The Actus Reus of Genocide in the Croatia v. Serbia Judgment: Between Legality and Acceptability

CAROLINE FOURNET

Abstract
The long-awaited verdict of the International Court of Justice in the Application of the Convention on the Prevention and Punishment of the Crime of Genocide case between Croatia and Serbia brought to an end the speculations as to whether or not a finding of genocide would be reached. After lengthy considerations on the genocidal actus reus, the Court dismissed all the claims of genocide, based on the lack of genocidal intent. If this conclusion is perfectly in line with established law and case law, its wider readability and acceptability outside of the legal microcosm is perhaps doubtful. How can a judgment which recognizes that acts falling within the list of proscribed genocidal acts have been committed but which then refutes their qualification as genocidal due to a lack of specific intent be explicable to those who lost their loved ones in what they feel was an enterprise of destruction?

Key words
causing serious mental harm; genocidal actus reus; ICTY; missing persons; right to the truth

When it issued its judgment in the Application of the Convention on the Prevention and Punishment of the Crime of Genocide case between Croatia and Serbia,¹ the International Court of Justice (ICJ) logically had to apply the definition of genocide as contained in Article II of the 1948 Genocide Convention which enumerates a limitative list of proscribed acts:

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.²

Given that this definition has been reproduced verbatim in the Statutes of the International Criminal Tribunal for Rwanda (ICTR), the International Criminal Tribunal for the Former Yugoslavia (ICTY), and the International Criminal Court (ICC),³ the International Court of Justice had at its disposal a substantial body of valid – and generally consistent – judicial precedents, including its own.⁴ In this context, it seems safe to assert that any expectations surrounding this case had more to do with the final verdict the International Court would ultimately render, and whether or not it would make a finding of genocide based on the facts, rather than with its interpretation of the legal definition of the crime of genocide.

As the following analysis will highlight, the conclusions of the ICJ in this instance were perfectly in line with established law, including case law. After a review of the facts of the case, and notwithstanding their qualification as potentially genocidal, the ICJ turned to the decisive element in the characterization of an act as genocide namely, genocidal intent. Having found that this intent had not been established, the ICJ dismissed the claims of genocide in their entirety. While this is perfectly understandable in law and comprehensible for legal scholars, it raises the issue of the broader readability and acceptability of such verdicts. How can a judgment which specifically states that acts which correspond to the crimes listed in the definition of genocide have been committed but which then refutes their qualification as genocidal based on the perpetrator’s intent – or lack thereof – be explicable to the general public and to the families of the victims?

It is possible that the ICJ was aware of this dilemma. This could explain its lengthy considerations on the genocidal actus reus which, although more factual than analytical and oscillating between detailing events and merely reporting ICTY case law, acknowledge the veracity and criminality of the acts perpetrated. It could also explain its – albeit timid – recognition of the rights of the families of the victims to know the truth as to the fate of their deceased relatives and its call for ‘the Parties to pursue [their] co-operation in good faith and to utilise all means available to them in order that the issue of the fate of missing persons can be settled as quickly as possible’.⁵

1. DECEIVING APPEARANCES: A SUCCINCT LEGAL ANALYSIS OF THE GENOCIDAL ACTUS REUS IN AN EXTENSIVE FACTUAL RECORD

The authoritative definition of the crime of genocide, as contained in the Genocide Convention, prohibits five enumerated acts – and these five acts only – but it does not define them. When the time came for the crime of genocide to be tried under

---

³ See Art. 2 of the ICTR Statute, Art. 4 of the ICTY Statute, and Art. 6 of the ICC Statute.
⁵ See Croatia v. Serbia, supra note 2, para. 359. See also ibid., para. 523.
international criminal law, the international criminal tribunals thus had no reasonable option other than to fill this conventional gap. Ruling on the premise that ‘[t]he actus reus of genocide is found in each of the five acts enumerated’\(^6\) and that ‘for a crime of genocide to have been committed, it is necessary that one of the acts listed … be committed’,\(^7\) the different chambers of the ICTR and the ICTY have succeeded in delimiting the scope of application of each of the five genocidal acts.

In so far as the Genocide Convention falls short of defining these five acts, the international criminal tribunals have considered that the narrow selection of potential genocidal acts in the Convention means that ‘the act must have been committed against one or several individuals, because such individual or individuals were members of a specific group, and specifically because they belonged to this group’.\(^8\) The judicial understanding of the genocidal actus reus is thus not solely constituted of the nature of the act perpetrated: the identity of the victim and the intent of the perpetrator also play a qualifying role in the determination of an act as genocidal. According to consistent case law, and admittedly in full respect of the conventional text, it is the specific intent to destroy which will ultimately characterize an act as genocidal. In the absence of such intent, the act might still be criminal but will not be qualified as genocide. This jurisprudential position is to be welcomed as a safeguard against expansive interpretations of the crime of genocide, potentially leading to abuses and running the risk of trivializing one of the most heinous international crimes.

Following the path drawn by the ad hoc tribunals, the ICJ adopted a similar approach in the *Croatia v. Serbia* Judgment. To assess the admissibility of the allegations of genocide made by both parties, it first established whether one or more of the acts listed under Article II of the Genocide Convention had indeed been committed. In its analysis of the applicable law relating to the acts of genocide,\(^9\) the ICJ essentially relied on its 2007 Judgment\(^10\) and on the case law of the ICTY. It also referred back to the travaux préparatoires of the Genocide Convention\(^11\) as well as to the International Law Commission’s 1996 Draft Code of Crimes against the Peace and Security of Mankind.\(^12\) Yet, in an astonishing fashion considering the essential and indisputable contribution of this tribunal to the interpretation and understanding of the law of genocide, it completely left aside the jurisprudential input of the ICTR. In particular, its statement that ‘rape and other acts of sexual violence are capable of constituting the actus reus of genocide within the meaning of Article II(b) of the

---


\(^9\) See *Croatia v. Serbia*, supra note 1, paras. 149–66.

\(^10\) *Prosecutor v. Kayishema and Ruzindana*, supra note 6, para. 312.


\(^12\) Ibid.
Convention\textsuperscript{13} could – and should – have referred to the groundbreaking \textit{Akayesu} case, in which the ICTR Trial Chamber held, for the first time, that, if perpetrated with genocidal intent, rape and sexual violence could constitute self-standing acts of genocide:

With regard … [to], rape and sexual violence, the Chamber wishes to underscore the fact that in its opinion, \textit{they constitute genocide in the same way as any other act} as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such.\textsuperscript{14}

This is perhaps even more visible in the ICJ’s consideration of Serbia’s counterclaim which is nothing more than a detailed summary of the \textit{Gotovina} case decided by the ICTY Trial Chamber and Appeal Chamber.\textsuperscript{15} That the ICJ extensively relied on the ICTY precedents in this particular judgment is understandable considering that it had to deal with facts that also fall under the jurisdiction of the ICTY. Ignoring the ICTY case law would have undoubtedly been a legal oddity. Nonetheless, ignoring the input of the ICTR is troubling. Was it omitted by mistake? Was it based on the perceived incompetence of the Tribunal? Was the ICJ unaware of the relevant decisions reached in Arusha? These explanations would not convince even the most sceptical observer. I suggest that the extensive and exclusive focus of the ICJ on the ICTY was done on purpose, not to dismiss the ICTR or create a hierarchy between the ad hoc tribunals, but rather to make its decision more understandable to those who are ultimately the most concerned namely, the families of the victims to whom the ICTY case law is already very familiar. This suggestion could find further support in the ICJ’s interesting reference to the right of the relatives of the victims to know the truth about what happened to their loved ones.

2. KEEPING UP APPEARANCES: A STRICT UNDERSTANDING OF THE ACT OF ‘CAUSING SERIOUS MENTAL HARM’ AMIDST CONCERNS FOR THE FAMILIES OF THE VICTIMS

In the present case, Croatia ‘raised the argument that the psychological pain suffered by the relatives of missing persons constituted serious mental harm within the meaning of Article II(b) of the Convention’.\textsuperscript{16} Although Croatia did so late during the oral proceedings, the ICJ nonetheless responded to this point and considered whether the violation of the right to the truth amounted to a genocidal act. This right has been defined by the United Nations Human Rights Council as:

\begin{quote}
The right of victims of gross violations of human rights and serious violations of international humanitarian law, and their families and society as a whole, to know the truth regarding such violations, to the fullest extent practicable, in particular the identity of.
\end{quote}

\textsuperscript{13} Ibid., para. 158. The only reference to the \textit{Akayesu} case was made by Croatia in support of its contention that measures had been taken to prevent births within the group; a reference that the ICJ however failed to uphold. See ibid., para. 164.


\textsuperscript{16} See \textit{Croatiav. Serbia}, supra note 1, para. 355.
the perpetrators, the causes and facts of such violations and the circumstances under which they occurred.\textsuperscript{17}

If the right to the truth first emerged within the context of the crime of enforced disappearances, it is gradually being recognized as a more generic and self-standing right. In the present instance, Croatia went even further by arguing that the ongoing refusal of the authorities to provide relatives with information as to the whereabouts and fate of the victims constituted serious mental harm under Article II(b) of the Genocide Convention. In other words, for Croatia, the violation of the right to the truth was nothing short of a genocidal act. Acceding to Croatia’s claim would have required the Court to find that:

the persistent refusal of the competent authorities to provide relatives of individuals who disappeared in the context of an alleged genocide with information in their possession, which would enable the relatives to establish with certainty whether those individuals are dead, and if so, how they died, is capable of causing psychological suffering.\textsuperscript{18}

It however concluded that ‘to fall within Article II(b) of the Convention, the harm resulting from that suffering must be such as to contribute to the physical or biological destruction of the group, in whole or in part’\textsuperscript{19} and that Croatia ‘failed to provide any evidence of psychological suffering sufficient to constitute serious mental harm within the meaning of Article II(b) of the Convention’.\textsuperscript{20}

By itself, this finding seems reasonable in law and in line with existing case law on the genocidal act of ‘causing serious mental harm’. Yet, it could equally be argued that the reverse conclusion would have also fit within the definition of ‘serious mental harm’ as elaborated by the ad hoc tribunals. In \textit{Krstić}, the ICTY Trial Chamber had specified that:

serious harm need not cause permanent and irremediable harm, but it must involve harm that goes beyond temporary unhappiness, embarrassment or humiliation. It must be harm that results in a grave and long-term disadvantage to a person’s ability to lead a normal and constructive life.\textsuperscript{21}

\textsuperscript{17} UN General Assembly, \textit{Report of the Human Rights Council}, UN Doc. A/67/53/Add. 1, p. 28, paras. 26–29. The right to the truth has also been recognized in a number of resolutions (see e.g., UN Commission on Human Rights, \textit{Human Rights Resolution 2005/66: Right to the Truth}, UN Doc. E/CN.4/RES/2005/66; UN Human Rights Council, \textit{Council Decision 2/105: Right to Truth}, UN Doc. A/HRC/21/L.16, and UN Human Rights Council, \textit{Council Resolution 9/11: Right to Truth}; UN Human Rights Council, \textit{Council Resolution 12/12: Right to Truth}), instruments (see UN General Assembly, \textit{International Convention for the Protection of All Persons from Enforced Disappearance}, UN Doc. A/61/448, Art. 24(2)) and judicial decisions (see Inter-American Commission and Court of Human Rights and European Court of Human Rights). This right is also at the heart of transitional justice following mass atrocities with the recent proliferation of truth and reconciliation commissions, which have been specifically set up to complement judicial proceedings and to recount the meaning of events so as to ensure the return and the maintenance of peace. More recently, the General Assembly of the United Nations adopted a resolution explicitly recognizing ‘the importance of respecting and ensuring the right to the truth so as to contribute to ending impunity and to promote and protect human rights’, UN General Assembly, \textit{Resolution Adopted by the Human Rights Council 21/7: Right to the Truth}, UN Doc. A/HRC/RES/21/7.

\textsuperscript{18} \textit{Croatia v. Serbia}, supra note 1, para. 160.

\textsuperscript{19} Ibid.

\textsuperscript{20} Ibid., paras. 356 and 523.

To assert that to be kept uninformed as to the fate of loved ones causes a ‘grave and long-term disadvantage’ is an understatement.

In fact, the ICJ would here have been inspired to rely on the ICTR precedents to better support its conclusions. And indeed, the ICTR has generally read the act of ‘causing serious mental harm’ in an expansive fashion, including within the definitional scope of the crime of genocide acts which had not been contemplated by the drafters of the Genocide Convention. The ICTR itself expressly recognized that ‘[r]eference to serious mental harm, in the context of the Genocide Convention, appears to have been restricted originally to the injection of pharmacological substances occasioning the serious impairment of mental faculties’.\(^{22}\) It nonetheless opted for a case-by-case determination of serious mental harm,\(^{23}\) finding that it ‘can be construed as some type of impairment of mental faculties, or harm that causes serious injury to the mental state of the victim’.\(^{24}\) This wide approach notwithstanding, the ICTR Appeals Chamber still noted that ‘nearly all convictions for the causing of serious bodily or mental harm involve rapes or killings’,\(^{25}\) a finding which could have been used by the ICJ as upholding its exclusion of the fact of not knowing the fate of the victims from the scope of the genocidal \textit{actus reus}. It is arguable that, with such supporting references, the position of the ICJ would have been more grounded in law. It might also have been more understandable to the relatives of the victims.

By merely encouraging ‘the Parties to continue their co-operation with a view to settling as soon as possible the issue of the fate of missing persons’,\(^{26}\) the ICJ may have been perceived as succinctly dismissing the rights and suffering of the families of the victims. It may also have missed an opportunity to recognize that the violation of the right to the truth does constitute ‘permanent and irremediable harm’ and does involve killings, thereby matching even the most stringent understanding of the act of ‘causing serious mental harm’.

3. CONCLUDING REMARKS

As observed in the introduction to this commentary, the main expectation regarding the ICJ’s judgment in \textit{Croatia v. Serbia} was arguably linked to its final verdict on the facts rather than to its legal reasoning. And indeed, a claim of genocide bears a very particular weight and meaning, a phenomenon Schabas has termed ‘the genocide mystique’:\(^{27}\) ‘[t]he word “genocide” itself has a strange, mysterious effect. For victims, it presents itself as a badge of honour, the only adequate way to describe their suffering or that of their ancestors’.\(^{28}\)

It is probably with this in mind that the ICJ, although refuting the claims of genocide, attempted to acknowledge the realities of the crimes perpetrated and

\(^{23}\) \textit{Prosecutor v. Kayishema and Ruzindana}, \textit{supra} note 6, paras. 110 and 113.
\(^{24}\) \textit{Prosecutor v. Gacumbitsi}, \textit{supra} note 6, para 291.
\(^{26}\) \textit{Croatia v. Serbia}, \textit{supra} note 1, para. 523. See also ibid., para. 359.
\(^{28}\) Ibid., at 102.
of the sufferings endured. It embarked on extensive factual surveys, truncating authoritative case law of the ICTR to favour ICTY case law that focuses exclusively on the Former Yugoslavia, thereby recognizing the specificity of the crimes perpetrated in this context. It also expressed its full conviction

that, in various localities in Eastern Slavonia, Western Slavonia, Banovina/Banija, Kordun, Lika and Dalmatia, the JNA and Serb forces perpetrated against members of the protected group acts falling within subparagraphs (a) and (b) of Article II of the Convention, and that the actus reus of genocide has been established.  

It was also

fully convinced that, during and after Operation “Storm”, Croatian armed forces and police perpetrated acts against the Serb population falling within subparagraphs (a) and (b) of Article II of the Genocide Convention, and that these acts constituted the actus reus of genocide. 

Yet, in spite of this full conviction, the Court subsequently dismissed the allegations of genocide made by both parties, based on the lack of genocidal intent. As explained above, this conclusion is understandable in law and in line with the case law of the ad hoc tribunals. But can this conclusion be comprehensible to the communities of victims? How can the concept that acts falling within the categories of proscribed genocidal acts only qualify as genocide if they had been perpetrated with the specific intent to destroy be adequately explained to those who lost their loved ones in what they feel was an enterprise of destruction? It seems reasonable to assert that the Court knew its verdict would cause distress. In this context, it is arguable that its endeavour to extensively record the acts perpetrated while not adding much to the existing body of case law and even dismissing some authoritative findings factually unrelated to the case at hand, was driven by a concern to judicially acknowledge the reality of the atrocities and to somehow make its conclusion slightly more acceptable to the victims of the unacceptable.

---

29 Croatia v. Serbia, supra note 1, para. 401.
30 Ibid., para. 499.