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The Failure of the International Court of Justice to Effectively Enforce the Genocide Convention

Keywords

Criminal Law, Genocide, International Court of Justice, Victims

The Failure of the International Court of Justice to Effectively Enforce The Genocide Convention

*Geoffrey S. DeWeese**

“Things fall apart; the centre cannot hold;
Mere anarchy is loosed upon the world,
The blood-dimmed tide is loosed, and everywhere
The ceremony of innocence is drowned”
The Second Coming ~ William Butler Yeats

PREFACE

The collapse of the UN safe-area of Srebrenica took place over the course of a few days in July of 1995. Starting with shelling on July 6,¹ the Serbs who surrounded the town began to indicate an intent to break a long stalemate. By July 10 they had control of the southern portion of the enclave right up to the town's edge.² On July 11 the town was abandoned by both the Muslim inhabitants and the Dutch Peacekeepers assigned to protect it; the safe-area ceased to exist.³

What occurred over the next few days is hard to accept, but there is no hiding from it. The town split up into two groups. Most of the women, children and elderly walked the two miles up to the Dutch headquarters in Potocari, on the northern edge of the safe-area.⁴ Some 10,000 to 15,000 others, mostly men and boys, both civilians and soldiers, started off in a long column through the mountains and woods of western Bosnia in hopes of making it to Muslim controlled Tuzla.⁵

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1. See DAVID ROHDE, *ENDGAME: THE BETRAYAL AND FALL OF SREBRENICA, EUROPE'S WORST MASSACRE SINCE WORLD WAR II* 3 (1997).

2. See *id.* at 115.

3. See *id.* at 161-66.

4. See *id.* at 163 -64.

5. See *id.* at 179-80.

In Potocari on July 12, the Serbs, led by General Ratko Mladic, began a process of loading the refugees on buses and trucks for transportation to Muslim controlled Bosnia.⁶ However, they herded out most of the men and held them separately.⁷ Meanwhile the men trudging their way through the hillsides came under attack, and soon the long line was spread out and in disarray.⁸

On Friday, July 14, two men found themselves crowded into the same gymnasium.⁹ Mevludin Oric had been part of the march to Tuzla, but, like so many he had been captured along with his cousin Haris.¹⁰ Hurem Suljic had been one of the old men pulled away from his family in Potocari on July 12 as the Serbs "evacuated" Srebrenica's civilian Muslim population to eastern Bosnia.¹¹ Now they were both held prisoner along with some 1,000 to 1,500 other men.¹² That afternoon General Mladic arrived and conferred with the other Bosnian Serb officers, laughing and smiling.¹³

Shortly after Mladic left, the Serbs began to herd the prisoners into a smaller room in groups of fifteen to twenty; within half an hour Oric and his cousin were part of one such small group to be taken.¹⁴ They were blindfolded and put in the back of trucks.¹⁵ After a short ride they were pulled out of the truck; moments later shots began to ring out.¹⁶

About five hours later Suljic was taken out of the same gym, blindfolded and put in the back of a truck.¹⁷ As it drove away, Suljic peeked out from under his blindfolded and was surprised to find that he, at fifty-five, was the youngest man in the truck.¹⁸ Looking out the back of the truck he saw the horrific sight of hundreds of dead bodies laying in rows with a bulldozer busy digging a mass grave.¹⁹ Taken out of the truck, the men were herded to the end of a row of bodies, and the Serbs

6. *See id.* at 204-05.

7. *See id.*

8. *See id.* at 225-228.

9. *See id.* at 272-74. The events described come from interviews conducted with the two by former Christian Science Monitor journalist David Rohde for his book *ENDGAME*. Throughout the book he only recounted events which he could either independently identify (he was one of the first to reach the sites of the mass graves) or which he felt were trustworthy. *See ROHDE, supra* note 1, at ix-xi.

10. *See Id.* at 272-74.

11. *See id.* at 206-07.

12. *See id.* at 288.

13. *See id.* at 289

14. *See id.*

15. *See id.*

16. *See id.*

17. *See id.* at 294.

18. *See id.* at 295.

19. *See id.*

began to shoot.²⁰

Somehow neither Oric and Suljic were hit, and by playing dead amongst the other victims they survived until nightfall when they found each other and escaped.²¹ Oric's cousin, who's dead body lay across his legs all day, and hundreds of others did not survive.²²

The story of Mevludin Oric and Hurem Suljic is not the only one which survives the war in Bosnia. What happened to them and those with them is typical of the genocide that occurred. According to the Red Cross, 7,364 people are still missing from Srebrenica alone, with 19,323 listed as missing from the entire war.²³ To put this into perspective, after the ten year Vietnam war period, which involved over two million Americans, there were only 2,097 missing.²⁴

I. INTRODUCTION

Three years before the fall of Srebrenica, on March 6, 1992, President Alija Izetbegovic declared independence for the Republic of Bosnia and Herzegovina following a national referendum.²⁵ Exactly one month later, as war was breaking out in the former Yugoslav republic, the European Community extended the Republic of Bosnia and Herzegovina recognition as an independent nation.²⁶ The next day, April 7, Bosnian Serbs announced their formation of a separate "Serbian Republic of Bosnia and Herzegovina."²⁷

Less than a year later, on March 20, 1993, Bosnia and Herzegovina ("Bosnia")²⁸ filed a complaint with the Registry of the International Court of Justice (ICJ) instituting proceedings against the Federal Republic of Yugoslavia (Serbia and Montenegro) ("Yugoslavia") alleging violations of the Convention on the Prevention and Punishment of the Crime of Genocide.²⁹

20. *See id.* at 295-96.

21. *See id.* at 291-93, 298-300, 302-304.

22. *See id.*

23. Michael Kelly, *Where are the Dead?* THE NEW YORKER, Feb. 16, 1998, at 36-37.

24. *Id.* at 37.

25. JAN WILLEM HONIG & NORBERT BOTH, SREBRENICA, RECORD OF A WAR CRIME 72 (1996).

26. *See* Steven J. Woehrel, *Bosnia -Herzegovina: Background to the Conflict 4*, (CRS Report for Congress No. 93-106 F,1993).

27. *See id.*

28. In researching for this article I found Herzegovina also to be spelled with a c instead of a z - Hercegovina. Not being a linguist myself, I have simply opted for the former spelling as it is what is used by the ICJ. In addition, I have tried to stick to using "Bosnia and Herzegovina" as the Court does, rather than the alternate form of "Bosnia-Herzegovina."

29. Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Yugoslavia (Serbia and Mon-*

The ICJ has yet to reach the merits of the case. Over the course of the past five years the ICJ has ruled on issues in three main categories: the indications of provisional measures,³⁰ preliminary objections to the Application and to the ICJ's jurisdiction to hear the case,³¹ and the permissibility of counter-claims.³² It was while the ICJ was dealing with these procedural issues that Srebrenica was overrun by Bosnian Serbs, leading to the disappearance and suspected mass murders of so many Bosnian Muslims.³³ As the case continued to drag on in The Hague, the war in Bosnia was brought to an uneasy end under the Dayton-Paris Peace Treaty and UN Peacekeepers were replaced by NATO forces.³⁴

The Bosnian war and the case it spawned before the ICJ serve as a reminder that violence in the form of genocide and warfare cannot be stopped in the courtroom. Perhaps the ICJ is not the place to settle disputes over issues as pressing as genocide. The procedures of the Court, and the lack of enforceability of its judgments outside of the actions of the U.N. and good will of the nations who are parties to it, do not meet the need for swift action when the issue is not only the placing of blame for acts of genocide, but the prevention of such ongoing acts. The Convention refers to both *Prevention* and *Punishment*, but while the ICJ ponders who should be punished, it has been utterly ineffective in the more immediate and more important work of preventing genocide.

To keep the Court's deliberations in perspective, I will spend a portion of this paper reviewing the social and political history of the Balkans and of the war that erupted there as the former communist state of Yugoslavia disintegrated. I begin by reviewing the history of the region up to the collapse of communist Yugoslavia. With this foundation, I will then present the holdings that have characterized the three phases of the litigation before the ICJ so far, along with some of the commentary from various judges. Next, I will review the events that were taking place in Bosnia while the case was being drawn out. I will

tenegro)), 1993 I.C.J. 3, 3-4 (Order of Apr. 8, 1993). Hereinafter I will only provide the citation and name of specific issuance rather than name the entire case each time. Therefore all I.C.J. references will be to this one case unless otherwise stated.

30. 1993 I.C.J. 3 (Order of Apr. 8, 1993); 1993 I.C.J. 325 (Order of September 13, 1993).

31. Judgment of July 11, 1996 (visited Sept. 2, 1997) <<http://www.law.cornell.edu/icj/icj4/judgment.htm>>.

32. Order of 17 December 1997 (visited Jan. 15, 1998) <<http://www.icj-cij.org/idocket/ibhy/ibhyorders/ibhyorder971217.htm1>>.

33. See Kelly, *supra* note 23, at 36-37.

34. See Craig Whitney, "Seize the Chance" *Balkan Plan Signed; Real Work Ahead*, THE DENVER POST, Dec. 15, 1995, available in 1995 WL 10205318.

conclude then with some personal observations and questions which I feel arise from both the case itself and its impact (or lack thereof) on the people of Bosnia.

II. HISTORY TO 1992

Prior to its acceptance by the world community as an independent state in 1992, there had never been an independent state of Bosnia.³⁵ Settled in the seventh century by Slavic peoples, the area in which Bosnia now rests was at the conflux of various world powers over the centuries.³⁶ To the west lay the Roman Catholic Church which was followed by the Croats, and to the east the Orthodox Church was pre-eminent and supported by the Serbs.³⁷ In the fifteenth century the conquest of Bosnia and the surrounding region by the Ottoman Empire brought Islam into this mix of religious ideals, and many people, both peasants and nobles, converted as a means of keeping their land.³⁸

Bosnia was becoming a focal point for international tension as the Christian nations in Europe came to feel threatened by such a large and strong Islamic state in Europe itself. In 1875 Slavs in Serbia and Montenegro intervened in an uprising in Bosnia and soon rebellion had spread throughout the region.³⁹ Sensing an opportunity to weaken its Ottoman enemy and gain valuable territory, Russia stepped in to support its Slavic neighbors.⁴⁰ In March of 1878 the Treaty of San Stefano gave the Russian Empire a triumphal victory and freed the Slavic states from Ottoman rule.⁴¹

The new borders laid out at San Stefano, however, didn't last very long as the rest of Europe became concerned with Russian expansion. In June and July of 1878 the lines were once again redrawn and territory redistributed by the Congress of Berlin.⁴² As part of the new structure, Bosnia and Herzegovina was given to the Austro-Hungarian Empire to administer.⁴³ While these new developments disappointed Russia, they angered Serbia and Montenegro and the Balkans continued to be a source of contention among the European powers.⁴⁴

Within the Balkans, religion may have divided the people, but they

35. See Woehrel, *supra* note 26, at 1.

36. See *id.*

37. See *id.*

38. See *id.*

39. THE WESTERN HERITAGE SINCE 1300 926 (Donald Kagan et al. eds., 4th ed. 1991).

40. See *id.*

41. See *id.*

42. See *id.* at 927.

43. See *id.*

44. See *id.*

were all of Slavic ancestry and spoke variations of the same language.⁴⁵ These peoples had found themselves ruled by various nations over the centuries - Turkey, Austria, Hungary, and Russia.⁴⁶ There was a growing movement of Slavic nationalism at the start of the twentieth century aimed at a union of the South Slavs (Yugoslavs) into an independent nation.⁴⁷ Serbia hoped to be the state that would unite these disparate peoples.⁴⁸

In 1908 Turkey began to regain some of its strength which led to the official annexing of Bosnia by Austria.⁴⁹ This angered the Serbs who had hoped to create a greater Yugoslav state, and it also antagonized Russia.⁵⁰ However, Germany, Austria's partner in the Dual Alliance, tacitly supported the move.⁵¹ In the ensuing years two small wars broke out in the Balkans and the various alliance that held Europe to a fragile stability began to strain under the pressure.⁵² Finally the assassination of Austrian Archduke Ferdinand, heir to the throne, in Sarajevo in 1914 by a Bosnian Serb nationalist proved to be too much and like dominoes the various European powers fell victim to their own alliances and one by one were drawn into war.⁵³

It is important to understand that during that first decade of the twentieth century, the Bosnians themselves were divided as to who they wanted to be aligned with. The Croats (about 18 percent of the population) wanted to stay a part of the Austrian Empire as a Croatian state.⁵⁴ Most of the Serbs (some 42 percent of the population) supported uniting with Serbia.⁵⁵ The Muslim population, (just over 31 percent of the population) descendants of those who converted under the Ottoman occupation, were claimed by both sides as simply being "Islamicized members of their group."⁵⁶ For their part, the Muslims wanted to be returned to the Ottoman Empire.⁵⁷ Even at this stage division was taking root within the diverse population of Bosnia and Herzegovina.

At the end of World War I the Serbs achieved their goal as the Kingdom of Yugoslavia was established to include Croatia, Bosnia,

45. *See id.* at 931.

46. *See id.*

47. *See id.*

48. *See id.*

49. *See id.*

50. *See id.*

51. *See id.* at 932.

52. *See id.* at 932-34.

53. *See id.* at 934.

54. Woehrel, *supra* note 26, at 2.

55. *See id.*

56. *See id.*

57. *See id.*

Montenegro, and Serbia.⁵⁸ This new state was by no means without disharmony, and while the Serbs did provide some religious toleration and reform of landownership provisions to protect Muslims, many of them emigrated to Turkey.⁵⁹ In 1941 Yugoslavia was conquered by Germany and it became part of a puppet Croatian state run by Croatian fascists who stated as a goal the expulsion of a third of Serbs, conversion to Catholicism of another third, and to kill the final third.⁶⁰ The Bosnian Muslims, on the other hand, were treated as potential allies who simply had to be converted.⁶¹ While many Muslims did side with the Fascists Ustashe, others turned to the Communist Partisans. Soon the Ustashe, Partisans, and the royalist Chetniks were fighting each other and hundreds of thousands of soldiers and civilians were killed.⁶²

The Partisans were led by Josip Broz, better known by his later name - Tito.⁶³ In 1943 Churchill determined that Tito was "killing the most Germans" and so he was given British support which led to his Partisans becoming the dominant force in the war and in post-war Yugoslavia.⁶⁴ Tito ran Yugoslavia until his death in 1980, and under his leadership the republics, including Bosnia and Herzegovina, were given wide autonomy under the 1974 Constitution.⁶⁵ Tito's regime also recognized the Muslim population as a national group, not just a religious one.⁶⁶

Following Tito's death, Yugoslavia suffered both economic hardship and corruption scandals, and by the late 1980s Serbian nationalist Slobodan Milosevic had risen to power.⁶⁷ As the 1990s began, the various republics became more self-assertive with non-Communist governments in Slovenia and Croatia advocating a loose federation, and Serbia pushing for more unity. Bosnia saw the formation of multiple parties from the various ethnic groups, and a coalition government was formed under Alija Izetbegovic, a Muslim.⁶⁸ In 1991 both Slovenia and Croatia declared independence from Yugoslavia and the Yugoslav People's Army (YPA) used Bosnia as a staging ground in an attempt to regain the republics, an act which increased tensions between Croats and Serbs within Bosnia.⁶⁹ Several Serb autonomous regions were declared

58. THE WESTERN HERITAGE, *supra* note 39, at 955.

59. Woehrel, *supra* note 26, at 2.

60. *See id.*

61. *See id.*

62. *See id.*

63. *See* EDGAR O'BALLANCE, CIVIL WAR IN BOSNIA : 1992-94 18 (1995).

64. *Id.* at 18-19.

65. Woehrel, *supra* note 26, at 2.

66. *See id.* at 2-3.

67. *See id.* at 3.

68. *See id.*

69. *See id.*

by the Serbian Democratic Party within Bosnia which announced they would secede should Bosnia claim independence. Croatian regions followed suit, saying they would stay as long as Bosnia didn't become Serb-dominated.⁷⁰

Nevertheless, in December of 1991 Bosnia applied to the European Community (EC) for recognition as an independent state after the EC gave the various republics a deadline for such action.⁷¹ A referendum was held on February 29 and March 1, 1992, in which independence was approved by 99.4 percent of the 63.4 percent who turned out for the vote (Serbs, 31 percent of the population, had boycotted the vote).⁷² While the three sides (Muslims, Serbs, and Croats) initially agreed to a plan to divide Bosnia into separate cantons with wide autonomy, too many factors remained unresolved and on April 4 Bosnian Serbs, supported by the YPA, began attacks which escalated with EC recognition of Bosnia and Herzegovina in April.⁷³ The next day the "Serbian Republic of Bosnia and Herzegovina" was announced by Serbs and an army commanded by YPA general Ratko Mladic soon had control of two-thirds of the new nation's territory.⁷⁴ While in May the YPA formally declared it was withdrawing from Bosnia, all Bosnian born YPA soldiers (nearly 80 percent) were told they could keep their equipment and remain in the new republic.⁷⁵

III. THE CASE

A. *Background*

Far from the violence and anarchy of the Balkans, the Peace Palace in the Hague, Netherlands, provides a luxurious and impressive home for the ICJ. In 1946, the ICJ was formed as an organ of the United Nations and took over where the Permanent Court of International Justice left off.⁷⁶ Two years later the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) was adopted by the U.N. General Assembly in December 1948.⁷⁷ Unlike the U.N.

70. *See id.*

71. *See id.*

72. *See id.*

73. *See id.*

74. *See id.*

75. *See id.*

76. *See* ARTHUR EYFFINGER, *THE INTERNATIONAL COURT OF JUSTICE 1946-1996* 98-99 (1996). The first sitting of the ICJ occurred on April 18, the same day the League of Nations and the Permanent Court of International Justice voted themselves out of existence. *Id.* at 99.

77. *Convention on the Prevention and Punishment of the Crime of Genocide*, *adopted* December 9, 1948, 78 U.N.T.S. 277 (entered into force January 12, 1951) [hereinafter

and the ICJ which both replaced international bodies that had existed prior to World War II, the Genocide Convention was a reaction to the horrible events of the war itself.

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)) is the 91st case to come before the ICJ since its founding,⁷⁸ and the second time the ICJ has been asked to adjudicate on the Genocide Convention. In 1951 the ICJ issued an Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crimes of Genocide.⁷⁹ In what Judge Stephen Schwebel, the current president of the ICJ, has called a "landmark opinion,"⁸⁰ the ICJ held that the Genocide Convention was "intended by the General Assembly and by the contracting parties to be definitely universal in scope."⁸¹

Unlike the case of Bosnia v. Yugoslavia, this earlier case was an advisory opinion only, and it wasn't until Bosnia filed its Application that jurisdiction was claimed under Article IX of the Genocide Convention.⁸² Under Article IX, "[d]isputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention . . . shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."⁸³

B. Orders for Provisional Measures - April 8 and September 13, 1993

1. Order of April 8, 1993

In its Application to the Court filed on March 20, 1993, Bosnia asked the ICJ to make numerous declarations, not all specifically re-

Genocide Convention]. The United States did not ratify the Genocide Convention until 1988, and then only subject to certain reservations, the first being that "before any dispute to which the United States is a party may be submitted to the jurisdiction of the International Court of Justice under [article IX of the Conventions], the specific consent of the United States is required in each case." U.S. Reservations and Understandings to the Genocide Convention, November 25, 1988, 28 I.L.M. 782.

78. See EYFFINGER, *supra* note 76, at 384.

79. 1951 I.C.J. 15 (May 28).

80. See Stephen M. Schwebel, *The Roles of the Security Council and the International Court of Justice in the Application of International Humanitarian Law*, 27 N.Y.U. J. INT'L L. & POL. 731, 734 (1995).

81. Reservations to the Convention, *supra* note 77, at 23.

82. Genocide Convention, *supra* note 77, Article IX.

83. *Id.*

lating to the Genocide Convention.⁸⁴ In addition to alleging violations of the Genocide Convention, Bosnia also asked the court to declare that Yugoslavia had violated the Geneva Conventions of 1949, the Hague Regulations on Land Warfare of 1907, the Universal Declaration of Human Rights, the United Nations Charter, and other principles of customary international law.⁸⁵ Further, Bosnia asked the ICJ to declare that under the circumstances, any Security Council resolutions relating to the former Yugoslavia should not be construed as preventing Bosnian self-defense and its right to acquire weapons from other states.⁸⁶ In light of the violations of the various treaties and customary law, Bosnia next asked to ICJ to order Yugoslavia to "cease and desist" such violations, specifically from acts such as "ethnic cleansing," mass rapes, destruction of communities and religious institutions, bombardment of civilian populations, the continuing siege of population centers, starvation of civilian populations, interference with delivery of humanitarian supplies, from all uses of force against, and violations of the sovereignty of Bosnia, and any support of those who were engaging in military actions against Bosnia.⁸⁷ Finally, the ICJ was asked to declare that Yugoslavia had to pay reparations to Bosnia for the damages it had inflicted.⁸⁸

In addition to the Application, Bosnia also requested that the Court immediately indicate various provisional measures which would be in effect while the Court was seized of the case.⁸⁹ The provisional measures requested were for Yugoslavia to stop the alleged violations and to stop providing aid to any group engaged in military actions against Bosnia, and that the Court declare that Bosnia should be allowed to procure arms for its self-defense.⁹⁰

In response to Bosnia's requests, Yugoslavia asked for provisional measures of its own, which in many respects mirrored Bosnia's. The measures asked that Bosnia be ordered to stop any actions aimed at Serbs living in Bosnia, that Bosnia disband prison camps, stop the destruction of Orthodox churches, observe a cease-fire agreed to on March 28, 1993, and cease the practice of "ethnic cleansing."⁹¹

On April 1 and 2, 1993, the Court heard oral observations from both sides dealing with the preliminary measures.⁹² In its Order the

84. *See* 1993 I.C.J. 3, 4-8 (Order of April 8, 1993).

85. *See id.* at 4-5.

86. *See id.* at 5-6.

87. *Id.* at 6-7.

88. *See id.* at 7.

89. *See id.* at 7-8.

90. *See id.* at 8.

91. *Id.* at 9-10.

92. *See id.* at 10.

Court noted that

... on a request for provisional measures the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, yet it ought not to indicate such measures unless the provisions invoked by the Applicant or found in the Statute appear *prima facie*, to afford a basis on which the jurisdiction of the Court might be established⁹³

Based on this understanding, the Court concluded that it could find a *prima facie* basis from the Genocide Convention.⁹⁴ It first noted that Article IX gave the Court jurisdiction to hear disputes relating to the application of the Convention.⁹⁵ Next it determined that both Bosnia and Yugoslavia had succeeded to the commitments of the former Socialist Federal Republic of Yugoslavia, which had been a signatory of the Genocide Convention.⁹⁶

Bosnia also presented as an additional basis for jurisdiction a letter to the President of the Arbitration Commission of the International Conference for Peace in Yugoslavia from the Presidents of Serbia and Montenegro.⁹⁷ In this letter, the Presidents stated that any legal disputes which could not be settled between the various former Yugoslav republics should be presented to the ICJ.⁹⁸ Bosnia maintained that this meant that any disputes between the former republics should be brought to the ICJ, but the Court disagreed. Instead, it interpreted the letter as only dealing with the specific disputes which were before the Arbitration Commission at that time.⁹⁹ As such, it could not be considered to rise to the level of a *prima facie* basis of jurisdiction.¹⁰⁰

Since the Court had established that the Genocide Convention was the only basis upon which its jurisdiction might be found, its next task was to determine what provisional measures it could indicate.¹⁰¹ After discussing the provisions of the Genocide Convention in light of the claims of both parties, the Court stated that "the circumstances require it to indicate provisional measures."¹⁰² But before laying out its order the court noted that

the decision given in the present proceedings in no way prejudices the

93. *Id.* at 11-12.

94. *See id.* at 16.

95. *See id.* at 14. For test of Article IX, *see supra* note 82 and accompanying text.

96. *See* 1993 I.C.J. 3 (Order of April 8, 1993), at 15-16.

97. *See id.* at 16-17.

98. *See id.* at 17.

99. *See id.* at 18.

100. *See id.*

101. *See id.* at 19.

102. *Id.* at 23.

question of the jurisdiction of the court to deal with the merits of the case, or any questions relating to the admissibility of the Application, or relating to the merits themselves, and leaves unaffected the right of the Governments of Bosnia-Herzegovina and Yugoslavia to submit arguments in respect of those questions.¹⁰³

Essentially the court was reassuring both sides that whatever decisions the court made regarding provisional measures, such decisions would not prejudice either party regarding the claims made at the merits.

The Court unanimously voted first (in paragraph 52 A(1)) that Yugoslavia should "take all measures within its power to prevent commission of the crime of genocide."¹⁰⁴ Next, by a vote of 13 to 1 (Judge Tarassov against) (paragraph 52 A (2)) the Court declared that Yugoslavia "should in particular ensure" that any military or paramilitary organization under its control or influence, or supported by it, "do not commit any acts of genocide" against Bosnian Muslims or anyone else.¹⁰⁵ Finally the Court, again voting unanimously (in paragraph 52 B), declared that both Yugoslavia and Bosnia "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."¹⁰⁶

Judge Tarassov stated in an appended Declaration to the Order that he voted against the second measure due to his fear that it would be construed as a pre-judgment of Yugoslavia's guilt, despite the courts earlier declaration that preliminary measures would not bias the merits of the case. He also dissented because he stated that Yugoslavia may not have control over all who claimed to be subject to it.¹⁰⁷

2. Order of September 13, 1993

Before long the ICJ found itself once again confronted with issues of provisional measures.¹⁰⁸ On July 27, 1993, four months after the filing of the Application and its requests for provisional measures, Bosnia filed a second request for provisional measures which was based upon the facts alleged in the original request, as well as a few new allegations.¹⁰⁹ Once again Bosnia asked that the Court immediately order Yugoslavia to stop providing any type of support to any groups in Bos-

103. *Id.*

104. *Id.* at 24 (paragraph 52 A (1)).

105. *Id.* (paragraph 52 A (2)).

106. *Id.* (paragraph 52 B).

107. *See id.* at 26-27.

108. 1993 I.C.J. 325 (Order of September 13, 1993).

109. *See id.* at 332.

nia, that Bosnia be allowed to buy weapons, ammunitions and supplies from other nations to facilitate its self-defense, and that other nations be allowed to provide such aid.¹¹⁰ The new requests were that all Yugoslavian officials, “especially the President of Serbia, Mr. Slobodan Milosevic” stop any plans to acquire any territory in Bosnia, that the Court declare that all contracting parties to the Genocide Convention have an “obligation” to prevent Genocide in Bosnia, and that United Nations Peace-Keeping Forces must “do all in their power” to get humanitarian aid to the people of Bosnia.¹¹¹

Once again Yugoslavia countered with its own request, asking the Court to order Bosnia “to take all measures within its power to prevent commission of the crime of genocide against the Serb ethnic group.”¹¹² Before hearings occurred on August 25 and 26, 1993, the two sides were allowed to appoint judges ad hoc as they did not have representation on the Court.¹¹³ Bosnia choose Elihu Lauterpacht to represent it, and Yugoslavia appointed Milenko Kreca.¹¹⁴

Yugoslavia again objected to Bosnia’s standing before the Court, but the ICJ rejected that contention as having been previously settled in its Order of April 8.¹¹⁵

The Court next turned its attention to examining the various additional basis of jurisdiction presented by Bosnia to determine if any of them established the required prima facie evidence of jurisdiction.¹¹⁶ Bosnia presented the Court with a 1919 Treaty signed by the Kingdom of the Serbs, Croats and Slovenes,¹¹⁷ the letter to the President of the Arbitration Commission presented in its previous request,¹¹⁸ and various customary and conventional laws of war such as the Geneva Conventions, the Hague Regulations on Land Warfare, and the Nuremberg Charter, Judgment, and Principles.¹¹⁹ The Court rejected each of these as not having been shown to provide any basis of a prima facie case upon which provisional measures could be based.¹²⁰

110. *See id.* at 332-333.

111. *Id.*

112. *Id.* at 334.

113. *See id.* at 335.

114. *See id.*

115. *See id.* at 337.

116. *See id.* at 339.

117. *See id.* The full name was the 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, on the Protection of Minorities, signed Sept. 10, 1919.

118. *See* 1993 I.C.J. 325, 340-41 (Order of September 13). *See also supra* notes 99-100 and accompanying text.

119. *See* 1993 I.C.J. 325 (Order of September 13) at 341.

120. *See id.* at 340-41.

Bosnia also asked the Court to find jurisdiction based on Yugoslavia's own requests for provisional measures, some of which Bosnia claimed went beyond the scope of the Genocide Convention.¹²¹ The Court also rejected this basis noting that subsequent requests had all stayed within the limits of the Genocide Convention, and further that Yugoslavia had constantly denied that the Court has jurisdiction on any basis including the Convention.¹²² Under such circumstances the Court said Yugoslavia's actions cannot be interpreted as an unequivocal and voluntary acceptance of the Court's jurisdiction.¹²³ The Court concluded that only the Genocide Convention had been shown to provide a *prima facie* case basis for jurisdiction.¹²⁴

In filing a second request for provisional measures, Bosnia had to show that those further measures requested were necessary for the protection of a legal right.¹²⁵ However, the Court determined that only one of the eight legal rights which Bosnia sought to be protected was based on the Genocide Convention, "the right of the People and State of Bosnia and Herzegovina to be free at all times from genocide and other genocidal acts perpetrated upon Them by Yugoslavia (Serbia and Montenegro), acting together with its agents and surrogates in Bosnia and elsewhere."¹²⁶ Therefore, only measures aimed at this right would be considered.¹²⁷

The Court determined first that those measures which sought to allow or require other nations or entities to provide weapons and supplies to Bosnia, or which were directed to Bosnia's right to receive such weapons and supplies were essentially attempts to have the Court clarify the role of outside parties and as such were beyond the scope of the Genocide Convention.¹²⁸ Further, the Court determined that requests aimed at protecting Bosnia's physical territory were not within the scope of the Genocide Convention which was aimed at protecting people, not territory.¹²⁹ Finally, in examining the last remaining request, that Yugoslavia stop supporting in any manner to any groups or individuals in Bosnia, the Court found that it was nearly identical to measures requested in Bosnia's first request, except that it was broader in scope.¹³⁰ However, inasmuch as this request did not specifically invoke the Geno-

121. *See id.* at 341.

122. *See id.*

123. *See id.* at 341-42.

124. *See id.* at 342.

125. *See id.* at 344.

126. *See id.* at 343.

127. *See id.* at 344.

128. *See id.* at 344-45.

129. *See id.* at 345-46.

130. *See id.* at 346.

cide Convention, it was outside the legal scope.¹³¹

In response to Yugoslavia's request that Bosnia be ordered to prevent the genocide of Serbs, the Court did find that the request was directly connected to the Genocide Convention, but that it had already been met by the Order of April 8 and as the circumstance had not changed, there was no need for more specific measures.¹³²

In concluding its examination of the requests of the two parties, the Court made known its frustration at the continued genocidal actions taking place in Bosnia.¹³³ Despite its Order of April 8, the Court noted that "great suffering and loss of life has been sustained by the population of Bosnia-Herzegovina in circumstances which shock the conscience of mankind."¹³⁴ The Court was clearly frustrated at the continued fighting taking place, despite numerous Security Council Resolutions condemning the ethnic cleansing and other violations of international law, which only aggravated the dispute before it.¹³⁵ It flatly stated that it was "not satisfied that all that might have been done has been done to prevent commission of the crime of genocide."¹³⁶ The Court concluded that what was required was not new indications of provisional measures, but simply an adherence to the ones already in place.¹³⁷ It therefore voted again on the operative paragraphs from its Order of April 8.¹³⁸ First, by a vote of 13 to 2, the Court reaffirmed paragraph 52 A (1), next, by a vote of 13 to 2, it reaffirmed paragraph 52 A (2) and finally, by a 14 to 1 vote, the Court reaffirmed paragraph 52 B.¹³⁹ Judge Tarassov changed his vote in favor on the first order to an against vote, and Judge ad hoc Kreca, voted against each one.¹⁴⁰

While no judges had done so with the Order of April 8, a number of them did attach opinions to this Order. One issue of interest to the various judges was whether or not provisional measures are legally binding. In his Separate Opinion, Judge Shahabuddeen took the view that they need not be found to be legally binding in order to impart a duty on a party.¹⁴¹ He expressed the opinion that a provisional measure is essentially a "judicial finding" and "any non-implementation, even if not in breach of a legal obligation, represents an inconsistency with that

131. *See id.*

132. *See id.* at 346-47.

133. *See id.* at 347-49.

134. *Id.* at 348.

135. *See id.*

136. *Id.* at 348-49.

137. *See id.* at 349.

138. *See Id.* at 349-50. *See supra*, notes 104-06 and accompanying text for specifics of these paragraphs.

139. 1993 I.C.J. 325 (Order of September 13) at 349-50.

140. *Id.* at 349-50.

141. *See id.* at 367 (Separate Opinion of Judge Shahabuddeen).

judicial finding.”¹⁴² While he admitted that the Court had no power to penalize non-implementation (which he felt Yugoslavia was guilty of), he did think the Court should consider such factors when presented for requests by the non-implementing party (in this case Yugoslavia), and that “it would not be correct” to act upon requests for measures by such parties.¹⁴³

Judge Weeramantry felt it was important to distinguish the question of whether provisional measures were legally binding from the question of enforcement.¹⁴⁴ He was of the opinion that the question of enforceability was secondary to that of validity.¹⁴⁵ It is clear in reading Judge Weeramantry's opinion that he did indeed view the question of whether such orders are binding as one “whose importance transcends the matter presently before the Court, important though it be.”¹⁴⁶ After examining various sources for an answer to this question, Judge Weeramantry concluded that the provisional measures did impose a legal obligation, and that this was especially important as the issues before the Court touched upon “the very existence of a people.”¹⁴⁷ Anything short of such an understanding would be “out of tune with the letter and spirit of the Charter and the Statute.”¹⁴⁸

Faced with non-compliance of the parties as to the first indications of provisional measures, Judge Ajibola asked, “Must the Court make orders in vain?”¹⁴⁹ He felt that the first Order of April 8 had not been complied with,¹⁵⁰ but found the question of its binding effect to be a difficult one.¹⁵¹ Nevertheless, he agreed with Judge Weeramantry's conclusion that they were binding, for “[l]ogic and common sense would consider it ridiculous and absurd for the Court to be unable to preserve the rights of the parties pending the final judgment.”¹⁵² After all, he reasoned, if the Court could not issue binding orders for such measures, the Court would not have been given such power in the first place by the Statute and Rules of the Court.¹⁵³ As to enforceability, he pointed out that the Court relies on the Security Council to ensure enforcement.¹⁵⁴ Ultimately, he stated that the order “should be binding and

142. *Id.*

143. *Id.* at 368.

144. *See id.* at 374 (Separate Opinion of Judge Weeramantry).

145. *See id.*

146. *Id.* at 374.

147. *Id.* at 380.

148. *Id.*

149. *Id.* at 394 (Separate Opinion of Judge Ajibola).

150. *See id.*

151. *Id.* at 397.

152. *Id.* at 399.

153. *See id.* at 400.

154. *See id.* at 401.

enforceable, otherwise, *ab initio*, there may be a good and reasonable ground to question its being issued at all.”¹⁵⁵

Judge Tarassov dissented because of his view that it was dangerous to impute responsibility to one nation for the acts of an ethnically homogenous group residing in another nation.¹⁵⁶ By his negative votes, he reaffirmed the apprehensions he had felt when the first request was presented in Bosnia’s Application.¹⁵⁷ He felt the Court should have made reference to the need of both parties to achieve a peace agreement at negotiations in Geneva.¹⁵⁸

Judge ad hoc Lauterpacht wrote a Separate Opinion in which he carefully addressed and defended the merits of each and every measure requested by Bosnia, as well as the various claims for jurisdiction presented by Bosnia.¹⁵⁹ His approach to the case was laid out early in his Opinion: “[T]he circumstances call for a high degree of understanding of, and sensitivity to, the situation and must exclude any narrow or overly technical approach to the problems involved.”¹⁶⁰

Judge ad hoc Kreca, for his part, took the opportunity to attack the Order of April 8 upon which the current Order was based.¹⁶¹ Judge ad hoc Kreca felt that the request failed to meet the qualifications of the definition of “people” in the Genocide Convention.¹⁶² He pointed out that Bosnia as a nation was actually a mix of ethnic communities, and as such was not a homogeneous people which could claim to fall under the Genocide Convention.¹⁶³ He further disagreed with the Court over the existence of any facts which would be the basis for provisional measures or jurisdiction.¹⁶⁴

Rather than granting Bosnia any new provisional measures, the Court only voted to re-affirm the Order it had rendered on April 8, 1993. Considering that the Court seemed to recognize that the earlier Order did not have the desired effect, it is hard to understand how the Court expected it to change the situation this time around. The case dragged on for another three years before the Court determined that it had jurisdiction to hear the case at all. It was during this time that Srebrenica fell. The provisional measures had no effect on the thousands who died in the aftermath of the town’s end.

155. *Id.* at 406.

156. *See id.* at 449 (Dissenting Opinion of Judge Tarassov).

157. *See id.* *See also supra* note 107 and accompanying text.

158. *See* 1993 I.C.J. 325 (Order of September 13) at 451.

159. *See id.* at 407-48 (Separate Opinion of Judge Lauterpacht).

160. *Id.*

161. *See id.* at 453.

162. *See id.* at 454.

163. *See id.*

164. *See id.* at 457-58.

C. Jurisdiction - July 11, 1996

Following the pair of Orders for the indication of provisional measures, the Court granted the parties a series of extensions for the filing of Bosnia's Memorial and Yugoslavia's Counter-Memorial.¹⁶⁵ However, by an Order of July 14, 1995¹⁶⁶, the proceedings on the merits were suspended when Yugoslavia filed preliminary objections relating to the admissibility of the Application and to the jurisdiction of the Court.¹⁶⁷ Bosnia was given until November 14, 1995 to present its observations and statements concerning Yugoslavia's objections.¹⁶⁸ After Bosnia filed its statement, Yugoslavia submitted to the Court the text of the General Framework Agreement for Peace in Bosnia and Herzegovina ("Dayton-Paris Agreement").¹⁶⁹ Nearly four months after the uneasy peace agreement had been signed, public hearings were held on Yugoslavia's Objections between April 29 and May 3, 1996.¹⁷⁰

After presenting Bosnia's requests as stated in its Memorial,¹⁷¹ the Court laid out seven preliminary objections argued by Yugoslavia.¹⁷² They first attacked the jurisdiction of the court over the case (as well as the date at which any possible jurisdiction would have begun to run) and next they attacked the admissibility of Bosnia's Application in the first place.¹⁷³ These objections altered slightly in form at oral arguments, specifically with Yugoslavia dropping one of its objections to admissibility and expanding on its arguments concerning when any ju-

165. See 1993 I.C.J. 470 (Order of October 7, 1993) (stating that at the request of Bosnia, it was given a six month extension for the filing of its Memorial to be due on April 15, 1994, and thus extending to 15 April 1995 the time-limit for the filing of a Counter-Memorial by Yugoslavia) and 1995 I.C.J. 80 (Order of March 21, 1995) (stating that at the request of Yugoslavia, over objections by Bosnia, the time-limit for the filing of Yugoslavia's Counter-Memorial was extended to June 30, 1995).

166. 1995 I.C.J. 279, 279-80 (Order of July 14, 1995).

167. See *id.*

168. See *id.*

169. See Judgment of July 11, 1996 (visited Sept. 2, 1997) <<http://www.law.cornell.edu/icj/icj4/judgment.htm>>, paragraphs 9 and 10. The Dayton-Paris Agreement was initialed in Dayton, Ohio on November 21, 1995, and signed in Paris on December 14.

170. See Judgment of July 11, 1996, *supra* note 169, at paragraph 12.

171. See *id.* at para. 14 (On Behalf of the Government of Bosnia-Herzegovina, in the Memorial). Bosnia presented seven requests to the Court, the first five all asking for the ICJ to adjudge and declare that Yugoslavia was in some manner guilty of violations of the Genocide Convention, the sixth called upon Yugoslavia to restore the situation which existed before the violations occurred, and the seventh asked to ICJ to require Yugoslavia to pay reparations to Bosnia for "damages and losses caused." *Id.* Bosnia also reserved the right to invoke other basis of jurisdiction should Yugoslavia challenge the Genocide Convention as grounds for jurisdiction. See *id.*

172. See *id.* at para. 14 (On Behalf of the Government of Yugoslavia, in the preliminary objections).

173. See *id.*

risdiction that may be found in the Genocide Convention would begin.¹⁷⁴

1. Jurisdiction Issues

The ICJ first tackled the issue of whether the two parties were bound by the Genocide Convention. Yugoslavia was bound, the Court said, because of its indications to the international community and to the United Nations that it would assume all the treaty obligations of the Socialist Federal Republic of Yugoslavia.¹⁷⁵ Additionally, since Yugoslavia had never contested that *it* was a party to the Genocide Convention, it was therefore bound by the provisions therein.¹⁷⁶

The larger question presented by Yugoslavia's objections was whether Bosnia was a party to the Convention. The Court determined that Bosnia was for two reasons. First, as Bosnia had given to the Secretary-General of the U.N. a Notice of Succession which was accepted by the Secretary-General as a valid succession by a recognized member state, it had legally succeeded to the treaty.¹⁷⁷ Second, by way of being accepted as a member of the United Nations, Bosnia may have been entitled to "automatic succession."¹⁷⁸ The Court concluded that in either case it was clear that as of the filing of the Application on March 20, 1993, Bosnia was a party to the Convention.¹⁷⁹

This determination led the Court to examine Yugoslavia's contentions that even if Bosnia was considered a party to the Genocide Convention, any actions taken under the Convention would be limited to after Bosnia became a party.¹⁸⁰ Yugoslavia argued that Article XIII of the Convention required a 90 day wait period before accession would be final, which would put the date at March 29 (90 days after Bosnia gave its Notice on December 29, 1992).¹⁸¹ Essentially, Yugoslavia was saying that Bosnia was not a party to the Convention until *after* it had submitted its Application, and therefore the Application was invalid. The Court replied that Article XIII did not matter since Bosnia was determined to have become a party through succession.¹⁸² Further, even if it

174. *See id.* at para. 15 (On Behalf of the Government of Yugoslavia, At the hearing on 2 May 1996). Another interesting change was that in the written objections Yugoslavia referred to Bosnia as the "so-called Republic of Bosnia-Herzegovina," but in the oral arguments they dropped this caveat and referred simply to "Bosnia-Herzegovina." *Compare* para. 14 *with* para. 15.

175. *See id.* at para. 17.

176. *See id.*

177. *See id.* at paras. 18-20.

178. *Id.* at para. 21.

179. *See id.* at para. 23.

180. *See id.* at para. 24.

181. *See id.* at para. 24.

182. *See id.*

was the case that Bosnia was not actually a party until March 29, that would only mean that the Application was a few days early, a problem which Bosnia could have at any time remedied.¹⁸³ The Court said it would not penalize a party to a dispute over a minor procedural error which could have been easily remedied.¹⁸⁴

Yugoslavia's fifth objection claimed that as the conflicts in Bosnia were domestic in nature, there was not international dispute, and that Article IX of the Genocide Convention¹⁸⁵ did not apply to issues of state responsibility.¹⁸⁶ The Court dismissed the first part of this objection by pointing out that Yugoslavia's part in the genocide was exactly what was at dispute and such arguments belonged to the merits of the case.¹⁸⁷ As to the second part of this objection, the Court disagreed with Yugoslavia's interpretation of Article IX of the Genocide Convention and determined that it conferred jurisdiction not only to issues dealing with a state's obligation to prevent and punish crimes of genocide, but also to acts of genocide committed by the state or its subsidiaries¹⁸⁸.

Yugoslavia had also argued that if the court were to find jurisdiction based on the Genocide Convention, it could only deal with events that occurred after the Convention became binding on the parties.¹⁸⁹ However, the Court determined that since there was no indication in the Convention of a limit to its jurisdiction *ratione temporis*, and no such reservations were presented in the Dayton-Paris Agreement, its jurisdiction extended to the beginning of the conflicts in Bosnia.¹⁹⁰

Finally, the Court addressed the various additional bases of jurisdiction presented by Bosnia.¹⁹¹ These were essentially the same bases which the Court had rejected as not presenting a *prima facie* basis for jurisdiction in the Orders of April 8 and September 13, 1993, regarding provisional measures.¹⁹² The Court again rejected them as being a bases of any jurisdiction, and concluded that only the Genocide Convention would apply in this case.¹⁹³

183. *See id.*

184. *See id.* at para. 26.

185. For text of Article IX, *see supra* note 82 and accompanying text.

186. *See* Judgment of July 11, 1996, *supra* note 169 at para. 29.

187. *See id.* at para. 31.

188. *See id.* at para. 32.

189. *See id.* at para. 34.

190. *See id.*

191. *See id.* at para. 35.

192. *See id.* at paras. 37-39. *See also supra* notes 97-100, 116-120 and accompanying text for ICJ's treatment of these bases in its Orders of April 8 and September 13, 1993.

193. *See* Judgment of July 11, 1996, *supra* note 169, at para. 41.

2. Admissibility of the Application

Having rejected Yugoslavia's objections to the jurisdiction of the Court, the ICJ could then turn to the objections based on the admissibility of the Application.¹⁹⁴ The first of these dealt with Yugoslavia's contention that the complaint dealt only with actions that occurred during a civil war which it was not a part of.¹⁹⁵ However, the Court pointed out that this was part of the dispute to be resolved on the merits, and therefore rejected this objection for the same reason it had rejected Yugoslavia's fifth objection.¹⁹⁶

Yugoslavia's second objection maintained that Bosnian President Alija Izetbegovic was not the legal president at the time of the filing and as such could not have authorized the filing of the Application.¹⁹⁷ The Court dismissed this by pointing out that Izetbegovic was recognized as the Head of State by the United Nations as well as the Dayton-Paris Agreement, and as such was presumed under international law to be able to act on behalf of his country.¹⁹⁸ Therefore the Application was admissible.¹⁹⁹

3. Votes and Attached Opinions

The Court voted 14 to 1 to dismiss the preliminary objections relating to the admissibility of the Application (Judge ad hoc Kreca voting against).²⁰⁰ The vote was 11 to 4 to dismiss the fifth preliminary objection relating to jurisdiction (Judges Oda, Shi, Vereshchetin and Judge ad hoc Kreca voting against).²⁰¹ Next, by 14 to 1 the Court voted to dismiss the preliminary objections relating to the start of jurisdiction under the Genocide Convention (Judge ad hoc Kreca voting against).²⁰² The Court then found that it did have jurisdiction to hear the dispute based on the Genocide Convention by a vote of 13 to 2 (Judge Oda and Judge ad hoc Kreca against), and by 14 to 1 it dismissed the additional bases of jurisdiction presented by Bosnia (Judge ad hoc Lauterpacht against).²⁰³ Finally, by 13 to 2, the Court found Bosnia's Application to

194. *See id.* at para. 42.

195. *See id.* at para. 43.

196. *See supra* notes 186-87 and accompanying text.

197. *See id.* at para. 44.

198. *See id.*

199. *See id.*

200. *See id.* at para 47.

201. *See id.*

202. *See id.*

203. *See id.*

be admissible (Judge Oda and Judge ad hoc Kreca against).²⁰⁴

Much as Judge ad hoc Lauterpacht had proceeded to comment in detail on each of Bosnia's requests for provisional measures and Bosnia's claimed bases of jurisdiction in his Separate Opinion to the Order of September 13,²⁰⁵ Judge ad hoc Kreca wrote an extensive Dissenting Opinion in which he examined and supported each of Yugoslavia's preliminary objections in detail.²⁰⁶ Judge ad hoc Lauterpacht amended a Declaration stating as he had thought Bosnia's claims for additional basis for jurisdiction presented a prima facie case in his Separate Opinion of September 13, he found no reason to believe that they were not valid still.²⁰⁷

Judges Shi and Vereshchetin wrote a Joint Declaration to explain why they voted against the dismissal of the fifth preliminary objection concerning jurisdiction.²⁰⁸ While they agreed that the Court had jurisdiction over cases dealing with the Genocide Convention, they felt that the Convention should be properly understood at affecting individual acts, not state acts.²⁰⁹ Therefore they felt there was not a dispute which the Convention could address.²¹⁰ Judge Oda expressed a similar viewpoint in his Declaration.²¹¹ He also felt that the Genocide Convention was aimed at preventing actions by individuals, not by states, and he felt that this prevented the Court from exercising jurisdiction as well as making the Application inadmissible.²¹² He did add, however, that his vote on this matter would not prejudice the position he might take on the merits.²¹³

Judge Shahabuddeen's Separate Opinion explained his views on the issues of treaty succession and *forum prorogatum*.²¹⁴ Judge Parra-Aranguren wrote his to express his opinion that in its request for provisional measures Yugoslavia had admitted that Bosnia was a party to

204. *Id.*

205. *See supra*, notes 159-60 and accompanying text.

206. *See* Dissenting Opinion of Judge ad hoc Kreca (visited October 2, 1997) <<http://www.law.cornell.edu/icj/icj4/kreca.htm>>. Printed off of the internet, his Dissent filled standard ninety standard 8 1/2 by 11 inch pages.

207. *See* Declaration of Judge ad hoc Lauterpacht (visited October 2, 1997) <<http://www.law.cornell.edu/icj/icj4/lauterpa.htm>>. *See also supra*, notes 159-60 and accompanying text.

208. *See* Joint Declaration of Judge Shi and Judge Vereshchetin (visited October 2, 1997) <<http://www.law.cornell.edu/icj/icj4/shiver.htm>>.

209. *See id.*

210. *See id.*

211. *See* Declaration of Judge Oda (visited October 2, 1997) <<http://www.law.cornell.edu/icj/icj4/oda.htm>>.

212. *See id.*

213. *See id.*

214. *See* Separate Opinion of Judge Shahabuddeen (visited October 2, 1997) <<http://www.law.cornell.edu/icj/icj4/shaha.htm>>.

the Genocide Convention and that he would have put more emphasis on the proper manner in which Bosnia succeeded to the Convention due to the Convention's humanitarian nature.²¹⁵ Judge Weeramantry also addressed the issue of automatic succession to treaties in his Separate Opinion.²¹⁶

Many legal issues were dealt with in the Court's Judgment concerning Yugoslavia's preliminary measures. Yet however important or interesting those issues were, they were not helpful to those suffering the genocide. The Judgment came on July 11, 1996, exactly one year to the day after Srebrenica's Muslim inhabitants and their UN protectors had to abandon the town. Was this on the mind of the Court when it handed down its decision? Was the war on their minds as they approved the various requests for extensions (by both sides it should be noted) to the time-limits? Nevertheless, the Court was finally ready to proceed to the merits of the case, the end almost seemed in sight.

D. Counter-Claims - December 17, 1997

On July 22, 1997 Yugoslavia presented its Counter-Memorial to the ICJ within the time-limit the Court had given it.²¹⁷ Included in its Counter-Memorial were various counter-claims which Yugoslavia asked the Court to adjudge and declare.²¹⁸ The Counter-Memorial first asked that the Court declare that no acts punishable by the Genocide Convention had occurred as either the acts alleged had not happened, or there was no intention of committing genocide, and/or no acts had been aimed at individuals just because of their ethnic or religious affiliation.²¹⁹ Second, it asked that the Court reject all of Bosnia's claims since the alleged acts of genocide were not committed by any organ of Yugoslavia, nor in Yugoslav territory, nor at the order of Yugoslavia.²²⁰ Third, it asked that Bosnia be held responsible for acts of genocide against Bosnian Serbs as a violation of the Genocide Convention.²²¹ Fourth, it asked that the Court declare that Bosnia has an obligation to punish

215. See Separate Opinion of Judge Parra-Aranguren (visited October 2, 1997) <<http://www.law.cornell.edu/icj/icj4/parra.htm>>.

216. See Separate Opinion of Judge Weeramantry (visited October 2, 1997) <<http://www.law.cornell.edu/icj/icj4/weeraman.htm>>.

217. See Order of December 17, 1997, at para. 5 (visited January 15, 1998) <<http://www.icj-cij.org/idoCKET/ibhy/ibhyorders/ibhyorder971217.html>>.

218. See *id.*

219. *Id.*

220. *Id.*

221. *Id.* Yugoslavia gave numerous examples of the genocide it claimed, including the texts of Bosnian newspapers, one of which printed the following song: "Dear mother, I'm going to plant willows, / We'll hand Serbs from them. / Dear mother, I'm going to sharpen knives, / We'll soon fill pits again." *Id.*

those responsible for acts of Genocide.²²² Fifth, the Court was asked to declare that Bosnia must take "necessary measures" so that such "acts would not be repeated in the future."²²³ And Sixth, it requested that Bosnia be ordered to eliminate all consequences of the violations and "provide adequate compensation."²²⁴

When Bosnia objected to the counter-claims of Yugoslavia, both sides were asked to present written observations on the issue to the Court.²²⁵ Bosnia requested that the portion of the Counter-Memorial which constituted counter-claims be dismissed as they were not "directly connected . . . with the subject-matter of the initial proceedings" as was required by Article 80 of the Rules of the Court.²²⁶ Bosnia claimed that if Yugoslavia wanted to institute proceedings, it should file an application through normal channels.²²⁷ Yugoslavia replied that the counter-claims arose from the same general facts and were founded on the same jurisdiction, i.e. the Genocide Convention,²²⁸ and therefore "the counter-claim is directly connected with the subject-matter of the claim."²²⁹

The Court observed that while a claim should normally be made by means of an application, certain claims are allowed to be introduced as incidental proceedings in order to "ensure better administration of justice."²³⁰ The Rules of the Court did not define what was meant by "directly connected," and therefore the Court determined it was up to its "sole discretion" based on "the particular aspects of each case" to determine the answer.²³¹ The Court concluded that since Yugoslavia would be relying on the same facts under the Genocide Convention as Bosnia, the counter-claims were directly connected and as such were admissible.²³²

The vote was 13 to 1 in favor of allowing the counter-claims and setting up a time-frame for Bosnia to reply to them and Yugoslavia then to submit a rejoinder (Judge Weeramantry against).²³³

Judge ad hoc Kreca wrote a Declaration in which he expressed concern that when viewed simply as a counter-claim, the claims put forth

222. *Id.*

223. *Id.*

224. *Id.*

225. *See id.* at paras. 6-25.

226. *Id.* at para. 10.

227. *See id.* at para. 16.

228. *See id.* at para. 18.

229. *Id.* at para. 24.

230. *Id.* at para. 30.

231. *Id.* at para. 33.

232. *See id.* at paras. 34, 37.

233. *Id.* at para. 43.

by Yugoslavia would therefore be considered "a secondary claim."²³⁴ He did not like the assumption which might arise that Bosnia's claim would be looked to as the "principle claim," or the more important claim.²³⁵ Rather, he would view Yugoslavia's claim as a rival claim, putting the parties in comparable positions to those involved in a territorial dispute.²³⁶

Judge Koroma submitted a Separate Opinion detailing his frustration that by approving the counter-claims, the Court was extending further a case which had already lasted too long.²³⁷ As he noted, this case involved "allegations of grave breaches of the Genocide Convention and other massive violation[s] of human rights."²³⁸ While he agreed that the counter-claims were admissible, he wished that the Court could have taken action to speed up the process so as to not "appear to compromise the proper administration of justice."²³⁹

Judge ad hoc Lauterpacht, while voting with the Court and seemingly against the party that appointed him, wrote in his Separate Opinion that he felt both parties should have been given the opportunity to present oral arguments.²⁴⁰ He also voiced his opinion that the Court could have "exercised its discretion in the present case by declining to join the otherwise admissible counter-claims to the principal claims."²⁴¹ Nevertheless, despite his reluctance to "see the complexity of this case magnified" by adding the counter-claims, he felt there was no other satisfactory solution.²⁴²

Weeramantry, now Vice-President Weeramantry, focused on three areas in his dissent: 1) the meaning of "counter-claim", 2) the Courts discretion to accept a counter-claim, and 3) involvement of third states due to the counter-claim.²⁴³ On the first issue, he stressed that a counter-claim must actually *counter* the original claim, and further, that such claims are not accepted under criminal law.²⁴⁴ Since genocide is a crime against humanity, counter-claims are not appropriate when examining such an issue.²⁴⁵ As to the second issue, Vice-President Weeramantry echoed his colleague Judge Koroma by maintaining that the Court could have used its discretion to deny the counter-claims as a

234. *Id.* at para. 1 (Declaration of Judge ad hoc Kreca).

235. *Id.*

236. *Id.*

237. *See id.* at Separate Opinion of Judge Koroma.

238. *Id.*

239. *Id.*

240. *See id.* at para. 2, Separate Opinion of Judge ad hoc Lauterpacht.

241. *Id.* at para. 19.

242. *Id.* at para. 22.

243. *Id.* at Dissenting Opinion of Vice-President Weeramantry.

244. *See id.* at (a) - The meaning of the Term "Counter-Claim."

245. *See id.*

means of moving towards a conclusion to the case.²⁴⁶ However, Weeramantry would have used such discretion where Koroma in the end did not.²⁴⁷ Finally, the Vice-President expressed his concern that the counter-claims might lead to the necessity of involving Croatia in the case which could cause further delays.²⁴⁸ Due to these considerations which he believed "would have been more in accordance with legal principle and practical convenience," Vice President Weeramantry would have proceeded to the completion of the Application, allowing Yugoslavia to take advantage of its right to file a separate application of its own at a later time.²⁴⁹

E. Current Status - January 22, 1998 to ?

As its deadline approached for submitting a Reply to Yugoslavia's Counter-Claims, Bosnia asked for an extension.²⁵⁰ The Court granted Bosnia's request with no objections from Yugoslavia, and by an Order on January 22, 1998, it extended to April 23, 1998 the time-limit for Bosnia to file its Reply, and to January 22, 1999 the time-limit for Yugoslavia to file its Rejoinder.²⁵¹ While the case has moved on to the merits, there is no indication that this stage of the proceedings are in any way close to reaching a conclusion.

IV - HISTORY SINCE INDEPENDENCE

Prior to the filing of Bosnia's Application in March of 1993, the war had progressed steadily. Over the course of the five years since the case had been before the ICJ, the war in Bosnia continued until an uneasy peace was finally established under the Dayton-Paris treaty. This next section will review the course of the war during the course of the case.

By May of 1992 the Serbs had gained control of about sixty percent of the Bosnia.²⁵² As town after town fell and people were forced to flee, a pattern began to emerge.²⁵³ First roadblocks manned by YPA troops would appear around town, followed by a warning for Serb inhabitants to evacuate.²⁵⁴ As soon as they left, the remaining Muslims and Croats found themselves subject to heavy artillery fire, occasionally from posi-

246. *See id.* at (b) - The Discretion of the Court.

247. *See id.*

248. *See id.* at (c) - The Involvement of a Third State.

249. *See infra* at Conclusion.

250. *See* Order of January 22 (visited February 5, 1998) <<http://www.icj-cij.org/idocket/ibhy/ibhyorders/ibhyorder980122.html>>.

251. *See id.*

252. HONIG & BOTH, *supra* note 25, at 73.

253. *See id.*

254. *See id.*

tions across the border.²⁵⁵ The townspeople left would thereby be forced into hiding for hours or days, until they were "softened up sufficiently by the [YPA]'s artillery, [and] paramilitary groups would move in."²⁵⁶

It seems that these paramilitary groups were effectively run by the Serbian government, even though they were not directly linked to Belgrade.²⁵⁷ Even some Serb government officials, perhaps wanting some credit, emphasized that the paramilitaries could not function without Serbian support.²⁵⁸ This seems confirmed by the fact that logistically they had to be supplied by Yugoslavia or else they would have run out of ammunition and weapons.²⁵⁹ As towns and villages were overrun by the Serbs, detention camps were set up to house the prisoners, and according to one U.N. report, the primary purpose of these camps was the permanent removal of anyone in a leadership position.²⁶⁰

By the end of May 1992 the lines seem to stabilize and did not change much until the summer of 1995.²⁶¹ In western Bosnia only a few pockets remained outside the control of the Serbs, including Gorazde, Srebrenica and Zepa.²⁶² Over the summer and into autumn people began fleeing the Serb controlled areas as they methodically "cleansed" their new holdings, and by the end of the year about two million people were refugees.²⁶³

Srebrenica was one area that fought back.²⁶⁴ While they held onto an enclave around their town, they were soon faced with another problem, they were cut off from the world and needed humanitarian assistance badly.²⁶⁵ The fighters in Srebrenica, led by twenty-five year old Naser Oric, who, ironically, had been a bodyguard to Serbian President Milosevic, continued to do as much damage to the Serbs as possible, and were responsible for many brutal counter-attacks.²⁶⁶ Soon, however, outside help was needed and it came in the form of French General

255. *See id.*

256. *Id.* at 73-74.

257. *See id.* at 75.

258. *See id.*

259. *See id.*

260. *See* Final report of the United Nations Commission of Experts established pursuant to Security Council Resolution 780 (1992), para. 175, *quoted in* HONIG & BOTH, *supra* note 25, at 76-77. The report also referred to these camps as "concentration camps," a name which conjures up images of Hitler's Holocaust. *Id.*

261. *See id.* at 77.

262. *See id.*

263. *Id.* This number was nearly half the population of Bosnia and was mostly Muslim. *Id.*

264. *See id.* at 77-79.

265. *See id.* at 79-80.

266. *See id.* at 77-81. He led an attack on the Serbs on Orthodox Christmas that reportedly left over a hundred soldiers and civilians dead in the town of Kravica. *Id.* at 81.

Philippe Morillon, UNPROFOR commander for Bosnia.²⁶⁷ Fearing for the safety of over 60,000 civilians packed into the small town of Srebrenica, on March 11, 1993, General Morillon made his way into the town without permission from his own superiors back in New York.²⁶⁸ While he was in Srebrenica, the shelling had stopped, and when he tried to leave the next day he was surrounded by the women and children of the town begging him to stay.²⁶⁹ Finally the French General gave up trying to leave and proclaimed to all "You are now under the protection of the United Nations . . . I will never abandon you."²⁷⁰

His actions that day led to the creation of the first U.N. "safe area," in Srebrenica and approximately thirty square miles around it when the Security Council passed Resolution 819 on April 16.²⁷¹ The Security Council's action came just in time, Srebrenica had been facing increased attacks and was near surrender.²⁷² The next month the Security Council adopted Resolution 824 which extended the safe-area concept to Sarajevo, Zepa, Tuzla, Gorazde and Bihac.²⁷³

Putting a safe area into place proved to be difficult. At first 34,000 troops were called for, but soon that number was down to some 7,600 troops.²⁷⁴ Finding nations who were willing to provide the troops proved to be difficult as well,²⁷⁵ but finally the Dutch agreed to take on the job and on March 3, 1994, Dutch forces began to replace the approximately 140 Canadian soldiers in Srebrenica.²⁷⁶ And so it was that by the summer of 1995 Srebrenica found itself demilitarized and "guarded" by some 750 Dutch soldiers in light blue U.N. helmets.

But on July 11, 1995, Srebrenica fell to the Serbs. After the town was overrun and its citizens either killed or forcefully moved out of the new Serbian controlled region, the world seemed to renew its interest in the conflict. The war ground to a halt half a year later when the Dayton-Paris Agreement was signed on December 14, 1995.²⁷⁷ Renewed NATO airstrikes probably served to help the Muslims and Croats fight

267. See *id.* at 82-83. UNPROFOR stands for United Nations Protection Force. UNPROFOR was assigned to all of the former Yugoslavia from February 1992 until April 1995, after which referred only to the forces in Bosnia. ROHDE, *supra* note 1, at xxi.

268. See *id.* at xv.

269. See HONIG & BOTH, *supra* note 25, at 86.

270. See ROHDE, *supra* note 1, at xv.

271. S.C. Res. 819, U.N. SCOR, 3199th mtg., U.N. Doc S/RES/819 (1993). See ROHDE, *supra* note 1, at xv.; HONIG & BOTH, *supra* note 25, at 95-97.

272. See ROHDE, *supra* note 1, at xv.

273. S.C. Res. 824, U.N. SCOR, 3208th mtg., U.N. Doc S/RES/824 (1993). See HONIG & BOTH, *supra* note 25, at 109.

274. See *id.* at 116.

275. See *id.* at 116-17.

276. See *id.* at 127.

277. See *id.* at 340-42.

the Serbs back and end the siege on Sarajevo, thus pushing the Serbs closer to the bargaining table.²⁷⁸ Nevertheless, under the Agreement, the former safe-areas of Srebrenica and Zepa are now under Bosnian Serb control.²⁷⁹ Some 60,000 NATO troops were initially sent in to enforce the peace, including some 20,000 Americans.²⁸⁰

At the same time that the negotiations were taking place in Dayton in November, both Bosnian Serb President Radovan Karadzic and General Ratko Mladic were indicted by the War Crimes Tribunal for crimes relating to the massacres of Srebrenica.²⁸¹ They are still at large.²⁸² President Clinton has only recently extended indefinitely the mission of the United States military in Bosnia, after having already extended the first deadline he had set for the withdrawal, though by now the US presence is down to about 8,500 troops.²⁸³ While it is clear that the NATO imposed peace has worked, it is unclear how long it will last when the troops leave.²⁸⁴

V. CONCLUSION

Why focus so much of a paper on the proceedings of the ICJ on the history and current state of the war in Bosnia? In reading the ICJ's orders and judgments concerning this case it is too easy to forget what is really at issue - the lives of thousands of innocent people. Twice in 1993 the ICJ ordered that nothing be done to exacerbate the situation in Bosnia, yet two years later, a year *before* the Court was to finally establish its jurisdiction, Srebrenica fell and thousands were killed.

It is the ghastly events which took place in Srebrenica that haunt me every time I think about the role of the ICJ in the dispute. What good is the ICJ, I ask myself, if it cannot even get to the merits on a case of such urgency as this one? In this respect I am comforted to know that there are those on the Court who share my concern, as expressed by Judge Koroma's Separate Opinion to the Order of 17 December 1997,²⁸⁵ and Vice-President Weeramantry's Dissenting Opinion on

278. *See id.* at 338-339.

279. *See id.* at 342.

280. *See Whitney, supra* note 34.

281. *See ROHDE, supra* note 1, at 342. While the Tribunal has issued indictments for 74, as of the summer of 1997, only 7 were in custody. John Kim, *International Institutions*, 31 INT'L LAW. 671, 675-76 (1997). In November of 1996 the tribunal convicted Drazen Erdemovic, who had pled guilty, for participating in the mass executions of the victims of Srebrenica. *Id.* at 676.

282. *See* Kevin Whitelaw, et al., *It's Tricky Going In And Trickier Getting Out*, U.S. NEWS & WORLD REP., Dec. 29, 1997, available in 1997 WL 8333185.

283. *See id.*

284. *See id.*

285. *See supra* notes 204-06 and accompanying text.

the same Order.²⁸⁶ Yet, even their comments on the need to reach a conclusion to the case came only after the case had been in The Hague nearly five years and after the war had been brought to a prayed for end.

I am not convinced that the Court will ever issue a final ruling on the merits in the near future. Too many things could happen to further delay the conclusion of the case, or derail it altogether. But should such a time arrive, I still hope that by settling through documentation the responsibility of those who are accused of Genocide, the Court will help create a permanent record for future generations to learn from. That was the triumph of Nuremberg, though the hope that by documenting the genocide of the Holocaust such acts would not be allowed again has not materialized in light of Bosnia, Rwanda, and Cambodia. Additionally, should the Court find for Bosnia, perhaps it could order Yugoslavia to pay damages and contribute to the rebuilding of the country, even if no amount of money could ever undo the nightmares.

Ultimately, the future of the Bosnian people, be they Croat, Serb or Muslim will rest in the hands of men like Mevludin Oric. Despite the horror of surviving a mass execution and the fact that of the forty-five men from his small village outside Srebrenica only 15 survived the trek to safety, he says he is willing to live again with Serbs.²⁸⁷ What Bosnia needs is a good dose of men like Oric who are willing to move on and stop the cycle of bloodshed. It will be courageous men and women like him who will determine the fate of the Balkans as the new century approaches, not the War Crimes Tribunal, NATO, or even the ICJ.

286. See *supra* note 213 and accompanying text.

287. ROHDE, *supra* note 1, at 386. Rohde tells of one night in March of 1996 when Oric put his arm around the man to left, saying "This man is my greatest friend and he is a Croat." Doing the same to the man to his right he said, "This man is my greatest friend and he is a Serb." Pulling them both close he concluded, "This is my Bosnia, this is my Bosnia." *Id.*