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Application of the Convention on the Prevention and Punishment of the Crime of Genocide

(Bosnia and Herzegovina *v.* Serbia and Montenegro)[1]

International Court of Justice. 26 *February* 2007

(Higgins, *President*; Al-Khasawneh, *Vice-President*; Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna and Skotnikov, *Judges*; Mahiou[2] and Kreća,[3] *Judges ad hoc*)

Summary: *The facts*:—The Socialist Federal Republic of Yugoslavia ("the SFRY") consisted of six republics: Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia. During 1991-2 the SFRY underwent a

[1] For earlier stages of the proceedings in this case, see 95 ILR 1 (Orders of 8 April 1993 and 13 September 1993 for Provisional Measures of Protection), 115 ILR 1 (Judgment of 11 July 1996 on Preliminary Objections) and 115 ILR 206 (Order of 17 December 1997 on Counterclaims). For the Judgment of 3 February 2003 in the related proceedings, *Application for Revision of the Judgment of 11 July 1996 in the Case Concerning* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia) (*Yugoslavia* v. *Bosnia and Herzegovina*), see 155 ILR 1. On the identification of the Respondent, see paras. 67-79 of the present Judgment.

In the present proceedings, Bosnia and Herzegovina was represented by Mr Sakib Softić, as *Agent*; Mr Phon van den Biesen, as *Deputy Agent*; Professor Alain Pellet, Professor Thomas Franck, Professor Brigitte Stern, Professor Luigi Condorelli, Ms Magda Karagiannakis, Ms Joanna Korner QC, Ms Laura Dauban and Mr Antoine Ollivier, as *Counsel and Advocates*; Ambassador Fuad Šabeta, Mr Wim Muller, Mr Mauro Barelli, Mr Ermin Sarajlija, Ms Amra Mehmedić, Ms Isabelle Moulier and Professor Paulo Palchetti, as *Counsel*.

Serbia was represented by Ambassador Radoslav Stojanović, as *Agent*; Mr Saša Obradović and Mr Vladimir Cvetković, as *Co-Agents*; Professor Tibor Varady, Mr Ian Brownlie CBE QC, Mr Xavier de Roux, Ms Nataša Fauveau-Ivanović, Professor Andreas Zimmerman, Mr Vladimir Djerić and Mr Igor Olujić, as *Counsel and Advocates*; Professor Sanja Djajić, Ms Ivana Mroz, Mr Svetislav Rabrenović, Mr Aleksandar Djurdjić, Mr Miloš Jastrebić, Mr Christian Tams and Ms Dina Dobrkovic, as *Assistants*.

[2] Appointed by Bosnia and Herzegovina.

[3] Appointed by Serbia and Montenegro.

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process of dissolution. Croatia, Macedonia and Slovenia proclaimed themselves independent States during 1991. Bosnia and Herzegovina declared itself to be an independent State on 6 March 1992. On 27 April 1992 the republics of Serbia and Montenegro proclaimed the existence of the Federal Republic of Yugoslavia ("the FRY"), later known as Serbia and Montenegro. At the same time, they claimed that the FRY continued the legal personality of the SFRY and the membership of the SFRY in the United Nations, as well as participation in the treaties to which the SFRY had become party. The claim that the FRY was the continuation of the SFRY was not accepted by the United Nations or the other former Yugoslav republics.

Fierce fighting took place in Bosnia and Herzegovina. Serb inhabitants of Bosnia and Herzegovina proclaimed an independent "Republika Srpska" in parts of Bosnia and Herzegovina that they controlled. At different times, the fighting involved the armed forces of the FRY, armed forces and volunteer groups proclaiming allegiance to the Republika Srpska, Croatian and Bosnian Croat armed forces and the armed forces of the Republic of Bosnia and Herzegovina.[4] The fighting continued, although with variations in the degree of involvement by the different armed forces and volunteer groups, until the conclusion of the General Framework Agreement for Peace ("the Dayton-Paris Agreement") between Bosnia and Herzegovina, the Republic of Croatia and the FRY on 14 December 1995.

Bosnia and Herzegovina commenced proceedings against the FRY in the International Court of Justice by an Application filed on 20 March 1993. The Application accused the FRY of various breaches of the Convention on the Prevention and Punishment of the Crime of Genocide, 1948 ("the Genocide Convention"), and invoked Article IX of the Genocide Convention[5] as the basis for the jurisdiction of the Court. Bosnia and Herzegovina claimed that the FRY was responsible for the acts of the Bosnian Serb forces, that it was responsible for the commission of genocide, for failure to prevent the commission of genocide and for failure to take the steps required by the Convention to punish acts of genocide. In support of these claims, Bosnia and Herzegovina submitted evidence which, it maintained, disclosed the existence of numerous massacres and other atrocities, in particular the killing of some 7,000 Bosnian Muslim men and boys after Serb forces captured the town of Srebrenica in July 1995.

In 1993 the Court issued two Orders regarding provisional measures of protection (95 ILR 1). In 1996 the Court ruled that it had jurisdiction over the dispute brought before it by the Application in so far as that dispute concerned the interpretation, application or fulfilment of the Genocide

[4] From 1995 the State was known as "Bosnia and Herzegovina" and is referred to by that name hereafter.

[5] Article IX provides: "Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the Convention, including those relating to 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."

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Convention (115 ILR 1). In 1997 the Court held that counterclaims filed by the FRY were admissible (115 ILR 206), although these were later withdrawn.

Following a change of government, Serbia and Montenegro applied to the United Nations in 2000 for admission as a Member and was admitted as a Member that year. Serbia and Montenegro also deposited an instrument of accession to the Genocide Convention in which it included a reservation to Article IX. In light of these developments, the Respondent contended that, at the time the Application was filed, it had not been a party to either the Statute of the Court or the Genocide Convention and could not have been subject to the jurisdiction of the Court. In that context, it noted that in the judgments in the *Legality of Force* cases (157 ILR 1), the Court had held that Serbia and Montenegro had not been a party to the Statute of the Court when the applications in those cases had been filed in 1999. The Respondent requested the Court to suspend the proceedings and rule upon the issue of its jurisdiction. Bosnia and Herzegovina maintained that the Court should decline to re-examine the question of jurisdiction, which it considered had been settled by the 1996 Judgment, and contended that, in any event, the Respondent had, by its conduct, created an estoppel or *forum prorogatum*. The Court declined the request for a suspension but indicated that it would not rule on the merits unless it was satisfied that it had jurisdiction.[6]

After the close of the oral proceedings, Montenegro voted to become an independent State and was admitted as a Member of the United Nations on 28 June 2006. By letters dated 3 and 16 June 2006,[7] the Republic of Serbia notified the United Nations that, in accordance with the Constitutional Charter of the State Union of Serbia and Montenegro, the legal personality of Serbia and Montenegro was continued by the Republic of Serbia. In response to an inquiry from the Court, Bosnia and Herzegovina stated that both Serbia and Montenegro were jointly and severally liable for the unlawful conduct which constituted the cause of action in the case.[8] The Republic of Montenegro denied that it was a respondent in the proceedings.

Held:—*A. The Identification of the Respondent*

It was a fundamental principle that no State could be subjected to the jurisdiction of the Court without its consent. The Republic of Montenegro did not continue the legal personality of Serbia and Montenegro and had made clear that it did not consent to the jurisdiction of the Court. Bosnia and Herzegovina had not asserted that the Republic of Montenegro was a party to the proceedings but had merely expressed its view as to the joint and several liability of the Republics of Serbia and Montenegro. Accordingly, the Republic of Serbia was the sole respondent (paras. 74-9).

[6] See para. 82 of the Judgment.
[7] See paras. 67-8 of the Judgment.
[8] See para. 71 of the Judgment.

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B. The Court's Jurisdiction

(By ten votes to five, Judges Ranjeva, Shi, Koroma, Skotnikov and Judge ad hoc Kreća dissenting) The Court had jurisdiction on the basis of Article IX of the Genocide Convention to adjudicate upon the dispute brought before it by Bosnia and Herzegovina (para. 471(1)).

(1) The Respondent was not precluded from raising the jurisdictional question at the present stage of the proceedings. It was unnecessary to determine whether its failure to raise the matter earlier amounted to an estoppel; while estoppel might be relevant to questions of consensual jurisdiction, it had no bearing upon the question whether or not a State had the capacity to be party to proceedings under the Statute of the Court (paras. 100-4).

(2) The 2003 Judgment in the *Application for Revision* (155 ILR 1) did not contain any finding on whether or not the Respondent had been a party to the Statute in 1993 (paras. 105-13).

(3) The matters determined by the operative part of the 1996 Judgment (115 ILR 1) were *res judicata*. The principle of *res judicata* was important because the stability of legal relations required that litigation come to an end, while it was in the interest of each party to a case that an issue already adjudicated in its favour not be argued again. That was applicable to decisions on jurisdiction, as well as to decisions on the merits. The fact that a judgment determined that the Court had jurisdiction did not preclude subsequent examination of a jurisdictional issue that was not decided in that judgment either expressly or by necessary implication. In the present case, however, it was necessarily implicit in the 1996 Judgment that the Court had jurisdiction *ratione personae* with regard to the Parties. The Respondent's contentions, if upheld, would in effect reverse that finding. To do so would be contrary to the principle of *res judicata* (paras. 114-39).

C. The Applicable Law

(1) Since the only basis for the jurisdiction of the Court was Article IX of the Genocide Convention, the Court had no power to rule on alleged breaches of other obligations under international law, not amounting to genocide, particularly those protecting human rights in armed conflict, even if the alleged breaches were of obligations under peremptory norms or of obligations which protected essential humanitarian values and which might be owed *erga omnes* (para. 147).

(2) The text, object and purpose and *travaux préparatoires* of the Genocide Convention established that the obligations of a State party were not limited to the prevention and punishment of genocide but included an obligation not to commit genocide. Failure to comply with that obligation entailed the responsibility of the State concerned in accordance with normal principles of international law. That responsibility was not of a criminal character (paras. 155-79).

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(3) The responsibility of a State for genocide was separate and distinct from the criminal liability of individuals for genocide; it could arise under the Convention without an individual being convicted of the crime (paras. 180-2).

(4) Unlike the obligation of a State to prosecute acts of genocide, which was limited to acts committed upon the territory of that State, the obligation of a State not to commit genocide was not territorially limited (paras. 183-4).

(5) Genocide required, in addition to the *actus reus* which might take one of a number of forms as set out in Article II, a *dolus specialis*. It was not enough that members of a group were targeted because of their membership of the group; the perpetrator had to intend to destroy the group as such in whole or in part. Great care had to be taken in finding in the facts a sufficiently clear manifestation of that intent. Neither the intent, as a matter of policy, to render an area "ethnically homogeneous", nor the operations carried out to implement such policy, could as such be regarded as genocide. Ethnic cleansing could constitute genocide only if carried out with a view to the destruction of a group rather than its removal from the region (paras. 186-90).

(6) The targeted group had to be defined positively and not by a negative characteristic, such as "non-Serb". While genocide might be committed where the intent was to destroy the protected group within a geographically limited area, and the position within a community of those targeted might be significant, it was nonetheless essential that there was an intent to destroy at least a substantial part of the protected group (paras. 191-201).

D. Questions of Proof

(1) It was well established that, in general, an applicant must establish its case and the burden of proving a fact rested upon the party which asserted the existence of that fact. In the present case, the Applicant had available to it extensive documentation from the records of the International Criminal Tribunal for the former Yugoslavia ("the ICTY"). The Court had not agreed to the Applicant's requests regarding production of unredacted copies of certain documents from the Respondent but it noted the Applicant's suggestion that it could draw its own conclusions regarding those documents (paras. 202-7).

(2) Claims against a State involving charges of exceptional gravity had to be proved by evidence that was fully conclusive. That requirement applied both to the allegations that the crime of genocide and other crimes enumerated in the Convention had been committed and to the allegations regarding the attribution of such acts to the Respondent (paras. 208-10).

(3) While the Court had to make its own assessment of the facts, it would draw on the extensive body of evidence obtained by examination of persons directly involved contained in the records of the ICTY. In principle the Court would accept as highly persuasive relevant findings of fact made by the ICTY trial chambers unless they had been upset on appeal. Any assessment by the ICTY based on the facts as found, for example as regarded the existence of the requisite intent, was also to be given due weight (paras. 211-24).

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(4) The care taken in preparing the report on "The Fall of Srebrenica", submitted by the United Nations Secretary-General to the General Assembly, the comprehensive sources examined and the independence of those responsible for its preparation lent considerable authority to that report (paras. 225-30).

E. Findings of Fact

(1) Following the fall of Srebrenica in July 1995, killings and other acts involving causing serious harm, constituting the *actus reus* of genocide, were committed by the armed forces of Republika Srpska with the intent of destroying in part the group of the Muslims of Bosnia and Herzegovina as such. Although the necessary *mens rea* had been shown to exist only with effect from a relatively late date when there was a change of plan regarding the fate of those who would be captured when Srebrenica fell, it had been shown to exist from that date. Accordingly, it had been established that genocide was committed by members of the Bosnian Serb forces from about 13 July 1995 (paras. 278-97).

(2) With regard to all the other localities in which it was alleged that genocide had been committed, the requisite *mens rea* had not been established, although it had been proved that numerous acts constituting the *actus reus* of genocide had been perpetrated. The specific intent to destroy the group in whole or in part had to be convincingly shown by reference to particular circumstances, unless a general plan to that end could be convincingly demonstrated to exist. For a pattern of conduct to be accepted as evidence of the existence of such specific intent, it would have to be such that it could only point to the existence of such intent. That was not the case here (paras. 245-77, 298-376).

F. Responsibility for the Events at Srebrenica

(1) (By thirteen votes to two, Vice-President Al-Khasawneh and Judge ad hoc Mahiou dissenting) The Respondent had not committed genocide, through its organs or persons whose acts engaged its responsibility under customary international law (para. 471(2)).

(a) The FRY had provided extensive financial and other support to Republika Srpska and its armed forces without which they would have been greatly constrained in the options available to them (para. 241). However, neither the Republika Srpska nor its armed forces were organs of the FRY either *de jure* or *de facto*. The same was true of the various Serb paramilitary forces. It was possible that persons, groups of persons or entities might, for purposes of international responsibility, be equated with State organs even if that status did not follow from internal law, provided that in fact they acted in complete dependence on the State. However, so to equate persons or entities with State organs when they did not have that status under the law of the State had to be exceptional, for it required proof of a particularly great degree of

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State control over them. That had not been proved in the present case. Accordingly, the acts of genocide committed at Srebrenica could not be attributed to the Respondent on that basis (paras. 385-95).

(b) Nor had it been established that the Republika Srpska, its armed forces or the paramilitary groups had operated under the direction and control of the FRY so as to make their acts attributable to it on the basis of the principle set out in Article 8 of the International Law Commission Articles on State Responsibility.[9] To establish responsibility on this basis, it was not necessary to show that the persons or groups who had perpetrated the acts in question were in general in a relationship of complete dependence upon the FRY. It was necessary, however, to show that they had acted under the effective control of the FRY or in accordance with its instructions in the specific operations in question; a general control was not enough. That was the test which the Court had laid down in its 1986 Judgment in *Military and Paramilitary Activities in and against Nicaragua*.[10] The fact that the Appeals Chamber of the ICTY had taken a different approach in its Judgment in *Tadić*[11] was not a sufficient reason to depart from that test. While the Court would take the fullest account of the judgments of the ICTY dealing with the events underlying the dispute, the situation was not the same for positions adopted by the ICTY on issues of general international law which did not lie within the specific purview of its jurisdiction. Nor was the fact that the present case concerned allegations of genocide a reason to adopt a different test; the rules for attributing alleged internationally wrongful conduct to a State did not vary with the nature of the wrongful act in question. It had not been established that the Respondent had exercised effective control over those who had carried out the genocide at Srebrenica or that those persons had acted pursuant to its instructions in the specific operation in question. The Respondent was not, therefore, responsible for the commission of genocide at Srebrenica (paras. 396-413).

(2) (By thirteen votes to two, Vice-President Al-Khasawneh and Judge ad hoc Mahiou dissenting) The Respondent had not conspired to commit genocide nor incited genocide. There was no evidence that any organ of the FRY or anyone under its effective control or acting on its instructions had committed acts that could be characterized as conspiracy to commit genocide or direct and public incitement to commit genocide, within Article III(b) or (c) of the Genocide Convention (paras. 416-17 and 471(3)).

(3) (By eleven votes to four, Vice-President Al-Khasawneh, Judges Keith and Bennouna and Judge ad hoc Mahiou dissenting) Serbia had not been complicit in genocide. The provision of means to enable or facilitate the commission of the crime was capable of rendering a State responsible for complicity in genocide in violation of Article III(e). However, taking account

[9] The text of Article 8 is set out at para. 398 of the Judgment.
[10] 76 ILR 1.
[11] 124 ILR 61.

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of the principles set out in Article 16 of the International Law Commission Articles on State Responsibility, which dealt with responsibility for aid or assistance in the commission of an internationally wrongful act,[12] the furnishing of means of assistance constituted genocide only if carried out with knowledge that the perpetrator had the specific intent for genocide. That had not been proved in the present case (paras. 418-24 and 471(4)).

(4) (By twelve votes to three, Judges Tomka, Skotnikov and Judge ad hoc Kreća dissenting) Serbia had violated the obligation to prevent genocide under Article I of the Convention. The obligation to prevent genocide had a separate legal existence of its own from the obligation to punish. The obligation was one of conduct, not of result; it was an obligation to use all means reasonably available to the State to prevent genocide so far as possible. Moreover, a State was required to act only within the limits of what was possible and what was permitted by international law. In view of the degree of influence that the FRY had over Republika Srpska and its armed forces at the time of the Srebrenica massacre, the specific obligations placed upon it by the Court's two Orders for provisional measures, and the fact that the FRY authorities must have been aware of the serious risk that genocide would occur once Srebrenica fell, it was necessary to conclude that the FRY had not taken all the steps required to prevent the tragic events which took place (paras. 425-38 and 471(5)).

(5) (By fourteen votes to one, Judge ad hoc Kreća dissenting) Serbia had violated its obligation to punish genocide by failing to transfer Ratko Mladić to the ICTY for trial. Since the Srebrenica massacre took place outside the territory of the Respondent, Article VI did not place the Respondent under an obligation to bring those responsible to trial before its own courts. However, the duty under that Article to co-operate with an international penal tribunal extended to all international criminal courts, including the ICTY. Serbia was under a legal obligation under the Dayton-Paris Agreement to comply with the ICTY's request for the surrender of Ratko Mladić. In addition, once a Member of the United Nations, Serbia came under other obligations to co-operate with the ICTY. Its failure to comply with those obligations also entailed a violation of its obligations under Article VI of the Genocide Convention (paras. 439-50 and 471(6) and (8)).

G. Compliance with the Orders for Provisional Measures

(By thirteen votes to two, Judges Skotnikov and Judge ad hoc Kreća dissenting) Serbia had violated its obligation to comply with the Court's Orders indicating provisional measures of protection. Although the Court only had occasion to state that its provisional measures had binding effect in a Judgment given some years after the Orders in the present case, that did not alter the fact that those Orders were legally binding (paras. 451-8 and 471(7)).

[12] The text of Article 16 is set out at para. 419 of the Judgment.

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H. Reparation

(By thirteen votes to two, Vice-President Al-Khasawneh and Judge ad hoc Mahiou dissenting) (para. 471(9))

(1) It was a well-established principle that, in a case where restitution was impossible, a State was entitled to obtain compensation for the damage caused by an unlawful act from the State responsible for that act. That required that there be a direct and certain causal nexus between the violation of the duty to prevent genocide and the damage caused by the acts of genocide. Such a nexus would exist only if the Court were able to conclude with sufficient certainty that the genocide at Srebrenica would have been averted if the Respondent had complied with its legal obligations. The Court could not come to such a conclusion. Accordingly, financial compensation would not be ordered. The Applicant was entitled to satisfaction and the current Judgment provided that (paras. 459-63).

(2) With regard to the violation of the obligation to punish genocide, the declaration by the Court that the Respondent had outstanding obligations regarding the transfer of persons accused of genocide to the ICTY constituted appropriate satisfaction. It would not be appropriate to require a guarantee of non-repetition (paras. 464-6 and 471(8)).

(3) With regard to the failure to comply with the Orders for provisional measures, the finding of a breach was sufficient to afford just satisfaction (paras. 467-70).

Dissenting Opinion of Vice-President Al-Khasawneh: (1) The Court should not have entertained the Respondent's attempt to reopen jurisdictional questions. The membership of the SFRY in the United Nations could have been suspended or terminated only in accordance with Articles 5 and 6 of the Charter of the United Nations and not by the resolutions adopted by the General Assembly and Security Council. The admission of the FRY to the United Nations in 2000 could not retroactively alter the fact that the SFRY had been a party to the Statute of the Court in 1993 (paras. 1-29).

(2) Serbia was responsible for the genocide committed at Srebrenica. The decision that Serbia was responsible only for a failure to prevent the commission of genocide was the result of a flawed methodology and the adoption of a test for attribution which was inappropriate and contrary to the jurisprudence of the ICTY. In addition, had the Court adopted more appropriate methods for the assessment of the facts, it would have found that genocide had occurred in other parts of Bosnia and Herzegovina and would, in all probability, have found that Serbia was responsible (paras. 30-62).

Joint Dissenting Opinion of Judges Ranjeva, Shi and Koroma: The Court should not have rejected Serbia's jurisdictional arguments on the basis that they had been ruled upon by necessary implication in the 1996 Judgment and were therefore *res judicata*. Whether a State had access to the Court was a matter of constitutional and statutory requirements. That question had not

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