

ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment of 3 February 2015

128. The Court recalls [...] that “if a State is to be responsible because it has breached its obligation not to commit genocide, it must be shown that genocide as defined in the Convention has been committed”. It may consist of acts, attributable to the State, committed by a person or a group of persons whose individual criminal responsibility has already been established. But the Court also envisaged an alternative scenario, in which “State responsibility can arise under the Convention for genocide and complicity, without an individual being convicted of the crime or an associated one”. [...]

A. The Mens Rea of Genocide

132. The “intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such” is the essential characteristic of genocide, which distinguishes it from other serious crimes. It is regarded as a *dolus specialis*, that is to say a specific intent, which, in order for genocide to be established, must be present in addition to the intent required for each of the individual acts involved.

133. In the present case, the Parties differ [...] (3) on what constitutes the evidence of the *dolus specialis*.

[...]

(3) Evidence of the dolus specialis

143. The Parties agree that the *dolus specialis* is to be sought, first, in the State’s policy, while at the same time accepting that such intent will seldom be expressly stated. They agree that, alternatively, the *dolus specialis* may be established by indirect evidence, i.e., deduced or inferred from certain types of conduct. They disagree, however, on the number and nature of instances of such conduct required for this purpose.

144. Croatia considers that conduct of this kind may be reflected in the actions of a small number of identified individuals, whereas Serbia cites the Elements of Crimes, adopted pursuant to the Rome Statute of the International Criminal Court, which refer to “a manifest pattern of similar conduct directed against [the] group”. The Respondent considers that this excludes the possibility of genocide being committed by a single individual or a small number of individuals.

145/146. In the absence of a State plan expressing the intent to commit genocide, it is necessary, in the Court’s view, to clarify the process whereby such an intent may be inferred from the individual conduct of perpetrators of the acts contemplated in Article II of the Convention. [...] [I]n order to infer the existence of *dolus specialis* from a pattern of conduct, it is necessary and sufficient that this is the only inference that could reasonably be drawn from the acts in question.

[...]

414. The Court notes that, in the *Mrkšić et al.* case, the ICTY Trial Chamber found that in Eastern Slavonia “the system of attack employed by the JNA [*označení pro armádu bývalé Jugoslávie, později Srbska*] typically evolved along the following lines:

(a) tension, confusion and fear is built up by a military presence around a village (or bigger community) and provocative behaviour; (b) there is then artillery or mortar shelling for several days, mostly aimed at the Croatian parts of the village; in this stage churches are often hit and destroyed; (c) in nearly all cases JNA ultimata are issued to the people of a village demanding the collection and the delivery to the JNA of all weapons; village delegations are formed but their consultations with JNA military authorities do not lead [...] to peaceful arrangements ; with or without waiting for the results of the ultimata a military attack is carried out ; and (d) at the same time, or shortly after the attack, Serb paramilitaries enter the village; what then follows varied from murder, killing, burning and looting, to discrimination” (*Mrkšić Trial Judgment*, para. 43). [...]

417. The Court recalls that, for a pattern of conduct to be accepted as evidence of intent to destroy the group, in whole or in part, it must be “such that it could only point to the existence of such intent”. This signifies that, for the Court, intent to destroy the group, in whole or in part, must be the only reasonable inference which can be drawn from the pattern of conduct (see paragraph 148 above).

418. In its oral argument, Croatia put forward two factors which, in its view, should lead the Court to conclude that intent to destroy is the only reasonable inference to be drawn from the pattern of conduct previously established: the context in which those acts were committed and the opportunity which the JNA and Serb forces [*obecné označení pro srbské nestátní ozbrojené skupiny*] had of destroying the Croat population. The Court will examine these in turn.

(a) Context

419. The Court will examine the context in which the acts constituting the *actus reus* of genocide within the meaning of subparagraphs (a) and (b) of the Convention were committed, in order to determine the aim pursued by the authors of those acts.

420. Croatia claims that the acts committed by the JNA and Serb forces against Croats between 1991 and 1995 represented the implementation, by the Serb nationalists and leadership, of the objective of a “Greater Serbia”. That entailed unifying those parts of the territories of the various entities of the [former Yugoslavia] in which ethnic Serbs were living. [...]

425. In its Trial Chamber Judgment in the *Babić* case, the ICTY [...] held that there had been a joint criminal enterprise whose objective

“was the permanent and forcible removal of the majority of Croat and other non-Serb populations from approximately one-third of Croatia through a campaign of persecutions in order to make that territory a Serb-dominated state” (*Babić Trial Judgment*, para. 34).

426. According to the ICTY, the leadership of Serbia and that of the Serbs in Croatia, inter alia, shared the objective of creating an ethnically homogeneous Serb State. That was the context in which acts were committed that constitute the *actus reus* of genocide within the meaning of Article II (a) and (b) of the Convention. However, the conclusion of the ICTY indicates that

those acts were not committed with intent to destroy the Croats, but rather with that of forcing them to leave the regions concerned so that an ethnically homogeneous Serb State could be created. The Court agrees with this conclusion. As the Tribunal found in the *Martić* case:

“[...] With regard to the period from 1992 to 1995, the Trial Chamber has been furnished with a substantial amount of evidence of massive and widespread acts of violence and intimidation committed against the non-Serb population, which were pervasive throughout the RSK [*Republika Srpska Krajina – území dnešního Chorvatska obývané převážně Srby*] territory. The Trial Chamber notes, in particular, that during this time period there was a continuation of incidents of killings, beatings, robbery and theft, harassment, and extensive destruction of houses and Catholic churches carried out against the non-Serb population. These acts created a coercive atmosphere which had the effect of forcing out the non-Serb population from the territory of the RSK. As a consequence, [...] almost the entire non-Serb population was forcibly removed to territories under the control of Croatia.” (*Martić* Trial Judgment, paras. 427, 430 and 431.) [...]

428. The Court therefore concludes that Croatia’s contentions regarding the overall context do not support its assertion that genocidal intent is the only reasonable inference to be drawn. [...]

(b) Opportunity

431. Croatia contends that the JNA and Serb forces systematically committed acts that constitute the *actus reus* of genocide [...] once the opportunity to do so was presented to them, i.e., when they attacked and occupied various Croat localities. According to Croatia, this factor demonstrates that their intention was to destroy the Croat group in whole or in part.

432. Serbia contests Croatia’s approach. It refers to several instances of the JNA and Serb forces sparing Croats by not killing them. Moreover, it argues that the criterion of opportunity must be weighed against that of substantiality. For Serbia, the limited number of Croat victims, seen in the light of the opportunities for killing supposedly available to the JNA and Serb forces, cannot give rise to an inference that an intent to destroy was present.

433. The Court will not seek to determine whether or not, in each of the localities it has previously considered, the JNA and Serb forces made systematic use of the opportunities to physically destroy Croats.

434. The Court considers, on the other hand, that the mass forced displacement of Croats is a significant factor in assessing whether there was an intent to destroy the group, in whole or in part. The Court has previously found that Croatia has not demonstrated that such forced displacement constituted the *actus reus* of genocide within the meaning of Article II (c) of the Convention (para. 377 above). Nonetheless, the Court recalls that the fact of forced displacement occurring in parallel to acts falling under Article II of the Convention may be “indicative of the presence of a specific intent (*dolus specialis*) inspiring those acts”.

435. In the present case, as emerges in particular from the findings of the ICTY, forced displacement was the instrument of a policy aimed at establishing an ethnically homogeneous Serb State. In that context, the expulsion of the Croats was brought about by the creation of a coercive atmosphere, generated by the commission of acts including some that constitute the *actus reus* of genocide within the meaning of Article II (a) and (b) of the Convention. Those

acts had an objective, namely the forced displacement of the Croats, which did not entail their physical destruction. The ICTY has estimated that between April 1991 and April 1992, between 80,000 and 100,000 persons fled the SAO Krajina (and then the RSK). The Court finds that the acts committed by the JNA and Serb forces essentially had the effect of making the Croat population flee the territories concerned. It was not a question of systematically destroying that population, but of forcing it to leave the areas controlled by these armed forces. [...]

437. The Court considers that it is also relevant to compare the size of the targeted part of the protected group with the number of Croat victims, in order to determine whether the JNA and Serb forces availed themselves of opportunities to destroy that part of the group. In this connection, Croatia put forward a figure of 12,500 Croat deaths, which is contested by Serbia. The Court notes that, even assuming that this figure is correct – an issue on which it will make no ruling – the number of victims alleged by Croatia is small in relation to the size of the targeted part of the group.

The Court concludes from the foregoing that Croatia has failed to show that the perpetrators of the acts which form the subject of the principal claim availed themselves of opportunities to destroy a substantial part of the protected group.

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438. Croatia points to activities of Serb paramilitaries as evidence of the *dolus specialis*. In particular, it relies upon a videotape of Zeljko Ražnatović or “Arkan”, leader of a Serb paramilitary group known as the “Serbian Volunteer Guard” or “Arkan’s Tigers”, made during the siege of Vukovar on 1 November 1991, showing him instructing his forces to take care not to kill Serbs and saying that since Serbs were in the basements of buildings and the Croats were upstairs, rocket launchers should be used to “neutralize the first floor”. Even if Arkan’s actions were attributable to Serbia, this speech appears to be but one isolated phase in the very lengthy siege of Vukovar, a siege in which, as the Court has already found, the degree of violence used by attacking forces was excessive, and during which grave suffering was undoubtedly caused to the civilian population as Serbia acknowledged at least to some extent. It is difficult to infer anything from one isolated instance.

Otázky:

1. Porovnejte tento rozsudek ICJ s rozsudkem ICTR ve věci *Kayishema a Ruzindana* z minulého týdne. Uveďte, zda se přístupy soudů při prokazování *dolus specialis* liší nebo spíše vykazují značnou podobnost. Svě tvrzení zdůvodněte.
2. Zaměřte se na argumenty Chorvatska a Srbska uvedené v odst. 144. Dvůr se k opodstatněnosti těchto tvrzení výslovně nevyjádřil, byť určité indicie týkající se odpovědi v rozsudku najdeme. Jak byste tyto argumenty posoudili vy? Je vyloučeno, aby genocida byla spáchána pouze jednou osobou či velmi malým počtem osob? Svě tvrzení zdůvodněte.