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## Between Light and Shadow: The International Law Against Genocide in the International Court of Justice's Judgement in Croatia v. Serbia (2015)

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# BETWEEN LIGHT AND SHADOW: THE INTERNATIONAL LAW AGAINST GENOCIDE IN THE INTERNATIONAL COURT OF JUSTICE'S JUDGMENT IN *CROATIA V. SERBIA* (2015)

Ines Gillich\*

## ABSTRACT

This Article identifies and critically analyzes the contributions the International Court of Justice (ICJ) made to the international law against genocide via the judgment in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* of February 3, 2015. This Article elaborates on the concept of genocide—a term that has originally been coined after the Armenian Genocide and the Holocaust—and the protection against this “crime of crimes” under international law. The analysis section of this Article refers to the historical and procedural context of the dispute between Croatia and Serbia in the case, which originates from the violent conflict between the two states following the dissolution of the former Socialist Federal Republic of Yugoslavia (SFRY). The main section of this Article criticizes the most important aspects of the ICJ’s judgment, especially the Court’s assessment of the constituent elements of genocide, the objective and the subjective components, while also taking into account the ICJ’s prior judgment in the *Bosnian Genocide Case* of 2007. The Article concludes that the ICJ’s reasoning is in line with its prior

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judgment. However, the Article criticizes that the Court has missed opportunities to clarify on questions of jurisdiction and of its relationship with International Criminal Tribunals. It also failed to shed light on the interpretation of the crime of genocide as an international wrongful act of states with respect to many important and highly controversial issues, thus missing the opportunity to establish clearer guidelines for many disputed aspects in the determination of genocide in future disputes.

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## I. Introduction

On February 3, 2015, the International Court of Justice [hereinafter ICJ] delivered its judgment in the case brought by Croatia against Serbia concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide.<sup>1</sup> The ICJ rejected—by fifteen votes to two—Croatia’s claim that Serbia was responsible for committing genocide during the armed conflict between Croatian and Serb forces in regions that are now part of Croatia’s territory between 1991 and 1995. The ICJ also rejected Serbia’s counter-claim that Croatia, in turn, should be held responsible for committing genocide during a military operation in 1995. The ICJ concluded that, even though the acts committed by both parties fulfilled the physical element of genocide (*actus reus*), the mental element (*mens rea*)—which requires a specific intent to destroy, in whole or in part, a particular group—was lacking on the side of both states.

Even though the decision technically only binds the two parties, its significance reaches far beyond the dispute. This is because genocide cases against states (unlike cases against individual perpetrators) are seldom brought before international courts. This case, therefore, provided the ICJ with the opportunity to further sharpen the contours of genocide under the Genocide Convention.<sup>2</sup> Grabbing this chance, the ICJ meticulously elaborated on the constituent elements of genocide as well as on important questions of proof and evidence. In addition to the difficulties in determining the substantive elements of this international crime, a jurisdictional problem further complicated the case: the ICJ was asked to assess acts that had been committed before

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<sup>1</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), Merits, 2015 I.C.J. Rep. 118 (Feb. 3), <http://www.icj-cij.org/docket/files/118/18422.pdf> [hereinafter Judgment].

<sup>2</sup> Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

Serbia became a party to the Genocide Convention. As a general principle, the Genocide Convention binds only state parties with respect to acts that took place after the date when the state becomes a party to the Convention.<sup>3</sup> Moreover, the Convention not only sets out the substantive legal obligations with respect to genocide but also provides the only legal basis for the ICJ's jurisdiction.<sup>4</sup>

The following analysis first provides an insight into the characteristics of genocide under international law, in particular under the Genocide Convention. The Article then comments on the most important aspects of the judgment and discloses the highlights and flaws in the Court's reasoning. The Article argues strength of the judgment lies in the Court's systematical assessment of the objective and subjective elements of genocide. Another positive feature is that the Court's interpretation of main elements of genocide is in line with its prior judgment on genocide in 2007 and so contributes to consistency and objectivity. One of the main flaws of the judgment is the ICJ's treatment of the jurisdictional challenges concerning acts that took place before the respondent state Serbia became a party to the Genocide Convention. The Court's arguments in favor of establishing jurisdiction are not convincing. In particular, the Court violates the principle of state consent upon which jurisdiction is based, because the Genocide Convention did not bind Serbia at the time when some of the alleged acts took place. The Article then goes on to criticize the ICJ's vast reference to the jurisprudence of International Criminal Tribunals and prosecutorial decisions. These references are problematic because International Criminal Tribunals are only concerned with the international criminal responsibility of individuals for genocide. The case before the ICJ, in contrast, concerns an international wrongful act of a state, which is structurally and substantively different with respect to its interpretation of the elements of genocide.

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<sup>3</sup> *Id.* at art. XIII (detailing terms of entry of the Convention into force with respect to signatories thereto).

<sup>4</sup> *Id.* at art. IX ("Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention . . . shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.").

The Article also argues that the ICJ interprets some elements of genocide too narrowly without the need to do so. In addition, the Court has failed to shed light on the interpretation of the crime of genocide as an international wrongful act of states with respect to many important and highly controversial issues, thus missing the opportunity establish clearer guidelines for many disputed aspects in the determination of genocide in future cases.

## II. Genocide under international law

Genocide is often called the “crime of crimes”<sup>5</sup> because it retains—apart from legal relevance—great symbolic significance. The use of the word genocide is associated with a certain moral stigma. It immediately invokes images of horrors and cruelties. This is why states either deliberately employ or studiously avoid using the word genocide in their international relations.<sup>6</sup>

### A. Origins of the term ‘genocide’

The polish legal scholar Raphael Lemkin invented the term “genocide” in 1944.<sup>7</sup> He composed it from the Latin “*gens*,

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<sup>5</sup> See Prosecutor v. Kambanda, Case No.: ICTR 97-23-S, Judgment and Sentence, ¶ 16 (Sept. 4, 1998), [https://www1.umn.edu/humanrts/instree/ICTR/KAMBANDA\\_ICTR-97-23/KAMBANDA\\_ICTR-97-23-S.html](https://www1.umn.edu/humanrts/instree/ICTR/KAMBANDA_ICTR-97-23/KAMBANDA_ICTR-97-23-S.html); Prosecutor v. Serushago, Case No. ICTR 98-39-S, Judgment and Sentence, ¶ 15 (Feb. 5, 1999), [https://www1.umn.edu/humanrts/instree/ICTR/SERUSHAGO\\_ICTR-98-39/SERUSHAGO\\_ICTR-98-39-S.htm](https://www1.umn.edu/humanrts/instree/ICTR/SERUSHAGO_ICTR-98-39/SERUSHAGO_ICTR-98-39-S.htm); WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES 227 (2d ed. 2009) (calling genocide the “crime of crimes” without implying that there is a hierarchy of international crimes) [hereinafter CRIME OF CRIMES].

<sup>6</sup> See Jim Acosta & Kevin Liptak, *Obama won't call it Armenian 'genocide' on 100th anniversary of atrocity*, CNN (Apr. 21, 2015, updated 9:08 PM ET), <http://www.cnn.com/2015/04/21/politics/obama-armenian-genocide-100th-anniversary> (reporting that, in the course of the public commemoration of the 100th anniversary of the Armenian Genocide, politicians deliberately avoided the term genocide to describe the atrocities committed by the Ottoman Empire to the Armenian population during WWI).

<sup>7</sup> See RAPHAEL LEMKIN, AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS 91-93 (1944) (providing an extensive legal analysis of German rule in countries occupied by Nazi Germany during the course of World War II along with the definition of the term genocide) [hereinafter AXIS RULE].

*gentis*” or the Greek root “*génos*”, meaning “birth, race, stock, kind” and from the Latin ending *-cidium*, which means cutting or killing.<sup>8</sup> Lemkin had the experience of the Assyrian massacre committed by the Ottoman army between 1914-1923 and in 1933 and the Holocaust committed by Nazi Germany during WWII in mind.<sup>9</sup> Defining genocide, Lemkin wrote:

Generally speaking, genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be the disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups.<sup>10</sup>

It is interesting to note that even though the Charter of the International Military Tribunal for Nuremberg mentions the term genocide and, moreover, some prosecutors used it in their Statements of the Offense, the Nuremberg Tribunal’s final judgment rather employs the term “crimes against humanity” and not genocide to deal with the persecution and physical extermination of national, ethnic, racial and religious minorities.<sup>11</sup>

## B. Genocide as a concept of international law

In the aftermath of the Nuremberg Trials, the UN General Assembly finally took up Lemkin’s idea of genocide as an international crime and passed a resolution calling for the preparation of a convention on genocide.<sup>12</sup> The *Convention on the Prevention and Punishment of the Crime of Genocide* was signed on December 9, 1948 and entered into force on January

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<sup>8</sup> See ANTONIO CASSESE ET. AL., INTERNATIONAL CRIMINAL LAW: CASES AND COMMENTARY 200 (2011) (explaining the etymology of the term genocide).

<sup>9</sup> RAPHAEL LEMKIN, LEMKIN ON GENOCIDE vii (Stephen L. Jacobs ed., 2012).

<sup>10</sup> LEMKIN, AXIS RULE, *supra* note 7, at 79.

<sup>11</sup> SCHABAS, CRIME OF CRIMES, *supra* note 5, at 36-42.

<sup>12</sup> UN GA Res. 96 (I), UN Doc. A/RES/96(I) (Dec. 11, 1946).

12, 1951.<sup>13</sup> Its current number of 146 member states evidences the international community's overwhelming condemnation of genocide.<sup>14</sup> The Genocide Convention is the first international treaty to embrace the idea of genocide as a crime under international law.<sup>15</sup> The preamble of the Convention makes this clear when stating that the state parties consider "*genocide . . . a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world.*"<sup>16</sup> Article I of the Convention also confirms "*that genocide, whether committed in time of peace or in time of war, is a crime under international law*" and establishes the states parties' obligation to "*undertake to prevent and to punish*" genocide.<sup>17</sup> Article II is the heart of the Convention, because it defines genocide as

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.

Article III then lists five prohibited modalities of the commission of genocide (genocide itself, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide).<sup>18</sup>

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<sup>13</sup> Genocide Convention, *supra* note 2, at 278.

<sup>14</sup> For a list of state parties *see* International Committee of the Red Cross, Convention on the Prevention and Punishment of the Crime of Genocide 9 December 1948, TREATIES, STATE PARTIES AND COMMENTARIES, [https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xpviewStates=XPages\\_NORMStatesParties&xp\\_treatySelected=357](https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xpviewStates=XPages_NORMStatesParties&xp_treatySelected=357) (last visited Dec. 1, 2015).

<sup>15</sup> Genocide Convention, *supra* note 2, at art. 1.

<sup>16</sup> Genocide Convention, *supra* note 2, at Preamble.

<sup>17</sup> *Id.* at art. 1.

<sup>18</sup> *Id.* at art. 1.

Finally, Article IX contains an important jurisdictional clause by which the states parties accept the compulsory jurisdiction of the ICJ with respect to “*disputes relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III.*”<sup>19</sup>

Genocide can be committed both in times of peace and in times of war.<sup>20</sup> It is also prohibited under customary international law and the prohibition is generally deemed to be *ius cogens*, a norm of a higher rank, from which no derogation is allowed.<sup>21</sup> It is noteworthy that the prohibition of genocide under customary international law, however, may differ from its contents under treaty law.<sup>22</sup>

Genocide is closely related to the right to life, a fundamental human right which is protected in many international human rights conventions and declarations. Consequently, genocide is also a matter of international human rights law.<sup>23</sup> Nonetheless, a structural difference exists in that

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<sup>19</sup> *Id.* at art. IX.

<sup>20</sup> Genocide Convention, *supra* note 2, art. 1 (affirming genocide can be committed “in time of peace or in time of war”). On the relationship between genocide and the laws of war, *see* the discussion below at IV B 6.

<sup>21</sup> *See* Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. Rep. 15, 23 (May 28), <http://www.icj-cij.org/docket/files/12/4283.pdf> [hereinafter Reservations] (contemplating that “underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation”).

<sup>22</sup> This issue has not been resolved yet in practice or in literature. *See generally* JOHN DUGARD, *Retrospective Justice: Law and the South Africa Model*, in TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES 273 (James McAdams ed., 1997) (noting that “it is by no means certain that the Genocide Convention . . . has itself become part of customary international law.”).

<sup>23</sup> *See e.g.* International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171, art. 6(2) (“In countries which have not abolished the death penalty, sentence of death may be imposed . . . not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide”); 999 U.N.T.S. 171, art. 6(3) (“When deprivation of life constitutes the crime of genocide, it is understood that nothing in this Article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.”).

human rights treaties are in principal concerned with the rights of a single individual whereas genocide is associated with the right to life of particular human groups. Moreover, genocide is not only deemed as an offense against the protected groups as such, but also as an offense against the entire international community (*erga omnes*).<sup>24</sup>

Another important distinction to be made is between genocide as an international wrongful act of states leading to state responsibility on the one hand and genocide as an international crime leading to individual criminal responsibility on the other hand. Genocide is warranted as an international crime for which individual persons may be prosecuted in the statutes of the International Criminal Tribunal for Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC). These statutes have in common that they reproduce the definition of genocide from Article II of the Genocide Convention.<sup>25</sup> International criminal law distinguished genocide from crimes against humanity, such as persecution, by its specific “intent to destroy” a protected group in whole or in part. This specific mental element in the definition of genocide demonstrates the elevated wrongfulness and seriousness of this crime.<sup>26</sup>

The different legal bases—international criminal law and international public law—also lead to substantial differences between the genocide as an individual crime and genocide as an international wrongful act of a state. International legal scholarship still falls short of addressing many of these differences in detail. One difference may arise regarding the

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<sup>24</sup> See Reservations, *supra* note 21, at 23-24 (discussing the genesis of the concept of obligations *erga omnes* for *jus cogens* crimes).

<sup>25</sup> See Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 4, amended by S.C. Res. 1411, U.N. Doc. S/RES/1411 (2002); Statute for the International Criminal Tribunal for Rwanda, art. 2, S.C. Res. 955, U.N. SCOR, U.N. Doc. S/RES/955 (1994); Statute of the International Criminal Court, art. 6, U.N. Doc. A/CONF. 183/9 (entered into force July 1, 2002) (sanctioning the crime of genocide).

<sup>26</sup> See generally KAI AMBOS & STEFAN WIRTH, *Sentencing, Cumulative Charging, Genocide and Crimes Against Humanity*, in ANNOTATED LEADING CASES: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 1994–1999, VOL. II 703 (André Klip & Goran Sluiter eds., 2001) (commenting on the structure of genocide in comparison to other crimes).

specific genocidal intent requirement: since a state as such cannot commit genocide itself, but only through individuals, genocide as a state act necessarily raises questions of attribution. Therefore, as a wrongful act of states, genocide, either requires the existence of a genocidal state policy or a pattern of widespread and systematic violence against a protected group from which genocidal intent can be inferred. In contrast, the ICJ has held that the individual crime of genocide can be committed even in absence of genocidal policy of the state or a collective act of violence.<sup>27</sup>

### III. The ICJ's treatment of challenges to its jurisdiction

The ICJ only rarely has occasion to decide disputes concerning genocide. Apart from the present case, the ICJ's judgment in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* of 2007 is particularly relevant. In that case the Court found for the first time a state (the former state union of Serbia and Montenegro) to be in breach of the Genocide Convention and, moreover, made important remarks on the interpretation of the constitutive elements of genocide.<sup>28</sup> One of the reasons why the ICJ is only rarely concerned with cases of genocide is its limited jurisdiction. Unlike the obligatory jurisdiction of national courts, jurisdiction of international courts is based on the consent of the states.<sup>29</sup> This means that states have to

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<sup>27</sup> Cf. Paola Gaeta, *On What Conditions Can a State Be Held Responsible for Genocide?*, 18 EUR. J. INT'L 631, 631 (2007), <http://www.ejil.org/pdfs/18/4/236.pdf> (arguing that the crime of genocide can be committed regardless of the existence of a state genocidal policy, whereas, in contrast, the state's international responsibility necessarily requires such a policy).

<sup>28</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro)*, 2007 I.C.J. 43 (Feb. 26), <http://www.icj-cij.org/docket/files/91/13685.pdf> [hereinafter *Bosnia Judgment*]; see generally Claus Kress, *The International Court of Justice and the Elements of the Crime of Genocide*, 18 EUR. J. INT'L 619 (2007), <http://www.ejil.org/pdfs/18/4/238.pdf> (criticizing the Bosnia Judgment) [hereinafter *Elements of Genocide*].

<sup>29</sup> *Status of Eastern Carelia Case, Advisory Opinion*, (1923) P.C.I.J. Ser. B., No. 5, at 27 ("[i]t is well established in international law that no State can, without its consent, be compelled to submit its disputes . . . either to

agree to the ICJ's judicial supervision.<sup>30</sup> Jurisdiction in the present case was based on Article 36(1) of the ICJ Statute, which provides that "the jurisdiction of the Court comprises all matters specially provided for in treaties and conventions in force."<sup>31</sup> Article IX of the Genocide Convention serves as a jurisdictional clause.

A major admissibility problem in the case under analysis arose because the allegations made by Croatia concerned acts that had been committed before Serbia became a party to the Genocide Convention and, therefore, become bound by the obligation not to commit genocide and by the jurisdictional clause of Article IX. This issue was not problematic in the former case, the Bosnian Genocide Case of 2007, because in that case the allegations concerned only acts committed after the Serbia acceded to the Genocide Convention. In order to better understand this problem, some remarks on the historical and procedural background of the dispute between Croatia and Serbia need to be made.

#### A. Historical Background: the break-up of the SFRY

The allegations raised by Croatia concern events that took place in the aftermath of the break-up of the Socialist Federal Republic of Yugoslavia (SFRY) in the early 1990s. Following violent political and social tensions, Slovenia, Croatia, Bosnia and Macedonia declared their independence from the SFRY and became independent states between 1991 and 1992. Croatia, Slovenia, and Bosnia and Herzegovina were admitted as UN member states on 22 May 1992, while Macedonia was admitted as a UN member state on 8 April 1993.<sup>32</sup>

On 27 April 1992, Serbia and Montenegro, formed the union of the Federal Republic of Yugoslavia (FRY), which

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mediation or to arbitration, or to any other kind of pacific settlement"); *see also* Treatment in Hungary of Aircraft and Crew of United States of America, (U.S. v. Hungary), Removal from the list, Order, 1954 ICJ Rep 103 (Jul. 12).

<sup>30</sup> *See* Statute of the International Court of Justice, art. 36, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 (entered into force Oct. 24, 1945) (listing the different forms in which consent may be given).

<sup>31</sup> *Id.*

<sup>32</sup> Press Release, United Nations, United Nations Member States, No. ORG/1469 (Jul. 3, 2006), <http://www.un.org/press/en/2006/org1469.doc.htm>.

would be renamed into Serbia and Montenegro later in 2003, gained sovereignty. At first, the FRY claimed to be the (only) legal continuator of the former SFRY, and not merely—like the other entities—a successor state of the SFRY.<sup>33</sup> Being a legal continuator would have meant that the FRY would have maintained the identical legal personality, and thus would have automatically possessed all existing rights and obligations of the SFRY. In contrast, the FRY, as a mere successor state, would have to be treated as an entirely new state. As a consequence, it would not have automatically inherited all the rights and obligations of the prior SFRY. The other ex-Yugoslav States and the international community—though not unequivocally—rejected the FRY's identity claim and requested the FRY to apply anew for UN Membership.<sup>34</sup> After having done so, the FRY was admitted to the United Nations on November 1, 2000.<sup>35</sup> In 2006, Montenegro seceded from the state union to become an independent state while Serbia continued the legal personality of the FRY (i.e. Serbia was undisputedly regarded as being identical with the former FRY).<sup>36</sup>

#### B. Procedural history of the case

On July 2, 1999, Croatia filed an application with the ICJ against the FRY alleging violations of the Genocide Convention that took place between 1991 and 1995. On November 18, 2008, the ICJ rendered a decision on preliminary objections raised by Serbia against the Court's jurisdiction. Serbia had raised the objections

- (1) that the ICJ lacks jurisdiction over the claims brought against the FRY,

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<sup>33</sup> Statement of 27 April 1992 by the Joint Session of the SFRY Assembly, the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro, U.N. Doc. A/46/915, Ann. II.

<sup>34</sup> See G.A. Res. 47/1 (Sept. 22, 1992) (determining that “the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the UN”).

<sup>35</sup> G.A. Res. 55/12 (Nov. 10, 2000).

<sup>36</sup> MARKO MILANOVIC, *Territorial Application of the Genocide Convention and State Succession*, in *THE UN GENOCIDE CONVENTION: A COMMENTARY* 488 (Paola Gaeta ed., 2009).

- (2) that alternatively, the ICJ lacks jurisdiction over claims in respect of acts committed before 27 April 1992, and
- (3) that the claims referring to taking effective steps to submit to trial certain individuals and return of cultural property are inadmissible and moot.<sup>37</sup>

The ICJ determined that after the secession of Montenegro from the state union with Serbia, Serbia was the sole successor state of the FRY/Serbia and Montenegro, and, therefore the right respondent in this case.<sup>38</sup> The ICJ determined that it had jurisdiction to rule on Croatia's claim in respect of acts committed after 27 April 1992, the date when the FRY came into existence as a separate state. The ICJ also held that by that date, the FRY/now Serbia became a party, by succession, to the Genocide Convention.<sup>39</sup> With respect to Serbia's objection that the ICJ lacks jurisdiction with regard to acts that had been committed before 27 April 1992, the ICJ reserved its decision on its jurisdiction to the final judgment.<sup>40</sup>

### C. The problem of the admissibility *ratione temporis*

In the judgment under analysis, the ICJ again affirmed that the respondent Serbia was not the legal continuator, but rather a successor state of the SFRY. Therefore, Serbia did not continue to automatically inherit the legal rights and obligations of the SFRY. The Court then acknowledged the Genocide Convention does not apply to acts of a state before the state has become a party to the Convention. Consequently, the Court determined that Serbia became a party to the Genocide

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<sup>37</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), 2008 I.C.J. Rep. Preliminary Objections, Judgment, ¶ 21 (Nov. 18), <http://www.icj-cij.org/docket/files/118/14891.pdf> [hereinafter Preliminary Objections Judgment].

<sup>38</sup> *Id.* at ¶ 34 (referring to statements made by the Serbian President and government members that Serbia will continue all memberships and international commitments inherited from the FRY).

<sup>39</sup> *See id.* at ¶ 11 (concluding from statements of FRY officials that "the FRY had thus "clearly expressed an intention to be bound . . . by the obligations of the Genocide Convention" and that "the 1992 declaration must be considered as having had the effects of a notification of succession to treaties, notwithstanding that its political premise was different").

<sup>40</sup> *Id.* at ¶ 146.

Convention in its own right only as of 27 April 1992.<sup>41</sup> Consequently, according to a strict reading of Article IX, which grants the ICJ jurisdiction over the Genocide Convention in this case, the ICJ would have had to reject its jurisdiction over the alleged acts that took place before that date. Article IX establishes that

[d]isputes 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.

The ICJ, however, did not follow this narrow interpretation of Article IX. Instead, the Court's argument took an interesting twist: it asked whether jurisdiction under this clause nevertheless is established by means of devolution of the SFRY's responsibility for the alleged violations of the Genocide Convention onto Serbia. The SFRY had been a party to the Genocide Convention since 1950. Croatia had raised two sets of arguments in favor of this position, which the ICJ now had to deal with. First, Croatia had argued that the acts before 27 April 1992 had been committed by a successful insurrection movement, in the process of the dissolution of the SFRY. Croatia invoked Article 10(2) of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts, which provides that "the conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law."<sup>42</sup>

According to Croatia, the conduct of this insurrection

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<sup>41</sup> Judgment, *supra* note 1, at ¶ 95-100.

<sup>42</sup> Int'l Law Comm'n, Articles on the Responsibility of States for Internationally Wrongful Acts, art. 10(2), in *Report of the International Law Commission, Fifty-Sixth Session, 23 April-1 June and 2 July-10 August 2001, Official Records of the General Assembly, Fifty-Sixth Session, Supplement No. 10* [2001], U.N. Doc. A/56/10, Ch. V (19 Sept. 2001) [hereinafter ILC Articles] (providing that "the conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.").

movement, by operation of the legal principle embodied in this provision, should be attributable to Serbia.

The ICJ rejected this argument and rightly noted that the customary law status of this provision is highly controversial.<sup>43</sup> In fact, the ILC Articles are a result of a long-term study conducted by the International Law Commission, a body of individual experts on international law, in an attempt to codify customary international law. In 2001, the ILC presented its draft to the UN General Assembly. But the ILC Articles were never included in a binding international treaty and the General Assembly has never taken position on the customary law status of these articles, making their legal status highly doubtful.<sup>44</sup>

The ICJ went on to note that

even if Article 10 (2)...could be regarded as declaratory of customary international law at the relevant time, that Article is concerned only with the attribution of acts to a new State; it does not create obligations binding upon either the new State or the movement that succeeded in establishing that new State.<sup>45</sup>

The Court's view is right because the underlying rationale of this provision is to maintain the organic or structural continuity between the insurrectional movement and the new state.<sup>46</sup> Thus, devolving attribution of the successful insurrection movement onto the new state ensures that a legal subject, that can be held responsible for an illegal act, continues to exist. Therefore, Article 10 (2) applies only with regard to an already existing international obligation, which

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<sup>43</sup> See generally JAMES CRAWFORD, *STATE RESPONSIBILITY: THE GENERAL PART* 176-178 (2014) (discussing the controversies concerning Article 10 of the ILC Articles); see also Patrick Dumberry, *New State Responsibility for Internationally Wrongful Acts by an Insurrectional Movement*, 17 *Eur. J. Int'l* 605, 607 (2006) ("Writers generally agree with the principle of the devolution of responsibility in the context of *governmental* changes. They, however, rarely address the other question of whether the same principle should apply in cases where actions of rebels result not in a change of government, but in the *creation of a new state*.").

<sup>44</sup> Cf. James Crawford et al., *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading*, 21 *EUR. J. INT'L L.* 963, at 963 (2001) (noting the General Assembly's lack of comments).

<sup>45</sup> Judgment, *supra* note 1, at ¶ 104.

<sup>46</sup> Dumberry, *supra* note 43, at 608.

has been established elsewhere, but it does not establish such an obligation itself.

The ICJ then addressed Croatia's second, and alternative legal argument. Croatia argued that, on 27 April 1992, when the FRY/Serbia claimed to be the legal continuator of the SFRY and that it would succeed to the treaty obligations of the SFRY, it also succeeded to the responsibility incurred by SFRY for the alleged violations of the Genocide Convention.<sup>47</sup>

The ICJ's reasoning on this point, which will be analyzed now, was one of the most controversial issues of the entire judgment, as evidenced by the voting scheme (eleven Judges voted in favor, six Judges voted against the admissibility) and the six separate opinions.<sup>48</sup> The ICJ is to be criticized for not having taken a clear and unambiguous position on this important issue. Instead, the ICJ stated rather cryptically:

It is true that whether or not the Respondent State succeeds . . . to the responsibility of its predecessor State for violations of the Convention is governed not by the terms of the Convention but by rules of general international law. However, that does not take the dispute . . . outside the scope of Article IX . . . [T]he disputes subject to that jurisdiction are those "relating to the interpretation, application or fulfilment" of the Convention, but it does not follow that the Convention stands alone. In order to determine whether the Respondent breached its obligations under the Convention . . . and, if a breach was committed, to determine its legal consequences, the Court will have recourse not only to the Convention itself, but also to the rules of general international law on treaty interpretation and on responsibility of States for internationally wrongful acts . . . The Court considers that the rules on succession that may come into play in the present case fall into the same category as those on treaty interpretation and responsibility of States . . . The Convention itself does not specify the circumstances that give rise to the responsibility of a State, which must be determined under general international law . . .<sup>49</sup>

The ICJ concluded that a finding that there is a dispute between the Parties "concerning the interpretation, application

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<sup>47</sup> Judgment, *supra* note 1, at ¶¶ 82, 106.

<sup>48</sup> See Judgment, *supra* note 1 (separate opinions issued by Judges Tomka, Xue, Skotnikov, Owada, Sebutinde and Kreca).

<sup>49</sup> Judgment, *supra* note 1, at ¶ 115.

or fulfilment of the Convention, which includes disputes relating to the responsibility of a State for genocide” would suffice for purposes of determining its jurisdiction.<sup>50</sup>

The ICJ determined that the question of whether or not the FRY/Serbia succeeded to the responsibility of the SFRY is a matter to be addressed in the merits, after having assessed that the SFRY had in fact violated its obligations under the Genocide Convention.<sup>51</sup>

The ICJ’s argument is problematic for a number of reasons. Before turning to the critique, a few clarifying words on the issue of state succession need to be made.

Whenever a state ceases to exist (as in the SFRY in the instant case) and is replaced by another state which has a distinct legal personality but is not the legal continuator in the territory of the former state (*i.e.* the FRY/Serbia), a question arises as to whether the rights and obligations of the former state devolve with respect to the new state.<sup>52</sup> This situation is generally referred to as state succession. The process of state succession can be broken apart into several distinct legal aspects, such as succession to treaties, to property, to debts, to international organizations, etc. These aspects are governed by customary international law, part of which is also codified in international treaties.<sup>53</sup>

The present case, however, differs from the above situation. The present case is not about whether or not Serbia has taken the place of the SFRY as a party to the Genocide Convention. The ICJ has answered this issue in the negative by stating that Serbia is bound to the Genocide Convention in

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<sup>50</sup> *Id.* at ¶ 111.

<sup>51</sup> *See id.* at ¶ 112 (identifying three contested points to be addressed in the merits: “(1) whether the acts relied on by Croatia took place; and, if they did, whether they were contrary to the Convention; (2) if so, whether those acts were attributable to the SFRY at the time that they occurred and engaged its responsibility; and (3) if the responsibility of the SFRY had been engaged, whether the FRY succeeded to that responsibility.”).

<sup>52</sup> *See e.g.* Vienna Convention on Succession of States in Respect of Treaties, art. 2(1)b), U.N. Doc. ST/LEG/SER.E./10 (defining state succession as “the replacement of one State by another in the responsibility for the international relations of territory”).

<sup>53</sup> *See generally* PATRICK DUMBERRY, STATE SUCCESSION TO INTERNATIONAL RESPONSIBILITY 5-9 (2007) (explaining legal aspects of state succession).

its own right, i.e. by acceding the Convention as of 27 April 1992. The present case concerns the question of whether Serbia has succeeded in the obligations arising from the (already established) violation of the Genocide Convention by the SFRY before 1992. In other words: Can the consequences of the international responsibility for a breach of the Genocide Convention committed by the SFRY be transferred onto Serbia as a different legal personality?

The ICJ answered this question neither in the affirmative nor in the negative. Instead, the Court argued that at least the existence of a mere dispute regarding the controversial issue of state succession to responsibility is sufficient to establish jurisdiction under Article IX of the Genocide Convention.

The ICJ's broad interpretation of Article IX, however, is not covered by the terms of this clause. Article IX is a typical example of a so-called compromissory clause. Jurisdiction based on such a clause is by its nature limited and narrow.<sup>54</sup> This is because jurisdiction of the ICJ is intrinsically linked to the consent of the state parties.<sup>55</sup> Naturally, when it comes to a dispute, applicants will try to argue to give the Court as wide a jurisdiction as possible, whereas respondents will strive for a much more restrictive exercise of jurisdiction.<sup>56</sup> Therefore, for reasons of objectivity, consent must be sought primarily in the terms of such a compromissory clause, which must not be interpreted against its wording.

A stricter and more literal interpretation, however, suggests that the "dispute" referred to in Article IX must be between the Contracting Parties, in this case Serbia and Croatia, and it must concern the „interpretation, application and fulfilment of the Convention" by exactly these parties.<sup>57</sup> The acts in questions (before 1992), however, do not trigger the fulfillment of the Convention by Serbia, but by the SFRY. The SFRY is, as the ICJ itself determined, not the legal predecessor

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<sup>54</sup>See ROBERT KOLB, THE INTERNATIONAL COURT OF JUSTICE 432 (2014) (commenting on the basis for the ICJ's jurisdiction).

<sup>55</sup> *Id.*

<sup>56</sup> See *id.* (referring to the ICJ case Pulp mills on the Uruguay River (2010) as an example to illustrate the opposition between the parties' interests on the one hand and the Court's cautious attitude in affirming its jurisdiction on the other hand).

<sup>57</sup> Judgment, *supra* note 1 (Separate Opinion of Judge Tomka, at ¶ 22).

of Serbia, but a different legal entity, which has ceased to exist. For these reasons, the ICJ's view that, in order to establish jurisdiction, it was sufficient that the SFRY (and not Serbia) was party to the Genocide Convention at the time the acts were committed<sup>58</sup>, must be rejected.

Also unsatisfactory is the Court's construction of the scope of Article IX to include issues of state succession to responsibility by simply declaring that "the rules on succession that may come into play in the present case fall into the same category as those on treaty interpretation and responsibility of States."<sup>59</sup> The Court fails to provide support for its view that state succession to international responsibility was governed by customary international law.<sup>60</sup> Existing state practice on this issue is ambiguous.<sup>61</sup> Legal doctrine does not provide a satisfying answer either. As James Crawford stated: "It is unclear whether a new State succeeds to any State responsibility of the predecessor State with respect to its territory."<sup>62</sup> The fact that rules of state succession to responsibility are neither contemplated in international treaties nor in other codifications of international law makes this area controversial.

Admittedly, one could argue in favor of devolution of state responsibility that the international wrongful act must not remain unpunished because of the application of the rules of State succession. However, the very personal character of international responsibility speaks against the transmissibility of state responsibility. In addition, it would also violate the principle of sovereign equality of states: another state cannot be held liable for internationally wrongful acts committed by a

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<sup>58</sup> Judgment, *supra* note 1, at ¶ 113.

<sup>59</sup> *Id.* at ¶ 115.

<sup>60</sup> Judgment, *supra* note 1 (Separate Opinion of Judge Kreca, at ¶¶ 60, 61).

<sup>61</sup> See Vaclav Mikulka, *State Succession and Responsibility*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY* 292-93 (Crawford et al. eds., 2010) (giving examples from state practice, such as the dissolution of the Union of Columbia in 1831 and the German assumption of liabilities arising from the delictual responsibility of the former German Democratic Republic after the German reunification in 1989).

<sup>62</sup> Int'l Law Comm'n, Commentary, Commentaries to the Draft Articles on State Responsibility, Rep. of the Int'l L. Comm'n on the Work of its Fifty-Third Session, U.N. Doc. A/56/10, ¶ 3 (2001).

different state. An exception can only be made where the successor state accepts the responsibility. In the case at hand, one could think of reinterpreting Serbia's claim of identity with the SFRY in an implied acquiescence to accept the responsibility of the former state for a violation of the Genocide Convention. The ICJ, however, did not explicitly advance this possible legal construction.

In addition, state succession to responsibility is not covered by the terms of Article IX.<sup>63</sup> The term "disputes relating to . . . the *responsibility* of a State for genocide" in this clause refers to state responsibility (i.e. a breach of an international obligation by a state) and not to state succession to responsibility (i.e. the legal regime governing the devolution of rights or obligations from one state onto another). Succession and responsibility, therefore, are distinct legal concepts. Thus, by importing state succession to responsibility into the terms of Article IX, the ICJ broadened its jurisdiction to include acts that have been committed before Serbia actually became bound by the Genocide Convention. This unsound construction given to Article IX by the ICJ provides a retroactive construction, thus violating the fundamental principle that a state can only be bound to obligations to which it has consented.<sup>64</sup> This construction may only be deemed sound if the Court had determined that Serbia is the legal continuator of the SFRY rather than a successor state.

Finally, the Court must be blamed for being inconsistent. Even if—as the ICJ suggested—state succession to responsibility was covered by Article IX, it would have been consequential to establish already in the admissibility stage whether this doctrine was part of customary international law at the time the FRY/Serbia became a party to Genocide Convention and if so, whether FRY/Serbia had in fact succeeded in the responsibility of the SFRY.<sup>65</sup> The Court

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<sup>63</sup> See Judgment, *supra* note 1 (Separate Opinions of Judges Sebutinde, at ¶ 15, Xue, at ¶ 18 and Tomka, at ¶18) (referring to the drafting history of the Genocide Convention in support of their views).

<sup>64</sup> See Judgment, *supra* note 1 (Declaration of Judge Xue, at ¶ 22 (noting that the Court had in fact applied the Convention retroactively).

<sup>65</sup> See Judgment, *supra* note 1 (Declaration of Judge Xue, at ¶17) and Judgment, *supra* note 1 (Separate Opinion of Judge Owada, at ¶ 21) (criticizing the inconsistency in the Court's reasoning); see also Judgment,

avoided taking a clear position and shifted this problem to the merits, where—after having found that genocide had not been committed—it did not need to return to this issue anymore.

In conclusion, it must be stated that rules of international law providing for the devolution of state responsibility have not developed.<sup>66</sup> Therefore, state responsibility to succession must be either generally rejected or regarded as not being covered by the terms of Article IX.

#### IV. The ICJ's treatment of the merits

On the merits, the ICJ held that the acts alleged by Croatia constituted the *actus reus* of genocide pursuant to subparagraphs (a) and (b) of Article II of the Convention (killings and acts causing serious bodily injury).<sup>67</sup> With respect to Serbia's counter claim, the ICJ likewise found the *actus reus* of genocide according to subparagraphs (a) and (b) of Article II to be established by actions of Croatian armed forces during a military operation in 1995.<sup>68</sup> The Court found, however, that the *mens rea* of genocide was lacking on the side of both parties, and therefore decided that none of the acts constituted the crime of genocide under the Genocide Convention.<sup>69</sup>

The following section discusses—without any claim to completeness—some aspects of the Court's judgment, which are important for the interpretation and evolution of the law of genocide beyond the confines of the present case.

#### A. Evidentiary value of ICTY cases

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*supra* note 1 (Separate Opinion of Judge Skotnikov, at ¶ 2) (explaining that ICJ had to “either to identify the legal mechanism by which the FRY assumed obligations under the Genocide Convention, and thus make Article IX applicable, before it came into existence, or to determine that no such legal mechanism existed”).

<sup>66</sup> See JAMES CRAWFORD, *BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 424 (2013) (noting that “state succession is an area of uncertainty and controversy . . . much of the practice is equivocal”); see also Judgment, *supra* note 1 (Separate Opinion of Judge Owada, at ¶¶ 20-22) (rejecting state succession to responsibility).

<sup>67</sup> Judgment, *supra* note 1, at ¶¶ 205, 360.

<sup>68</sup> *Id.* at ¶ 499.

<sup>69</sup> See the discussion *infra* at IV.B.5.d.

Like in its Bosnian Genocide Judgment of 2007,<sup>70</sup> where the Court for the first time found a violation of the Genocide Convention, the ICJ in the present case again referred significantly to proceedings before the ICTY—both to determine the facts and with regard to legal conclusions.<sup>71</sup> This practice of the ICJ raises the question of the relationship between the ICJ and International Criminal Tribunals, such as the ICTY.

The ICJ first recalled that the law of genocide—as an international crime of individuals on the one hand and as an international wrongful act of a state on the other hand—is governed by different legal regimes, which in general pursue different aims. Despite these differences, the ICJ noted that it would nevertheless take into account decisions of international criminal courts and tribunals in examining whether genocide has been committed.<sup>72</sup>

References to statements and decisions of other international bodies in principle should be welcomed because they contribute to legal coherence and uniformity. Moreover, judicial decisions are explicitly assigned a subsidiary means for determining international law.<sup>73</sup> Nevertheless, the ICJ should take a different position when it comes to references to international criminal bodies, like the ICTY. The ICJ should distinguish between references to findings of fact and references to legal determinations made by the ICTY.

The ICTY's findings of fact are valuable for the proceedings before the ICJ and should be welcomed. The ICTY's mandate is to adjudicate on individual criminal responsibility for serious violations of international humanitarian law perpetrated in the former Yugoslavia.<sup>74</sup> As a

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<sup>70</sup> Bosnia Judgment, *supra* note 28, ¶ 223.

<sup>71</sup> See e.g., Judgment, *supra* note 1, ¶¶ 220-294, 308, 376, 393, 473 (referring to ICTY cases regarding the determination of facts), ¶ 157 (referring to the ICTY's interpretation of "serious harm" in the definition of genocide) and ¶ 158 (referring to the ICTY's view that rape may amount to the *actus reus* of genocide).

<sup>72</sup> *Id.* ¶¶ 128-29.

<sup>73</sup> See Statute of the International Court of Justice, art. 38(1)(d), *supra* note 30 (listing judicial decisions as a supplementary source of international law).

<sup>74</sup> Statute of the International Criminal Tribunal for the Former

more specialized institution, it is in general better equipped to investigate the factual circumstances.

With regard to legal determinations, in particular the interpretation of the elements of genocide, however, the ICJ should be extremely cautious to refer to the decisions of international criminal bodies.<sup>75</sup> Relying on legal evaluations in the context of international criminal law is problematic because of the structural and substantial differences between state responsibility and individual criminal responsibility for genocide, especially when it comes to determining genocidal intent. While criminal tribunals adjudicate on the criminal responsibility of individual persons, the ICJ—when assessing genocide—is concerned with the cumulative impact of different acts committed in a wide area by a large number of perpetrators, who may not even be individually identifiable. Therefore, the ICJ should not take over legal determinations on genocide by International Criminal Tribunals without reflection.

Even more caution should be applied with respect to assigning relevance to decisions of the ICTY Prosecutor whether or not to include a charge of genocide in an indictment. In this regard, the ICJ referred to a passage in its 2007 Bosnia Judgment, where the Court had stated that “as a general proposition the inclusion of charges in an indictment cannot be given weight. What may however be significant is the decision of the Prosecutor . . . not to include or to exclude a charge of genocide.”<sup>76</sup> The ICJ fails to explain why the Prosecutor’s decision not to charge for genocide may be significant, while the Prosecutor’s decision to charge for genocide may not.

Instead of making this distinction, prosecutorial decisions—irrespective of their contents—should not be assigned legal value for proceedings before the ICJ at all. An international criminal Prosecutor is assigned wide discretion as

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Yugoslavia, art. 1, *supra* note 25.

<sup>75</sup> *But see* Judgment, *supra* note 1 (Separate Opinion of Judge Skotnikov, ¶14) (arguing that the ICJ is not competent to decide on genocidal intent and stating that the ICJ instead should have better taken notice of the relevant proceedings of the ICTY).

<sup>76</sup> Bosnia Judgment, *supra* note 28, ¶ 217.

to whether or not to bring a charge and, moreover, he does not need to give reasons for his decision.<sup>77</sup> It should also be considered that the Prosecutor's decision is not merely based on legal, but on a variety of pragmatic considerations, such as the cost and length of the proceeding and the availability of witnesses.<sup>78</sup> Prosecutorial decisions are, therefore, not judicial decisions, and consequently are not a supplementary source of law according to Article 38(1)(d) of the ICJ Statute.<sup>79</sup> An international Prosecutor has a dual function, acting both as an objective 'administrator of justice' in the interest of international justice when identifying, investigating and prosecuting an international crime, and as a subjective party in an adversarial trial.<sup>80</sup>

In the present judgment, it remains unclear how much evidential weight the ICJ places on the decisions of the ICTY Prosecutor, because some statements of the ICJ remain ambiguous. For instance, while in one passage the Court, after having found that genocidal intent is lacking, noted that "the ICTY prosecutor has never charged any individual on account of genocide,"<sup>81</sup> the Court stated in another passage that it "did not intend to turn the absence of charges into decisive proof that there had not been genocide, but took the view that this factor may be of significance and would be taken into consideration".<sup>82</sup>

Similarly nebulous are passages in which the ICJ seems to make a distinction regarding the rank and hierarchy of persons

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<sup>77</sup> See generally Jingbo Dong, *Prosecutorial Discretion at the International Criminal Court: A Comparative Study*, 2 J. POL. & L 109, 112 (2009) (studying the role of the Prosecutor at the ICC arguing that his decision to bring a charge is not governed by the rule of law, but is under his discretion).

<sup>78</sup> See, e.g. *Prosecutor v. Delalic*, IT-96-21-A, Judgment, Appeals Chamber (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001), ¶ 602 (stating that "the entity responsible for prosecutions has finite human and financial resources and cannot realistically be expected to prosecute every offender").

<sup>79</sup> Statute of the International Court of Justice, *supra* note 30, at art. 38(1)(d).

<sup>80</sup> Sergey Vasiliev, *Trial*, in *International Prosecutors* 728 (Luc Reydam, Jan Wouters, Cedric Ryngaert eds., 2012) (commenting on the operational function of a prosecutor).

<sup>81</sup> Judgment, *supra* note 1, ¶ 440.

<sup>82</sup> *Id.* ¶ 187.

in the chain of command against whom a charge of genocide is brought. The ICJ stated “the fact that charges of genocide were not included in any of the indictments is of greater significance than would have been the case had the defendants occupied much lower positions in the chain of command.”<sup>83</sup> The ICJ is to blame for not further elucidating this issue and setting clearer standards for future cases.

### B. Elements of genocide

According to the definition in Article II of the Genocide Convention, the crime of genocide has two requirements: first, that a state commits one of the prohibited acts listed in subparagraphs a-e (*actus reus*) and second, that the state has a specific intent when conducting these acts, i.e. the intent to destroy, in whole or in part, a national, ethnical, racial or religious group (*mens rea*).<sup>84</sup> As the ICJ has stressed, these two elements are intertwined in that “the determination of *actus reus* can require an inquiry into intent . . . [and] the characterization of the acts and their mutual relationship can contribute to an inference of intent.”<sup>85</sup>

The following analysis focuses on select issues relating to genocide in the ICJ’s judgment, which are the question of the protected groups, the acts necessary for constituting genocide, and the existence and proof of the required special intent to commit genocide. These issues are also the most controversial ones discussed by international doctrine and jurisprudence concerning genocide. Therefore, the Court’s view can help to clarify and shed light on certain disputed aspects of the law of genocide.

#### 1. Protected “group”

Both the prohibited acts of subparagraphs (a)-(e) and the specific intent refer to a particular object of genocide, which is a national, racial, ethnical or religious group. Legal controversies concern the question of whether the list of protected groups is

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<sup>83</sup> *Id.*

<sup>84</sup> Genocide Convention, *supra* note 2, at art. II.

<sup>85</sup> *Id.* ¶ 130.

exhaustive or merely illustrative. This issue especially concerns the protection of political or social groups, which are not explicitly mentioned in Article II. The wording and the *travaux préparatoires* of this provision suggest an exhaustive list.<sup>86</sup>

Another controversial point is how exactly the terms defining the targeted groups should be defined, since the four groups contemplated by Article II elude precise definition. Should they be construed objectively, from the perception of third-party observers, or subjectively, from the perspective of the persons involved? If they are to be construed subjectively, whose perspective is relevant? The perspective of the perpetrators or the self-perception of the targeted group?<sup>87</sup> Moreover, should these groups be defined positively, by the existence of certain common characteristics, or negatively, by the absence of certain features?<sup>88</sup>

In the 2007 Bosnia Judgment, the ICJ had rejected a negative construction and, though not unequivocally, indicated that it would also reject a purely subjective determination, opting for the inclusion of objective criteria.<sup>89</sup>

If a perpetrator kills many people believing they constitute

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<sup>86</sup> See Lars Berster, *art. II, in* CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE; A COMMENTARY 102 (Christian Tams et al. eds. 2014) (pointing out the limitations under the Genocide Convention); see also Beth Van Schaack, *The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot*, 106 YALE L.J. 2259, 2261 (1997) (arguing that that Genocide Convention limits the protected classes to those listed in art. 2); but see *The Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T (Int'l Crim. Trib. for Rwanda Sept. 2, 1998), ¶ 616 (suggesting that other groups than those expressly mentioned may be protected because the drafters of the Genocide Convention focused not so much on the listed types of groups as on trying to find terms to depict groups of a stable and permanent character).

<sup>87</sup> See e.g. *Prosecutor v. Rutaganda*, ICTR-96-3-T (Int'l Crim. Trib. for Rwanda Trial Chamber, Dec. 6, 1999) ¶ 56 (employing a subjective definition of a group); Claus Kress, *The Crime of Genocide Under International Law*, 6 INT'L CRIMINAL L. REV 461, 477 (2006) (opting for an objective definition of a group).

<sup>88</sup> See e.g. *Prosecutor v. Jelusic*, IT-95-10-T (Int'l Crim. Trib. for the Former Yugoslavia, Dec. 14, 1999), ¶ 70 (employing a negative definition); but see *Prosecutor v. Stakic*, Appeals Chamber Judgment, IT-97-24-A (Int'l Crim. Trib. for the Former Yugoslavia, Mar. 22, 2006) ¶ 20 (rejecting a negative construction).

<sup>89</sup> Bosnia Judgment, *supra* note 28, ¶¶ 193-96.

a protected group, when in fact they are not, this does not constitute genocide under the objective definition.<sup>90</sup> Instead, it constitutes genocide under the subjective approach.<sup>91</sup> The disadvantage of the subjective approach, however, is that it leaves it up to the perpetrator himself to define the crime, making the commission of genocide hardly foreseeable and determinable for others.<sup>92</sup> Therefore, a differentiated, combined approach is preferable: an objective criterion to determine whether a group constitutes a protected group under the Genocide Convention, and a subjective approach in order to determine whether a specific individual belongs to the protected group.

In the present Judgment, the ICJ missed the opportunity to further clarify its view on this issue, probably because this point had not been explicitly contested by Serbia. Instead of elaborating more on this point, the ICJ simply determined the protected group to be Croat national or ethnical group on the territory of Croatia.<sup>93</sup>

## 2. Meaning of subparagraph (b) “Causing serious bodily or mental harm to members of the group”

The ICJ had to decide whether the *actus reus* of genocide in the form of “causing serious bodily or mental harm to members of the group” under subparagraph (b) was established. Legal controversy concerns the meaning of “serious”. This term indicates that the bodily or mental harm has to meet a certain threshold, but views on the specific degree differ in legal scholarship.<sup>94</sup>

In the present judgment, the ICJ opted for a narrow interpretation by setting the standard high. According to the Court “serious” not only refers to the immediate negative

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<sup>90</sup> L. J. VAN DEN HERIK, *THE CONTRIBUTION OF THE RWANDA TRIBUNAL TO THE DEVELOPMENT OF INTERNATIONAL LAW* 134 (Koninklijke Brill NV 2005).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 134-35.

<sup>93</sup> See Judgment, *supra* note 1, ¶ 205 (finding that the Croat national group is protected under the Genocide Convention).

<sup>94</sup> See Berster, *supra* note 86, at 118 (providing further references for the definition of “serious”).

mental or physical effect on individual group members, but also requires that the harm must be of such nature as to contribute to the destruction of the targeted group as such.<sup>95</sup> The Court pointed out that ICTY uses a similar interpretation of “serious harm”.<sup>96</sup>

In fact, a narrow interpretation finds some support in the *travaux préparatoires* of the Genocide Convention.<sup>97</sup> It is also the view taken by the International Law Commission.<sup>98</sup> According to this interpretation, for example, bodily or mental torture, inhumane or degrading treatment, rape, sexual violence, and persecution would constitute the act of genocide since these acts include serious physical and/or mental injuries to individual group members and also may have a detrimental effect on the group as a whole.<sup>99</sup>

However, such a narrow interpretation is not strictly required by the term’s literal meaning, its object and purpose or from a contextual interpretation. Nothing in Article II suggests that the acts listed in subparagraphs (a)-(e) are to be construed to require a concrete aptitude to contribute to the destruction of the group.<sup>100</sup> In addition, such a narrow interpretation is not necessary in light of the Convention’s object and purpose, since the issue of using ineligible means to affect the group as such can be duly addressed when establishing the genocidal intent.<sup>101</sup> Rather, the meaning of

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<sup>95</sup> Judgment, *supra* note 1, ¶ 157.

<sup>96</sup> *Id.* ¶ 157 (referring to *Prosecutor v. Krajišnik*, IT-00-39-T (Int’l Crim. Trib. for the Former Yugoslavia, Trial Chamber, Sept. 27, 2006), ¶ 862 and *Prosecutor v. Tolimir*, IT-05-88/2-T (Int’l Crim. Trib. for the Former Yugoslavia, Trial Chamber, Dec. 12, 2012) ¶ 738).

<sup>97</sup> See Berster, *supra* note 86, at 118 (discussing the drafting history of the Genocide Convention).

<sup>98</sup> Int’l Law Comm’n, Draft Code of Crimes against Peace and Security of Mankind with commentaries, 51 UN GAOR Supp. (No. 10) at 14, U.N. Doc. A/CN.4/L.532, corr.1, corr.3 (1996).

<sup>99</sup> *Prosecutor v. Rutaganda*, ICTR-96-3-T, Trial Chamber (Int’l Crim. Trib. for the Former Yugoslavia, Dec. 6, 1999), ¶ 51 (accepting genocide for acts constituting acts of bodily or mental torture, inhumane or degrading treatment, rape, sexual violence, and persecution).

<sup>100</sup> See Berster, *supra* note 86, at 119 (arguing *e contrario* with regard to the term “calculated to” in subparagraph (c), which stipulates that the conditions imposed upon the group have to be capable of causing its destruction).

<sup>101</sup> *Id.* at 119.

“serious bodily harm” and “serious mental harm” should be determined on a case-by-case basis, using a common sense approach. Excluded should only be minor or temporary impairment of physical or mental faculties.

A narrow interpretation, however, may be appropriate to restrict a too extensive application of the Genocide Convention in cases where the acts are not immediately directed against the group members but against third persons. In the case, Croatia had argued to include the psychological suffering of relatives of individuals who disappeared in the context of an alleged genocide. The ICJ did not accept this argument as such, but considered that the persistent refusal of the competent authorities to provide these relatives with information, which would enable them to establish whether those individuals are dead and how they died, may only fall within the scope of this provision, if the harm resulting from that suffering contributes to the physical or biological destruction of the group.<sup>102</sup> For example, in a case concerning mass executions in Srebrenica, the ICTY Trial Chamber found that, witnessing executions of relatives and friends, the victims suffered the further mental anguish of helplessness by lying still and listening for long hours to the moans of those executed.<sup>103</sup>

3. Meaning of subparagraph (c) “Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction”

Acts falling under subparagraph (c), “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction”, have been described as “measures of slow death”.<sup>104</sup> International legal scholarship generally construes the term “calculated” as including an objective element, in addition to the subjective element of intent.<sup>105</sup> The exact scope of this objective content, however, is a matter of legal controversy—with some scholars construing this term to mean

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<sup>102</sup> Judgment, *supra* note 1, ¶ 160.

<sup>103</sup> *Prosecutor v. Blagojevic and Jokic*, IT-02-60-T, Trial Chamber (Int’l Crim. Trib. for the Former Yugoslavia, Jan. 17, 2005), ¶¶ 647-49.

<sup>104</sup> Berster, *Convention on Genocide Commentary*, *supra* note 86, at 121.

<sup>105</sup> *See id.* at 122 (providing further references).

that the measure used must be the principle mechanism of destruction, while for others a certain capability, possibility or probability of bringing about the destruction of the group is sufficient.<sup>106</sup>

In the present judgment, the ICJ did not endorse a position. Nevertheless, the Court seemed to favor an interpretation in the sense that the measure inflicted must entail some probability with regard to the full or partial destruction of the group. This can be inferred from the ICJ's rejection of Croatia's claim that rape, deprivation of food and medical care, looting of property and forced labor of Croats constituted the *actus reus* of subparagraph (c). The ICJ held these measures to be on a scale below the threshold of inflicting conditions of life on the group capable of bringing about its physical destruction.<sup>107</sup>

The ICJ must be welcomed for employing the probability test. It is a common standard in criminal law to make a certain criminal conduct objectively quantifiable. Probability is a matter of common knowledge because one who does the act, knowing the present state of things, is guilty irrespectively of whether it can be proven that he has subjectively foreseen the all the consequences.

The ICJ took great care in establishing whether other acts alleged by Croatia qualified as "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction." In this regard, the ICJ, e.g., concluded that forcing Croats to wear specific signs to stigmatize the group's members was not aimed at the immediate physical destruction of this group. This conducted is rather, as the Court noted, only a preliminary step towards the perpetration of the *actus reus* of genocide, because this measure helps to identify the group. Nevertheless, the ICJ announced that this measure can be taken into account for establishing the *mens rea* of genocide, the existence of genocidal intent.<sup>108</sup>

The ICJ also confirmed its position taken in the 2007 Bosnia Judgment with regard to *ethnic cleansing* or forced

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<sup>106</sup> *Id.* at 123.

<sup>107</sup> Judgment, *supra* note 1, ¶¶ 364-72, 385, 393.

<sup>108</sup> *Id.* ¶ 382.

displacement In the Bosnia Judgment, the ICJ had defined *ethnic cleansing* as “rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area”.<sup>109</sup> When drafting the Genocide Convention the states did not consider *ethnic cleansing* or *forced displacement* as a stand-alone act of genocide. However, they were of the view that at least some aspects of the forcible expulsion of a protected group should be included in subparagraph (c) of Article II (“deliberately inflicting on the group conditions of life calculated to bring about its physical destruction”).<sup>110</sup>

Discussing whether the alleged *forced displacement* or *ethnic cleansing* of Croats in the case under analysis should be characterized as the *actus reus* under this subparagraph, the ICJ cited its Bosnia Judgment, where it had explained that

[n]either the intent, as a matter of policy, to render an area ‘ethnically homogeneous’, nor the operations that may be carried out to implement such policy, can as such be designated as genocide: the intent that characterizes genocide is ‘to destroy, in whole or in part’ a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement . . . In other words, whether a particular operation described as ‘ethnic cleansing’ amounts to genocide depends on the presence or absence of acts listed in Article II of the Genocide Convention, and of the intent to destroy the group as such.<sup>111</sup>

The ICJ stressed that the circumstances, in which the forced displacements were carried out, are critical.<sup>112</sup> Regarding Croatia’s allegations in this case, the Court found that the restrictions on the movement of the Croats contributed to a climate of coercion and terror. They were aimed at forcing those persons to leave the territories controlled by Serb forces. The Court also acknowledged that restrictions on freedom of

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<sup>109</sup> Bosnia Judgment, *supra* note 28, ¶ 190.

<sup>110</sup> See Berster, *Convention on Genocide Commentary*, *supra* note 86, at 132 (explaining that Syria’s proposal that the Convention should contain an expansive conception of genocide which includes forced mass exodus was rejected by the other state parties).

<sup>111</sup> Bosnia Judgment, *supra* note 28, ¶ 190.

<sup>112</sup> Judgment, *supra* note 1, ¶163.

movement may undermine the social bond between members of the group, and hence lead to the destruction of the group's cultural identity. The Court, however, found no evidence to conclude that these measures were carried out in circumstances calculated to result in the total or partial physical destruction of the group.<sup>113</sup>

The ICJ's restrictive and cautious approach is to be welcomed. This is because restrictions on the free movement of persons or groups of persons can pursue different (either legitimate or illegitimate) aims, for example security or economic reasons according to a specific government policy. One example is 'Israel's relocation policy in the occupied Palestinian territories. These restrictions are not *per se* indicative of an *actus reus* of genocide.

However, such measures may serve as an early warning sign. This was correctly noted by the ICJ when adding that, nonetheless, measures of forced displacement occurring in parallel acts falling under Article II may be "indicative of the presence of a specific intent (*dolus specialis*) inspiring those acts".<sup>114</sup> In this regard, the relocation policy of Nazi-Germany concerning Jews during World War II serves an example of a measure indicating genocidal intent.

#### 4. Meaning of subparagraph (d) "Measures intended to prevent births within the group"

With respect to subparagraph (d) "Measures intended to prevent births within the group" the ICJ commented on the disputed issue whether this provision includes rape. According to the Court's view, rape under certain conditions may fall within the scope of this provision. The Court referred to the ICTR's decision in *Akayesu*. There, the ICTR had stated that the mental effects of rape could lead members of the group not to procreate and that rape therefore, especially in patriarchal societies where membership of a group is determined by the identity of the father, could be "an example of a measure intended to prevent births within a group"<sup>115</sup>

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<sup>113</sup> *Id.* ¶ 380.

<sup>114</sup> *Id.* ¶ 434.

<sup>115</sup> ICTR-96-4-T ¶¶ 507-08.

In the case at hand, the ICJ did not have enough elements to evaluate this issue because Croatia could not provide sufficient evidence that rape was committed specifically with the intention to prevent births within the group.<sup>116</sup>

### 5. Genocidal intent

The subjective side of genocide or the *mens rea*, requires the existence of two separate mental elements. First, the perpetrator's *mens rea* concerning the fulfillment of all the objective criteria of the prohibited acts of genocide listed in the subparagraphs of Article II. Second, the specific intent (*dolus specialis*) to "destroy" the targeted group, in whole or in part.

As the ICJ rightly emphasized, it is the second mental element, the specific genocidal intent, the intent to "destroy", that contributes to the elevated wrongfulness of genocide, making this crime distinguishable from other international crimes.<sup>117</sup>

The determination of the specific mental element of genocide is difficult. There are huge practical difficulties in determining the existence of such intent, because it is impossible to peek into the minds of the perpetrators. In cases before the ICJ dealing with international wrongful acts of states, rather than persons, another aspect, in addition, comes into play: Usually, international courts when deciding on state responsibility are only concerned with objective criteria: to determine whether a norm of international law has been violated and whether the violation is attributable to a state. The existence of a specific subjective or mental state of the state is not relevant for establishing state responsibility; subjective elements are alien elements when it comes to international wrongful act of states and state responsibility. Instead, they are typical elements in establishing international criminal responsibility of individual persons in the area of international criminal law. Genocide is the only exception, because it requires the existence of a mental element, even with regard to state conduct. It follows from this exceptional character of genocide, that the ICJ, as a body adjudicating on

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<sup>116</sup> Judgment, *supra* note 1, ¶ 397.

<sup>117</sup> *Id.* ¶ 132.

violations of international obligations by states, unlike International Criminal Tribunals, is generally not so experienced with handling a *mens rea* element.

a) The intent to “destroy” (a group in whole or in part)

International doctrine generally employs two different approaches to establish genocidal intent, which are known as the *knowledge-based approach* and the *purpose-based approach*. These two approaches differ in that they either stress the cognitive element (*knowledge-based approach*) or emphasize the volitional element concerning the special purpose, in the genocidal intent (*purpose-based approach*).<sup>118</sup> For example, under the *knowledge-based approach*, a perpetrator acts with the *mens rea* of genocide when he willingly commits a prohibited act with the knowledge that his action would bring about the destruction of a protected group, or alternatively, with the knowledge that his conduct would contribute to other acts being committed against the group, which when put together, would bring about the destruction of that group, in whole or in part.<sup>119</sup> Therefore, for the second alternative, a plan or state policy, or positive knowledge of the context in which genocide occurs would be necessary.

Under the *purpose-based approach*, the perpetrator must consciously desire his prohibited act to result in the destruction of the group in whole or in part and he must know that his acts will likely cause such an effect.

The ICJ, like in its 2007 Bosnia Judgment, though not expressly stating it, followed the *purpose-based approach* by requiring that the destruction of the group was the primary goal or purpose of the conduct.<sup>120</sup> This approach best fits the

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<sup>118</sup> See e.g. Berster, *Convention on Genocide Commentary*, *supra* note 86, at 136; Kress, *Elements of Genocide*, *supra* note 28, at 625 (explaining the different approaches to genocidal intent in legal scholarship).

<sup>119</sup> See Katherine Goldsmith, *The Issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide: Toward a Knowledge-Based Approach* *Genocide Studies and Prevention*, 5 *Genocide Studies and Prevention* 245 (2010) (naming as an example from English law a situation where a person obtains a gun, willingly aims it at someone, and pulls the trigger).

<sup>120</sup> See Judgment, *supra* note 1, ¶¶ 134-136; Bosnia Judgment, *supra* note 28, ¶ 188 (employing the purposed-based approach to determine

language in the definition of genocide in Article II of the Genocide Convention. Moreover, the attribution of intent to a perpetrator who, under the knowledge-based approach, only foresaw the destruction of the group is a too low standard. A low standard is not justifiable given the incredibly significant stigma that is attached to the crime of genocide. Therefore, a high standard of intent and, consequently, a high burden of proof must apply in genocide cases.

The ICJ then elaborated on the question whether the term “destroy” only includes the physical or biological destruction, or whether it also encompasses the destruction of the targeted group as a social entity.<sup>121</sup> Lemkin, the author of the term genocide, considered the intent to destroy in a broad way. In his view, genocide starts with the perpetrator’s intent to destroy the group’s economic life or its cultural and social characteristics, culminating in its physical destruction as the ultimate stage.<sup>122</sup> The German Constitutional Court in the *Jorgic* Case also favors a broad interpretation of the term “destroy” in the sense to include the social or cultural destruction of a group.<sup>123</sup> The European Court of Human Rights upheld this interpretation and argued that the broad interpretation of intent to destroy does not appear unreasonable when read within the systematic context of the prohibited conduct, which includes measures intended to prevent births in a group and the forcible transfer of children of the group to another group.<sup>124</sup>

The ICJ has taken a different approach and, by doing so, has aligned itself in the jurisprudence of International Criminal Tribunals.<sup>125</sup> In the present judgment, the ICJ

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genocidal intent).

<sup>121</sup> See generally Kress, *Elements of Genocide*, *supra* note 28, at 625 (commenting on the definition of “destroy”); see also *Prosecutor v. Krstic*, IT-98-33-T (Int’l Crim. Trib. for the Former Yugoslavia, Trial Chamber, Aug. 2, 2001) at ¶ 580 (rejecting a social conception as a proper definition for the term “destroy”).

<sup>122</sup> LEMKIN, *AXIS RULE*, *supra* note 7, at 87-89.

<sup>123</sup> See *In Re Jorgic*, 2 BvR 1290/99 (Federal Constitutional Court, Germany, Dec. 12, 2000) at ¶ III(4)(a)(aa) (interpreting Article 220a of the German Criminal Code).

<sup>124</sup> *Jorgic v. Germany*, No. 74613/01 (E.Ct.H.R., July 12, 2007) ¶¶ 103-113.

<sup>125</sup> See *The Prosecutor v Krstic*, IT-98-33-T, *supra* note 121, ¶¶ 576-580

followed the reasoning in its 2007 Bosnia Judgment by rejecting a broad interpretation of “destroy”.<sup>126</sup> The Court concluded that the specific intent is to be interpreted narrowly, requiring that the perpetrator must have intended the physical or biological destruction of the protected group.<sup>127</sup>

In fact, the drafting history of the Genocide Convention supports the ICJ’s view, by suggesting a narrow interpretation of the term destruction, which encompasses only the physical or biological destruction.<sup>128</sup> Such a narrow interpretation is also supported by a systematic interpretation of Article II of Genocide Convention, since all prohibited acts listed in subparagraphs a-e refer to a conduct, which results in a physical destruction. Thus, interpreting the term destroy otherwise would disconnect the umbrella clause from the prohibited modalities of the commission of genocide.<sup>129</sup>

The Genocide Convention expressly envisages situations where a group may be targeted for destruction “in part”. In the present case, the ICJ had to take position on the question of how large the targeted “part” must be to meet the threshold for genocidal intent.

The Genocide Convention and its *travaux préparatoires* remain silent on this issue. It is argued that, in light of the protective purpose of the Genocide Convention, only such fractions, whose destruction would affect the entire group’s existence, may qualify.<sup>130</sup>

The ICJ cited from its 2007 Bosnia Judgment, in which it had determined that the term “in part” must be understood as “substantial part”.<sup>131</sup> According to the ICJ, the substantiality criterion must be assessed by reference to a number of factors, such as the geographical location of the targeted group, the

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(opting for a narrow interpretation of intent).

<sup>126</sup> Judgment, *supra* note 1, ¶¶ 134-136; Bosnia Judgment, *supra* note 28, ¶ 190.

<sup>127</sup> Judgment, *supra* note 1, ¶ 36.

<sup>128</sup> See Int’l Law Comm’n, Report of the International Law Commission on the work of its forty-eighth session, UN Doc. A/51/10 (6 May 1996-26 July 1996), at 90-91 (displaying the drafting history of the Genocide Convention).

<sup>129</sup> Kress, *Elements of Genocide*, *supra* note 28, at 627.

<sup>130</sup> Berster, *Convention on Genocide Commentary*, *supra* note 86, at 148-49.

<sup>131</sup> Judgment, *supra* note 1, ¶ 142.

area of the perpetrator's activity and control, and the prominence of the targeted part within the group as a whole.<sup>132</sup> Regarding the latter factor, the ICJ referred to the ICTY's *Krstic* decision, in which the tribunal noted that

“[i]f a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial.”<sup>133</sup>The ICJ, using a slightly modified language than in its 2007 Judgment, transformed these factors for the first time into a tripartite test to determine whether the substantiality requirement is met. The Court explained, “[i]n evaluating whether the allegedly targeted part of a protected group is substantial in relation to the overall group, the Court will take into account the quantitative element as well as evidence regarding the geographic location and prominence of the allegedly targeted part of the group.”<sup>134</sup>This test applied to the case under consideration, the ICJ first delineated the Croats living in specific regions (Eastern and Western Slavonia, Banovina/Banija, Kordun, Lika and Dalmatia) as the relevant part of the targeted group.<sup>135</sup> Then, the ICJ went on to assess whether this identified part was substantial. The Court found that “the ethnic Croat population living in the [identified] regions . . . numbered between 1.7 and 1.8 million [individuals . . . and] constituted slightly less than half of the ethnic population living in Croatia.”<sup>136</sup> The ICJ further stated “that acts committed by JNA and Serb forces in the [identified] regions . . . targeted the Croats living in those regions, within which these armed forces exercised and sought to expand their control.”<sup>137</sup> With respect to the criteria of the prominence of the group, the Court found that Croatia had not provided any information on this point.<sup>138</sup> This, however, did not preclude the Court from generally finding that “the Croats living in the

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<sup>132</sup> *Id.*

<sup>133</sup> *Prosecutor v. Krstic*, Case No. IT-98-33-A, Judgment, ¶ 12 (Int'l Crim. Trib. for the Former Yugoslavia, Appeals Chamber Apr. 19, 2004) (referred to by the ICJ in the Bosnia Judgment, *supra* note 28, ¶ 200).

<sup>134</sup> Judgment, *supra* note 1, ¶ 142.

<sup>135</sup> *Id.* ¶ 403.

<sup>136</sup> *Id.* ¶ 406.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

identified regions formed a substantial part of the ethnic Croat group living within the territory of Croatia during the relevant period.”<sup>139</sup>

A closer look at the Court’s reasoning reveals that the Court has not only reaffirmed the substantiality criterion enunciated in its 2007 Bosnia Judgment, but, has also systematized the different factors of this criterion by setting out a formula for a tripartite test to assess whether the substantiality threshold is met. Despite the slightly different language employed, the ICJ has not departed from its 2007 test, but only renamed and restructured it. The test pronounced by the Court in the present Judgment suggests that the three criteria for the substantiality test (quantitative element, geographic location and prominence) are to be applied in an egalitarian manner. There is no normative order between these factors.

With this adapted substantiality test, the ICJ has aligned itself with the jurisprudence of International Criminal Tribunals as well as the majority view among legal commentators.<sup>140</sup> Nevertheless, it must be criticized that, beyond this welcome clarification of the standard applied in its prior Judgment, the criteria set out in the tripartite test remain vague. In conclusion, the ICJ again has missed out the opportunity to set out further parameters that would provide guidance to future cases.

#### b) Proof of genocidal intent

To prove genocidal intent is an extremely difficult task. In contrast to the determination of physical acts, which are visible and therefore can be proven by reference to a number of objective criteria, looking inside the mind of a perpetrator is impossible. In fact, many perpetrators cannot be held responsible for committing genocide because of the high threshold that applies to genocidal intent. The Armenian Genocide of the early 20<sup>th</sup> century is a good example where,

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<sup>139</sup> *Id.*

<sup>140</sup> See e.g. *Prosecutor v. Krstic*, *supra* note 121, ¶ 12; *Prosecutor v. Tolimir*, *supra* note 96, ¶ 749; *Berster*, *supra* note 86, at 149 (arguing in favor of the substantiality test).

despite the international community's overwhelming condemnation of the events as genocide, Turkey, the legal continuator of the then-existing Ottoman Empire, still denies that it had acted with genocidal intent.<sup>141</sup>

Especially when it comes to determining genocidal intent of a state, difficulties arise because the state is an abstract entity which, unlike individual persons, *per se* does not possess a particular state of mind. Therefore, in order to hold the state internationally responsible for genocide, it is crucial to attribute the actions of individual perpetrators to the state. When it comes to establishing genocidal intent of the state, the question, therefore, is whether the intent of an individual acting alone or in a group is sufficient, or if the presence of a particular state policy is required. In this regard, it must be recalled again that the nature of individual criminal responsibility is fundamentally different than that of state responsibility for genocide. Consequently, different standards to prove genocidal intent may apply.<sup>142</sup>

In the case under consideration, the ICJ faced the difficult task of establishing whether Serbia and Croatia had acted with the necessary *mens rea*. The ICJ began its analysis with an extensive discussion on the standard and burden of proof of genocidal intent. The Court first recalled the general procedural rule that the party alleging a fact also bears the burden of proof for that fact.<sup>143</sup> Regarding the standard of proof, the ICJ referred to its 2007 Bosnia Judgment, where it had held that "claims against a State involving charges of

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<sup>141</sup> Cf. John Kifner, *Armenian Genocide of 1915: An Overview*, N.Y. TIMES, [http://www.nytimes.com/ref/timestopics/topics\\_armeniangenocide.html](http://www.nytimes.com/ref/timestopics/topics_armeniangenocide.html) (explaining the events that led to the Armenian Genocide).

<sup>142</sup> *Compare Prosecutor v. Jelisić*, Case No. IT-95-10-A, Judgment, ¶ 48 (Int'l Crim. Trib. for the Former Yugoslavia Appeal Chamber July 5, 2001) (stating that "[t]he existence of a plan or policy is not a legal ingredient of the crime, although it may facilitate proof of the crime") with Kress, *supra* note 67, at 461 (arguing that genocide as a state act requires the existence of a state policy, or at least a collective destructive act). See also the International Criminal Court (ICC) Elements of Crimes for Article 6 of the ICC Statute (departing from the case law of International Criminal Tribunals in requiring proof that genocide occurred "in the context of a manifest pattern of similar conduct directed against that group").

<sup>143</sup> Judgment, *supra* note 1, ¶ 172.

exceptional gravity must be proved by evidence that is fully conclusive . . . [t]he same standard applies to the proof of attribution for such acts.”<sup>144</sup>The ICJ also clarified a passage from its 2007 Bosnia Judgment, where it had noted that inference of genocidal intent must be “the only possible inference.” This formulation had caused some confusion among scholars, because it slightly differed from the statement made by the ICTY that “[s]uch a finding must be the only reasonable conclusion available from the evidence.”<sup>145</sup> The ICJ now took the chance to explain that the ICTY’s criterion is in substance identical with that laid down by the Court in its 2007 judgment.<sup>146</sup>

Evaluating the Court’s statement, it must be noted that such a high standard of proof for genocidal intent goes beyond the usual test applied by the ICJ in regular cases of international responsibility of states. In fact, such a high standard resembles only standards of proof for guilt in criminal proceedings. On the one hand, applying such a high standard makes it particular difficult to prove genocide. On the other hand, a strict test is justified because of the special character and stigma that is attached to genocide as the “crime of crimes.”

c) The ICJ’s assessment of the evidence

The ICJ first noted that it could not find an explicit state policy to commit genocide by the Croatian or Serbian government. Therefore, the ICJ found it necessary to establish whether a pattern of conduct existed, from which genocidal intent—as the only reasonable inference—could be drawn.<sup>147</sup> In order to prove the existence of such a pattern of conduct by Serbia, Croatia had advanced a number of factors.<sup>148</sup> The ICJ

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<sup>144</sup> Judgment, *supra* note 1, ¶ 178; Bosnia Judgment, *supra* note 28, ¶ 209.

<sup>145</sup> *Prosecutor v. Tolimir*, *supra* note 96, ¶ 34.

<sup>146</sup> Judgment, *supra* note 1, ¶ 148.

<sup>147</sup> Judgment, *supra* note 1, ¶ 148 (referring to the Bosnia Judgment, *supra* note 28, at ¶ 373).

<sup>148</sup> *Id.* at ¶ 408 (determining the factors advanced by Serbia as: The political doctrine of Serbian expansionism (1), statements of public officials and propaganda of state controlled media (2), that the pattern of attacks far

examined only those factors that

[C]oncern the scale and allegedly systematic nature of the attacks, the fact that those attacks are said to have caused casualties and damage far in excess of what was justified by military necessity, the specific targeting of Croats and the nature, extent and degree of the injuries caused to the Croat population.<sup>149</sup>

According to ICJ these factors implied a pattern of widespread attacks, conducted according to a similar *modus operandi*, by Serb forces on localities with Croat populations. But the Court determined that intent to destroy the group, either totally or partially, was not the only reasonable inference that could be drawn from this pattern of conduct.<sup>150</sup> Similarly, the ICJ did not find genocidal intent on the part of Croatia when assessing Serbia's counter-claim.<sup>151</sup>

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exceeded any legitimate military objective (3), contemporaneous video footage (4), the explicit recognition by the JNA that paramilitary groups were engaging in genocidal acts (5), the close co-operation between the JNA and the Serb paramilitary groups implying close planning and logistical support (6), the systematic nature and scale of the attacks on Croats (7), that ethnic Croats were constantly singled out for attack while local Serbs were excluded (8), that ethnic Croats were required to identify themselves and their property by special marks (9), the number of Croats killed and missing as a proportion of the local population (10), the nature, degree and extent of the injuries inflicted (through physical attacks, acts of torture, inhuman and degrading treatment, rape and sexual violence), "including injuries with recognizable ethnic characteristics" (11), the use of ethnically derogatory language in the course of killing, torture and rape (12); the forced displacement of Croats and the organized means adopted to this end (13); the systematic looting and destruction of Croat cultural and religious monuments(14); the suppression of Croat culture and religious practices (15); the consequent permanent and evidently intended demographic changes to the regions concerned(16); the failure to punish the crimes (17)).

<sup>149</sup> *Id.* ¶ 413.

<sup>150</sup> *Id.* ¶¶ 416, 424-26 (finding that the aims of the Serb forces included, i.e. a political objective to unite Serb areas in Croatia in order to establish a unified territory and creating an ethnically homogeneous Serb State) and ¶ 430 (finding that the intent of the perpetrators was not to physically destroy the members of the protected group, as such, but to punish them because of their status as enemies in a military sense.)

<sup>151</sup> Judgment, *supra* note 1, ¶ 500 (rejecting Serbia's argument that genocidal intent can be inferred from the actual language of the transcript of the meeting held at Brioni on 31 July, 1995 and, in any event, from the pattern of conduct that is apparent from the totality of the actions decided upon and implemented by the Croatian authorities during and immediately after Operation "Storm.")

Evaluating the Court's reasoning, it has to be concluded that the Court's rejection of genocidal intent of Croatia and Serbia is consequential, considering the high threshold which applies. Nevertheless, the Court did not make it really clear why it only focused on only some of the factors advanced by Croatia to establish genocidal intent. The arguments of the Court on this point remain superficial.<sup>152</sup>

#### 6. Relevance of the Law of War

A final observation need to be made regarding the relevance of International Humanitarian Law, or the Law of War, in the present judgment. The ICJ briefly addressed the issue of whether acts committed during an armed conflict must, in order to constitute the *actus reus* of genocide, be unlawful under International Humanitarian Law (IHL). This issue was under dispute between Croatia and Serbia because Serbia had argued that acts committed by Serb forces occurred during a "legitimate combat" with Croatian armed forces.<sup>153</sup> The ICJ noted that it does not "rule, in general or in abstract terms, on the relationship between the [Genocide] Convention and international humanitarian law."<sup>154</sup> The ICJ acknowledged that, while the Genocide Convention and IHL are two distinct bodies of rules, pursuing different aims, IHL might nevertheless be relevant in order to decide whether the alleged acts constitute genocide within the meaning of the Genocide Convention.<sup>155</sup> Accordingly, the ICJ made in different places throughout the judgment some remarks on the illegality under IHL of certain acts, which it considered relevant for the determination of the *actus reus* and *mens rea* of genocide. For example, with regard to the *actus reus* of genocide, the ICJ referred to the ICTY *Mrkšić* case. In that case the Tribunal had determined that a military operation against Croat forces had been carried out in an indiscriminate way, directed deliberately against the civilian population, in contrast to IHL.<sup>156</sup> With

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<sup>152</sup> For a possible explanation, see concluding remarks.

<sup>153</sup> *Id.* ¶ 152.

<sup>154</sup> *Id.* ¶ 153.

<sup>155</sup> *Id.*

<sup>156</sup> Judgment, *supra* note 1, ¶ 472.

regard to subparagraph (b), the ICJ again referred to the ICTY, which had found that certain Croat Prisoners of War had been subject to ill treatment and torture, perpetrated by Serb forces.<sup>157</sup> Also, IHL seemed to be relevant to the ICJ for establishing the *mens rea* of genocide. In this regard, the ICJ explained its special consideration of only some of the factors advanced by Croatia to prove genocidal intent with the fact “that those attacks are said to have caused casualties and damage far in excess of what was justified by military necessity”.<sup>158</sup> The ICJ seemed to regard the illegality of a conduct under IHL, especially a violation of the principle of military necessity or proportionality, as an indicator for genocidal intent. Concerning Serbia’s counter-claim, the ICJ also referred to IHL when noting that the legality of the shelling of Serbian villages by Croat forces during a military operation indicated that the mental element of genocide was lacking.<sup>159</sup>

In international scholarship the relationship between the law of genocide and IHL has not been satisfyingly settled. Insofar, the ICJ’s statements in this Judgment provide an interesting contribution to the discussion.

#### V. Concluding remarks

With its Judgment in *Croatia v. Serbia* of 2015 the ICJ—at least in a juridical sense—closed a 15-year old violent chapter of the post-Yugoslav history. One of the lasting (political and historical) contributions of the judgment is to set a record for history of the horrible events that have happened. In addition to its political significance, the ICJ’s ruling has also made an important legal contribution to the international law of genocide. By largely following the path set out in the ICJ’s 2007 *Bosnia* judgment, the present judgment contributed to a coherent legal approach the interpretation of the main elements of genocide, even though it must be noted that the Court sometimes remains too vague with respect to disputed aspects of this crime. One of the major themes throughout the

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<sup>157</sup> *Id.* ¶ 308.

<sup>158</sup> *Id.* ¶ 413.

<sup>159</sup> *Id.* ¶¶ 474-75.

entire judgment is the Court's general restrictive approach regarding the interpretation of the *actus reus* and *mens rea* of genocide by which the Court has set a high threshold for allegations of genocide in future cases. Strongly criticized must be the ICJ's treatment of the jurisdictional problem concerning alleged acts that took place before Serbia became bound by the Genocide Convention in its own right. Notwithstanding these problematical aspects, the ICJ's recent decision on the Genocide Convention, overall, is to be welcomed. The legal impact of this judgment reaches beyond the dispute between Serbia and Croatia in the present case. This is not only because decisions of the ICJ are an authoritative statement of the principal judicial organ of the United Nations, but also because judicial decision in general serve as a supplementary means of interpretation for international law. The ICJ's contribution to the international law of genocide, therefore, will certainly serve as a guideline for other courts and legal practitioners in dealing with future cases concerning genocide.