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CASE AND COMMENT

JURISDICTION AND RESPONSIBILITY BY NECESSARY IMPLICATION: GENOCIDE IN BOSNIA

ON 26 February 2007 the International Court of Justice (''ICJ'' or ''Court'') delivered its decision in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (''the Bosnia Genocide Case''). The decision is a wide-ranging one but two issues provoked significant disagreement amongst the members of the Court – the finding that it had jurisdiction over the dispute and that States can be directly responsible for genocide.

The claim arose out of the disintegration in the early 1990s of the Socialist Federal Republic of Yugoslavia (''SFRY''), which was made up of Bosnia and Herzegovina (''Bosnia''), Croatia, Macedonia, Montenegro, Serbia and Slovenia. Bosnia declared independence in 1991 and was admitted as a member of the United Nations (''UN'') in 1992. Serbia and Montenegro, then known as the Federal Republic of Yugoslavia (''FRY''), claimed to be the continuator State of the SFRY and therefore entitled to the latter's seat in the UN. This claim was not generally accepted, but it was not until 2000 that the FRY applied for membership of the UN; it was admitted on 1 November 2000. FRY later changed its name to ''Serbia and Monetenegro''. Thereafter Montenegro declared itself independent of Serbia and was admitted as a member of the UN in June 2006. Serbia accepted continuity between itself and the former Serbia and Montenegro, but Montenegro did not. The Court concluded that therefore Montenegro had not consented to the jurisdiction of the ICJ and any findings were directed to Serbia alone.

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Bosnia alleged that Serbia violated the Convention on the Prevention and Punishment of the Crime of Genocide (''the Convention''). A similar claim by Croatia remains on the Court's docket: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Croatia* v. *Serbia and Montenegro*).

Jurisdiction

In 2004 the Court decided that it did not have jurisdiction in eight cases brought by Serbia against NATO Member States (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium*), *Preliminary Objections, Judgments, I.C.J. Reports 2004*, p. 279) (''*Legality of Use of Force* cases''). The Court held that, given its admission as a member of the UN on 1 November 2000, Serbia and Montenegro was not a member of the UN, or therefore party to the ICJ Statute, when it filed its application in 1999.

Similarly, in the *Bosnia Genocide Case*, Serbia argued that it was not a member of the UN or party to the ICJ Statute when Bosnia instituted the proceedings in 1993. However, in this case, the Court held that it did have jurisdiction to adjudicate on the dispute.

It is clear, and the parties to the *Bosnia Genocide Case* accepted, that the decisions in the *Legality of Use of Force* cases are only binding on the parties to those claims. Nevertheless, the different outcome is striking. The Court justified the conclusion in the *Bosnia Genocide Case* by reference to the *res judicata* effect of its earlier decision on Serbia's preliminary objections (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 623) (''the 1996 decision'').

The issue of whether Serbia was the continuator State of the SFRY and a member of the UN (and therefore capable of accessing the ICJ) was neither raised by the parties nor considered *proprio motu* by the Court in the 1996 decision (Serbia's preliminary objections were made on other grounds). Nevertheless, the Court interpreted its finding that ''on the basis of Article 9 of [the Convention], it has jurisdiction to adjudicate upon the dispute'' in the 1996 decision ''as incorporating a determination that all the conditions relating to the capacity of the parties to appear before it had been met''.

Six members of the Court, out of 15 judges, disagreed with this approach, reasoning that a decision cannot be *res judicata* of an issue it did not address. A number of them also submitted that the notion of an unstated element of the Court's reasoning was contrary to the obligation in Article 56 of the ICJ Statute to state the principles on which a decision is based.

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Further, Judges Ranjeva, Shi, Koroma (the only members of the Court who were also members at the 1996 decision) and Tomka pointed to the Court's denial in the *Legality of the Use of Force* cases that any definitive decision on Serbia's status had been reached in the 1996 decision. Judges Skotnikov and Tomka questioned why argument on jurisdiction was permitted if it had been definitively determined by the earlier decision. There was also reference to resulting inconsistency in the present judgment, with the Court finding that the 1996 decision, which is addressed to the "Federal Republic of Yugoslavia (Serbia and Montenegro)", was *res judicata* in establishing jurisdiction over Serbia but denying that it has similar effect over Montenegro.

However, despite disagreeing with the majority's reasoning, Judge Tomka agreed with the finding that the Court had jurisdiction over the dispute. In relation to whether Serbia is party to the Convention, Judge Tomka submitted (with reference to Article 34 of the 1978 Vienna Convention on the Succession of States in Respect of Treaties) that there is a rule of customary international law that any treaty in force in a predecessor State at the date of its dissolution continues in force in respect of each successor State. The SFRY became a party to the Convention in 1950. Judge Tomka reasoned that upon its dissolution in 1992 the Convention continued in force in relation to each of the successor States including Serbia, and no legal effect should be attached to Serbia's purported accession to that Convention in 2001. While agreeing that the ICJ did not have jurisdiction over Serbia before it became a member of the UN, he noted that Bosnia could have brought its claim after 1 November 2001. Applying the principle that the Court should not penalise a defect in procedure which the applicant could easily remedy, Judge Tomka concluded that it would make no sense to require Bosnia to resubmit its application in the same terms. With Serbia both a party to the Statute and to the Convention, there was, in Judge Tomka's view, no impediment to the exercise of the Court's jurisdiction.

Croatia's claim against Serbia, where there is no previous decision on jurisdiction on which Croatia can rely, may provide an opportunity for further scrutiny of this approach.

Direct State responsibility under the Convention

The *Bosnia Genocide Case* is the first time one state has claimed against another for genocide. The Convention clearly imposes an obligation on individuals not to commit genocide. Whether it also imposes such an obligation on States has long been the subject of debate.

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The Court found that Article 1 imposes a direct obligation on State parties not to commit genocide. Article 1 provides that "[t]he Contracting Parties confirm that genocide … is a crime under international law which they undertake to prevent and to punish". The Court reasoned that the characterisation of genocide as an international crime implies an undertaking by the States party to the Convention not to commit it and the explicit obligation to prevent genocide necessarily implies a prohibition of its commission. The Court referred to the terms and drafting history of Article 9, which provides that the ICJ has jurisdiction over disputes "relating to the responsibility of a State for genocide", in support of this conclusion.

Again, six judges disagreed, arguing that the provisions of the Convention clearly demonstrate that it is concerned with the criminal responsibility of individuals and not, apart from the explicit obligations to prevent and punish genocide, with the responsibility of States. Most took issue with the majority's reliance on an assumed or implied obligation, in the light of the clear terms of the Convention and the serious nature of the obligation concerned. Reference was also made to the legislative history of the Convention, and in particular to the unsuccessful attempts to include explicit reference to direct State responsibility for genocide.

A number of judges reinforced this interpretation by reference to the fact that the ICJ is not a criminal court, and lacks, in particular, the ability to establish the requisite mental intent of the crime of genocide.

Judges Owada, Tomka and Skotnikov suggested an interpretation of the troublesome Article 9 which falls between supporting direct State responsibility for genocide and limiting responsibility to prevention and punishment only. They accepted that where an individual's conduct is attributable to the State, then the State might be liable, arguing that this possibility explains the reference to "the responsibility of a State for genocide" in Article 9. It will be interesting to see if this approach finds support in future decisions.

The majority finding that a State can be responsible for genocide is, as the outcome on the evidence demonstrates, only the first step in finding that it is responsible. Of the many atrocities alleged, only those perpetrated by the Army of the Republika Sprksa ("VRS", a Bosnian Serb entity) at Srebenica in July 2005 were held to have been committed with the necessary intent to destroy the group. The Court found that the VRS was neither a formal nor an informal organ of Serbia, and that the individual perpetrators did not act on Serbia's instruction or under its control. The Court found that Serbia is not therefore directly responsible for the genocide at Srebenica. However, it did find that Serbia did not use all means reasonably available to it

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to prevent the genocide and that its failure to co-operate with the International Criminal Tribunal for the Former Yugoslavia was a breach of its obligation to punish.

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PROTECTING PROTEST – A CONSTITUTIONAL SHIFT

THE law regulating public protest is constituted by a miscellaneous assortment of statutes (such as the Public Order Acts of 1936 and 1986) and judicial decisions (which may or may not be directly concerned with persons exercising a right to protest), none of which sources were traditionally thought of as giving rise to a right to protest in public. That was the Diceyan analysis of the position at common law. In the course of giving judgment in a case decided just before the Human Rights Act 1998 came into force (*Redmond-Bate* v. *Director of Public Prosecutions* (1999) 163 J.P. 789, 795), Sedley L.J. predicted that that legislation would give rise to a "constitutional shift". And so it has, according to the decision of the House of Lords in *R on the application of Laporte* v. *Chief Constable of Gloucestershire* [2006] UKHL 55, [2007] 2 W.L.R. 46. There, it was held that the police have no power to prevent a breach of the peace that might arise in the course of the gathering, either by arrest or by the use of measures falling short of arrest, unless a breach of the peace is "imminent".

At the very centre of our public order law sits the *sui generis* phenomenon of the "breach of the peace". To commit a breach of the peace is not as such a criminal offence in England (it is otherwise in Scotland), but a person who has committed or caused a breach of the peace or is about to do so may be required by a policeman to desist and, should he fail to do so, he can be arrested. The power has been used frequently in the public order context to require a speaker whose message is unwelcome to the audience to whom it is addressed to desist from speaking, a plain curb on the right to freedom of speech in public. Into the common law mix, however, has come the Human Rights Act 1998, and the protections afforded by Articles 10 and 11 of the European Convention on Human Rights ("ECHR"), which guarantee rights to freedom of expression and freedom of assembly respectively. If those rights are engaged in any particular situation, after the Human Rights Act the onus rests upon the authorities to show that any interference with or restrictions imposed are prescribed by law, necessary in a democratic society and no more than is proportionate to the legitimate aim being pursued.

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