

**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 8 April 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 called upon Yugoslavia (Serbia and Montenegro) to “immediately . . . take all measures within its power to prevent commission of the crime of genocide”. The Court’s Order of provisional measures stated that 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 conspiracy to commit 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”.

The Court also held that neither Party should “aggravate or extend the existing dispute over the prevention or punishment of the crime of genocide, or render it more difficult of solution”.

The Court issued these provisional measures in response to a suit initiated by Bosnia and Herzegovina on 20 March 1993. The Court found that it had *prima facie* jurisdiction

to issue its Order under the Convention on the Prevention and Punishment of the Crime of Genocide concluded by the United Nations in 1948, to which Yugoslavia and Bosnia and Herzegovina are parties. The Genocide Convention describes as genocide acts “committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group”.

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The full text of the operative paragraph of the Order reads as follows:

“52. For these reasons,

THE COURT

*Indicates*, pending its final decision in the proceedings instituted on 20 March 1993 by the Republic of Bosnia and Herzegovina against the Federal Republic of Yugoslavia (Serbia and Montenegro), the following provisional measures:

A. (1) Unanimously,

The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should immediately, in pursuance of its undertaking in the Convention on the Prevention and Punishment of the Crime of Genocide of

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9 December 1948, take all measures within its power to prevent commission of the crime of genocide;

(2) By 13 votes to 1,

The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) 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 conspiracy to commit 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, ethnic, racial or religious group;

IN FAVOUR: President Sir Robert Jennings; Vice-President Oda; Judges Ago, Schwebel, Bedjaoui, Ni, Evensen, Guillaume, Shahabuddeen, Aguilar Mawdsley, Weeramantry, Ranjeva, Ajibola;

AGAINST: Judge Tarassov;

B. Unanimously,

The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) and the Government of the Republic 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.”

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Judge Tarassov appended a declaration to the Order.

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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 Herzegovina 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 requests the Court to adjudge and declare:

“(a) That Yugoslavia (Serbia and Montenegro) has breached, and is continuing to breach, its legal obligations towards the people and State of Bosnia and Herzegovina under articles I, II (a), II (b), II (c), II (d), III (a), III (b), III (c), III (d), III (e), IV and V of the Genocide Convention;

(b) That Yugoslavia (Serbia and Montenegro) has violated and is continuing to violate its legal obligations toward the people and State of Bosnia and Herzegovina under the four Geneva Conventions of 1949, their Additional Protocol I of 1977, the customary international laws of war including the Hague Regulations on Land Warfare of 1907, and other fundamental principles of international humanitarian law;

(c) That Yugoslavia (Serbia and Montenegro) has violated and continues to violate articles 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26 and 28 of the Universal Declaration of Human Rights with respect to the citizens of Bosnia and Herzegovina;

(d) That Yugoslavia (Serbia and Montenegro), in breach of its obligations under general and customary international law, has killed, murdered, wounded, raped, robbed, tortured, kidnapped, illegally detained and exterminated the citizens of Bosnia and Herzegovina, and is continuing to do so;

(e) That in its treatment of the citizens of Bosnia and Herzegovina, Yugoslavia (Serbia and Montenegro) has violated, and is continuing to violate, its solemn obligations under Articles 1 (3), 55 and 56 of the Charter of the United Nations;

(f) That Yugoslavia (Serbia and Montenegro) has used and is continuing to use force and the threat of force against Bosnia and Herzegovina in violation of Articles 2 (1), 2 (2), 2 (3), 2 (4) and 33 (1) of the Charter of the United Nations;

(g) That Yugoslavia (Serbia and Montenegro), in breach of its obligations under general and customary international law, has used and is using force and the threat of force against Bosnia and Herzegovina;

(h) That Yugoslavia (Serbia and Montenegro), in breach of its obligations under general and customary international law, has violated and is violating the sovereignty of Bosnia and Herzegovina by:

—armed attacks against Bosnia and Herzegovina by air and land;

—aerial trespass into Bosnian airspace;

—efforts by direct and indirect means to coerce and intimidate the Government of Bosnia and Herzegovina;

(i) That Yugoslavia (Serbia and Montenegro), in breach of its obligations under general and customary international law, has intervened and is intervening in the internal affairs of Bosnia and Herzegovina;

(j) That Yugoslavia (Serbia and Montenegro), in recruiting, training, arming, equipping, financing, supplying and otherwise encouraging, supporting, aiding, and directing military and paramilitary actions in and against Bosnia and Herzegovina by means of its agents and surrogates, has violated and is violating its express charter and treaty obligations to Bosnia and Herzegovina and, in particular, its charter and treaty obligations under Article 2 (4) of the Charter of the United Nations, as well as its obligations under general and customary international law;

(k) That under the circumstances set forth above, Bosnia and Herzegovina has the sovereign right to defend itself and its people under Article 51 of the Charter and customary international law, including by means of immediately obtaining military weapons, equipment, supplies and troops from other States;

(l) That under the circumstances set forth above, Bosnia and Herzegovina has the sovereign right under

Article 51 of the Charter and customary international law to request the immediate assistance of any State to come to its defence, including by military means (weapons, equipment supplies, troops, etc.);

(m) That Security Council resolution 713 (1991), imposing a weapons embargo upon the former Yugoslavia, must be construed in a manner that shall not impair the inherent right of individual or collective self-defence of Bosnia and Herzegovina under the terms of Article 51 of the Charter and the rules of customary international law;

(n) That all subsequent Security Council resolutions that refer to or reaffirm resolution 713 (1991) must be construed in a manner that shall not impair the inherent right of individual or collective self-defence of Bosnia and Herzegovina under the terms of Article 51 of the Charter and the rules of customary international law;

(o) That Security Council resolution 713 (1991) and all subsequent Security Council resolutions referring thereto or reaffirming thereof must not be construed to impose an arms embargo upon Bosnia and Herzegovina, as required by Articles 24 (1) and 51 of the Charter and in accordance with the customary doctrine of *ultra vires*;

(p) That pursuant to the right of collective self-defence recognized by Article 51 of the Charter, all other States parties to the Charter have the right to come to the immediate defence of Bosnia and Herzegovina—at its request—including by means of immediately providing it with weapons, military equipment and supplies, and armed forces (soldiers, sailors, airpeople, etc.);

(q) That Yugoslavia (Serbia and Montenegro) and its agents and surrogates are under an obligation to cease and desist immediately from its breaches of the foregoing legal obligations, and is under a particular duty to cease and desist immediately:

- from its systematic practice of so-called ‘ethnic cleansing’ of the citizens and sovereign territory of Bosnia and Herzegovina;
- from the murder, summary execution, torture, rape, kidnapping, mayhem, wounding, physical and mental abuse, and detention of the citizens of Bosnia and Herzegovina;
- from the wanton devastation of villages, towns, districts, cities, and religious institutions in Bosnia and Herzegovina;
- from the bombardment of civilian population centres in Bosnia and Herzegovina, and especially its capital, Sarajevo;
- from continuing the siege of any civilian population centres in Bosnia and Herzegovina, and especially its capital, Sarajevo;
- from the starvation of the civilian population in Bosnia and Herzegovina;
- from the interruption of, interference with, or harassment of humanitarian relief supplies to the citizens of Bosnia and Herzegovina by the international community;
- from all use of force—whether direct or indirect, overt or covert—against Bosnia and Herzegovina, and from all threats of force against Bosnia and Herzegovina;
- from all violations of the sovereignty, territorial integrity or political independence of Bosnia and Herzegovina, including all intervention, direct or indirect, in the internal affairs of Bosnia and Herzegovina;

—from all support of any kind—including the provision of training, arms, ammunition, finances, supplies, assistance, direction or any other form of support—to any nation, group, organization, movement or individual engaged or planning to engage in military or paramilitary actions in or against Bosnia and Herzegovina;

(r) That Yugoslavia (Serbia and Montenegro) has an obligation to pay Bosnia and Herzegovina, in its own right and as *parens patriae* for its citizens, reparations for damages to persons and property as well as to the Bosnian economy and environment caused by the foregoing violations of international law in a sum to be determined by the Court. Bosnia and Herzegovina reserves the right to introduce to the Court a precise evaluation of the damages caused by Yugoslavia (Serbia and Montenegro)”.

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:

“1. That Yugoslavia (Serbia and Montenegro), together with its agents and surrogates in Bosnia and elsewhere, must immediately cease and desist from all acts of genocide and genocidal acts against the people and State of Bosnia and Herzegovina, including but not limited to murder; summary executions; torture; rape; mayhem; so-called ‘ethnic cleansing’; the wanton devastation of villages, towns, districts and cities; the siege of villages, towns, districts and cities; the starvation of the civilian population; the interruption of, interference with, or harassment of humanitarian relief supplies to the civilian population by the international community; the bombardment of civilian population centres; and the detention of civilians in concentration camps or otherwise;

2. 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, militia or individual engaged in or planning to engage in military or paramilitary activities in or against the people, State and Government of Bosnia and Herzegovina;

3. That Yugoslavia (Serbia and Montenegro) itself must immediately cease and desist from any and all types of military or paramilitary activities by its own officials, agents, surrogates, or forces in or against the people, State and Government of Bosnia and Herzegovina, and from any other use or threat of force in its relations with Bosnia and Herzegovina;

4. That under the current circumstances, the Government of Bosnia and Herzegovina has the right to seek and receive support from other States in order to defend itself and its people, including by means of immediately obtaining military weapons, equipment and supplies;

5. That under the current circumstances, the Government of Bosnia and Herzegovina has the right to request the immediate assistance of any State to come to its defence, including by means of immediately providing weapons, military equipment and supplies, and armed forces (soldiers, sailors, airpeople, etc.);

6. That under the current circumstances, any State has the right to come to the immediate defence of Bosnia and Herzegovina—at its request—including by means of immediately providing weapons, military equipment and supplies, and armed forces (soldiers, sailors, and airpeople, etc.)”.

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'."

Oral observations were presented by the Parties at public hearings held on 1 and 2 April 1993.

The Court begins by considering Yugoslavia's claim in its written observations that the legitimacy and mandate of the Government and the President of Bosnia and Herzegovina are disputed. The Court observes that the Agent of Bosnia and Herzegovina stated that President Izetbegovic is recognized by the United Nations as the legitimate Head of State of the Republic of Bosnia and Herzegovina; that the Court has been seised of the case on the authority of a Head of State, treated as such in the United Nations; that the power of a Head of State to act on behalf of the State in its international relations is universally recognized; and that accordingly the Court may, for the purposes of the present proceedings on a request for provisional measures, accept the seisin as the act of that State.

Turning to the question of jurisdiction, the Court recalls that it ought not to indicate provisional measures unless the provisions invoked by the Applicant or found in the Statute appear, *prima facie*, to afford a basis on which the jurisdic-

tion of the Court might be established; and that this consideration embraces jurisdiction both *ratione personae* and *ratione materiae*.

The Court then refers to the indication by Bosnia and Herzegovina in the Application that the "continuity" of Yugoslavia with the former Socialist Federal Republic of Yugoslavia, a Member of the United Nations, has been contested by the entire international community, including the United Nations Security Council (cf. resolution 777 (1992)) and General Assembly (cf. resolution 47/1). After citing the texts of the above-mentioned resolutions of the Security Council and General Assembly, as well as the text of a letter from the Legal Counsel of the United Nations to the Permanent Representatives to the United Nations of Bosnia and Herzegovina and Croatia, which contains the "considered view of the United Nations Secretariat regarding the practical consequences of the adoption by the General Assembly of resolution 47/1", and noting that the solution adopted therein is not free from legal difficulties, the Court observes that the question whether or not Yugoslavia is a Member of the United Nations and as such a party to the Statute of the Court is one which the Court does not need to determine at the present stage of the proceedings. Article 35 of the Statute, after providing that the Court shall be open to the parties to the Statute, continues:

"2. The conditions under which the Court shall be open to other States shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, but in no case shall such conditions place the parties in a position of inequality before the Court."

The Court therefore considers that proceedings may validly be instituted by a State against a State which is a party to such a special provision in a treaty in force, but is not party to the Statute, and independently of the conditions laid down by the Security Council; that a compromissory clause in a multilateral convention, such as article IX of the Genocide Convention, relied on by Bosnia and Herzegovina in the present case, in the view of the Court, can be regarded *prima facie* as such a "special provision"; that accordingly if Bosnia and Herzegovina and Yugoslavia are both parties to the Genocide Convention, disputes to which article IX applies are in any event *prima facie* within the jurisdiction *ratione personae* of the Court.

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The Court then turns to the consideration of its jurisdiction *ratione materiae*; article IX of the Genocide Convention, upon which Bosnia and Herzegovina in its Application claims to found the jurisdiction of the Court, 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 Court observes that the former Socialist Federal Republic of Yugoslavia signed the Genocide Convention on 11 December 1948, and deposited an instrument of ratification, without reservation, on 29 August 1950; and that both Parties to the present case correspond to parts of

the territory of the former Socialist Federal Republic of Yugoslavia.

The Court proceeds to consider two instruments: a declaration whereby (the present) Yugoslavia, on 27 April 1992, proclaimed its intention to honour the international treaties of the former Yugoslavia, and a "Notice of Succession" to the Genocide Convention deposited by Bosnia and Herzegovina on 29 December 1992. Yugoslavia contended that Bosnia and Herzegovina should be held to have acceded (not succeeded) to the Convention with effect, under article XI thereof, only as from the ninetieth day following the deposit of its instrument, so that the Court would possess jurisdiction, if at all, only subject to a temporal limitation. The Court, however, considers it unnecessary to pronounce upon this contention in deciding whether to indicate provisional measures, when it is concerned not so much with the past as with the present and future. On the basis of the two instruments the Court finds that article IX of the Genocide Convention appears 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.

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Having further examined a document which in Bosnia and Herzegovina's submission constituted an additional basis of jurisdiction of the Court in this case, namely a letter, dated 8 June 1992, addressed to the President of the Arbitration Commission of the International Conference on the former Yugoslavia by the President of the Republic of Montenegro and the President of the Republic of Serbia, the Court finds itself unable to regard that letter as constituting a *prima facie* basis of jurisdiction in the present case and must proceed therefore on the basis only that it has *prima facie* jurisdiction, both *ratione personae* and *ratione materiae*, under article IX of the Genocide Convention.

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With regard to its jurisdiction, the Court finally observes that the objection by Yugoslavia to the effect that "it would be premature and inappropriate for the Court to indicate provisional measures" while the Security Council is acting in the matter under Article 25 and Chapter VII of the Charter is primarily addressed to those measures which go beyond matters within the scope of the Genocide Convention and which for that reason the Court cannot consider. It recalls that in any event the Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions, and that both organs can therefore perform their separate but complementary functions with respect to the same events.

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After summing up the rights which Bosnia and Herzegovina and Yugoslavia seek to have protected by the indication of provisional measures, the Court observes that it

is confined to the consideration of such rights under the Genocide Convention as might form the subject-matter of a Judgment of the Court in the exercise of its jurisdiction under article IX of that Convention.

The Court notes that the Applicant claims that acts of genocide have been committed, and will continue to be committed, against, in particular, the Muslim inhabitants of Bosnia and Herzegovina and that the facts stated in the Application show that Yugoslavia is committing acts of genocide, both directly and by means of its agents and surrogates, and that there is no reason to believe that Yugoslavia will voluntarily desist from this course of conduct while the case is pending before the Court; and that the Respondent observes that the situation is not one of aggression by one State against another, but a civil war, and that Yugoslavia has not committed any acts of genocide, at the same time requesting the Court "to establish the responsibility of the authorities" of Bosnia and Herzegovina for acts of genocide against the Serb people in Bosnia and Herzegovina.

The Court observes that, pursuant to article I of the Genocide Convention, all parties to that Convention have undertaken "to prevent and to punish" the crime of genocide; and that in the view of the Court, in the circumstances brought to its attention and outlined above in which there is a grave risk of acts of genocide being committed, Yugoslavia and Bosnia and Herzegovina, whether or not any such acts in the past may be legally imputable to them, are under a clear obligation to do all in their power to prevent the commission of any such acts in the future.

The Court further observes that, in the context of the present proceedings on a request for provisional measures, it cannot make definitive findings of fact or of imputability and that it is not called upon now to establish the existence of breaches of the Genocide Convention by either Party, but to determine whether the circumstances require the indication of provisional measures to be taken by the Parties for the protection of rights under the Genocide Convention. The Court then finds that it is satisfied, taking into account the obligation imposed by article I of the Genocide Convention, that the indication of measures is required for the protection of such rights.

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From the information available to it, the Court is also satisfied that there is a grave risk of action being taken which may aggravate the existing dispute or render it more difficult of solution. The Court furthermore re-echoes the words of the General Assembly which it had already cited in 1951, to the effect that the crime of genocide "shocks the conscience of mankind, results in great losses to humanity . . . and is contrary to moral law and to the spirit and aims of the United Nations".

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The Court finally observes that the decision given in the present proceedings in no way prejudices the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the merits themselves, and leaves unaffected the right of the Governments of Bosnia and Herzegovina and Yugoslavia to submit arguments in respect of such jurisdiction or such merits.

*Declaration of Judge Tarassov*

Judge Tarassov supports the provisional measures indicated by the Court in paragraph 52 A (1) and paragraph 52 B of its Order. He is, however, of the opinion that the Court should have indicated the same measures in respect of Bosnia and Herzegovina as it has done in respect of Yugoslavia in the above-mentioned paragraph 52 A (1).

To his regret, he is unable to vote in favour of paragraph 52 A (2) of the Order, for three reasons: first, because the

provisions thereof are very close to a prejudgment of the merits in that they are open to the interpretation that Yugoslavia is indeed, or at least may very well be, involved in acts of genocide; second, because of the lack of balance in these provisions which single out one element of the population of Bosnia and Herzegovina for protection; and third, because of the impracticability of what is demanded from Yugoslavia; in this last respect the Court should not imply that Yugoslavia may have responsibility for the commission of acts which in fact may be beyond its control.