# DECLARATION OF JUDGE BENNOUNA

*[Translation]*

*FRY's continued presence within the United Nations — Effects of Serbia and Montenegro's admission to the United Nations on 1 November 2000 — Serbia's complicity in genocide — Accomplice's* mens rea *as opposed to principal perpetrator's — Relationship between individual criminal liability and State responsibility — Definition of complicity — "Scorpions", a paramilitary force under Serbian control.*

I wish by means of this declaration to expand upon and clarify certain aspects of the Court's reasoning in reaffirming its jurisdiction to decide this case. I shall then explain why I disagree with the Court's finding that Serbia was not complicit in the genocide committed at Srebrenica.

*In respect of jurisdiction*, I am in full agreement with the Court's discussion of the authority of the 1996 Judgment as *res judicata*, in that the Judgment took as established the status of the Federal Republic of Yugoslavia (FRY) as a Member of the United Nations and a party to the Statute of the Court. While the Parties themselves did not dispute the question of membership status at the critical date when the proceedings were instituted, as the Court has pointed out, the world body was faced with an unprecedented situation, which, as observed by its Legal Counsel on 29 September 1992:

> "is not foreseen in the Charter of the United Nations, namely, the consequences for purposes of membership in the United Nations of the disintegration of a Member State on which there is no agreement among the immediate successors of that State or among the membership of the Organization at large" (United Nations, doc. A/47/485).

The Security Council had taken note of the disagreement and drawn the conclusion that the FRY did not automatically succeed the Socialist Federal Republic of Yugoslavia (resolution 777 (1992)). Accordingly, the General Assembly, in its resolution 47/1 of 22 September 1992, suspended the FRY's participation in the work of the General Assembly and stated that the FRY should apply for membership in the United Nations; the FRY nevertheless continued to take part in debates in the Security Council and to circulate its documents as official documents of the United Nations.

In my view, the FRY's "*sui generis* position" referred to by the Court in its Judgment of 3 February 2003 on the application for revision had to do with the will expressed within the United Nations to keep the State

within the Organization but with reduced rights, pending its submission to the test set out in Article 4 of the Charter and a showing that it was a peace-loving State accepting the obligations under the Charter and able and willing to carry them out.

It was not until 1 November 2000 that Serbia and Montenegro was admitted to the United Nations after the Milošević régime was overthrown and its leader surrendered to the International Criminal Tribunal for the former Yugoslavia (ICTY) in The Hague. It cannot however be inferred from this that a legal void obtained between the time the former Yugoslavia broke up and the date Serbia and Montenegro was subsequently admitted to membership, that is to say for nearly eight years. The FRY's continued presence within the United Nations allowed the Organization to retain means of applying pressure to the country, notably by way of sanctions under Chapter VII of the Charter, until its conduct again conformed with international legality. The Court was fully cognizant of this situation in 1996 when it found jurisdiction to adjudicate the dispute referred to it by Bosnia and Herzegovina. It appears obvious to us that, given the unprecedented circumstances confronting the international community, Serbia and Montenegro's change in attitude and its admission to the United Nations on 1 November 2000 could only take effect prospectively.

In the Judgment on the application for revision the Court considered that:

> "Resolution 47/1 did not *inter alia* affect the FRY's right to appear before the Court or to be a party to a dispute before the Court under the conditions laid down by the Statute." (*Application for Revision of the Judgment of 11 July 1996 in the Case concerning* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia), Preliminary Objections *(Yugoslavia* v. *Bosnia and Herzegovina), Judgment, I.C.J. Reports 2003*, p. 31, para. 70.)

And, in ruling on jurisdiction in 1996, the Court was perfectly aware of the FRY's position vis-à-vis the United Nations. That is why the Court, acting on an application for revision, wished to emphasize that

> "General Assembly resolution 55/12 of 1 November 2000 [on the FRY's admission] cannot have changed retroactively the *sui generis* position which the FRY found itself in vis-à-vis the United Nations over the period 1992 to 2000, or its position in relation to the Statute of the Court and the Genocide Convention" (*ibid.*, para. 71).

*In respect of the merits of this case*, it is my view that all the conditions were met to justify a finding by the Court that the FRY was responsible for complicity with the Republika Srpska and its army in genocide at Srebrenica. This is why I have voted against point 4 of the operative clause.

Consideration of the issue of the FRY's complicity in genocide, within the meaning of Article III *(e)* of the 1948 Convention, has shown the extent to which the Court, when assessing the responsibility of the State, has relied on the findings by the International Criminal Tribunal for the former Yugoslavia in respect of the guilt of the main culprits in this tragedy, whether Mr. Milošević or Mr. Mladić. Moreover, the Court has depended exclusively on the ICTY appellate judgment in the *Krstić* case in characterizing the crime committed at Srebrenica as the crime of genocide.

As the Milošević trial could not be completed and Mr. Mladić has not been arrested and handed over to the ICTY, it was not possible for the Court to obtain all the evidence needed to assess Serbia's complicity in the genocide committed at Srebrenica. As a result, the Court gave the FRY the benefit of what the Court believed to be the subsisting doubt as to the conduct of the FRY's senior leadership in July 1995, when the groundwork was being laid for the crime at Srebrenica, notably on the issue whether the FRY knew or had reason to know that the Republika Srpska army was preparing to commit genocide. In my opinion, the *mens rea* required of an accomplice is not the same as that required of a principal perpetrator, namely the specific intent *(dolus specialis)* to commit genocide, and it cannot be otherwise, since requiring such intent would be tantamount to equating an accomplice with a co-principal.

In this connection, it is possible to refer, by way of analogy, to Article 16, entitled "Aid or assistance in the commission of an internationally wrongful act", of the International Law Commission's Articles on State Responsibility, providing:

> "A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
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> *(a)* That State does so with knowledge of the circumstances of the internationally wrongful act; and
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> *(b)* The act would be internationally wrongful if committed by that State."

It follows from this Article, which can be seen as addressing "complicity" in inter-State relations, that the two requisite elements are assistance and knowledge of the circumstances of the internationally wrongful act, not participation in committing it.

In this case the *mens rea* is the intent on the part of the accomplice to assist the principal perpetrator where the accomplice has actual or constructive knowledge of the nature of the crime which the principal is preparing to commit. This is the International Law Commission's interpretation of Article III *(e)*, on complicity, of the 1948 Genocide Convention (International Law Commission Report on the Work of its Fifty-third Session, 2001, pp. 146-147).

It is a fact that much concordant evidence before the Court showed that the FRY should have known that genocide was being plotted and

nevertheless continued to assist the Republika Srpska and its armed forces in their operations, including at Srebrenica.

It is difficult to understand why the Court avoided any pronouncement on the definition of complicity, thereby leaving open the question whether an accomplice must share the specific intent *(dolus specialis)* of the principal perpetrator of genocide (Judgment, para. 421). The Court should however have rejected any such requirement, which the Respondent advocated, because it is contrary to the generally accepted definition of complicity and, as a matter of logic, because it would lead to the preposterous result of identifying accomplices with principal perpetrators. To avoid having to decide the question — and this is unfortunate for clarification of international law on the subject — the Court took the view that the accomplice must at least be aware of the principal's specific intent; this enabled it then to conclude, on the basis of an interpretation of the facts which we find misguided, that Serbia had not been complicit.

It is true that the ICTY's findings in the trials of those mainly responsible, whether at the head of the FRY or the Republika Srpska, could have provided conclusive information dispelling all possible doubt as to the knowledge which the leaders of Serbia and Montenegro had of the plans being laid at Srebrenica. This naturally leads us to think that a thorough determination as to the State's responsibility must in fact await the arrest and trial of those primarily responsible for the tragedy of Srebrenica and the light which may thereby be shed on the role played by the FRY.

Thus, from the extensive argument made before the Court, I am convinced of the close relationship between individual criminal liability and State responsibility in proceedings of this type. Indeed, it is rare for a State bluntly to proclaim its intent to destroy, in whole or in part, an ethnical, cultural or religious group or to disclose its knowledge that such a crime was going to occur or to admit to having committed it. Thus, it is through the conduct of those whose acts bind the State and by way of their prosecution that responsibility can be traced to the State itself, except of course where the State in question has been defeated and is under occupation, its demolished organizational infrastructure having disgorged all the secrets in its files to international justice. But this is not the case of the FRY (Serbia and Montenegro), which went so far as to deny the Court access to the unexpurgated records of its "Supreme Defence Council" (letter of 16 January 2006 from the Agent of Serbia and Montenegro).

That said, it is my view that the evidence before the Court already established the FRY's complicity in genocide.

The existence of the *actus reus* of the crime, namely the manifold aid and assistance furnished by Belgrade to the Republika Srpska and its army, the VRS, has been amply confirmed by the Court in its examination of the FRY's responsibility for breach of the obligation to prevent

genocide. This ongoing political, military and financial support existed before, during and after the massacre at Srebrenica.

It remains to be considered whether the requisite *mens rea* was present, that is whether the aid and assistance continued even though the FRY knew or should have known that the recipients were preparing to commit an act of genocide and the FRY thus supported them in the pursuit of their aims. It is when aid and assistance are furnished in full knowledge of the recipient's genocidal intent that they constitute complicity, thus being distinguishable from a violation of the obligation of prevention, in respect of which all that is required is an awareness of the risk of genocide.

I recognize that the difficulty in proving in this case that Belgrade knew of the genocidal intent harboured by the Bosnian Serb Army arises from the fact that such intent did not come into being, according to the ICTY, until barely two days before the genocide was carried out between 13 and 17 July 1995. But this genuine difficulty does not automatically lead to the conclusion that Belgrade did not know and could not have known that genocide was being decided upon.

First, a number of officers in Belgrade's Yugoslav army (the VJ) were assigned to the Bosnian Serb army (VRS) headquarters at Han Pijesak and it is inconceivable that they did not inform their superiors (see the 10 April 2002 report by the Netherlands Institute for War Documentation, "Srebrenica — a 'safe' area").

Secondly, General Wesley Clark (an American military adviser) testified as follows at the *Milošević* trial:

> "*General Clark*: I was still wrestling with the idea as to how it is that Milošević could maintain that he had the authority and the power to deliver the Serb compliance with the agreement. And so I simply asked him. I said, 'Mr. President, you say you have so much influence over the Bosnian Serbs, but how is it then, if you have such influence, that you allowed General Mladić to kill all those people in Srebrenica?' And Milošević looked at me and he paused for a moment. He then said, 'Well, General Clark', he said, 'I warned Mladić not to do this, but he didn't listen to me'.
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> *Question*: Your understanding of what he was referring to, if you have an understanding beyond the words themselves, can you give it to us?
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> *General Clark*: Certainly.
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> *Question*: And explain, if it does have a context and understanding, how you arrive at that understanding.
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> *General Clark*: Well, it was very clear what I was asking was about the massacre at Srebrenica. When I said 'kill all these people',

> it wasn't a military operation, it was the massacre. And this was in fact what had been in the news." (*Milošević*, IT-02-54, hearing transcripts, 15 December 2003.)

Indeed, a number of sources attest that General Mladić was in continuous contact with Milošević before the massacres began, in particular between 7 and 14 July 1995 (see the Secretary-General's Report pursuant to General Assembly resolution 53/35, entitled "The Fall of Srebrenica", United Nations, doc. A/54/549, pp. 76-77).

In our opinion it has therefore been shown that the authorities in Belgrade were fully apprised of the attack in Srebrenica and that they also should have known that preparations were under way for the slaughter of that city's Muslim population.

For proof of this, it is sufficient to recall that the "Scorpions", a paramilitary force controlled by the Minister of the Interior of Serbia and Montenegro, were present at the very site where the massacre took place.

The Court moreover acknowledges having received documents linking the "Scorpions" with the "MUP of Serbia [Serbian Ministry of the Interior]" or referring to them as "a unit of Ministry of Interiors of Serbia" (Judgment, para. 389), but it draws no conclusion from this in respect of complicity, confining itself to considering, for purposes of determining direct responsibility, whether these paramilitary forces were *de jure* organs of the Respondent or were completely dependent on it. Even assuming this not to be the case, the ties between these forces and the Serbian Ministry of the Interior and their proven participation in the massacre at Srebrenica could have led the Court at the very least to consider whether, as a result, Serbia was not kept abreast of the groundwork for and perpetration of the genocide at Srebrenica.

Serbia, which struggled to keep afloat the Republika Srpska and its army, the VRS, the ranks of which included many officers whose careers depended on Belgrade, had developed manifold ties with the political and military organizations which decided upon the genocide and carried it out; Serbia therefore had full knowledge of the genocide, which makes it an accomplice in the crime and gives rise to its international responsibility.

In my opinion, the Court, on the basis of the material already before it and without having to await further judgments by the ICTY, could have found complicity on the part of Serbia in the genocide perpetrated at Srebrenica; in so ruling, it would have done justice to the memory of the thousands of victims of the massacre, while meeting the expectations of their families.

At the same time, this would not have been excessively harsh on Serbia nor in any way hindered the reconciliation and co-operation needed between Balkan States; while the Court is dealing with the actions of a country, that country was led by a régime described as follows by the

Council of Ministers of Serbia and Montenegro in a declaration made on 15 June 2005:

> "Those who committed the killings in Srebrenica, as well as those who ordered and organized that massacre represented neither Serbia nor Montenegro, but an undemocratic régime of terror and death, against which the majority of citizens of Serbia and Montenegro put up the strongest resistance."

It is undoubtedly true that one consequence of State continuity is that the State remains responsible for any wrongful act committed in its name. Is this any reason to lapse into negationist thinking? Certainly not. One of the most valuable lessons of the tragedies which have darkened the last century and shocked the conscience of all mankind is that the past must be accepted in its whole truth and forgiveness must accordingly be sought for the suffering inflicted. This, without doubt, is the only way towards building a common future. While this process extends beyond justice in the strict sense, justice can contribute greatly to it.

*(Signed)* Mohamed BENNOUNA.