

DISSENTING OPINION OF JUDGE *AD HOC* VUKAS

As I shared the Court's conclusion in its Judgment of 18 November 2008, I attached only a separate opinion in order to make clear my personal reasoning that led me to support the conclusions of the Court. However, in respect of the present Judgment, I have delivered a dissenting opinion as I am against the Court's rejection of Croatia's claim concerning the violations of the Convention on the Prevention and Punishment of the Crime of Genocide by the Republic of Serbia against members of the Croat ethnic group on the territory of the Republic of Croatia.

## I. JURISDICTION AND ADMISSIBILITY

1. In its 2008 Judgment, the Court rejected two of Serbia's preliminary objections to the jurisdiction of the Court. However, it concluded that Serbia's preliminary objections *ratione temporis* did not possess, in the circumstances of the case, an exclusively preliminary character. These preliminary objections concerned the inadmissibility of the claims of the Republic of Croatia, based on acts or omissions which took place before the Federal Republic of Yugoslavia came into being (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 419, para. 21 (point 2)). Therefore, the Court reserved the decision thereon to the present phase of proceedings (*ibid.*, p. 460, para. 130 and p. 466, para. 146 (point 4)).

2. For the determination of the jurisdiction of the Court in respect of Serbia, at that time the "Federal Republic of Yugoslavia" (FRY), what is very important is the declaration made by the FRY on 27 April 1992 (the date on which the FRY was proclaimed a State) which stated that:

"The Federal Republic of Yugoslavia, continuing the State, international legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all the commitments that the Socialist Federal Republic of Yugoslavia assumed internationally." (United Nations doc. A/46/915, Ann. II, quoted in *ibid.*, p. 446, para. 98.)

The correct interpretation of the above statement concerning the continuation of the "international legal and political personality" of the SFRY, means that the FRY succeeded also as to the responsibility for acts committed by the SFRY. It follows from that general principle that

the FRY also succeeded to the responsibility already incurred by the SFRY for the alleged violations of the Genocide Convention before 27 April 1992.

In addition to this legal explanation of the responsibility of the FRY, it is useful to recall that the real leaders of the SFRY, in its last years, were the persons that formally proclaimed the establishment of the FRY on 27 April 1992.

## II. CONSIDERATION OF THE MERITS OF THE PRINCIPAL CLAIM

3. On the basis of the analysis of the arguments/documents submitted by the Parties,

“the Court considers it established that a large number of killings were carried out by the JNA and Serb forces during the conflict in several localities in Eastern Slavonia, Banovina/Baniija, Kordun, Lika and Dalmatia. Furthermore, the evidence presented shows that a large majority of the victims were members of the protected group, which suggests that they may have been systematically targeted . . . The Court thus finds that it has been proved by conclusive evidence that killings of members of the protected group . . . were committed, and that the *actus reus* of genocide specified in Article II (*a*) of the Convention has therefore been established.” (Judgment, para. 295.)

Furthermore, the Court considers that

“during the conflict in a number of localities in Eastern Slavonia, Western Slavonia, and Dalmatia, the JNA and Serb forces injured members of the protected group . . . and perpetrated acts of ill-treatment, torture, sexual violence and rape. These acts caused such bodily or mental harm as to contribute to the physical or biological destruction of the protected group. The Court considers that the *actus reus* of genocide within the meaning of Article II (*b*) of the Convention has accordingly been established.” (*Ibid.*, para. 360.)

Summing up the two above-mentioned conclusions, the Court found that in the mentioned localities in Croatia 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 (*ibid.*, para. 401).

4. However, in respect of its final conclusion concerning the relation of the acts committed against the Croat population in the mentioned areas and the Convention, the Court decided

“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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Thus, in the opinion of the Court, Croatia has not established that the only reasonable inference that can be drawn from the pattern of conduct it relied upon was the intent to destroy, in whole or in part, the Croat group. The acts constituting the *actus reus* of genocide within the meaning of Article II (a) and (b) of the Convention were not committed with the specific intent required for them to be characterized as acts of genocide.” (Judgment, paras. 437 and 440.)

5. However, the quoted conclusion of the Court has not taken into account two important elements related to the acts committed against the Croat group. The first has already been mentioned in its own text: it has not taken into account the number of Croatian victims of acts specified in Article II (b) of the Convention. The second is the fact that the prominence of the victims within a national group cannot be interpreted in a restricted manner as in the Court’s text (*ibid.*, para. 437). Namely, “prominent”, “significant” or “substantial” can have various meanings. According to the latest, and one of the best books on the Convention on Genocide, published in 2014 by C. Tams, L. Berster and B. Schiffbauer, “substantial” can mean “a number of circumstantial aspects like the strategic importance of the group-members’ area of settlement”<sup>1</sup>. This interpretation is especially important in respect of the acts of the JNA and Serb forces in Croatia. Namely, the geographical map of Croatia (reproduced in the main Judgment) confirms that almost all the genocide acts mentioned in the documents and statements of Croatia were committed in two regions most important for the establishment of a Greater Serbia: the Eastern Slavonia border of Croatia with Serbia, and in Lika and Dalmatia. The first area was most important in preventing the extension of the Republic of Serbia to the eastern area of the Republic of Croatia, and the second was dangerous for the existence of the so-called “Republika Srpska Krajina”. For that reason, as I mentioned in the course of the deliberations of the Court, I cannot agree with the conclusion that “Cro-

<sup>1</sup> Christian J. Tams, Lars Berster and Björn Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary*, C. H. Beck/Hart/Nomos, 2014, p. 149, para. 133.

atia 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” (Judgment, para. 437) and that “Croatia has failed to substantiate its allegation that genocide was committed” (*ibid.*, para. 441).

6. In conformity with my conviction concerning the commission of genocide on the territory of the Republic of Croatia against members of the Croat ethnic group, I am of the opinion that the Court had to confirm Croatia’s claims related to the commission of that crime. The Application of Croatia requested the Respondent to take immediate and effective measures against everybody who was included in the commission of acts of genocide. Extremely important is also the requirement of the Republic of Croatia that Serbia should provide to the Applicant all information within its possession or control as to the whereabouts of Croatian citizens who are missing as a result of the genocide acts for which it is responsible.

It would also be correct to make reparation to Croatia and its citizens for the damages caused by the Respondent as well as returning to the Applicant all remaining items of cultural property within the jurisdiction of the Respondent, which were seized in the genocide acts for which it is responsible (*ibid.*, para. 51).

### III. CONSIDERATION OF THE MERITS OF THE COUNTER-CLAIM

7. Establishing its independence, Croatia has tried — individually and with international support — to unite its entire population, which has been a difficult and important historical task. However, part of its population of Serb nationality did not accept the independence of Croatia and gradually established its own *quasi* State — the *Republika Srpska Krajina* (RSK) inside Croatia!

For five years the Government of the Republic of Croatia tried to prevent the establishment of Krajina as a part of the Belgrade Republic of Serbia. As all the peaceful efforts of Croatia were rejected by Krajina, the leaders of the Republic of Croatia decided at the beginning of August 1995 to use force in order to eliminate the Republic of Serb Krajina from the natural and peaceful development of the Republic of Croatia. As the RSK had not enough support from Belgrade, in five days the Croatian forces eliminated the Krajina armed forces from Croatia. As in all armed conflicts, there were victims on both sides. Not only among the members of the armies, but also on the side of the civilian population.

Many civilians left Croatia, but they are now returning to their homes. The Government of the Republic of Croatia does everything possible in

the present difficult economic situation to enable the Serbs from Croatia to return to their cities, villages and homes.

*(Signed)* Budislav VUKAS.

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