



Yugoslavia: What State Responsibility and Sovereignty mean for a Disintegrating State

*Majko, majko, još te sanjam
Sestro, brate, još vas sanjam svake noći
Nema vas, nema vas, nema vas
Tražim vas, tražim vas, tražim vas
Gdje god krenem vidim vas
Majko, oče, što vas nema*

*Bosno moja, ti si moja mati
Bosno moja, majkom ću te zvati
Bosno majko, Srebrenice sestro
Neću biti sam*

*Mother, mother, I still dream of you
Sister, brother, I still dream about you every night
You're not here ...
I'm searching for you ...
Wherever I go, I see you
Mother, father, why aren't you here*

*My Bosnia, you're my mother
My Bosnia, I'll call you my mother
Bosnia mother, Srebrenica sister
I won't be alone*

*'Srebrenički inferno',
Text by: Džemaludin Latić,
Song commemorating the Srebrenica Genocide.*

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Issue

For many people growing up after the second world war, the Cold War was a day-to-day reality. The world was divided along political lines, perhaps most tangibly in Europe, where an 'iron curtain' divided Eastern Europe from Western Europe. The first being ideologically aligned with the Soviet Union, the second with the United States¹.

Yugoslavia came to be known as a separate entity in the vast body of Soviet satellite States of which Eastern Europe consisted. Under the rule of Josip Broz Tito, Yugoslav citizens enjoyed relative prosperity. Yugoslavia, a one-party socialist federalist state consisted of six republics: Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia; the capital, Belgrade, was situated in Serbia².

An important element of Tito's policies was the suppression of any nationalism within the Yugoslav republics. Following his death however, ethnic animosity grew and so did the desire for Croatia and Slovenia to secede. After declaring independence, Slovenia was drawn into an armed conflict later dubbed the 'Ten Day War', this was the first of several armed conflicts in the following years, now known as the 'Yugoslav Wars'. Some of these conflicts notoriously included acts of genocide and ethnic cleansing³. These war crimes were the subject of several Court Cases, conducted on national levels, by the International Criminal Tribunal for the former Yugoslavia⁴, The European Court of Human Rights⁵ and the International Court of Justice⁶.

¹ Robert Service. (2015). *The End of the Cold War, 1985-1991*. PublicAffairs.

² Silber, L., & Little, A. (1997). *Yugoslavia: Death of a nation* (p. 416). New York: Penguin Books.

³ Perunovic, S. (2016). Animosities in Yugoslavia before its demise: Revelations of an opinion poll survey. *Ethnicities*, 16(6), 819-841.

⁴ ICTY. (2005). *History*. International Criminal Tribunal for the former Yugoslavia. Retrieved October 16, 2022, from <https://www.icty.org/sid/95>

⁵ 'Mothers Of Srebrenica' Sue Netherlands In European Court of Human Rights. (2020, January 21). Radio Free Europe. Retrieved October 16, 2022, from <https://www.rferl.org/a/mothers-srebrenica-sue-netherlands-european-court-human-rights/30389053.html>

⁶ Jennings, R. Y., & Valencia-Ospina, E. (1993). Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide. *American Journal of International Law*, 87(3), 505-520.

In this essay I will compare two cases brought before the International Court of Justice, with the aim of formulating a possible judgment for one of these cases which is still ongoing.

I will analyze the case brought before the International Court of Justice (hereinafter called 'the ICJ') by the Republic of Bosnia and Herzegovina ('Bosnia and Herzegovina') against the Federal Republic of Yugoslavia (hereinafter called 'Serbia and Montenegro'). Following the secession of Slovenia, Croatia and Bosnia and Herzegovina, Yugoslavia actually only still consisted of Serbia and Montenegro, which itself ceased to exist in 2006, after Montenegro seceded from the union, considering this I shall refer to Yugoslavia as 'Serbia and Montenegro'. The ICJ case called: 'Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide' (hereinafter referred to as the 'Bosnian Genocide Case') was filed in the registry of the court on 20 March 1993⁷, over two years before the infamous Srebrenica Genocide occurred in and around the town of Srebrenica in Eastern Bosnia and Herzegovina. In the Court's judgment in 2007, the genocide was explicitly mentioned⁸.

I will also analyze the proceedings instituted by The Republic of Ukraine (hereinafter 'Ukraine') against The Russian Federation ('Russia'), following Russia's invasion of Ukraine in February 2022. In its application Ukraine contends that Russia falsely claimed acts of genocide have occurred within the Luhansk and Donetsk Oblasts and that Russia used this to justify its occupation of sovereign Ukrainian territory. Ukraine further accuses Russia of

⁷ International Court Of Justice. (1993, March 20). *Application Of The Convention On The Prevention And Punishment Of The Crime Of Genocide (Bosnia And Herzegovina V. Yugoslavia (Serbia And Montenegro)) Application Of The Republic Of Bosnia And Herzegovina*. Application. Retrieved October 16, 2022, From <https://www.icj-cij.org/public/files/case-related/91/7199.pdf>

⁸ International Court Of Justice. (2007, February 26). *Application Of The Convention On The Prevention And Punishment Of The Crime Of Genocide (Bosnia And Herzegovina V. Serbia And Montenegro) Summary Of The Judgment Of 26 February 2007*. International Court Of Justice. Retrieved October 16, 2022, From <https://www.icj-cij.org/public/files/case-related/91/13687.pdf>

planning acts of genocide against Ukrainian Nationals⁹. As Russian troops withdrew from towns surrounding Kyiv, evidence of war crimes emerged, a massacre in the town of Bucha became world news as images of people shot, with their hands tied to their backs with zip-ties circulated¹⁰.

This case touches on several key issues within International Law, regarding Responsibility, Sovereignty, legal obligations and the Jurisdiction of international Courts like the ICJ. In this essay I will analyze the proceedings in the Bosnian Genocide Case, the claims made by Bosnia and Herzegovina, the counter-arguments offered by Serbia and Montenegro, as well as a short analysis on the Case's relevance with regards to State Responsibility and alleged breaches of Sovereignty. I will further compare the ongoing proceedings between Ukraine and Russia with the Bosnian Genocide Case, discuss similarities, differences and formulate my expected outcome of the Case.

Rule

Considering the Convention on the Prevention and Punishment of Genocide of 9 December 1948 is the subject of the primary claim made by the Government of Bosnia and Herzegovina in the ICJ case in 1993 as well as the case brought before the Court by Ukraine in 2022, it is imperative that we begin with analyzing the Convention. In the Bosnian Genocide Case, Bosnia and Herzegovina claim Serbia and Montenegro breached their legal obligations under Article I, II, III, IV, and V of the Genocide Convention¹¹. Ukraine claimed Russia intentionally misinterpreted Article I, II and III of the convention, to justify an unlawful

⁹ International Court Of Justice. (2022, February 26). *Application Allegations Of Genocide Under The Convention On The Prevention And Punishment Of The Crime Of Genocide (Ukraine V. Russian Federation)*. Cour Internationale De Justice. Retrieved October 16, 2022, From <https://www.icj-cij.org/public/files/case-related/182/182-20220227-app-01-00-en.pdf>

¹⁰ Anna, C. (2022, April 10). *War Crimes Watch: A Devastating Walk Through Bucha's Horror*. Ap News. Retrieved October 16, 2022, From <https://apnews.com/article/Russia-Ukraine-Europe-War-Crimes-7791e247ce7087ddd64a2bbdcc5b888>

¹¹ (7)

invasion of Ukraine's territory. Ukraine further claimed Russia itself is planning acts of Genocide in Ukraine¹², which later in the year appeared to be possible, following the emergence of possible war crimes in the town of Bucha.

The manner in which the parties in both cases apply and interpret the Genocide Convention differs greatly, but before analyzing this in-depth, it is necessary to understand the content of the Convention:

Article I stipulates that all contracting parties confirm that genocide, committed either in times of war or times of peace constitute a crime under International Law, which the contracting parties undertake to prevent and to punish¹³.

Article II further establishes what genocide is, in that it is any of five acts committed with the intent to destroy, entirely or partly, a national, ethnical, racial or religious group. The acts include: murder, bodily or mental harm, inflicting life condition onto the group for the purpose of its destruction, the prevention of births or the transfer of children from the group to another group¹⁴.

Article III underlines it isn't only the act of genocide that shall be illegal under the convention but also, conspiracy to commit genocide, incitement to commit genocide, attempt and complicity¹⁵.

Article IV establishes it isn't only constitutionally responsible rulers or public officials that shall be punished under the convention but private individuals too¹⁶.

¹² (9)

¹³ UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, United Nations, Treaty Series, vol. 78, p. 277, Article I, available at: <https://www.refworld.org/docid/3ae6b3ac0.html> [accessed 16 October 2022]

¹⁴ ^ Article II

¹⁵ ^ Article III

¹⁶ ^ Article IV

Article V requires all contracting parties to enact legislation which effectively implements the convention in National Law and fashion punishment for persons found guilty of any of the acts specified in Article III¹⁷.

Ukraine's application instituting proceedings only does so in the context of the Genocide Convention. Bosnia and Herzegovina's application in 1993 was far more extensive, further claiming Serbia and Montenegro had violated Article 1,2,3,4,5,6,7,8,9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26 and 28 of the Universal Declaration of Human Rights through their actions against the citizens of Bosnia and Herzegovina¹⁸. Though I will not elaborate on every Article mentioned in Bosnia and Herzegovina's claim, I will discuss some Articles which seem exceptionally relevant to the Case.

Article 1 established that all people are born free and equal in dignity and rights, are endowed with reason and conscience and should act in a spirit of brotherhood¹⁹.

Article 2 declares everyone is entitled to the rights and freedoms set out in the Declaration, without distinction, most relevant to the Bosnian war: religion²⁰.

Article 3 the right to life, liberty and security of person²¹.

Article 9 protects people from arbitrary arrest, detention or exile²².

Article 10 and 11 stipulate the means by which a person is to be tried under the law, which includes rights like the right to a public hearing by an independent, impartial tribunal, the right to be presumed innocent until proven guilty²³.

¹⁷ ^ Article V

¹⁸ (7)

¹⁹ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), Article 1, available at: <https://www.refworld.org/docid/3ae6b3712c.html> [accessed 16 October 2022]

²⁰ ^ Article 2

²¹ ^ Article 3

²² ^ Article 9

²³ ^ Article 10 and 11

Article 28 perhaps pertains to the Bosnian War is the right enshrined in Article 28, which stipulates the right to a social and international order in which the rights and freedoms of the Universal Declaration of Human Rights can be effectively implemented²⁴.

Another element of International Law I want to analyze within the context of both the Bosnian Genocide and the Russian invasion of Ukraine is the concept of State Responsibility. State Responsibility is a concept in International Law enshrined within the UN Charter which is invoked when one State commits an internationally wrongful act against another State. This can mean use of force, or threatening the use of force. Any coercive interference of one State in the internal affairs of another State would constitute State Responsibility²⁵. The International Law Commission (ILC) has largely been responsible for the articulation of State responsibility and its functioning on the International Plane. In 1996, for example, the ILC made the distinction between international delicts and crimes. Criminal liability of a state, though hotly contested, is becoming much more credible like in cases of State enabled genocide. Dubbed 'direct responsibility', agents of States, which can range from constitutionally responsible rulers to a Government official on a regional level, any official which represents the State, committing any unlawful act in their capacity as State agent would warrant State Responsibility. In the case of indirect responsibility, it is a State's authorization of an internationally wrongful act by another State or non-State agents which would constitute State Responsibility. Once a link has been established the State that authorized the act can be held liable, even when the party that carries out the act exceeds or disobeys instructions²⁶.

In cases of a territorial dispute or a civil war between different social groups, the issue of Sovereignty arises, an invasion of a State's territory by another State clearly

²⁴ ^ Article 28

²⁵ Crawford, J. (2012). Public International Law, Part IX.25.2

²⁶ Saxena, V. (2021, March 8). All you need to know about State responsibility in International law. iPleaders. Retrieved October 16, 2022, from <https://blog.iplayers.in/need-know-state-responsibility-international-law/>

violates its Sovereignty, but an internal insurgence, with the intent of creating a new State can lead to complications in determining whether there was a violation of Sovereignty, or whether a newly formed State has acquired the rights and obligations central to Sovereignty. Sovereignty is an incredibly well-developed element of International law, without it States and inter-State relations as we know them could not exist. State territory, its adjacent airspace and territorial waters, make for the physical and social base for a State. Sovereignty is the physical manifestation of the legal personality of a State, whereas jurisdiction more specifically pertains to the rights, liberties and powers of that State within this territory. Although territorial Sovereignty may seem like it describes a State's ownership over a territory, it better describes a State's legal competence over its territory, the rights to arrange its internal affairs. Sovereignty does also not constitute a State's jurisdiction or control over a territory, it is possible for another State or entity to hold administrative power over a State's territory²⁷. With the 2014 annexation of Crimea by Russia, for example, the annexation was internationally denounced and the area was internationally regarded as Ukrainian sovereign territory under the administration of Russia, it was not internationally recognised as a part of Russia's territory²⁸.

Application

I shall now continue by comparing the relevant legal framework relevant to the Bosnian Genocide Case. As the argumentation and implementation of the laws relevant to the Bosnian Genocide Case are drastically different to the application of the same legal framework to the Ukraine v. Russia Case, I shall analyze the latter separately.

²⁷ Crawford, J. (2012). Public International Law, Part III.8.2

²⁸ Government of the United Kingdom. (2021, March 4). Seventh anniversary of Russia's illegal annexation of Crimea: UK statement. GOV.UK. Retrieved October 16, 2022, from <https://www.gov.uk/government/speeches/seven-years-of-illegal-occupation-of-crimea-by-the-russian-federation-uk-statement>

The primary element of Bosnia and Herzegovina's application to the ICJ instituting proceedings against Serbia and Montenegro, was the violation of the Genocide Convention specifically: Articles I, II, III, IV and V. The Respondent contested that a civil war does not constitute an international dispute, it referred to Article IX of The Genocide Convention. The Court noting that the first and fifth preliminary objection technically raised the same question, it found that the Convention, in Article I, despite mentioning times of "peace or war" and establishes genocide is an International offence, it does not in any way shape or form refer to the nature of the conflict. The Court, taking this preliminary objection and Serbia and Montenegro's other objections into account, rejected all of them, with the exception of the fourth preliminary objection as it was withdrawn by the Respondent itself, subsequently the Court declared it had jurisdiction²⁹.

The Court, concluding that Serbia and Montenegro as well as Bosnia and Herzegovina are contracting parties to the Genocide Convention and thus are subject to its obligations, turned its attention to Article II of the Convention, which determines certain acts committed with the intent of (partly) destroying a social group constitutes genocide.

The Court had some difficulty with establishing which 'group' had been the target of the alleged genocide, considering both non-Serbs, Bosnian Muslims and Croats had been victimized. The Court concluded it had to determine the group through particular positive characteristics, not the lack of them.

It subsequently determined it would assess whether genocide had been committed with the intent to destroy the Bosnian Muslims.

With regards to Article II of the Genocide Convention, the Court found that it was inconclusive whether the goal of the mass-murder of Bosnian Muslims had the purpose of

²⁹ International Court Of Justice. (1996, July 11). Case Concerning Application Of The Convention On The Prevention And Punishment Of The Crime Of Genocide (Bosnia And Herzegovina V. Yugoslavia) Preliminary Objections. Cour Internationale De Justice. Retrieved October 16, 2022, From <https://www.icj-cij.org/public/files/case-related/91/091-19960711-jud-01-00-en.pdf>

destroying the group, in part or in its entirety. It noted that the acts might amount to war crimes or crimes against humanity, but that it did not have the jurisdiction to consider this³⁰.

The Massacre at Srebrenica was a particularly dark chapter of the Bosnian War, etched into our collective memory and infinitely more so in the lives of the people who lost loved ones. The Court took the position of the Trial Chamber and Appeals Chamber of the Kristic and Blagojevic cases, concluding Bosnian-Serb forces were responsible for killing roughly 7000 Bosnian Muslim men and that these acts were to be considered genocide³¹.

The Applicant tried to prove intent by sketching a timeline of a pattern of atrocities committed in different communities over a longer period of time, which focused on Bosnian Muslims as well as Croats. The Court found this to be too broad of a proposition and did not consider it proof of intent to destroy the Bosnian Muslims or Croats.

Territorial sovereignty was also considered by the Court, noting a State does not only bear responsibility for its action within its own territory, but also anywhere said State might be acting, this referring to the possible liability of Serbia and Montenegro engaging in alleged acts of genocide on Bosnia and Herzegovina's territory, but also its responsibility to prosecute those accused of Genocide.

With regards to State Responsibility, the concept of indirect responsibility applies to Serbia and Montenegro for the existence of close ties between the Respondent and the Republika Srpska. Although State Responsibility is not explicitly mentioned, the Court established that the Respondent was providing financial and military support to the Republika Srpska which enabled the authorities of the Republika Srpska to commit the alleged atrocities³².

³⁰ International Court Of Justice. (2007, February 26). *Case Concerning Application Of The Convention On The Prevention And Punishment Of The Crime Of Genocide Affaire Relative Av L'*. Cour Internationale De Justice. Retrieved October 16, 2022, From <https://www.icj-cij.org/public/files/case-related/91/091-20070226-jud-01-00-en.pdf>

³¹ (30)

³² (30)

The claim central to Ukraine's application instituting proceedings against Russia also pertained to the Genocide Convention but concerned a very different practical application. In its application Ukraine refers to several instances of Russian officials claiming the people of the Eastern Ukrainian Donbas and Luhansk Oblasts were subjected to genocide by the Ukrainian Government. Examples are Russian President Vladimir Putin referring to "horror and genocide" suffered by people in the Eastern Ukrainian Oblasts³³, three days later justifying the Russian invasion of Ukraine, domestically referred to as a 'special military operation', "to stop that atrocity, that genocide of the millions..."³⁴. The Russian Foreign Minister said the purpose of the invasion was "preventing the neo-Nazis and those who promote methods of genocide from ruling this country"³⁵.

Ukraine believes that Russia, who is a party to the Genocide Convention, has chosen to include allegations of genocide in its rhetoric in order to justify invading Ukraine. Article I of the Convention would provide a legal basis for a country to resort to a military intervention in order to "prevent and punish" alleged genocide, which Article I requires of a contracting State. Ukraine further argues that the Russian government has not provided Ukraine, the International Community or the public with any proof of genocide occurring within the Donbas and Luhansk Oblasts. It actually refers to the OHCHR's human rights report on Ukraine, which never mentions genocide, or any acts which could be interpreted as such. Ukraine further accuses Russia of intentionally killing and inflicting injury on

³³ Address by the President of the Russian Federation of 21 February 2022, <http://en.kremlin.ru/events/president/transcripts/statements/67828>.

³⁴ Address by the President of the Russian Federation of 24 February 2022, <http://en.kremlin.ru/events/president/transcripts/statements/bydate/24.02.2022>.

³⁵ Statement and reply by Permanent Representative Vassily Nebenzia at UNSC briefing on Ukraine, 23 February 2022, <https://russiaun.ru/en/news/230222un>.

Ukrainian Nationals and planning to commit acts of genocide themselves³⁶. Though this was not yet known at the time, in April 2022 evidence of possible war crimes would emerge in the town of Bucha, which might later substantiate this claim³⁷.

Conclusion

In the Bosnian Genocide Case the Court eventually ruled that Serbia and Montenegro were neither directly responsible for the Srebrenica genocide, nor were Serbia and Montenegro complicit in it. The court did however conclude that Serbia had breached the Genocide Convention by not preventing the Srebrenica genocide and not cooperating with the International Tribunal for the former Yugoslavia and for violating its obligation to comply with provisional measures ordered on April 8 and September 13 1993. The Court did not further examine other claims of breached treaty law, like the alleged violations of the UDHR³⁸.

The case brought before the ICJ by Bosnia and Herzegovina was incredibly significant, substantially because Serbia and Montenegro failed their obligations under the Genocide Convention, but also completely disregarded provisional measures ordered by the Court, which required Serbia and Montenegro to do anything in its power to prevent acts of genocide from occurring. From a legal standpoint the Court's phlegmatic judgment in light of overwhelming proof of atrocities committed by the Bosnian-Serbs under the direction of, or with the support of Serbia and Montenegro is understandable considering the legal

³⁶ International Court Of Justice. (2022, February 26). Application Allegations Of Genocide Under The Convention On The Prevention And Punishment Of The Crime Of Genocide (Ukraine V. Russian Federation). Cour Internationale De Justice. Retrieved October 16, 2022, From <https://www.icj-cij.org/public/files/case-related/182/182-20220227-app-01-00-en.pdf>

³⁷ Anna, C. (2022, April 10). *War Crimes Watch: A Devastating Walk Through Bucha's Horror*. Ap News. Retrieved October 16, 2022, From <https://apnews.com/article/Russia-Ukraine-Europe-War-Crimes-7791e247ce7087dddf64a2bbdcc5b888>

³⁸ International Court Of Justice. (2007, February 26). *Case Concerning Application Of The Convention On The Prevention And Punishment Of The Crime Of Genocide Affaire Relative Av L'*. Cour Internationale De Justice. Retrieved October 16, 2022, From <https://www.icj-cij.org/public/files/case-related/91/091-20070226-jud-01-00-en.pdf>

limitations under which the Court was operating. The Court was only tasked with examining whether genocide had been committed by, with the help or authorization of, or with compliance of Serbia and Montenegro.

Considering the legal limitations under which the Court formulated its judgment in the Bosnian Genocide Case, any hope that the Case brought before the ICJ by Ukraine against Russia will yield any substantive judgement by the ICJ is unlikely. I believe the Court will swiftly quash the Russian accusations of genocide occurring by the hand of the Ukrainian government, for there is no evidence of such events occurring³⁹. It is clear the Russian accusations of genocide are merely a way to justify its invasion of Sovereign Ukrainian territory, but while the Russian accusations are a fabricated war crime, Russian troops themselves might be responsible for committing war crimes, after proof of such crimes emerged in the town of Bucha in April 2022⁴⁰. The Ukrainian Government claimed in its original application that Russia was conspiring to commit genocide, now they might consider arguing conspiracy has evolved in commission. Taking into consideration the Court's difficulty in establishing a protected group in the Bosnian Genocide Case, and its limited interpretation of genocide, it is to be expected that any claims against Russia for committing genocide would be rejected by the Court.

Genocide is one of the most heinous crimes people can inflict upon one another. The images of people in Bucha lying dead in the streets with their hands tied with zip-ties and the horrific footage of men being led to their deaths in Srebrenica is etched in our collective memory. Seeing such images and dealing with these feelings instills in many of us feelings of tremendous sadness and pain, infinitely more so for survivors and those who lost loved ones. International Law, though comparatively stoic, serves a meaningful purpose in processing this trauma and bringing those responsible to justice.

³⁹ OHCHR. (n.d.). Ukraine. OHCHR.org. Retrieved October 16, 2022, from <https://www.ohchr.org/en/countries/ukraine>

⁴⁰ (37)