

**APPLICATION OF THE CONVENTION ON THE PREVENTION AND
PUNISHMENT OF THE CRIME OF GENOCIDE
(Bosnia and Herzegovina v Yugoslavia [Serbia and Montenegro])
PRELIMINARY OBJECTIONS**

[1996] ICJ Reports

In its judgment delivered on 11 July 1996, the Court rejected the seven preliminary objections raised by Yugoslavia in the case. It found that it had jurisdiction to deal with the case on the basis of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, and dismissed the additional bases of jurisdiction invoked by Bosnia-Herzegovina. The Court further found that the Application filed by Bosnia-Herzegovina was admissible.

The Court therefore proceeded to consider the merits of the case on the basis of Article IX of the Genocide Convention.

Note: The Court did not deal with the seven preliminary objections in any order.

HISTORY OF THE CASE

On 20 March 1993, the Republic of Bosnia-Herzegovina (Bosnia-Herzegovina) instituted proceedings against the Federal Republic of Yugoslavia (Yugoslavia) in respect of a dispute concerning alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention) adopted by the General Assembly of the United Nations on 9 December 1948, as well as various matters which Bosnia-Herzegovina claimed were connected with it. The Application invoked Article IX of the Genocide Convention as the basis of the jurisdiction of the Court.

Immediately after the filing of its Application, Bosnia-Herzegovina submitted a request for the indication of provisional measures under Article 41 of the Statute of the Court. As an additional basis of the jurisdiction of the Court in the case of Bosnia-Herzegovina, it involved a letter dated 8 June 1992, addressed to the President of the Arbitration Commission of the

International Conference for Peace in Yugoslavia by the Presidents of the Republics of Montenegro and Serbia. On 1 April 1993, Yugoslavia submitted written observations on Bosnia-Herzegovina's request for provisional measures. It recommended the Court to order the application of provisional measures to Bosnia-Herzegovina. By an Order dated 8 April 1993, after hearing the parties, the Court indicated certain provisional measures with a view to the protection of rights under the Genocide Convention.

On 27 July 1993, Bosnia-Herzegovina submitted a new request for the indication of provisional measures. In subsequent communications, it stated that it was amending or supplementing the request and Application, including the basis of jurisdiction it relied on. By letters dated 6 August and 10 August 1993, it indicated that it was relying on two additional bases of the jurisdiction of the Court. The first was the Treaty between the Allied and Associated Powers and the Kingdom of the Serbs, Croats and Slovenes on the Protection of Minorities, signed at Saint-Germain-en-Laye on 10 September 1919. The second was customary and conventional international laws of war and international humanitarian law. This was followed by Yugoslavia's request for the indication of provisional measures. On 10 August and 23 August 1993, it filed written observations on Bosnia-Herzegovina's new request, as amended or supplemented.

By an Order dated 13 September, the Court, after hearing the parties, reaffirmed the measures indicated in its Order of 8 April 1993 and declared that those measures should be immediately and effectively implemented.

In its Counter-Memorial, Yugoslavia raised preliminary objections concerning the admissibility of the Application and the jurisdiction of the Court to entertain the case. It submitted to the Court, as a document relevant to the case, the text of the General Framework Agreement for Peace in Bosnia and Herzegovina and its annexes (collectively "the peace agreement"), initialled in Dayton, Ohio on 21 November 1995 and signed in Paris on 14 December 1995 (the Dayton-Paris Agreement).

Public hearings were held in April and May 1994 to deal with Yugoslavia's preliminary objections.

JURISDICTION RATIONE PERSONAE

Since Bosnia-Herzegovina had principally relied on Article IX of the Genocide Convention as a basis for the jurisdiction of the Court, the Court started by considering the seven preliminary objections raised by Yugoslavia on this point. It noted the withdrawal by Yugoslavia of its fourth preliminary objection. In its third objection, Yugoslavia had disputed the contention that the Convention bound the two parties or that it had entered into force between them. In its fifth objection, Yugoslavia had objected to the argument that the dispute fell within the provisions of Article IX of the Convention.

The proceedings instituted before the Court were between two states whose territories were located within the former Socialist Federal Republic of Yugoslavia. At the time of the proclamation of the Federal Republic of Yugoslavia on 27 April 1992, a formal declaration was adopted on its behalf which expressed the intention of Yugoslavia to remain bound by the international treaties to which the former Yugoslavia was party. The Court observed that it was not contested that Yugoslavia was party to the Genocide Convention. Thus, Yugoslavia was bound by the provisions of the Convention on the date of the filing of the Application in the present case on 20 March 1993.

On 29 December 1992, Bosnia-Herzegovina transmitted a Notice of Succession to the Secretary-General of the United Nations, as depositary of the Genocide Convention. Yugoslavia had contested the validity and legal effect of that Notice on the ground that Bosnia-Herzegovina was not qualified to become a party to the Convention.

The Court noted that Bosnia-Herzegovina became a Member of the United Nations following the decisions adopted on 22 May 1992 by the Security Council and the General Assembly, bodies competent under the Charter. Article XI of the Genocide Convention opened it to "any Member of the United Nations". From the time of its admission to the United Nations, Bosnia-Herzegovina could thus become a party to the Convention. The Court held that the circumstances of Bosnia-Herzegovina's accession to independence, which Yugoslavia had referred to in its third preliminary objection, were of little consequence.

It was therefore clear from the foregoing that Bosnia-Herzegovina could become a party to the Convention through the mechanism of state succession. The parties differed, however, on the legal consequences to be drawn from the occurrence of state succession in that case.

On its jurisdiction, the Court did not consider it necessary to make a determination on the legal issues concerning state succession in respect to treaties which had been raised by the parties. Whether Bosnia-Herzegovina automatically became party to the Genocide Convention on the date of its independence on 6 March 1992, or whether it became a party as a result, whether retroactive or not, of its Notice of Succession of 29 December 1992, at all events it was a party to it on the date of the filing of its Application.

Yugoslavia submitted that, even supposing that Bosnia-Herzegovina had been bound by the Convention in March 1993, it could not at that time have entered into force between the parties, because the two states did not recognise one another. Therefore, the conditions necessary to found the consensual basis of the Court's jurisdiction were lacking.

The Court rejected Yugoslavia's arguments because of the signature and entry into force on 14 December 1995 of the Dayton-Paris Agreement. Article X of the agreement stipulated that the parties recognised each other as sovereign independent states within their international borders. Even if it were to be assumed that the Genocide Convention did not enter into force between the parties until the signature of the Dayton-Paris Agreement, all the conditions had been fulfilled to found the jurisdiction of the Court *ratione personae*. It added that although the jurisdiction of the Court should normally be assessed on the date of the filing of the act instituting proceedings, the Court, like its predecessor, the Permanent Court of International Justice, could always have recourse to the principle according to which it should not penalise a defect in a procedural act which the applicant could easily remedy.

In the light of the foregoing, the Court rejected Yugoslavia's third preliminary objection. (Bedjaoui P, Schwebel V-P, Oda, Guillaume, Shahabuddeen, Weeramantry, Ranjeva, Herczegh, Shi, Koroma, Vereshchetin, Ferrari Bravo, Parra-Aranguren JJ, Lauterpacht J *ad hoc*; Kreca J *ad hoc* dissenting).

JURISDICTION RATIONE MATERIAE

In order to determine whether it had jurisdiction to entertain the case on the basis of Article IX of the Genocide Convention, the Court had to verify whether there was a dispute between the parties that fell within the scope of that provision. Article IX of the Convention provided:

Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

It was jurisdiction *ratione materiae*, as so defined, to which Yugoslavia's fifth objection related.

The Court noted that there was an earlier case in which the two parties held clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations.¹

It held that by reason of the rejection by Yugoslavia of the complaints formulated against it by Bosnia-Herzegovina, there was a legal dispute. To found its jurisdiction, the Court had to find that the dispute in question fell within the provisions of Article IX of the Genocide Convention.

Yugoslavia disputed this. It contested the existence in this case of an "international dispute" within the meaning of the Convention, based on two propositions. First, that the conflict occurring in certain parts of the Applicant's territory was of a domestic nature. Yugoslavia was not party to the Convention and did not exercise jurisdiction over that territory at the time in question. Second, that state responsibility, as referred to in the requests of Bosnia-Herzegovina, was excluded from the scope of Article IX.

¹ *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase (Advisory Opinion)* [1950] ICJ Reports 71.

With regard to Yugoslavia's first proposition, the Court considered that, irrespective of the nature of the conflict forming the background to the acts referred to in Articles II and III of the Convention, the obligations of prevention and punishment which were incumbent upon the states party to the Convention remained identical. It noted that it could not, at this stage in the proceedings, settle the question whether Yugoslavia took part, directly or indirectly, in the conflict at issue, which clearly belonged to the merits.

Lastly, as to the territorial problems linked to the application of the Convention, the Court held that it followed from the object and purpose of the Convention that the rights and obligations enshrined by the Convention were rights and obligations *erga omnes*. The Court noted that the obligation each state thus had to prevent and to punish the crime of genocide was not territorially limited by the Convention.

Concerning the second proposition advanced by Yugoslavia on the type of state responsibility envisaged in Article IX of the Convention, the Court observed that the reference in Article IX to "the responsibility of a State for genocide or for any of the other acts enumerated in Article III", did not exclude any form of state responsibility. Nor was the responsibility of a state for acts of its organs excluded by Article IV of the Convention, which contemplated the commission of an act of genocide by "rulers" or "public officials". As a result, the Court felt it had to reject the fifth preliminary objection of Yugoslavia.

JURISDICTION RATIONE TEMPORIS

Here, the Court confined itself to the observation that the Genocide Convention, and in particular Article IX, did not contain any clause the object or effect of which was to limit in such manner the scope of its jurisdiction *ratione temporis*. It observed that the parties did not make any reservation, either to the Convention or on the occasion of the signature of the Dayton-Paris Agreement. The Court thus found that it had jurisdiction in the case to give effect to the Genocide Convention with regard to the relevant facts which had occurred since the beginning of the conflict. The Court rejected Yugoslavia's sixth and seventh preliminary objections. (Bedjaoui P, Schwebel V-P, Oda, Guillaume, Shahabuddeen, Weeramantry, Ranjeva, Herczegh, Shi, Koroma, Vereshchetin, Ferrari Bravo, Parra-Aranguren JJ, Lauterpacht J *ad hoc*; Kreca J *ad hoc* dissenting).

ADDITIONAL BASIS OF JURISDICTION INVOKED BY BOSNIA-HERZEGOVINA

The Court found that it could not uphold any of the following as a basis for its jurisdiction in the present case: (1) a letter dated 8 June 1992 addressed to the President of the Arbitration Commission of the International Conference for Peace in Yugoslavia by Mr Momir Bulatovic, President of the Republic of Montenegro, and Mr Slobodan Milosevic, President of the Republic of Serbia; (2) the Treaty between the Allied and Associated Powers (United States of America, the British Empire, France, Italy and Japan) and the Kingdom of the Serbs, Croats and Slovenes, that was signed at Saint-Germain-en-Laye on 10 September 1919 and entered into force on 16 July 1920; or (3) the additional bases of jurisdiction invoked by Bosnia-Herzegovina. Nor did the Court find that Yugoslavia had given "voluntary and indisputable" consent which would confer upon the Court a jurisdiction exceeding that which it had already acknowledged to have been conferred upon it by Article IX of the Genocide Convention. Its jurisdiction to entertain the case was based on Article IX of the Genocide Convention only.

ADMISSIBILITY OF THE APPLICATION

According to the first preliminary objection of Yugoslavia, the Application was inadmissible on the ground that it referred to events that took place within the framework of a civil war. Consequently there was no international dispute upon which the Court could make a finding.

This objection was very close to the fifth objection which the Court had already considered. In responding to that objection, the Court had in fact also answered this objection. Having noted that there was a dispute between the parties which fell within the provisions of Article IX of the Genocide Convention, namely, an international dispute, the Court found that the Application was inadmissible on the sole ground that, in order to decide the dispute, it would be impelled to take account of events that might have occurred in the context of civil war. It followed that the first objection of Yugoslavia should be rejected (Bedjaoui P, Schwebel V-P, Oda, Guillaume, Shahabuddeen, Weeramantry, Ranjeva, Herczegh, Shi, Koroma, Vereshchetin, Ferrari Bravo, Parra-Aranguren JJ, Lauterpacht J *ad hoc*; Kreca J *ad hoc* dissenting).

According to the second objection of Yugoslavia, the Application was inadmissible because Mr Alija Izetbegovic was not serving as President of the Republic, but as President of the Presidency when he granted the authorisation to initiate proceedings. That authorisation had been granted in violation of certain rules of domestic law of fundamental significance. Yugoslavia had contended that Mr Izetbegovic was not even acting legally at that time as President of the Presidency.

The Court observed that according to international law, there was no doubt that every Head of State was presumed to be able to act on behalf of the state in its international relations. At the time of the filing of the Application, Mr Izetbegovic was recognised as the Head of State of Bosnia-Herzegovina, in particular by the United Nations. As a result, the Court rejected the second preliminary objection of Yugoslavia (Bedjaoui P, Schwebel V-P, Oda, Guillaume, Shahabuddeen, Weeramantry, Ranjeva, Herczegh, Shi, Koroma, Vereshchetin, Ferrari Bravo, Parra-Aranguren JJ, Lauterpacht *J ad hoc*; Kreca *J ad hoc* dissenting).

Finally, the Court emphasised that it did not consider that Yugoslavia had, in presenting its objections, abused its rights to do so under Article 36(6) of the Statute of the Court and Article 79 of the Rules of Court. Having established its jurisdiction under Article IX of the Genocide Convention, and that the Application was admissible, the Court held that it could therefore proceed to consider the merits of the case on that basis.

ANNEXURE²

DECLARATION OF ODA J

Oda J, although conscious of some disquiet at being disassociated from the great majority of the Court, stated that as a matter of legal conscience he felt bound to present his position that the Court should have dismissed the Application. He cast a negative vote for the reason that the Court lacked jurisdiction *ratione materiae*. In his view, Bosnia-Herzegovina in its

² This is a summary of the separate Declarations and Opinions of the judges.

Application did not give any indication of opposing views regarding the *application or interpretation* of the Genocide Convention which could have existed at the time of the filing of the Application. This alone could have enabled the Court to find that there was a dispute with Yugoslavia under the Convention.

Oda J stated that the Genocide Convention was unique in having been adopted by the General Assembly in 1948 at a time when, due to the success of the Nuremberg Trial, the idea prevailed that an international criminal tribunal should be established for the punishment of criminal acts directed against human rights, including genocide. The Convention was essentially directed *not* to the rights and obligations of states *but* to the protection of rights of individuals and groups of persons which had become recognised as universal. He stated that the failure of any contracting party “to prevent and to punish” such a crime could only be rectified and remedied through (i) resort to a competent organ of the United Nations (Article VIII) or (ii) resort to an international penal tribunal (Article VI). It could not invoke the responsibility of states in inter-state relations before the International Court of Justice.

Referring to the *travaux préparatoires* of the Convention, Oda J pointed to the very uncertain character of Article IX of the Genocide Convention. In his view, in order to seize the Court of the case, Bosnia-Herzegovina had to show that Yugoslavia could indeed have been responsible for the failure of the fulfilment of the Convention in relation to itself. More particularly, Bosnia-Herzegovina had to show that Yugoslavia had breached the rights of Bosnia-Herzegovina as a contracting party (which by definition was a state), and that the rights were protected rights under the Convention. This had not been shown in the Application. Further, the Convention was not intended to protect the rights of Bosnia-Herzegovina as a state.

As a result, Oda J held that Bosnia-Herzegovina did not allege that it had a dispute with Yugoslavia relating to the interpretation or application of the Genocide Convention. Only such a dispute could have constituted a basis of the Court’s jurisdiction under the Convention, and not the commission of genocide or genocidal acts which were categorised as crimes under international law.

Oda J also doubted whether the Court was the appropriate forum for determining the questions on genocide or genocidal acts raised by Bosnia-Herzegovina. He doubted whether international law, the Court, or the welfare of the unfortunate individuals concerned, would actually benefit from the Court's consideration of cases of this nature.

He added that the Court should maintain a strict position in connection with questions of its jurisdiction as the consensus of the sovereign states in dispute essentially constituted the basis of that jurisdiction. If the basic conditions were to be relaxed, he expected a flood of cases pouring into the Court, whose main task was the settlement of international disputes.

JOINT DECLARATION OF SHI AND VERESHCHETIN JJ

Shi and Vereshchetin JJ jointly declared that since Article IX of the Genocide Convention afforded an arguable legal basis for the Court's jurisdiction to the extent that the subject of the dispute related to "the interpretation, application or fulfilment" of the Convention, they voted in favour of the judgment, except for paragraph 1(c) of its *dispositif*. Nevertheless, they were concerned about certain substantial elements of the case. In particular, they were disquieted by the statement of the Court, in paragraph 32 of the Judgment, that Article IX of the Genocide Convention did "not exclude any form of State responsibility".

In their view, the Genocide Convention was essentially and primarily designed as an instrument directed towards the punishment of persons committing genocide or genocidal acts, and the prevention of such crimes by individuals. The determination of the international community to bring individual perpetrators of genocidal acts to justice, irrespective of their ethnicity or the position they occupied, pointed to the most appropriate course of action. Therefore, in their view, it might be argued that the Court was not the proper venue for the adjudication of the complaints which the Application had raised in the proceedings.

DECLARATION OF LAUTERPACHT J *AD HOC*

In his declaration, Lauterpacht J *ad hoc* explained that he voted for paragraph 2(b) of the operative part of the judgment in so far as it excluded any jurisdiction of the Court beyond that which it had under Article IX of

the Genocide Convention. This avoided any appearance of inconsistency with his remarks on *forum prorogatum* in his separate opinion of September 1993.

SEPARATE OPINION OF SHAHABUDDEN J

In his separate opinion, Shahabuddeen J stated that the special characteristics of the Genocide Convention pointed to the *desideratum* of avoiding a succession time-gap. Thus, this justified the Convention's construction to imply that a party to the Convention could unilaterally treat states as successor from the time of their independence, including any status which the predecessor state had as a party to the Convention. The necessary consensual bond was completed when the successor state decided to avail itself of the undertaking by regarding itself a party to the Convention.

SEPARATE OPINION OF WEERAMANTRY J

Weeramantry J stated that the Genocide Convention was a multilateral humanitarian convention to which there was automatic succession upon the break-up of a state which was party to it. This principle followed from many considerations, and was part of contemporary international law. For example, the Convention was not centred on individual state interests, and transcended concepts of state sovereignty. The rights it recognised imposed no burden on the state, and the obligations it imposed existed independently of conventional obligations. Moreover, it embodied rules of customary international law and contributed to global stability. Another circumstance was the undesirability of a hiatus in succession to the Genocide Convention, associated with the special importance of human rights guarantees against genocide during periods of transition. The beneficiaries of the Genocide Convention were not third parties in the sense which attracted the *res inter alios acta* principle. The rights conferred by the Convention were non-derogable. For all these reasons, the conclusion was compelling that automatic succession applied to the Convention.

He also expressed the view that the principle of continuity to the Genocide Convention was of particular importance in contemporary international law, owing to the break-up of states in many parts of the world. It was precisely in such unsettled times that the people of such states needed the protection of the Convention.

SEPARATE OPINION OF PARRA-ARANGUREN J

Notwithstanding his approval of the operative parts of the decision, Parra-Aranguren J held: (1) the admission made by Yugoslavia on 10 August 1993 that Bosnia-Herzegovina was a party to the Genocide Convention when requesting the Court for indication of provisional measures, made Article IX on jurisdiction applicable; and (2) the declaration made by Bosnia-Herzegovina expressing its wish to succeed to the Convention with effect from 6 March 1992 was the date on which it became independent. Accordingly, in his opinion, the Court should have remarked on and developed the point that the declaration was in conformity with the humanitarian nature of the Genocide Convention, the non-performance of which would adversely affect the people of Bosnia-Herzegovina. He also observed that the Court had already addressed this in its Advisory Opinion of 21 June 1971 on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*³ notwithstanding Security Council Resolution 276⁴ and that it was in conformity with Article 60(5) of the 1969 Vienna Convention on the Law of Treaties.

DISSENTING OPINION OF KRECA J AD HOC

Kreca J *ad hoc* found that the relevant conditions for the entertainment of the case by the Court, namely, those relating to jurisdiction and admissibility, had not been met.

The Court did not resolve the dilemma as to whether Bosnia and Herzegovina, at the time the Application and the Memorial were submitted, and Bosnia and Herzegovina now, after entry into force of the Dayton-Paris Agreement, were in fact one and the same state. This question was irrefutably relevant in the present case since it opened the way for the *persona standi in indicio* of Bosnia and Herzegovina. He thought that the proclamation of Bosnia and Herzegovina as a sovereign and independent state constituted a substantial breach, both formally and substantively, of the cogent norm on equal rights and self-determination of peoples. Thus, one could speak only of succession *de facto* and not of succession *de jure* in relation to the transfer of the rights and obligations of the predecessor state.

³ [1971] ICJ Reports 16.

⁴ Ibid para 122.

Kreca *J ad hoc* disagreed with the Court that the "obligation each State thus had to prevent and punish the crime of genocide was not territorially limited by the Convention". He felt that it was necessary to draw a clear distinction between the legal nature of the norm prohibiting genocide and the implementation or enforcement of that norm. The fact that the norm prohibiting genocide was a norm of *jus cogens* could be understood as implying that the obligation of states to prevent and punish genocide was not territorially limited. More particularly, that norm, like the other norms of international law, was applicable by states not in an imaginary space but in a territorialised international community. This meant that territorial jurisdiction, as a general rule, suggested the territorial character of the obligations of those states both in prescriptive and enforcement terms. If this were not the case, the norms of territorial integrity and sovereignty which also have the character of *jus cogens*, would be violated.

He held that under the Genocide Convention, a state could not be responsible for genocide. The meaning of Article IV of the Convention which stipulated criminal responsibility for genocide or the other acts enumerated in Article III of the Convention excluded, *inter alia*, the criminal responsibility of states. It also rejected the application of the act of state doctrine in this matter.