Human rights—*Jus cogens* character of certain human rights norms—Prohibition of genocide—Genocide Convention, 1948 — Status — Nature of rights and obligations under Genocide Convention—Character as obligations *erga omnes*

International Court of Justice—Jurisdiction—Principles on which jurisdiction based—Whether Court should adopt strict approach to jurisdiction—Disputes clause in multi-lateral treaty—Genocide Convention, 1948, Article IX—Jurisdiction *ratione personae*—Whether Convention in force between claimant and respondent — Date at which Convention must be in force—Jurisdiction *ratione materiae* —Scope of Convention—Nature of disputes covered by Article IX—Jurisdiction *ratione temporis*—Admissibility

International Court of Justice—Counter-claims—Rules of Court, Article 80—Definition of counter-claim—Requirement of direct connection between counter-claim and original claim—Meaning—Connection in fact and in law—Discretion of Court—Procedure—Whether Court obliged to hold oral proceedings on admissibility of counter-claim

International criminal law—Genocide—Genocide Convention, 1948—Definition—Nature of obligations under Genocide Convention — Whether conferring rights and imposing responsibility upon States

International organizations—United Nations—Admission of new member—Significance—Admission of Bosnia and Herzegovina as member—Whether establishing Statehood of Bosnia and Herzegovina—Recognition of President of Bosnia and Herzegovina

Recognition—Of States and governments—Significance—Whether establishing that entity is a State—Whether signifying acceptance of claim to succession—Recognition of particular individual as Head of State—Significance of non-recognition—Whether treaty in force between States which do not recognize one another—Subsequent act of mutual recognition — Dayton–Paris Agreement between Bosnia and Herzegovina, Croatia and Federal Republic of Yugoslavia

State responsibility—Acts of State organs—Relationship between State responsibility and individual criminal

responsibility — Genocide — Genocide Convention, 1948— Whether State can be responsible for genocide contrary to the Convention — Whether dispute regarding alleged responsibility of State for genocide falling within Article IX of the Convention—Prohibition of genocide as obligation owed *erga omnes*—Significance

State succession—Dissolution of State—Socialist Federal Republic of Yugoslavia — Emergence of Bosnia and Herzegovina as State — Treaty obligations of former Yugoslav State — Genocide Convention, 1948 — Whether Bosnia and Herzegovina succeeding to obligations of former Yugoslavia—Concept of automatic succession to certain treaties—Whether part of customary international law—Date on which Bosnia and Herzegovina became party to Genocide Convention

States—Existence—Admission to United Nations—Circumstances in which State created—Significance of recognition and non-recognition

Treaties—Application—Genocide Convention, 1948—Nature of rights and obligations—Interpretation—Succession of new States

War and armed conflict—Character of conflict—Conflict in Bosnia and Herzegovina—Whether internal or international —Allegations of genocide—Whether affected by character of conflict

CASE CONCERNING APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

(BOSNIA AND HERZEGOVINA *v.* YUGOSLAVIA)[1]

[1] The Republic of Bosnia and Herzegovina was represented by HE Mr Muhamed Sacirbey, Ambassador and Permanent Representative of the Republic of Bosnia and Herzegovina to the United Nations, as Agent; Mr Phon van den Biesen, Attorney in Amsterdam, as Deputy-Agent, Counsel and Advocate; Mr Thomas M. Franck, Professor at the School of Law and Director, Center for International Studies, New York University, Mr Alain Pellet, Professor, University of Paris X-Nanterre and Institute of Political Studies, Paris, and Ms Brigitte Stern, Professor, University of Paris I (Panthéon-Sorbonne), as Counsel and Advocates; Mr Khawar M. Qureshi, Member of the English Bar, Lecturer in Law, King's College, London, Ms Vasvija Vidović, Minister-Counsellor, Embassy of Bosnia and Herzegovina in the Netherlands, Representative of the Republic of Bosnia and Herzegovina at the International Criminal Tribunal for the former Yugoslavia, and Mr Marc Weller, Assistant Director of Studies, Centre for International Studies, University of Cambridge, Member of the Faculty of Law of the University of Cambridge, as Counsel; Mr Pierre Bodeau, Research Assistant/Tutor, University of Paris X-Nanterre, Mr

International Court of Justice

Preliminary Objections. 11 *July* 1996

(Bedjaoui, *President*; Schwebel, *Vice-President*; Oda, Guillaume, Shahabuddeen, Weeramantry, Ranjeva, Herczegh, Shi, Koroma, Vereshchetin, Ferrari Bravo and Parra-Aranguren, *Judges*; Lauterpacht[2] and Kreća,[3] *Judges ad hoc*)

Order on Counter-claims. 17 *December* 1997

(Schwebel, *President*; Weeramantry, *Vice-President*; Oda, Bedjaoui, Guillaume, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren and Kooijmans, *Judges*; Lauterpacht and Kreća, *Judges ad hoc*)

SUMMARY:[4] *The facts*:—Bosnia and Herzegovina had been one of the six republics constituting the Socialist Federal Republic of Yugoslavia ("SFRY"). 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 republics (Croatia, Macedonia and Slovenia) also declared themselves independent of the SFRY. The two remaining republics (Serbia and Montenegro) announced that they would continue in federation under the name of the Federal Republic of Yugoslavia. The population of Bosnia and Herzegovina comprised Muslims, Serbs and Croats. Following the declaration of independence, hostilities occurred between Bosnian Government forces and Serb and Croat forces throughout most of Bosnia and Herzegovina. These hostilities did not cease until the conclusion of the General Framework Agreement for Peace ("the Dayton–Paris Agreement") which was signed by the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia on 14 December 1995.[5]

Michiel Pestman, Attorney in Amsterdam, and Mr Thierry Vaissière, Research Student, Cedin-Paris I (Panthéon-Sorbonne), as Counsellors; and Mr Hervé Ascencio, Research Assistant/Tutor, University of Paris X-Nanterre, Ms Marieke Drenth, Ms Froana Holl, Mr Michael Kellogg, Mr Harold Kocken, Ms Nathalie Lintvelt, Mr Sam Muller, Mr Joop Nijssen, and Mr Eelco Szabó, as Assistants.

The Federal Republic of Yugoslavia was represented by Mr Rodoljub Etinski, Chief Legal Adviser, Ministry of Foreign Affairs of the Federal Republic of Yugoslavia, Professor of International Law, Novi Sad University, and Mr Djordje Lópičić, Chargé d'Affaires, Embassy of the Federal Republic of Yugoslavia in the Netherlands, as Agents; Mr Ian Brownlie, CBE, FBA, QC, Chichele Professor of Public International Law, University of Oxford, Mr Miodrag Mitić, Assistant Federal Minister for Foreign Affairs of the Federal Republic of Yugoslavia (Ret.), and Mr Eric Suy, Professor, Catholic University of Louvain (K.U. Leuven), formerly Under-Secretary-General and Legal Counsel of the United Nations, as Counsel and Advocates; and Mr Stevan Djordjević, Professor of International Law, Belgrade University, Mr Shabtai Rosenne, Member of the Israel Bar, and Mr Gavro Perazić, Professor of International Law, Podgorica University, as Counsel.

[2] Judge *ad hoc* designated by Bosnia and Herzegovina.
[3] Judge *ad hoc* designated by Yugoslavia.
[4] The summary was prepared by Professor Christopher Greenwood.
[5] 35 ILM (1996) 75.

On 20 March 1993, the Republic of Bosnia and Herzegovina ("Bosnia and Herzegovina") filed an Application instituting proceedings against the Federal Republic of Yugoslavia (Serbia and Montenegro) ("Yugoslavia") in which it accused Yugoslavia of violations of the Genocide Convention and other international agreements.[6] Bosnia and Herzegovina also requested provisional measures of protection.[7] Bosnia and Herzegovina maintained that Yugoslavia had been involved in the hostilities in Bosnia and Herzegovina and was responsible for acts of genocide which it maintained had been committed against the people of Bosnia and Herzegovina.[8]

Bosnia and Herzegovina initially maintained that the Court had jurisdiction under Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, 1948 ("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 SFRY had been a party to the Genocide Convention. On 27 April 1992 Yugoslavia formally declared that it would abide by all the international commitments assumed by the SFRY. On 29 December 1992 Bosnia and Herzegovina deposited with the Secretary-General of the United Nations a Notice of Succession, declaring that it wished to accede to the Genocide Convention with effect from 6 March 1992. The Secretary-General formally notified the parties to the Genocide Convention of this Notice on 18 March 1993.

Subsequently, Bosnia and Herzegovina also sought to rely upon the Treaty of Saint Germain-en-Laye, 1919,[9] on the customary and conventional laws of war and international humanitarian law, on a letter dated 8 June 1992 from the Presidents of the republics of Serbia and Montenegro to the President of the Arbitration Commission of the International Conference for Peace in Yugoslavia[10] and the doctrine of *forum prorogatum*. In its second Provisional Measures Order of 13 September 1993 the Court doubted whether its jurisdiction could be founded upon any of these additional bases for jurisdiction. The Memorial of Bosnia and Herzegovina concentrated upon the Genocide Convention[11] but did not abandon reliance upon the additional bases for jurisdiction.

[6] The relevant part of the Application is set out at p. 13 below.

[7] The Court indicated provisional measures in its Order of 8 April 1993 (95 *ILR* 1). A further Order in respect of requests for provisional measures of protection advanced by both Parties was given on 13 September 1993 (95 *ILR* 1).

[8] See the relevant passage from the Memorial of Bosnia and Herzegovina, set out at p. 15 below.

[9] Treaty between the Allied and Associated Powers (the United States of America, the British Empire, France, Italy and Japan) and the Kingdom of the Serbs, Croats and Slovenes, signed at Saint Germain-en-Laye on 10 September 1919.

[10] The relevant part of this letter appears at p. 31 below. For consideration of this letter by the Arbitration Commission, see *Interlocutory Decision (Opinions Nos 8, 9 and 10)* of 4 July 1992, 92 *ILR* 194.

[11] See p. 15 below.

Preliminary Objections Proceedings

Yugoslavia submitted preliminary objections to the jurisdiction of the Court.[12] With regard to the question of jurisdiction under the Genocide Convention, Yugoslavia contended that:

(1) The Court lacked jurisdiction *ratione personae*, because Bosnia and Herzegovina had not established itself as an independent State in accordance with the principle of self-determination and had not, therefore, become a party to the Genocide Convention.

(2) The Court lacked jurisdiction *ratione materiae*, because:

(a) the conflict in Bosnia and Herzegovina was an internal conflict in which Yugoslavia took no part. Nor did Yugoslavia exercise jurisdiction over any part of Bosnia and Herzegovina; and

(b) the Application was based upon a fundamentally erroneous interpretation of the Genocide Convention and contained allegations of State responsibility which fell outside the scope of the Convention.

(3) Even if the Court did possess jurisdiction, that jurisdiction was limited *ratione temporis* and did not exist in respect of events occurring before Yugoslavia recognized Bosnia and Herzegovina on 14 December 1995. Alternatively, the relevant date was the date on which the Genocide Convention entered into force between Bosnia and Herzegovina and Yugoslavia. Since the Notification of Succession deposited by Bosnia and Herzegovina on 29 December 1992 operated as an instrument of accession, the Convention entered into force for Bosnia and Herzegovina on 29 March 1993 (three months after the Notice). If, however, Bosnia and Herzegovina was held to have become a party to the Genocide Convention by operation of the principle of State succession, the relevant date was either 18 March 1993, when the Notification of Succession was communicated to other Parties, or 29 December 1992, the date on which the Notification was given to the depositary. The Notification could not operate retrospectively.

Yugoslavia also challenged the additional grounds for jurisdiction advanced by Bosnia and Herzegovina and the admissibility of the Application.

Held (*in the Judgment of 11 July 1996*):—(i) (by thirteen votes to two) the Court had jurisdiction under Article IX of the Genocide Convention; (ii) (by fourteen votes to one) the Court did not have jurisdiction under any of the other instruments relied upon by Bosnia and Herzegovina; and (iii) (by thirteen votes to two) the Application was admissible.

(1) (by fourteen votes to one) The objection to the jurisdiction *ratione personae* of the Court was rejected. The Genocide Convention was a treaty in force between Bosnia and Herzegovina and Yugoslavia.

(a) When the Federal Republic of Yugoslavia was proclaimed on 27 April 1992, it was announced that the Federal Republic would abide by all the treaty commitments of the SFRY. Since the SFRY had been party to the Genocide Convention, that Convention was in force for Yugoslavia when the Application was filed on 20 March 1993 (p. 23).

[12] Those objections are set out in the form in which they were originally submitted at p. 17 below. The preliminary objections in the form in which they were advanced by Yugoslavia at the oral hearings are set out at p. 19.

(b) Bosnia and Herzegovina had been admitted to membership of the United Nations by decisions of the Security Council and the General Assembly on 22 May 1992. It was not necessary to decide whether Bosnia and Herzegovina automatically succeeded to the Genocide Convention, since it had undoubtedly succeeded by the date of the Application (pp. 24-5).

(c) Nor was it necessary to determine the effect of non-recognition upon treaty relations between Bosnia and Herzegovina and Yugoslavia prior to 14 December 1995. Even if the Genocide Convention was not applicable between the two States prior to that date, it was applicable now. Since Bosnia and Herzegovina could always bring a fresh Application, the Court would not determine that it lacked jurisdiction on the ground that there might have been no treaty basis for jurisdiction between the two States at the date the Application was filed (pp. 25-7).

Per Judges Shahabuddeen, Weeramantry and Parra-Aranguren: The special nature of the Genocide Convention meant that it was a treaty to which the succession of States was automatic when new States emerged from the dissolution of a State which had been a party to the Convention. This conclusion followed from the fact that the Convention did not impose obligations over and above those which existed under customary international law and from the need to avoid a hiatus in succession to obligations under the Convention (pp. 46-9 and 51-67).

(2) (by eleven votes to four) Yugoslavia's objection to jurisdiction *ratione materiae* was rejected. There was a dispute, within the scope of Article IX of the Genocide Convention, between the two States.

(a) The fact that Article I of the Genocide Convention[13] provided that genocide was a crime whether committed in time of peace or in time of war clearly indicated that the Convention was applicable whenever the acts to which it referred were committed, irrespective of the nature of the conflict in the course of which they were committed (pp. 27-8).

(b) The question whether or not Yugoslavia had taken part in the conflict in Bosnia and Herzegovina was a matter in dispute between the parties and fell to be resolved at the merits stage (p. 28).

(c) The rights and obligations enshrined in the Convention were rights and obligations *erga omnes*. The obligation of each State to prevent and punish the crime of genocide was not territorially limited by the Convention (pp. 28-9).

(d) Article IX conferred jurisdiction in respect of "the responsibility of a State for genocide". No distinction was drawn between responsibility for failure to prevent and punish and responsibility for the actual perpetration of genocide. Nor did the provisions which contemplated the criminal responsibility of "rulers" or "public officials" exclude the responsibility of the State for the acts of its organs (pp. 29-30).

Per Judge Oda (dissenting): The Genocide Convention was essentially directed not to the rights and obligations of States but to the protection of the rights and obligations of individuals and groups of persons. Bosnia and Herzegovina had failed to show in its Application that it was alleging that Yugoslavia had violated Bosnia and Herzegovina's rights under the

[13] See p. 28 below.

Convention. It was doubtful whether the Court was the appropriate forum for the resolution of this case. The Court should maintain a strict position regarding its jurisdiction (pp. 38-43).

Per Judges Shi and Vereshchetin (dissenting from part of the reasoning): The Genocide Convention was primarily directed towards the punishment of persons committing genocide and genocidal acts and to the prevention of such crimes by individuals, not towards State responsibility (pp. 44-5).

(3) (by fourteen votes to one) Yugoslavia's objection to jurisdiction *ratione temporis* was rejected. Article IX did not contain any clause the object or effect of which was to limit the jurisdiction of the Court *ratione temporis*, nor did the parties assert such a limitation at the time of becoming party to the Convention or on signature of the Dayton–Paris Agreement. The Court therefore had jurisdiction to give effect to the Convention with regard to the relevant facts which had occurred since the beginning of the conflict in Bosnia and Herzegovina (p. 30).

(4) (by fourteen votes to one) None of the additional bases for jurisdiction advanced by Bosnia and Herzegovina could be accepted. The letter to the President of the Arbitration Commission did not amount to a binding undertaking by the Presidents of Serbia and Montenegro unconditionally to accept the unilateral submission to the Court of a wide range of legal disputes. The Court saw no reason to depart from the view in its second provisional measures decision[14] that the other instruments relied on by Bosnia and Herzegovina did not confer jurisdiction on the Court. Nor had Yugoslavia given consent to a wider jurisdiction under the doctrine of *forum prorogatum* (pp. 30-4).

Per Judge *ad hoc* Lauterpacht: The Court could have found that it had jurisdiction on the basis of *forum prorogatum* (p. 35).[15]

Per Judge Shahabuddeen: The decision of the Court regarding *forum prorogatum* was correct. That doctrine was, in any event, irrelevant to the question of jurisdiction under Article IX of the Genocide Convention (pp. 49-51).

(5) (by thirteen votes to two) The objections to the admissibility of the Application were rejected. The fact that the conflict in Bosnia and Herzegovina might have been a civil war did not preclude the Court from adjudicating upon allegations of violations of the Genocide Convention. Notwithstanding Yugoslavia's claim that Mr Alija Izetbegović had not been the lawful President of Bosnia and Herzegovina and that the decision to commence proceedings had not been validly taken, Mr Izetbegović had been internationally recognized as Head of State, in particular by the United Nations. Under international law, every Head of State was presumed to be able to act on behalf of the State and its international relations (pp. 34-5).

[14] 95 *ILR* 1.

[15] Judge *ad hoc* Lauterpacht discussed this question in his Separate Opinion in the second provisional measures case: 95 *ILR* 1 at 136-9.

Per Judge *ad hoc* Kreća (dissenting): (1) The Court had failed to resolve the essential question whether Bosnia and Herzegovina at the time of filing the Application and Bosnia and Herzegovina after the Dayton–Paris Agreement were one and the same. The proclamation of Bosnia and Herzegovina as an independent State had been a substantial breach of the norms on equal rights and self-determination of peoples. Accordingly, there had been no *de jure* succession by Bosnia and Herzegovina to the rights and obligations of the SFRY (pp. 70-102 and 115-74).

(2) The fact that the decision to institute proceedings was taken in violation of the internal law of Bosnia and Herzegovina was of great importance. At the time of filing the Application, Mr Izetbegović was not the Head of State of Bosnia and Herzegovina and had no authority to act on behalf of Bosnia and Herzegovina (pp. 102-15).

(3) (a) The conflict in Bosnia and Herzegovina was *sui generis* and could not be classified as wholly internal in character, although elements of civil war were present. The *jus cogens* character of the prohibition of genocide meant that it was a universal norm which bound States in all parts of the world. However, the fact that the norm prohibiting genocide was a norm of *jus cogens* did not imply that the obligation of States to prevent and punish genocide was not territorially limited. On the contrary, respect for the territorial integrity of States, iself a norm of *jus cogens*, meant that the obligations of States under the Genocide Convention had to be performed within their own territories (pp. 174-7).

(b) A State could not be responsible for genocide under the Genocide Convention, which was concerned with the responsibility of individuals, not States. A dispute regarding alleged State responsibility for genocide did not, therefore, come within Article IX of the Genocide Convention (pp. 177-82).

(4) The concept of "automatic succession" to certain types of treaty was not yet part of customary international law and existed solely at the level of *lex ferenda* (pp. 183-204).

Counter-claims Order

Following the dismissal of its preliminary objections, Yugoslavia filed its Counter-Memorial on 22 July 1997. The Counter-Memorial included counter-claims.[16] In its counter-claims, Yugoslavia asked the Court to adjudge and declare that Bosnia and Herzegovina had been guilty of genocide against the Serb population of Bosnia and Herzegovina and of other violations of the Genocide Convention. Bosnia and Herzegovina maintained that the counter-claims did not meet the requirements of Article 80(1) of the Rules of Court[17] on the ground that they were not sufficiently directly connected with the subject-matter of Bosnia and Herzegovina's claim.

Held (*in the Order of 17 December 1997*) (by thirteen votes to one):—The counter-claims were admissible as such and formed part of the current proceedings.

[16] The counter-claims are set out at pp. 210-11 below.

[17] Article 80(1) provides that:

A counter-claim may be presented provided that it is directly connected with the subject-matter of the claim of the other party and that it comes within the jurisdiction of the Court.

(1) A counter-claim had a dual character. It was an autonomous legal act, the object of which was to submit a new claim to the Court and thus to widen the subject-matter of the dispute. It was, however, linked to the principal claim and reacted to it. A respondent State was allowed to submit a counter-claim, instead of pursuing its claim in separate proceedings, for reasons of procedural economy and to allow the Court to have an overview of the respective claims and to decide them in a consistent way. A respondent was not entitled to use a counter-claim as a means of referring to an international court claims which exceeded the limits of that court's jurisdiction as recognized by the parties (pp. 216-17).

(2) The Rules of Court did not, however, define what was meant by "directly connected" and it was therefore for the Court, in its sole discretion, to determine whether the counter-claim was sufficiently connected to the principal claim, taking account of the particular aspects of each case. That task involved an assessment of the degree of connection between the claim and the counter-claim both in fact and in law (p. 218).

(3) In the present case, the claim and the counter-claims rested on facts of the same nature and forming part of the same factual complex. Moreover, Yugoslavia intended to rely on certain identical facts both for its defence and for its counter-claims. The fact that the Genocide Convention was not based upon reciprocity of obligations did not preclude the Yugoslav counter-claims being directly connected with the Bosnia and Herzegovina claim (pp. 218-20).

Per Judge *ad hoc* Kreća: A claim made by a respondent State which fulfilled the requirements of Article 80(1) of the Rules of Court was automatically to be treated as a counter-claim and joined to the original proceedings. In the present case, the existence of a legal connection between the claim and the counter-claims was obvious; both were inseparably connected to the Genocide Convention (pp. 222-31).

Per Judge Koroma: The Court should not allow a counter-claim to be used as the means of delaying the administration of justice, especially in a case which involved such grave issues. If the Rules of Court appeared to place restraints on the Court, the Court should either exercise its discretion in the interests of the good administration of justice or propose that the Rules be reviewed (pp. 231-6).

Per Judge *ad hoc* Lauterpacht: In accordance with Article 80(3) of the Rules[18] the Court should have held oral proceedings before ruling on the admissibility of the counter-claims. It was not necessary, for the purposes of establishing a direct connection within Article 80(1), that a counter-claim in respect of genocide be directly connected to the individual and specific acts forming the basis of the principal claim, provided that the counter-claim related to acts affected by the same treaty and occurring in the course of the same conflict. While it was open to the Court, even in a case in which the requirements of Article 80(1) were met, to order a separate trial of a counter-claim, the present case was not suitable for such separation (pp. 236-44).

[18] See p. 237 below.

Per Vice-President Weeramantry (dissenting): The Yugoslav allegations were not properly characterized as counter-claims within the meaning of Article 80 of the Rules and should have been the subject of separate proceedings. The delay which the counter-claims would create would have led the Court to exercise its discretion against joining them to the original claim. The involvement of Croatia in the counter-allegations also suggested that joinder was inappropriate (pp. 244-53).

The Judgment on Preliminary Objections, the Order on Counter-claims and the Declarations, Separate Opinions and Dissenting Opinions of Judges are set out as follows:

The text of the Order on Counter-claims commences at p. 206. The following is the text of the Judgment on Preliminary Objections:

THE COURT, **[597]**

composed as above,

after deliberation,

delivers the following Judgment:

1. On 20 March 1993, the Government of the Republic of Bosnia and Herzegovina (hereinafter called "Bosnia and Herzegovina") filed in the Registry of the Court an Application instituting proceedings against the Government of