



SCHOOL OF LAW
CASE WESTERN RESERVE
UNIVERSITY

Case Western Reserve Journal of
International Law

Volume 40
Issue 1 2007-2008

2007

International Court of Justice as a Forum for Genocide Cases

John Quigley

Follow this and additional works at: <https://scholarlycommons.law.case.edu/jil>



Part of the [International Law Commons](#)

Recommended Citation

John Quigley, *International Court of Justice as a Forum for Genocide Cases*, 40 Case W. Res. J. Int'l L. 243 (2008)
Available at: <https://scholarlycommons.law.case.edu/jil/vol40/iss1/14>

This Article is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Journal of International Law by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

INTERNATIONAL COURT OF JUSTICE AS A FORUM FOR GENOCIDE CASES

*John Quigley**

The international community, in drafting the Genocide Convention in 1948, included a submissions clause that provided for jurisdiction in the International Court of Justice (ICJ) against a state that might violate the Convention.¹ The drafters were not entirely clear in their wording, however, and questions arose as to whether the submissions clause applied only to a state's obligation to prevent and punish genocide committed by others, or whether it applied to a state's obligation to avoid committing genocide itself as well.

The Genocide Convention was directed primarily against individuals, making genocide punishable at the level of the individual perpetrator. The Genocide Convention, in its substantive provisions, reads like a criminal law document, defining the offense of genocide in terms of an *actus reus* and *mens rea*. The Genocide Convention requires states to prevent genocide, and—if it is committed in a state's territory—to punish it.

Throughout the drafting proceedings, the United Kingdom and Belgium sought to include language to make it clear that a state must itself not commit genocide. The United Kingdom and Belgium failed to secure a reference to such an obligation in several of the substantive provisions. They did manage, however, to gain the insertion in the submissions clause of a phrase that appears to confer jurisdiction on the ICJ over a suit against a state for its own perpetration of genocide.²

The issue was not tested until 1993 when Bosnia sued Yugoslavia in the ICJ, accusing Yugoslavia of failing to prevent and punish genocide, and of perpetrating it. In 1996, the ICJ decided that the Genocide Convention gave the ICJ jurisdiction over a suit alleging a state's perpetration of genocide.

This essay recounts how the Court arrived at that conclusion, but also assesses the broader jurisdictional picture for the ICJ with regard to acts that may be classified as genocide or that may be unlawful under a different

* President's Club Professor in Law, The Ohio State University. B.A., LL.B., M.A., Harvard University.

¹ Convention on the Prevention and Punishment of the Crime of Genocide art. 9, Dec. 9, 1948, 78 U.N.T.S. 277.

² Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo. (Serb. & Mont.)), Preliminary Objections, 1996 I.C.J. 595, 623 (July 11).

legal category. En route, the essay considers the efficacy of ICJ jurisdiction on these matters and the Court's treatment of the issue that sharply raised the jurisdictional issue in Bosnia's suit against Yugoslavia—namely, ethnic cleansing.

I. JURISDICTIONAL BASES OTHER THAN GENOCIDE

The jurisdictional bases for the ICJ to deal with atrocities are scant. Unless both the potential applicant state and the potential respondent state have filed declarations under Article 36(2) of the Court's Statute, submitting themselves to jurisdiction for any and all international legal questions, jurisdiction must be grounded in a treaty.³ With regard to war and peace issues, and to issues of individual rights, one finds few treaties that contain a submissions clause. And even when one finds a submissions clause, reservations are liberally filed to it.

This was the jurisdictional wasteland that confronted Bosnia when it filed an application against Yugoslavia in 1993, seeking a judicial forum to stop atrocities connected with what was being called "ethnic cleansing" in Bosnia. The Genocide Convention did, at least arguably, give the Court jurisdiction over state-perpetrated genocide, but it was anyone's guess whether the Court—even if it found jurisdiction—would consider the facts being alleged by Bosnia to constitute genocide.

Bosnia's filing represented the first time a state had ever sought a judicial injunction against ongoing, widespread atrocities being committed against a civilian population. There was little basis on which to predict how the ICJ would deal with the matter.

II. GENOCIDE

Genocide had not been defined substantially beyond what was written in the Genocide Convention in 1948. No international court had been created that might have entertained penal prosecutions against individuals for genocide. One case in Israel had been adjudicated under a statute based on—but somewhat different from—genocide as defined in the Genocide Convention.⁴ One case in Cambodia had been adjudicated under the Genocide Convention, but the Cambodian court had done little to elaborate the parameters of genocide.⁵

As a result, there was little learning available either on the legal content of genocide, or on the question of whether, even if it could be

³ Statute of the International Court of Justice art. 36(2), June 26, 1945, 59 Stat. 1060.

⁴ *Attorney-General of Isr. v. Adolf Eichmann*, 36 I.L.R. 277 (Isr. S. Ct., 1963).

⁵ See GENOCIDE IN CAMBODIA: DOCUMENTS FROM THE TRIAL OF POL POT AND IENG SARY 461–523 (Howard J. De Nike et al. eds., 2000).

shown that a state had committed genocide, jurisdiction would lie in the ICJ.

Beyond all that, of course, lay the uncertain power of the ICJ to gain implementation of any order it might issue. The power identified in the U.N. Charter for the U.N. Security Council to act to compel compliance with an order of the ICJ had never been tested.⁶ And even though the ICJ had been able to gain some compliance with its decisions prior to that time, this case involved war, probably the most difficult issue on which to secure compliance by an unwilling defendant state.

Moreover, an interim order, even if obtained, was of uncertain significance. By Bosnia's allegation, the Bosnian Serb militia was then committing the atrocities with Yugoslavia's connivance. In light of this, would an interim order have any impact on Yugoslavia or on the Bosnian Serb militia? As of 1993, the ICJ had not decided whether its interim orders were binding on the state against which they were issued. So Yugoslavia might have plausibly declined to comply without putting itself in a position of violating international law.⁷ Additionally, the possible impact on the international community was uncertain. It was unclear whether any interim order against Yugoslavia telling it to stop committing genocide would spur any action at the international level that might help end the atrocities.

Nonetheless, Bosnia sought and gained an interim order on April 8, 1993, in which the Court recognized that Yugoslavia was, at the least, failing to prevent genocide in Bosnia and requesting that Yugoslavia cease what it was doing.⁸ Bosnia returned to the ICJ in August 1993, explaining that Yugoslavia was failing to comply, and the Court granted another interim order calling on Yugoslavia to implement the April 8 order.⁹

III. PROOF OF FACTS OF GENOCIDE

Beyond all the uncertain legal issues lay the difficulty of proving facts. There had been a U.N. investigation, and it had come to a conclusion

⁶ U.N. Charter art. 94, para. 2.

⁷ Judge Weeramantry, writing separately to the issuance of the September 13, 1993 order and anticipating the Court's 2001 judgment in *LaGrand*, discussed in detail the character of interim measures and concluded that they were binding. On that basis he found that Yugoslavia was in violation of an international legal obligation for its non-compliance with the interim measures of April 8, 1993. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo. (Serb. & Mont.)), 1993 I.C.J. 376–89 (Sept. 13) (separate opinion of Judge Weeramantry) [hereinafter Prevention and Punishment Sept].

⁸ Prevention and Punishment Sept., *supra* note 7; Request for the Indication of Provisional Measures, 1993 I.C.J. 1, 24 (Apr. 8).

⁹ Prevention and Punishment Sept., *supra* note 7; Further Requests for the Indication of Provisional Measures, 1993 I.C.J. 325, 350 (Sept. 13).

adverse to Yugoslavia. It even utilized the phrase “ethnic cleansing.”¹⁰ If it could be shown that atrocities were being committed in Bosnia and that those atrocities could be characterized as genocide, the problem of proving the responsibility of Yugoslavia remained.

The ICJ had previously been criticized in 1984 for allowing itself to be drawn into a case that concerned an ongoing military conflict. In that case, the United States argued that Nicaragua’s complaint against it should be deemed inadmissible because the Court could not adequately determine what was occurring on the ground in Central America.¹¹ After the ICJ decided that the suit was admissible, the United States withdrew from the case and subsequently withdrew its Article 36(2) declaration of acceptance of the Court’s jurisdiction, as well.

Some of the evidence that Bosnia presented to the ICJ was newspaper clippings. Judge Shahabudeen, in a separate opinion in regard to the order of September 13, 1993, averted to the use of media reports by the United States in the *Tehran Hostages* case.¹² Nicaragua too, in its case against the United States, had relied on media accounts to support its allegations.¹³ Judge Shahabudeen thought it permissible to accept any source of information. The media material was adduced largely to demonstrate Yugoslavia’s involvement with atrocities being committed by the Bosnian Serb militia.¹⁴

On September 13, 1993, the ICJ’s issuance of a second interim order in Bosnia’s favor strongly suggested that Yugoslavia was not in compliance with the April 8 interim order, meaning that it was failing to prevent genocide. Judge Shahabudeen, in a separate opinion attached to the September 13 order said: “The evidence warrants a finding of non-implementation against Yugoslavia.”¹⁵ Judge Weeramantry, also in a separate opinion, described in some detail the evidence presented by Bosnia from U.N. observers, from NGOs attesting to mass atrocities against the Bosnian Muslims, and from the Serbian government attesting to its continued provision of aid to the Bosnian Serb militia.¹⁶

Bosnia was supplying the ICJ not only with factual information, but with legal arguments as well. In its September 13 order, the ICJ addressed

¹⁰ Prevention and Punishment Sept., *supra* note 7, at 328.

¹¹ Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.) 1984 I.C.J. 392, 437.

¹² Prevention and Punishment Sept., *supra* note 7, at 357–58 (separate opinion by Judge Shahabudeen).

¹³ Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.) 1 I.C.J. Pleadings 210–213.

¹⁴ Prevention and Punishment Sept., *supra* note 7, at 358.

¹⁵ *Id.* at 365.

¹⁶ *Id.* at 370ff (separate opinion by Judge Weeramantry).

Yugoslavia's complaints of an "unending flood of sometimes heavy documentation."¹⁷ The Court said that the submission by the Applicant of a series of documents up to the eve of, and even during, the oral proceedings of August 1993 was "difficult to reconcile with an orderly progress of the procedure before the Court."¹⁸ The September 13 order concluded, however, that the Court, "taking into account the urgency and the other circumstances of the matter, considers it possible to receive the documents in question."¹⁹

Yugoslavia had a point in asserting that Bosnia was filing written submissions in more than the usual quantity. In fact, during the month of August, Bosnia made eight new filings of factual information or legal argumentation. In the typical case before the ICJ, a state would file only its application and nothing more until memorials were due.

The material being filed was necessary to prove that atrocities were continuing, and to examine the many unresolved legal issues. Additionally, some of the filings related to the political situation, as a plan emerged in the spring of 1993 to divide Bosnia territorially along ethnic lines. This development was important to Bosnia's contention that a second interim measures order was needed.

One of the documents Bosnia submitted in this flurry of filings was a substantial memorandum I prepared on the concept of complicity, as applied to a state facilitating genocide being committed by a non-state entity.²⁰ At this time, complicity was an undeveloped issue in international law. The Genocide Convention contained a provision rendering complicity culpable, along with actual perpetration, but that provision could be seen as oriented to individuals, so that its applicability to a state was not obvious. The International Law Commission (ILC) was in the preliminary stages of drafting what was expected to be a treaty on state responsibility, and in that context, the ILC was elaborating a provision that held a state responsible for facilitating an international wrong by another state. But complicity of one state in aid of another, to say nothing of complicity of a state in aid of a non-state entity, was uncharted territory. I had done some of the early scholarly investigation of complicity, which I used in preparing this memorandum.²¹

¹⁷ *Id.* at 336.

¹⁸ *Id.*

¹⁹ *Id.* at 336–37.

²⁰ Memorandum from Francis A. Boyle, General Agent for the Republic of Bosnia and Herzegovina before the International Court of Justice on Imputability to the Judges of the International Court of Justice (Aug. 25, 1993), available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=f4&case=91&code=bhy&p3=0> (follow "25 August 1993" hyperlink).

²¹ John Quigley, *Complicity in International Law: A New Direction in the Law of State Responsibility*, 57 BRIT. Y.B. INT'L L. 77 (1986).

IV. TREATY OF THE SERBS, CROATS AND SLOVENES AS A BASIS FOR JURISDICTION

Another of the documents filed in August 1993 asserted a new basis for the Court's jurisdiction. In a supplemental pleading that I prepared, Bosnia argued that a treaty concluded in 1919 by the World War I Allies with Yugoslavia (under its prior name of Kingdom of the Serbs, Croats and Slovenes)²² provided a jurisdictional base for Bosnia's claims against Yugoslavia.²³ Professor Francis Boyle, Bosnia's Co-Agent, had identified the treaty as potentially providing jurisdiction, and asked me to develop the argument, resulting in the filing of August 6.²⁴

The 1919 treaty was important for Bosnia because it was not obvious that the ICJ would find jurisdiction in the case on any ground. The ICJ had provisionally found jurisdiction under the Genocide Convention—enough to issue the April 8 order—but this was being challenged by Yugoslavia. Moreover, it was unclear which of the alleged atrocities would be deemed actionable as genocide. The 1919 treaty opened the possibility of bringing in a wider range of atrocities because it required “full protection of life and liberty to all inhabitants of the kingdom without distinction of birth, nationality, race, language, or religion.”²⁵ It also specifically required the Kingdom to assure “security in law and in fact” to “racial, religious or linguistic minorities.”²⁶

If even a modest portion of what Bosnia alleged was true, these provisions of the 1919 treaty were being violated. In particular, Bosnia sought to present evidence about systematic rape of Bosnian Muslim women in internment camps, and it was not clear whether the Court would consider this evidence relevant to allegations based on the Genocide Convention.

On August 23, the eve of the oral hearings on Bosnia's critical second request for provisional measures, Yugoslavia filed a detailed response to Bosnia's argument that jurisdiction would lie under the 1919

²² Treaty between the Allied and Associated Powers and the Kingdom of the Serbs, Croats and Slovenes (Protection of Minorities), Sept. 10, 1919, n. 17, *reprinted in* 1 INTERNATIONAL LEGISLATION: A COLLECTION OF THE TEXTS OF MULTIPARTITE INTERNATIONAL INSTRUMENTS OF GENERAL INTEREST 312 (Manley O. Hudson ed., 1931) [hereinafter Kingdom of the Serbs].

²³ Amendment to the Application and Additional Grounds of Jurisdiction cited by Bosnia and Herzegovina (Aug. 6, 1993), *available at* <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=f4&case=91&code=bhy&p3=0> (follow “6 August 1993” hyperlink) [hereinafter “Aug. 6 Amendment”].

²⁴ *See Id.*

²⁵ Kingdom of the Serbs, *supra* note 22, at art. 2.

²⁶ *Id.*

Treaty.²⁷ Bosnia's argument was a complex one, requiring a number of steps to get from the 1919 treaty to current jurisdiction over Yugoslavia. Yugoslavia's response was correspondingly complex. It was drafted for Yugoslavia by Shabtai Rosenne, who, in addition to being the leading expert on ICJ jurisdiction and procedure, was a noted scholar on the minority rights treaties concluded in the aftermath of the First World War. Rosenne argued that the 1919 treaty was no longer in force.

Bosnia needed to respond to Rosenne's points at the oral proceeding, scheduled to begin on August 25. The response I prepared formed the basis for Bosnia's response at the hearing of August 26.²⁸

The minorities treaties concluded at the end of the First World War were designed to ensure minority rights in states whose territories were newly configured, and in which past ethnic tension raised concerns as to the treatment of minorities. One of the minorities covered by the 1919 treaty—indeed specifically mentioned in it—were Bosnian Muslims.²⁹

At the time, Yugoslavia was known as the Kingdom of the Serbs, Croats and Slovenes. The Kingdom's minority protection treaty with the Allies required it to “assure full and complete protection of life and liberty to all inhabitants of the Kingdom without distinction of birth, nationality, language, race or religion.”³⁰ In the event of a dispute, the treaty called for submission of cases to the Permanent Court of International Justice (PCIJ)³¹ The ICJ gained jurisdiction provided for in submission clauses that referred cases to the Permanent Court of International Justice.³²

The treaty allowed for oversight by the League of Nations. Any member of the League Council could raise a case in the PCIJ if it thought that a minority was being mistreated in violation of the treaty. Another provision of the 1919 treaty extended that right to any member of the League.³³ When the United Nations replaced the League, the U.N. General Assembly indicated that it would assume the role of the League in regard to treaties.³⁴

²⁷ Memorandum from Rodoljub Etinski, Agent of the Federal Republic of Yugoslavia, on the Observations of the Federal Republic of Yugoslavia Concerning the Requests for Indication of Provisional Measures (Aug. 23, 1993), available at <http://www.icj-cij.org/docket/files/91/13579.pdf>.

²⁸ FRANCIS A. BOYLE, THE BOSNIAN PEOPLE CHARGE GENOCIDE 287–339 (1996) (commenting on the proceedings of August 26, 1993, 3:00 p.m. proceedings at the ICJ concerning *Bosnia v. Serbia* on the Punishment of the Crime of Genocide).

²⁹ Kingdom of the Serbs, *supra* note 22, at art. 10.

³⁰ *Id.* at art. 2.

³¹ *Id.* at art. 11.

³² Statute of the International Court of Justice, art. 37, June 26, 1945, 59 Stat. 1055, 1060.

³³ Kingdom of the Serbs, *supra* note 22, at art. 16.

³⁴ Transfer of Certain Functions, Activities, and Assets of the League of Nations, G.A. Res. 24 (I), at 35, U.N., U.N. Doc. A/64 (Feb. 12, 1946).

The U.N. Secretary-General devoted attention to the minority treaties in the early years of the United Nations. Yugoslavia argued that this consideration reflected the death of these treaties.³⁵ Bosnia disagreed, arguing that any state member of the United Nations stood in the shoes of any state member of the League.³⁶ Thus, Bosnia, as a U.N. member state, could sue Yugoslavia, the successor state to the Kingdom of the Serbs, Croats and Slovenes, for violation of the rights of a minority that had been the object of protection under the 1919 treaty.

In its order of September 13, 1993, the ICJ rejected jurisdiction based on the 1919 treaty. Without considering all the points raised by Yugoslavia, the Court said that the treaty applied only to acts by Yugoslavia within its own territory, and that once Bosnia detached itself from Yugoslavia, Yugoslavia's obligations to the Bosnian Muslims under the treaty were no longer in effect.³⁷

When the case reached the preliminary objections stage, Bosnia withdrew the claim of jurisdiction under the 1919 treaty and the parties did not brief the issue. Oddly, however, the Court decided to rule on the 1919 treaty as a possible basis of jurisdiction. As it had done in 1993, it decided that the 1919 treaty did not give Bosnia jurisdiction over Yugoslavia. Repeating the reason given in 1993, the ICJ decided that the 1919 treaty applied to Yugoslavia's treatment of minorities only within Yugoslavia's borders. The atrocities alleged by Bosnia occurred in Bosnia, after Bosnia seceded from Yugoslavia in 1992. Therefore, said the Court, the 1919 treaty did not cover the atrocities.³⁸

Of course, when the treaty was concluded, the Bosnian Muslims did inhabit Yugoslavia's predecessor state. They separated from the state in 1991–92, precisely to avoid the discrimination that the treaty was to prevent. Bosnia was not arguing that the treaty applied to all minorities anywhere, but only to those that were protected under the treaty. Bosnia regarded the separation as irrelevant for purposes of treaty coverage.³⁹

The issue of the minority treaties may have future significance, because there were several others,⁴⁰ plus minority protection provisions in

³⁵ Memorandum from Rodoljub Etinski, Agent of the Federal Republic of Yugoslavia, on the Observations of the Federal Republic of Yugoslavia Concerning the Requests for Indication of Provisional Measures (Aug. 23, 1993), paras. 8, 9, *available at* <http://www.icj-cij.org/docket/files/91/13579.pdf>.

³⁶ Aug. 6 Amendment, *supra* note 23, at 15.

³⁷ Prevention and Punishment Sept., *supra* note 7, at 340ff.

³⁸ Application of the Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 2, at 619–20.

³⁹ See Aug. 6 Amendment, *supra* note 23, at 2.

⁴⁰ Treaty between the Allied and Associated Powers and Poland art. 12, June 28, 1919, 3 Malloy 3714; Treaty between the Allied and Associated Powers and Czechoslovakia art. 14,

peace treaties,⁴¹ and unilateral declarations promising equality to minorities.⁴² In many instances, minorities still within the borders as they stood at the end of the First World War may have occasion to bring a claim.

V. EFFICACY OF GENOCIDE JURISDICTION

A broader issue raised by the 1993 proceedings is whether it served any purpose to seek an interim order from the Court. The Genocide Convention has been invoked more frequently to prosecute individuals than to bring suits against a state. If the Court issues an interim order to stop ongoing atrocities, the state may decline to comply.

Prosecution of individuals rarely occurs quickly. Fear of prosecution may act as a deterrent, but as far as direct action dealing with a developing situation is concerned, it is only against the state that legal action can occur with a view to stopping one or another of the warring parties. A suit against a state may pressure that state, or it may serve to mobilize the opinion of other states.

As Judge Tonka rightly pointed out in the Court's 2007 judgment in the Bosnia case, the Court's two interim orders of 1993 did not prevent the Srebrenica killings of 1995.⁴³ Nonetheless, the two interim orders of 1993 may have had some impact. The Security Council utilized the order of April 8 to make demands on Yugoslavia. In Resolution 819 of April 16, 1993, the Security Council took note of the interim measures order of April 8, citing the ICJ's indication that Yugoslavia should immediately do whatever was in its power to prevent the commission of genocide. The Security Council also criticized the Bosnian Serb militia, describing what was occurring in Bosnia as "ethnic cleansing."⁴⁴ It called on Yugoslavia to "immediately cease the

Sept. 10, 1919, 3 Malloy 3699; Treaty between the Allied and Associated Powers and Rumania art. 12, Dec. 9, 1919, 5 L.N.T.S. 335; Treaty on the Protection of Minorities in Greece art. 16, Aug. 10, 1920, 28 L.N.T.S. 243.

⁴¹ Treaty of Peace between the Allied and Associated Powers and Austria art. 69, Sept. 10, 1919, *reprinted in* 3 MAJOR PEACE TREATIES OF MODERN HISTORY, 1562 (Fred L. Israel ed., 1967); Treaty of Neuilly art. 57, Nov. 27, 1919, *id.* at 1727; Treaty of Trianon art. 60, June 4, 1920, *id.* at 1863; Treaty of Lausanne art. 44, July 24, 1923, 28 L.N.T.S. 11.

⁴² Declaration Concerning the Protection of Minorities in Albania art. 7, Oct. 2, 1921, *reprinted in* 1 INTERNATIONAL LEGISLATION: A COLLECTION OF THE TEXTS OF MULTIPARTITE INTERNATIONAL INSTRUMENTS OF GENERAL INTEREST at 733 (Manley O. Hudson ed., 1931). Declaration Concerning the Protection of Minorities in Lithuania art. 9, May 12, 1922, 22 L.N.T.S. 393.

⁴³ Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (*Bosn. & Herz. v. Yugo. (Serb. & Mont.)*), 2007 I.C.J. 1, at para. 2 (Feb. 26) [hereinafter Judgment of Feb. 26] (separate opinion of Judge Tomka).

⁴⁴ S.C. Res. 819, U.N. Doc. S/RES/819 (Apr. 16, 1993).

supply of military arms, equipment and services to the Bosnian Serb paramilitary units.”⁴⁵

VI. GENOCIDE AND ETHNIC CLEANSING

By its April 8, 1993 order, the Court seemed to take the position that ethnic cleansing—perpetrated by the means being used against Bosnian Muslims—constituted genocide.⁴⁶ The Court said that Yugoslavia should ensure that any military units supported by it, or any organizations or persons who “may be subject to its control, direction or influence do not commit any acts of genocide, whether directed against the Muslim population of Bosnia and Herzegovina or against any other national, ethnical, racial or religious group.”⁴⁷ Judge Tarassov, in a declaration, objected that this language was “open to the interpretation that the court believes that the Federal Government of Yugoslavia is indeed involved in such genocidal acts.” He called this language “very close to a pre-judgment of the merits, despite the Court’s recognition that, in an Order indicating interim measures, it is not entitled to reach determinations of fact or law.”⁴⁸

In its 2007 judgment, however, the Court concluded that Yugoslavia’s acts in 1992–93 did not reflect genocide. In its 2007 judgment, the Court focused on the Srebrenica killings of 1995, which it found did constitute genocide. The Court distinguished the Srebrenica killings of 1995 from those of 1992–93 in the various internment camps, like Omarska and Keraterm. It found the former to constitute genocide, but not the latter.⁴⁹

The Court did not provide a convincing reason for distinguishing the two. In both instances, persons were killed with the aim of taking over territory free of Bosnian Muslims. Judge Khasawneh pointed out in his dissent that the *Krstic* appeal chamber of the Yugoslavia tribunal had found genocidal intent for the Srebrenica killings on the basis of an aim to rid the Srebrenica area of Bosnian Muslims.⁵⁰ The only difference with Srebrenica was that the killings were in higher numbers, and occurred in a shorter period of time.

The Court did acknowledge the ethnic cleansing aim behind the Srebrenica killings. The judges quoted the trial chamber of the Yugoslavia tribunal in *Blagojevic*, a case that concerned the Srebrenica killings, in finding that:

⁴⁵ *Id.*

⁴⁶ Judgment of Feb. 26, *supra* note 43, at para. 50 (dissenting opinion of Judge Mahiou).

⁴⁷ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz v. Yugo. (Serb. & Mont.)), 1993 I.C.J. 24, at para. 52 (Apr. 8).

³⁷ *Id.* at 27 (Declaration of Judge Tarassov).

³⁸ *See* Judgment of Feb. 26, *supra* note 43, at paras. 269, 297, 471.

³⁹ *See id.* at para. 41 (dissenting opinion of Vice-President Al-Khasawneh).

The Bosnian Serb forces not only knew that the combination of the killings of the men and the forcible transfer of the women, children and elderly, would inevitably result in the physical disappearance of the Bosnian Muslim population of Srebrenica, but clearly intended through these acts to physically destroy this group.⁵¹

The Court did not explain what it understood the *Blagojevic* trial chamber to have meant by the words “physically destroy this group.” The word “group” here apparently refers to the Bosnian Muslims, who were in Srebrenica at the time, and not only to the men whom the Army of the Serb Republic (VRS) killed. Thus, the majority of Bosnian Muslims at Srebrenica were not physically destroyed, but were forcibly removed. The apparent purpose of killing the men was to prevent the reconstitution of a Bosnian Muslim population in Srebrenica and the surrounding area.

The Court does not explain how this scenario differs from the VRS actions of 1992–93. There too, Bosnian Muslims were killed, and other acts of violence, including rape, were perpetrated with the aim of terrorizing the population to flight, so that the territory would become devoid of Bosnian Muslims. Yet the Court found insufficient evidence of an intent to destroy, as required for genocide.⁵² Nevertheless, evidence was available of a concerted plan to attach the areas involved in both these episodes to Serbia, without their Bosnian Muslim inhabitants. If the VRS intended to physically destroy the Bosnian Muslims at Srebrenica in July 1995, it is not clear why it did not intend to physically destroy the Bosnian Muslims at the locations of the atrocities perpetrated in 1992–93.

What the Court resorts to, by relying on the Yugoslavia tribunal’s trial chamber in the *Krstic* case, is an analysis of numbers based on the Court’s questionable prior conclusion that genocide is committed only when some level of substantiality is reached with respect to the population ‘targeted.’ The Court, quoting the trial chamber in *Krstic*, said that there were 40,000 Bosnian Muslims in Srebrenica in July 1995. Although, it says, this represented only a small percentage of the Muslims of Bosnia-Herzegovina, “the importance of the Muslim community of Srebrenica is not captured solely by its size.”⁵³

⁴⁰ *Id.* at para. 294 (quoting Prosecutor v. Blagojevic, Case No. IT-02-60-T, Judgment, para. 677 (Jan. 17, 2005)).

⁵² *Id.* at paras. 277, 319, 354, 334. In regard to physical or mental harm, the court did not mention the contrary analysis of the Akayesu trial chamber, which found that rape, as inflicted in Rwanda in 1994, reflects genocidal intent. See Prosecutor v. Akayesu, Case No. IT-96-4-T, Judgment, para. 731 (Sept. 2, 1998).

⁵³ Judgment of Feb. 26, *supra* note 43, at para. 296 (quoting Prosecutor v. Krstic, Case No. IT-98-33-A, Judgment, para. 15 (Apr. 19, 2005)).

The logic here is that the VRS intended to destroy 40,000. But there had been an effort to remove the Bosnian Muslims from the entire eastern sector of Bosnia, so killing 7,000 at Srebrenica could just as easily be characterized as part of an intent to destroy the entire Bosnian Muslim population of eastern Bosnia. The killings and other atrocities of 1992–93 at the internment camps had the same aim.

The Court's willingness to characterize the Srebrenica killings as genocide, based on the context for those killings as the Court found it, shows that the Court does not view forced departure as inconsistent with genocide, so long as the acts and intent required for genocide are present. Indeed, the Court explicitly stated that ethnic cleansing, on those bases, may constitute genocide.⁵⁴ In the 1992–93 episodes, as with Srebrenica in 1995, the VRS carried out terror, violence, and organized evacuations in tandem.⁵⁵

The Court considered evidence that the VRS destroyed religious and cultural objectives, as it determined whether the VRS had created conditions of life calculated to destroy the Bosnian Muslims. The Court found the destruction to have occurred but said that it did not qualify as creating such conditions. The Court did not mention this destruction of religious and cultural objectives when deciding the issue of whether or not the VRS intended to destroy the Bosnian Muslims. Although destruction of religious and cultural objectives is not an act prohibited under Article 2(c) of the Genocide Convention, it may well be relevant, when acts in violation of Article 2 are committed, to determining whether those acts are carried out with intent to destroy the group. Certainly, destroying a group's museums, libraries, historical archives, monuments, or religious buildings may provide evidence of an intent to destroy the group.

VII. ETHNIC CLEANSING IN THE YUGOSLAVIA TRIBUNAL'S JURISPRUDENCE

The Court relied heavily on the fact that the ICTY prosecutor generally avoided prosecutions for genocide. The Court stated: “[We have] carefully examined the criminal proceedings of the ICTY and the findings of its Chambers, cited above, and observe[] that none of those convicted were found to have acted with specific intent.”⁵⁶ By the proceedings “cited above,” the Court was referring to cases arising out of the 1992–93 activity of the VRS. In one case, however, the ICTY appeals chamber found a genocide conviction to be appropriate. Goran Jelisic was charged by the ICTY prosecutor with genocide. He was acquitted at trial, on a finding that he lacked genocidal intent, but the appeals chamber said that the evidence

⁵⁴ *Id.* at para. 190.

⁵⁵ *See id.* at paras. 329–32.

⁵⁶ *Id.* at para. 277.

showed genocidal intent, and that he should have been convicted of genocide.⁵⁷

Moreover, the genocide indictments of Mladic and Karadzic were active as of 2007 and the allegations ranged well beyond Srebrenica, encompassing the ethnic cleansing of 1992–93. These indictments charged an intent to destroy the Bosnian Muslims on the basis of “acts of physical and psychological abuse” at Omarska, Keraterm, and other detention facilities.”⁵⁸

The Court’s reliance on non-prosecution for genocide in the ICTY is, in any event, questionable. The ICTY prosecutor had the option—which the ICJ did not⁵⁹—of charging individuals with war crimes or crimes against humanity, and thereby gaining the same potential sentence of imprisonment. Since prosecuting for genocide requires proof of the intent to destroy a group—over and above the intent that must be proved concerning immediate acts—a prosecutor might well avoid charging genocide, even in cases where genocide might be provable.

On the issue of whether an overall plan existed for genocide, the Court said that,

significantly, the proposition is not consistent with the findings of the ICTY relating to genocide or with the actions of the Prosecutor, including decisions not to charge genocide offenses in possibly relevant indictments, and to enter into plea agreements, as in the *Plavsic* and *Sikirica et al.* Cases (IT-00-40 and IT-9508), by which the genocide-related charges were withdrawn.⁶⁰

A plea agreement, however, hardly demonstrates an absence of the crime charged. For a prosecutor, it is quite rational to drop a genocide charge if the accused is willing to plead to a crime against humanity. That action by the prosecutor in no way implies that the genocide charge is not sustainable.

The Court notes that in a number of Srebrenica-related ICTY cases, genocide was not charged.⁶¹ It is not clear what point the Court is trying to make. The Court itself decided that genocide was committed at Srebrenica, and of course, the ICTY did as well. The fact that some Srebrenica figures

⁵⁷ Prosecutor v. Jelisi, Case No. IT-95-10-A, Judgment, paras. 42–52 (July 5, 2001).

⁵⁸ Prosecutor v. Karadzic & Mladic, Case No. IT-95-5, IT-95-18, Indictment, paras. 17–18 (July 24, 1995).

⁵⁹ Application of the Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 43, at para. 277 (The court stated the following: “The killings outlined above may amount to war crimes and crimes against humanity, but the Court has no jurisdiction to determine whether this is so.”).

⁶⁰ *Id.* at para. 374.

⁶¹ *Id.* at para. 375.

were charged with genocide while others were not, in no way implies that genocide was not committed at Srebrenica.

Judge ad hoc Mahiou rightly questioned the Court's reliance on non-convictions in the ICTY as evidence that genocide had not occurred. An individual commander may execute orders that implement genocide without understanding that genocide is being perpetrated.⁶² Moreover, there may be state-perpetrated genocide, even though an individual implementing that genocide cannot be convicted due to a lack of genocidal intent.

VIII. PATTERN OF ATROCITIES AS REFLECTING GENOCIDAL INTENT

The Court said that it did not find an intent to destroy proved by the pattern of atrocities perpetrated by the VRS.⁶³ The Court did find, however, that there was a plan, attributable not only to the VRS, but also directly to Yugoslavia,⁶⁴ to expel the Bosnian Muslims from the area to be attached to Serbia.⁶⁵ Furthermore, the Court found facts regarding treatment in the internment camps that were consistent across a number of camps, and therefore not attributable to the whims of particular camp guards or commanders. The treatment, which involved acts described in Art. 2 of the Genocide Convention, was aimed at terrorizing the population to flight, in conformity with the stated plan to force the evacuation of the Bosnian Muslim population. Judge Khasawneh thought that one might reasonably infer a genocidal intent from these practices, as had the ICTY and ICTR in a number of cases.⁶⁶

The Court also said that, as of the date of the Court's judgment, the ICTY had made no finding of genocide for conduct in Bosnia, other than at Srebrenica.⁶⁷ The Court used this fact to negate Bosnia's argument that the pattern of similar conduct at many locations in Bosnia showed genocidal intent. Yet, as Judge Khasawneh and Judge ad hoc Mahiou pointed out in dissent, in the relevant cases the ICTY was dealing with the guilt of a particular person, whose conduct did not encompass the entirety of the territory.⁶⁸ When the ICTY prosecutor indicted individuals at the highest echelon

⁶² *Id.* at para. 54 (dissenting opinion of Judge Mahiou).

⁶³ *Id.* at para. 373.

⁶⁴ *Id.* at para. 371.

⁶⁵ *Id.* at para. 372.

⁶⁶ *Id.* at paras. 43–47 (dissenting opinion of Vice-President Al-Khasawneh).

⁶⁷ *Id.* at para. 374. As noted, the *Jelisić* appeals chamber decision did find genocide, even though the trial chamber had not.

⁶⁸ *Id.* at paras. 42, 53 (dissenting opinion of Judge Mahiou). The ICTY did acquit Momčilo Krajišnik of genocide, even though his conduct spanned the entire territory. Prosecutor v. Krajišnik, Case No. IT-00-39-T, Judgment (Sept. 27, 2006). Nevertheless, the fact that Krajišnik personally may, in the ICTY's view, have not entertained genocidal intent does not mean that such an intent did not exist for the VRS, or for Yugoslavia.

whose conduct extended throughout the territory—namely Mladic and Karadzic—it did, as already noted, indict for genocide.

IX. STATE PERPETRATION OF GENOCIDE

Genocide as a legal category is more critical with respect to state-to-state complaints than criminal prosecution of individuals. Individuals, if prosecuted in an international forum, can be charged with crimes against humanity, or, if in wartime, with war crimes. If prosecuted in a domestic forum, an individual can be charged with murder or other acts against the person.⁶⁹ But to sue a state for genocide in the ICJ, genocide may be the only basis for jurisdiction.

A state party can be sued for the perpetration of genocide by another state party only if the Genocide Convention imposes an obligation not to commit genocide. The Court, affirming its 1996 judgment in the case, read the Genocide Convention as imposing such an obligation, although the Court eventually decided in its 2007 judgment that Yugoslavia had not done so. In the 2007 judgment, Judges Owada, Shi, Koroma, Tonka, and Skotnikov disagreed with the Court on its conclusion that the Genocide Convention is violated by a state that itself perpetrates genocide. These five judges said that, regardless of the evidence, a state party does not violate the Genocide Convention if it perpetrates genocide.⁷⁰ Judge Shi, who was on the Court in 1996, had expressed the same view in the Court's 1996 judgment on jurisdiction.⁷¹

The majority of the Court read Article 9, which states that a state party may sue another “for genocide,” as covering genocide committed by a state party.⁷² The majority also viewed an obligation not to commit genocide as implicit in the Article 1 obligation to prevent genocide:

It would be paradoxical if States were thus under an obligation to prevent, so far as within their power, commission of genocide by persons over whom they have a certain influence, but were not forbidden to commit such acts through their own organs . . . In short, the obligation to prevent

⁶⁹ Charging genocide in domestic court has generally been done to highlight how bad the person was, rather than as necessary to secure a conviction. For a review of domestic genocide prosecutions, see JOHN QUIGLEY, *THE GENOCIDE CONVENTION: AN INTERNATIONAL LAW ANALYSIS* 23–49 (2006).

⁷⁰ See *infra* notes 72–77.

⁷¹ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo. (Serb. & Mont.) 1996 I.C.J. 631 (July 11) (joint declaration of Judge Shi and Judge Vereshchetin), available at <http://www.icj-cij.org/docket/files/91/7355.pdf>.

⁷² See Judgment of Feb. 26, *supra* note 43, at para. 169.

genocide necessarily implies the prohibition of the commission of genocide.⁷³

Judges Shi and Koroma responded that one cannot so lightly infer such a significant obligation as that not to commit genocide:

[I]f the Convention was intended to establish an obligation of such grave import as one that could entail some form of criminal responsibility of punishment of a State by an international tribunal such as this Court for genocide, this would have been expressly stipulated in the Convention, but the convention did not do so.⁷⁴

Judge Owada similarly viewed it as inadmissible to read in an obligation not specified:

It seems to me absolutely clear from the very title and the whole structure of the Convention that the object and purpose of the convention is to make a solemn compact among the States parties to the Convention to 'confirm that genocide [as defined by the Convention] is a *crime under international law*' and to 'undertake to prevent and to punish' this international crime⁷⁵

Judge Tomka said that Article 1's purpose was to proclaim "genocide is a crime under international law" and to seek "the enactment of its prohibition in internal criminal laws."⁷⁶ He saw nothing in Article 1 that prohibited a state from committing genocide. Judge Skotnikov similarly found no basis for an "unstated obligation" on states not to commit genocide in a provision that was penal in character.⁷⁷

Judges Owada, Shi, Koroma, Tomka, and Skotnikov, stating the matter in penal terms, reflected a conceptual ambiguity that had caused difficulty as the Genocide Convention was being drafted. The Genocide Convention was, to be sure, a penal convention in that it defined an offense and required states to act in particular ways to prevent and to punish it. In this sense, the Genocide Convention is similar to later treaties on issues such as terrorist acts and violence against diplomats. The United Kingdom, which promoted inclusion of specific language on a state's obligation not to commit genocide, stressed, however, that such liability would not be of a penal character but would be in the nature of the responsibility a state bears for any internationally wrongful act.⁷⁸

⁷³ *Id.* at para. 166.

⁷⁴ *Id.* at para. 4 (Joint Declaration of Judges Shi and Koroma).

⁷⁵ *Id.* at para. 45 (separate opinion of Judge Owada).

⁷⁶ *Id.* at para. 44 (separate opinion of Judge Tomka).

⁷⁷ *Id.* at para. 4 (Declaration of Judge Skotnikov).

⁷⁸ See QUIGLEY, *supra* note 69, at 227–33.

The United Kingdom was unable to gain the insertion of language about a state's obligation not to commit genocide in the substantive provisions of the Genocide Convention precisely for the reason that Judges Owada, Shi, and Koroma now cite; namely, that the delegates viewed the Genocide Convention as a penal convention. The delegates did not, however, take the matter to the length which Judges Owada, Shi, and Koroma did. They did not understand how a state could incur penal responsibility—hence the reluctance to insert the provision sought by the United Kingdom.⁷⁹ When it came to Article 9, however, the other states, urged by the United Kingdom, agreed to the phrase that gives the Court jurisdiction over suits against a state “for genocide.”

This phrasing covers state-perpetrated genocide. The Court's majority cited the phrase “for genocide” in Article 9, which is as it appears in the English text of the Genocide Convention. It also cited the rendition in the French text, which is “en matière de génocide.”⁸⁰ The Court's position would have been enhanced even more had it cited the Russian and Chinese texts of Article 9. The Russian text adds a noun not present in the English text, to say that a state is subject to ICJ jurisdiction “for the perpetration of genocide.” The Chinese text, employing a different syntax entirely, renders a state party subject to ICJ jurisdiction for harming a category (race) of people. The Russian and Chinese texts seem, perhaps even more clearly than the English text, to subject a state to ICJ jurisdiction for the perpetration of genocide.⁸¹ The “harming” in the Chinese text and the “perpetration” in the Russian text both seem to refer to the state as the subject of the action. The Russian text, to be sure, does not say “for its perpetration of genocide,” but rather “for the perpetration of genocide,” thus, in theory, leaving open the possibility that a state could be responsible only for the perpetration of genocide by others.⁸²

The majority's conclusion is warranted notwithstanding the objections of Judge Owada, who, after recounting the U.K.'s failure to gain the insertion of a clause on state-perpetrated genocide in Genocide Convention, expressed doubt that the delegates voting in favor of the “for genocide” phrase in Article 9 understood “its impact upon the essential character and the scope of the convention.”⁸³ Tellingly, however, Judge Owada noted,

⁷⁹ Judgment of Feb. 26, *supra* note 43, at paras. 63–64 (separate opinion of Judge Owada).

⁸⁰ *Id.* at para. 169.

⁸¹ See QUIGLEY, *supra* note 69, at 237.

⁸² The Russian language does not use definite articles; hence there is no difference in Russian between “for the perpetration of genocide” and “for perpetration of genocide.” It is open to a translator to insert, or omit, a definite article when translating into English. See generally R.F. Christian, *Some Consequences of the Lack of a Definite and Indefinite Article in Russian*, 5 THE SLAVIC AND EAST EUR. J. 1 (1961).

⁸³ Judgment of Feb. 26, *supra* note 43, at para. 68 (separate opinion of Judge Owada).

quite correctly, that a great majority of the delegates who participated in the debate were in general consensus that this new formulation should not be aimed at “criminalizing a State as such for perpetrating the act of genocide.”⁸⁴ What they voted for was a provision that subjected a state party to ICJ jurisdiction for its own perpetration of genocide, but with genocide conceived for this purpose as an internationally wrongful act, rather than as a crime.

Judge Owada ultimately agreed with the majority’s proposition that Article 9 subjects a state party to suit for its own perpetration of genocide, but not on the basis of state-perpetrated genocide being covered by Article 1. Rather, he said, Article 9 reflects a subjection to ICJ jurisdiction for the obligation found in customary international law not to commit genocide.⁸⁵

Judge Tonka also objected to the majority’s analysis of Article 9. He read the Article 9 clause on responsibility of a state “for genocide” to mean that a state may be responsible “on the basis of attribution to the State of the genocidal acts perpetrated by persons.”⁸⁶ Judge Tonka had in mind a situation in which genocide is committed by an individual where “a certain relationship existed between the individual perpetrator of the genocide and the State in question.”⁸⁷ If that is true, however, then one is looking at state-perpetrated genocide, since a state is responsible for genocide on the basis of its commission by persons whose acts are attributable to that state. A state is responsible for committing genocide, not only if its highest authorities are behind the enterprise, but also when the genocidal acts and intent are those of persons for whom it is accountable.⁸⁸

The Court’s conclusion that state-perpetrated genocide is necessarily included within the prohibition to prevent is sound. If evidence shows that a state, through its organs, is perpetrating genocide, it would, as a matter of logic, be the case that the state is failing to prevent genocide.

X. RESERVATIONS TO THE SUBMISSION CLAUSE OF THE GENOCIDE CONVENTION

An issue that critically affects the Court’s ability to deal with genocide is the legality of reservations that states have filed to Article 9, the submissions clause. May states party to the Genocide Convention freely exempt themselves from the Court’s jurisdiction when they commit genocide themselves or when they fail to prevent it when committed by others?

⁸⁴ *Id.*

⁸⁵ *Id.* at para. 73.

⁸⁶ *Id.* at paras. 56, 61(v) (separate opinion of Judge Tomka).

⁸⁷ *Id.* at 56.

⁸⁸ Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission, U.N. GAOR, 56 Sess., Supp. No. 10, art. 4, U.N. Doc. A/56/10 (2001).

In 1999, the Court answered this question in the affirmative when Yugoslavia sued ten states for genocide. Two of them, Spain and the United States, had reservations to Article 9. The Court held that, based on their reservations, Spain and the United States were not required to answer Yugoslavia's allegations.⁸⁹

Yugoslavia did not try to challenge the validity of these reservations; hence, the Court did not hear argument on the point. The Court stated its conclusion only perfunctorily that Spain and the United States were not subject to its jurisdiction. In a later case, however, the point was hotly contested. The Democratic Republic of Congo (Congo) sued Rwanda for mass atrocities that, according to Congo's allegations, were attributable to Rwanda during a military incursion into Congo. Congo claimed jurisdiction under the Genocide Convention, but Rwanda had reserved to Article 9.

In a 2006 judgment on jurisdiction, the Court ruled—consistent with its 1999 position—that Rwanda was not subject to the Court's jurisdiction on a genocide allegation by virtue of its reservation to Article 9.⁹⁰ The Court addressed, albeit briefly, Congo's argument that a reservation to Article 9 is inconsistent with the object and purpose of the Genocide Convention, and hence invalid. The Court said:

Rwanda's reservation to Article IX of the Genocide Convention bears on the jurisdiction of the Court, and does not affect substantive obligations relating to acts of genocide themselves under that Convention. In the circumstances of the present case, the Court cannot conclude that the reservation of Rwanda in question, which is meant to exclude a particular method of settling a dispute relating to the interpretation, application or fulfilment [sic] of the Convention, is to be regarded as being incompatible with the object and purpose of the Convention.⁹¹

Five judges writing separately questioned the Court's distinction between a reservation on jurisdiction and a reservation that might relate to a "substantive obligation" of a treaty.⁹² In some treaties—human rights treaties in particular—the jurisdiction accorded to a monitoring or decision-making body might be the essence of the treaty. The five judges suggested, in particular, that were a state party to the International Covenant on Civil and Political Rights to reserve to the provisions of the Covenant requiring it

⁸⁹ *Legality of Use of Force (Yugo. v. Spain)*, 1999 I.C.J. 772 (June 2); *Legality of Use of Force (Yugo. v. U.S.)*, 1999 I.C.J. 924 (June 2).

⁹⁰ *Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda)* (Judgment of Feb. 3, 2006), para. 70, available at <http://www.icj-cij.org/docket/files/126/10435.pdf> (last visited Oct. 24, 2007).

⁹¹ *Id.* at para. 67.

⁹² *Id.* at para. 21 (separate opinion of Judges Higgins, Kooijmans, Elarby, and Simma).

to report periodically to the Human Rights Committee, such a reservation would be “contrary to the object and purpose of the Covenant.”⁹³

Although the five judges did not go so far as to find that the Court had jurisdiction over Rwanda, they questioned “the Court’s repeated finding that a reservation to Article IX of the Genocide Convention is not contrary to the object and purpose of that treaty.”⁹⁴ They limited their separate opinion to their assertion that the question of whether a reservation to Article 9 is contrary to the object and purpose of the Genocide Convention should not be left solely to the other state party, but is legitimately an issue for the Court.⁹⁵ They suggested that the Court might usefully revisit the question of the validity of a reservation to Article 9.⁹⁶

Judge Koroma, going farther, dissented, saying that Rwanda’s reservation to Article 9 was invalid and therefore, the Court had jurisdiction over Congo’s application. Judge Koroma cited the Court’s 1996 judgment on jurisdiction in the Bosnia case, in which the Court said that the Genocide Convention’s obligations were *erga omnes*. “Hence,” he wrote:

[A] State which denies the Court’s jurisdiction to enquire into allegations alleging violation of the Convention would not be lending the co-operation required to ‘liberate mankind from [the] . . . odious scourge’ of genocide or to fulfil [sic] the object and purpose of the Convention. Denying recourse to the Court essentially precludes judicial scrutiny into the responsibility of a state in a dispute relating to the violation of the Convention.”⁹⁷

The fact that an obligation is *erga omnes* goes to the character of the obligation—whether the obligation is one owed only to another state, or to the community of states generally. It does perhaps—and this is Judge Koroma’s use of the concept—go to the importance of the obligation. Judge Koroma, in effect, stated that the submissions clause is of the essence of the Genocide Convention, because calling a state to account for committing genocide, or for failing to prevent it, is the essence of the Convention.

If the Court takes up the suggestion of the five judges to think hard about whether a reservation to Article 9 is valid, and if it decides for invalidity, the Genocide Convention will be a more serious mechanism for combating genocide. Indeed, the argument for invalidity is quite plausible. The United Kingdom and the Netherlands have both objected to Article 9 reservations on the ground that the reservations are incompatible with the object and purpose of the Genocide Convention.⁹⁸

⁹³ *Id.*

⁹⁴ *Id.* at para. 3.

⁹⁵ *Id.* at para. 28.

⁹⁶ *Id.* at para. 29.

⁹⁷ *Id.* at para. 21 (Koroma, J., dissenting).

⁹⁸ See QUIGLEY, *supra* note 69, at 217–21.

XI. SUITS BY NON-INVOLVED STATES PARTY TO THE GENOCIDE CONVENTION

Judge Koroma mentioned, as indicated, the Court's 1996 reference to the Genocide Convention as one whose obligations are *erga omnes*. That fact opens the possibility of broad use of the Genocide Convention to stop atrocities. Suit may be brought not only by a state in whose territory another commits genocide, or a state against whose nationals another commits genocide, but also by any other state party to the Convention. The underlying rationale is that the obligation not to commit genocide is owed to all other states parties. This rationale applies not only to genocide, but also to human rights obligations generally.⁹⁹ A limitation comes with reservations to the Genocide Convention's submissions clause, to be sure, since suit can be brought only by a state that has not reserved to it, and only against a state that has not reserved to it.

Despite this possibility, to date, no Genocide Convention suit has been filed by a state that did not regard itself or its nationals as victims of the genocide alleged. States often protest over rights violations that do not directly affect them, but rarely do they go so far as to initiate legal action.¹⁰⁰ Yet, as international pressure increases to deal with human rights violations, non-involved states may view suit as an appropriate response.

CONCLUSION

The utility of the Genocide Convention to counteract atrocities is limited both by the ICJ's limited jurisdiction and by the Court's narrow reading of genocide, particularly in the context of ethnic cleansing. On the jurisdictional side, there is great need for wider-ranging submissions to jurisdiction if the Court is to have any possibility of dealing with atrocities perpetrated by a state. The Genocide Convention presents a potentially broad scope of jurisdiction, because any State party may sue any other, at least if a reservation to the submissions clause has not been filed by either state. Unfortunately, reservations to the Genocide Convention's submissions clause limit the Court's jurisdiction. Yet, the Court's recent questioning of these reservations may lead it to rule such reservations invalid.

⁹⁹ See *id.* at 246–59.

¹⁰⁰ For a case in which non-involved states did file, see *The Greek Case*, 1969 Y.B. EUR. CONV. ON H.R. (Eur. Comm'n of H.R.).