



PREVENTIVE FAILURE DURING THE BOSNIAN GENOCIDE: AN ANALYSIS

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The breakup of Bosnia and Herzegovina caused the massacre that was marked the second most heinous after the Second World War. In 1991 around the breakup of Union of Soviet Socialist Republics [Hereinafter referred to as USSR], the Federalist Republic of Yugoslavia [Hereinafter referred to as Fry] got divided into portions. The population composition of Bosnia-Herzegovina had 44% Muslims, 31% Serbians and 13% Croatians, the leftover percentage referring to themselves as Yugoslav Nationals.

SF Serbia wanted to set up a greater Serbian State, with an exclusive Serb population in the marked territory and hence, they were against the formation of Bosnia-Herzegovina. The SDA Party, a party backed by the Muslim majority won the elections within Bosnia-Herzegovina after its formation.

When the European Community, which later evolved into the European Union, was approached, a separatist movement began. Radovan Karadžić, the president of Republic Sprska, led the call for the formation of Republika Sprskaby claiming that that SDA didn't represent the ethnic Serbs. This movement was supported by the Serbian President, Slobodan Milošević. In 1992, the

war began in Bosnia, where the Serbian forces, the JNA and VRS [forces of Republika Sprska] began to besiege Mostar, Foca, and Srebrenica amongst other cities which had a considerable Muslim population. Amongst other innumerable kinds of brutalities, these places were extensively bombed, the mosques were burnt, and the women were sexually abused. The Genocide itself entailed several acts. However, this analysis will limit itself to the massacres that took place in Srebrenica.

I. CLASSIFICATION OF THE ARMED CONFLICT

It is important to note that International Humanitarian Law is only applicable in situation of an armed conflict. An armed conflict is said to be of existence under two broad circumstance, the first being that of use of armed force between states and the second being that of a protected armed violence between such groups with a state, or such groups and the state.¹ An armed conflict can be determined as either that of an international nature or that of a non-international nature. The former deals with sovereign states, while the latter deals with organized armed groups along with states.

The classification of the said issue as an international armed conflict itself has been up for debate. In the case of Prosecutor v. Tadic² the trial chamber was the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991. In the concerned case, it held the

¹ ICTY, The Prosecutor v. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on

Jurisdiction, IT-94-1-A, 2 October 1995 [Hereinafter *Tadic*].

² *Id.*



conflict in Bosnia-Herzegovina to be that of a mixed nature having both international and national conflicts, which contradicted the previous judgments pursuant to Article 61³ that held the conflict as only an International Armed Conflict.⁴

The Tadic⁵ Judgement recognised the existence of an international armed conflict because of the conflict between the armed forces of Bosnia-Herzegovina and JNA by seeking proof of Belgrade controlling the latter; the judgement draws a distinction from 19th May after which it deems the nature of the conflict had changed. The Srebrenica Massacre took place after the nature of the said conflict had changed.

The Tadic judgment refutes the view held by the United Nations Commission of Experts as well.⁶ Judge McDonald in her dissenting opinion stated that the Nicaragua test⁷ was misapplied while there was clear existence of an effective control.⁸ In the while the Nicaragua test only mentions the existence of the state having issued a specific instruction which should be beyond ammunition and

finance; the Tadic judgement went another step to establish the Overall control Test.⁹ This include the overall control of the state and it's active participation in planning and supervision in addition to the existing established test.

The ICJ judgement criticizes the application of the said test.¹⁰ Several other scholars which suggests that division of an armed conflict into segments in order to exclude the rules applicable to International Armed conflicts is alien to the practiced concepts.¹¹

Although despite multiple criticisms, the classification of the concerned genocide remains to be that of the status of a Non-International Armed Conflict. Furthermore, ICTY has confirmed that the definition of Article 3 shall encompass situations where several fractions encompass each other without government involvement¹² by stating, "*whenever there is [...] protracted armed violence between governmental authorities and organized armed groups or*

³ International Criminal Tribunal for the former Yugoslavia, Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.7 (1996).

⁴ ICTY, Prosecutor v. Nikolic, Review of Indictment Pursuant to Rule 61, ¶30, Case IT-94-2- R61, (Oct. 20, 1995); ICTY, Prosecutor v. Mrksic, Confirmation of Indictment, Case IT-95-13-1 (Nov. 7, 1995); ICTY, Prosecutor v. Mrksic, Review of Indictment Pursuant to Rule 61, ¶25, Case IT-95-13-R61(Apr. 3, 1996); ICTY, Prosecutor v. Karadzic, Review of Indictments Pursuant to Rule 61, ¶88, Case IT-(5-5-R61, IT-95-18-R61 (July 11, 1996).

⁵ Tadic, *supra* note 1.

⁶ James C. O' Brien, The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia, 87(4) American Journal of International Law, 639, 639-659 (1993).

⁷ Military and Paramilitary Activities in and against Nicaragua, *Nicaragua v United States, Judgement*, 1986 I.C.J. 14 (1986).

⁸ Application of the Convention on the Prevention and Punishment of the Crime of Genocide, *Bosnia and Herzegovina v Serbia and Montenegro, Judgment*, ICJ GL No 91, ICGJ 70 (ICJ 2007), ¶64(q) (Feb. 26).[*Herinafter, BosniavSerbia*].

⁹ Tadic, *supra* note 1.

¹⁰ *BosniavSerbia, Supra* note 8, at ¶402-406.

¹¹ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)*), Preliminary objections, 11 July 1996, International Court of Justice Reports (1996), 595.

¹²Y. SANDOZ , C.SWINARSKLET AL. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 ¶ 4461, ICRC, GENEVA,(1987).



*between such groups within a State*¹³ Thus, without having to prove attribution we can conclude that, the conflict must be classified as non-International armed conflict.

II. PREVENTION OF GENOCIDE: AN OBLIGATION

As the name of the case dealing with Bosnian genocide suggests, it relates to the application of the Convention on the Prevention and Punishment of the Crime of Genocide¹⁴; both Bosnia and Serbia are parties to the same. We shall examine Article 1¹⁵ of the Convention which brings out two distinct obligations; the first is the obligation to prevent genocide and the second is the obligation to punish genocide. For the purpose of this paper we shall focus on the former, i.e. the obligation to prevent genocide.

In order to determine the obligations imposed by the convention, the court must rely on ordinary meanings of terms, read in conjunction with the object and purpose to rule out ambiguity. For this, the court may rely on supplementary means of interpretations such as the *travaux preparatoires* of the Convention in consideration along with the circumstances in

which the same has been concluded. This same rule has been codified in Article 31¹⁶&32¹⁷ of the VCLT and has been recognised as a valid source of customary international law¹⁸. The focus of this paper shall lay on Article I¹⁹. The first claim made by the said article is that, Genocide is considered to be a crime under international law, which must be read with the preamble of the convention and the resolution 96(I) of GA.²⁰ The Court, in its previous judgements, has stated the prohibition of genocide does indeed form *jus cogens*.²¹

Considering the ordinary meaning as reflected in several conventions and the purpose of the Convention which is humanitarian, Article I can be inferred to have a distinct obligation to prevent which is independent of the obligations raised by other articles. Focusing on the drafting history, the undertaking was moved from the preamble to the operative clause as we see today and there existed a linking clause which was removed; both these changes confirming the previously inferred obligation. Moreover, there is customary international law in the form of

¹³ICTY, The Prosecutor v. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶70, IT-94-1-A, 2 October 1995.

¹⁴Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9 1948, S. Exec. Doc. O, 81-1 (1949), 78 U.N.T.S. 277.

¹⁵*Id.* at Art 1.

¹⁶Vienna Convention on the Law of Treaties, Art.26, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter, VCLT].

¹⁷*Id.*

¹⁸Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, ¶174 &¶ 94; case concerning Avena and Other Mexican Nationals (Mexico v.

United States of America), Judgment, ¶48 &¶83 I.C.J. Reports 2004,; LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001, ¶501 & ¶99; and Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002, ¶ 645 & ¶ 37.

¹⁹Convention on the Prevention and Punishment of the Crime of Genocide, Art. I, Dec. 9 1948, S. Exec. Doc. O, 81-1 (1949).

²⁰G.A. Res. A/RES/96, The Crime of Genocide (December 11, 1946).

²¹Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda), ¶ 64, I.C.J. 219 (Order of July 10, 2002).



GA resolutions²² and ILC resolutions²³ that identify genocide as an international crime that invokes both national and international responsibility to both individuals and the states involved.

There are several conventions²⁴ that impose an obligation to prevent genocide, however, the extent of the obligation defers from convention to convention. The primary focus of this paper shall be the convention but it won't be limited to the same.

Before we delve into the analysis, it is important to highlight the difference between the above stated obligation arising out of Article I and the obligation arising out Article III(e), which is to not commit or be complicit in an act of genocide. A state might be held liable in violation to a duty to prevent without having full knowledge of facts, but for a state to be held complicit, it is important for the state organs to be aware of the situation. The duty to prevent genocide has two broad aspects to it. Firstly, the defendants are bound to exercise due diligence and secondly, the genocide itself must have taken place. The most important thing to consider here is that this duty to prevent is that of conduct and not that of result. The presence of both the above mentioned two broad aspects is imperative for there to be breach of the concerned duty.

²²G.A. Res. A/RES/180 (II), Draft Convention on Genocide (November 21, 1947).

²³G.A. Res. (A/RES/177(V), International Convention for the Protection of All Persons from Enforced Disappearance (December 20, 2006); G.A. Res. A/RES/178 (II), Draft Declaration on the Rights and Duties of states (November 21, 1947).

²⁴Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art 2, Dec. 10, 1984, 1465 U.N.T.S. 85, 113; S. Treaty Doc. No. 100-20 (1988); 23 I.L.M. 1027 (1984); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons,

III. THE BREACH: INFERENCES AND THE COURT'S DECISION

Our focus shall be limited to the Srebrenica and the respective conduct of the Federal Republic of Yugoslavia. FRY had links of political, military, and financial nature with the Republic Srpska and VSR, in fact, FRY was in a position to exert influence upon the group of Bosnian Serbs that were behind the said genocide. Furthermore, FRY was under the orders of the Court dated 8 April, 1993, to prevent any armed unit which might be it's under control, direction or influence, from committing genocide.²⁵ The court's emphasised on the term influence by explicitly mentioning it indicates that it asked of the respondent to stop those who come under their direct control but also those with whom they maintained links and relations.

The Court in this situation must and rightly did infer that FRY was aware of the actions leading to the genocide. Documents second this inference as there is record of Mr. Bildt, the European Union Negotiator meeting Mr. Milosevic in Belgrade to ask for access to the UNHCR in order to provide assistance and for the ICRC to being the process of registration of those being treated as prisoners of war by the Bosnian Serb Army.²⁶

including Diplomatic Agents, Art.4, Annex to UNGA Res. n 3166 (XVIII) of 14 December 1973; the Convention on the Safety of United Nations and Associated Personnel, Art. 11, (December 9, 1994); the International Convention on the Suppression of Terrorist Bombings, Art. 15 (December 15, 1997).

²⁵Yugoslavia (Serbia and Montenegro), Provisional Measures, Order of 8 April 1993, *I.C.J. Reports 1993*, ¶ 52 A (2).

²⁶Report of the Secretary-General pursuant to General Assembly resolution 53/35: The fall of Srebrenica [A/54/549].



General Clark's testimony during the ICTY²⁷ case recorded a statement that indicated that Milosevic told the General that he had asked the Serbs to not proceed but they turned a deaf ear. While Milosevic denied ever having made that statement, General Clark's testimony was nevertheless relied on by the trial chamber.²⁸

There is no evidence to prove that the official organs of the state were made aware on record, but there is enough evidence to prove the involvement and awareness of the head of the state, President Milosevic. There is no evidence found or provided by the defendant state even in the ICJ case to prove any action taken in furtherance of prevention of the genocide despite having the onus of proving the same. The requirement of due diligence is also that of conduct and not that of the end, thus, it is immaterial to the situation if the act would have still taken place despite preventive measures being in place. The question inconsideration is that of availability of the means and their deployment and usage; the same was reiterated in the judgement.²⁹

Since the first requirement is that of due diligence, and the State failed to take any preventive measure despite having the knowledge of the possibility and the means to have taken such action, the State stands in violation of the duty of due diligence. The second requirement is met by default as the genocide is an uncontested fact recognised by all stake holders involved and other

international organizations as well. The extent of duty to prevent genocide would consider complicity as an inherent breach. However, in the current situation the above discussion has already proved the breach and it is useless to prove complicity in case of Srebrenica. Hence, it can be concluded that the duty to prevent genocide was breached.

IV. CRITIQUE

The ICJ judgement has been criticized for using the '*effective control*'³⁰ test instead of the '*overall control*'³¹ test for the purpose of establishing attribution and for having a high standard of burden of proof. It is imperative to highlight that despite having the agency the court decided against ordering the redacted material in accordance with Art.49³²; and despite Serbia's refusals, it chose not make negative inferences, as was pointed out in Vice-President Al-Khasawneh's dissenting opinion.³³

The bold interpretation of Article 1 which was broadened to include acts having taken place outside the jurisdiction of the responsible state which potentially imposes the same scope of duty on all states, is interesting. Unfortunately, the judgment fails to mention if Article I can be considered a sole ground for universal jurisdiction.

Even though the judgement held FRY not guilty of being complicit in the genocide; it did, in fact, hold FRY to be in violation of the

²⁷ICTY, prosecutor v. Slobodan Milošević, Decision on Motion for Judgment of Acquittal, IT-02-54-T, 16 June 2004.

²⁸*Id.* at ¶280.

²⁹BosniavSerbia, *Supra* note 8, at ¶438.

³⁰Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 169 (Order of May 10).

³¹Tadic, *supra* note 1.

³²CHRISTIAN J. TAMS, ET AL., THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY, 1099–1108 (OXFORD: OXFORD UNIVERSITY PRESS, 2006).

³³BosniavSerbia, *Supra* note 8, at dissenting opinion of Vice-President Al-Khasawneh.



duty to prevent genocide. Since this piece is focused on the latter, so shall the critique. The widened interpretation of the duty to prevent genocide seems to align with the United Nations' political bodies which have stated to recognize the responsibility to protect. The same has also aided this doctrine's entrenchment within customary law.

While the interpretation has been broadened, the consequences haven't been. The Court, in this case, decided in a thirteen to two vote ratio that, "*Court's findings in those paragraphs constitute appropriate satisfaction, and that the case is not one in which an order for payment of compensation, or, in respect of the violation referred to in subparagraph (5), a direction to provide assurances and guarantees of non-repetition, would be appropriate.*"³⁴Of course, there has to be distinction drawn in terms of consequences levied when actors are themselves complicit as compared to when they are ignorant, and the former needs to be direr than the latter. However, this should not result in the latter's significance becoming so diminished that it provides next to no incentive to perform the duty of prevention.

There has to be a balance of implications of an actor's failure to perform such duty and the damages incurred by the failing actor. The lack of this balance in this situation has rendered this implementation antithetical to the very purpose of IHL as a legal field.

³⁴BosniavSerbia, *Supra* note 8, at ¶471(9).