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The Specific Intent (*Dolus Specialis*) Requirement of the Crime of Genocide: Confluence or Conflict between the Practice of *Ad Hoc* Tribunals and the ICJ

Yusuf AKSAR*

ABSTRACT

The international community has been witnessing the first ever interpretation and application of the Genocide Convention through the practice of the *ad hoc* tribunals at the international level. The significance of the practice lies in the interpretation of the elements of the crime of genocide and in the clarification of its substantive content. In addition to the practice of the *ad hoc* tribunals, the International Court of Justice (the ICJ) in its judgement in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Case)* had to, amongst other issues, deal with the requirements of the crime of genocide. However, the findings of both the *ad hoc* tribunals and the ICJ in proving the existence of the genocidal intent and the attribution of responsibility are too different from one to other. Should such a situation be perceived as a confluence or conflict in international law?

Key Words: Genocide, Genocidal intent, International Court of Justice (ICJ), Individual Criminal Responsibility, State Responsibility.

Soykırım Suçunda Özel Kast Unsuru: Uluslararası Adalet Divanı ve *Ad Hoc* Mahkeme Uygulamaları Arasındaki İçtihat Birlikteliği ya da İhtilafı

ÖZET

Uluslararası toplum, tarihinde ilk defa *Ad Hoc* Mahkemeler olarak kurulan mahkemeler aracılığıyla Soykırım Sözleşmesi hükümlerinin yorumlanması ve uygulanmasına tanıklık etmektedir. Şüphesiz ki, uluslararası ceza hukuku alanında soykırım suçunun unsurlarının ve kapsamının belirlenmesi bakımından, adı geçen mahkemelerin uygulamaları önemli bir yere sahiptir. *Ad Hoc* Mahkemelerin uygulamaları yanında, Uluslararası Adalet Divanı da Bosna Hersek devleti tarafından Sırbistan aleyhine açılan *Soykırım Suçunun İşlenmesinin Önlenmesi ve Sorumlularının Cezalandırılması Sözleşmesinin Uygulanmasıyla İlgili Davada (Soykırım Davası)*, diğer birçok sorunun yanında, soykırım suçunun unsurlarıyla da ilgilenmek zorunda kalmıştır. Ancak, uluslararası ceza hukuku alanında bireysel cezai sorumluluğun tesisine görevli *Ad Hoc* Mahkemelerin, soykırım suçunu diğer uluslararası suçlardan ayırt etmeye yarayan ve suçun en önemli unsurunu oluşturan soykırım kastı olarak ifade edilen özel kasta yönelik görüşü, Uluslararası Adalet Divanının yorum ve uygulamasından farklılık arz etmektedir. Uluslararası düzeyde faaliyet gösteren *Ad Hoc* Mahkemeler ile Uluslararası Adalet Divanı arasındaki bu farklı yorumlama ve uygulama nasıl açıklanabilir? İçtihat birlikteliği? Ya da İhtilaf?

Anahtar Kelimeler: Soykırım, Soykırım Kastı, Uluslararası Adalet Divanı, Bireysel Cezai Sorumluluk, Devletin Sorumluluğu.

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Introductory Remarks on the Crime of Genocide

The term “genocide” was used, for the first time in international law, by Raphael Lemkin who combined the Greek word *genos* (race, tribe) with the French suffix *cide* (form the Latin *caedere*, to kill).¹ According to Lemkin, genocide means;

the destruction of a nation or of an ethnic group ... genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. ... Genocide is directed against the national group as entity and the actions involved are directed against the individuals, not in their individual capacity but as members of the national group.²

Since then, the crime of genocide has been one of the most important attractive subjects of international lawyers.³ Although the crime of genocide has been considered as the most horrendous crime, the term “genocide” has been mistakenly defined to cover all different aspects of life or to label all massive killings of civilians as genocide.⁴ For instance, the bombings of Hiroshima and Nagasaki by nuclear weapons were named as genocide in the course of war.⁵

Undoubtedly, Article II of the Convention on the Prevention and Punishment of the Crime of Genocide, which was adopted by the UN General

¹ Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government Proposals for Redress*, Washington, D.C., Endowment for International Peace, 1944, p. 79.

² *Ibid.*

³ In international law, there are a number of works concerning the crime of genocide. Some of them can be indicated as follows: P N Drost, *The Crime of State: Penal Protection for Fundamental Freedoms of Persons and Peoples, Book II, Genocide*, Leyden, A. W. Sijthoff, 1959; William A. Schabas, *Genocide in International Law*, Cambridge, Cambridge University Press, 2000; Antonio Cassese, *International Criminal Law*, Oxford, Oxford University Press, 2003; Ilias Bantekas and Susan Nash, *International Criminal Law*, London and New York, Routledge-Cavendish, 2006; M. Cheriff Bassiouni (ed.), *International Criminal Law*, Brill, 3rd ed., 2008; Yusuf Aksar, *Implementing International Humanitarian Law: From the Ad Hoc Tribunals to a Permanent International Criminal Court*, New York, London, Routledge, 2004.

⁴ Leo Kuper, “Theoretical Issues Relating to Genocide: Uses and Abuses”, in George J. Andreopoulos (ed.), *Genocide: Conceptual and Historical Dimensions*, Philadelphia, University of Pennsylvania Press, 1994, pp. 35-36; Helen Fein, “Genocide, Terror, Life Integrity, and War Crimes: The Case for Discrimination”, in Andreopoulos, *Genocide*, p. 95. For example, even birth control clinics were labeled as the place in where the crime of genocide was committed on the ground that it creates an act constituting genocide under Article 2 (d) of the Convention, which indicates one category of acts of genocide as the “imposi[tion of] measures intended to prevent births within the group”. See Kuper, “Theoretical Issues”, p. 35.

⁵ Leo Kuper, “Other Selected Cases of Genocide and General Massacres: Types of Genocide”, in Israel W. Charny (ed.), *Genocide A Critical Bibliographic Review*, London, Mansell Publishing Limited, 1988, p. 158.

Assembly in 1948,⁶ provides the most authoritative provisions in international law and defines genocide as:

... Any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, 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.

In this context, when the related international law documents are examined it can be seen that Articles 2 and 4 of the International Criminal Tribunal for Rwanda (ICTR)⁷ and the International Criminal Tribunal for the Former Yugoslavia (ICTY)⁸ Statutes respectively, and Article 6 of the International Criminal Court (ICC) Statute⁹ constitute a verbatim reproduction of the 1948 Genocide Convention. In accordance with the definition provided in the Genocide Convention and other instruments, the necessary elements of the crime of genocide can be indicated as follows: The *acts* (indicated through a-e in the Convention), the *victimized (protected) group* (membership of a national, ethnic, racial or religious group) and *the intent* (to destroy, in whole or in part the protected group).

It is quite clear that the acts covered by the Genocide Convention (indicated through a-e) could be encompassed under the definition of other international crimes either as crimes against humanity or war crimes. For example, murder of

⁶ The Genocide Convention, 78 U.N.T.S. 277 opened for signature on 8 December 1948 and entered into force on 12 January 1951.

⁷ The International Criminal Tribunal for the Prosecution of Persons Responsible for the Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, between 1 January and 31 December 1994. It was also established by the Security Council resolution, which was adopted by a vote 13-1-1 by the Security Council at its 3453d meeting, on 8 November 1994. SC Res. 955 UNSCOR, 49th Year, 3453 meeting at 1 UN Doc. S/RES/955 (1994).

⁸ The International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991. It was established by the UN Security Council resolution, which was adopted by unanimously by the Security Council at its 3217 meeting, on 25 May 1993. SC Res. 827, UNSCOR, 48th Year, 1993 SC Res. & Dec. At 29, UN Doc. S/INF/49 (1993).

⁹ Article 6 of the ICC Statute (known as Rome Statute of the International Criminal Court which was adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, UN Doc. A/CONF.183/9, 17 July 1998).

an individual clearly constitutes the act of killing members of the group that leads to the commission of genocide.¹⁰ The acts of torture, mental, inhuman or degrading treatment, persecution,¹¹ rape and sexual violence¹² certainly constitute causing serious bodily or mental harm to members of the group, which is one category of the acts indicated in the Genocide Convention. In addition to rape, sexual mutilation, the practice of sterilization, forced birth control, separation of sexes and prohibition of marriages¹³ may constitute the crime of genocide under the act of imposing measures intended to prevent births within the group indicated in the Convention.

Concerning the victimized/protected group requirement of the crime of genocide, the fact that an act must be committed against an identifiable group, namely a national, ethnic, racial or religious group should be indicated here. The protected groups in the Genocide Convention are limited to national, ethnic, racial or religious groups and cannot include any other political, social or economic groups. Although the fact that the number of protected groups is clear the substantive content or the definition of those groups are not. The practice of the ICTR and the ICTY has a significant role for interpreting and applying the definitions of mentioned groups. In this sense, the practice of the ICTR is impressive. The ICTR in the *Akayesu Case* defines a *national group*, as “group is defined as a collection of people who are perceived to share a legal bond based

¹⁰ ICTR, Trial Chamber, *Akayesu Case, Judgement*, paras. 6.3.1.274-277.; ICTR, *Trial Chamber, Kayishema and Ruzindana Case, Judgement*, paras. 101-104.; ICTY, *Krstić Case, Judgement*, para. 546.

¹¹ ICTR, Trial Chamber, *Akayesu Case, Judgment*, para. 6.3.1.283.; ICTY, *Trial Chamber, Krstić Case, Judgement*, para.560.

¹² For the first time in international criminal law, rape and sexual violence were considered, by the ICTR, as constituting acts which fall within the meaning of the Genocide Convention and having the same effects as other acts with regard to destroying the protected groups. The related part of the historical Judgement of the ICTR in the *Akayesu Case* may be quoted as follows: “... rape and sexual violence ... 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 ... the acts of rape and sexual violence ... were committed solely against Tutsi women, many of whom were subjected to the worst public humiliation, mutilated, and raped several times. ... These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of Tutsi group as a whole”. (ICTR, Trial Chamber, *Akayesu Case, Judgement*, paras. 7.8.214-215).

¹³ The legal justification of rape constituting of genocide under the acts indicated as imposing measures intended to prevent births within the group provided by the ICTR in the *Akayesu Case* may be cited as follows: “In patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group, with the intent to have her give birth to a child who will consequently not belong to its mother’s group”. ICTR, Trial Chamber, *Akayesu Case, Judgement*, para. 6.3.1.289.

on common citizenship, coupled with reciprocity of rights and duties”,¹⁴ an *ethnic group* as “a group whose members share a common language or culture”,¹⁵ a *racial group* “is based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors”,¹⁶ and a *religious group* “is one whose members share the same religion, denomination or mode of worship.”¹⁷ Since the work at present is limited to the specific intent requirement of the crime of genocide, the concept of protected group will not be examined here.¹⁸

In fact, the vital element distinguishing the crime of genocide from war crimes or crimes against humanity is the specific intent (*dolus specialis*), which is too difficult to prove its presence in time of war or in time of peace in international criminal law. The practice of international judicial institutions is the only place in where the guideline to the issue in question can be provided.

As parallel to the development of international criminal law and of international human rights law, there should not be any doubt on the fact that the rules governing the crime of genocide are part of customary rules of international law which have reached the level of *jus cogens*,¹⁹ and the consequential obligation on States to prevent and punish the crime of genocide is *erga omnes* in nature.²⁰ Despite its extensive prohibition in international law, until the practice of the ICTY and the ICTR, it was not possible to enforce these rules at the international level. By way of the practice of the *ad hoc* tribunals, the international community, for the first time, has been witnessing charges of genocide and the punishment of individuals responsible for this heinous crime.

¹⁴ ICTR, Trial Chamber, *Akayesu Case, Judgement*, paras. 6.3.1.298-299.

¹⁵ *Ibid.* paras. 6.3.1.300-301.

¹⁶ *Ibid.* paras. 6.3.1.302-303.

¹⁷ *Ibid.* paras. 6.3.1.304-305.

¹⁸ The reference to some works in this regard may be indicated as follows: Schabas, *Genocide in International Law*, p. 102-150; Bantekas and Nash, *International Criminal Law*, p. 145-146; Yusuf Aksar, “The “Victimized Group” Concept in the Genocide Convention and the Development of International Humanitarian Law through the Practice of *ad hoc* Tribunals”, *Journal of Genocide Research*, Vol 5, No 2, 2003, p. 211-224.

¹⁹ *Advisory Opinion on Reservations to the Convention on Genocide Case* (1951), *ICJ Rep.* 15, p. 23.

²⁰ *Ibid.*; and also see *Barcelona Traction Case* (Belgium v. Spain), (1970) *ICJ Rep.* 3, at paras. 33-34; *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections*, (Bosnia-Herzegovina v. Yugoslavia, (11 July 1996), (1996) *ICJ Rep.* 595 para. 31. For the *jus cogens* and *erga omnes* nature of the rules governing genocide, also see *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, UN Doc. S/1994/674-27 May 1994, para. 88.; *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994)*, UN Doc. S/1994/1405- 9 December 1994, (*for Rwanda*), para. 152.

In addition to the enforcement of individual criminal responsibility by the practice of the *ad hoc* tribunals, the international community has recently also had the chance to follow the interpretation and application of the Genocide Convention from the point of view of enforcing State responsibility in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia Herzegovina v. Serbia and Montenegro)*, which was handed down by the International Court of Justice (ICJ) on 26 February 2007.²¹

The practice of *ad hoc* tribunals in enforcing the individual criminal responsibility for the crime of genocide, on the one hand, and the Judgement of the ICJ in seeking the responsibility of a State for genocide in the *Genocide Case* on the other are so significant in terms of providing a guideline in interpreting and applying the provisions of the Genocide Convention. However, the interpretation and application of the same Convention by different international judicial institutions resulted in different conclusions which are not easy to be justified in international law. Although there are many different aspects in the mentioned practice, this paper will only examine the handling of the specific intent requirement of the crime of genocide by the *ad hoc* tribunals and the ICJ.

The Practice of the ICJ and Its Evaluation in Light of the Practice of the *Ad Hoc* Tribunals

As with Article II of the Genocide Convention, Articles 2 (2) and 4 (2) of the ICTR and the ICTY Statutes respectively, provides jurisdiction over the crime of genocide. That is why the ICTY and the ICTR are under the obligation of providing interpretation and application of the specific intent requirement of the crime of genocide, that is to say that, the act must be committed “with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”. Although the requirement of intent is the central element of the crime of genocide there was no definitive interpretation available either in the language or in the drafting history of the Convention,²² which was creating some problems that have to be solved by the practice of international judicial institutions.

As has been indicated above, the international community has been witnessing the first ever interpretation and application of the Genocide Convention by way of the practice of the *ad hoc* tribunals at the international level. In this context, the practice of the ICTR is impressive and particularly, it should be noted that the *Akayesu Judgment* constitutes a historical turning point

²¹ *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosnia and Herzegovina v. Serbia and Montenegro)*, (26 February 2007). Full text of the judgement is available at: <http://www.icj-cij.org>.

²² Steven R. Ratner and Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law Beyond the Nuremberg Legacy*, Oxford, Clarendon Press, 1997, p. 33.

in the history of international law since being the first ever implementation of the Genocide Convention by an international tribunal.²³

In addition to the enforcement of individual criminal responsibility of the crime of genocide through the practice of the international criminal judicial institutions, States are also under the obligation that derives from Article I of the Genocide Convention not to commit genocide. There can be no doubt on the fact that the establishment of individual criminal responsibility is quite different from the State responsibility on the ground that the previous one deals with the specific regulations of international law while the later concerns with the general international law.

For the first time, the international community had the chance to witness the practice of implementing State responsibility in relation to the crime of genocide by means of the *Genocide Case* which was brought before the ICJ by Bosnia and Herzegovina against the Federal Republic of Yugoslavia (Serbia and Montenegro) on 20 March 1993. In the *Genocide Case*, Bosnia and Herzegovina sued the Federal Republic of Yugoslavia (the FRY, Serbia and Montenegro) for the violations of the Convention on the Prevention and Punishment of the Crime of Genocide. According to Bosnia and Herzegovina's arguments, Serbia and Montenegro must be found responsible for planning, committing genocide, aiding and abetting in genocide, conspiring to commit genocide, inciting genocide, failing to prevent genocide and failing to punish genocide since it participated in such acts either through its organs or the control it exercised over the entity known as *Republika Srpska*. The Judgment of the ICJ making some significant contributions to the substantive law on genocide, State responsibility and evidence in this regard was delivered on 26 February 2007. However, the method used by the ICJ and the findings of the Court have already been criticized by international lawyers or commentators.²⁴

²³ *The Prosecutor v. Jean-Paul Akayesu, Judgement*, Case No: ICTR-96-4-T, 2 September 1998; See Press Release, "First-Ever Judgements on Crime of Genocide Due 2 September", UN Doc. AFR/93 L/2894, (31 August 1998); Press Release, *Rwanda International Criminal Tribunal Pronounces Guilty Verdict in Historic Genocide Trial*, UN Doc. AFR/94 L/2895, (2 September 1998); Press Release, *Secretary-General Welcomes Rwanda Tribunal's Genocide Judgement as Landmark in International Criminal Law*, UN Doc. SG/SM/6687 L/2896, (2 September 1998). Some of the other landmark decisions of the ICTR include: *The Prosecutor v. Clement Kayishema and Obed Ruzindana, Judgement*, Case No: ICTR-95-1-T, 21 May 1999; *The Prosecutor v. Georges Anderson Nderubumwe Rutaganda, Judgement*, Case No: ICTR-96-3-T, 6 December 1999.

²⁴ Sandesh Sivakumaran, "Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007", *International and Comparative Law Quarterly*, Vol. 56, 2007, p. 695. Antonio Cassese, "A Judicial Massacre", *Guardian Unlimited*, 27 February 2007. Ruth Wedgwood, "Slobodan Milosevic's Last Waltz", *The New York Times*, 12 March 2007.

Having established its jurisdiction in the *Genocide Case*, the ICJ followed a method or approach which had some *similarities* with the practice of the *ad hoc* tribunals in a way that two steps (*whether the crime of genocide occurred in a specific region and the attributability of individual criminal responsibility*)²⁵ had to be passed in establishing the responsibility of State for the mentioned acts; a) whether the crime of genocide occurred in Bosnia and Herzegovina and b) the attribution of State responsibility concerning the crime of genocide.

Whether the Crime of Genocide Occurred in Bosnia and Herzegovina

As a first step, the ICJ in the light of the evidence before it decided whether the crimes committed in the various regions of Bosnia and Herzegovina could amount to the crime of genocide, in another words, the offences could fell within the scope of Article II of the Genocide Convention or not. In the view of the Court, the crime of genocide, apart from the region of *Srebrenica*, had not taken place in Bosnia Herzegovina. The legal base for reaching such a conclusion was that the members of the protected group were not subject to the atrocities with the intent to destroy in whole or in part the group as such required by the Genocide Convention.²⁶ In short, according to the Court the intent requirement of the crime of genocide was not at present. Only the acts committed at Srebrenica from about 13 July 1995 were committed with genocidal intent.²⁷ The Court also stated that such intent could not be extended to cover other crimes occurred in the rest of the territory of Bosnia and Herzegovina since the genocidal intent could not be inferred from the pattern of atrocities/conducts.²⁸

From the point of international criminal law and international law, there is no way to welcome the findings of the ICJ on establishing the genocidal intent for the following reasons:

Firstly, the ICJ rejected the Bosnia and Herzegovina's argument that the pattern of atrocities/conducts occurred in many communities proved the necessary intent of genocide on the ground that it was "not consistent with the findings of the ICTY relating to genocide or with the actions of the Prosecutor, including decisions not to charge genocide offences in possibly relevant indictments, and to enter into plea agreements".²⁹ It should not be surprising that the ICTY may not found genocide based on patterns of conducts/atrocities in the whole of Bosnia and Herzegovina since the ICTY deals with the enforcement of individual criminal responsibility for the persons accused before

²⁵ For the detailed examination of such an approach/method, see Aksar, *Implementing International Humanitarian Law*, p.214-221.

²⁶ *Genocide Case, Judgement*, para. 277.

²⁷ *Genocide Case, Judgement*, para. 297.

²⁸ *Genocide Case, Judgement*, para. 373.

²⁹ *Genocide Case, Judgement*, para. 374.

it and the relevant evidence can only be limited to the sphere of operations of the accused. Additionally, the practice of the Prosecution Service of the ICTY, in particular the prosecution's acceptance of a plea bargain or failure to charge a particular person with the crime of genocide cannot be considered as reliable evidence on proving the intent requirement of genocide since they are simply justified as trial tactics.³⁰

Secondly, it is necessary to remember that the crime of genocide can be committed in time of peace or in time of war.³¹ In order to establish the individual criminal responsibility for the crime of genocide, it is not a *sine qua non* element that the crime in question must have taken place all over the territory in question. As have been well-established by the practice of *ad hoc* tribunals, the search for the presence of intent is normally limited to the region where the crimes committed and the accused concerned like the regions of *Srebrenica, Brcko, Taba commune and Kibuye Prefecture*, not the whole territory of Bosnia Herzegovina or of Rwanda. As far as the crime of genocide is concerned, such a practice is sufficient for the enforcement of individual criminal responsibility in criminal trials, but it cannot be suitable for a case involving State responsibility.

Thirdly, in addition to these facts, it should also be noted that the jurisdiction of the ICTY and ICTR provides a guideline on how to infer genocidal intent from the facts and circumstances.³² There cannot be any doubt on the fact that the pattern of atrocities/conducts easily fell within this jurisprudence. As long as the international crimes committed in Bosnia and Herzegovina are taken into account, there is a great deal of evidence which can be used to prove the presence of specific intent to regard criminal acts as constituting the crime of genocide.³³ The first ever use of the notion of "ethnic cleansing" in the international arena should have been considered as implying the existence of genocidal intent in the Yugoslavian conflict.³⁴ Unfortunately, the

³⁰ Dissenting Opinion of Vice-President Al-Khasawneh, *Genocide Case*, para. 42.; Sivakumaran, "Application of the Convention", p. 699-700.

³¹ Article I of the Genocide Convention.

³² Dissenting Opinion of Vice-President Al-Khasawneh, *Genocide Case*, paras. 43-47.

³³ *Final Report*, paras. 87-101. *Application of the Republic of Bosnia and Herzegovina* [to the ICJ], *the Genocide Case*, (20 March 1993), in Francis A. Boyle, *The Bosnian People Charge Genocide*, Amherst, Massachusetts, Aletheia Press, 1996. In particular, see para. 87B of the Application setting out evidence and statements implicating the FRY's Government's involvement in genocide. For the utterances of soldiers that should be taken into account as proving the presence of the requirement of intent of genocide, see paras. 32, 37, 54, 83 of the *Application*.

³⁴ John Webb, "Genocide Treaty -Ethnic Cleansing- Substantive and Procedural Hurdles in the Application of the Genocide Convention to Alleged Crimes in the Former Yugoslavia", *Georgia Journal of International & Comparative Law* Vol. 23, 1993, p. 400-401. Also see Drazen Petrovic, "Ethnic Cleansing -An Attempt at Methodology", *European Journal of International Law*, Vol. 5, No. 1, 1994, p. 357-358.

view taken by the ICJ with regard to the concept of “ethnic cleansing” is far from the meaning of its usage in the context of Yugoslavian conflict. According to the ICJ, “in the context of the Convention, the term “ethnic cleansing” has no legal significance of its own. That said, it is clear that acts of “ethnic cleansing” may occur in parallel to acts prohibited by Article II of the Convention, and may be significant as indicative of the presence of a specific intent (*dolus specialis*) inspiring those acts.”³⁵ While the ruling of the Appeals Chamber in the *Krstic Case* that pattern of conduct known as ethnic cleansing can be accepted as evidence of the intent requirement of genocide³⁶ is in front of the international community, the handling of the notion of “ethnic cleansing” by the ICJ causes great concerns. This is because, even one member of the ICJ, Judge Al-Khasawneh in his dissenting opinion, criticized the justification by saying that: “The Court ignores the facts and substitutes its own assessment of how the Bosnian Serbs could have hypothetically best achieved their macabre Strategic Goals”.³⁷

The Attribution of State Responsibility Concerning the Crime of Genocide

Having already concluded that the only acts occurred in Srebrenica constituted genocide, as a second step, the ICJ considered whether the genocide could be attributable to Serbia or not. According to the view of the ICJ, the genocide at Srebrenica was not attributable to Serbia since there was no sufficient evidence proving that either any *de jure* organ of the FRY (the name used for Serbia and Montenegro at the time of the offences occurred in Srebrenica) was involved in genocide³⁸ or *de facto* organs namely, the *Republika Srpska*, the VRS (the army of the *Republika Srpska*) and the “Scorpions” (a paramilitary group) acted in complete dependence on the FRY.³⁹ In reaching such a finding, the ICJ had to make a choice between the two different conflicting tests in implementing the rules of international law: the *effective control test* in the *Nicaragua Case*⁴⁰ whose conditions were set out by the ICJ and the *overall control test* in the *Tadic Case*⁴¹ whose conditions were indicated by the ICTY. The Court preferred to use the effective control test in order to decide whether the acts took place in Srebrenica could be attributable to Serbia or not. The view of the ICJ relating to

³⁵ *Genocide Case, Judgement*, para. 190.

³⁶ Appeals Chamber, *Krstic Case, Judgement*, Case No. IT-98-33-A, para. 34.

³⁷ Dissenting Opinion of Vice-President Al-Khasawneh, *Genocide Case*, para. 41.

³⁸ *Genocide Case, Judgement*, paras. 386-389.

³⁹ *Genocide Case, Judgement*, paras. 390-395.

⁴⁰ *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. USA)*, (1986), *ICJ Rep.* 14.

⁴¹ Appeals Chamber, *Prosecutor v. Dusko Tadic, Judgement*, Case No: IT-94-1-A, (15 July 1999), paras. 126-145.

the use of effective control test should also be considered as in compliance with its jurisprudence in this regard. As has been indicated in the *Nicaragua Case*, in deciding the responsibility of the USA as a State for the acts committed by contras in and against Nicaragua, the USA must have had effective control of the military or paramilitary operations in question.⁴²

However, the approach taken by the ICJ clearly conflicts with the practice of the ICTY and it should not be considered as in compliance with the development of international law in general and of international humanitarian law in particular for the following reasons:

Firstly, although the ICTY is established in order to enforce the individual criminal responsibilities of persons accused of international crimes, it should be noticed that the ICTY has been dealing with the crimes committed in the territory of the former Yugoslavia since 1993. It has already created the jurisprudence which the international community could have never ever imagined before the establishment of the ICTY even after the establishment of it. That is the jurisprudence and success of the practice of *ad hoc* tribunals which lead to the establishment of the International Criminal Court that became in operation on 1 July 2002. In accordance with such jurisprudence, the ICJ should have given much more weight to the *overall control* than the *effective control test* in deciding whether Serbia was responsible for the crime of genocide. According to which, the Government of the Federal Republic of Yugoslavia (consisting of Serbia and Montenegro at that time) and its army, JNA (the Yugoslav People's Army/VJ (the new name for the army of the FRY after the withdrawal of JNA, exercised overall control over *Republica Srpska* and VRS (the army of the Bosnian *Republica Srpska*), both of whom were acting *de facto* organs of the FRY, and such finding was sufficient to classify the conflict in Bosnia and Herzegovina as an international armed conflict.⁴³

Secondly, the ICJ in the *Genocide Case* criticized the findings of the ICTY in the *Tadic Case* on the ground that it had only criminal jurisdiction over individuals and such jurisdiction could not be extended to the concept of State responsibility. Moreover, in the view of the ICJ the overall test could be suitable for determining the nature of armed conflict whether international or not and the attribution of individual criminal responsibility of individuals in this regard but not suitable for finding a State responsible.⁴⁴ According to the ICJ, only the effective control test established in the *Nicaragua Case* was convenient in

⁴² *Nicaragua Case*, para. 115.

⁴³ Appeals Chamber, *Prosecutor v. Dusko Tadic, Judgment*, Case No. IT-94-1-A, 15 July 1999, para. 162. For the detailed examination of the decision of the both Trial Chamber and the Appeals Chamber in this regard, see Aksar, *Implementing International Humanitarian Law*, p. 128-132.

⁴⁴ *Genocide Case, Judgment*, para. 404.

determining State responsibility. However, the situation in Srebrenica and Bosnia and Herzegovina in general was completely different from the one in the *Nicaragua Case*.⁴⁵ As has the practice of the ICTY proved that there was a unity of goals, unity of ethnicity and a common ideology between Serbia on the one hand and *Republika Srpska*, VRS and the other paramilitary groups on the other. The involvement of the JNA (later VJ) and the authorities of Serbia into the conflict through leaving staff, equipment to the Bosnian Serbs, creating the VRS from the JNA etc. could be considered as a deliberate attempt to cover up their participation into the conflict. Such a situation could have been enough for finding Serbia responsible. The real problem with the ICJ decision is the application of unrealistically high standard of proof (effective control) for establishing State responsibility according to which Serbian officials must send specific orders or instructions to the mentioned entities or groups to commit the crime of genocide. It is clear that there is no way to get such orders or instructions openly.⁴⁶

Thirdly, and lastly, the ICTY has to deal with the nature of armed conflict whether it is an international armed conflict or not in order to apply its jurisdiction concerning the grave breaches of the 1949 Geneva Conventions. As has been well-established by the practice of the ICTY, the international nature of armed conflict is a *sine qua non* element in finding any individual responsible for the grave breaches system. This is exactly what the ICTY has been trying to do. The findings of the ICTY's an armed conflict as the international one should have some meaning in international law in the sense that what factors or which State's involvement made the conflict as international. This way of understanding logically should lead to the conclusion that the State in question should be found responsible for its involvement into the conflict. However, what the ICJ did was completely against these facts and its ruling clearly conflicted with the established jurisprudence of the *ad hoc* tribunals.

Concluding Remarks

The ICJ in the *Genocide Case* found Serbia only responsible for failing to prevent the crime of genocide not the complicity in genocide on the ground that Serbia was aware, or should normally have been aware, of the serious danger that acts of the crime of genocide would be committed.⁴⁷ For the aforementioned reasons, the best way would have been the application of the overall control test by the ICJ in the *Genocide Case*. This is because the international community has been witnessing the increase of the number of international judicial institutions throughout the world. Their presence is important in solving disputes between

⁴⁵ Dissenting Opinion of Judge Al-Khasawneh, *Genocide Case*, para. 36.

⁴⁶ Antonio Cassese, "Judicial Massacre", *Guardian Unlimited*, 27 February 2007.

⁴⁷ *Genocide Case, Judgement*, para. 432.

the subjects of international. Although each international judicial organ is established in accordance with its specific jurisdiction it is inevitable that there will be inter-actions amongst them. Concerning the crime of genocide occurred in the territory of the former Yugoslavia, it is not possible to explain the two approaches of the two different international judicial institutions, namely the ICTY and the ICJ. How can it be explained to the members of the international community that while the ICTY finds that the armed conflict is an international armed conflict the ICJ decides Serbia is not responsible for the crime of genocide took place in Bosnia and Herzegovina? Is it possible to say that the internationality of an international armed conflict has nothing to do with the concept of State responsibility in international law? Suppose that there is a State creating an army from its own army for *Republika Srpska*, paying their salaries, equipping, funding, aiding and abetting them etc. and such State is not found responsible in relation to the crimes committed by them. How it comes? As one of the leading international lawyer's saying the approach taken by the ICJ could be justified as "It is all to the good that Serbia may soon rejoin Europe. But it does not facilitate that reunion to disguise what happened in the past."⁴⁸

⁴⁸ Ruth Wedgwood, "Slobodan Milosevic's Last Waltz", *The New York Times*, 12 March 2007.

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