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

(Croatia *v.* Serbia)[1]

International Court of Justice

[1] In the preliminary objections phase, Croatia was represented by H.E. Mr Ivan Šimonović as Agent; H.E. Ms Andreja Metelko-Zgombić, Ms Maja Seršić and H.E. Mr Frane Krnić, as Co-Agents; Mr James Crawford, S.C. and Mr Philippe Sands, Q.C., as Counsel and Advocates; Mr Mirjan Damaška, as Counsel; Mr Ivan Salopek and Ms Jana Špero, as Advisers. Serbia was represented by Mr Tibor Varady, as Agent; Mr Saša Obradović as Co-Agent; Mr Andreas Zimmermann, LL.M. (Harvard) and Mr Vladimir Djerić as Counsel and Advocates; H.E. Mr Radoslav Stojanović, H.E. Ms Sanja Milinković, Mr Vladimir Cvetković, Ms Jelena Jolić, Mr Igor Olujić, Mr Svetislav Rabrenović, Mr Christian J. Tams and Ms Dina Dobrković as Advisers.

In the merits phase, Croatia was represented by Ms Vesna Crnić-Grotić, as Agent; H.E. Ms Andreja Metelko-Zgombić, Ms Jana Spero, Mr Davorin Lapaš, as Co-Agents; Mr James Crawford, A.C., S.C., F.B.A., Mr Philippe Sands, Q.C., Mr Mirjan R. Damaška, Sir Keir Starmer, Q.C., Ms Maja Seršić, Ms Kate Cook, Ms Anjolie Singh and Ms Blinne Ní Ghrálaigh, as Counsel and Advocates; Mr Luka Mišetić, Ms Helen Law and Mr Edward Craven, as Counsel. Serbia was represented by Mr Saša Obradović, as Agent; Mr William Schabas, O.C., M.R.I.A., Mr Andreas Zimmermann, Mr Christian J. Tams, Mr Wayne Jordash, Q.C., Mr Novak Lukić and Mr Dušan Ignjatović, as Counsel and Advocates.

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Preliminary Objections. 18 *November* 2008

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

Merits. 3 *February* 2015

(Tomka, *President*; Sepúlveda-Amor, *Vice-President*; Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, *Judges*; Vukas and Kreća, *Judges ad hoc*)

SUMMARY:[4] *The facts*:—The Socialist Federal Republic of Yugoslavia ("the SFRY") consisted of six republics: Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia. During 1991-92 the SFRY underwent a 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. The FRY was subsequently admitted to membership in the United Nations, on 1 November 2000, following a letter written by the FRY's newly elected President to the United Nations Secretary-General requesting admission.

Although the majority of the inhabitants of Croatia were of Croat origin according to the official census at the end of March 1991 (78 per cent), ethnic and national minorities were also represented; 12 per cent of the population was of Serb origin and there was a majority of Serbs in certain localities. Political tensions between the Government of the Republic of Croatia ("Croatia") and the Serbs living in Croatia and opposed to its independence, increased at the start of the 1990s and Serb autonomous regions were established. In spring 1991, clashes broke out between the Croatian armed forces and those of the Serb Autonomous Region of Krajina and other armed

[2] Appointed by Croatia.
[3] Appointed by the Federal Republic of Yugoslavia.
[4] Prepared by Ms Karen Lee, Co-Editor.

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groups and the Yugoslav National Army ("JNA").[5] By the summer of 1991, an armed conflict had broken out in Croatia, during which violations of the Convention on the Prevention and Punishment of the Crime of Genocide, 1948 ("the Genocide Convention") were allegedly committed during heavy fighting, especially in and around the town of Vukovar. In December 1991, the Serbs of the Serb Autonomous Region of Krajina (which then comprised territories in Banovina/Banija, Kordun, Lika and Dalmatia) proclaimed the establishment of the "Republika Srpska Krajina" ("RSK"); Serb forces also came to control Western and Eastern Slavonia. Negotiations in late 1991 and early 1992 resulted in the Vance plan and the deployment of the United Nations Protection Force, but attempts to achieve a peaceful settlement failed. In the spring and summer of 1995, Croatia re-established control over the greater part of the Serb-held territories following a series of military operations: Western Slavonia through Operation Flash and Krajina through Operation Storm. Eastern Slavonia was gradually reintegrated into Croatia between 1996 and 1998 following the Erdut Agreement, 1995.

Croatia ("the Applicant") commenced proceedings against the FRY ("the Respondent")[6] in the International Court of Justice by an Application filed on 2 July 1999. Referring to acts which occurred during the conflict that took place between 1991 and 1995 in the territory of the SFRY,[7] the Application accused the FRY of various breaches of the Genocide Convention[8] and invoked Article IX of the Genocide Convention[9] as the basis for the jurisdiction of the Court. Croatia claimed that the FRY had breached its legal obligations toward the people and Republic of Croatia under Articles I, II(a)-(d),[10] III(a)-(e), IV and V of the Genocide Convention, and that it had an obligation to pay reparations for damages

[5] The Yugoslav People's Army, also known as the Yugoslav National Army, is referred to as the JNA (*Jugoslavenska narodna armija*).

[6] The Respondent was named "the Federal Republic of Yugoslavia" when the Application was filed. It was later named "Serbia and Montenegro" (on 4 February 2003) and "the Republic of Serbia" (on 3 June 2006).

[7] For the background to those events, see paras. 61-73 of the judgment on the merits.

[8] Croatia was a party to the Genocide Convention at all relevant times and had not made any reservation excluding the application of Article IX. The SFRY signed the Genocide Convention on 11 December 1948, and deposited an instrument of ratification, without reservation, on 29 August 1950. It was common ground between the Parties that the SFRY was thus a party to the Convention at the time in the 1990s when it began to disintegrate into separate and independent States.

[9] Article IX provides: "Disputes between the Contracting Parties relating to the interpretation, application or fulfillment 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."

[10] Article II provides: "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: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group."

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to persons, property, the economy, and the environment caused by these violations of international law.[11]

On 11 September 2002, the FRY raised preliminary objections relating to the Court's jurisdiction to entertain the case and to the admissibility of the Application; the proceedings on the merits were suspended. The FRY maintained that the Court lacked jurisdiction over the claims brought by Croatia ("the first preliminary objection"). The Respondent claimed that it did not have the capacity to participate in the proceedings; it also maintained that it was not a party to the Genocide Convention when the Application was filed, only becoming a party by accession on 10 June 2001 and with the notification of accession by the FRY (dated 6 March 2001 and deposited on 12 March 2001) containing a reservation with respect to Article IX. In the alternative, the FRY asserted that the following claims of Croatia were beyond the Court's jurisdiction and inadmissible: the claims based on acts or omissions which took place before the FRY came into being (i.e. before 27 April 1992) ("the second preliminary objection") and the claims referring to submission to trial of certain persons within the jurisdiction of Serbia,[12] providing information regarding the whereabouts of missing Croatian citizens and return of cultural property ("the third preliminary objection"). Croatia maintained that the Court had jurisdiction to adjudicate upon its Application.

By a letter dated 5 February 2003, the FRY informed the Court that the name of the State had been changed to Serbia and Montenegro following the adoption and promulgation of the Constitutional Charter of Serbia and Montenegro by the Assembly of the FRY on 4 February 2003. On 3 June 2006 the National Assembly of the Republic of Montenegro adopted a declaration of independence. By a letter dated 3 June 2006, the President of the Republic of Serbia ("Serbia") informed the United Nations Secretary-General that the United Nations membership of the State union of Serbia and Montenegro would be continued by Serbia, which remained responsible in full for the rights and obligations of that State union under the UN Charter. By letters of 16 and 30 June 2006, Serbia requested that it be considered a party to all international agreements in force instead of Serbia and Montenegro and confirmed its intention to continue to exercise its rights and honour its commitments deriving from those treaties concluded by Serbia and Montenegro. On 28 June 2006, the Republic of Montenegro ("Montenegro") was admitted as a new member of the United Nations.

With respect to the first preliminary objection, the Respondent claimed that it did not have the capacity under Article 35 of the Court's Statute to participate in the proceedings because, as the Court had confirmed in the

[11] For details of the claims made in Croatia's Application and the Parties' submissions, see paras. 20-2 of the judgment on preliminary objections and paras. 49-51 of the judgment on the merits.

[12] Croatia adjusted its submission to take account of the fact that, since the presentation of the Memorial, former President Slobodan Milošović had been transferred to the International Criminal Tribunal for the former Yugoslavia and had since died.

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Legality of Use of Force cases ("the 2004 Judgments"),[13] it was not a member of the United Nations until 1 November 2000 and therefore not party to the Statute at the time of filing of the Application on 2 July 1999. Croatia argued that the FRY was a member of the United Nations at the time of filing and, even if it was not, Serbia's status within the United Nations in 1999 did not affect the present proceedings as the Respondent became a member in 2000, thereby validly gaining capacity to take part in these proceedings. The Respondent also maintained that the Court's jurisdiction, which was instituted on 2 July 1999, could not be based on Article IX of the Genocide Convention since Serbia had never become bound by that Article (its accession only becoming effective on 10 June 2001 with a reservation regarding Article IX). Croatia argued that both Parties were bound by the Genocide Convention as successor States of the SFRY.

With respect to the second preliminary objection, the Respondent contended that Croatia's Application was inadmissible in so far as it referred to acts or omissions prior to the FRY's proclamation of independence on 27 April 1992 since acts or omissions could not be attributed to it if it did not exist. Croatia stated that the Respondent's argument in fact seemed to be that the Court had no jurisdiction *ratione temporis* over acts or events occurring before that date,[14] and that the Court had already stated that there were no temporal limitations to the application of the Genocide Convention and to its exercise of jurisdiction under that Convention in the absence of reservations to that effect.[15]

With respect to the third preliminary objection, while accepting the Respondent's argument that the claim referring to submission to trial of Mr Milošović had become moot, Croatia contended that many others responsible for what it considered to constitute genocidal acts in its territory and claimed to be within the Respondent's jurisdiction had yet to be handed over to the ICTY or to Croatia or submitted to trial in Serbia. The Respondent maintained that Croatia's submission regarding information on missing persons was inadmissible since it fell outside the scope of the Genocide Convention, and moot since there had been co-operation on this since 1995. Croatia maintained that this submission was within the Convention's scope, that the Respondent had at its disposal information on a large number of missing persons and that the provision of whereabouts information was an appropriate remedy. As to the submission concerning the return of cultural property, the Respondent asserted that it was inadmissible since jurisdiction could not include property claims. Croatia argued that this claim fell within the scope

[13] *Legality of Use of Force* cases, 157 ILR 1.

[14] The Respondent maintained this alternative argument on the grounds that 27 April 1992 was the earliest possible point in time at which the FRY could have become bound by the Genocide Convention.

[15] Judgment of 11 July 1996 in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina* v. *Yugoslavia*), 115 ILR 1.

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of the Genocide Convention since genocide could also be committed through destruction of a group's cultural identity as well as its physical destruction.

Judgment on Preliminary Objections (18 November 2008)

Held:—The Court had jurisdiction to entertain the Application of the Republic of Croatia subject to the finding on the temporal question.

A. The identification of the respondent Party

It was a fundamental principle that no State could be subjected to the jurisdiction of the Court without its consent. The question whether such consent existed on the part of Serbia was one of the issues raised by the preliminary objections. Serbia had accepted continuity between Serbia and Montenegro and the Republic of Serbia and said that it would honour its commitments deriving from international treaties concluded by Serbia and Montenegro, which would include the Genocide Convention. Montenegro had been admitted as a new State to the United Nations; it did not continue the international legal personality of the State union of Serbia and Montenegro. Montenegro had also made it clear that it did not consent to the Court's jurisdiction in the present dispute. Neither had Croatia asserted that Montenegro was still a party to the present case. Accordingly, the Republic of Serbia was the sole Respondent[16] (paras. 23-34).

B. The First Preliminary Objection

(1) (by ten votes to seven, Judges Ranjeva, Shi, Koroma, Parra-Aranguren, Owada, Skotnikov and Judge ad hoc Kreća dissenting) The first preliminary objection submitted by the Republic of Serbia in so far as it related to its capacity to participate in the proceedings instituted by the Application of the Republic of Croatia was rejected.

(a) Since Croatia and Serbia were States, they could be parties in cases before the Court pursuant to Article 34 of its Statute. At the date of filing its Application (2 July 1999), Croatia was a member of the United Nations and thus a party to the Statute of the Court in compliance with Article 35 of the Court's Statute. As such, the Court was "open" to Croatia. The Parties disagreed as to whether Serbia satisfied the conditions under Article 35(1) or (2) of the Statute (paras. 57-60).

(b) It was appropriate first to examine whether Serbia had access to the Court on the basis of Article 35(1) of the Statute. If Serbia was a party to the Statute, at the pertinent time, it had capacity to participate in proceedings before the Court, in whatever role (paras. 61-73).

(c) The question of the status and position of the State known as the FRY when the Application was filed, in relation to the Statute of the Court and to

[16] The Respondent will hereafter be referred to as Serbia, except when reference has to be made to the FRY or to Serbia and Montenegro because of the historical context.

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the Genocide Convention was central. The legal status of the FRY (now Serbia) had been determined by the Court over the period from the dissolution of the former SFRY to the admission of the FRY to the United Nations on 1 November 2000 in the 2004 Judgments. While the 2004 Judgments did not have the force of *res judicata* since the Parties were not the same, they might be relevant given that they addressed the Respondent's legal position from 1992 to 2000, and that the Court only departed from its settled jurisprudence for very particular reasons (paras. 52-6 and 74-6).

(d) From 1 November 2000 until the date of the present judgment, the Respondent was a party to the Statute by virtue of its status as a member of the United Nations pursuant to Article 93(1) of the Charter, which automatically granted all members the status of party to the Statute (para. 77).

(e) While the general rule was that the jurisdiction of the Court was to be assessed on the date of instituting proceedings, the Court had shown realism and flexibility in certain situations.[17] The important consideration was whether the initially unfulfilled conditions would be met should fresh proceedings be brought. For the sound administration of justice, it was preferable to conclude that the condition had from that point been fulfilled rather than compel the applicant to initiate fresh proceedings. Neither was there any reason why an applicant's deficiency might be overcome in the course of proceedings, while that of a respondent might not. The question of access was closely related to jurisdiction inasmuch as the consequences of unmet conditions were the same. In the circumstances of the present case, there was reason to look beyond the legal situation prevailing at the date of the Application. The Applicant had not been careless in filing the Application when it did; at that date the Respondent considered that it had capacity to participate in proceedings before the Court. While Croatia's Application was filed on 2 July 1999, its much longer Memorial on the merits was filed on 1 March 2001, after the admission of the FRY to the United Nations on 1 November 2000. The fulfilment of conditions in Article 35 of the Statute could therefore be assessed at a date after the Application filing date, more precisely after 1 November 2000 (paras. 78-90).

(f) The Court was thus "open" to the FRY on 1 November 2000. The Court would therefore be able to uphold its jurisdiction if it found that Serbia was bound by Article IX of the Genocide Convention on 2 July 1999 (when proceedings were instituted) and remained bound by that Article until at least 1 November 2000 (paras. 91-2).

(2) (by twelve votes to five, Judges Ranjeva, Shi, Koroma, Parra-Aranguren and Judge ad hoc Kreća dissenting) The first preliminary objection submitted by the Republic of Serbia in so far as it related to the jurisdiction *ratione materiae* of the Court under Article IX of the Genocide Convention to entertain the Application of the Republic of Croatia was rejected.

[17] See *Mavrommatis Palestine Concessions* (*Greece* v. *Great Britain*), 2 Ann Dig/ILR 27 and para. 82 of judgment on preliminary objections.

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