Recent Developments

An Impossible Standard of Intent?: Croatia v. Serbia at the International Court of Justice. By Tara Zivkovic

In 1999 the government of Croatia filed a lawsuit at the International Court of Justice (ICJ) against Serbia for acts of genocide committed between 1991 and 1995. Ten years later, Serbia retaliated with a countersuit arguing that Croatia had also violated the 1948 Genocide Convention for crimes committed against Serbian populations during the Balkan wars in 1995. In February of this year—sixteen years after the original complaint was filed—the ICJ unceremoniously dismissed both claims.

The ICJ’s verdict in Croatia v. Serbia was entirely expected. International legal experts, as well as the countries themselves, understood from the beginning that their cases lacked a viable legal basis, mainly due to the highly demanding standard for establishing ‘genocidal intent’ of the perpetrator under international law. In proving intent, consistent with Article 2 of the Genocide Convention, international courts have held that it is not sufficient to establish that the offender meant to engage in an act of genocide; a prosecutor must also demonstrate that the offender engaged in the conduct with the specific intent of destroying “in full or in part, a national, ethnical, racial or religious group as such.” While the legal definition of genocide therefore requires both a physical (actus reus) and mental (mens rea) element, proving the latter—known as the dolus specialis, or the “specific intent” requirement—is exceptionally difficult. Indeed, the ICJ has found only a single case of genocide from the Balkan wars: the massacre of 8,000 Muslims in Srebrenica.

1. The International Court of Justice (ICJ) is the primary judicial organ of the United Nations.
With a weak legal basis, the *Croatia v. Serbia* case, stretching over a
decade, was instead driven primarily by political considerations: a significant
portion of victims in both countries have yet to receive any legal recognition
for the crimes perpetrated against them. Politicians from each country, by
pursuing an ongoing trial at the ICJ, were able to claim to their local
populations that they were engaging in efforts of post-conflict justice, without
doing much of anything. The case therefore serves as an important reminder:
international courts can sometimes be used as costly and unnecessary theaters
for political problems that should instead be dealt with domestically.

Although the recent ICJ judgment is in many ways anti-climactic, it still
presents a valuable opportunity to review the legal standing of genocide. I will
proceed by examining the necessary elements for substantiating a claim of
genocide under the Genocide Convention, paying specific attention to the
demanding requirement of *dolus specialis* as discussed by the majority opinion
in the *Croatia v. Serbia* decision. I will then consider whether genocide has
actually served as a productive legal category for addressing the atrocities
committed by governments during the Balkan wars.

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The Genocide Convention makes clear that genocide is first and foremost
a crime of intent. Indeed, the “intent to destroy” requirement is directly related
to the specific wrong that genocide—as opposed to other crimes against
humanity—attempted to capture. Raphael Lemkin, a Polish lawyer, coined the
term in 1943 based on his belief that groups themselves are essential to
humanity, beyond the individuals that comprise them. As David Luban, a
scholar of international criminal law and legal ethics, aptly describes it: “to
annihilate a group is a crime that diminishes humanity over and above the loss
of the slaughtered individuals.”

Particularly striking is the fact that genocide is a crime whose legal
definition differs substantially from its common usage. The systematic killing
of an ethnic population, usually considered an obvious case of genocide, cannot
be classified as such absent the *dolus specialis* requirement. This is a subtle but
important legal distinction and is critical to understanding why the claims
brought by the two countries in *Croatia v. Serbia* were tenuous from the start.
The main argument dismissing both genocide claims rests precisely on the
distinction of genocide and ethnic cleansing: with no proof of genocidal intent,
acts of ethnic cleansing can only legally be classified as crimes against
humanity, and are subsequently outside of the jurisdiction of the ICJ in this
specific case.
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While acts of ethnic cleansing alone do not constitute genocide under the Convention, they can be evidence of the *actus reus* of genocide. Indeed, in the *Croatia v. Serbia* opinion, the Court acknowledged that genocidal acts by Serbia had been established in certain instances against the Croats. Yet the Court reiterated that forced displacements of an ethnic group only constitute genocide if it is also proven that the displacements “were calculated to bring about the physical destruction of the group.” The Court posited instead that the campaigns of mass extermination were committed for other purposes—rendering certain regions ethnically homogenous, for example—rather than for the specific intent of destroying an ethnic group.

Legal debate has centered on the necessary standard of proof for establishing *dolus specialis*, particularly concerning how standards of proof might differ for states as compared to individuals. While the standard of proof for individuals is supported by robust case law coming from various international tribunals, the ICJ has had relatively few opportunities to clarify the standard for *dolus specialis* as it pertains to states. In the previous genocide case from the Balkan wars, *Bosnia v. Serbia*, the ICJ evaded the task of providing a definite *mens rea* standard for state intent. Instead, the Court argued that although genocide had been conclusively committed in Srebrenica, there was no evidence that the government of Serbia was aware of the genocidal intent of the Bosnian leadership responsible for the massacre. Lacking the knowledge requirement, the Court found there was no reason to address the *mens rea* element, and ruled that Serbia was not responsible for the genocide in Srebrenica.

Like the *Bosnia v. Serbia* judgment, the ICJ in *Croatia v. Serbia* does little to elucidate the legal uncertainty that surrounds the standard of proof for *dolus specialis* as it applies to states. The opinion instead follows the standard advanced by previous case law, holding that in the absence of direct evidence, “specific intent” is most likely established through inference, for states and individuals alike. In line with judgments from the International Criminal Tribunal for the Former Yugoslavia (ICTY), the ICJ argues that the inference of genocidal intent is proven if it is the “only reasonable inference” that can be drawn from the pattern of conduct. In other words, if a given pattern of

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15. *Croatian Genocide*, ¶ 157, 158, 161, 166.
16. *Id.* ¶ 295, 360, 401.
17. *Id.* ¶ 160.
18. *Id.* ¶ 426.
19. SCHABAS, supra note 7.
21. *Id.* at 179.
22. *Croatian Genocide*, ¶ 147.
23. *Id.* ¶ 146.
conduct potentially gives rise to more than one inference, genocidal intent cannot be established.

The “only reasonable inference” standard is a stringent threshold, difficult to prove both in cases in which the perpetrator is an individual, and arguably even more challenging concerning the actions of a state—by nature, a complex amalgam of different institutions and people. Indeed, international courts dealing with the Balkan wars have found “genocidal intent” only in four cases, all against individuals. A state has yet to be convicted.

This is troubling for many reasons, some of which were addressed in the dissenting opinion of *Croatia v. Serbia* by the Brazilian Judge Cançado Trindade. In his opinion, Judge Trindade argues that the ICJ has pursued “too high a standard of proof for the determination of the occurrence of genocide.” This makes it nearly impossible for a state to be convicted—a problem, given that genocide, by its nature and sheer scope, is a crime more likely committed by states rather than by individuals. Too stringent a standard for establishing genocidal intent allows egregious state behavior to go unpunished. Under such circumstances, the Genocide Convention will effectively lose its power, giving rise to a world where “[l]awlessness would replace the rule of law.”

The real legal puzzle presented in the *Croatia v. Serbia* decision is this: as parties to the 1948 Genocide Convention, Croatia and Serbia can only be convicted under international law for acts of genocide and not for crimes against humanity. There is subsequently a significant lacuna in international law in which crimes committed by states, such as mass extermination, widespread rape, or ethnic cleansing, fall just below the standard of genocide and will therefore go unpunished. To resolve this problem, certain academic commentators, as well as the dissenting opinion of Judge Cançado Trindade, argue for a looser definition of genocide as a means to hold states accountable for crimes against humanity that would otherwise go unaddressed. Opponents of this view believe that genocide, precisely due to its uniqueness, should be difficult to prove, and therefore only applicable in the most extreme cases. Thus far, the ICJ’s decisions seem to be in support of this latter view.

Law is a powerful reconciliation mechanism for recognizing and publicly affirming individual losses. The case of *Croatia v. Serbia* demonstrates how
the unrelenting pursuit for the legal recognition of genocide—a crime meant only to apply in the smallest subset of cases—can actually be antithetical to the greater process of transitional justice. Genocide should not be employed to shoulder the burden of addressing atrocities that cannot legally be classified as such. As evidenced by the *Croatia v. Serbia* decision, law cannot be bent to solve what are largely political problems. Rather than getting caught up in a lengthy, meritless trial at the ICJ, doomed from the beginning, the respective governments would have done better to engage in bilateral initiatives of post-conflict justice. Pursuing this avenue would have given rise to a reconciliation process between Croatia and Serbia that would certainly be more legally sound, and possibly more expedient, than the one currently in place.

*HISTORY AFTER GENOCIDE AND MASS VIOLENCE* (1998) (exploring the tension between post-conflict policy approaches that prioritize the desire to punish perpetrators and those that focus on reconciliation).