APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro))

This case is still pending. The written phase was concluded earlier this year and, accordingly, the case is ready for the oral hearings. It is expected that in early 2001, the Court will announce the dates for such hearings.

THE PROCEEDINGS: A CHRONOLOGY

In the original Application in this case filed on 20 March 1993, Bosnia and Herzegovina (the Applicant) instituted proceedings against Yugoslavia (Serbia and Montenegro) (the Respondent) for alleged violations of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).[1] The Applicant invoked Article IX of the Convention as the basis of the Court's jurisdiction.

At the same time, the Applicant filed a request for the indication of provisional measures. The Court granted this request on 8 April 1993[2] pending its final decision in the proceedings.

On 27 July 1993, the Applicant filed a second request for the indication of provisional measures.

On 5 August 1993, the President of the Court addressed a message to both Parties pursuant to Article 74(4) of the Rules of Court. Under this provision, the President may, pending the meeting of the Court, "to call upon the parties to act in such a way as will enable any order the Court may make on the request for provisional measures to have its appropriate effects". As a result, the President called upon the Parties to comply with the provisional measures indicated in the Order of 8 April 1993 and to take every measure possible to prevent the commission, continuance or encouragement of the "heinous crime of genocide".

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[1] This Convention was adopted on 9 December 1948 and entered into force on 12 January 1951.

[2] [1993] International Court of Justice Reports 3.

On 10 August 1993, the Respondent filed its own request for the indication of provisional measures. On 13 September 1993, the Court by Order reaffirmed the measures indicated earlier, stating that they should be immediately and effectively implemented.[3]

On 26 June 1995, the Respondent raised certain preliminary objections to the Court's jurisdiction regarding: (a) the Application's admissibility; and (b) the Court's jurisdiction to deal with the merits of the Applicant's claims. By virtue of Article 79(3) of the Rules of Court, the proceedings on the merits were suspended whilst the proceedings for the preliminary objections began.

On 11 July 1996, the Court delivered its Judgment, dismissing the preliminary objections. The Court held that it had jurisdiction to hear the dispute[4] on the basis of Article XI of the Genocide Convention. Dismissing the additional basis of jurisdiction invoked by the Applicant, the Court found that the Application was admissible.

On 23 July 1996, the Court by Order fixed 23 July 1997 as the time-limit for the Respondent to file its Counter-Memorial, which together with the counter-claims were filed on time.

By a letter dated 28 July 1997, the Applicant informed the Court that the Applicant was of the opinion that the Respondent's counter-claims did not meet the criterion of Article 80(1) of the Rules of Court and as such should not be joined to the original proceedings.

On 22 September 1997, the Court's President met with the Agents of both Parties who accepted that their Governments would submit written observations on the admissibility of the Respondent's counter-claims.

On 9 October and 23 October 1997, the Applicant and Respondent respectively submitted their written observations to the Court.

On 17 December 1997, the Court by Order held that the Respondent's counter-claims were admissible and formed part of the proceedings in

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[3] Ibid 325.

[4] [1996] International Court of Justice Reports 595.

the case. The Court directed the Parties to submit further written pleadings on the merits of their claims and fixed time-limits for the filing of such pleadings.[5]

Subsequently, the Court made other Orders on time-limits, the latest on 22 January 1998 extending the time-limit for the Applicant to file its Reply by 23 April 1998 and the Respondent to file its Rejoinder by 22 January 1999.

Since then, the Parties have been engaged in several exchanges of letters concerning new procedural difficulties in the case following the end of the written phase of the proceedings. This is where the case rests at present, awaiting the oral hearings.

THE APPLICATION

In its Application, the Applicant alleged that the Respondent had violated the Genocide Convention. In support of its application and to found the jurisdiction of the Court, the Applicant referred to Article IX of the Convention, Articles 36(1) and 40(1) of the Statute of the Court and Article 38 of the Rules of Court.

In addition, owing to the importance and urgency of the masters raised by the Application, the Applicant requested the Court to indicate immediately interim measures of protection so as to avoid further loss of life, as well as physical and mental harm, for hundreds of thousands of Bosnian People. The Application was aimed at preventing a human catastrophe that was unseen since World War II (1939-1945) pending a final determination of the Applicant's claims.

Applicant's Statement of Facts

In its Statement of Facts, the Applicant referred to the periods of history when genocide had inflicted great losses on humanity. The Applicant argued that in order to eradicate such an odious scourge, international cooperation was needed. It referred to United Nations General Assembly resolution 96(I) of 11 December 1946, which declares that genocide is a crime under international law. The

[5] [1997] International Court of Justice Reports 243.

Applicant also recalled the proceedings in 1948 that led to the General Assembly adopting the Genocide Convention and the Contracting Parties agreeing to take measures to end this crime and punish those responsible.

The Applicant stated that it had suffered and continued to suffer the effects of the genocide committed by the Respondent, its agents and surrogates in Bosnia and elsewhere aimed ultimately at the "annihilation" of Bosnia and its People. The Applicant referred to Nazi Germany's "Final Solution" that caused the utter destruction of a People for no other reason than they belonged to a particular national ethnical, racial, and religious group as such. The Applicant argued that similar acts by the Respondent could have only one name, namely, genocide, which were being committed within its territory. The Applicant pleaded that the enormity of such evil actions required all States to act collectively to stop the destruction of the Bosnian People.

To establish its *prima facie* case against the Respondent, the Applicant proceeded to provide evidence of the Respondent's unlawful behaviour. The Applicant stated that in Bosnia, the human rights of all were respected for centuries even before the 1948 Universal Declaration of Human Rights. Now, Bosnia was being punished for trying to restore human and democratic values after decades of communist rule in its territory. As one of the youngest sovereign democracies in the world and a United Nations Member, the Applicant was experiencing the most difficult crisis in its history caused by the Respondent's aggression.

(i) The History of Bosnia and Herzegovina

According to the Applicant, for centuries Bosnia and Herzegovina had been a theatre of war used by world powers to obtain world supremacy. In spite of this, its People kept their identity as seen in the preservation of their common language and common culture. The People had tolerated and respected each other as evidenced by the numerous cultural objects, Catholic churches and Islamic mosques that had been left untouched for centuries until now. Over 50% of all marriages in the former Yugoslavia were mixed marriages, further testimony to such tolerance and respect.

The name "Bosnia" was first recorded in the 10th century. Since then, many rulers in the Balkan region had incorporated this name into their titles such as "Ban" (Governor) Boric (1154-1163). In 1463, the Ottoman Empire conquered Bosnia together with Serbia, Montenegro, Slavonia and Lika. Bosnia's distinctiveness was reconstituted as "Bosnian Pasha-dom (Pashaluk)" founded in 1580. As the largest Turkish military-administrative unit in the Ottoman Empire, it consisted mostly of Serbia, Montenegro, Slavonia, Lika, Dalmatia and Bosnia and Herzegovina. The Bosnian Pasha-dom functioned in that form without any changes until the War of Vienna (1683-1699) between the Ottoman Empire and the Austro-Hungarian Empire. In 1703, the Vizier of Bosnia moved the seat of the Pasha-dom from Sarajevo to Travnik. From then on until 1878, the borders would shift owing to incursions by the Austro-Hungarian Empire and other ethnic armed groups.

At the 1878 Berlin Congress, the European powers gave the Austro-Hungarian Empire the mandate to conquer Bosnia and Herzegovina, stipulating that formal recognition should be given to the Turkish Sultan's sovereignty. In 1908, the Austro-Hungarian Empire annexed Bosnia and Herzegovina, which became an administrative unit of the Austro-Hungarian Empire. However, the proclamation of Bosnia and Herzegovina's statehood was embodied within the Bosnian Sabor (Parliament), which became functional in 1916 at Sarajevo.

In 1918, Bosnia and Herzegovina became part of the newly created Kingdom of Serbs, Croats and Slovenes that was later renamed the Kingdom of Yugoslavia in 1933. During World War II, the Governdom of Bosnia and Herzegovina was part of the independent State of Croatia. In 1945, Bosnia and Herzegovina became a federal unit within the former Yugoslavia, demonstrating the elements of statehood such as an administrative government, social and state welfare programs, and tax collection.

(ii) Background to the Current Violence

According to the Applicant, the break-up of the former Yugoslavia and subsequent aggression against the newly independent States of Slovenia and Croatia were the genesis of the genocide currently taking place in the Balkans against Bosnians and Croatians, as documented in

numerous human rights reports. The abominable acts were rooted partly in the collapse of the League of Communists in early 1990. In April-May 1990, Slovenia and Croatia held free elections and non-communist governments were elected in both States. They vowed to convert the former Yugoslavia into a confederation or, if this were blocked by Serbia, to secede. When the negotiations failed, both Republics carried out this pledge on 25 June 1991.

Fighting between Serb guerrillas and Croatian forces that had been occurring for months intensified after Croatia's declaration of independence. The inexperienced and under-resourced Croatian forces suffered heavy losses including about a third of Croatia's territory to Serbian insurgents acting in conjunction with the former Yugoslav People's Army (YPA), which proclaimed the "union" of the areas it controlled with Serbia. In January 1992, Croatia agreed to the deployment of a United Nations peacekeeping force in the areas of conflict inside Croatia.

The Applicant State claimed that it was the next former Yugoslav republic to be engulfed in the fighting. It held free elections in November and December 1990 and three ethnically based parties representing Serbs, Croats, and Muslims were elected. The three parties formed a coalition government, the Republic Presidency. From September-November 1991, the Serbian Democratic Party declared that several so-called Serbian autonomous regions within the Applicant State would secede from the Republic if the Republic declared its independence from the former Yugoslavia. Some of these regions had Serbian majorities while others had relatively few Serbs but they were strategically located between the Serb majority areas and Serbia itself.

In December 1991, the Applicant applied to the European Community (EC) for recognition as an independent State. The Applicant State announced that a referendum would be held on 29 February and 1 March 1992 on its independence. An overwhelming majority of 99.4% of the votes cast approved independence. Turnout was 63.4%, largely because ethnic Serbs (who made up about 31 per cent of the Republic's population) boycotted the vote. In other words, almost 63 per cent of the electorate opted for independence and this referendum was valid under the then applicable constitutional law.

On 6 March 1992 the Applicant proclaimed its independence as a republic. Its Presidency consisted of seven elected members – two Muslim representatives, two Croat representatives, two Serb representatives and one member representing the remaining "undeclared" citizens. This body, representing all the Applicant's citizens, including Bosnian Serbs, envisioned a constitutional and administrative framework similar to the models found in the United States and other Western democracies. Accordingly, the EC decided to recognise the Applicant State on 6 April 1992.

However, on 4 April 1992, Serb militia forces acting at the behest of and in cooperation with the former YPA and air force, launched military attacks throughout the Applicant's territory. The attacks intensified after the EC extended its recognition on 6 April 1992. The next day, Serb militia forces announced that they had created the so-called "Serbian Republic of Bosnia and Herzegovina". The former YPA quickly seized about two-thirds of the Applicant's territory, conquering rapidly the ethnically mixed and Muslim-majority areas in central and eastern Bosnia.

In an unsuccessful attempt to prevent United Nations economic sanctions against Yugoslavia for their support and direction of Serb military and paramilitary forces in the Applicant's territory, the former YPA announced in May 1992 that it was withdrawing from the Republic. It announced also that the former YPA soldiers who were born in Bosnia and Herzegovina (estimated at about 80%) could stay in the Republic and were to be given the former YPA's supplies.

The Applicant alleged that at the time of filing its Application in the Court, Serbian forces and militias in the Applicant's territory were operating under the direction of and with assistance from the Respondent. For this reason, the Applicant argued that the Respondent was fully responsible under international law for their own activities including those of the former YPA.

On 29 June 1992, the United Nations received permission from the warring forces to send a peacekeeping contingent to Croatia to secure Sarajevo's airport, to keep open a humanitarian aid pipeline into the city. However, the Respondent's siege and bombardment of Sarajevo continued, leading to international concern. This concern grew when it

was reported that nearly 2 million Muslim and Croat refugees were being expelled from Serb-held territories beyond Sarajevo. Victims spoke of the use of intimidation and violence to induce them to leave their homes. The most appalling were reports of Serb-run detention camps where witnesses spoke of summary executions, gang rapes of female prisoners, beatings, torture and starvation of prisoners.

On 7 August 1992, Bosnian diplomats released a memo dated 8 July 1992 from United Nations peacekeepers in Croatia, which stated that Serb militia forces in the Applicant State had intensified the so-called "ethnic cleansing" operations in May 1992. According to United Nations General Assembly resolution 47/121 of 18 December 1992, this "ethnic cleansing against the Bosnian People...is a form of genocide". As such, the Applicant submitted that "ethnic cleansing" was really a euphemism for acts of genocide within the meaning of the Genocide Convention.

(iii) Planning for a "Greater Serbia"

The Applicant submitted that much of the earliest violence (predating recognition) was caused by paramilitary units from Serbia and Montenegro in the former Yugoslavia, which carried out acts of terror and intimidation against non-Serbs. The greatest atrocity was the systematic shelling and starvation by siege of large cities. Civilians were the primary targets of military action, contrary to the Red Cross Geneva Conventions. The abuse of individuals and groups of non-Serbs took almost every conceivable form of torture, humiliation, and killing. The policy of driving out innocent civilians of a different ethnic or religious group from their homes as part of "ethnic cleansing" was practised by Yugoslav/Serbian forces in Bosnia on a scale that dwarfed anything seen in Europe since Nazi times.

Considering the extent and manner of the aggression, the confiscation of documents and the consequences manifested by the aggression, the Applicant claimed that the Yugoslav/Serb aggression was pre-planned with the objective of destroying Muslims within the nation and occupying areas where they had lived. As evidence, the Applicant referred, *inter alia,* to the longstanding Yugoslav plan to create a so-called "Greater Serbia", namely, the "Nacertanije (Plan)" published by the Serbian priest, Garasanin, in 1844. The Applicant also presented a

number of specific factual allegations of acts of genocide, starting with General Assembly Resolution 47/121 of 18 December 1992. The allegations included the killing of members of a group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, and imposing measures intended to prevent births within the group.

Genocide Convention

The relevant provisions of the Genocide Convention are as follows:

> *Article I*
> The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.
>
> *Article II*
> In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such:
> Killing members of the group;
> Causing serious bodily or mental harm to members of the group;
> Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> Imposing measures intended to prevent births within the group;
> Forcibly transferring children of the group to another group.
>
> *Article III*
> The following acts shall be punishable:
> Genocide;
> Conspiracy to commit genocide;
> Direct and public incitement to commit genocide;
> Attempt to commit genocide;
> Complicity in genocide.
>
> *Article IV*
> Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

Article IX
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.

The Court's Jurisdiction

On 29 December 1992, the Applicant State transmitted a letter to the United Nations Secretary-General, Boutros Boutros-Ghali enclosing the original Notice of Succession on the Genocide Convention showing that it was executed on 17 December 1992. The Secretary General is the depositary for the Convention. In this Notice, the Applicant declared its wish to succeed to the Genocide Convention, to which the former Socialist Federal Republic of Yugoslavia was a party. In doing so, the Applicant State undertook to comply with the Convention with effect from 6 March 1992, the date of its independence.

The Applicant stated that the effective date of the Notice of Succession accorded with the normal rules of customary international law relating to State succession with respect to treaties. *Inter alia*, the rules were codified in Articles 17, 22-23 and 34 of the 1978 Vienna Convention on Succession of States in Respect of Treaties. The former Yugoslavia had signed this Convention on 6 February 1979 and deposited an instrument of ratification on 28 April 1980. The Applicant also argued that the former Yugoslavia had signed the Genocide Convention on 11 December 1948 and deposited an instrument of ratification without reservation on 29 August 1950.

For the above reasons, the Applicant argued that it had succeeded to the former Yugoslavia's obligations in the Genocide Convention on 6 March 1992, without any reservations. As a result, both Parties were and had been Parties to the Genocide Convention at all times continuously in relation the present proceedings. Furthermore, since the former Yugoslavia took part in the San Francisco Conference, that State was an original Member of the United Nations under Article 3 of the Charter.

The Applicant referred to a joint session of the rump Parliamentary Assembly of the former Socialist Federal Republic of Yugoslavia, the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro on 27 April 1992. The joint session adopted a declaration supposedly expressing the will of their citizens "to stay in the common state of Yugoslavia" and proclaiming the so-called "Federal Republic of Yugoslavia" (FRY). The declaration stated that the FRY would assume the international legal and political personality of the former Socialist Federal Republic of Yugoslavia (SFR of Yugoslavia) and abide strictly by all the international commitments of the SFR of Yugoslavia.[6]

The Applicant stated that this purported State "continuity" had been contested vigorously by the whole international community, including the Security Council in resolutions 757 (1992) and 777 (1992) and the General Assembly in resolution 47/1 (1992). The Applicant had agreed with these resolutions. In addition, the declaration of 27 April 1992 indicated clearly that "[t]he Federal Republic of Yugoslavia...sh[ould] strictly abide by all the commitments that the SFR of Yugoslavia assumed internationally".

The Respondent confirmed its intention to honour the international treaties of the former Yugoslavia in a Note dated 27 April 1992 from the Permanent Mission of Yugoslavia to the United Nations Secretary-General.[7] This evidenced the Respondent's express intention to be bound by the terms of the Genocide Convention without reservation. By a Letter dated 29 September 1992 sent by the Under-Secretary-General, the Legal Counsel, to the Permanent Representatives of Bosnia and Herzegovina and Croatia to the United Nations, the Under-Secretary-General attempted to discuss the "practical consequences" of General Assembly resolution 47/1 (1992). *Inter alia,* the Letter stated:[8]

> On the other hand the resolution neither terminates nor suspends Yugoslavia's *membership* in the Organization...The resolution does not take away the right of Yugoslavia to participate in the work of organs other than Assembly bodies...

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[6] See A/46/915, Annex II (7 May 1992).
[7] See A/46/915, Annex I, 7 May 1992.
[8] See A/47/485, Annex, 30 September 1992.

Consequently, the Applicant argued that from the facts described above and which would be developed more fully in subsequent submissions it was clear that a dispute had arisen between the Parties. This related "to the interpretation, application, or fulfilment of the present [Genocide] Convention, including those relating to the responsibility of a State for genocide or any of the other acts enumerated in article III", within the meaning of Article IX.

Applicant's Claims under the Genocide Convention

The Applicant submitted that the Court had jurisdiction to hear its Application and made several claims under the Genocide Convention:

1. According to Article I, the Contracting Parties confirms that genocide, whether committed in time of peace or in time of war, is a crime under international law, which they undertake to prevent and to punish.

   The Applicant claimed that the Respondent had breached its obligations under this Article by planning, preparing, conspiring, promoting, encouraging, and aiding and abetting in the commission of genocide against the Applicant and its People. The Respondent had refused to prevent or to punish those responsible for such acts. By performing such unlawful and criminal activities, the Respondent had incurred an international legal responsibility and was bound to cease and desist from such activities immediately. The Respondent also had to pay the Applicant reparations for the damage and prejudice suffered.

2. Article II defines the international crime of genocide.

   The Applicant claimed that the Respondent and its officials, agents and surrogates had expressly violated, and continued to violate, and have threatened to continue violating Article II(a)-(d) with respect to the Applicant and its People.

3. Article III provides that the following acts are punishable: (a) genocide; (b) conspiracy to commit genocide; (c) direct and public incitement to commit genocide; (d) attempt to commit genocide; (e) complicity in genocide.

The Applicant claimed that the Respondent, its officials, agents, and surrogates had committed numerous, gross, and consistent violations of Article III(a)-(e) with respect to the Applicant State and its People.

4. According to Article IV, persons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials, or private persons.

   The Applicant claimed that the Respondent's "constitutionally responsible rulers" and "public officials" had either personally or by their agents and surrogates acting under their direct control or with their cooperation, support, encouragement or approval violated Articles II and III(a)-(e). So far, the Respondent had refused to punish such persons in breach of the Respondent's own obligations under Articles III and IV.

   The Applicant also claimed that certain "private individuals", acting under the control of or in cooperation with the Respondent's "constitutionally responsible rulers" or "public officials" had violated Article III(a)-(e). Such behaviour and acts created personal responsibility under international law as well as State responsibility for the Respondent. Yet, so far, the Respondent had refused to punish these "private individuals", thus violating its own obligations under Articles III and IV.

5. Pursuant to Article V, the Contracting Parties undertook to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the Convention and in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article III.

   The Applicant claimed that, so far, the Respondent had not provided effective penalties for persons guilty of genocide or any of the other acts enumerated in Article III, thus violating its own obligations under Article V.

6. Article VIII of the Genocide Convention provides that any Contracting Party may call upon the competent organs of the

United Nations to take such action under the Charter considered appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III.

Accordingly, the Applicant argued that the Genocide Convention expressly conferred international legal competence upon all United Nations organs, especially the International Court of Justice. As such, the organs should take effective action to prevent and suppress all acts of genocide and all the other acts enumerated in Article III alleged to have been perpetrated by the Respondent.

7. Article I of the Genocide Convention states that all States that are Contracting Parties have an international legal obligation "to prevent" the commission of acts of genocide.

   The Applicant claimed that under this obligation, the Contracting Parties were required to give it support, such as military weapons, equipment, supplies, troops and financing. This would enable the Applicant to lawfully defend itself against the Respondent.

8. The Applicant claimed further that it had the inherent right of self-defence under the Genocide Convention against acts of genocide and other genocidal acts enumerated in Article III. This right of self-defence against genocide included within itself the right to seek and receive support from other Contracting Parties to the Genocide Convention. Consequently, it had the basic right under the Convention to seek and receive immediately from the other Contracting Parties military weapons, equipment, supplies, troops and financing in order to defend itself against the acts of the Respondent that were contrary to the Convention.

Consequently, the Applicant requested the Court to act immediately and effectively to prevent and suppress all acts of genocide and all other genocidal acts as enumerated in Article III and required by Article VIII. In particular, the Applicant argued that Article VIII required the Court to grant its Request for the Indication of Provisional Measures of Protection immediately and in the terms specified in the Application before the Court.

Applicant's Claims under the United Nations Charter

The Applicant claimed that as a United Nations Member and a Party to its Charter, it possessed the inherent right of both individual and collective self-defence under Article 51 that *inter alia* provides:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security...

Pursuant to this Article, the Applicant argued that it had the right to seek and receive support from the other 179 Members of the United Nations, including the right to seek and receive military weapons equipment, supplies, troops and financing from them. This would assist the Applicant to defend itself against the Respondent's breach of the obligations found in Article 2(2)-(4).

The Applicant argued Article 33(1), which refers to disputes the continuance of which is likely to endanger the maintenance of international peace and security. If so, there was an obligation to, "first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice".

The Applicant claimed that the Security Council had not taken any effective measures to prevent, punish or suppress the Respondent's actions as required by Articles I and VIII of the Genocide Convention. As a result, the Applicant had the right under the Genocide Convention to seek and receive support from United Nations Members. Further, the Applicant claimed that so far the Security Council had not taken effective measures necessary to maintain international peace and security in this case within the meaning of Article 51. Therefore, the Applicant's right of individual and collective self-defence against the Respondent remained intact.

On 25 September 1991, the Security Council adopted resolution 713 (1991) at the express request of and with the permission of the

representative of the former Yugoslavia.[9] Consequently, acting pursuant to its powers under Chapter VII, the Security Council decided to impose an arms embargo upon the former Yugoslavia.[10] However, during the debate on the adoption of resolution 713 (1991), Security Council Members made it quite clear that the legal validity of the resolution depended upon the consent of the former Yugoslavia to the arms embargo. Although the Security Council had imposed the arms embargo upon the former Yugoslavia at its express request and with its consent, the Applicant State had not yet come into existence as an independent State until 6 March 1992. As such, the Applicant argued that the Security Council's arms embargo upon the former Yugoslavia did not and could not apply to the Applicant.

Furthermore, the Applicant had not consented to or acquiesced in the extension of this arms embargo to itself. On the contrary, the Applicant claimed that the extension of the embargo from the former Yugoslavia to itself would violate its inherent right of individual and collective self-defence as recognised by customary international law and Article 51 of the United Nations Charter. The Security Council reaffirmed this arms embargo against the former Yugoslavia in paragraph 5 of resolution 724 on 15 December 1991. The Security Council had reaffirmed this arms embargo against the former Yugoslavia in resolution 727 paragraph 6 of 8 January 1992. However, this arms embargo continued to apply only to the former Yugoslavia. As a result, the Applicant argued that these resolutions did not and could not apply to it since it did not become an independent State until 6 March 1992.

The Applicant State was not admitted to United Nations membership until General Assembly resolution 46/237. Immediately thereafter, it became subject to all the responsibilities, privileges, duties, and rights of the Charter, especially Article 51. Until the date of its independence as a sovereign State on 6 March 1992, and in any event no later than 22 May 1992, the Applicant had, and still has, the inherent right to self-defence, both individually and collectively, under customary international law and Article 51.

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[9] United Nations Doc S/PV3009, 25 September 1991 at 17.

[10] See Weller, "The international response to the dissolution of the Socialist Federal Republic of Yugoslavia", (1992) 86 American Journal of International Law 569, 577-578.

Therefore, all subsequent Security Council resolutions that routinely reaffirmed the arms embargo imposed upon the former Yugoslavia by paragraph 6 of resolution 713 (1991), paragraph 5 of resolution 724 (1991), and paragraph 6 of resolution 727 (1992) could not be construed properly to apply to the Applicant. On the other hand, these resolutions should be construed as consistent with Article 51. To do otherwise would render them *ultra vires* since Article 51 states that *"[n]othing* in the present Charter shall impair the inherent right of individual or collective self defence...". *(emphasis added)*

In addition, Article 24(2) provides that "[t]he specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII." Thus, even when the Security Council acts under Chapter VII of the Charter, it must "act in accordance with the Purposes and Principles of the United Nations" as found in Chapter I and more particularly in Articles 1-2. As such, the arms embargo imposed upon the former Yugoslavia and its successors by the Security Council in resolution 713 (1992) did not legally apply and could not apply to the Applicant at any time. It would be improper to interpret resolution 713 (1991) otherwise and it would render resolution 713 (1991) *ultra vires* the Security Council under both Articles 24(2) and 51. Further, the Security Council would not be acting "in accordance with the Purposes and Principles of the United Nations"; instead, it would breach Article 24(2).

To avoid a wrong, the Applicant requested the Court to interpret Security Council resolution 713 (1991) to mean that there was never a mandatory arms embargo applicable to the Applicant under Chapter VII. The Applicant argued that this was a straightforward exercise of Charter interpretation that fell clearly within the Court's powers, competence, and purview under Article 92, which named the Court, not the Security Council or General Assembly, "the principal judicial organ of the United Nations".

The Applicant referred to *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)*[11] confirming a State's right to ask other States to come to its defence against armed attacks, armed aggressions and other illegal acts

[11] [1986] International Court of Justice Reports 14.

perpetrated against it. In the present case, the Applicant argued that the same right flowed to it from Article I of the Genocide Convention.

Consequently, the Applicant requested the Court to affirm and to clarify its right of individual and collective self-defence under Article 51, customary international law, and *jus cogens* under the unique circumstances of this case.

Laws of War and International Humanitarian Law

The Applicant claimed that the Respondent's acts constituted war crimes under the laws of war and international humanitarian law. It alleged that the Respondent had committed numerous violations and grave breaches under the following international instruments:

(a) the four Geneva Conventions of 12 August 1949 and their Additional Protocol I of 8 June 1977;
(b) the customary international laws of war including the Hague Regulations on Land Warfare of 1907; and
(c) and fundamental principles and rules of international humanitarian law.

In this regard, the Notice of Succession in the letter dated 29 December 1992 was relevant. The Applicant (through its Ambassador) had transmitted the Notice on the four 1949 Geneva Conventions and the two 1977 Additional Protocols[12] to the Permanent Observer Mission of Switzerland to the United Nations.[13] In a letter dated 19 January 1993, the Swiss Permanent Mission to the United Nations informed the Applicant's Permanent Mission to the United Nations that the Bosnian instrument of succession to the four Geneva Conventions of 1949 and the two Additional Protocols of 1977 were deposited with the Swiss Government on 31 December 1992. The letter noted that the date of succession was 6 March 1992 when Bosnia became independent. Therefore, from the above, both Parties had continuously been Parties to the four Geneva Conventions and their two Additional Protocols at all times relevant to these proceedings.

[12] The Bosnian Minister of Foreign Affairs executed the Notice on 17 December 1992 without any reservations. It became effective on 6 March 1992, the date of the Applicant State's independence.
[13] Switzerland is the depository of the Geneva Conventions and Protocols.

Universal Declaration of Human Rights

The Applicant claimed that several of the alleged violations referred to above were also gross violations of the Universal Declaration of Human Rights of 10 December 1948. Referring specifically to Articles 1-23, 25-26 and 28, the Applicant claimed that the Respondent had sought to circumvent, negate, overturn and destroy the entirety of the Universal Declaration with respect to Bosnian citizens. Yet the fundamental human rights protected by the Universal Declaration were considered binding upon all States of the international community as a matter of customary international law and *jus cogens*. This included Articles 1(3) and 55-56 of the United Nations Charter.

Summary of Alleged Breaches by the Respondent

The Applicant alleged that the Respondent had breached various international treaties and agreements and basic principles of customary international law, the laws of war, international humanitarian law, international criminal law, and principles of *jus cogens*. More specifically, they included the following international instruments:

1. the Genocide Convention;
2. the 1948 Universal Declaration of Human Rights;
3. the four 1949 Red Cross Geneva Conventions of 1949 and the 1977 Additional Protocols;
4. the 1907 Hague Regulations on Land Warfare; and
5. the United Nations Charter.

Judgment Requested

Subject to the right to revise, supplement or amend its Application and subject to additional relevant evidence and legal arguments, the Applicant requested the Court to adjudge and declare as follows:

(a) That the Respondent has breached, and is continuing to breach, its legal obligations toward the Applicant under Articles I, II(a)-(d), III(a)-(e), IV and V of the Genocide Convention.
(b) That the Respondent has violated and is continuing to violate its legal obligations toward the Applicant under the four 1949 Red Cross Geneva Conventions and the 1977 Additional Protocol I,

the customary international laws of war including the Hague Regulations on Land Warfare of 1907, and other fundamental principles of international humanitarian law.

(c) That the Respondent has violated and continues to violate Articles 1-23, 25-26 and 28 of the Universal Declaration of Human Rights with respect to the citizens of the Applicant.

(d) That the Respondent has breached its obligations under general and customary international law, has killed, murdered, wounded, raped, robbed, tortured, kidnapped, illegally detained, and exterminated the Applicant State's citizens and continues to do so.

(e) That in its treatment of the citizens of the Applicant State, the Respondent has violated, and continues to violate, its obligations under Articles 1(3) and 55-56 of the Charter.

(f) That the Respondent has used and is continuing to use force and the threat of force against the Applicant in violation of Articles 2(1)-(4) and 33(1) of the Charter.

(g) That the Respondent has used, is using and threatening to use force against the Applicant in breach of its obligations under general and customary international law.

(h) That the Respondent has violated and is violating the sovereignty of the Applicant State, in breach of its obligations under general and customary international law, by:
- armed attacks against the Applicant by air and land including aerial trespass into Bosnian airspace; and
- efforts by direct and indirect means to coerce and intimidate the Government of the Applicant.

(i) That the Respondent, in breach of its obligations under general and customary international law, has intervened and is intervening in the internal affairs of the Applicant.

(j) That the Respondent in recruiting, training, arming, equipping, financing, supplying and otherwise encouraging, supporting, aiding, and directing military and paramilitary actions in and against the Applicant by means of its agents and surrogates, has violated and is violating its express United Nations Charter and other treaty obligations to the Applicant. In particular, the Respondent has breached its Charter and treaty obligations under Article 2(4) of the Charter, as well as other obligations under general and customary international law.

(k) That the Applicant has the sovereign right to defend itself and its People under Article 51 of the United Nations Charter and customary international law, including by means of obtaining military weapons, equipment, supplies and troops from other States immediately.

(l) In the above context, that the Applicant has the sovereign right to request the immediate assistance of any State to come to its defence, including by military means (such as weapons, equipment, supplies and troops).

(m) That Security Council resolution 713 (1991), imposing a weapons embargo upon the former Yugoslavia, must be construed in a manner that shall not impair the Applicant's inherent right of individual or collective self-defence under Article 51 of the United Nations Charter and the rules of customary international law.

(n) That all subsequent Security Council resolutions that refer to or reaffirm resolution 713 (1991) must be construed in a manner that shall not impair the Applicant's inherent right of individual or collective self-defence under Article 51 of the United Nations Charter and the rules of customary international law.

(o) That Security Council resolution 713 (1991) and all subsequent Security Council resolutions referring thereto or reaffirming thereof must not be construed to impose an arms embargo upon the Applicant, as required by Articles 24(1) and 51 of the United Nations Charter and in accordance with the customary law doctrine of *ultra vires*.

(m) That pursuant to the right of collective self-defence recognised by Article 51 of the United Nations Charter, all other States parties to the Charter have the right to come to the immediate defence of the Applicant, at its request, including by means of immediately providing the Applicant with weapons, military equipment and supplies, and armed forces (such as soldiers, sailors and airpeople).

(q) That the Respondent, its agents and surrogates are under an obligation to cease and desist immediately from its breaches of the foregoing legal obligations. Further, the Respondent is under a particular duty to cease and desist immediately:

- from its systematic practice of so-called "ethnic cleansing" of the citizens and sovereign territory of the Applicant;

- from the murder, summary execution, torture, rape, kidnapping, mayhem, wounding, physical and mental abuse, and detention of the citizens of the Applicant State;
- from the wanton devastation of villages, towns, districts, cities, and religious institutions in the Applicant State;
- from the bombardment of civilian population centres in the Applicant State, and especially its capital, Sarajevo;
- from continuing the siege of any civilian population centres in the Applicant State, and especially its capital, Sarajevo;
- from the starvation of the civilian population in the Applicant State;
- from the interruption of, interference with or harassment of humanitarian relief supplies to the citizens of the Applicant State by the international community;
- from all use of force, whether direct or indirect, overt or covert, against the Applicant, and from all threats of force against the Applicant;
- from all violations of the sovereignty, territorial integrity or political independence of the Applicant, including all intervention, direct or indirect, in the internal affairs of the Applicant; and
- from all support of any kind, including the provision of training, arms, ammunition, finances, supplies, assistance, direction or any other form of support, to any nation, group, organisation, movement or individual engaged or planning to engage in military or paramilitary actions in or against the Applicant.

Finally, the Applicant claimed that the Respondent was under an obligation to pay the Applicant, in its own right and as *parens patriae* for its citizens, reparations for the Respondent's breaches of international law in a sum to be determined by the Court. However, the Applicant reserved the right to introduce to the Court a precise evaluation of the damages caused by the Respondent.

More specifically, the Applicant claimed for the following:

- death, physical and mental injury of the Bosnian population;
- destruction and property damage;
- environmental harm;

- gross violation of the Genocide Convention;
- violation of the United Nations Charter;
- violation of the four 1949 Geneva Conventions and the 1977 Additional Protocol I;
- violation of the 1907 Hague Regulations on Land Warfare;
- violation of the 1948 Universal Declaration of Human Rights; and
- violation of several other international treaties and agreements, principles of customary international law, the laws of war, international humanitarian law, international criminal law, and *jus cogens* specified in further submissions of the Applicant.

THE COURT'S FIRST INDICATION OF PROVISIONAL MEASURES

The oral hearings regarding this request for the indication of provisional measures were held on 1-2 April 1993. At a public sitting held on 8 April 1993, the President of the Court read the Order granting the request for provisional measures made by the Applicant.[14] The Court held that pending its final decision in the proceedings instituted on 20 March 1993, the following provisional measures were granted:[15]

1. The Respondent should immediately, in pursuance of its undertaking in the Genocide Convention, take all measures within its power to prevent commission of the crime of genocide.
2. The Respondent should in particular ensure that its military, paramilitary or irregular armed units including any organisations and persons subject to its control, direction or influence, do not commit any acts of genocide. This included conspiracy to commit genocide, direct and public incitement to commit genocide, or complicity in genocide, whether directed against the Muslim population of the Applicant State or against any other national, ethnical, racial or religious group.
3. The Parties should not take any action and should ensure that no action is taken which may aggravate or extend the existing dispute over the prevention or punishment of the crime of genocide, or render it more difficult of solution.

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[14] [1993] International Court of Justice Reports 3.
[15] Tarassov J appended a declaration to the Order.

APPLICANT'S SECOND REQUEST FOR PROVISIONAL MEASURES

On 27 July 1993, the Applicant filed a second request for the indication of provisional measures, stating that this "extraordinary step" was taken because the Respondent had violated all three measures above. The violations caused the grave detriment of both the Applicant State and its People. In addition to the continuing campaign of genocide against the Bosnian People, the Applicant alleged that the Respondent was "planning, preparing, conspiring to, proposing, and negotiating the partition, dismemberment, annexation and incorporation of the sovereign state of Bosnia and Herzegovina...by means of genocide."

As a consequence, the provisional measures requested were as follows:

1. That the Respondent must immediately cease and desist from providing, directly or indirectly, any type of support to any party in the Applicant State for any reason or purpose.
2. That the Respondent and all of its public officials, including and especially the President of Serbia, Mr Slobodan Milosevic, must immediately cease and desist from any and all efforts, plans, plots, schemes, proposals or negotiations to partition, dismember, annex or incorporate the Applicant's sovereign territory.
3. That the annexation or incorporation of any sovereign territory of the Applicant by the Respondent by any means or for any reason shall be deemed illegal, null, and void *ab initio.*
4. That the Applicant must have the means "to prevent" the commission of acts of genocide against its own People as required by Article I of the Genocide Convention.
5. That all Contracting Parties to the Genocide Convention are obliged by Article I thereof "to prevent" the commission of acts of genocide against the Applicant State and its People.
6. That the Applicant State must have the means to defend itself and its People from acts of genocide and partition and dismemberment by means of genocide.
7. That all Contracting Parties to the Genocide Convention have the obligation thereunder "to prevent acts of genocide, and partition and dismemberment by means of genocide, against the Applicant State and its People".
8. That in order to fulfil its obligations under the Genocide Convention under the current circumstance, the Government of

Bosnia and Herzegovina must have the ability to obtain military weapons, equipment, and supplies from other Contracting Parties.

9. That in order to fulfil their obligations under the Genocide Convention under the current circumstances, all Contracting Parties thereto must have the ability to provide military weapons, equipment, supplies and armed forces (soldiers, sailors, airpeople) to the Applicant State at its request.
10. That United Nations Peacekeeping Forces in Bosnia and Herzegovina (UNPROFOR) must do all in their power to ensure the flow of humanitarian relief supplies to the Bosnian People through the Bosnian city of Tuzla.

Article 74(4) of the Rules of Court

On 5 August 1993, the President of the Court addressed a message to both Parties pursuant to Article 74(4) of the Rules of Court. This provision enabled him, pending the meeting of the Court, "to call upon the parties to act in such a way as will enable any order the Court may make on the request for provisional measures to have its appropriate effects". He stated the following:

> I do now call upon the Parties so to act, and I stress that the provisional measures already indicated in the Order which the Court made after hearing the Parties, on 8 April 1993, still apply. Accordingly I call upon the Parties to take renewed note of the Court's Order and to take all and any measures that may be within their power to prevent any commission, continuance, or encouragement of the heinous international crime of genocide.

RESPONDENT'S REQUEST FOR PROVISIONAL MEASURES

A few days after the Court indicated provisional measures pursuant to the Applicant's second request, on 10 August 1993 the Respondent also filed a request for the indication of provisional measures as follows:

> The Government of the so-called Republic of Bosnia and Herzegovina should immediately, in pursuance of its obligation under the Convention on the Prevention and Punishment of the

> Crime of Genocide of 9 December 1948, take all measures within its power to prevent commission of the crime of genocide against the Serb ethnic group.

The hearings were held on 25 and 26 August 1993 and the Court handed down its Order on 13 September 1993. The Court reaffirmed the provisional measures indicated in its first Order of 8 April 1993, stating that the measures should be immediately and effectively implemented.[16] Oda J appended a declaration to the Order; Shahabuddeen, Weeramantry and Ajibola JJ and Lauterpacht J *ad hoc* appended individual opinions; Tarassov J and Kreca J *ad hoc* appended dissenting opinions.

RESPONDENT'S PRELIMINARY OBJECTIONS

On 26 June 1995, the Respondent filed certain preliminary objections in this case. First, the objections related to the Application's admissibility, and secondly, to the Court's jurisdiction to deal with the case. Under Article 79(3) of the Rules of Court the proceedings on the merits of the Applicant's Application were suspended when the Respondent filed its preliminary objections. The proceedings were then organised for consideration under the provision of this Article. Public sittings to hear the oral arguments of the Parties on the Respondent's preliminary objections were held between 29 April and 3 May 1996.

At a public sitting held on 11 July 1996, the Court delivered its Judgment on the preliminary objections.[17] The Court rejected the Respondent's objections, finding that the Court had jurisdiction to hear the case pursuant to Article XI of the Genocide Convention. Therefore, the Court dismissed the additional basis of jurisdiction invoked by the Applicant and found that the Application was admissible.

Oda J appended a declaration to the Judgment of the Court; Shi and Vereshchetin JJ appended a joint declaration; Lauterpacht J *ad hoc* also appended a declaration; Shahabuddeen, Weeramantry and Parra-Aranguren JJ appended separate opinions to the Judgment; and Kreca J *ad hoc* appended a dissenting opinion.

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[16] [1973] International Court of Justice Reports 325.
[17] [1996] International Court of Justice Reports 595.

RESPONDENT'S COUNTER-CLAIMS

In its counter-claims, the Respondent requested the Court to adjudge and declare that the Applicant was responsible for the acts of genocide committed against the Serbs in the Applicant State's territory and for other violations of the obligations created by the Genocide Convention. The Respondent claimed that the Applicant's propaganda had "incited acts of genocide". Further, the Applicant's armed forces and other organs had committed acts of genocide and other acts prohibited by the Convention and the Applicant had not prevented such acts.

The Respondent argued that the Applicant had an obligation to punish the persons held responsible for the above acts prohibited by the Convention and that it was bound to take necessary measures to ensure that the acts would not be repeated. The Respondent also argued that the Applicant was duty-bound to eliminate all consequences of the violation of the obligations established by the Convention and provide "adequate compensation".

By a letter of 28 July 1997, the Applicant informed the Court that the Respondent's Counter-Claim did not meet the criterion found in Article 80(1) of the Rules of Court and therefore should not be joined to the original proceedings.

On 22 September 1997, the President of the Court convened a meeting where the Parties' Agents accepted that their respective Governments would submit written observations on the question of the admissibility of the Respondent's Counter-Claims.

By an Order of 17 December 1997, the Court found that the Respondent's Counter-Claims as contained in the Counter-Memorial were admissible and formed part of the proceedings. The Court further directed the Applicant to submit a Reply and the Respondent to submit a Rejoinder relating to the claims of both Parties. The Court fixed time-limits for the filing of pleadings on 23 January 1988 and 23 July 1998 respectively. The Court considered that the above procedure was necessary in order to ensure strict equality between the Parties, to reserve the Applicant's right to present its views in writing a second time on the Respondent's counter-claim in an additional pleading that could be the subject of a subsequent Order.

Kreca J *ad hoc* appended a declaration to the Order; Koroma and Lauterpacht JJ appended separate opinions; and Weeramantry V-P appended a dissenting opinion.

SUBSEQUENT PROCEEDINGS

Following the above proceedings, the Court gave a number of Orders concerning the time-limits for the filing of pleadings by both Parties, the latest Order in January 1998. As stated above, since then, several exchanges of letters have taken place concerning new procedural difficulties in the case and, as such, the proceedings on the merits of the case remain pending.