, the Court’s interpretation of Article 3 is that contracting States also have the duty not to engage in “conspiracy, direct and public incitement, attempt to commit genocide, or complicity in genocide” (Cassese 2008, 129).

2.4.7 State Responsibility

According to the ILC, on Article 2 of the International Law Commission Articles on State Responsibility for Internationally Wrongful Acts (ARSIWA):

There is an internationally wrongful act of a State when conduct consisting of an action or omission:
(a) is attributable to the State under international law; and
(b) constitutes a breach of an international obligation of the State (International Law Commission, 2001).

In that way, a State is internationally responsible for actions or omissions that are attributed to it under International Law if they constitute breaches of international obligations.

As for breaches of international obligations, Articles 12 and 13 of ARSIWA affirm:

Article 12
Existence of a breach of an international obligation
There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.

**Article 13**

**International obligation in force for a State**

An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs (International Law Commission, 2001).

As for attribution of wrongful conduct, Article 4 of ARSIWA explains that conducts of State organs, as performed through its agents, will be attributed to their respective State:

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
2. An organ includes any person or entity which has that status in accordance with the internal law of the State (International Law Commission, 2001).

State organs listed in Article 4 are not limited to central government organs, to officials at a high level or to people with responsibilities for the external relations (Harris 2010, 425): acts or omissions committed by any organ of the state may give rise to its international responsibility, as long as there is a certain degree of control by the state in question over the perpetrators.

2.4.7.1 Attribution of responsibility to States for acts committed by non-State actors

Firstly, the term non-state actor in the international scene can be understood as a reference to some “uncivil’ groups determined to acquire weapons of mass destruction and target them against civilian population” (Clapham, 2010). Regarding the fact that these groups usually violate human rights, is an obligation of the State to stop and to punish the non-State actors as to protect the victims (Clapham, 2010).

In the area of responsibility, the conduct of a person or a group shall be considered as an act of State under international law if the person or group is in fact acting on the instructions of or under the direction or control of the State, this State in carrying out the conduct, as stated by Article 8 of ARSIWA:
Article 8
Conduct directed or controlled by a State
The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of that State in carrying out the conduct (International Law Commission, 2001).

One issue is that the conducts will only be attributable to the State when the operations was directed or controlled by the State (ILC, 2001). In the Nicaragua case, the ICJ stated that general “overall control” would have been insufficient to ground responsibility (ICJ, 1986). On the other hand, in the Tadić case, the YWCT adopted the approach that the degree of control might vary according to the circumstances and a high threshold might not always be required (Shaw, 2003). In other words, in the YWCT, the Appeals Chamber took the view that acts committed by Bosnian Serbs could give rise to international responsibility on the basis of the overall control exercised by the Federal Republic of Yugoslavia over the Serbian Army, without any prove of FRY’s instruction (ICJ, 2007, §402).

In the case Bosnia and Herzegovina v. Yugoslavia, the Court emphasized that the main point in this case, regarding State’s responsibility, was to determine if the FRY organs “originated the genocide, by issuing instructions to the perpetrator or exercising direction or control, and if, as a result, the conduct of organs of the Respondent, having been the cause of commission of the genocide acts, constituted a violation of the internationals obligations” (ICJ, 2007, §397). The ICJ demonstrated the test to determinate if a person or group may be equated with a State organ, even if not having this “status” under internal law: is not necessary to prove a relationship of complete competence, but it has to be “proved that the person or group acted in accordance with the State’s instructions or under ‘effective control’” (ICJ, 2007, §400). The Court, yet, give emphasis to the fact that it has to “be shown that this ‘effective control’ was exercised” (ICJ, 2007, §400).

2.4.8 Reparations for Damages caused by a State’s Breach of an International Obligation

When a State breaches an international obligation, it must comply with some obligations toward the Victim State. First, the State responsible must cease the wrongful act, if it is still happening. Then, it shall offer guarantees that such wrongful acts will not happen again (Cassese 2005). Article 30, of the ILC Draft illustrates as follows:

Article 30
Cessation and non-repetition
The State responsible for the internationally wrongful act is under an obligation:
(a) to cease that act, if it is continuing;
(b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require (INTERNACIONAL LAW COMISSION, 2001).

Cessation of the conduct is the first requirement when trying to eliminate consequences of the wrongful act, followed by the reparation of damages (Harris 2010). If the State refuses to repair or to pay compensation to the extent required by the State that suffered the damages, the responsible State must consent to any peaceful attempt to settle the dispute made by the injured State (Cassese 2005). It is interesting to observe the Factory Chorzów case, settled in the Permanent Court of International Justice where the Court established:

The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law14 (PCIJ 1928, 47).

There are three forms of reparation stated in the Article 34 of the ILC Draft: restitution, compensation and satisfaction, which can be demand singly or in combination. All sorts of reparations are settled by the ILC Drafts.

In case of material damage, the most befitting kind of reparation is restitution, to the possible extent, as exposed in Article 35 of the ICL Draft:

Article 37
Satisfaction
1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.
2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.
3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State (International Law Commission, 2001).

14 See Factory at Chorzów case. Judgment of 13 September 1928 (including the text of the declarations of Judge de Bustamante and Judge Altamira).
2.4.9 Reparations for Victims of Grave Breaches of International Human Rights

The problem of reparations provided for grave violations of Humanitarian Law and International Humanitarian Law is present in the United Nations General Assembly (UNGA) Resolution 60/147 of 2005. According to this document, in cases of gross violations of International Humanitarian Law, provided by crimes under International Law, the State has the obligation to investigate and the duty to prosecute the author of these breaches.

Nonetheless, victims of violation have the right to effective and equal access to justice; prompt, adequate and effective reparation for the harm suffered and access to information regarding violations and reparation mechanisms. Regarding this resolution, the reparation must be proportional to the gravity of the violation and in accordance with domestic laws. It may be executed through restitution, compensation, rehabilitation (which includes medical and psychological treatments), satisfaction and, also, by guarantees of non-repetition of the wrongful act (UNGA, 2005).

2.5 Legal Precedents

2.5.1 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) – International Court of Justice

In this case, Bosnia and Herzegovina filed an application, on 20 March 1993, against Serbia and Montenegro, in face of genocide crimes committed by Serbians after the fragmentation of Yugoslavia. The applicant requested provisional measures ordering the Respondent to take, immediately, all the necessary actions to prevent commission of the crime of genocide. In fact, Bosnia and Herzegovina claimed that Yugoslavia, the antecessor of Serbia and Montenegro, its agents, public officials and surrogates violated articles of the Convention on the Prevention and Punishment of the Crimes of Genocide. Furthermore, the Applicant stood for its inherent right, under the Convention and the fact that the UNSC have not acted for preventing the acts of genocide, for self-defense in face of the attacks of Yugoslavia (ICJ 1993a).

The Court unanimously held that Serbia and Montenegro should immediately take measures to stop genocidal actions. In addition, unanimously, the Court declared that both States should not take any act that would result in aggravation or extension of the already existed dispute. Finally, by thirteen votes to one, the ICJ decided that Respondent should ensure that any group - military, paramilitary or irregular armed -, directed or supported by the State, would not commit, conspire to commit, direct or publicly promote any act of genocide or of complicity in this
kind of crime (ICJ 1993b).

In its judgment, the ICJ emphasized that, regarding the Convention on Prevention and Punishment of the Crime of Genocide, the obligation to punish the perpetrator and the obligation to prevent genocide are two distinct yet connected duties (ICJ 2007, 16). The Court found that Serbia did not commit genocide in violation of its obligations under the Convention. The Court expounded that the State did not conspire to commit or to incite genocide, as Serbia was not complicit in genocide and that the Respondent did not violate the obligation to prevent genocide. It was also recognized by the ICJ that, while failing to transfer Ratko Mladić, who was indicted for genocide and complicity in genocide by the International Criminal Tribunal for the Former Yugoslavia (ICTY), Serbia had violated its obligations under the Convention. Furthermore, the Court found that Serbia violated its obligations regarding the provisional measures ordered on 8 April 1992, not taking all measures to prevent genocide in Srebrenica in July 1995 (ICJ 2007, 20).

Finally, the Court decided that Serbia should take all the effective steps to transfer individuals accused of genocide or any related acts to the International Criminal Tribunal for the former Yugoslavia, and to fully cooperate with it. Hence, in accordance with the Court’s finding, it was not an appropriate payment of compensation for the alleged Serbian violations of the committed acts, but satisfaction was considered applicable, since the judgment by itself was considered a form of reparation (ICJ 2007, 21-22).

2.5.2 Trial of Pakistani Prisoners of War (Pakistan v. India)

The Pakistani Prisoners of War case relates to the Indo-Pakistani War of 1971\(^\text{15}\). On 11 May 1973, Pakistan filled an Application, directed to the ICJ, against India, claiming that the Government of India had violated articles of the Convention on the Prevention and Punishment of the Crime of Genocide. The Applicant alleged that a large number of Pakistanis became prisoners of war of India, after the surrender of the Eastern Command of the Pakistan army. During the occupation, India would have encouraged and helped the East Pakistan to declare its

\(^{15}\) The Indo-Pakistani War of 1971 was the third war between India and Pakistan. The reason for this war was different from the two previous conflicts. In 1970, Pakistan failed trying to accommodate the demands for autonomy of East Pakistan. For that reason, in 1971, Pakistan’s armed forces tried to defeat the resistance movement. Because of this armed conflict, a lot of east Pakistanis died. Nevertheless, India was organizing, training and providing sanctuary to the Liberation Force in Bengali, the East Pakistani armed resistance. By that reason, and for bilateral attacks, the fighting spread to West Pakistan and resulted in a state of war between India (which supported the independence of East Pakistan) and Pakistan. On 6 December 1971, East Pakistan became an independent country named Bangladesh (BBC 2002).
intention to prosecute a number of Pakistani prisoners of war under Indian custody. The allegations for this trial were the commitment of genocide acts and crimes against humanity (ICJ 1973a). At this specific point, the Government of Pakistan claimed that the jurisdiction over nationals related to genocide crimes committed in Pakistani territory, alleged by Bangla Desh, would be of Pakistan not of other State.

Among its claims, Pakistan asked the Court to declare that no other Government or authority is competent to exercise jurisdiction over the one hundred and ninety-five Pakistani nationals in Indian custody, accused of genocide acts in Pakistani territory. Furthermore, as the allegations against the abovementioned war prisoners related to genocide acts, they cannot be misunderstood with the concepts of “crime against humanity” (ICJ 1973a, 7). With the Application, Pakistan filled its request for the indication of interim measures of protection, where the State argued to the Court that the process of repatriation of war prisoners and civilian internees could not be harmed for the charges of genocide. Moreover, it stated that those individuals under Indian custody could not be transferred to Bangladesh for trial until the pronouncement of the Court in relation to Pakistan’s claim to exclusive jurisdiction (ICJ 1973b).

The government of India declined to consent to the jurisdiction of the ICJ in the case, so the Court could not proceed with the case, because there was no legal basis for its jurisdiction in the case. In the judgment for the request of the indication of interim measures of protection, the Court, by eight votes against four, decided that the written proceeding should be first addressed to the question of the jurisdiction of the Court in this case (ICJ 1973c, 8). So the ICJ fixed the dates for the Memorial of the Government of Pakistan and the date for the Counter-Memorial of the Government of India.

Finally, the Court had removed the case from the list, regarding a letter from the Agent of Pakistani, where he referred negotiations between Pakistan and India, which had resulted in an agreement signed in New Delhi on 28 August 1973. By this letter, the Government of Pakistan officially requested the discontinuance of proceedings in the case (ICJ 1973d, 5). Even though the case was not about violations related to acts of genocide committed by the Respondent, but rather to the jurisdiction to hold to trial the responsible individuals for genocide action, the preliminary discussion between the judges about the jurisdiction of the Court in the case was important, because it opened to the international community the urge to discuss the issue of jurisdiction of the Court in cases related to genocide acts.

2.5.3 ICTY: Prosecutor v. Popović et Al., IT-05-88, 10 June 2010

The Popović et al. case, initiated by Prosecutor of the International Criminal
Tribunal for the former Yugoslavia in 2009, concerned seven former high-ranking Bosnian Serb military and police officials who were convicted of a range of crimes, including genocide, committed in 1995 in relation to the fall of the United Nations protected enclaves of Srebrenica and Žepa, eastern Bosnia, which held tens of thousands of Bosnian Muslim refugees. After the fall of Srebrenica in July 1995, approximately 8,000 men were separated from the women, children and elderly, and transported to locations where they were detained and killed, which is deemed the worst massacre of the Bosnian war (Simons 2010).

The two defendants convicted of genocide were Colonels Vujadin Popović and Ljubisa Beara. The three-judge panel at The Hague ruled that the definition of genocide as of the 1948 United Nations Resolution had been met for (i) with intent to destroy a part of the Bosnian Muslim people as a national, ethnical, or religious group, Popović and Beara killed members of the group by planned and opportunistic summary executions and (ii) with the same intent, they caused serious bodily or mental harm to both female and male members of the Bosnian Muslim populations of Srebrenica and Žepa, including the separation of able bodied men from their families and the forced movement of the population from their homes to areas outside the Republika Srpska (Prosecutor v. Popović et al. 2010).

2.5.4 ICTR: Prosecutor v. Jean Kambanda, ICTR 97-23-S, 4 September 1998

This case is significant in regard of the unprecedented acknowledgment of the direct participation of a head of government in genocide. Jean Kambanda was Prime Minister of Rwanda during the period of mass violence that occurred there in 1994, whereby nearly a million Tutsis and moderate Hutus were massacred by Hutu extremists (BBC 2011). Kambanda demonstrated his involvement in direct and public incitation to commit such massacres by supporting broadcasted calls to murder and by the distribution of weapons and ammunition to militias (Swaak-Goldman 2001).

The former Prime Minister was arrested in Nairobi, Kenya on 18 July 1997 and transferred to the International Criminal Tribunal for Rwanda on the same day. He was held responsible for the killing of and the causing of serious bodily or mental harm to members of the Tutsi population with intent to destroy, in whole or in part, an ethnic or racial group, as such, and thereby was convicted of committing genocide, stipulated in Article 2(3)(a) of the Statute of the ICTR as a crime, and attributed to him by virtue of Article 6(1) and 6(3), and punishable in reference to Articles 22 and 23 of the Statute. On 4 September 1998, Kambanda was condemned to life imprisonment (Prosecutor v. Jean Kambanda 1998).
This case concerns Mr Jorgic’s complaint about his conviction by the German courts, notably for having committed genocide during the ethnic cleansing which took place in the northern Bosnia’s region of Doboj between May and September 1992. He alleged, in particular, that the German courts had not had jurisdiction to convict him and that their wide interpretation of his crime had no basis in German or international law (Jorgic v. Germany 2007).

As regards the definition of genocide, the German trial court ruled that the expression “destruction of a group” used in the German Criminal Code meant the group’s destruction as a social unit in its distinctiveness and particularity and its feeling of belonging together and did not require its destruction in a biological-physical sense. It concluded that the applicant had acted with intent to destroy a group of Muslims in the north of Bosnia. Whilst many authorities had favored a narrow interpretation of the crime of genocide, there had already been several authorities which had interpreted it in a wider way, in common with the German courts. The European Court of Human Rights adjudged that the national courts’ interpretation of the crime of genocide could reasonably be regarded as consistent with the essence of that offence and reasonably foreseeable by the applicant at the material time (Cassese et al. 2010, 229). The ECHR ultimately found that the applicant was lawfully detained after conviction “by a competent court” and also noted that he was found guilty of acts of a considerable severity and duration (Jorgic v. Germany 2007).

3 SUBMISSIONS

The Republic of Croatia requests this Court to adjudge and declare that:

a) The Court has jurisdiction to judge the dispute between the Republic of Croatia and the Federal Republic of Yugoslavia regarding Yugoslavia’s submission to prosecute the responsible individuals for the genocide acts;

b) The Federal Republic of Yugoslavia has violated article 2 of the Convention of Prevention and Punishment of the Crime of Genocide, when people whose conduct had killed, cause deliberate body or mental harm to member of the Croat national or ethnical group, deliberately affected on the conditions of life of Croatians and imposed measures of birth control;

c) The Federal Republic of Yugoslavia, when complied with the conducts intended to commit the acts of genocide abovementioned, has violated article 3 of the Convention;
d) The Federal Republic of Yugoslavia, even conscious of the possibility of the genocide acts, did not take any action to prevent them, violating article 1 of the Convention;

e) The Federal Republic of Yugoslavia failed, violating articles 1 and 4 of the Convention, to bring to trial responsible individuals for the acts of genocide and of incitement of genocide;

f) Nevertheless, in face of its responsibilities, the Federal Republic of Yugoslavia is under the subsequent obligations:

(1) To take the effective actions to submit to trial those citizens or other individuals, within its jurisdiction, suspects of having committed the genocide acts or any other act related to it, in particular Slobodan Milošević, former president of RFY, and to ensure that these people will be punished if convicted;

(2) To return any items of cultural property, and

(3) To pay reparations for damages to Croatians and their properties, as to Croatia for damages to its economy and environment.

The Federal Republic of Yugoslavia asks this Court to adjudge and declare that (FEDERAL REPUBLIC OF YUGOSLAVIA, ICJ, 2002):

a) there is a lack of jurisdiction before the claims brought by the Republic of Croatia against Yugoslavia;

Or, alternatively, declare that

b) statements based on omissions or acts that happened before the Federal Republic of Yugoslavia had turned into the Socialist Federal Republic of Yugoslavia are not valid. It means that the Federal Republic of Yugoslavia can’t be responsible for acts committed before 27 April 1992, when the FRY was proclaimed;

c) the possible recognition of the Court is inadmissible, to take effective steps to submit Mr. Milošević to trial, as well as other responsible individuals; to declare the need of providing information concerning the situation and location of missing Croatian citizens and of the return of cultural property of Croatia.

REFERENCES


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