DECLARATION OF JUDGE SKOTNIKOV

No jurisdiction — Respondent had no access to Court when proceedings instituted — Relevance of 2004 Legality of Use of Force *cases — Issue of access to Court not determined in 1996 Judgment —* Res judicata *not absolute and exhaustive in incidental proceedings.*

No implied obligation in Genocide Convention for States not to commit genocide — Such unstated obligation unnecessary to engage State responsibility for genocide — State responsibility engaged when an individual, whose acts are attributable to the State, commits crime of genocide — Court lacks criminal jurisdiction necessary to establish whether individuals have committed genocide — Determination by courts and tribunals with such criminal jurisdiction may provide basis for State responsibility for genocide if they are consistent with requirements of Genocide Convention — Judgments of ICTY in Krstić *and* Blagojević *not consistent as based on crime of "aiding and abetting" and involve findings relating to state of mind of persons not before ICTY — Commission of genocide at Srebrenica not sufficiently established.*

Duty to prevent interpreted too widely — Only applicable within territory under a State's jurisdiction or control — Duty to prevent one of result not conduct.

JURISDICTION

In the 2004 *Legality of Use of Force* cases, the Court has acknowledged a certain legal reality, which exists independently from the wishes of the Court or the Parties and which cannot be any different in this case: Serbia and Montenegro had not been a Member of the United Nations, and consequently, was not a party to the Statute of the Court, before it was admitted on 1 November 2000 to the United Nations as a new Member under Article 4 of the United Nations Charter (see, for example, *Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004*, pp. 314-315, para. 91). On that basis, the Court has concluded that Serbia and Montenegro did not have access to the Court at the time of institution of proceedings and for that reason, the Court decided that it had no jurisdiction to entertain these cases (*ibid.*, pp. 327-328, paras. 127 and 129).

However, what the Court's reasoning in the present case means is that, by application of the principle of *res judicata* in incidental proceedings, the Court can create parallel realities: namely, in this case, unlike in the

Legality of Use of Force cases, the existence of access to the Court by the Respondent by virtue of its finding on jurisdiction in the 1996 Judgment on Preliminary Objections (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 595).

The notion that the issue of access by the Respondent to the Court under Article 35, paragraph 1, of the Statute must be considered as having been dealt with in the 1996 Judgment, although it undoubtedly was not, is a further blow to the reality which, according to the Judgment, may be altered as "a matter of logical construction" if the integrity of the principle of *res judicata* so requires:

> "the legal complications of the position of the Respondent in relation to the United Nations were not specifically mentioned in the 1996 Judgment. The Court stated . . . that 'Yugoslavia was bound by the provisions of the [Genocide] Convention on the date of the filing of the Application in the present case' (*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. 610, para. 17), and found that 'on the basis of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, it has jurisdiction to adjudicate upon the dispute' (*ibid.*, p. 623, para. 47 (2) *(a)*). Since . . . the question of a State's capacity to be a party to proceedings is a matter which precedes that of jurisdiction *ratione materiae*, and one which the Court must, if necessary, raise ex officio, . . . this finding must as a matter of construction be understood, by necessary implication, to mean that the Court at that time perceived the Respondent as being in a position to participate in cases before the Court. On that basis, it proceeded to make a finding on jurisdiction which would have the force of *res judicata*. The Court does not need, for the purpose of the present proceedings, to go behind that finding and consider on what basis the Court was able to satisfy itself on the point. Whether the Parties classify the matter as one of 'access to the Court' or of 'jurisdiction *ratione personae*', the fact remains that the Court could not have proceeded to determine the merits unless the Respondent had had the capacity under the Statute to be a party to proceedings before the Court." (Judgment, para. 132.)
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> "That the FRY had the capacity to appear before the Court in accordance with the Statute was an element in the reasoning of the 1996 Judgment which can — and indeed must — be read into the Judgment as a matter of logical construction." (*Ibid.*, para. 135.)

It is obvious that the notion of an "unstated element of the reasoning" is not compatible with Article 56 of the Statute, which provides that "[t]he judgment shall state the reasons on which it is based".

It should also be noted that the part of the 1996 Judgment dealing with jurisdiction *ratione personae* concerned only the question of whether the Applicant and the Respondent were parties to the Genocide Convention, and the assumption of that Judgment was that the Convention satisfies the requirement of Article 35, paragraph 2, of the Statute, and thus represents an independent and sufficient basis for the Respondent's access to the Court. This was in line with a provisional view which the Court had taken in the 1993 Order indicating provisional measures:

> "proceedings may validly be instituted by a State against a State which is a party to such a special provision in a treaty in force, but is not party to the Statute, and independently of the conditions laid down by the Security Council in its resolution 9 of 1946" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 14, para. 19).

That is why the Court did not address the uncertain and contradictory issue of the Respondent's access to the Court under Article 35, paragraph 1, either in 1993 or in 1996. However, in the 2004 *Legality of Use of Force* Judgments the Court addressed the issue of access under both Article 35, paragraph 1 and paragraph 2, and stated that the "treaty in force" clause, contained in paragraph 2, concerns only the treaties which were in force at the date of the entry into force of the Statute (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004*, pp. 323-324, para. 113).

The idea that the parallel reality, created by the Court, is as solid as the one existing independently from it, is expressed in the Judgment in no ambiguous terms:

> "However fundamental the question of the capacity of States to be parties in cases before the Court may be, it remains a question to be determined by the Court, in accordance with Article 36, paragraph 6, of the Statute, and once a finding in favour of jurisdiction has been pronounced with the force of *res judicata*, it is not open to question or re-examination, except by way of revision under Article 61 of the Statute. There is thus, *as a matter of law*, no possibility that the Court might render 'its final decision with respect to a party over which it cannot exercise its judicial function', because the question whether a State is or is not a party subject to the jurisdiction of the Court is one which is reserved for the sole and authoritative decision of the Court." (Judgment, para. 138.)

Then, the Court affirms that it cannot possibly be acting *ultra vires* in establishing, by applying the principle of *res judicata*, its own parallel reality:

> "the operation of the 'mandatory requirements of the Statute' falls to be determined by the Court in each case before it; and once the Court has determined, with the force of *res judicata*, that it has jurisdiction, then for the purposes of that case no question of *ultra vires* action can arise, the Court having sole competence to determine such matters under the Statute" (Judgment, para. 139).

The Court's line of argument is based on the notion of a general finding on jurisdiction reached in incidental proceedings being absolute and exhaustive in nature (it goes without saying that the Court's decisions on specific preliminary objections have the full authority of *res judicata*).

However, that clearly was not the view of the Court when it authorized the Registrar to inform the Respondent that:

> "The Court moreover, as was in fact observed by Serbia and Montenegro in the 'Initiative' document, and as the Court has emphasized in the past, is entitled to consider jurisdictional issues *proprio motu*, and must 'always be satisfied that it has jurisdiction' (*Appeal Relating to the Jurisdiction of the ICAO Council, I.C.J. Reports 1972,* p. 52). It thus goes without saying that the Court will not give judgment on the merits of the present case unless it is satisfied that it has jurisdiction. Should Serbia and Montenegro wish to present further argument to the Court on jurisdictional questions during the oral proceedings on the merits, it will be free to do so." (Letter of 12 June 2003.)

The content of this letter was a clear indication to the Parties that no final decision on jurisdiction had been taken, for it would have been unthinkable for the Court to say to the Respondent that it was free to present further argument to the Court on jurisdictional questions without entertaining a possibility to consider them positively. It would have been inconceivable for the Court to mention *proprio motu* action without having considered the possibility of taking this action, and the further possibility that the result of this action could be a negative finding on jurisdiction. Otherwise, the invitation to Serbia and Montenegro to argue jurisdictional questions in the merits phase would be totally without purpose.

The letter of June 2003 indicated the admissibility of the objections of the Respondent to the application of Article 35 of the Statute. Indeed, the objections to the Court's jurisdiction were made as a part of the final submissions and have been rejected by the Court in the *dispositif* of the present Judgment.

The Court's position is based on the interpretation of the *res judicata* principle in incidental proceedings as absolute and exhaustive. This interpretation is a sharp departure from its previous more cautious and nuanced position on this subject. It comes into conflict with the "non-exhaustive character of preliminary objection proceedings" (by which

"whether or not matters of jurisdiction have been raised at the stage envisaged for preliminary objections, they may still be raised later, even by the Court *proprio motu*" (Shabtai Rosenne, *The Law and Practice of the International Court 1920-2005*, Vol. II, p. 876, II.229)). It limits the right and the duty of the Court to act *proprio motu* to ensure that at all stages of the proceedings jurisdiction indeed exists. Finally, as is the case in this proceeding, it may bring the Court into conflict with legal facts which are created by entities other than the Court and with its own findings reached in a different case on the very same facts. There is also a touch of the Court's own infallibility in its reasoning which is difficult for me to accept.

For the reasons stated above, I could not support the conclusion of the Court as contained in paragraph 1 of the operative clause of the Judgment.

MERITS

Under Article IX of the Genocide Convention the Court is to settle disputes between the Contracting Parties, "including those [disputes] relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III". The underlying logic of the Judgment is that no State can be held responsible for genocide or any of the other acts enumerated in Article III unless the Genocide Convention imposes on the Contracting Parties an obligation not to themselves commit genocide and the other acts enumerated in Article III of the Convention.

The Judgment states that "[s]ince Article IX is essentially a jurisdictional provision, the Court considers that it should first ascertain whether the substantive obligation on States not to commit genocide may flow from the other provisions of the Convention" (Judgment, para. 166). The Judgment recognizes that "such an obligation is not expressly imposed by the actual terms of the Convention" *(ibid.)*. Then, according to the logic of the Judgment, this obligation must be implied in Article I: "the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide" *(ibid.)*. The Judgment also concludes that the obligation of States to not commit genocide themselves is applicable to the other acts enumerated in Article III (Judgment, para. 167).

I do not find this construction sustainable for the following reasons.

First, the very idea of an unstated obligation is objectionable in general.

Second, the "unstated obligation" in question does not fit into the Convention. The Convention, in its substantive part, deals with the criminal culpability of individuals. The Judgment addresses this fact and attempts to reconcile it with the idea of a State's obligation to not commit the very criminal acts it undertakes to prevent and punish. This

attempt, however, is not persuasive. Nor could it be, since it is simply not what the Convention actually says.

Third, the notion of a State's obligation not to commit genocide, and the other Article III acts, comes into conflict with the very foundations of the Genocide Convention since there is no such thing under the Convention as genocide (or any of the other Article III acts) which is not a crime. Yet, it is generally accepted that there is no such thing as State criminal responsibility. The Court, the parties, the International Law Commission (the ILC), are all in agreement that States do not commit crimes. Consequently, what is achieved by introducing the concept of a State itself committing genocide is decriminalization of genocide, which as a result is transformed into an internationally wrongful act. This transformation is as amazing as it is impossible under the Genocide Convention.

The Court, while concluding that "the Contracting Parties to the Convention are bound not to commit genocide" makes a clarification that the Parties are under the obligation not to do so "through the actions of their organs or persons or groups whose acts are attributable to them" (Judgment, para. 167).

The Court states that "if an organ of the State, or a person or group whose acts are legally attributable to the State, commits any of the acts proscribed by Article III of the Convention, the international responsibility of that State is incurred" (Judgment, para. 179). This is absolutely true. A State's responsibility is engaged when a crime of genocide is committed by an individual whose acts are legally attributable to it. No "unstated obligation" for States not to themselves commit genocide is needed for this responsibility to be incurred through attribution.

Therefore, I cannot accept the Court's reasoning that, unless the Convention is read as containing an obligation on State parties not to commit genocide themselves, States would not be "forbidden to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law" (Judgment, para. 166). The ILC stated the obvious when it said:

> "The State is a real organized entity, a legal person with full authority to act under international law. But to recognize this is not to deny the elementary fact that the State cannot act of itself. An 'act of the State' must involve some action or omission by a human being or group: 'States can act only by and through their agents and representatives'." (Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, p. 71.)

It would indeed be extraordinary to read the Genocide Convention as allowing States "as such" to commit genocide, or any of the other Article III acts, for their responsibility will be incurred when a crime of genocide is committed by persons capable of engaging State responsibility. Generally, as a matter of principle, wherever international law criminalizes an act, if that act is committed by an individual capable of engaging State responsibility, the State can be held responsible. The fact that some international conventions criminalizing certain acts contain "escape clauses", as in the cases of the International Convention for the Suppression of Terrorist Bombings and the International Convention for the Suppression of Acts of Nuclear Terrorism, excluding armed forces during an armed conflict from the scope of these conventions[1], only confirms this principle. This principle is definitely embodied in the Genocide Convention, which first, specifically refers in Article IX to the responsibility of a State for genocide, a crime committed according to its substantive part by individuals, and second, reflects the absolute prohibition of genocide under general international law[2]. The artificial notion of a State's obligation under the Genocide Convention not to commit genocide does nothing to reinforce this air-tight prohibition.

There has been some measure of agreement between the Parties on this point. According to the Respondent

> "for a State to be responsible under the Genocide Convention, the facts must first be established. As genocide is a crime, it can only be established in accordance with the rules of criminal law, under which the first requirement to be met is that of individual responsibility. The State can incur responsibility only when the existence of genocide has been established beyond all reasonable doubt. In addition, it must then be shown that the person who committed the genocide can engage the responsibility of the State . . ." (CR 2006/18, p. 20, para. 38.)

According to the Applicant

> "in the full meaning of the term, genocide is an international crime

[1] See the International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1979, Art. 19, para. 2, and the International Convention for the Suppression of Acts of Nuclear Terrorism, adopted by the General Assembly of the United Nations on 13 April 2005, Art. 4, para. 2.

[2] The fact that Article IX is the subject of reservations by a number of States parties, does not change in any way the absolute character of the prohibition of genocide as reflected in the Genocide Convention. A reservation to Article IX does not absolve a State from responsibility for genocide, it only prevents this Court from settling a dispute related to this responsibility.

> which not only engages the criminal responsibility of the individuals committing it but also that of the State to which the acts committed by individuals, acting *de jure* or *de facto* on its behalf, may be ascribed" (CR 2006/33, p. 31, para. 44).

Should the Court have adopted the approach according to which State responsibility is incurred when the crime of genocide or the other Article III crimes are committed by individuals capable of engaging such responsibility, it would have stayed on the firm ground of the Convention and would have been perfectly able to make a determination required by Article IX as to "the responsibility of a State for genocide or for any of the other acts enumerated in Article III".

Article IX widens the scope of dispute settlement beyond the usual "interpretation and application" (the addition of "fulfilment" is not particularly significant) to include the responsibility of a State for genocide and the other Article III acts.

However, nothing in Article IX suggests that the Court is empowered to go beyond settling disputes relating to State responsibility and to actually conduct an enquiry and make a determination whether or not the crime of genocide was committed.

The Court simply cannot establish individual responsibility for the crime of genocide by persons capable of engaging a State's responsibility since it lacks criminal jurisdiction.

In particular, by reason of the lack of criminal jurisdiction, the Court cannot establish the existence or absence of genocidal intent, since nothing in the Genocide Convention indicates that it deals with genocidal intent in any other sense than it being a requisite part, a mental element, of the crime of genocide.

What the Court can and must do is to make a finding as to whether it has been sufficiently determined that genocide was committed.

To make this determination, it would have been sufficient for the Court in this case to rely on the findings of the International Criminal Tribunal for the former Yugoslavia (the ICTY), to the extent they are in conformity with the Genocide Convention, which is the sole basis for jurisdiction in these proceedings.

Instead, the Court adopted a position according to which it can itself make a determination as to whether or not genocide was committed without a distinct decision by a court or tribunal exercising criminal jurisdiction. The Judgment offers no explanation as to the legal basis of this position. Rather the Court constructs for itself "the capacity" to do so (Judgment, para. 181), which is nowhere to be found in the Genocide Convention.

The Court asserts that:

> "Any other interpretation could entail that there would be no legal recourse available under the Convention in some readily con-

> ceivable circumstances: genocide has allegedly been committed within a State by its leaders but they have not been brought to trial because, for instance, they are still very much in control of the powers of the State including the police, prosecution services and the courts and there is no international penal tribunal able to exercise jurisdiction over the alleged crimes; or the responsible State may have acknowledged the breach." (Judgment, para. 182.)

However, reference to the absence of legal recourse under certain circumstances as an argument *au contrario* neither supports nor clarifies the Court's position. No recourse would be available, for example, when a State in question has made a reservation to Article IX. As to the above example about State leaders still in control of their country, on the contrary, legal recourse would remain available if the Court was properly seised; moreover, the Court, after establishing its jurisdiction on a prima facie basis, can, if requested, indicate provisional measures of a binding character. Furthermore, to deal immediately with these circumstances an action of the United Nations Security Council, under Chapter VII of the United Nations Charter, would probably be required. As to the possible unavailability of an international penal tribunal, the Security Council can establish an *ad hoc* criminal tribunal, if the State in question is not party to the Rome Statute of the International Criminal Court, opened for signature on 17 July 1998. And, of course, should a State acknowledge its responsibility for genocide before this Court, questions of establishing whether genocide was committed and whether a Respondent is responsible for it simply would not arise, allowing the Court to proceed straight to the issue of reparations.

The proposition that the Court not only determines a State's responsibility for genocide, but also establishes whether genocide was committed or not, flows, of course, from the idea of a State's obligation to not commit genocide itself, which the Court infers from the Convention. According to that construction, the Court simply determines the violation of this "treaty obligation". Therefore, following that logic, the lack of criminal jurisdiction is not an impediment at all, since the Court does not deal with genocide as a crime which, of course, is what it indisputably is under the Genocide Convention. This approach is inconsistent with both the Genocide Convention and the Court's Statute.

Having stated that it "must itself make its own determination of the facts which are relevant to the law which the Applicant claims the Respondent has breached", the Court acknowledges that "[m]any of the allegations before the Court have already been the subject of the processes and decisions of the ICTY" (Judgment, para. 212) and concludes that:

> "it should in principle accept as highly persuasive relevant findings of fact made by the Tribunal at trial, unless of course they have been upset on appeal. For the same reasons, any evaluation by the Tribunal based on the facts as so found for instance about the existence of the required intent, is also entitled to due weight." (Judgment, para. 223.)

After having thus established in principle a possibility of arriving at conclusions different to those of this criminal tribunal as to whether or not genocide was committed, the Court proceeded to examine the allegations which had already been considered and decided on by the ICTY, thus putting itself potentially on a collision course with the Tribunal.

This kind of collision of course has not occurred in practice. However, this does not make the Court's failure to strike a proper balance under the Genocide Convention between the Court's jurisdiction and that of a criminal tribunal any lesser.

At the same time, a clear distinction must be made between the Court conducting its own investigation and coming up with legally binding findings as to whether genocide was committed, which it cannot do, and the Court applying the test of the Genocide Convention to the decisions of the ICTY on genocide, which it must do, given that its jurisdiction is based solely on the Genocide Convention and the jurisdiction of the Tribunal is based on its Statute. That test is whether the decisions of the ICTY are consistent with the Genocide Convention. Should a finding of the ICTY fail that test, the Court must disregard this particular finding in deciding the case before it.

Unfortunately, the Court, while applying the test of Genocide Convention to the decisions of the ICTY, did not do it to the extent necessary.

The Court concluded that acts of genocide were committed by "members of the VRS [Army of the Republika Srpska] in and around Srebrenica from about 13 July 1995" (Judgment, para. 297). In reaching this conclusion the Court relied on the findings of the ICTY in the *Krstić* and *Blagojević* cases (*Krstić*, IT-98-33-A, Judgment of Appeals Chamber, 19 April 2004 (hereafter *"Krstić"*) and *Blagojević and Jokić*, IT-02-60-T, Judgment of Trial Chamber I, 17 January 2005 (hereafter *"Blagojević"*)).

These two individuals (only Krstić's conviction is final) were convicted of a crime established by the Tribunal's Statute (Art. 7, para. 1), but not recognized by the Genocide Convention, namely aiding and abetting genocide. As found by the ICTY, neither Krstić nor Blagojević had genocidal intent. ("There was a demonstrable failure by the Trial Chamber to supply adequate proof that Radislav Krstić possessed the genocidal intent" (*Krstić*, para. 134).) The Tribunal, basing itself on its Statute, has held that persons furnishing aid and assistance can be convicted of aiding

and abetting genocide without having genocidal intent. The Genocide Convention, however, requires genocidal intent for every proscribed act enumerated in it, which has been recognized by the ICTY itself (*Krstić*, para. 142) and has not been disputed by the Parties.

Consequently, these two — and so far the only — convictions of charges related to genocide cannot be taken into account by the Court since its jurisdiction is based solely on the Genocide Convention whereas these convictions are not.

Nevertheless, these two Judgments are relevant to the case before the Court to the extent that they state that genocide occurred in Srebrenica. Indeed, in the final analysis the whole case in the present Judgment is made on the basis of this particular finding by the ICTY.

The question is, however, whether or not this finding has been made within the specific scope of the Genocide Convention.

The way the ICTY has dealt, *inter alia*, with the issue of genocidal intent suggests that the answer to this question is likely to be negative. In the *Blagojević* case the Trial Chamber concluded that Bosnian Serb forces had intended to destroy the Muslim population of Srebrenica (*Blagojević*, para. 677). In the *Krstić* case the ICTY was slightly more specific, referring to some members of the VRS Main Staff. The Appeals Chamber decided that, in concluding that some (unnamed or unknown) members of the VRS Main Staff intended to destroy the Bosnian Muslims of Srebrenica, the Trial Chamber "did not depart from the legal requirements for genocide" (*Krstić*, para. 38).

Tellingly, the Appeals Chamber did not say that the Trial Chamber had not departed from the legal requirements of the Genocide Convention, for, *inter alia*, it is highly doubtful that, according to the Convention, genocidal intent, a mental element to be established in criminal proceedings, can be established without trying (or at the very least identifying and presenting the necessary proof) a person or persons harbouring it. As a matter of fact, the Tribunal itself has recognized that it is necessary to have insight into the state of mind of alleged perpetrators in order to draw the inference that those perpetrators had genocidal intent.

In the *Stakić* case it stated:

> "Having heard all the evidence, the Trial Chamber finds that it has not been provided with the necessary insight into the state of mind of alleged perpetrators acting on a higher level in the political structure than Dr. Stakić to enable it to draw the inference that those perpetrators had the specific genocidal intent." (IT-97-24-T, Judgment, 31 July 2003, para. 547.)

It is very difficult to reconcile this requirement of "necessary insight into the state of mind of alleged perpetrators", which is fully compatible with the Genocide Convention, and the approach adopted by the ICTY in the *Krstić* case:

> "The inference that a particular atrocity was motivated by genocidal intent may be drawn, moreover, even where the individuals to whom the intent is attributable are not precisely identified." (*Krstić*, para. 34.)

Not only does this approach not appear to be in conformity with the requirements of the Genocide Convention, it also raises questions related to the fairness of criminal proceedings and the accuracy of their conclusions. What if, for example, at a later stage, during a possible trial of so far unnamed members of the VRS Main Staff, the Tribunal, after obtaining the "necessary insight into the state of mind of alleged perpetrators", finds that these individuals did not possess genocidal intent? Or, are these individuals guilty even before they have been tried? And, since they are not, the question remains open as to whether the massacre in Srebrenica can be qualified as genocide.

The conclusion of the Court in these circumstances should have been that the commission of genocide or of the other Article III acts in Srebrenica has not been sufficiently established.

In spite of the difficulties I have with the Court's interpretation of the Genocide Convention, as outlined above, as well as, consequently, with the wording of paragraphs 2, 3 and 4 of the operative clause of the Judgment, I have found myself in a position to vote for these paragraphs since in substance they do contain the answer to the core question of this case: the Respondent is not responsible for genocide or any of the other acts enumerated in Article III. My vote in favour of these paragraphs does not in any way compromise my position that it has not been sufficiently established that the massacre in Srebrenica can be qualified as genocide.

The additional difficulty I have is with the Court's treatment of the obligation to prevent under the Genocide Convention, which I find to be extraordinarily expansive.

The views of the Applicant presented on the subject of prevention were quite reasonable:

> "This obligation is expressed in very general and, as it were, introductory terms in Article I, which closely follows the wording of the title of the Convention. Later provisions, in Articles IV to VIII, add a whole series of specific details and clarifications essential to its implementation. However, these further provisions focus primarily on punishment, while rules on prevention are scantly developed.

> It is true, however, that no precise boundary can be established between prevention and punishment. First, it is well known that a well-organized system of enforcement, capable of imposing penalties proportionate to the seriousness of offences, plays a very important preventive role; and secondly, effective prevention calls for the punishment of any acts preparatory to genocide (such as conspiracy to commit genocide or attempted genocide, etc.), or again acts constituting incitement to commit genocide. In other words, the punishment of most of the so-called 'ancillary' acts identified in Article III of the Convention . . . plays a definite, though obviously non-exhaustive, role in the area of prevention." (CR 2006/11, p. 16, paras. 1-2.)

> "The lack of territorial limitations on the obligation to prevent and punish the crime of genocide, which [the Court] highlighted in 1996, means therefore that a State party to the Convention must discharge this obligation even outside its sphere of territorial sovereignty, when it exercises — whether legally or illegally — effective control over a territory outside its borders by assuming prerogatives of public authority in that territory." (*Ibid.*, p. 20, para. 12.)

The Respondent did not challenge this approach. On its part it was said that "[p]reventive measures would be legislation directed against genocide" (CR 2006/20, p. 21, para. 343). And that,

> "the Genocide Convention can only apply when the State concerned has territorial jurisdiction or control in the areas in which the breaches of the Convention are alleged to have occurred" (CR 2006/16, p. 15, para. 20).

Accordingly, there was no dispute between the Parties about the interpretation of the duty to prevent. However, the Court has chosen to come up with an initiative on the subject stating that "the duty to prevent places States under positive obligations, to do their best to ensure that such acts do not occur" (Judgment, para. 432) and adding that,

> "a State may be found to have violated its obligation to prevent even though it had no certainty, at the time when it should have acted, but failed to do so, that genocide was about to be committed or was under way; . . . it is enough that the State was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed" (Judgment, para. 432).

The Court thus equates the notion of "due diligence" with the duty to prevent under the Genocide Convention and applies it to the international arena where various States having varying capacities "to influence effectively the action of persons likely to commit, or already committing,

genocide" (Judgment, para. 430), each within its capacity "to influence" must do their best to ensure that acts of genocide do not occur.

This may be seen as a commendable appeal to the nations of the world to do all they can to prevent genocide but it is not a proper interpretation of the Convention according to customary international law, as reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. The content which the Court provides for the obligation to prevent (rather than interpreting it) represents a political statement which is clearly outside the specific scope of the Genocide Convention.

What the Court should have said on the subject is, in my opinion, the following: a State fails its duty to prevent under the Genocide Convention if genocide is committed within the territory where it exercises its jurisdiction or which is under its control. Even if the perpetrators are not its organs or persons capable of engaging its responsibility under customary international law, the failure is still there. Even if the State in question takes the exhaustive measures required by the Convention, such as enactment of relevant legislation, should genocide occur within the territory under its jurisdiction or control, it still fails its duty to prevent. The duty to prevent is a duty of result and not one of conduct.

Instead the Court has introduced a politically appealing, but legally vague, indeed, hardly measurable at all in legal terms, concept of a duty to prevent with the essential element of control being replaced with a highly subjective notion of influence. I do not think that the Court's interpretation of the duty to prevent as a duty of conduct and not one of result (Judgment, para. 430), which is a logical element of the above-mentioned concept, is a service to the cause of preventing genocide.

Consequently, I could not support the conclusion of the Court as contained in paragraph 5 of the operative clause. In addition, my negative vote on this paragraph also reflects my position, as outlined above, that it has not been sufficiently established that the massacre in Srebrenica can be qualified as genocide.

For the latter reason, I could not support the finding of the Court contained in paragraph 7 of the operative clause as to the Respondent's non-compliance with the provisional measures ordered by the Court on 8 April and 13 September 1993. However, I hold the view that the authorities of the Federal Republic of Yugoslavia did not act on these Orders as they should have. Should they have done so, this could have had an effect of averting many of the atrocities other than genocide. The fact that these atrocities occurred in Bosnia and Herzegovina during the relevant period has not been denied by the Respondent.

I supported the finding contained in paragraph 6 since the Respondent

has failed to provide the Court with a clear-cut statement that it has done all in its power to apprehend and transfer Ratko Mladić, indicted for genocide and complicity in genocide, for trial by the ICTY.

I agree with the Court's decision in paragraph 8 of the operative clause as to the Respondent's obligation to co-operate with that Tribunal in respect of individuals accused of genocide or any of the other acts proscribed by Article III of the Convention.

(Signed) Leonid SKOTNIKOV.