

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

**Order of 13 September 1993**

In an Order issued in the case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), the Court issued an interim order of provisional measures reaffirming the measures it ordered on 8 April 1993, when Bosnia and Herzegovina first moved in the Court against Yugoslavia (Serbia and Montenegro). It held that "the present perilous situation demands, not an indication of provisional measures additional to those indicated by the Court's Order of 8 April 1993, but immediate and effective implementation of those measures".

The Court declined to adopt more far-reaching injunctions requested by Bosnia as well as an injunction sought by Yugoslavia requiring Bosnia to take all measures within its power to prevent commission of the crime of genocide against the Serbs in Bosnia. In declining Bosnian requests, among others, to interdict plans to partition Bosnian territory, to declare annexation of Bosnian territory to be illegal, and to hold that Bosnia must have the means to prevent acts of genocide and partition by obtaining military supplies, the Court pointed out that it had *prima facie* jurisdiction in this case to order interim measures only within the scope of the jurisdiction conferred on it by the Convention on the Prevention and Punishment of the Crime of Genocide. It was not entitled to deal with broader claims.

At the same time, the Court recorded that, since its Order of 8 April, and despite it and many resolutions of the United Nations Security Council, "great suffering and loss of life has been sustained by the population of Bosnia and Herzegovina in circumstances which shock the conscience of mankind and flagrantly conflict with moral law . . .". It observed that the "grave risk" which the Court apprehended in April of the dispute over the commission of genocide in Bosnia being aggravated and extended "has been deepened by the persistence of conflicts" on its territory "and the commission of heinous acts in the course of those conflicts". The Court declared that it is "not satisfied that all that might have been done has been done" to prevent genocide in Bosnia, and reminded the Parties to the case that they were obliged to take the Court's provisional measures "seriously into account".

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In its Order, the Court recalls that on 20 March 1993 Bosnia and Herzegovina instituted proceedings against Yugoslavia in respect of a dispute concerning alleged violations by Yugoslavia of the Convention on the Prevention and Punishment of the Crime of Genocide. In the Application Bosnia and Herzegovina, basing the jurisdiction of the Court on article IX of the Convention for the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly of the United Nations on 9 December 1948 (hereinafter called "the Genocide Convention"), recounts a series of events in Bosnia and Her-

zegovina from April 1992 up to the present day which, in its contention, amount to acts of genocide within the definition given in the Genocide Convention and claims that the acts complained of have been committed by former members of the Yugoslav People's Army (YPA) and by Serb military and paramilitary forces under the direction of, at the behest of, and with assistance from Yugoslavia, and that Yugoslavia is therefore fully responsible under international law for their activities.

The Court refers to the submissions of Bosnia and Herzegovina, which request the Court to adjudge and declare:

*[See paragraphs (a)-(r) reproduced on pages 46 and 47, in the Order of 8 April 1993.]*

The Court further refers to the request made by Bosnia and Herzegovina (also on 20 March 1993) for the indication of the following provisional measures:

*[See paragraphs 1-6 reproduced on page 47, in the Order of 8 April 1993.]*

The Court also refers to the recommendation by Yugoslavia (in written observations on the request for provisional measures, submitted on 1 April 1993) that the Court order the application of the following provisional measures:

- to instruct the authorities controlled by A. Izetbegovic to comply strictly with the latest agreement on a cease-fire in the 'Republic of Bosnia and Herzegovina' which went into force on 28 March 1993;
- to direct the authorities under the control of A. Izetbegovic to respect the Geneva Conventions for the Protection of Victims of War of 1949 and the 1977 Additional Protocols thereof, since the genocide of Serbs living in the 'Republic of Bosnia and Herzegovina' is being carried out by the commission of very serious war crimes which are in violation of the obligation not to infringe upon the essential human rights;
- to instruct the authorities loyal to A. Izetbegovic to close immediately and disband all prisons and detention camps in the 'Republic of Bosnia and Herzegovina' in which the Serbs are being detained because of their ethnic origin and subjected to acts of torture, thus presenting a real danger for their life and health;
- to direct the authorities controlled by A. Izetbegovic to allow, without delay, the Serb residents to leave safely Tuzla, Zenica, Sarajevo and other places in the 'Republic of Bosnia and Herzegovina', where they have been subject to harassment and physical and mental abuse, and having in mind that they may suffer the same fate as the Serbs in eastern Bosnia, which was the site of the killing and massacres of a few thousand Serb civilians;

—to instruct the authorities loyal to A. Izetbegovic to cease immediately any further destruction of Orthodox churches and places of worship and of other Serb cultural heritage, and to release and stop further mistreatment of all Orthodox priests being in prison;

—to direct the authorities under the control of A. Izetbegovic to put an end to all acts of discrimination based on nationality or religion and the practice of 'ethnic cleansing', including the discrimination relating to the delivery of humanitarian aid, against the Serb population in the 'Republic of Bosnia and Herzegovina'."

After recalling its Order of 8 April 1993, the Court refers to a second request of Bosnia and Herzegovina, filed on 27 July 1993, by which it urgently requests the Court to indicate the following additional provisional 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 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 Peacekeeping 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 Court then recalls that on 5 August 1993 the President of the Court addressed a message to both Parties, referring to Article 74, paragraph 4, of the Rules of Court, which enables him, pending the meeting of the Court,

"to call upon the parties to act in such a way as will enable any order the Court may make on the request for provisional measures to have its appropriate effects",

and stating:

"I do now call upon the Parties so to act, and I stress that the provisional measures already indicated in the Order which the Court made after hearing the Parties, on 8 April 1993, still apply.

Accordingly I call upon the Parties to take renewed note of the Court's Order and to take all and any measures that may be within their power to prevent any commission, continuance, or encouragement of the heinous international crime of genocide".

The Court further refers to a request by Yugoslavia, filed on 10 August 1993, whereby Yugoslavia requested the Court to indicate the following provisional measure:

"The Government of the so-called Republic of Bosnia and Herzegovina should immediately, in pursuance of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, take all measures within its power to prevent commission of the crime of genocide against the Serb ethnic group".

Hearings on the two requests were held on 25 and 26 August 1993.

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After referring to several questions of procedure, the Court begins by considering that in order to be admissible the second request by Bosnia and Herzegovina, and that of Yugoslavia, should be based upon new circumstances such as to justify their being examined. The Court finds that that is the case.

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Turning to the question of its jurisdiction, the Court recalls that in its Order of 8 April 1993 the Court considered that article IX of the Genocide Convention, to which both the Applicant and the Respondent are parties, appeared to the Court

"to afford a basis on which the jurisdiction of the Court might be founded to the extent that the subject-matter of the dispute relates to 'the interpretation, application or fulfilment' of the Convention, including disputes 'relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III' of the Convention" (*I.C.J. Reports 1993*, p. 16, para. 26).

It thereafter examines several additional bases of jurisdiction relied on by the Applicant, finding that the 1919 Treaty of Saint-Germain-en-Laye is irrelevant for the present request; that no new fact has been put forward to reopen the question of whether the letter of 8 June 1992 addressed to the President of the Arbitration Commission of the International Conference for Peace in Yugoslavia may constitute a ground for jurisdiction; that the Court's jurisdiction under customary and conventional laws of war and international humanitarian law is not prima facie established; and that a communication Yugoslavia made in the context of the first request for provisional measures by the Applicant, dated 1 April 1993, cannot, even prima facie, be interpreted as "an unequivocal indication" of a "voluntary and indisputable" acceptance of the Court's jurisdiction.

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The Court then observes that the power of the Court to indicate provisional measures under Article 41 of the Statute of the Court has as its object to preserve the respective rights of the parties pending the decision of the Court, and presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings; and whereas it follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by the Court to belong either to the Applicant or to the Respondent and that the Court, having established the existence of one basis on which its jurisdiction might be founded, namely, article IX of the Genocide Convention, and having been unable to find that other suggested bases could prima facie be accepted as such, ought not to indicate measures for the protection of any disputed rights other than those which might ultimately form the basis of a judgment in the exercise of the jurisdiction thus prima facie established.

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After reiterating the measures it indicated in its Order of 8 April 1993, the Court then sums up the rights sought to be protected, as enumerated in the second request of Bosnia and Herzegovina for the indication of provisional measures, and concludes that nearly all of those rights were asserted in almost identical terms in Bosnia and Herzegovina's first request and that only one of them is such that it may prima facie to some extent fall within the rights arising under the Genocide Convention; and that it was therefore in relation to that paragraph and for the protection of rights under the Convention that the Court indicated provisional measures in its Order of 8 April 1993.

The Court then turns to the list of measures which the Applicant requests it to indicate and observes that it includes certain measures which would be addressed to States or entities not parties to the proceedings. The Court considers that the judgment in a particular case has, in accordance with Article 59 of the Statute of the Court, "no binding force except between the parties"; and that accordingly the Court may, for the preservation of those rights, indicate provisional measures to be taken by the

parties, but not by third States or other entities who would not be bound by the eventual judgment to recognize and respect those rights.

Three of the measures requested by the Applicant provide that the Government of Bosnia and Herzegovina "must have the means" to prevent the commission of genocide, and to defend its people against genocide, and "must have the ability to obtain military weapons, equipment and supplies" from the other parties to the Genocide Convention. The Court observes that Article 41 of the Statute empowers the Court to indicate measures "which ought to be taken to preserve the respective rights of either party", and that this means measures which ought to be taken by one or both parties to the case; that, however, it is clear that the intention of the Applicant in requesting these measures is not that the Court indicate that the Respondent ought to take certain steps for the preservation of the Applicant's rights, but rather that the Court make a declaration of what those rights are, which "would clarify the legal situation for the entire international community", in particular the members of the United Nations Security Council. The Court accordingly finds that this request must be regarded as outside the scope of Article 41 of the Statute.

Two of the measures requested relate to the possibility of "partition and dismemberment", annexation or incorporation of the sovereign territory of Bosnia and Herzegovina. The Court is unable to accept that a "partition and dismemberment", or annexation of a sovereign State, or its incorporation into another State, could in itself constitute an act of genocide and thus a matter falling within the jurisdiction of the Court under article IX of the Genocide Convention. On the other hand, in so far as it is the Applicant's contention that such "partition and dismemberment", annexation or incorporation will result from genocide, the Court, in its Order of 8 April 1993, has already indicated that Yugoslavia should "take all measures within its power to prevent commission of the crime of genocide", whatever might be its consequences.

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Turning to the request by Yugoslavia, the Court does not find that the circumstances, as they now present themselves to the Court, are such as to require a more specific indication of measures addressed to Bosnia and Herzegovina so as to recall to it both its undoubted obligations under the Genocide Convention and the need to refrain from action of the kind contemplated by paragraph 52 B of the Court's Order of 8 April 1993.

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The Court finally refers to Article 75, paragraph 2, of the Rules of Court, which recognizes the power of the Court, when a request for provisional measures has been made, to indicate measures that are in whole or in part other than those requested and observes that the Court has to consider the circumstances drawn to its attention and to determine whether those circumstances require the indication of further provisional measures to be taken by

the Parties for the protection of rights under the Genocide Convention.

After reviewing the situation and after referring to several pertinent resolutions of the Security Council, the Court comes to the conclusion that

“the present perilous situation demands, not an indication of provisional measures additional to those indicated by the Court’s Order of 8 April 1993 . . . but immediate and effective implementation of those measures”.

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The full text of the operative paragraph reads as follows:

“61. For these reasons,

THE COURT,

(1) By 13 votes to 2,

Reaffirms the provisional measure indicated in paragraph 52 A (1) of the Order made by the Court on 8 April 1993, which should be immediately and effectively implemented;

IN FAVOUR: President Sir Robert Jennings; Vice-President Oda; Judges Schwebel, Bedjaoui, Ni, Evensen, Guillaume, Shahabuddeen, Aguilar Mawdsley, Weeramantry, Ajibola, Herczegh; Judge *ad hoc* Lauterpacht;

AGAINST: Judge Tarassov; Judge *ad hoc* Kreća;

(2) By 13 votes to 2,

Reaffirms the provisional measure indicated in paragraph 52 A (2) of the Order made by the Court on 8 April 1993, which should be immediately and effectively implemented;

IN FAVOUR: President Sir Robert Jennings; Vice-President Oda; Judges Schwebel, Bedjaoui, Ni, Evensen, Guillaume, Shahabuddeen, Aguilar Mawdsley, Weeramantry, Ajibola, Herczegh; Judge *ad hoc* Lauterpacht;

AGAINST: Judge Tarassov; Judge *ad hoc* Kreća;

(3) By 14 votes to 1,

Reaffirms the provisional measure indicated in paragraph 52 B of the Order made by the Court on 8 April 1993, which should be immediately and effectively implemented.

IN FAVOUR: President Sir Robert Jennings; Vice-President Oda; Judges Schwebel, Bedjaoui, Ni, Evensen, Tarassov, Guillaume, Shahabuddeen, Aguilar Mawdsley, Weeramantry, Ajibola, Herczegh; Judge *ad hoc* Lauterpacht;

AGAINST: Judge *ad hoc* Kreća.”

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Vice-President Oda appended a declaration to the Order of the Court.

Judges Shahabuddeen, Weeramantry and Ajibola and Judge *ad hoc* Lauterpacht appended separate opinions to the Order.

Judge Tarassov and Judge *ad hoc* Kreća appended dissenting opinions to the Order.

#### *Declaration of Vice-President Oda*

Vice-President Oda, in his declaration, regrets that the Court took no specific position on Yugoslavia’s request for the indication of a provisional measure to the effect that Bosnia and Herzegovina should do all in its power to prevent genocidal acts against the Serb ethnic group, a request presented on the basis of evidence submitted to the United Nations. He is unconvinced by the Court’s reasons for avoiding a direct response to this request.

#### *Separate opinion of Judge Shahabuddeen*

In his separate opinion, Judge Shahabuddeen explained his reasons for agreeing with the Court’s holding on the question of prorogated jurisdiction. He could not accept Yugoslavia’s objection that Bosnia and Herzegovina’s request for interim measures amounted to a request for an interim judgment. Nor could he accept that, in the circumstances of the case, Bosnia and Herzegovina was not entitled to rely on media material. In his view, Yugoslavia had not complied with the provisional measures indicated by the Court on 8 April 1993. For this and other reasons given by him, he considered that it would not be correct for the Court to act on the basis of the material presented by Yugoslavia.

#### *Separate opinion of Judge Weeramantry*

Judge Weeramantry in his separate opinion stated that the facts before the Court fall into three categories: accounts and reports carried by the media; statements of disinterested third parties such as United Nations officials; and communiqués issued by the Government of Yugoslavia and the Government of the Republic of Serbia. The opinion states that even if the first category be completely excluded, the material placed before the Court in the second and third categories is sufficient to satisfy the Court on a provisional basis and for the limited purpose of interim measures that circumstances exist, in terms of Article 41 of the Statute of the Court, showing a prima facie case of non-compliance by Yugoslavia with the Order of the Court of 8 April.

The rest of the opinion addresses the question whether a provisional order made by the Court is binding in law. The opinion examines the general principles applicable to the matter as well as the relevant provisions of the Charter of the United Nations, the Statute of the Court and the Rules of Court, and reaches the conclusion that provisional measures once ordered impose an obligation of compliance with that Order which is binding in law.

It also states that in the absence of such a principle the competence of the Court to discharge the obligations resting upon it under the Charter and the Statute would be significantly impaired.

#### *Separate opinion of Judge Ajibola*

On the two requests for indication of provisional measures presented to the Court by both Parties, Judge Ajibola reaches the same conclusion, in his separate opinion, as the Court, albeit via another route. He points out that since the Parties have not complied with the first Order issued by the Court, it has the power to insist that no subsequent Order should be indicated until the Parties ensure that the earlier Order of 8 April 1993 has been complied with. In

his view, the Court has that power, not only by invoking its statutory power under the Statute and Rules of Court, but also as a part of its inherent power under general international law.

He further states that in his view the Court has the power to indicate provisional measures as part of its incidental power and function, and that such measures ought to be binding, effective and enforceable, since otherwise it may be impeded from functioning as a Court. It is for these alternative reasons that he supports the decision of the Court, whereby it reaffirms the provisional measures indicated in paragraph 52 of its Order of 8 April 1993.

#### *Separate opinion of Judge ad hoc Lauterpacht*

Judge *ad hoc* Lauterpacht, concurring with the Court, says that he would have preferred the Court's Order to be more detailed both in its statement of material facts and in the measures which it indicates. Emphasizing the unprecedented human dimension of the case, he finds that the atrocities committed by the Serbs against the Muslims in Bosnia, especially the process of "ethnic cleansing", amount to genocide and that the Respondent Government has done nothing to rebut the evidence of its support for the Bosnian Serbs.

He observes that the Security Council's arms embargo has led to a marked imbalance between the weaponry in the hands of the Serbian and Muslim populations of Bosnia and Herzegovina and that the United Nations Special Rapporteur (whose view has been adopted by the General Assembly) has identified this imbalance as having contributed to the intensity of ethnic cleansing in the area. He points to the fact that the prohibition of genocide has long been accepted as a matter of *jus cogens*, a legal order superior to treaties. In so far, therefore, as the embargo can be seen as contributing to ethnic cleansing and thus to genocide, its continuing validity has become doubtful and the Security Council should know this when reconsidering the embargo.

In addition to sharing the Court's opinion that it possesses jurisdiction under the Genocide Convention, Judge Lauterpacht holds that the Respondent has, by a request that it made to the Court on 1 April 1993, given the Court additional jurisdiction to deal with certain other aspects of the conflict in Bosnia. He, therefore, favours the indication of additional measures to cover such matters as compliance with the Geneva Conventions, the release of detainees and the ending of discrimination on ethnic grounds.

#### *Dissenting opinion of Judge Tarassov*

Judge Tarassov recalls that he had been unable to support one of the measures indicated by the Order of the Court of 8 April 1993, because it came, in his view, close to a prejudgment and imposed ill-defined and

virtually unlimited requirements on Yugoslavia. Bosnia's second request confirmed his apprehensions in that it ascribed alleged acts of genocide entirely to Yugoslavia with no attempt to establish a causal link. To base a finding of a State's responsibility on a simple ethnic link with part of the population of another State would be very dangerous for international law. Nevertheless, the Court has reiterated its previous conclusions, but without duly mentioning Bosnia's own obligations analogous to those of Yugoslavia, despite the latter's specific request in that sense. The Court thus seems to have prematurely decided that Yugoslavia has the lion's share of responsibility for the prevention of acts of genocide.

Judge Tarassov finds this a one-sided approach to a fratricidal war in which all ethnic groups involved have suffered inexpressibly. He is unable to support an Order enshrining it when all interested parties have accepted a constitutional agreement and are urged by the Security Council to conclude a just and comprehensive political settlement as soon as possible. To stress the need for the Parties to the case to facilitate that settlement would have been to indicate the most urgent and effective measure for the prevention of genocide, but unfortunately the Court made no reference at all to that need. The Court's silence on the point amounts to a regrettable failure to exercise its moral authority.

#### *Dissenting opinion of Judge ad hoc Kreća*

Judge *ad hoc* Kreća is of the opinion that the indicated provisional measures, particularly the first two of them, are not balanced, and that they are broad, being ambiguous and suggestive, so that both in wording and in content they come dangerously close to, and even incorporate, certain elements of an interim judgment.

He takes the view that the prejudicial nature of these measures emanates from this Order which, in substance, is a reaffirmation of the Order of 8 April 1993.

In his opinion, in this stage of proceedings in which the Court cannot make "definitive findings of fact and imputability", if the Court found that all requirements for the indication of such measures had been met, it should have decreed a general provisional measure which would, in substance, have coincided with the message of the President of the Court of 5 August 1993 addressed to both Parties in the dispute, together with specific interim measures based on the concept of notoriety which would include a request to the Applicant to continue the peace negotiations as the most effective and expedient way to put an end to the inferno of civil war in Bosnia and Herzegovina.

Judge *ad hoc* Kreća also believes that, in relation to the general measure, such specific interim measures should be of either an alternative or a cumulative nature.