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CASE CONCERNING APPLICATION OF THE CONVENTION ON THE
PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE
(BOSNIA AND HERZEGOVINA *v.* YUGOSLAVIA
(SERBIA AND MONTENEGRO))

International Court of Justice

Request for the Indication of Provisional Measures. 8 April 1993

(Sir Robert Jennings, *President*; Oda, *Vice-President*; Ago, Schwebel, Bedjaoui, Ni, Evensen, Tarassov, Guillaume, Shahabuddeen, Aguilar Mawdsley, Weeramantry, Ranjeva and Ajibola, *Judges*)

Further Requests for the Indication of Provisional Measures. 13 September 1993

(Sir Robert Jennings, *President*; Oda, *Vice-President*; Schwebel, Bedjaoui, Ni, Evensen, Tarassov, Guillaume, Shahabuddeen, Aguilar Mawdsley, Weeramantry, Ajibola and Herczegh, *Judges*; Lauterpacht¹ and Kreća,² *Judges ad hoc*)

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First Request for Provisional Measures

The facts: — The Republic of Bosnia and Herzegovina (“Bosnia-Herzegovina”) instituted proceedings before the International Court of Justice against the Federal Republic of Yugoslavia (Serbia and Montenegro) (“Yugoslavia”), accusing it of responsibility for the commission of genocide in Bosnia-Herzegovina.

¹ Judge *ad hoc* designated by Bosnia and Herzegovina.

² Judge *ad hoc* designated by Yugoslavia.

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ICJ (BOSNIA-HERZEGOVINA *v.* YUGOSLAVIA)

Bosnia-Herzegovina had been one of the six republics constituting the Socialist Federal Republic of Yugoslavia. It declared itself independent on 6 March 1992 and was admitted as a member of the United Nations on 22 May 1992. During 1991 and 1992 three other Yugoslav republics declared themselves independent. The two remaining republics, Serbia and Montenegro, announced that they would continue in federation under the name of the Federal Republic of Yugoslavia, which they claimed was the continuation of the Socialist Federal Republic. The Federal Republic's claim automatically to continue the United Nations membership of the Socialist Federal Republic was, however, rejected by the Security Council and the General Assembly.³

In April 1992 intensive fighting broke out within the territory of Bosnia-Herzegovina. Although much of the fighting took place between forces drawn from the Muslim, Serb and Croat communities of Bosnia-Herzegovina, the Government of Bosnia-Herzegovina alleged that the Serb forces were organized, supported and directed by Yugoslavia and that former members of the Yugoslav People's Army ("YPA"), under the control of the Government of Yugoslavia, were involved in fighting on the Serb side and were responsible for atrocities against civilians, especially Muslims. In response to this fighting, the Security Council adopted a number of resolutions taking measures under Chapter VII of the United Nations Charter. It also maintained in force Resolution 713 (1991) by which it had imposed an embargo on the delivery of arms and other military equipment to any part of the territory of the former Yugoslavia.⁴

On 20 March 1993 the Government of Bosnia-Herzegovina submitted to the International Court of Justice an Application⁵ in which it claimed that acts amounting to genocide under the definition in the Convention on the Prevention and Punishment of the Crime of Genocide, 1948, (the "Genocide Convention") had been and were being committed in Bosnia-Herzegovina by former members of the YPA and by Serb military and paramilitary forces under the direction and with the assistance of Yugoslavia. Bosnia-Herzegovina asked the Court to adjudge and declare that Yugoslavia had breached and was continuing to breach its obligations under the Genocide Convention, the Geneva Conventions for the Protection of the Victims of War, 1949, and other provisions of international humanitarian law, the Universal Declaration of Human Rights and various articles of the United Nations Charter and general customary law regarding respect for human rights and the prohibition on the use of force. Bosnia-Herzegovina also asked the Court to adjudge and declare that Bosnia-Herzegovina retained the right of self-defence, including the right to seek and receive military assistance from other States and that Security Council Resolution 713 and later resolutions should not be construed so as to impose an embargo on the delivery of arms to Bosnia-Herzegovina.

In its Application, Bosnia-Herzegovina maintained that the Court had

³ See Security Council Resolution 777 (1992), p. 27, below, and General Assembly Resolution 47/1, p. 28, below.

⁴ See p. 155, below.

⁵ The full text of this part of the Application is set out at pp. 19-20, below.

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jurisdiction under Article IX of the Genocide Convention, which provides that:

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 Socialist Federal Republic of Yugoslavia had been a party to the Genocide Convention. On 27 April 1992 the Federal Republic of Yugoslavia adopted a formal declaration that it would abide by all the international commitments assumed by the Socialist Federal Republic.⁶ On 29 December 1992 the Government of Bosnia-Herzegovina deposited with the United Nations Secretary-General a Notice of Succession, declaring that it wished to succeed to the Genocide Convention with effect from 6 March 1992.⁷

Subsequently, Bosnia-Herzegovina also sought to rely, as an additional basis for jurisdiction, upon a letter, dated 8 June 1992, from the Presidents of Serbia and Montenegro to the President of the Arbitration Commission of the International Conference for Peace in Yugoslavia.⁸ In that letter, the two Presidents had challenged the competence of the Arbitration Commission to give an opinion on certain questions referred to it and had maintained that legal disputes on which agreement could not be reached should be submitted to the International Court of Justice.

At the same time as it filed its Application, Bosnia-Herzegovina asked the Court to indicate, as provisional measures of protection, that Yugoslavia, together with its "agents and surrogates in Bosnia and elsewhere", should cease all acts of genocide against the people and State of Bosnia-Herzegovina and that Yugoslavia should cease providing support for any group engaging in military or paramilitary activities against the people, State and Government of Bosnia-Herzegovina and from mounting military and paramilitary activities of its own against Bosnia-Herzegovina. Bosnia-Herzegovina also requested that the Court indicate that, under the current circumstances, Bosnia-Herzegovina had the right to seek and receive assistance in defending itself, including the right to obtain military equipment and to request military assistance and that other States had the right to furnish such equipment and assistance.⁹

Yugoslavia objected that the President of the Republic of Bosnia-Herzegovina, Mr A. Izetbegovic, who had appointed the agents for Bosnia-Herzegovina and had authorized the institution of proceedings, and the Government of Bosnia-Herzegovina lacked legitimacy and were not entitled to act on behalf of Bosnia-Herzegovina. Yugoslavia denied that Bosnia-Herzegovina had been entitled to succeed to the Genocide Convention

⁶ See p. 30, below.

⁷ See p. 31, below.

⁸ For the text of this letter, see p. 32, below. See also 92 *ILR* 194.

⁹ The provisional measures requested by Bosnia-Herzegovina are set out in full at p. 23, below. See also the statement of the rights which Bosnia-Herzegovina sought to protect by these measures, p. 35, below.

and maintained that the 29 December 1992 Notice of Succession should be seen as an act of accession which took effect only ninety days after it was deposited. In addition, Yugoslavia argued that, as the Security Council had acted under Chapter VII of the Charter in respect of the situation in Bosnia-Herzegovina and was continuing so to act, it would be inappropriate for the Court to indicate provisional measures of the kind requested. Yugoslavia also contended that the situation in Bosnia-Herzegovina was one of civil war in which Yugoslavia was not involved and that the authorities controlled by Mr Izetbegovic were themselves responsible for the commission of acts of genocide against the Serb population of Bosnia-Herzegovina. Yugoslavia asked the Court to indicate, as provisional measures of protection, that those authorities should comply with the latest agreement on a cease-fire, respect the Geneva Conventions and the laws of war and desist from various practices in respect of the Serb population of Bosnia-Herzegovina.¹⁰ The Government of Bosnia-Herzegovina denied that there was any credible evidence that its forces were involved in genocide.

Held:—(1) The Court had been seised of the case on the authority of a Head of State who was treated as such in the United Nations. The authority of a Head of State to act on behalf of the State in its international relations was universally recognized and, for the purposes of a request for provisional measures, the Court could accept that seisin as the act of the State (p. 26).

(2) On a request for provisional measures the Court was not required finally to satisfy itself that it had jurisdiction on the merits of the case, though it should not indicate such measures unless the provisions invoked by the Applicant or found in the Statute of the Court appeared, *prima facie*, to afford a basis on which the jurisdiction of the Court *ratione personae* and *ratione materiae* might be established (pp. 26-7).

(3) The approach taken by the Security Council and the General Assembly regarding the United Nations membership of Yugoslavia raised the question whether the Respondent State in the present case was a party to the Statute of the Court. It was not, however, necessary to answer that question since, by virtue of Article 35(2) of the Statute,¹¹ proceedings might validly be brought against a State which was a party to a special provision in a treaty in force, even if that State was not a party to the Statute. A compromissory clause in a multilateral convention, such as Article IX of the Genocide Convention, could *prima facie* be regarded as such a special provision, so that, if both Bosnia-Herzegovina and Yugoslavia were parties to the Genocide Convention, there was a *prima facie* basis for jurisdiction *ratione personae* (pp. 27-9).

(4) The United Nations Secretary-General had treated the Bosnian notice of 29 December 1992 as a notification of succession, effective from 6 March 1992, rather than an instrument of accession, which would take effect only ninety days after 29 December 1992. Nevertheless, it was not necessary at the present stage of the proceedings for the Court to determine the precise nature

¹⁰ The provisional measures requested by the Federal Republic of Yugoslavia are set out in full at pp. 24-5, below.

¹¹ The text of Article 35(2) is set out at p. 29, below.

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of the notice since, even if it were characterized as an instrument of accession, the period of ninety days had now expired. In considering a request for provisional measures, the Court was concerned with the present and future rather than with questions of responsibility for past events. Since both Bosnia-Herzegovina and Yugoslavia were parties to the Genocide Convention, Article IX constituted a *prima facie* basis for jurisdiction *ratione materiae* in so far as the subject matter of the present dispute fell within its terms (pp. 29-31).

(5) The fact that Bosnia-Herzegovina had not mentioned the letter of 8 June 1992 in its Application did not in itself debar it from subsequent reliance upon the letter as an additional basis for jurisdiction. It was not clear, however, that the letter was intended as an immediate commitment to accept unconditionally the unilateral submission to the Court of a wide range of legal disputes. The letter could not, therefore, be regarded as a *prima facie* basis for jurisdiction (pp. 31-3).

(6) The Court could perform its judicial functions in relation to a matter which was also the subject of political action by the Security Council. The two organs performed separate but complementary functions (pp. 33-4).

(7) The object of the power to indicate provisional measures of protection was to ensure that irreparable prejudice should not be caused to rights which might subsequently be adjudged to belong to one of the Parties. The Court having identified Article IX of the Genocide Convention as the sole basis on which its jurisdiction might be founded, should not, therefore, indicate measures for the protection of disputed rights other than those which might ultimately form the basis of a judgment in the exercise of that jurisdiction (p. 34).

(8) While the Court could not, at the present stage of the proceedings, make definitive findings of fact, in the circumstances brought to its attention there was a grave risk of acts of genocide being committed. Bosnia-Herzegovina and Yugoslavia, whether or not any such acts in the past might be attributable to them, were under a clear obligation to do all in their power to prevent the commission of any such acts in the future. Under Article 75(2) of the Rules of Court, the Court had power to indicate provisional measures which differed, in whole or in part, from those requested by the Parties (pp. 34-7).

(9) Article VIII of the Genocide Convention,¹² even assuming that it was applicable to the Court, did not give it functions or competences additional to those in the Statute (pp. 37-8).

(10) The information available to the Court indicated that there was a grave risk of action being taken which might aggravate or extend the existing dispute or render it more difficult of solution and the Court would therefore exercise its power to indicate provisional measures with a view to preventing such a development (p. 38).

In its Order of 8 April 1993, the Court accordingly indicated the following provisional measures:

(a) (unanimously) that the Government of the Federal Republic of Yugoslavia should immediately, in pursuance of its undertaking in the

¹² The text of Article VIII is set out at p. 37, below.

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Genocide Convention take all measures within its power to prevent commission of the crime of genocide (paragraph 52(A)(1));

(b) (by thirteen votes to one, Judge Tarassov dissenting) that the Government of the Federal Republic of Yugoslavia should in particular ensure that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, do not commit any acts of genocide, of direct and public incitement to commit genocide, or of complicity in genocide, whether directed against the Muslim population of Bosnia and Herzegovina or against any other national, ethnical, racial or religious group (paragraph 52(A)(2));

(c) (unanimously) the Government of the Federal Republic of Yugoslavia and the Government of Bosnia and Herzegovina 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 (paragraph 52(B)).

Declaration of Judge Tarassov: The Government of Yugoslavia should immediately take all measures which were within its real power to prevent commission of the crime of genocide. The Government of Bosnia-Herzegovina was under the same duty. The provisional measures indicated in paragraph 52(A)(2), however, were very close to a judgment on the merits of the case and imposed requirements upon the Respondent which were vague, unlimited and impracticable (pp. 41-2).

Further Requests for the Application of Provisional Measures

The facts:—On 27 July 1993 Bosnia-Herzegovina made a second request for provisional measures of protection, in which it asked the Court to indicate the following measures:

1. That Yugoslavia (Serbia and Montenegro) must immediately cease and desist from providing, directly or indirectly, any type of support—including training, weapons, arms, ammunition, supplies, assistance, finances, direction or any other form of support—to any nation, group, organization, movement, military, militia or paramilitary force, irregular armed unit, or individual in Bosnia and Herzegovina for any reason or purpose whatsoever.

2. That Yugoslavia (Serbia and Montenegro) 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 sovereign territory of Bosnia and Herzegovina.

3. That the annexation or incorporation of any sovereign territory of the Republic of Bosnia and Herzegovina by Yugoslavia (Serbia and Montenegro) by any means or for any reason shall be deemed illegal, null, and void *ab initio*.

4. That the Government of Bosnia and Herzegovina must have the

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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 People and State of Bosnia and Herzegovina.

6. That the Government of Bosnia and Herzegovina must have the means to defend the People and State of Bosnia and Herzegovina 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 People and State of Bosnia and Herzegovina.

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 Government of Bosnia and Herzegovina at its request.

10. That United Nations Peace-keeping Forces in Bosnia and Herzegovina (i.e., 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.

The legal rights which Bosnia-Herzegovina sought to protect by the indication of these measures were set out as follows:

- (a) the right of the citizens of Bosnia and Herzegovina physically to survive as a People and as a State;
- (b) the rights of the People of Bosnia and Herzegovina to life, liberty, security, and bodily and mental integrity, as well as the other basic human rights specified in the 1948 Universal Declaration of Human Rights;
- (c) the right of the People and State of Bosnia and Herzegovina to be free at all times from genocide and other genocidal acts perpetrated upon Them by Yugoslavia (Serbia and Montenegro), acting together with its agents and surrogates in Bosnia and elsewhere;
- (d) the right of the People and State of Bosnia and Herzegovina to be free at all times from the use or threat of force directed against Them by a foreign State acting in conjunction with its agents and surrogates on Their sovereign territory and elsewhere;
- (e) the right of Bosnia and Herzegovina to conduct its affairs and to determine matters within its domestic jurisdiction without interference or intervention by any foreign State acting directly or by means of agents and surrogates, or both;
- (f) the right of self-determination of the People of Bosnia and Herzegovina;

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- (g) the basic right of sovereign existence for the People and State of Bosnia and Herzegovina;
- (h) the right of the Republic of Bosnia and Herzegovina to continue to exist as a Member State of the United Nations Organization itself.

On 4 August 1993 the Agent for Bosnia-Herzegovina submitted, in addition, “a request for an immediate Order without hearing pursuant to the Second Request” for provisional measures, relying upon Article 75(1) of the Rules of Court.¹³ On 5 August 1993 the President of the Court addressed a message to both Parties, under Article 74(4) of the Rules of Court¹⁴ calling upon them to act in such a way as to enable any order which the Court might make for provisional measures to have its appropriate effects and, in particular, reminding them of the contents of the Order of 8 April 1993 (pp. 51-2). On 11 August 1993 the Registrar of the Court, on the instructions of the President, replied to the letter of 4 August stating that the Court did not consider that the question of the exercise of its powers under Article 75(1) arose where, as here, each of the Parties had made specific requests for the indication of provisional measures and that, in any event, those powers did not extend to the indication of measures without affording both Parties the opportunity of being heard.

Bosnia-Herzegovina maintained that a *prima facie* basis for the jurisdiction of the Court existed under Article IX of the Genocide Convention and the letter of 8 June 1992 on which it had relied in the first request for provisional measures. In addition, it argued that the Court had jurisdiction under the Treaty between the Allied and Associated Powers and the Kingdom of the Serbs, Croats and Slovenes on the Protection of Minorities, 1919 (“the 1919 Treaty”),¹⁵ and the customary and conventional laws of war and international humanitarian law. Bosnia-Herzegovina also maintained that Yugoslavia had itself requested the indication of provisional measures which went beyond the protection of rights under the Genocide Convention and had therefore, under the doctrine of *forum prorogatum*, agreed that the Court should have a jurisdiction extending beyond the scope of the Genocide Convention.

Yugoslavia asked the Court to reject the provisional measures requested by Bosnia-Herzegovina on the grounds, *inter alia*, that the Court had no jurisdiction to indicate them, that they were not based on new facts, constituted an abuse of the right to request provisional measures and amounted to a request for an interim judgment. Yugoslavia also asked the Court to indicate that

¹³ Article 75(1) provides that:

The Court may at any time decide to examine *proprio motu* whether the circumstances of the case require the indication of provisional measures which ought to be taken or complied with by any or all of the Parties.

¹⁴ Article 74(4) provides that:

Pending the meeting of the Court, the president may 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.

¹⁵ The relevant provisions of the 1919 Treaty are set out at pp. 57-8, below.