DISSENTING OPINION OF JUDGE *AD HOC* MAHIOU

[Translation]

1. Course of proceedings and related effects — Respondent's conduct and access to the Court — Chronology of events — Analysis of the Respondent's conduct — Respondent's unilateral declarations and their implications for its treaty obligations and its status with the United Nations — Issues of acquiescence and estoppel — Effects of the Respondent's conduct and the Convention for the Prevention and Punishment of the Crime of Genocide.

2. State responsibility in respect of the Convention on the Prevention and Punishment of the Crime of Genocide — Contents and scope of the travaux préparatoires *— Issue of the addition of State responsibility for acts of genocide — Recognition of the civil responsibility of States — Link between the Genocide Convention and the rules of international law on responsibility.*

3. Question of evidence with respect to genocide — Burden of proof — Criteria to be adopted — Contribution of the jurisprudence of the international criminal tribunals and particularly the International Criminal Tribunal for the former Yugoslavia — Powers of the Court — Article 49 of the Statute and Article 62 of the Rules of Court — Criticism of the Court's position in refusing to make use of the powers available to it with respect to evidence.

4. Intentional element of the crime of genocide — Definition of the intentional element — To destroy, in whole or in part, a group, as such — To destroy a national, ethnical, racial or religious group — Total or partial destruction of the Muslims of Bosnia and Herzegovina — Positive or negative definition of a group — Relevance of application to the present case — Evidence and deduction of genocidal intent — Intent of the perpetrators of acts of genocide — Genocidal intent or knowledge of such intent for accomplices — Policy of ethnic cleansing and its links to the genocide — Contribution of the jurisprudence of the international criminal tribunals.

5. Attributability of responsibility for the crime of genocide to the Respondent — Respondent's responsibility for acts committed by its de jure *organs — Respondent's responsibility for the acts of organs of Republika Srpska regarded as* de facto *organs of the Respondent — Respondent's responsibility for the acts of organs of Republika Srpska in view of the control exerted over them by the Respondent — Respondent's responsibility for incitement and conspiracy to commit genocide — Respondent's responsibility for complicity in genocide.*

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INTRODUCTION

1. Beyond the terrible human tragedy that it represents, as the Parties in dispute admit that some 100,000 individuals lost their lives in usually very cruel circumstances, while others were left with an unspeakable range of physical and psychological scars, the *Bosnia and Herzegovina* v. *Serbia and Montenegro* case is probably the most important, the most complex and the most difficult one ever to come before the International Court of Justice. It is exceptional just in terms of proceedings, as the case has been before the Court for over 14 years now and the hearings on the merits were constantly put back by an unparalleled procedural battle; all possible and conceivable means have been called upon and exploited beyond the point of what the Court's Statute might legitimately permit; it therefore seems appropriate to review the course of the proceedings and the conduct of the Respondent. It is also exceptional for the volume of written arguments, pleadings and testimony. It is exceptional above all in that it is the first time that the Court has been seised to adjudicate on an accusation of genocide and its consequences, given that genocide is considered to be the worst crime of which either an individual or a State, as in the present instance, can be accused. This case has allowed the Court to apply the Convention on the Prevention and Punishment of the Crime of Genocide and to interpret most of its provisions, some of which have given rise to considerable debate as to their meaning and the scope which should be attributed to them[1]. It was incidentally in its reference to genocide in the *Armed Activities on the Territory of the Congo* case that the Court put to one side its hesitations and reservations regarding the *jus cogens*, by expressly asserting that the rule prohibiting genocide assuredly constituted a peremptory norm of international law (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Rwanda), Judgment*, *I.C.J. Reports 2006*, pp. 31-32, para. 64).

2. The importance, complexity and difficulty also and especially extend to the merits of the case, as is evidenced by the length of the Court's Judgment, most of the considerations of which could be commented upon to express agreement or dissent regarding one aspect or another of the assertions made, the reasoning used and the findings arrived at. I did not, however, regard it as appropriate or relevant to do so; I humbly submit that the purpose of a judge's separate opinion, even a dissenting one, is not to engage in excessively lengthy considerations of substance, to undertake a re-examination and re-appraisal of each of the points addressed by the Court and to put together, as it were, another Judgment; the aim is rather to focus on a number of key elements in the Court's approach in

[1] The Court has thus contradicted the opinion of one author who rather rashly asserted the following: "The Genocide Convention is unnecessary when applicable and inapplicable when necessary" (G. Schwarzenberger, *International Law*, Vol. 1, 3rd ed., 1957, p. 143).

order to identify the points of fact and of law which may lead one to agree or disagree with all or part of its reasoning and findings. For example, it would appear that the novelty and singularity of the issues raised for the Court by this genocide case have revealed not only shortcomings in the approach adopted, but possibly also the limits to the exercise of the Court's judicial functions. While the Court holds itself to be fully competent to settle all the difficult and complex issues surrounding an allegation of genocide, it did not see fit to provide itself with the real means to carry out such a task. The aim of this opinion is essentially, on the one hand, to record my views on certain aspects of the issues raised by the Court, even where I do not disagree with the solutions applied, and, on the other hand, to indicate and explain, with all due respect for the Court, my points of contention as regards the approach it adopted in performing its judicial function and the major findings at which it has arrived.

3. As indicated above, I do not intend to address all the issues which could legitimately be raised by each of the points considered by the Court, or even a majority of them; the present opinion will be confined to a few major points which, to my mind, constitute the crux of the problem. It is true, nevertheless, that a great many of the issues are linked more or less solidly to each other and a response to one often implies, explicitly or implicitly, a response to the other; this allows for a leaner elucidation of the arguments which follow, addressing in turn the course of the proceedings, State responsibility in respect of the Convention for the Prevention and Punishment of the Crime of Genocide, the question of evidence, the problem of intent in the crime of genocide and the issue of the attributability of the crime of genocide and related acts to the Respondent.

I. The Course of the Proceedings and Related Effects

4. Although it is the Respondent's prerogative to draw on all the possibilities afforded by the Court's Statute and Rules to assert its point of view, I believe it is worthwhile, in this case, to review the course of the proceedings, as the Court was obliged to rule several times on its jurisdiction, after having established it 11 years earlier in 1996. Given that the course of these proceedings was dominated by the Respondent's initiatives, a review of its conduct and all the resulting implications will be instructive.

5. From 1992 to 2000, the Federal Republic of Yugoslavia (hereinafter the FRY) claimed to be the only continuator State of the former Socialist Federal Republic of Yugoslavia (SFRY) and consistently maintained

that it was bound by all the international commitments entered into by the former SFRY. It regarded itself as a Member of the United Nations and thus a party to the Statute of the Court, and certainly did not hesitate to use the right of access to the Court that is granted by the Statute. As the respondent State in the present case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, the FRY disputed the Court's jurisdiction, but on grounds other than Article IX of the Genocide Convention; not only did it take part in the proceedings by submitting requests for the indication of provisional measures in response to the requests filed by Bosnia and Herzegovina in 1993 and by raising preliminary objections in 1995, but it filed counter-claims in 1997. The FRY also appeared before the Court as an Applicant; on 29 April 1999 it filed ten Applications concerning NATO Member States. Finally, the FRY is the Respondent in another case pending before the Court, having been accused in the Application filed by Croatia on 2 July 1999 of violations of the Genocide Convention.

6. In September 2000, Mr. Koštunica won the presidential election and the democratic opposition implemented a change of régime in Serbia and Montenegro. The new Government of Serbia and Montenegro then decided to alter its position concerning the automatic continuation of the legal personality of the former SFRY, its membership of the United Nations and its status as a party to the Court's Statute and to the Genocide Convention. Consequently, it applied for admission to the United Nations as a new Member, eight years after the Security Council and General Assembly resolutions encouraging it to do so. The FRY was admitted to the United Nations on 1 November 2000. Subsequently, the FRY adopted a completely different attitude from the one held before that date, stating that it had discovered *a posteriori* that prior to 1 November 2000 it had not been a Member of the United Nations and, consequently, had not been a party to the Court's Statute or to the Genocide Convention. Thus on 23 April 2001, the Respondent filed an Application seeking revision of the Judgment of 11 July 1996 on the Preliminary Objections (in which the Court established its jurisdiction under Article IX of the Genocide Convention), on the grounds that its admission to the United Nations on 1 November 2000 unequivocally demonstrated that it had not been a party to the Statute of the Court or to the Genocide Convention before that date. On 4 May 2001, it submitted an Initiative to the Court to reconsider ex officio jurisdiction in the present case, which was based on the same arguments to challenge the Court's jurisdiction. Similarly, in its oral arguments in 2006, Serbia and Montenegro defended the position that it

> "was not a party to the Statute, and had no access to the Court when the Application was submitted . . . the Respondent never became

bound by Article IX of the Genocide Convention. Serbia and Montenegro did not consent to the jurisdiction of this honoured Court in this case." (CR 2006/12, p. 47, para. 1.11.)

7. It should be pointed out that the identity of the State, as a legal person, is not affected by changes in the stance and composition of its rulers. And of course the Court is not open to governments, but to States. Moreover, international law attributes legal consequences to certain manifestations of the unilateral will of States. Hence the acknowledgment of the situation, notification, acquiescence and conduct of a State during proceedings all give rise to obligations for the States concerned. The jurisprudence of the International Court of Justice has attributed legal consequences to State conduct on a number of occasions: *Arbitral Award Made by the King of Spain on 23 December 1906, I.C.J. Reports 1960*, p. 213, "Nicaragua, by express declaration and by conduct, recognized the Award as valid and it is no longer open to Nicaragua to go back upon that recognition and to challenge the validity of the Award"; *Temple of Preah Vihear (Cambodia* v. *Thailand), I.C.J. Reports 1962*, p. 32, "that Thailand is now precluded by her conduct from asserting that she did not accept it". Although the Court had already had reason to observe that

> "[i]t is indeed unusual that a State which has submitted a claim by the filing of an Application should subsequently challenge the jurisdiction of the Court to which of its own accord it has applied" (*Monetary Gold Removed from Rome in 1943, Preliminary Question (Italy* v. *France, United Kingdom and United States of America), Judgment, I.C.J. Reports 1954*, p. 28),

Serbia and Montenegro went a great deal further, adopting positions which contradicted what it had previously accepted, expressly or tacitly, in the present case. This change of attitude by Serbia and Montenegro concerning the Court's jurisdiction, by challenging the country's membership of the United Nations and its obligations under the Genocide Convention, raises many issues which deserve our attention here.

A. The Effects of the Respondent's Conduct and Access to the Court

1. Chronology

8. The FRY had consistently maintained that it was the continuator State of the former SFRY and thus a Member of the United Nations, a position very well described by Serbia and Montenegro in the course of the oral proceedings of 2006:

> "The essence of the position taken by the former Government of the FRY was the following: we stayed on course. We are a founding

> Member of the United Nations. We remained a Member of the United Nations, and a party to international conventions continuing the personality of the former Yugoslavia. We remained the same State from which others have tried to secede (or did secede). Hence, our admission to the United Nations is beside the point, and no scrutiny under Article 4 of the Charter is needed, since we never ceased to be a Member. Due to continuity, we remained a Member of the United Nations, and we remained a party to the treaties to which the SFRY was a party." (CR 2006/12, p. 53, para. 1.33.)

9. When the Federal Republic of Yugoslavia was proclaimed on 27 April 1992, a formal declaration was adopted in its name, whereby:

> "The Federal Republic of Yugoslavia, continuing the State, international legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all the commitments that the Socialist Federal Republic of Yugoslavia assumed internationally."

The intention thus expressed by the FRY to abide by the international treaties to which the former Yugoslavia had been a party was confirmed in an official Note dated 27 April 1992 addressed to the Secretary-General by Yugoslavia's Permanent Mission to the United Nations (United Nations, doc. A/46/915, Ann. I). In the present case, it continued to take numerous and repeated initiatives attesting to its full participation. For example:

— on 1 April 1993 and 9 August 1993, in its written observations on the provisional measures requested by Bosnia and Herzegovina, the FRY made its own requests for the indication of provisional measures;

— on 26 June 1995, the FRY raised preliminary objections regarding the admissibility of the Application and the Court's jurisdiction, but none of those objections concerned the issue of access to the Court, the acceptance by the FRY of the Court's jurisdiction or its status as a party to the Genocide Convention;
— on 23 July 1997, the FRY filed its Counter-Memorial in which it submitted counter-claims;
— on 26 April 1999, the FRY made a declaration recognizing the jurisdiction of the Court as compulsory by virtue of Article 36, paragraph 2, of the Court's Statute;
— on 29 April 1999, the FRY submitted Applications instituting proceedings against ten NATO Member States, in each of which it based the jurisdiction of the Court on Article IX of the Genocide Convention and specified in its request for the indication of

provisional measures that it was indeed a Member of the United Nations;

— on 20 April 2001, the FRY withdrew its counter-claims against Bosnia and Herzegovina.

10. However, alongside these procedural measures, other far more problematic initiatives were to be taken. Thus in June 1999, the Serb member of the joint Presidency of Bosnia and Herzegovina, taking advantage of the temporary powers conferred by the rotating chairmanship of the Presidency of Bosnia and Herzegovina[2], informed the Court of two decisions: the appointment of a Co-Agent, by a letter of 9 June 1999, and Bosnia and Herzegovina's intention of discontinuing the proceedings against the FRY, by a letter of 10 June 1999. Both letters were addressed directly to the Court instead of being sent via the original Agent who had represented Bosnia and Herzegovina until that point, who on 14 June 1999 informed the Court that no decision had been taken to discontinue the proceedings; on 15 June 1999, the FRY hastened to accept the discontinuance, while the same original Agent of Bosnia and Herzegovina intervened again, on 21 June 1999, to reiterate that no decision to discontinue the case had been made. A further development took place on 3 September 1999, when the FRY informed the Court that it had agreed with the Bosnian Serb President of Bosnia and Herzegovina to put an end to the proceedings. On 15 September 1999, the new President of Bosnia and Herzegovina exposed to the Court the joint manoeuvring of the FRY and the Bosnian Serb President of Bosnia and Herzegovina, indicating that there had never been any decision to discontinue proceedings or to appoint a Co-Agent in the case.

2. Analysis of the Respondent's conduct

(a) *The implications of the FRY's unilateral declaration regarding membership of the United Nations as the continuator State of the former SFRY*

11. The International Law Commission's Special Rapporteur on the unilateral acts of States has tabled for discussion a draft article worded as follows to define a unilateral act:

> "an unequivocal expression of will which is formulated by a State with the intention of producing legal effects in relation to one or more other States or international organizations, and which is known to that State or international organization"[3].

[2] The Presidency of Bosnia and Herzegovina is a joint institution comprising three members (one Bosniak, one Croat and one Serb), with a rotating chair.

[3] Report of the International Law Commission on the Work of its Fifty-second Session, *Official Records of the General Assembly, Supplement No. 10* (A/55/10), p. 88, footnote 165.

It is generally accepted that diplomatic conduct engages the State, and the Court acknowledges that certain declarations define the attitude of a State in such a way that it is not at liberty to change that attitude subsequently. In the *Nuclear Tests* case, the Court adopted the following position:

> "It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding." (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 267, para. 43.)

12. Thus the declaration made by the Government of the FRY on 27 April 1992, confirmed by the official Note to the Secretary-General of the United Nations of the same date, in which it undertook to comply with the international treaties to which the former Yugoslavia was a party, is indeed a unilateral expression of will, attributable to the FRY and intentionally designed to produce legal effects. Moreover, "to have legal effect, there was no need for these statements to be addressed to a particular State, nor was acceptance by any other State required" (*ibid.*, p. 269, para. 50); Bosnia and Herzegovina's position with regard to a unilateral act undertaken by the FRY normally has no bearing on its legal effects.

(b) *The issues of acquiescence and estoppel*

13. While estoppel and acquiescence both flow from the general principle of good faith, what sets estoppel apart from acquiescence, strictly speaking, is the element of detriment or prejudice caused by the change in attitude of one State towards another State.

14. The *Dictionnaire de droit international public* thus defines acquiescence as: "Consent held to be given by a State in view of its (active or passive) conduct with respect to a given situation"[4]. According to the Court, acquiescence is "equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent" (*Delimitation of the Maritime Boundary in the Gulf of Maine (Canada/United*

[4] J. Salmon (ed.), *Dictionnaire de droit international public*, 2001, p. 21.

States of America), Judgment, I.C.J. Reports 1984, p. 305, para. 130). For a State to be bound by its passivity, certain elements are required, mere silence on its own not appearing sufficient to engage a State — it must be a "qualified silence": "if a State, which is aware of the claims of an opposing party, refrains from reacting during a certain period of time, despite its interest and in spite of the opportunities allowing for a reaction, it may reasonably be assumed that it intends itself to be engaged"[5].

15. In the instant case, the fact that the FRY submitted a request for provisional measures, then made counter-claims in its Counter-Memorial (declared admissible by the Court in its Order of 17 December 1997)[6] attested to active conduct manifesting its right to appear before the Court. The fact that preliminary objections were filed concerning the admissibility of the Application and the Court's jurisdiction with respect to Bosnia and Herzegovina, but not one about the jurisdiction of the Court over the FRY or its right of access to the Court, was also highly significant; whereas one might legitimately have expected the Respondent to raise all the preliminary objections which might have moved the Court to acknowledge a lack of jurisdiction, as this was the "opportunity for protest to be lodged"[7], the FRY did not take advantage of such an opportunity. Thus the fact that the issue of access to the Court was not raised during eight years of proceedings, when it was in the Respondent's interest to advance such an argument, is an element demonstrating the Respondent's acquiescence and evidence that at that time the FRY had no doubt about its status as a party to the Court's Statute. That acquiescence was of an active rather than a passive variety, as the FRY effectively used its right of access to the Court, not just by participating in proceedings, but also by submitting its own counter-claims in the present case, as well as ten Applications instituting procedure in 1999 *(Legality of the Use of Force)*.

16. According to the *Dictionnaire de droit international public,* estoppel is:

> "a peremptory objection, often viewed as a procedural objection, preventing a State party to proceedings from asserting a claim or submitting an argument which contradicts its earlier conduct or a position taken previously on which a third party legitimately relied"[8].

[5] H. Das, "L'*estoppel* et l'acquiescement: assimilations pragmatiques et divergences conceptuelles", *Revue belge de droit international*, 1997, Vol. 30, p. 619.

[6] Article 80 of the Rules of Court indicates that a counter-claim can only be heard if "it comes within the jurisdiction of the Court".

[7] H. Das, *op. cit.*, 1997, Vol. 30, p. 622.

[8] J. Salmon (ed.), *op. cit.*, p. 450.

Estoppel (or the principle of a bar on contradicting oneself to the detriment of another) is expressly acknowledged by national case law concerning international arbitration[9]. Although international jurisprudence focused on the issue of estoppel is not very plentiful, the International Court of Justice has already had the opportunity to find at times with respect to this principle, and to set forth the conditions in which it can be invoked (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgments, I.C.J. Reports 1969*, p. 26; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J. Reports 1984*, p. 309; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 415; *Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras* v. *Nicaragua), Judgment, I.C.J. Reports 1960*, p. 213). It had the opportunity to explain that:

> "estoppel may be inferred from the conduct, declarations and the like made by a State which not only clearly and consistently evinced acceptance by that State of a particular régime, but also had caused another State or States, in reliance on such conduct, detrimentally to change position or suffer some prejudice" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 415, para. 51).

17. Based on the three elements of estoppel usually acknowledged by the doctrine[10] (clear and unequivocal initial conduct or declarations; effective and legitimate reliance in good faith on such conduct or declarations by the other party dictating its own conduct; detriment resulting from that reliance or a change in the relative positions of the parties), there can be no doubt, in the context of the current case, that the conditions exist to invoke estoppel. Unlike the FRY's claims according to which it could not have presented, in 1993 and 1996, the objections to jurisdiction which it now raises, nothing stopped it from raising them at

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[9] Thus, for example, the First Civil Chamber of France's Cour de Cassation in a judgment dated 6 July 2005 found inadmissible "in virtue of the principle of estoppel" that a claimant of arbitration subsequently disputes the existence of the arbitration agreement on which he had previously based himself without any reserves in order to submit his claim:

> "Mr. X ... who himself initiated arbitration before the Iran-US Claims Tribunal and who participated in the arbitral proceeding, without any reserve, for more than nine years, is not permitted, pursuant to the principle of estoppel, to then bring a contradictory claim that the Tribunal ruled upon the matter without an arbitration agreement or based on a void agreement, because there was no binding arbitration agreement ..." (Ch. Civ. 1, 6 July 2005, *Bulletin 2005* I, No. 302, p. 252, translation by White & Case LLP.)

[10] R. Kolb, *La bonne foi en droit international public*, 2000, pp. 360 *et seq.*

that time, since it referred to the issue of Bosnia and Herzegovina's *locus standi* and it knew that its status as a Member of the United Nations was the subject of heated debate, which should have prompted it to take the necessary measures to remedy the situation.

18. Nevertheless, note should also be taken of the ambiguity of the Applicant's position on the FRY's membership of the United Nations as the continuator State of the SFRY. Indeed, at the same time as it was disputing the FRY's claim to be the continuator of the SFRY and to remain a Member of the United Nations, Bosnia and Herzegovina filed for proceedings against that same State before the International Court of Justice. True, in the context of the period, that contradiction can be explained or even laid aside, given that what it disputed was that the FRY was the sole continuator State and should not benefit from a more advantageous status than the other successor States; Bosnia and Herzegovina was of the opinion that all the States concerned should be treated equally as successor States and that each of them should apply for admission to the United Nations. In other words, a distinction should be made between the political action carried out before the authorities of the United Nations at the time and the legal action before the Court, especially as the status of the FRY relative to the United Nations was highly complex throughout the period and Bosnia and Herzegovina wished to safeguard its rights for the future vis-à-vis the FRY, which continued to refuse to ask for a clarification of its position. However it may be, it appears neither reasonable nor equitable for the Respondent to benefit now from an attitude that it retroactively characterizes as erroneous, and to claim that it had no access to the Court at the time when the Application was filed. The principle of good faith requires States and their agents to act in a fair way in compliance with the law in the fulfilment of their undertakings.

B. The Effects of the Respondent's Conduct and the Genocide Convention

1. Chronology

19. As we have just seen, throughout the proceedings until 2000, Yugoslavia continued to maintain that it was bound by the Genocide Convention, both in its implicit and explicit acceptance of the Court's jurisdiction on the basis of Article IX of the Genocide Convention and in its refusal of all the other grounds for jurisdiction put forward by the Applicant:

— on 1 April 1993, in its Written Observations submitted to the Court regarding the Request for the indication of provisional measures, the Government of the FRY also advised the Court to indicate provi-

sional measures and stated that it "does not accept the competence of the Court in any request of the Applicant which is outside the Convention on the Prevention and Punishment of the Crime of Genocide";

— one of the counsel for the FRY declared at the public sitting of 2 April 1993: "The Federal Republic of Yugoslavia does not consent to any extension of the jurisdiction of the Court beyond what is strictly stipulated within the Convention itself" (CR 93/13, p. 16);

— this position was confirmed on 23 August 1993, when, in its Written Observations, the FRY noted: "It is obvious that, by requiring provisional measures on 1 April 1993, the intention of the FR of Yugoslavia was not to accept the jurisdiction of the Court whatsoever, or to an extent beyond what is strictly stipulated in the Genocide Convention";

— the Agent of the FRY referred on 26 August 1993 to "our dispute over the implementation of the Convention on the Prevention and Punishment of the Crime of Genocide" (CR 93/34, p. 16);

— in the Dayton Agreement, which entered into force on 14 December 1995, the parties committed themselves to respect and uphold the rights and freedoms established in a number of international agreements, including the Genocide Convention[11].

2. Analysis of the Respondent's conduct

20. Since the FRY submitted that it only accepted the Court's jurisdiction within the scope of the Genocide Convention, its conduct in acknowledging itself as a party to the Convention and accepting the Court's jurisdiction on that one basis alone can be viewed as active and unequivocal. Such conduct can now be held against it, and it cannot deny it without undermining the principle of good faith. In fact, on 1 April 1993 and 23 August 1993 the FRY even requested the indication of provisional measures and asked the Court to instruct Bosnia and Herzegovina to respect its obligations regarding the Genocide Convention, and immediately to take all the necessary measures to prevent the commission of genocide on the Serbs. Since that date, Bosnia and Herzegovina has based itself upon Article IX of the Genocide Conven-

[11] Article 1 of the first chapter of Annex 6 in the Paris-Dayton Agreement states:

> "The Parties shall secure to all persons within their jurisdiction the highest level of internationally recognized human rights and fundamental freedoms, including the rights and freedoms provided in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols and other international agreements listed in the Appendix to this Annex."

That Appendix, entitled "Human Rights Agreements", lists the agreements, with in first place the "1948 Convention on the Prevention and Punishment of the Crime of Genocide".

tion as the "only ground for jurisdiction", since there was no further doubt about it.

21. All the elements for estoppel exist in the instant case, as, first, the FRY's statements were clear, precise and repeated over time. Second, the effective reliance on good faith of the Applicant as regards the Respondent's position with respect to the Genocide Convention prompted it to limit itself to that Convention as the basis for the Court's jurisdiction. Third, Bosnia and Herzegovina would suffer material and moral prejudice as a result of the Respondent's change of attitude. Consequently, the Respondent, having acquiesced to the fact that it was a party to the Genocide Convention and acknowledged the jurisdiction of the Court on this ground, is bound by its conduct and logically estoppel bars it from making any contrary claim, especially as another consideration applies linked to the notion of *forum prorogatum*.

22. The theory of *forum prorogatum* consists on the one hand "of an extension of the jurisdiction of an international court . . . and, on the other, *forum prorogatum* can be regarded as a *substitute for seisin of an international court*"[12]. The first meaning of the theory is of little relevance to the case at hand[13], but the second, by which a State "accepts the jurisdiction of an established international court such as the International Court of Justice after the seisin . . . by conclusive acts implying tacit acceptance"[14] can be broadly applied in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)*. The Court has had reason to accept the substance of the *forum prorogatum* theory on several occasions (*Corfu Channel (United Kingdom* v. *Albania), Preliminary Objection, Judgment, 1948, I.C.J. Reports 1947-1948*, p. 28; *Anglo-Iranian Oil Co. (United Kingdom* v. *Iran), Preliminary Objection, Judgment*, *I.C.J. Reports 1952*, p. 114; *Mavrommatis Jerusalem Concessions, Judgment No. 5, 1925, P.C.I.J., Series A, No. 5*, pp. 27-28). In the *Haya de la Torre* case, the Court held that submitting arguments on the merits of the case was equivalent to tacit acceptance of its jurisdiction:

> "All the questions submitted to it have been argued by them [the Parties] on the merits, and no objection has been made to a decision on the merits. This conduct of the Parties is sufficient to confer jurisdiction on the Court." (*Haya de la Torre (Colombia/Peru), Judgment, I.C.J. Reports 1951*, p. 78.)

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[12] Ch. Rousseau, "Le règlement judiciaire", *Droit international public*, Vol. V, Sirey, 1983, p. 398.

[13] The issue of extending the Court's jurisdiction was raised in the requests for the indication of provisional measures submitted by the FRY, certain of which went beyond the framework of the Genocide Convention. The Court, however, did not uphold that argument.

[14] J. Salmon (ed.), *op. cit.*, p. 518.

In the *Anglo-Iranian Oil Co.* case, the Court said:

> "The principle of *forum prorogatum*, if it could be applied to the present case, would have to be based on some conduct or statement of the Government of Iran which involves an element of consent regarding the jurisdiction of the Court" (*Anglo-Iranian Oil Co. (United Kingdom* v. *Iran), Preliminary Objection, Judgment*, *I.C.J. Reports 1952*, p. 114);

as such elements were lacking in that particular case, the Court rightly found that it had no jurisdiction. This is not so in the present case.

23. The question is what can be regarded as "conclusive acts" in the case at hand. From 1993 to 2001, the FRY did not effectively at any point dispute being a party to the Genocide Convention and acknowledged that that agreement formed the Court's ground for jurisdiction. And the Court endorsed that position on a number of occasions.

— First in its Order of 13 September 1993:

> "Whereas in its Order of 8 April 1993 the Court considered that Article IX of the Genocide Convention, to which both the Applicant and the Respondent are parties, appeared to the Court
>
> 'to afford a basis on which the jurisdiction of the Court might be founded to the extent that the subject-matter of the dispute relates to "the interpretation, application or fulfilment" of the Convention, including disputes "relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III" of the Convention' " (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro), Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 338, para. 25).

— Then in the 1996 Judgment on the Preliminary Objections:

> "The Court observes, furthermore, that it has not been contested that Yugoslavia was party to the Genocide Convention. Thus, Yugoslavia was bound by the provisions of the Convention on the date of the filing of the Application in the present case, namely, on 20 March 1993." (*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.)

In its 2006 oral arguments, the Applicant stressed that

> "by failing to raise such an objection, Yugoslavia has in this regard accepted the *de facto* jurisdiction of the Court on this point and has established a form of *forum prorogatum*, which the most elementary dictates of good faith prevent it from again contesting today" (CR 2006/3, p. 19, para. 19).

More than that, as we have seen above, the FRY publicly acknowledged this fact on a number of occasions during proceedings, contending that it only accepted the Court's jurisdiction within the confines of the Genocide Convention.

— Finally, the FRY filed counter-claims with the Court on the same basis of jurisdiction and requested the Court to declare that Bosnia and Herzegovina had committed acts of genocide on the Serb population (Counter-Memorial submitted on 23 July 1997). Although the Court did not adjudge that point, the FRY's conduct indicated that it had no objection to the continuation of proceedings on the merits and that it would thus be justified to invoke the Court's jurisdiction in the case based on the principle of *forum prorogatum*, despite the Respondent's belated challenge, which did not emerge until April 2001, when the Court rejected the Application for Revision, thereby reiterating its jurisdiction once again.

24. To conclude, the basic principle of good faith which underpins the notions of acquiescence, estoppel and *forum prorogatum* can be applied directly to the present case and give rise to law and obligations[15]. In his dissenting opinion in the *Arbitral Award Made by the King of Spain* case, Judge Urrutia Holguin explained very clearly that:

> "The objection on the grounds of good faith which exists in almost all legal systems and which prevents a party from profiting by its own misrepresentation and which, in Anglo-Saxon law, is known as estoppel, would be applicable in the present case if it were proved that the action and behaviour of one of the States caused the other State to place reliance upon its acts of acquiescence and to believe in its renunciation of its right to dispute the validity of the award." (*Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras* v. *Nicaragua), Judgment, I.C.J. Reports 1960*, p. 222.)

Similarly, Vice-President Alfaro, in a separate opinion in the *Temple of Preah Vihear* case, said:

> "Whatever term or terms be employed to designate this principle such as it has been applied in the international sphere, its substance is always the same: inconsistency between claims or allegations put forward by a State, and its previous conduct in connection therewith, is not admissible *(allegans contraria non audiendus est)*. Its purpose is always the same: a State must not be permitted to benefit by its own inconsistency to the prejudice of another State *(nemo potest mutare consilium suum in alterius injuriam)*. *A fortiori,* the State must not be allowed to benefit by its inconsistency when it is through its own wrong or illegal act that the other party has been deprived of its right

[15] R. Kolb, *op. cit.*, p. 157.

> or prevented from exercising it. *(Nullus commodum capere de sua injuria propria.)* Finally, the legal effect of the principle is always the same: the party which by its recognition, its representation, its declaration, its conduct or its silence has maintained an attitude manifestly contrary to the right it is claiming before an international tribunal is precluded from claiming that right *(venire contra factum proprium non valet)*." (*Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment, I.C.J. Reports 1962*, p. 40.)

25. The Court's jurisdiction must be seen in the light of the situation obtaining at the time that the Application was filed; as one author notes, "a fact is to be considered in reference to the law prevailing at the same time; to analyse according to a rule that was not in force at the time of the fact would be to attribute anachronistically retroactive effect to that rule . . ."[16]. The conduct of the Respondent, at the time when the Court's jurisdiction needs to be examined, amounted to showing clear consent to be bound by the Statute of the Court and, more importantly, the Genocide Convention, in such a way as to provide all the elements to found the Court's jurisdiction. The Applicant submitted that "the Court does not pass judgment in an ideal platonic world; its judgments are delivered at a given point in time, in specific circumstances, in the light of the information available, and at that point in time" (CR 2006/37, p. 43, para. 24). If the FRY was readmitted as a new Member of the United Nations on 1 November 2000 and changed its legal tactics, this should not have any retroactive effect on the preceding situation or on its international undertakings, *inter alia* the fact that it remained bound by the Genocide Convention, on which the Court's jurisdiction was established at the time that the Application was made, pursuant to the rules of State succession.

26. The declaration of the Federal Republic of Yugoslavia and the official Note addressed to the Secretary-General by the Permanent Mission of Yugoslavia to the United Nations (A/46/915), both dated 27 April 1992, clearly demonstrate the intention of the FRY to present itself as the continuator of the SFRY.

The first indicated:

> "The representatives of the people of the Republic of Serbia and the Republic of Montenegro,
>
> Expressing the will of the citizens of their respective Republics to stay in the common state of Yugoslavia,
>
> . . . . . .
>
> Wish to state in this Declaration their views on the basic, immediate and lasting objectives of the policy of their common state, and on its relations with the former Yugoslav Republics.

[16] J. Combacau, "L'écoulement du temps", *Le droit international et le temps*, 2001, p. 87.

In that regard, the representatives of the people of the Republic of Serbia and the Republic of Montenegro declare:

1. The Federal Republic of Yugoslavia, continuing the state, international legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all the commitments that the SFR of Yugoslavia assumed internationally,

. . . . . .

Remaining bound by all the obligations to international organizations and institutions whose member it is . . .”

The second stated:

“The Assembly of the Socialist Federal Republic of Yugoslavia, at its session held on 27 April 1992, promulgated the Constitution of the Federal Republic of Yugoslavia. Under the Constitution, on the basis of the continuing personality of Yugoslavia and the legitimate decisions by Serbia and Montenegro to continue to live together in Yugoslavia, the Socialist Federal Republic of Yugoslavia is transformed into the Federal Republic of Yugoslavia, consisting of the Republic of Serbia and the Republic of Montenegro.

Strictly respecting the continuity of the international personality of Yugoslavia, the Federal Republic of Yugoslavia shall continue to fulfil all the rights conferred to, and obligations assumed by, the Socialist Federal Republic of Yugoslavia in international relations, including its membership in all international organizations and participation in international treaties ratified or acceded to by Yugoslavia.”

27. Thus the FRY, by these two acts, expressed its intention to ensure the continuity of the SFRY rather than its succession. Its position was clearly for

“a straightforward amputation of the Yugoslav State, which would continue to exist despite the secession of four of its republics. This represented the intention to apply the principle of the constitutional and territorial variability of a State, enabling a legal personality to survive in spite of substantial modifications.”[17]

Continuation effectively means that

“the State remains legally identical, even if it has undergone certain

[17] A. Vahlas, “A propos de trois questions récurrentes en matière de succession d’Etats: application au cas yougoslave”, in P. M. Eisemann, M. Koskenniemi (eds.), *La succession d’Etats: la codification à l’épreuve des faits — State Succession: Codification Tested against the Facts*, 2000, p. 853.

> transformations, for example, a reduction or enlargement of its territory, a change of government, an alteration to its name: in other words, the legal identity is asserted beyond the historical contingencies"[18].

28. As has also been emphasized, there are a number of advantages to continuation relative to succession:

> "the continuator State, supposedly identical to the predecessor State from the perspective of its legal personality, does not need to join the international community. The continuator State naturally replaces the predecessor State and thereby avoids following all the procedures for admission to international organizations or recognition by other States."[19]

Thus "no problems regarding the transmission of rights or obligations should arise in this case, since, by definition, the holder of those rights and obligations remains the same"[20]. The legal consequences of continuation are therefore that the rights and obligations of the initial State are maintained. In principle, it is not necessary for the international community to recognize the situation for a claim to continuity to become effective. In reality, however, recognition by other States generally seems to be required, above all from those States most directly concerned.

29. As for succession, it means that there is "instead of and in place of the initial State, which can thenceforth be called the predecessor State, the advent of a new State, which will be characterized as the successor State"[21]. The purpose of succession is thus to substitute one State for another with respect to responsibility for the international relations of a territory. It consequently involves a certain discontinuity in the organization, composition and functioning of the State. It requires recognition of the successor State by the international community.

30. In the instant case, the FRY's declaration and official Note, both dated 27 April 1992, could have been sufficient to make the FRY automatically the continuator of the SFRY, since no demand for recognition by the international community is in principle required. In fact, "a continuator State in principle benefits *ipso facto* from the international recognition from which it benefited — and continues to benefit — as the State which continues to exist"[22]. Practice, nonetheless, has shown how necessary expressions of such recognition are. The continuator State is effectively different from the predecessor State. While it maintains the legal and international personality and remains bound by its international undertakings, the spatial field of application of the assumed obli-

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[18] B. Stern, "La succession d'Etats", *Recueil des cours de l'Académie de droit international*, 1996, Vol. 262, p. 40.
[19] A. Vahlas, *op. cit.*, p. 854.
[20] B. Stern, *op. cit.*, p. 41.
[21] *Ibid.*, p. 40.
[22] *Ibid.*, p. 59.

gations have been changed as a result of the territorial modifications inherent in all succession processes. The utility of renewed international recognition is thus warranted by the adaptations to the situation of the predecessor State.

31. Further, to determine the FRY's status as a continuator, we must necessarily ponder the process of the dismemberment of the SFRY. Dissolution means that a State splits into two or more new States, none of which can claim to be identified with the pre-existing State. All of the resulting States must in principle be regarded as successor States. As for secession, it involves the continuation by one State of the personality of the predecessor State and the succession of other States from that predecessor State. Theoretically, it was thus for third-party States to determine whether the break-up of SFRY was a dissolution or a secession by way of international recognition. In this respect, the FRY declared itself to be the continuator of the SFRY, while the other States born out of that break-up (Croatia, Macedonia, Bosnia and Herzegovina and Slovenia) viewed themselves as successor States and generally refused to acknowledge the FRY's status as continuator, although certain agreements were reached on this point, as we shall see below. Consequently, if other States were to recognize the FRY as the continuator of the SFRY it would mean that, in their view, the new States had seceded. If not, the SFRY would be considered as dissolved and the FRY could not be viewed as the continuator of that State, since the State concerned had ceased to exist. Nevertheless, the distinction between dissolution and secession seems to be less clear-cut than it might appear. Thus the Vienna Convention on Succession of States in respect of Treaties provides for secession whether or not the predecessor State continues to exist (Art. 34). Moreover, with respect to treaties, the same rules apply in the event of a dissolution as in the event of secession. According to Article 34 of the 1978 Convention, in both cases, any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed. That being the case, it is of little consequence whether or not the FRY was recognized as the continuator of the SFRY: if the SFRY had been dissolved, the FRY could be recognized as one of its successors and gain the status of a party to the treaties ratified by the former Yugoslavia; if, on the contrary, the break-up of the SFRY took the form of several secessions by parts of its territory, the FRY would have been entitled to become its continuator and thus uphold the international undertakings assumed by the SFRY. In either case, the FRY would have succeeded the SFRY with respect to the treaties by which the latter was bound and *inter alia* the Genocide Convention, especially as the SFRY signed and ratified the Convention on the Succession of States in respect of Treaties on 6 February 1979 and 28 April 1980 respectively.

32. The two declarations of 27 April 1992 constituted two unilateral, autonomous acts which, by demonstrating the FRY's wish to be the continuator of the SFRY, committed it to act as such. As was noted by the

International Law Commission in its report on the work of its Fifty-seventh Session, unilateral acts such as those of 27 April 1992 entail certain legal effects. Thus, according to the International Law Commission, it appears "evident . . . that the existence of unilateral acts producing legal effects and creating specific commitments [was] now beyond dispute"[23]. The jurisprudence of the International Court of Justice provides a number of examples of acknowledgment of unilateral acts and of their effects in international law, *inter alia* for the State which made them (*Legal Status of Eastern Greenland, Judgment, 1933, P.C.I.J., Series A/B, No. 53*, p. 22; *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 253; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 457; *Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment, I.C.J. Reports 1962*, p. 6).

33. As for the FRY's intention to commit itself internationally by those unilateral acts of 27 April 1992, there does not seem to be any question about it. The declaration is addressed to the President of the Security Council, thus highlighting the fact that it is not a document which can only have an effect under internal law. Moreover, the declaration and the Note were appended to a letter dated 6 May 1992 to the Secretary-General of the United Nations. The letter indicated that the two documents could be regarded as "official[s] document[s] of the General Assembly"[24].

34. Although the other successor States of the former Yugoslavia challenged the FRY's status at the United Nations and called for equal treatment with it, they had the opportunity, during the same period, to accept the continuity of the FRY in relation to the SFRY. This they did not by political declarations before one or another body, the legal value of which could be open to argument, but also in agreements in due form which clearly engage their signatories. Thus the annex to the Agreement on the Regulation of Relations and Promotion of Co-operation between Macedonia and the FRY signed on 8 April 1996 seems to be an explicit acknowledgment of continuity; in fact, the following was indicated:

> "In the light of the historical facts, both States mutually respect their state continuity (the Republic of Macedonia respects the State continuity of the Federal Republic of Yugoslavia and the Federal Republic of Yugoslavia respects the State continuity of the Republic of Macedonia)"[25].

35. Moreover, an "Agreement on Normalization of Relations between the Federal Republic of Yugoslavia and the Republic of Croatia" was signed on 23 August 1996, in which it was stated that Croatia acknowl-

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[23] Report of the International Law Commission on the Work of its Fifty-seventh Session (2005), United Nations, doc. A/60/10, pp. 132-133.

[24] United Nations, doc. A/46/915.

[25] Agreement on the Regulation of Relations and Promotion of Co-operation between the Republic of Macedonia and the Federal Republic of Yugoslavia, Belgrade, 8 April 1996, Ann., United Nations, doc. S/1996/291.

edged the continuity between the SFRY and the FRY. Article 5 also said:

> "Proceeding from the historical fact that Serbia and Montenegro existed as independent States before the creation of Yugoslavia, and bearing in mind the fact that Yugoslavia has continued the international legal personality of these States, the Republic of Croatia notes the existence of the State continuity of the Federal Republic of Yugoslavia."[26]

36. Finally, Bosnia and Herzegovina made a similar statement, although in slightly different terms, in the Joint Declaration signed in Paris on 3 October 1996 by the Serbian and Bosnian Presidents. Point IV lays down to this end:

> "The Federal Republic of Yugoslavia will respect the integrity of Bosnia and Hercegovina in accordance with the Dayton Agreement which affirmed the continuity of various forms of statal organization of Bosnia and Hercegovina that the peoples of Bosnia and Hercegovina had during their history. *Bosnia and Hercegovina accepts the State continuity of the Federal Republic of Yugoslavia.*
>
> Both sides agree to resolve issues of succession on the basis of the rules of international law on succession of States and by agreement."[27] (Emphasis added.)

All of the aforementioned elements show that interpretations regarding the status of the FRY varied depending on the body, dialogue and time involved; those variations and the resulting ambiguity cannot be interpreted as giving a straightforward, automatic retroactive effect to the decision to admit the FRY to the United Nations in November 2000. True, that decision clarified the situation for the present and the future, but it did not settle the issue regarding the preceding period, *inter alia* the crucial time when Bosnia and Herzegovina filed its Application with the Court and the FRY's status remained on hold. In any event, it would not have been justified in the present case to challenge the Court's decision on its jurisdiction of 11 July 1996 on the basis of the situation regarding the FRY's status within the United Nations obtaining at the date the Application was filed, especially after analysis of the Respondent's conduct from 1993 to 2000, as we have seen above.

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[26] Agreement on Normalization of Relations between the Federal Republic of Yugoslavia and the Republic of Croatia, Belgrade, 23 August 1996, Art. 5, United Nations, doc. A/51/318-S/1996/706.

[27] Joint Declaration of the President of the Republic of Serbia and the President of the Presidency of Bosnia and Herzegovina, Paris, 3 October 1996, United Nations, doc. A/51/461-S/1996/830.

II. State Responsibility in Respect of the Convention on the Prevention and Punishment of the Crime of Genocide

37. The provisions of the Genocide Convention have given rise to problems of interpretation due to the ambiguous way in which they were written, the uncertainty of some of the concepts used or the scope that should be attributed to them[28]. Controversy has also surrounded Article IX, which provides that

> "[d]isputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute",

although such arguments can sometimes exaggerate the difficulty of its interpretation, given that certain references are sufficiently clear and demand no further comment, unless the interpretation is overstretched in order to arrive at unreasonable conclusions. In the present case, the Court has given an interpretation which I largely share; however, I feel that my position on this point warrants further explanation.

38. The reference to the responsibility of States in that Article has given rise to doubts: "there were many doubts as to the actual meaning of the reference to the responsibility of States"[29]; it has also been said that Article IX is "already . . . such a weak jurisdictional mechanism"[30], with "ambiguous wording"[31]; it has even been claimed that the State responsibility towards which the Article is directed involves a criminal

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[28] These problems have been noted in the doctrine concerning a number of articles, with reference to a lack of concrete practice accentuating the difficulties (see, for example, Joe Verhoeven, "Le crime de génocide: originalité et ambiguïté", *Revue belge de droit international*, Vol. XXIV, 1991/1, pp. 5 *et seq.*). However, since the establishment of international criminal tribunals and the contribution of their jurisprudence, a number of areas have been clarified, thus reducing the difficulties of interpretation, although not eliminating them (see A. M. La Rosa and S. Villalpando, "Le crime de génocide revisité. Nouveau regard sur la définition de la Convention de 1948 à l'heure de son cinquantième anniversaire. Tentative d'appréhension théorique des éléments constitutifs du crime", in K. Boustany and D. Dormoy (eds.), *Génocide(s)*, 1999, pp. 53 *et seq.*; W. A. Schabas, "The Crime of Genocide, Recent Problems of Interpretation", *International Humanitarian Law*, Vol. 1, Ardsley, Transnational, 2003, pp. 239 *et seq.*; G. Verdirame, "The Genocide Definition in the Jurisprudence of the *Ad Hoc* Tribunals", *The International and Comparative Law Quarterly*, Vol. 49, 2000, pp. 578 *et seq.*).

[29] N. Robinson, *The Genocide Convention. Its Origins and Interpretation*, 1949, p. 42.

[30] A. Cassese, "La communauté internationale et le génocide", *Mélanges Michel Virally: le droit international au service de la paix, de la justice et du développement*, 1991, p. 185.

[31] N. Jorgensen, "State Responsibility and the 1948 Genocide Convention", in *The Reality of International Law: Essays in Honour of Ian Brownlie*, 1999, pp. 273-275.

aspect of State responsibility[32], although that controversial interpretation is not upheld by the greater part of scholarly opinion, as we will see subsequently[33].

39. The Respondent submits that the rules which usually govern the international responsibility of States cannot be applied with respect to Article IX, a position which it maintains even though in 1996 the Court rejected the objection raised by Serbia and Montenegro according to which the responsibility of a State for an act of genocide perpetrated by the State itself was supposedly excluded from the scope of the Convention[34]. The Parties therefore argued over that point once again in both the written pleadings and the oral arguments. The Applicant used the normal and ordinary meaning of the text of Article IX as a basis for establishing State responsibility for genocide, emphasizing that "[i]t is therefore essential to keep in mind every word of Article IX" (CR 2006/8, p. 18, para. 22) and that ascertaining whether the Genocide Convention provides for State responsibility "ought not to strain our capacity for treaty interpretation" (CR 2006/11, p. 50, para. 7), thus concluding that such responsibility should be recognized for all the acts proscribed by the Convention. As for Serbia and Montenegro, it has upheld a different approach, drawing *inter alia* on the interpretation of Article IX given by two of the Court's judges in the joint declaration which they appended to the 1996 Judgment, in which they submitted that:

> "The Convention on Genocide is essentially and primarily directed towards the punishment of persons committing genocide or genocidal acts and the prevention of the commission of such crimes by individuals.
>
> . . . . . .
>
> Therefore . . . this Court is perhaps not the proper venue for the adjudication of the complaints which the Applicant has raised in the current proceedings." (*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)*, joint declaration of Judges Shi and Vereshchetin, pp. 631-632.)

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[32] F. Malekian, *International Criminal Law. The Legal and Critical Analysis of International Crimes*, Vol. 1, 1991, p. 305 ("the term responsibility of a state (in Art. IX) can also be interpreted as the international criminal responsibility of the state").

[33] M. N. Shaw, "Genocide and International Law", in *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne*, 1989, pp. 813 *et seq.*; N. Jorgensen, "State Responsibility and the 1948 Genocide Convention", *op. cit.*, pp. 273 *et seq.*

[34] "The Court would observe that the reference in Article IX to the responsibility of a State for genocide or for any of the other acts enumerated in Article III does not exclude any form of State responsibility." (*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. 616, para. 32.).

40. If the opinion of these two judges was guarded, as illustrated by the use of the word "perhaps", that of Judge Oda in his declaration:

> "I admit that the extremely vague and uncertain provision of Article IX of the Genocide Convention may leave room for the Court to allow itself to be seised of the present case, but consider that such a conclusion would be based on a misinterpretation of the real spirit of the Genocide Convention" (*ibid.*, p. 630, para. 10),

and, more particularly, Judge *ad hoc* Kreća in his dissenting opinion: "I am convinced that the Genocide Convention provided for no international civil responsibility of States for the crime of genocide" (*ibid.*, p. 772, para. 105) were far more categorical in their conclusions for rejecting State responsibility. According to the Respondent, "the Genocide Convention does not provide for the responsibility of States for acts of genocide as such" (CR 2006/16, p. 15, para. 20); Article IX mentions State responsibility, but

> "of course the wording has to be construed with the other provisions of the Convention. It is individuals who are criminally liable, in accordance with the provisions of domestic law as applied by domestic courts." (*Ibid.*, p. 19, para. 41.)

Basing itself upon the *travaux préparatoires*, the Respondent added that

> "the content of Article IX is not consistent with the substantive provisions of the Convention. And given that Article IX is devoted to the machinery of settlement of disputes, it surely cannot be predominant." (*Ibid.*, p. 21, para. 49.)

However, an examination of the drafting history leads us to conclude that the Convention's authors intended to include State responsibility for genocide in the Convention (I), and since, in international law as it now stands, that cannot be a criminal responsibility, it can only take the form of the international responsibility of States (II).

A. An Examination of the Travaux Préparatoires *for the Genocide Convention*

41. In principle and in accordance with Article 32 of the Vienna Convention on the Law of Treaties, reference to the *travaux préparatoires* may be made

> "in order to confirm the meaning resulting from application of Article 31, or to determine the meaning when the interpretation according to Article 31: *(a)* leaves the meaning ambiguous or

> obscure; or *(b)* leads to a result which is manifestly absurd or unreasonable"[35].

In the *Lotus* case, the Permanent Court of International Justice clearly stated that "there is no occasion to have regard to preparatory work if the text of a convention is sufficiently clear in itself" (*"Lotus", Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 16).

42. In the Respondent's opinion, Article IX of the Genocide Convention is not sufficiently clear when it establishes State responsibility for acts of genocide. In the words of the Respondent's counsel, who challenged the meaning given to it by the Court:

> "The interpretation adopted in this provisional mode by the Court is not buttressed by any reference to the substantial preparatory work of the Convention.
>
> In the circumstances, there is no reason of principle or consideration of common sense indicating that the issue of interpretation is no longer open." (CR 2006/16, p. 14, para. 16-17.)

He added that:

> "The *travaux préparatoires* show that it was during the last phase of elaboration of the Convention that, by a very slim majority of 19 votes to 17, with nine abstentions, the provision relating to the responsibility of States for genocide or genocidal acts was included . . . without the concurrent introduction of necessary modifications into other articles of the Convention." (*Ibid*., p. 14, para. 18.)

43. Apart from the challenge to *res judicata* implied, such a conception gives an unusual interpretation to the *travaux préparatoires*. It is hardly very convincing to claim that the reference to the responsibility of States was introduced into the article on dispute settlement at the last minute, without making the necessary modifications to the other articles. An objective, detailed reading of the *travaux préparatoires* of the Convention clearly shows that the issue of the responsibility of States was debated throughout the discussions on Articles II, IV, VI and IX, before such responsibility was adopted in Article IX[36]. First, the issue of State responsibility was indirectly raised in the discussions concerning the draft Article II of the *Ad Hoc* Committee on Genocide's report. The French delegation wanted to emphasize "the role of Governments in the perpetration of genocide"[37], and tabled an amendment to the definition of genocide to which it added the words: "it is committed, encouraged or

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[35] Vienna Convention on the Law of Treaties of 23 May 1969, Art. 32.

[36] On those debates see *inter alia* N. Jorgensen, "State Responsibility and the 1948 Genocide Convention", *op. cit*., pp. 275 *et seq*.

[37] *Official Records of the General Assembly, Third Session, Part I, Sixth Committee*, 69th meeting, p. 56 (France, Chaumont).

tolerated by the rulers of a State"[38]. The delegate of the United Kingdom, while expressing his intention to vote against the French amendment as "it made the mistake of excluding cases of genocide committed by private individuals", stressed, nonetheless, that "the text drafted by the *Ad Hoc* Committee was also deficient in that it failed adequately to stress the responsibility of the State for the acts of genocide committed in its territory or international responsibility for acts of genocide committed by a State". Mr. Fitzmaurice also emphasized that "[i]t was in fact difficult to imagine that genocide could be perpetrated on a large scale without the collusion of rulers"[39]. In that debate, the notion of the necessity of a responsibility of States to prevent and punish genocide was backed by a number of other delegations, such as Peru[40], the United States of America — albeit to a more limited extent[41] — and the United Kingdom of course.

44. Subsequently, during the sometimes rather confused debate concerning Article V, Belgium and the United Kingdom tabled amendments linking the perpetration of genocide to the State. Belgium's amendment suggested the punishment of State agents, while that of the United Kingdom tried to introduce a "criminal responsibility" for States; the two different amendments, submitted to establish the jurisdiction of the ICJ for State responsibility, were initially rejected, but were put back on the agenda during the discussions on Article VII and, after a fairly prolonged debate, the responsibility of States was finally accepted in Article IX[42], following several amendments to the draft put forward by the *Ad Hoc* Committee. The *travaux préparatoires* do not thus run counter to the ordinary and apparent meaning of the terms of Article IX; one might even conclude that they bear it out, as demonstrated by the assessment made by the United Kingdom's delegate to the Sixth Committee, with the statement by Mr. Fitzmaurice that:

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[38] *Official Records of the General Assembly, Third Session, Part I, Sixth Committee*, Annex to Summary Records of Meetings, doc. A/C.6/211, p. 14.

[39] *Official Records of the General Assembly, Third Session, Part I, Sixth Committee*, 79th meeting, p. 160 (United Kingdom, Fitzmaurice).

[40] *Official Records of the General Assembly, Third Session, Part I, Sixth Committee*, 69th meeting, p. 60 (Peru, Maurtua):

> "The individual should be protected by his own national legislation whereas international jurisdiction would apply to Governments which did not do their duty in that respect or encouraged the crime of genocide."

[41] *Official Records of the General Assembly, Third Session, Part I, Sixth Committee*, 79th meeting, p. 158 (United States of America, Maktos):

> "if, in spite of all the measures taken, the State did not succeed in arresting the guilty person, an international agency acting instead of the national courts would have no better chance of succeeding. On the other hand, if a State had not done all it could to prevent or punish the crime, international responsibility would come under consideration."

[42] Article X in the *Ad Hoc* Committee's draft.

> "While everyone agreed that an act of genocide, if committed by a State or Government, was a breach of the Convention, there appeared to be considerable difficulty in expressing that idea in the text of the Convention itself."[43]

45. The foregoing explanations imply that the Genocide Convention indeed introduced a direct responsibility of States for acts of genocide[44], and not just a duty to prevent and punish the perpetration of genocide by individuals as claimed by the Respondent. No other conclusion is possible, since a genocidal undertaking cannot readily be envisaged without the support or collusion of the State, and more importantly any other outcome would result in a situation which would be both paradoxical and absurd, contrary to the rules of interpretation in Article 32 of the Vienna Convention on the Law of Treaties[45]. As L. A. Sicilianos noted:

> "It would be absurd for the Convention to cover only the responsibility resulting from the failure of a State in its duty to prevent and punish and not the responsibility of a State for acts of genocide perpetrated by itself; all the more so given that Article IV of the Convention indicates that persons committing genocide . . . are to be punished, whether they are rulers, public officials or private individuals. A different approach would deprive the Convention of its reason for existence."[46]

The Court clearly and firmly adopted that approach in a paragraph of its Judgment of 11 July 1996, which warrants quotation in full:

> "The Court would observe that the reference in Article IX to 'the responsibility of a State for genocide or for any of the other acts enumerated in Article III', does not exclude any form of State responsibility." (*I.C.J. Reports 1996 (II)*, p. 616, para. 32).

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[43] See *Official Records of the General Assembly, Third Session, Part I, Sixth Committee*, Summary Records of Meetings, 21 September-10 December 1948, 96th meeting, p. 352.

[44] In view of this, it is even more difficult to understand the extremely restrictive interpretation adopted by Judge Oda in a secondary sentence in his declaration appended to the 11 July 1996 Judgment, in which the Convention is said to be.

> "a new type of treaty to deal with the rights of individuals as a whole, but not with the rights and obligations in the inter-State relations" (*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)*, declaration of Judge Oda, p. 629, para. 9).

[45] The process of interpretation must not deprive the terms of a Convention of their substance unless the text, the context and the subject-matter clearly prompt such a conclusion (see in this respect: *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, pp. 4 and 24; *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, pp. 69 and 89).

[46] L. A. Sicilianos, "La Responsabilité de l'Etat pour absence de prévention et de répression des crimes internationaux", *Droit international pénal*, 2000, p. 116.

The Court confirms and explains the reasons underlying this approach in paragraph 166 of the present Judgment in terms with which I wholeheartedly agree. That of course shows that the Court is capable of identifying the consequences that may result for the responsibility of the State concerned[47].

B. The Nature of State Responsibility

46. While there is no longer any doubt about the idea of State responsibility in internal and international legal systems, the notion of a State's criminal responsibility is far from universally accepted, and for some the characterization "criminal" in conjunction with State responsibility even appears improper, since "even when an internationally wrongful act by a State is qualified as a crime, it does not lead to the same legal consequences as for the criminal acts of individuals"[48]. The long history of debate within the ILC during the consideration of the draft Articles on State Responsibility for Internationally Wrongful Acts was a good illustration of the theoretical and practical problems of these concepts[49]; we know that the ILC, having maintained the notion of international crimes by States in the first reading, abandoned it upon the second reading precisely so as to avoid any confusion between the crimes of individuals and the particularly serious internationally wrongful acts of States[50]; for that reason, it opted to describe the latter by way of a lengthy circumlocution targeting "serious breaches of obligations under peremptory norms of general international

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[47] Regarding the Court's role in this area, see Chapter 9 of W. A. Schabas, "State Responsibility and the Role of the International Court of Justice", in *Genocide in International Law*, 2000, pp. 418-446.

[48] M. Kamto, "Responsabilité de l'Etat et responsabilité de l'individu pour crime de génocide — Quels mécanismes de mise en œuvre?", in *Génocide(s)*, 1999, p. 489.

[49] The two opposing viewpoints which emerged during those debates, regarding the distinction between "crimes" and "delicts", were summarized in the positions taken by two members of the Commission, one in favour and the other opposed to the recognition of the notion of State crimes, in the volume containing the ILC's contribution to the United Nations Decade of International Law, *International Law on the Eve of the Twenty-First Century: The Views of the International Law Commission — Le droit international à l'aube du XXI^e siècle: réflexions de codificateurs*, United Nations, New York, 1997; according to A. Pellet ("Vive le Crime! Remarques sur les degrés de l'illicite en droit international"), "There are very good reasons, both theoretical and practical, in favour of maintaining the distinction between the two categories of internationally wrongful acts ...", pp. 287-288; according to R. Rosenstock ("An International Criminal Responsibility of States?", in *International Law on the Eve of the Twenty-First Century: The Views of the International Law Commission — Le droit international à l'aube du XXI^e siècle: réflexions de codificateurs, op. cit.*), "There is no basis in State practice for distinction between 'delicts' and 'crimes'. There does not, in the view of the writer, seem to be any logically or politically compelling reason to create such a distinction." (P. 284.)

[50] See E. Wyler, "From 'State Crime' to Responsibility for 'Serious Breaches of Obligations under Peremptory Norms of General International Law'", *European Journal of International Law*, Vol. 13 (2002), No. 3, pp. 1156 *et seq.*

law" (Chap. III, Arts. 40 and 41, of the draft)[51], thus avoiding the term "crime" while nonetheless covering the notion it contains.

47. Serbia gave over considerable time in its oral arguments to demonstrate that the Genocide Convention implies no criminal responsibility whatsoever for States for genocide (CR 2006/16, pp. 19-30, paras. 38-82 (Brownlie)), when there is really no great difference between the Respondent and the Applicant on that precise point; that was probably attributable to the proportions taken by the discussion on that issue within the International Law Commission with respect to draft Article 19 on the international crimes of States[52]. The difference actually lies elsewhere, since, although the Respondent is right to assert that the Convention does not provide for the criminal responsibility of States, that does not mean that the Convention does not address State responsibility at all. While Bosnia and Herzegovina is not of the view that Serbia must be held criminally responsible[53], it is because the responsibility of States is additional to the responsibility of individuals. That was the approach decided on by the ILC at its fifty-third session in 2001 for its draft Articles on State Responsibility, as well as that of the Statute of the International Criminal Court, of which Article 25 states that "[n]o provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law"[54]. That is also the general opinion of the doctrine, summarized thus:

> "Neither civil nor criminal, international responsibility borrows from both major 'techniques', but also possesses its own features and cannot be equated to the categories of internal law, given that the community of nations has little in common with national communities."[55]

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[51] See the comments on these Articles (*International Law Commission Report*, 2001, pp. 298 *et seq.*).

[52] These discussions were echoed in the Court's own deliberations when it rendered its 1996 Judgment, as shown by the opinions of Judges Shi, Vereshchetin and Oda and, more particularly, Judge *ad hoc* Kreća, who wrote several pages on the notion of States' criminal responsibility (*I.C.J. Reports 1996 (II)*, pp. 767-772, paras. 103-105).

[53] "The responsibility of States in international law is neither civil nor criminal — it is simply international", CR 2006/8, p. 12, para. 6 (Pellet).

[54] Article 10 of the Statute also states "[n]othing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute".

[55] P. Daillier and A. Pellet, "Droit international public", *LGDJ*, 7th ed., 2002, p. 764. It is not, however, certain that this double negation — neither civil nor criminal —, also used by other scholars (see J. Barbosa, "State Crimes: a Decaffeinated Coffee?", in *Liber Amicorum Georges Abi Saab*, L. Boisson de Chazournes and V. Gowlland-Debas (eds.), 2001, p. 360), entirely settles the issue. It would probably be clearer to say that it equates to civil responsibility, as the main outcome sought is reparation; there may be a repressive aspect to the notion of reparations, but under international law in its current form, the punitive aspect with respect to a State remains a political decision dependent upon the Security Council acting under the relevant provisions of the United Nations Charter.

48. It was also asserted that the Court has no jurisdiction to impose reparation, since the Convention does not provide for such measures[56]. It is true that certain aspects may be overlooked in treaties and in the Genocide Convention in particular, *inter alia* the procedure for reparation. But the Court is in a position to put right such deficiencies by recourse to general international law; in that respect, the ILC has made a particularly significant contribution through its work, by clarifying the content of the rules applying to State responsibility.

49. In short, as the Court clearly indicated in its 1996 Judgment, which is *res judicata*, "Article IX does not exclude any form of State responsibility" and that interpretation is consistent with the *travaux préparatoires* of the Convention, which show that the principle of State responsibility for genocide was established after a lengthy debate following the joint Anglo-Belgian proposal. The Court clearly and explicitly confirms that interpretation, finding that "Contracting Parties may be responsible for genocide and the other acts enumerated in Article III of the Convention" (Judgment, para. 169). That is also consistent with the idea that the proscription of genocide is also a rule of customary international law which is binding upon States, even if they have not adopted the Convention (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23 ("the principles underlying the Convention are recognized by civilized nations as binding on States even without any conventional obligation")); consequently, any violation of that proscription constitutes not just a wrongful act, but also a serious breach of the obligations under peremptory norms of general international law[57], resulting for the State concerned in all of the applicable legal consequences of international responsibility, *inter alia* the obligation to cease the act, provide assurances of non-repetition and make reparation for the injury caused by the breach[58].

[56] N. Robinson, *op cit*., p. 43, "since the Convention does not specifically refer to reparation, the parties to it did not undertake to have accepted the Court's compulsory jurisdiction in this question".

[57] Article 40 of the International Law Commission's draft Articles on State Responsibility for Internationally Wrongful Acts.

[58] See Articles 28 *et seq*. of the International Law Commission's draft Articles.

III. The Question of Evidence

50. When making its first Order of 8 April 1993 on provisional measures, the Court had already noted the existence of a "grave risk of acts of genocide being committed" in the case. Having received a fresh request for provisional measures, the Court found, in its second Order of 13 September 1993, that the Respondent had not only failed to respect the measures indicated for preventing and punishing such acts, but had further taken measures such as to aggravate the situation. For it stated that:

> "since the Order of 8 April 1993 was made, and despite that Order, and despite many resolutions of the Security Council of the United Nations, great suffering and loss of life has been sustained by the population of Bosnia-Herzegovina in circumstances which shock the conscience of mankind and flagrantly conflict with moral law and the spirit and aims of the United Nations" (*I.C.J. Reports 1993*, p. 348, para. 52).

And above all, it added that it: "[wa]s not satisfied that all that might have been done ha[d] been done to prevent commission of the crime of genocide in the territory of Bosnia-Herzegovina" (*ibid.*, pp. 348-349, para. 57).

For all the caution of the terms employed by the Court and the fact that they are prima facie findings, it was already apparent that the evidence submitted by the Applicant was sufficiently convincing to lend credence to the accusation brought against the Respondent, to reaffirm the provisional measures already ordered and to allow reference to the commission of genocide.

51. Since 1996, and *inter alia* as a result of the trials held before the International Criminal Tribunal for the former Yugoslavia (ICTY), evidence has accumulated in the form of an impressive mass of information: official or non-official documents from various Serb entities involved, directly or indirectly, in the acts of genocide; oral or written statements from the central figures in the Bosnian tragedy, including the leading figures tried for or accused of these acts; resolutions, reports and other United Nations documents; reports and documents of the intelligence services of the various States; testimonies of victims and perpetrators of acts of atrocity before the ICTY or national tribunals; statements by witnesses, expert witnesses or experts before the Court; proceedings and judgments of the ICTY (trial and appeal chambers) and so on. Naturally this information cannot all be treated uniformly as evidence; as the Court rightly indicates, it must be examined with all the attention and circumspection necessary in order to establish the veracity or plausibility of the facts, their imputation and the share of liability falling on the Respondent.

52. The requirement, in this case, was to furnish evidence showing that a State is involved in genocide, either as perpetrator or co-perpetrator of this crime or as an accomplice in its commission, or as failing to do anything to prevent or punish the perpetrators. Now since the State is a legal entity, namely an abstraction unable to act on its own, the acts or omissions imputed to it are materially committed by individuals, acting individually or collectively, coming in one way or another under the authority of the State involved.

It is therefore necessary to prove, first, the truth of these acts or omissions and, further, the link with the State. Other forums than the Court have already had occasion to deal with such situations, since an international criminal tribunal has been set up and some national courts have sometimes been seised to prosecute and judge individuals accused of genocide in the former Yugoslavia. These trials, together with those before the International Criminal Tribunal for Rwanda, which concern individuals, have afforded the opportunity to examine the various aspects of the crime of genocide and constitute a considerable contribution to understanding the many facets of this crime, clarifying its constituent elements and characterizing the acts that should be covered by this accusation.

53. With regard more particularly to the International Criminal Tribunal for the former Yugoslavia, its activity covers very extensively and directly the same facts as those submitted to the Court for consideration; an important difference, however, lies in the fact that they are apprehended by the ICTY from a particular angle, that of the individual criminal liability of each accused, whereas the Court apprehends them from another angle, that of the international responsibility of the State. Although the judgments of the ICTY are not binding on the International Court of Justice, they are based on factual findings which constitute relevant and even decisive evidence of the reality of the crime of genocide that the Court cannot overlook.

In each trial, the Tribunal respected all the procedures and guarantees so as to establish the exact circumstances of the crimes committed; it examined under adversarial proceedings each of the numerous items of evidence or presumptions regarding the acts held against the accused; it examined all the prosecution or defence arguments before reaching a decision, on trial and sometimes on appeal, that was fully reflected upon and weighed with due regard for the profile of the accused and of each actual situation. For each case, a necessary and generally very long period of time was spent in order to "prove beyond any reasonable doubt" that the accused did or did not take part in acts of genocide. In any event, any judgment recognizing the existence of acts of genocide in Bosnia and Herzegovina constitutes a starting-point for considering whether and to what extent such acts are attributable to organs or persons under the authority of the Respondent or acting on its behalf and thereby engaging its responsibility.

54. As we know, while charges of genocide were brought against sev-

eral individuals, the Trial Chamber accepted the charge to sentence only a few persons as perpetrator of or accomplice in the crime of genocide in the case of the Srebrenica massacre (*Tadić*, *Krstić* and *Blagojević* cases); the Appeals Chamber has not endorsed all these judgments and, so far, it has upheld the crime of genocide in only one case to sentence the accused as accomplice and not as perpetrator or co-perpetrator of such a crime (*Krstić* case)[59], showing itself to be very demanding in terms of the standard of proof. However, even when the judgment does not, on the basis of the evidence adduced, find the accused guilty of genocide (*Brdjanin*, *Jelisić*, *Stakić* and *Sikirica et al.* cases), that does not necessarily mean that there has been no genocide. In my opinion, the evidence requirements are not precisely the same according to whether we are concerned with the personal involvement of an individual or with the involvement of a State. The most exacting standard is justified in criminal proceedings where precise individual conduct is being judged and there is a need to prove the avowed intent — beyond any reasonable doubt — of an accused to commit an act of genocide; we know that the strictness of this requirement has given rise to debate and has been challenged, as shown both by the dissenting opinions occasionally accompanying some judgments[60] and by the numerous commentaries prompted by those judgments in legal writings. The fact remains that, even if such a standard is not met and personal participation in genocide is not found, the acquittal of an individual of this crime does not rule out its reality; for an accused may carry out atrocious acts by obeying orders without being fully informed or fully aware that they are part of a policy aimed at genocide.

There can thus be conflicts in the jurisprudence, for example between a trial chamber of the ICTY establishing guilt for genocide and the Appeals Chamber rejecting such guilt, without this being decisive as regards the existence of a policy of genocide[61]. In this case, the need is not so much to prove that the accused personally perpetrated or was an accomplice in an act of genocide; the need is rather to identify items of evidence such as will make it convincingly clear that crimes were committed in circumstances such that they pertain directly to a genocidal policy imputable to

[59] The Appeals Chamber has not yet ruled in the case of *Blagojević*, found guilty of complicity in genocide by the Trial Chamber on 17 January 2005.

[60] See, for example, the partially dissenting opinions of Judge Shahabuddeen in the *Krstić* and *Jelisić* cases and of Judges Wald and Pocar in the *Jelisić* case.

[61] This is moreover confirmed by the doctrine (cf. W.A. Schabas, *op. cit.,* p. 227; L. van den Herik and E. van Sliedregt, "Ten Years Later, the Rwanda Tribunal Still Faces Legal Complexities: Some Comments on the Vagueness of the Indictment, Complicity in Genocide and the Nexus Requirement for War Crimes", *Leiden Journal of International Law*, Vol. 17, 2004, pp. 537-557; C. Eboe-Osuji, "Complicity in Genocide versus Aiding and Abetting Genocide, Construing the Difference in the ICTR and ICTY Statutes", *Journal of International Criminal Justice*, Vol. 3, 2005, pp. 56-81).

a State and, more precisely, that they were committed or instigated by individuals coming directly under the authority of the respondent State or acting on its behalf or on its account or under its control in carrying out such a criminal project.

55. As we have observed, it is rare for a State to proclaim, officially or publicly, that it intends to carry out an illicit action, let alone proclaim its intent to commit a serious crime, particularly genocide, which is generally regarded as the "crime of crimes". Even in the case of the two examples where such a crime has been recognized as having been committed, that of the genocide of the Jews by Nazi Germany and the genocide of the Tutsis in Rwanda, it was not clearly embarked upon officially and publicly, since the proclamation of a "final solution" policy in the former case and the "ethnic cleansing" project in the latter retain a degree of ambiguity; in reality it took the defeat and fall of the two régimes concerned, with access to the records including confidential or secret documents, to make it possible to gather an array of evidence attesting that genocide had been programmed and carried out against certain clearly identified individual groups.

56. In the present case, the change of political régime and the fall of President Milošević, regarded as the main figure responsible for the war and the crimes committed in Bosnia and Herzegovina, has led only to limited and partial access to the sources of information on how the operations were conducted. One of the main exhibits relating to the direct involvement of the Serbian State in the operations against non-Serb populations is the record of the meetings of the Supreme Defence Council; that document was produced before the ICTY and brought to the notice of the Court, but much of its content had been censored, blackened to make it illegible. This camouflage operation legitimately arouses the suspicion that the Belgrade authorities wish to withhold certain information from the Court, probably decisions that reveal the direct involvement of Serbian army officers serving in the army of the Serb entity of Bosnia (Republika Srpska) throughout the tragedy. While many high-ranking Serbian officers were indeed present in Bosnia and Herzegovina, this means that an even more considerable number of soldiers and other elements of paramilitary forces were also present, which might lead to the conclusion that the Serbian State was directly involved in the criminal undertaking, and possibly in acts of genocide as well. Bosnia and Herzegovina asked the Court to require the respondent State to produce that document in unexpurgated form, first by means of a written request and then in the oral proceedings, without its request being satisfied. It is on this very important point that the Court's position appears questionable, since not only does it reject the Applicant's request, but it provides no explanation or justification for doing so; it merely states very abruptly that "the Applicant has extensive documentation and other evidence available to it, especially from the readily accessible ICTY records" and that "[i]t has made very ample use of it" (Judgment, para. 206). That,

however, is not the issue. The point is that among the mass of ICTY documents and files that are available, it is necessary to find and produce those which may constitute items of evidence that bear out the accusations. Thanks to the remarkable investigative work carried out by the ICTY, the Applicant has managed to obtain such a document, but one that is incomplete through the will of the Respondent. The Applicant's wish to see the document in full is entirely legitimate, as its contents could be an important or even decisive element in demonstrating the more or less direct involvement of the Respondent in the criminal enterprise of which it is accused. However, the Applicant's request was not acted upon and the Court itself used none of its powers to obtain any documents at all.

57. As we know, the Court itself "may, even before the hearing begins, call upon the agents to produce any document" (Statute, Art. 49) and it may also "call upon the parties to produce such evidence or to give such explanations as the Court may consider to be necessary for the elucidation of any aspect of the matters in issue" (Rules of Court, Art. 62, para. 1). Since the Court was unable to meet the request of the applicant State or to invite *proprio motu* the Respondent to provide the document, it has not been possible to obtain clarifications regarding the document in question; the Court has had to make do with a question asked of the Respondent by a judge regarding the link between its refusal to produce the document in full and the present case before the Court, and a reply from the Respondent which does not provide the desired clarifications. The Respondent's reply that the blackening of the documents produced before the ICTY was linked to the protection of national security interests and unconnected with the present case before the Court is not satisfactory.

More than ten years after the events took place, it seems difficult to understand in what manner the disclosure of the minutes of the Supreme Defence Council could damage national security interests; it appears, quite plainly, that the masking was intended to render illegible the names of many officers of the Serbian military forces engaged directly in the territory of Bosnia and Herzegovina where crimes and possibly acts of genocide were taking place.

58. The hesitations or misgivings of the Court about responding to a request or deciding *proprio motu* to order the production of a document are indeed readily understandable; such action may involve a number of drawbacks that can be summarized thus:

— giving the impression that the Court is going to assist — or even stand in for — the party making the request in its task of assuming the burden of proof, whereas that is not the role of the Court and it must maintain a perfectly equal balance between the parties;

— taking a measure of which the symbolic force vis-à-vis the sovereignty of States is indisputable, which might make them more distrustful of the powers and role of the Court;
— meeting with a refusal invoking the interest of national defence and the confidentiality surrounding it, and so finding itself in an embarrassing situation for the credit of the Court, which lacks the means of obliging a State to comply with its decisions[62]. In a less dramatic case than the instant one, the Court requested the United Kingdom to communicate certain documents relating to passage orders of warships in the Corfu Channel, but those documents were not produced, the plea being naval secrecy, and the witnesses declined to answer questions on them (*Corfu Channel (United Kingdom* v. *Albania)*, *Merits, Judgment, I.C.J. Reports 1949*, p. 32).

59. However, the merit and the relevance of these arguments do not suffice to make them convincing in the present case. We can here leave aside the second and third arguments, which pertain to the jurisprudential policy of the Court and the balance that should be achieved between the requirements of justice and the desirability of dealing tactfully with the sovereignty and susceptibility of States; the problem is not peculiar to the present case and, although it is of particular interest, developing the discussion further does not appear to be necessary. On the other hand, the first argument relating to the role of the Court in the matter of proof[63] merits some brief consideration, particularly since the Court is for the first time seised of a grave accusation of genocide against a State and, in the face of such an accusation, the problem of evidence is singularly important and acute; it is therefore logical and to be expected that the Court should be called upon or that it should itself employ every means offered it by its Statute to arrive at clear findings on the authenticity or otherwise of alleged facts.

60. It is well established in all legal systems, both national and international, that the onus of proof is incumbent on the party relying on it and, in the present case, it is for Bosnia and Herzegovina to prove that Serbia committed genocide or, failing that, that it was an accomplice in

[62] On the problem of secrecy, see G. Niyungeko, "La preuve devant les juridictions internationales", thesis, Free University of Brussels, 1988, pp. 188-189 and 287-292.

[63] On the more general problem of proof before the Court, see G. Guillaume, "Preuve et mesures d'instruction devant les juridictions internationales", in *La Cour internationale de Justice à l'aube du XXI^e siècle: le regard d'un juge*, 2003, pp. 85-110; M. Lachs, "La preuve et la Cour internationale de Justice", in Ch. Perelman and P. Foriers (eds.), *La preuve et le droit*, 1981, pp. 109-123; C. F. Amerasinghe, "Principes en matière de preuve dans le procès international", *Annuaire de l'Institut de droit international*, Vol. 70, 1, 2002-2003, pp. 139-398; H. W. A. Thirlway, "Evidence before International Courts and Tribunals", in R. Bernardt *et al.* (eds.), *Encyclopedia of Public International Law*, 1995, 2, pp. 330 *et seq.*; J. C. Witenberg, "La théorie des preuves devant les juridictions internationales", *Recueil des cours de l'Académie de droit international,* 1936, Vol. 56, pp. 5-102.

genocide. One of the main allegations is that members of Serbian military and paramilitary forces were the perpetrators of or, at the very least, accomplices in acts of genocide that took place on Bosnian territory and, in support of that allegation, Bosnia and Herzegovina provided a document produced before the ICTY such as to back and lend credibility to the allegation; but the document is incomplete through the will of the respondent State, which obscured a large part of it, and full knowledge of it is impossible without action by the Court calling for its production in full. Furthermore, there are sufficiently substantiated and serious presumptions justifying such action, since the document is likely to assist in the "elucidation of any aspect of the matters in issue" (Art. 62 of the aforesaid Rules), namely the extent and nature of Serbia's involvement in the tragic events of Bosnia and Herzegovina; in addition, although that incomplete document is now part of the evidence on file, the Court examined it too briefly and in unfavourable conditions regarding its interpretation to draw any conclusions one way or the other with regard to the hidden parts.

61. One might think that this document was not treated appropriately by the Court, which did not make use of its powers in order to determine the truth of the matter. We are in a very special situation where the party on which the onus of proof is incumbent has honoured its obligation up to the point where it comes up against the intent of its opponent, which is in possession of the exhibit requested and hence the key to a solution; it follows that we are faced with a situation of inequality to the detriment of the applicant State, and action by the Court would merely have restored the equality of the parties by applying reasonably and equitably the principle of onus of proof. Such a solution would be in keeping with the conclusions drawn from the debates of the Institute of International Law[64] and would not call into question, in the opinion of a former President of the Court, the Court's impartiality or independence[65].

Furthermore, although there is not in the Statute and Rules of Court any rule regarding the obligation to co-operate where evidence is concerned, the opposing party must nevertheless act in good faith and not oppose the production of an exhibit in its possession which is needed to establish

[64] According to the Rapporteur, C. F. Amerasinghe,

> "[i]n the application of this principle the tribunal may in the appropriate circumstances divide the burden of proof in relation to a particular situation"

and he proposes, in the draft Articles, provisions that the parties must co-operate with the Tribunal for the production of evidence, particularly that which is in their possession or under their control (cf. "Principes en matière de preuve dans le procès international", *op. cit.*, p. 197 and pp. 392 *et seq.*).

[65] Cf. the observations of President G. Guillaume on the report of C. F. Amerasinghe to the Institute of International Law, "Principes en matière de preuve dans le procès international", *op. cit.*, p. 314.

the facts[66]; legal opinion is generally in agreement in calling that a general principle of law[67] and, as recalled by the Rapporteur of the International Law Commission, Professor George Scelle, during its work on model rules for arbitration proceedings, "there is . . . a definite principle that the contesting States are under an obligation to co-operate in good faith in the production of evidence"[68]. One cannot thus help noting or deploring the pusillanimity of the Court and its refusal to provide, in all legality and equity, a means among others of ascertaining the truthfulness of an allegation in a case where the search for truth is particularly awaited and necessary. An over-rigid position in this respect can only lead to unreasonable or unjust results[69], because the "statement of the facts" that the Court must take into consideration (Rules, Art. 95, para. 1) has not been so considered, on account of the absence of an item of evidence the production of which it would have been able to require. One might take the liberty here to recall the relevant observation of Judge Bustamante in the *Barcelona Traction* case:

> "I naturally accept that in each case the onus of proof is placed on one of the parties, but it is also true that the overriding interests of justice give the Court the faculty of taking such steps as are possible to induce the parties to clarify what is not sufficiently clear." (*Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain), Preliminary Objections, Judgment, I.C.J. Reports 1964*, p. 80.)

One might thus conclude that the Court has missed a good opportunity to put into effect legitimately the powers attributed to it by the Statute with regard to evidence; while that is particularly regrettable in the dramatic circumstances of the present case, it could also be so on a more general level in the future, in any case in which crimes are alleged on the basis of identified items of evidence held by one of the parties which refuses to produce them. By refraining from action, at the request of the other party or on its own initiative — when such action is demanded by the search for truth — the Court is in danger of creating a disturbing and concerning precedent.

62. If, in the future, the Court should once again be called upon to rule on the existence of a genocide, one might wonder how it could really

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[66] It was undoubtedly this principle that prompted the conduct of Switzerland in the *Interhandel* case, when it stated:

> "However, should the Court so desire, the Swiss Government would be willing to depart from any strict rule as to the sharing of the burden of proof between the applicant Party and the respondent Party." (Memorial of Switzerland of 3 March 1958, *I.C.J. Pleadings, Interhandel*, p. 128, para. 82.)

[67] Cf. G. Niyungeko, *op. cit.*, pp. 172 *et seq.*; J. C. Witenberg, *op. cit.*, pp. 47-49; C. F. Amerasinghe, *op. cit.*, pp. 305-306, together with the observations of Sir Ian Sinclair, p. 327.

[68] Cf. *Yearbook of the International Law Commission*, Vol. II, 1950, p. 134.

[69] Cf. C. F. Amerasinghe, *op. cit.*, p. 219.

perform such a task. In the present case, had there not been the huge investigative work carried out by the ICTY Office of Prosecution and the painstaking cross-checking performed by the ICTY trial chambers to establish the facts and the reality of acts of genocide, the Court would not have been in a position to draw on appropriate knowledge of the facts in order to rule on the alleged crimes and responsibilities engaged. Whatever it may say, and contrary to what it suggests in paragraph 181, the Court does not possess the legal and material facilities to conduct the necessary investigations in order to establish the guilt of the persons said to be the perpetrators of acts of genocide, which is the first step in subsequently determining whether those acts are attributable to persons or organs under the authority, in one way or another, of the State accused of breaching the Convention on the Prevention and Punishment of the Crime of Genocide. In the present case, the role played by the ICTY, the contribution of various United Nations bodies and other regional and national organizations, as well as the change of régime in Belgrade and the fall of the leaders of the FRY implicated in the violence in Bosnia, facilitated the establishment of the facts and access to evidence. But, in a different context, in which the leaders of the accused State were still in power and there was no international criminal tribunal with a mandate to prosecute the perpetrators of genocidal acts, the Court would find it practically impossible to gather sufficient evidence to enable it to decide on the reality of the acts of genocide and come to conclusions concerning the possible involvement of a State; all the more so since the Court has shown a highly restrictive approach to the application and interpretation of its Rules by refusing to play a more active role in establishing the facts and seeking out the truth.

63. While refusing to request the production of the document, the Court suggests that it is at liberty to draw the relevant conclusions from its non-disclosure (para. 206); however, none were drawn in the present case. In fact, the major finding against the Respondent in the Judgment — which consisted of saying in this case that it did not fulfil its obligation to prevent and punish the crime of genocide — appears to have no link to the document of which the Court did not see fit to request the disclosure. Without knowing the exact contents of the hidden text, it is objectively difficult and very hazardous to state whether those contents might have had a decisive influence one way or another in deciding on the principal allegations made against the Respondent:

— the commission of genocide through its organs or by persons whose acts engaged its responsibility;
— conspiracy to commit genocide or incitement to genocide;
— complicity in genocide.

In view of that uncertainty and of the explanations below, one cannot help but entertain serious doubts about the Court's approach; by finding

that no breaches took place of the three above-mentioned obligations, without having made appropriate efforts to encourage the production of items of evidence, the Court can only give rise to questions and objections as regards both the application and interpretation of its Rules and the findings at which it has arrived.

IV. The Problem of Intent in the Crime of Genocide

64. The definition of the crime of genocide given by the Convention in its Article II rests upon the combination of two elements, the material element *(actus reus)* and the intentional element *(mens rea)*. In addition to genocide, the Convention punishes the acts of conspiracy, incitement and attempt to commit genocide, and complicity in genocide. It is also incumbent on all States bound by the Convention to prevent and punish the commission of genocide. Acts of genocide are always committed by individuals, under the authority of an entity which is the real orchestrator of these acts[70]; this is generally a State acting through its organs or through third organs operating on its account, on its behalf or even on the basis of a *de facto* relationship with this State, without being legally vested in any power. Hence the link between the legal entity which is the State and the offence is mediate, through the agency of individuals dependent on it in some manner and, for this reason, capable of engaging the responsibility of the State concerned. This reality considerably affects the evidence of genocidal intent, namely which are the wrongdoers whose intent is required: is it the actual perpetrator of the act, the planner of the crime, or both?

65. The crimes punished under the Convention being all intentional crimes, they may be relied on to establish, on the one hand, the individual responsibility of their perpetrators and, on the other, State responsibility, as the Convention does not confine the acts listed in Article III to individual responsibility, as we have seen in the preceding developments. What is special about the crime of genocide is that it requires the combination of a general intent and a specific intent, the evidence of the intentional element being subjected to the general rules of evidence before the Court, which must seek out or deduce that intent from the circumstances of the case, its task having been greatly facilitated by the work already completed by the international criminal tribunals, which

[70] According to the ICTR, "although a specific plan to destroy does not constitute an element of genocide, it would appear that it is not easy to carry out a genocide without such a plan, or organisation" (*Kayishema* case, 21 May 1999, para. 94). The ICTY noted "that it will be very difficult in practice to provide proof of the genocidal intent of an individual if the crimes committed are not widespread and if the crime charged is not backed by an organisation or a system" (*Jelisić* case, Trial Chamber I, Judgment of 14 December 1999, para. 101).

have contributed both items of evidence and insight with respect to intent.

A. The Intentional Element

66. There is frequent discussion of the importance accorded to the intentional element, some regretting the subjectivism introduced into the Convention with the fear of seeing "the perpetrators of a crime escape punishment on the pretext of absence of wrongful intent" [71], and that this "offers States a convenient way out" [72]. "There is a widespread opinion preferring to consider that there is genocide from the moment that there is mass extermination, without any need to take account of the end purpose pursued" [73], but this position is liable to have an adverse effect on the conventional definition of genocide, emphasizing a special intent to destroy a group as such. If the mass exterminations are not aimed at individuals on the very account of their membership of a particular group, one cannot speak of genocide within the terms of the Convention; on the other hand, as one author has noted,

> "there will be . . . genocide from the moment when, in the course of a policy whose harmful consequences are plainly apparent, whatever the actual purpose, the intent to destroy a group as such emerges. To pursue, if not to shape, such a policy must in such a case be considered to constitute genocide, even if its destructive effects were not initially intended." [74]

67. Some legal writers maintain that the crime of genocide covers acts which, without being originally intended to cause the physical disappearance of a group, lead to disappearance or the risk of disappearance on account of their being carried out. This sense "would make it possible to qualify as a crime of genocide, in addition to the deliberate annihilation of a group, the practices of forced population displacements and other acts of 'ethnic cleansing'" [75], as we shall see later. In all cases, what characterizes the crime of genocide as defined by the Convention is the existence of a wrongful intent and, more specifically, a general wrongful intent and a special intent.

68. General intent is effective knowledge of the material elements of the offence and of the perpetrator's intent to act. The definition of genocide requires a general intent which is that to commit one of the five acts listed in Article II, namely:

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[71] J. Verhoeven, *op. cit.*, p. 17.
[72] A. Cassese, *op. cit.*, p. 184.
[73] J. Verhoeven, *op. cit*., p. 23.
[74] *Ibid.*, pp. 19-20.
[75] L. Boisson de Chazournes, "Les ordonnances en indication de mesures conservatoires dans l'affaire relative à *l'Application de la convention pour la prévention et la répression du crime de génocide*", *AFDI*, 1993, Vol. XXXIX, p. 530.

(a) killing members of the group;
(b) causing serious bodily or mental harm to members of the group;

(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) imposing measures intended to prevent births within the group;
(e) forcibly transferring children of the group to another group.

By their very nature, these acts constitute conscious and deliberate acts, and cannot be the product of accident or oversight. The emphasis placed on intention in subparagraph *(c)* (deliberately inflicting) has no real legal consequence, since the intention must be established in each of the acts enumerated. As has been observed,

> "the limitative character of the enumeration contained in Article II is in principle readily understandable in view of the traditional rules expressed in criminal law by the adages *nullum crimen sine lege* and *nulla poena sine lege*. Besides, this should not be carried too far since the terms used are relatively broad and must remain so, despite the principle of restrictive interpretation of the punitive provisions."[76]

69. In the crime of genocide, it does not suffice that the perpetrator has wished to commit one of the acts listed in Article II; the perpetrator must have further acted "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group". This specific intent therefore requires the acts to be likely to cause specific damage, and the perpetrator to be aware of that. Actual destruction of the group is not a precondition for characterizing the crime of genocide; the mere intent to seek that specific damage suffices to conclude that the offence exists[77].

70. The specific intent must be distinguished from the motive. Some legal writers consider that special intent is the inclusion of the motive in wrongful intent, and that "the theory of genocide derogates from general law in that it includes the motive in the legal constitution of the offence"[78]. However, these analyses are not always clear and introduce a doubt regarding two different notions which sometimes seem to be used one for the other, particularly when some treat the motive *("mobile")* as equiva-

[76] J. Verhoeven, *op. cit.*, p. 15.
[77] N. Robinson, *The Genocide Convention: A Commentary*, 1960, p. 58 ("Actual destruction need not occur; intent is sufficient"); M. N. Shaw, "Genocide in International Law", in *International Law in a Time of Perplexity: Essays in Honour of Shabtai Rosenne*, 1989, pp. 797-805 ("Actual physical destruction is not required; what is essential is the need to demonstrate the subjective element").

[78] H. Donnedieu De Vabres, "De la piraterie au génocide: les nouvelles modalités de la répression criminelle", *Mélanges G. Ripert*, 1950, Vol. 1, p. 245, cited by J. Verhoeven, *op. cit.*, p. 17.

lent to special intent and term as motives *("motifs")* the other reasons irrelevant to the offence. For example, what certain authors call *"mobiles"* and exclude from the definition of the offence[79], others call *"motifs"* and also exclude from the definition of the offence[80]. What is important in the application of the Genocide Convention is that its drafters decided to include in the definition of the crime of genocide the specific intent to destroy a particular group (that some call "motive"), and to exclude the other reasons which may underlie that destructive will. The intent in question consists in the seeking of a wrongful result, while the motive is the reason prompting the offender to carry out the offence (e.g., revenge, enrichment, etc.); the motive may vary from one person to another in a same type of act, and the offence is irrelevant to the motives, whatever they may be[81]. The specific intent in the crime of genocide may be complex and comprise several aspects, but what must always be involved is the "intent to destroy, in whole or in part, a . . . group, as such", which group may be "national, ethnical, racial or religious" (Genocide Convention, Art. II).

1. To destroy, in whole or in part, a . . . group, as such

71. Literally, to destroy *(détruire)* is *"altérer profondément et violemment (quelque chose d'organisée) de manière à faire perdre l'aspect, la forme, les caractères essentiels"* ("to alter profoundly and violently (something organized) in such a manner as to cause it to lose its aspect, form and essential characteristics")[82]. Killing is one of the manners of destroying but not the only one. The ICTY Appeals Chamber stated, in the *Krstić* case, that the intent to destroy the group as a separate and distinct entity can also be manifest in the forcible transfer of a population, which would thus be an "additional means by which to ensure the physical destruction" of the targeted community[83]. The prohibited act must be committed because of the victim's membership of a particular group and for the purpose of achieving the overall aim of destroying the group. But the perpetrator of the genocide does not have to seek to destroy the entire group; it suffices that the perpetrator's intent is to destroy part of it. According to some legal writers, the addition of "as such", "solely seeks to highlight the

[79] A. M. La Rosa and S. Villalpando, "Le crime de génocide revisité. Nouveau regard sur la définition de la convention de 1948 à l'heure de son cinquantième anniversaire. Tentative d'appréhension des éléments constitutifs du crime", *op. cit.* ("the offence is irrelevant to the motives, whatever they may be").

[80] J. Verhoeven, *op. cit.,* p. 19 ("les motifs pour lesquels le génocide est perpétré sont parfaitement indifférents" ["the motives for perpetration of the genocide are perfectly irrelevant"]).

[81] A. M. La Rosa and S. Villalpando, *op. cit.*, p. 83.

[82] *Le Robert*, dictionnaire de la langue française, 2nd ed., 1992.

[83] Judgment of 19 April 2004, para. 31.

essence of a particular crime represented by the intent to destroy a group of human beings; it carries no other restriction, however questionable its use may seem"[84]. According to the commentary on the draft Code of Crimes against the Peace and Security of Mankind, which uses the definition of genocide in the 1948 Convention, to destroy the group "as such" means destroying "a separate and distinct entity, and not merely some individuals because of their membership in a particular group"[85].

72. Let us note that the Convention does not stipulate any quantitative threshold for the crime of genocide. Once intent has been established and perpetration of the crime has begun, there is nothing to prevent genocide from having been committed even if the number of victims is small. It suffices to have committed any of the acts enumerated in the intent to achieve the destruction, in whole or in part, of a protected group; in principle, one could even go so far as to say that "a single murder, a single assault causing bodily harm to a member of the group would suffice, provided that they are accompanied by the specific intent of the perpetrator"[86]. That is a theoretical assumption, however, as there is inevitably or necessarily a quantitative aspect to any genocidal policy, and the crime must at the very least target a sufficiently large number of individuals or a substantial part of the protected group, as noted by the Court (Judgment, para. 198). In the present case, there is no lack of evidence of a great many murders and atrocities committed systematically in various parts of Bosnian territory. The written and oral pleadings of the applicant State abound in examples that the Respondent — being unable to dispute the facts in most instances — endeavours to minimize or give a different qualification. According to numerous, cross-checked testimonies, tens of thousands of non-Serbs, most of them Muslims, were killed between 1992 and 1995, and this constant practice constituted, in certain cases, forms of destruction of the "non-Serb" community, if one accepts this negative manner of defining the group. Without claiming to be exhaustive, the Court gives a damning overview of the extent and seriousness of the killings perpetrated on civilian populations in paragraphs 245 to 276; if the number of victims was often in the tens or hundreds, it sometimes reached the thousands, as indicated by the Court in several paragraphs (247, 252, 257-259, 262 and 271).

2. A national, ethnical, racial or religious group

73. The Convention seeks to protect groups of the most extensive kind

[84] J. Verhoeven, *op. cit.*, p. 19.
[85] Report of the International Law Commission on the Work of its Forty-eighth Session, United Nations, doc. A/51/10, p. 45.
[86] A. M. La Rosa and S. Villalpando, *op. cit.*, p. 87.

possible, provided they present "the essential element of stability"[87]. The stability and the permanence of the group are among the reasons which prompted the drafters of the Convention not to include economic, political, cultural or social groups among the groups protected. The Convention does not supply a precise definition of the terms "national, ethnical, racial or religious", which is not really a shortcoming since what is important is not so much the objective determination of the characteristic features of each group as the fact that "measures have been taken in practice to distinguish them"[88]. Examining the preparatory work for the 1948 Convention, the ICTR specified that the Convention seeks to protect "any stable and permanent group"[89]. This was the case of the Tutsis, whose identity cards showed their ethnic affiliation. This is also the case of the Serbs, Croats and Muslims, defined as such in the Constitution of the SFRY, then that of Bosnia and Herzegovina.

74. Muslim identity is not regarded in Bosnia as the mere fact of belonging to a religion; it refers to a group of persons sharing a particular culture, language and traditional way of life, as the applicant State indicates. It is therefore the expression "ethnic group" which covers most closely the motivation behind the crimes committed in Bosnia and Herzegovina by the Serbs. The ethnic group generally defines an infra-national and infra-State cultural or linguistic group. The victim may be the "Muslims of Srebrenica"[90] or of any other municipality, since they form part of the broader group represented by "the Bosnian Muslims". The applicant State raised the possibility of defining the group negatively, namely "non-Serbs" (CR 2006/32, p. 23, para. 9 (Stern)); that does not imply the absence of acts of genocide for want of specific groups targeted, as the Respondent argues, for two communities were specially targeted, the Croats of Bosnia and Herzegovina and above all the Muslims of Bosnia and Herzegovina. As the Court has found, after the ICTY, on the basis of the information establishing the facts, the genocide was mainly targeted against the Muslims: quantitatively because they were the main victims of the mass-scale crimes; intentionally because they were targeted by the inflammatory statements of Serb leaders (notably by the political leader of the Bosnian Serbs, R. Karadžić). The fact that Croats have also been victims of crimes does not detract from the genocidal dimension of the criminal design. In all the genocides committed and recognized (Tutsis, Jews), persons of other groups than the originally targeted group have been victims without that affecting the reality of the characterization of genocide. In view of this, one might question the validity of

[87] *Official Records of the General Assembly, Third Session, Part I, Sixth Committee*, 69th meeting, p. 58 (Venezuela, Pérez Perozo).
[88] A. M. La Rosa and S. Villalpando, *op. cit.*, p. 90.
[89] *Akayesu* case, Judgment of 2 September 1998, para. 701.
[90] Used by the ICTY in several cases (*Tadić*, *Krstić*, *Blagojević*).

retaining only a positive definition of the group targeted and of rejecting any negative definition; such a position is excessively restrictive and the corresponding interpretation of the drafting history of the Genocide Convention and the Court's 1951 Advisory Opinion *(Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide)* in paragraph 194 of the Judgment is not based on convincing assumptions.

75. It was on the basis of the massacre of some 7,000 Muslims that the ICTY characterized the acts committed in 1995 in Srebrenica as genocide. General Radislav Krstić, whose individual genocidal intent was not upheld, was sentenced for complicity in genocide by the Trial Chamber on 2 August 2001, which sentence was upheld by the Appeals Chamber on 19 April 2004. It is on the basis of factual realities and the overall intent behind the crimes committed that the applicant State submits, with sufficiently convincing arguments, the existence of an intent on the part of the Serbs not just to remove completely the non-Serbs, particularly the Muslims, from certain Bosnian territories, but also to destroy the greater part and sometimes all of them in certain regions. In view of the special context of the acts committed in Bosnia and Herzegovina, there is indeed justification for extending the sense of "ethnic group", or rather adopting a negative or reverse definition of it. It was in their awareness of their own membership of an ethnic group that the Serbs resolved to destroy on Bosnian territory the individuals not so affiliated. The concept of the objective reality of the ethnic group needs some tempering in keeping with the circumstances, so as also to take into consideration a subjective concept of the ethnic group on the part of the perpetrators of the crimes in the choice of their victims. The important consideration is the discriminatory choice of the victims on the basis of an affiliation or non-affiliation judged subjectively by the criminals.

76. Analysing the acts committed in Bosnia, Victor-Yves Ghebali recalls that the SFRY, before its break-up, comprised various branches of the Slav ethnic group (thus Serbs, Croats and Muslims) and non-Slav ethnic groups (such as the Albanians)[91]; ethnic conflicts arise as soon as one of the protagonists makes a battle cry of protection of the collective identity of its proto-nation. The author also recalls the phantasmic dimension inherent in any genocide and the overestimation of the "collective Self" of an ethnic group, accompanied by the ontological diabolizing of another ethnic group of the nation-State being deconstructed. The need to restore a mythical State of original ethnic purity is then used to justify exterminating the diabolized ethnic group. Denouncing the ethnonationalistic self-overestimation of the Serbs, Mr. Ghebali confirms that

[91] V.-Y. Ghebali, "Les Nations Unies et les organisations régionales dans les conflits yougoslaves: complémentarité ou concurrence?", *Les Nations Unies et l'ex-Yougoslavie, rencontres internationales d'Aix-en-Provence*, 1998, p. 41. By the same author, "Le semblable et le différent. Réflexions sur les conflits ethniques de l'Europe post-communiste", *Mélanges en l'honneur de Nicolas Valticos*, 1998.

ethnic cleansing was the purpose and not the consequence of the war, with its drift towards incitement to commit a genocide.

77. Let us note that the incitement must be direct and public at the same time, private incitement having not been taken into consideration by the drafters of the Convention. The intentional element of this offence lies in the awareness of the perpetrator that the acts that he or she is committing incite the commission of genocide. What is at issue is the intent to incite, regardless of whether or not such incitements have achieved their purpose and led effectively to the commission of genocide; direct and public incitement to commit genocide does not require proof that genocide has been committed. The fact of deliberately propagating the Greater Serbia ideology, of arousing racial hatred in the context of the period by calling for the creation of an exclusively Serb State, of inciting "ethnic cleansing" and of prompting a general spirit of ethnic and religious hatred, and so on, all amounts to direct and public incitement within the meaning of the Convention. In the *Tadić* case, for example, the ICTY went back over the propaganda campaign starting in 1989 to prepare the Serbs of Bosnia for the subsequent events by telling them that they were the target of a massacre that the Muslims were preparing[92]. The creation of a morbid climate of hate and fear centring on a specific group is always the starting-point for a policy of discrimination, gradually turning into a campaign of exactions and subsequently of elimination.

78. The intentional element of conspiracy to commit genocide lies in the resolve to act with the aim of committing genocide, and in participation in a joint plan. The existence of a genocidal plan is logically a part of such a criminal enterprise, even if it did not necessarily culminate in practice. From all the material gathered by the applicant State, what can be seen is the existence of a conspiracy between the Belgrade and Pale authorities to plan and implement a policy of elimination of the Muslim populations by means of the various armed formations of the "Republika Srpska", the Serb paramilitaries and certain elements of the Serb military forces (VRS or army of the "Republika Srpska"). While the intent can sometimes be observed, it is generally deduced from a number of acts and behaviour patterns, the assessment of which is naturally left to the appreciation of the judges, having due regard for "the preponderance of the evidence or the balance of probabilities"[93].

B. Deduction of Genocidal Intent

79. A person alleging a fact must prove it and, once the Applicant has fulfilled the obligation of establishing proof of violation of the Conven-

[92] *Tadić,* IT-94-1-T, Trial Chamber, Judgment of 7 May 1997, para. 96.

[93] A. M. La Rosa and S. Villalpando, "Le crime de génocide revisité. Nouveau regard sur la définition de la Convention de 1948 à l'heure de son cinquantième anniversaire. Tentative d'appréhension théorique des éléments constitutifs du crime", *op. cit.*, p. 101.

tion, it is for the Respondent to adduce the defence evidence demonstrating that the alleged facts did not take place or were not committed with the intent to destroy a group protected by the Convention. The judges can consequently accept all evidence that they deem relevant and compelling, since

> "within the limits of its Statute and Rules, it [the Court] has freedom in estimating the value of the various elements of evidence, though it is clear that general principles of judicial procedure necessarily govern the determination of what can be regarded as proved" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 40, para. 60).

80. Documentary evidence remains a prime form of evidence, but official declarations are also an important source to which the Court resorts to substantiate the facts. The Court itself has said that:

> "Among the legal effects which such declarations [by the authorities] may have is that they may be regarded as evidence of the truth of facts, as evidence that such facts are attributable to the States the authorities of which are the authors of these declarations and, to a lesser degree, as evidence for the legal qualification of these facts." (*Ibid.*, p. 43, para. 71.)

Furthermore, "the Court is not bound to confine its consideration to the material formally submitted to it by the parties" (*ibid.*, p. 25, para. 30) and it can itself seek other items of evidence. However, as we have already had reason to deplore, the Court did not make use of the means available to it, even when it appeared appropriate to do so.

1. Evidence of genocidal intent

81. The Convention provides no particular rules regarding proof of the moral element. The specific intent to destroy a national, ethnic, racial or religious group in whole or in part, within a general State policy, is seldom expressed and must necessarily be deduced from the circumstances of the particular case, especially when the requirement is to prove the tortious intent of a State. To demonstrate the genocidal intent of Serbia, it is not necessary that all the criminal acts were committed by agents of that State directly, nor that all the individuals having committed atrocities shared the genocidal intent. The establishment of the existence of a concerted genocidal plan advocated by military and paramilitary units that the State in question endorsed, assisted and supported in its implementation would be sufficient to show intent to commit genocide or to be an accomplice to it, which would then engage the responsibility of that State.

82. The applicant State has maintained that it is possible to presume the intent to commit genocide, but the requirement is rather to deduce this intent from the elements of the particular case and not to voice mere presumptions when it comes to proving a crime, especially such a serious one. It has been said in this respect: "The best evidence of an intentional element obviously lies in declarations, writings and other direct indications of the thinking of the perpetrator of the crime."[94] Admittedly, in practice, because of the nature of this crime, it is hardly conceivable that rulers might publicly state or put in writing that they have a genocidal plan; hence it is essential to proceed by deduction in order to establish intent to take part in such a crime. The intent is therefore proved by logical deduction in the light of the acts of the accused by virtue of the principle that perpetrators are supposed to desire the consequences of their acts. With regard to genocide, the proliferation and systematic use of hate-filled speeches, violent shows of aggressiveness, instances of destruction[95] and cruel conduct, let alone massacres, towards a group protected by the Convention suggest or presuppose the intent to commit genocide. The number of victims is also an important item of evidence, for when the number of victims exceeds the tens of thousands of individuals belonging to one and the same group and extends to several geographical areas, that shows it to be a serious element of intent to commit genocide. In short, because such a subjective element as the intent to destroy a group is difficult to prove tangibly, it is essential to take account of all the relevant circumstances in the case, and above all of the convergence of items of evidence. It is for this reason that I am unable to subscribe to the assertions contained in certain paragraphs of the Court's Judgment, *inter alia*, paragraphs 373 to 376, in which it dismisses the existence of a general plan to destroy a substantial part of the Bosnian Muslim population; in its examination, it does not really give due regard to or put into perspective all the material elements and evidence of intent apparent from the dossier before the Court.

2. Ethnic cleansing[96]

83. The "clinical" expression "ethnic cleansing" was apparently used for the first time in 1981 in the Yugoslav media, referring to the estab-

[94] D. Boyle, "Génocide et crimes contre l'humanité: convergences et divergences", *La justice pénale internationale dans les décisions des tribunaux* ad hoc — *Etudes des Law Clinics en droit pénal international*, 2003, p. 137.

[95] For example, in the *Karadžić* and *Mladić* cases, the Tribunal based its charge on, *inter alia*, the destruction of cultural monuments in finding the existence of this specific intent.

[96] Other expressions (e.g. ethnic purification) are sometimes used, without any detectable difference since they prove to be synonyms.

lishment of "ethnically pure territories" in Kosovo[97], and it was initially journalistic and military vocabulary without any precise legal definition. The term was subsequently used by various entities, beginning with the Security Council, to describe the situation in Bosnia; it considered that ethnic cleansing was illegal and unacceptable, justifying the maintenance and even intensification of sanctions against the FRY (resolution 752 (1992) of 15 May 1992; resolution 787 (1992) of 16 November 1992). The fact that resolution 827 (1993) of 25 May 1993 establishing the ICTY to try the various violations of humanitarian law in Bosnia (preamble to the resolution) expressly mentions "ethnic cleansing" in its preamble as a grave crime is already an item of evidence that it may be regarded as tantamount to the crime of genocide. For its part, the General Assembly initially considered the "odious practice of 'ethnic cleansing'" to constitute a violation of humanitarian law (resolution 46/242 of 25 August 1992) and subsequently reverted to it more precisely to condemn "the abhorrent policy 'ethnic cleansing', which is a form of genocide" (resolution 47/121 of 18 December 1992). The Commission on Human Rights used the term "ethnic purification" on 13 August 1992. The following year, it echoed the positions of the General Assembly by recalling that, on the one hand, the Muslim population was "virtually threatened with extinction" and, on the other, that the ethnic cleansing of which it was the principal victim constituted a form of genocide. According to the Special Rapporteur of the Commission on Human Rights on extrajudicial executions, "[t]he description of atrocities committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as 'ethnic cleansing' particularly seems to be a euphemism"[98], and he took the view that the executions of Muslims and Croats committed by the Serbs indeed corresponded to genocide as defined in the 1948 Convention. In the *Brdjanin* case, the ICTY speaks of a "coherent, consistent strategy of 'ethnic cleansing' against Bosnian Muslims"[99].

84. Ethnic purification may start out as a mere forcible population transfer not featuring among the acts listed in the Convention and cannot in itself constitute proof of the intent to destroy, since displacement presupposes the survival of the group while genocide seeks its disappearance. But the operation can degenerate to take on another aspect, as observed by W. Schabas, and become "acts aimed at displacing a population in order to change the ethnic composition of a given territory, and

[97] D. Petrović, "Ethnic Cleansing — An Attempt at Methodology", *European Journal of International Law*, 1994, Vol. 5, No. 3, p. 342.

[98] "Extrajudicial, Summary or Arbitrary Executions", Note by the Secretary-General, United Nations, doc. A/51/457, para. 69.

[99] IT-99-36-T, Judgment of 1 September 2004, paras. 548-551; CR 2006/5, p. 30 (Karagiannakis).

generally to render the territory ethnically homogenous or 'pure'"[100]. Above all, ethnic purification is seldom an isolated act of forcible displacement, for it is generally accompanied by murder, rape, torture and other acts of violence and the destruction of the religious and cultural heritage in order to wipe out all trace of the ousted ethnic group. Consequently, the factual situation is that ethnic cleansing and genocide are two notions that come closer to each other, and W. Schabas acknowledges that ethnic cleansing is the alarm signal heralding genocide[101]. This was sadly confirmed in Srebrenica, where all men of an age to bear arms were systematically killed and the rest of the population forcibly displaced; some 7,000 Muslims were killed, which represents 20 per cent of the population of the area. In the *Krstić* case, as has already been indicated, the ICTY said that "forcible transfer could be an additional means by which to ensure the physical destruction of the Bosnian Muslim community"[102], and it added that

> "[t]he fact that the forcible transfer does not constitute in and of itself a genocidal act does not preclude a Trial Chamber from relying on it as evidence of the intentions of members of the VRS Main Staff. The genocidal intent may be inferred, among other facts, from evidence of other 'culpable acts systematically directed against the same group'."[103]

85. Furthermore, the contribution of the *Nikolić* case in this respect is of interest because it introduces a globalizing vision of genocide which is described as a crime reflecting and covering a variety of acts where the intention may be deduced from the policy of "ethnic cleansing" and even from the gravity of the discriminatory acts[104]. It is therefore in such a context that ethnic cleansing should be placed, meaning that there gradually ceases to be a frontier with genocide itself; it is at once the warning signal, the means and the purpose.

3. The case law of the ICTY

86. The ICTY Statute, Article 4, paragraph 2, defines genocide by incorporating Articles II and III of the 1948 Convention, thereby enabling judges to apply that Convention, while recognizing that it had codified a rule of *jus cogens*. The judgments of the ICTY are of great use and real relevance for the Court in determining the facts and defining genocide, since the Tribunal has had occasion to evaluate the facts and the intentions of the perpetrators, thereby uncovering evidence of the existence of a genocidal plan among the persons who perpetrated and planned

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[100] W. Schabas, *Genocide in International Law*, 2000, p. 199.
[101] *Ibid.*, p. 201.
[102] *Prosecutor* v. *Krstić*, Appeals Chamber, Judgment of 19 April 2004, para. 31.
[103] *Ibid.*, para. 33.
[104] *Prosecutor* v. *Nikolić*, Decision of 20 October 1995, para. 34.

the operations carried out in Bosnia and Herzegovina. Among the persons prosecuted before the ICTY, 18 were charged with genocide and/or complicity in genocide. The Trial Chamber was "convinced beyond any reasonable doubt that a crime of genocide was committed in Srebrenica" in two cases (*Radislav Krstić* case[105] and *Blagojević* case[106]) and it found the two accused guilty of complicity in genocide. Four other individuals were acquitted of the crime of genocide but found guilty of other crimes[107], three individuals pleaded guilty and the charge of genocide was withdrawn[108], six cases are still pending[109] and three accused are still at large[110].

87. The case law of the judgments of criminal tribunals, with regard to the intentional element, may be enlightening. For example, the contribution of the *Ntakirutimana* Judgment[111] lies in the fact that the ICTR Appeals Chamber echoed, in that case, some of the findings of the ICTY Appeals Chamber in the *Krstić* case. Consequently the findings of the *Krstić* Judgment are now binding on the ICTY and the ICTR Trial Chambers. Upon conclusion of its analysis, the ICTR Appeals Chamber adopted and applied the findings of the *Krstić* Judgment, deeming that "[t]he intent to commit genocide is not required for an accused to be found guilty of aiding and abetting genocide" (para. 508) and that "a conviction for aiding and abetting genocide upon proof that the defendant knew about the principal perpetrator's genocidal intent is permitted by the Statute and case law of this Tribunal" (para. 501). On the basis of the facts of the case, the Appeals Chamber considered that Gérard Ntakirutimana was criminally liable on account of having "aided and abetted genocide" and handed down a new sentence accordingly (paras. 509 and 560).

88. The *Blagojević et al.* Judgment (17 Jan. 2005, ICTY) formulates the most important developments since the *Krstić* Judgment regarding certain elements of the crime of genocide. In this case, an ICTY Trial Chamber specified the notion of "physical or biological destruction" of a group (entering into the definition of *dolus specialis*) and, further, defined the *mens rea* of the superior required by Article 7 (3) of the ICTY Statute for a sentence for the crime of genocide.

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[105] *Krstić* (IT-98-33).
[106] *Blagojević* (IT-02-60).
[107] *Brdjanin* (IT-99-36), *Jelisić* (IT-95-10), *Sikirica* (IT-95-8), and *Stakić* (IT-97-24).
[108] *Momir Nikolić* (IT-98-33), *Obrenović* (IT-02-60/2), and *Plavsić* (IT-00-39 and 40/1).
[109] *Beara* (IT-02-58), *Borovcanin* (IT-02-64), *Krajisnik* (IT-00-39 and 40), *Drago Nikolić* (IT-03-63), *Pandurević* (IT-05-86) and *Popović* (IT-02-57).
[110] Karadžić, Mladić and Tolimir.
[111] *Prosecutor* v. *Ntakirutimana*, ICTR-96-10-A and ICTR-96-17-A, Appeals Chamber, Judgment of 13 December 2004.

89. On the basis of the opinion of Judge Shahabuddeen in the *Krstić* Judgment, and after analysing the texts and the situation, the Chamber considered that "the term 'destroy' in the genocide definition can encompass the forcible transfer of a population" (para. 665) and that:

> "the physical or biological destruction of a group is not necessarily the death of the group members. While killing large numbers of a group may be the most direct means of destroying a group, other acts or series of acts, can also lead to the destruction of the group. *A group is comprised of its individuals, but also of its history, traditions, the relationship between its members, the relationship with other groups, the relationship with the land.* The Trial Chamber finds that the physical or biological destruction of the group is the likely outcome of a forcible transfer of the population when this transfer is conducted in such a way that the group can no longer reconstitute itself — particularly when it involves the separation of its members. In such cases the Trial Chamber finds that *the forcible transfer of individuals could lead to the material destruction of the group, since the group ceases to exist as a group, or at least as the group it was.* The Trial Chamber emphasizes that its reasoning and conclusion are not an argument for the recognition of cultural genocide, but rather an attempt to clarify the meaning of physical or biological destruction." (Para. 666.)

90. With regard to the facts of the case and in accordance with this approach, the *Blagojević et al.* Judgment concluded that: "the criminal acts committed by the Bosnian Serb forces were all parts of one single scheme to commit genocide of the Bosnian Muslims of Srebrenica" (para. 674). Pursuing, in this case, its examination of complicity in genocide by virtue of Articles 4 (3) *(e)*, 7 (1) and 7 (3) of the Statute, the Chamber specified the contribution of the *Krstić* Judgment regarding the complicity of superiors and the *mens rea*, concluding that:

> "The Trial Chamber finds that the *mens rea* required for superiors to be held responsible for genocide pursuant to Article 7 (3) is that superiors knew or had reason to know that their subordinates (1) were about to commit or had committed genocide and (2) that the subordinates possessed the requisite specific intent." (Para. 686.)

91. It is true that the decisions reached on the merits by the ICTY in genocide cases are not numerous, but there are a great many findings of fact and of law concerning the commission of crimes against humanity, murder, rape, forcible displacement and the destruction of mosques and

other traces of Muslim culture, and when these findings are taken cumulatively, they point to the existence of a broader plan entailing a policy of genocide; as the Applicant indicated, by reference to this mass of criminal acts, "[i]t is that terrible pattern which, ultimately, transforms many ordinary cases into overarching and undeniable genocide" (CR 2006/5, p. 19, para. 34).

V. The Issue of the Attributability of Acts of Genocide to the Respondent

92. In order to engage the responsibility of a State on the basis of commission of the crime of genocide, it must be shown that the conduct of the organs and persons who effectively perpetrated the crime is attributable to that State. The International Law Commission's Articles on State Responsibility for Internationally Wrongful Acts appended to General Assembly resolution 56/83[112] provide for various means by which conduct can be attributed to a State. The conduct at issue may be that of a State organ, in which case it will be directly attributable to the State, or it may be that of an organ or persons who are not officially under the State's direction, but are in fact acting as a *de facto* organ of the State, on its instructions or under its control.

93. In the present case, the responsibility for the crime of genocide committed in Bosnia and Herzegovina can be attributed to the Respondent inasmuch as several of its State organs were directly or indirectly involved in its perpetration. The conduct of various organs of the Republika Srpska is also attributable to the Respondent where they appear to be *de facto* organs of the Federal Republic of Yugoslavia (FRY) or at least acting under its control. The responsibility of the Respondent is not only engaged in the event of its having committed genocide directly, but also for acts related to the genocide, as we shall see below.

A. The Responsibility of the Respondent for Acts Committed by Its de Jure *Organs*

94. Under Article 4 of the above-mentioned International Law Commission Articles,

> "[t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as

[112] General Assembly resolution 56/83, A/RES/56/83, 12 December 2001, Fifty-sixth Session.

an organ of the central government or of a territorial unit of the State".

It is common knowledge and, more importantly, evidence exists before the ICTY that both political and military organs under the authority of the Respondent effectively committed war crimes and crimes against humanity within the framework of a policy of "ethnic cleansing", for which there are serious presumptions of genocidal intent, and continued to perpetrate them even after the formal "withdrawal" from Bosnian territory of the Respondent's army. Implementation of those operations by Serb combatant forces could not have taken place without a broad-ranging master plan developed by the highest political authorities of the Respondent to enable the control of certain territories and to remove the non-Serb populations from them, by means including their expulsion or, sometimes, extermination of protected groups.

95. All of the acts of the JNA and then the VJ and the Serbian paramilitary units are attributable to the Respondent, irrespective of whether they constitute actions or omissions. The same conclusion would be reached even if it was to be shown that its armed forces were in fact acting under the control of the Republika Srpska, as the Respondent cannot disclaim its responsibility for internationally wrongful acts committed by elements appertaining to its armed forces; indeed, Article 7 of the ILC's Articles provides for the responsibility of a State even when its organs have not followed its instructions or have followed the instructions of another authority. Determining the responsibility of the authorities in Belgrade in the acts perpetrated in Bosnia and Herzegovina amounts to demonstrating that the JNA and the other combatant forces were those who carried out a scheme conceived and launched with the agreement and involvement of the said authorities.

96. Ethnic cleansing was thus planned by the political authorities of the Respondent. Propaganda to that effect had been deployed following the dissolution of the Yugoslav Communist Party in January 1990. That propaganda was centred on the notion that the Serbian people had been the victim of genocides for over a century and that it had to protect itself from these in the future, hence the idea of a "Greater Serbia" based on a simple principle: "all the Serbs within a single State". The guiding principle was that, in the event of the break-up of Yugoslavia, the borders of the new Serbian State should not follow those of the former Republics, but be drawn along ethnic lines. As of 15 January 1991, Milošević made reference to such a reunified Serbian nation within the boundaries of one single State made up of at least three federal units: Serbia, Montenegro and a united Bosnia and Knin region.

97. The events in Bosnia were thus part of a master plan which represented just one aspect of the Greater Serbia project and involved a three-pronged approach of military, political and propaganda operations. The military operation was directed towards ethnic cleansing, to be implemented by the regular army of Yugoslavia and the combatant forces

enrolled alongside it. To do that, it was necessary to rid the Respondent's army of its non-Serb elements beforehand, in order to ensure its loyalty in the forthcoming conflicts and to organize the arming of the Serb populations. It was the Belgrade authorities which launched hostilities against Bosnia and Herzegovina, just after its declaration of independence. The political operations consisted of co-ordinating the action of the various Serb belligerents and helping them to establish parallel institutions, both at the level of the Republika Srpska and at the lower levels within that new entity. The Serbian authorities also acted to make sure that the "formal" withdrawal of the JNA did not endanger ethnic cleansing. The FRY's intention to carry out that plan and its direct involvement long after 19 May 1992 were condemned by the General Assembly in its resolution 49/10 of 8 November 1994. In that resolution, the United Nations General Assembly called upon

> "all parties, in particular the Federal Republic of Yugoslavia (Serbia and Montenegro), to comply fully with all Security Council resolutions regarding the situation in the Republic of Bosnia and Herzegovina and strictly to respect its territorial integrity, and in this regard concludes that their activities aimed at achieving integration of the occupied territories of Bosnia and Herzegovina into the administrative, military, educational, transportation and communication systems of the Federal Republic leading to a *de facto* state of occupation are illegal, null and void, and must cease immediately" [113].

The General Assembly denounced the plans it attributed to the Respondent, especially the project of establishing a "Greater Serbia", and ordered it to abandon the measures taken on the ground by the Republika Srpska, responsibility for which the Assembly nevertheless attributed to the Respondent.

98. The JNA (the Respondent's army), the security forces and the Serb paramilitary groups did not therefore exceed their authority; indeed they acted with the joint co-operation of two authorities, the Respondent and the Republika Srpska, when intervening in the territory of Bosnia and Herzegovina. The presence of the Respondent's forces is revealed by internal documents of the Republika Srpska's forces, which *inter alia* indicate their presence during the Srebrenica massacre in July 1995, citing precisely the entities involved (special forces of the Serbian Ministry of the Interior and the Scorpions paramilitary unit) [114]. And as the Court has recalled elsewhere, "the conduct of any organ of a State must be regarded as an act of that State" (*Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human*

[113] General Assembly resolution 49/10 of 8 November 1994, doc. A/RES/49/10.

[114] The documents attesting to the presence of the Respondent's forces are telegrams from the commander in Trnovo cited in the Applicant's Reply, appended as annexes to that document and referred to during the oral arguments.

Rights, Advisory Opinion, I.C.J. Reports 1999 (I), p. 87, para. 62). This principle, originating in general international law with respect to the law of armed conflicts, written into the Geneva Conventions and included in the ILC's draft Articles, was recently reiterated by the International Court of Justice in the case between the Congo and Uganda:

> "According to a well-established rule of a customary nature, as reflected in Article 3 of the Fourth Hague Convention respecting the Laws and Customs of War on Land of 1907 as well as in Article 91 of Protocol I additional to the Geneva Conventions of 1949, a party to an armed conflict shall be responsible for all acts by persons forming part of its armed forces." (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 242, para. 214.)

The Court had moreover to apply that principle and recognize in the same case that

> "Uganda at all times has responsibility for all actions and omissions of its own military forces in the territory of the RDC in breach of its obligations under the rules of international human rights law and international humanitarian law which are relevant and applicable in the specific situation" (*ibid.*, para. 180, see also paras. 220, 250 and 345).

99. The Respondent has recently acknowledged the responsibility of some of its organs for certain crimes committed during the conflict. Such acknowledgment is, however, couched in vague terms and resembles more a condemnation of war criminals and their crimes than one of acts of genocide. On 15 June 2005, the Council of Ministers of Serbia and Montenegro thus adopted an official declaration in which it solemnly condemned "the crimes committed against Bosnian prisoners of war and civilians in Srebrenica in 1995". The declaration contained another paragraph of far greater significance:

> "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 whom the great majority of citizens of Serbia and Montenegro put up the strongest resistance. Our condemnation of crimes in Srebrenica does not end with the direct perpetrators. We demand the criminal responsibility of all who committed war crimes, organized them or ordered them, and not only in Srebrenica. Criminals must not be heroes. Any protection of the war criminals, for whatever reason, is also a crime."

100. The Council of Ministers of Serbia and Montenegro therefore condemned a "massacre", implicating perpetrators from and the leadership of that same State. The unrepresentative nature of the authorities of the time referred to in the text cannot attenuate, much less annul, the

resulting legal consequences for the Respondent, as the actions were those of the Government of an established State at that time, effectively exercising its power and recognized as such by the international community. The actions of that Government, by virtue of the universally acknowledged principle of State continuity notwithstanding changes of régime[115], remain acts of that State which continue to engage its international responsibility. Even if the statement avoids mentioning genocide, it does at least acknowledge the massacre at Srebrenica: it speaks of "crimes", "killings" and "war crimes", but it is not for Serbia and Montenegro unilaterally to characterize these acts; what it views as "crimes", "killings", "war crimes" and other acts of violence can very easily be qualified differently. It is obvious that this belated declaration can be considered as an acknowledgment of the responsibility of the Serbian State for the killings in Srebrenica — qualified as genocide by the ICTY. It is not insignificant that it acknowledges the veracity of certain acts and that it attributes them to the Government of the time, whose actions engage the international responsibility of the State. Moreover, the genocide in Srebrenica cannot be taken out of its context and is but the culmination of a criminal undertaking that had been pursued for several years.

B. The Responsibility of the Respondent for the Acts of Organs of the Republika Srpska

101. Following the apparent withdrawal of the Respondent's forces on 19 May 1992, the implementation of ethnic cleansing reached its height by means of the Republika Srpska and the parallel institutions established by the Bosnian Serbs. That "handover" of the genocide was to a large extent no more than a subterfuge designed to make sure that the pressure exercised by the international community upon the Respondent did not become too great and thereby endanger the Serbian master plan. The Republika Srpska and its combatant forces were in reality so closely controlled by the Respondent that they can even be treated as *de facto* organs of the latter.

1. The organs of the Republika Srpska regarded as de facto *organs of the Respondent*

102. Before determining whether the organs of the Republika Srpska can be equated to organs of the Respondent, it is necessary to come back to the nature and purpose of the parallel institutions set up on Bosnian territory. The purpose in Bosnia was to establish territorial continuity between all the Serb territories of Bosnia and Herzegovina in such a way as to permit their attachment to Serbia and to make any non-Serb State impossible in these territories. To achieve this, the Bosnian Serbs estab-

[115] The reference here is to the change of régime within the FRY and not the demise of the SFRY.

lished parallel institutions at the level of their republic and at the regional and municipal levels. The Serb Assembly of Bosnia and Herzegovina was thus established on 24 October 1991. On 9 January 1992, that Assembly proclaimed the Serb Republic of Bosnia, which was renamed the Republika Srpska (RS) on 12 August 1992. In March 1992, an MUP (Ministry of the Interior attached to the federal structure of the Respondent) was established for the Serbs of Bosnia. The creation of these institutions was officially supposed to enable the autonomy of the territories of Bosnia with a mostly Serb population to be upheld and so facilitate their attachment to the FRY. They were above all to be made use of in order to carry out ethnic cleansing, so as to turn the coveted territories, by every means, into territories with a solely or mostly Serb population.

103. It may on the face of it seem questionable to state that the acts of the Bosnian Serbs' armed forces (VRS) could be attributed to the Respondent by mere assimilation to an organ of the Serbian State. Apparently, these forces were not formally termed organs of the Respondent by its own internal law, and Article 4, paragraph 2, of the ILC Articles quoted above specifies that: "An organ includes any person or entity which has that status in accordance with the internal law of the State." The main criterion for determining status as an organ of the State of a person or group of persons therefore rests on the qualification that the internal law of the State confers on that person or group of persons. However, according to the ILC commentary, "a State cannot avoid responsibility for the conduct of a body which does in truth act as one of its organs merely by denying it that status under its own law. This result is achieved by the use of the word 'includes' in paragraph 2."[116] Any misclassification of a person, by internal law, with the aim of absolving the State of its international responsibility cannot be invoked if that person in fact behaves as an organ of the State within the State structure.

104. In the present case, the Applicant in its oral arguments (CR 2006/10) refers to such conduct by speaking of effective assimilation to a State organ. Here it is the effective links between the State and these apparently external entities which must be taken into account. The organ whereby the State acts may be *de jure* or *de facto*; what matters is that it behaves in this capacity and that it acts on behalf of the State, and that the persons or groups of persons concerned may be equated with State organs. In the *Tadić* case, the ICTY considered that the acts committed by a group of persons could be assimilated "to State organs on account of their actual behaviour within the structure of a State (and regardless of any possible requirement of State instructions)"[117].

[116] Report of the International Law Commission, Fifty-third Session, 2001, A/56/10, para. 11.
[117] ICTY, *Tadić*, IT-94-1-A, Appeals Chamber, Judgment of 15 July 1999, para. 141.

105. Indeed, the RS and its entities considered themselves to be territorial subdivisions of the Respondent. The sole purpose of the RS was to become attached to the FRY, to act like a constituent federal republic, which implies that it did not wish to act as an independent entity and enjoyed only very limited autonomy with respect to the FRY. This intention is moreover formally borne out by the "Constitution" of the Republika Srpska: according to Article 3 of the consolidated version of the text, "[t]he Republic shall be part of the Federal Republic of Yugoslavia"; according to its Article 6, "[t]he citizens of the Republic shall possess the nationality of Yugoslavia and the nationality of the Republic". This Constitution thus recognizes the relationship of subordination and the submission of the Republika Srpska to the FRY, particularly since this consolidated version was adopted after the withdrawal of the JNA and the self-styled declaration of independence of the Republika Srpska. These parallel institutions were in no way recognized by the international community and had no legal existence except by way of the Respondent, as was illustrated at the negotiation of the Dayton Agreements, where there was a single Serb delegation, representing both the FRY and the Pale authorities.

106. In many respects, the establishment of the army of the Republika Srpska (VRS) as an entity distinct from the Respondent's armed forces was largely a matter of form, as in reality it appeared to be more of a command unit of the reconstructed Yugoslav army, an extension of the JNA (the army of the FRY) with a certain degree of autonomy, rather than an independent army. The indictment concerning General Momcilo Perisić is very instructive on this point. As the Chief of General Staff of the FRY's army from 1993 to 1998 and thus responsible for implementing the decisions of the Supreme Defence Council of the FRY, General Perisić played a key role in the support provided to the VRS, as set out in the indictment:

> "During his tenure . . . Momcilo Perisić exercised his authority, pursuant to the policies and limitations set by the SDC, to provide substantial military assistance to the VRS which he knew was used, in significant part, in the commission of the crimes described in this indictment.
>
> Such assistance included continuing the practice of providing the majority of senior officers in the VRS as well as supplying large quantities of weapons, ammunition, and other logistical materials necessary for the commission of crimes . . . In some instances such assistance consisted of sending regular VJ troops stationed in the FRY into BiH. Momcilo Perisić provided this assistance through acts performed directly by him and by acts performed by his subordinates."[118]

[118] ICTY, IT-04-81, Amended Indictment, paras. 8-9.

The indictment subsequently makes the following observation:

> "The co-ordination between the VJ and the VRS was so close that the political leaders of the Republika Srpska and General Ratko Mladić could request that particular VJ officers be placed under their operational command or be retired via the 30th Personnel Centre." (Para. 14.)

This is of course only an indictment and the allegations it contains have not been confirmed by the Tribunal, but there is every chance that they will be, judging by the decisions already made concerning persons with a lower level of responsibility; as the ICTY Trial Chamber stated in the *Prosecutor* v. *Brdjanin* case,

> "the steps taken to create a VRS independent of the JNA were merely a ploy to fend off any potential accusations that the FRY was intervening in the armed conflict taking place on the territory of Bosnia-Herzegovina and to appease the requests of the international community to cease all involvement in the conflict"[119].

107. Command of the army of the Republika Srpska was not really independent and one might instead speak of autonomy in relation to the JNA, from which many officers were seconded to the VRS to assist it and sometimes to take charge of military operations. On 25 April 1992, when Bosnia and Herzegovina was already recognized as an independent State, General Mladić was appointed commander of the 2nd District of the JNA by the Belgrade authorities. He was thus given responsibility for commanding all the JNA forces in Bosnia.

After the "formal" withdrawal of Serbian troops, he nevertheless remained in place. The JNA changed its name in that territory to the VRS, but Mladić was not recalled to Belgrade and, on the contrary, he became the commander-in-chief of that army with the same responsibilities (same troops, same territory, etc.); on 24 June 1994, Belgrade's Supreme Defence Council — the highest political military authority in the FRY — promoted him to the rank of lieutenant-general in the Respondent's army, a rank which he kept until May 2002.

108. In Belgrade, within the Respondent's army renamed the VJ, a new department was established by the Supreme Defence Council to manage and control all the officers of the Respondent's army (the VJ) engaged in the Bosnian conflict in the ranks of the VRS: the 30th Per-

[119] ICTY, *Prosecutor* v. *Brdjanin*, IT-99-36-T, Judgment of 1 September 2004, para. 151.

sonnel Centre. Through that department, the officers continued to be paid by the VJ while serving on behalf of the VRS. All the personnel matters concerning those officers (pay, pensions, promotions, etc.) were taken over by this department of the VJ as they remained officers of the Respondent's army, while the rest of the VRS's troops were paid from the budget of the Serb Republic of Bosnia, although that budget was itself largely provided by Belgrade. The records of meetings of the Supreme Defence Council prove that Belgrade had full control over a significant proportion of the Republika Srpska's army officers who were first and foremost officers of the Respondent's army, beginning with the commander-in-chief. In that regard, the Court arrives at some surprising conclusions in paragraph 388. One of them is that no evidence has been presented that either General Mladić or any of the other officers whose affairs were handled by the 30th Personnel Centre were, according to the internal law of the Respondent, officers of its army. How can officers be promoted to very high ranks in the Respondent's command if they do not belong to the senior officer corps of that same command? What more evidence can be provided than the inclusion of the officers concerned on the Respondent's official list in which only officers legally recognized by its own internal law can appear? The other conclusion is that it does not appear from the internal law of the Respondent that they belonged to its army, which is not only questionable, as I have just explained, but also contradicts what is said at the end of that same paragraph: the Court notes that those officers (and more particularly General Mladić) may have been being "administered" from Belgrade; but they cannot be under the control of Belgrade, even for administrative purposes, unless they are governed by the Respondent's internal law. Moreover, the argument of administrative control put forward by Belgrade and taken up by the Court is in reality no more than a legal subterfuge, as the ICTY has revealed in certain of its judgments, to disguise the involvement of the Respondent's agents.

109. Even if the VRS cannot be regarded as a *de facto* organ of the Respondent — although it might be characterized as such on the basis of the criterion of overall control, as we shall see below — it clearly appears, because of the effective links with that State and the close unison achieved through the quite substantial presence of officers of the Respondent, to have acted on its directions or under its control. For the ICTY Trial Chamber,

> "Throughout 1991 and into 1992, the Bosnian Serb leadership communicated with the SFRY leadership on strategic policy in the event that BiH would become independent. The Trial Chamber is satisfied that these factors coupled with the continued payment of

> the salaries of the VRS officers by Belgrade indicate that, after 19 May 1992, the VRS [army of the Republika Srpska] and the VJ [Yugoslav army] did not constitute two separate armies . . . The Trial Chamber is satisfied that, despite the change of name from JNA to Army of the SerBiH after 19 May 1992, and subsequently to VRS, no consequential material changes actually occurred. While the change in name did not point to any alteration of military objectives and strategies, the equipment, the officers in command, the infrastructures and the sources of supply also remained the same." [120]

110. We have already likewise noted that the MUP (Interior Ministry) of the Bosnian Serbs — and its fighting forces, notably the paramilitary groups — also acted in unison with the federal MUP. The functional ties rendering the organs of the Republika Srpska dependent on the Respondent confirm the possibility of equating them with organs of the latter. The reality of these links, particularly in structural terms, is sufficient without any need to demonstrate that the RS was "totally dependent" on the FRY. The Respondent provided all the weaponry of the VRS, taking care to leave it its own arsenal at the time of the 19 May 1992 withdrawal; and it did not fail to provide the VRS and the paramilitaries with weapons, munitions and fuel, to pay the officers' salaries via the 30th Personnel Centre, and to reorganize its financial structures culminating in a certain form of integration of the economies of the FRY and the Republika Srpska. The budget of the Republika Srpska was, if not entirely then at least largely, funded by Belgrade; while the other VRS military were theoretically paid out of the budget of the Serb Republic of Bosnia, their pay was in fact provided by issues of the Respondent's currency. The Republika Srpska was in such a close relationship with the FRY that its proclaimed independence was no more than a kind of façade to avoid compromising the FRY in the eyes of the international community and the imposition of sanctions, *inter alia* by the United Nations Security Council.

111. It is this conclusion which prompted the Presiding Judge of the ICTY Trial Chamber in the *Tadić* case to dissociate herself from the other two judges in order to contend, in her separate and dissenting opinion, that the Respondent's involvement was manifest, after a detailed and well-argued analysis of which it is worth repeating here the essential elements contained in the following three paragraphs:

> "7. The evidence proves that the creation of the VRS was a legal fiction. The only changes made after the 15 May 1992 Security Council resolution were the transfer of troops, the establishment of a

[120] ICTY, *Prosecutor* v. *Brdjanin*, IT-99-36-T, Judgment of 1 September 2004, para. 151.

Main Staff of the VRS, a change in the name of the military organisation and individual units, and a change in the insignia. There remained the same weapons, the same equipment, the same officers, the same commanders, largely the same troops, the same logistics centres, the same suppliers, the same infrastructure, the same source of payments, the same goals and mission, the same tactics, and the same operations. Importantly, the objective remained the same: to create an ethnically pure Serb State by uniting Serbs in Bosnia and Herzegovina and extending that State from the Federal Republic of Yugoslavia (Serbia and Montenegro) to the Croatian Krajina along the important logistics and supply line that went through opstina Prijedor, thereby necessitating the expulsion of the non-Serb population of the opstina.

8. Although there is little evidence that the VRS was formally under the command of Belgrade after 19 May 1992, the VRS clearly continued to operate as an integrated and instrumental part of the Serbian war effort. This finding is supported by evidence that every VRS unit had been a unit in the JNA, the command and staffs remaining virtually the same after the re-designation. The VRS Main Staff, the members of which had all been generals in the JNA and many of whom were appointed to their positions by the JNA General Staff, maintained direct communications with the VJ General Staff via a communications link from Belgrade. Colonel Selak, commander of the logistics platoon that provided logistical support to units in the Banja Luka area (both before and after 19 May 1992), stated:

> 'Some officers had been given direct [telephone] lines, Belgrade/Pale. There was a link there and it was used in everyday communication because there was a need for direct communication between the Chief of Staff of the Army of *Republika Srpska* with the Army of Yugoslavia.'

Moreover, the VRS continued to receive supplies from the same suppliers in the Federal Republic of Yugoslavia (Serbia and Montenegro) who had contracted with the JNA, although the requests after 19 May 1992 went through the Chief of Staff of the VRS who then sent them onto Belgrade. The ties between the military in Bosnia and Herzegovina and the SDS political party, which advocated a Greater Serbia, similarly remained unchanged after the re-designation.

10. All of this, including the evidence referred to by the majority, makes obvious that the re-designation was motivated only by the desire of the Federal Republic of Yugoslavia (Serbia and Montenegro) to avoid offending the international community by violating the

> Security Council resolution ordering the JNA to cease involvement in Bosnia and Herzegovina." [121]

It is on the basis of that argumentation that the Chamber's Presiding Judge criticized the other two judges, first for having adopted a criterion of effective control which was inappropriate and unnecessary for the case concerned, and second for having applied that criterion wrongly, since it was in any event apparent from the evidence examined that such control existed [122]. We can only concur with that analysis and those findings.

2. The control exerted by the Respondent over the organs of the Republika Srpska

112. The responsibility of Serbia for the acts and omissions of its organs does not rule out its responsibility on other accounts, and notably for the behaviour of persons or groups of persons in fact acting on the instructions or directions, or under the control, of the Belgrade authorities. In view of the above-mentioned degree of unison existing between the staff of the Republika Srpska's army and that of the Respondent, it follows that the instructions and directions were in a way practically automatic as regards both the planning and implementation of the military operations carried out by the VRS. The intelligence apparatus at the disposal of the army of the FRY enabled it to be fully informed about how operations were proceeding. The indictment of Momcilo Perisić, the Chief of General Staff of the FRY's army, cited previously, gives a clear illustration of that system:

> "During the time relevant to this indictment the VJ maintained its own intelligence apparatus that was actively engaged in gathering information about what was transpiring in the conflicts in BiH . . . This apparatus provided Momcilo Perisić with regular timely reports of events. The VJ General Staff also received intelligence reports from VRS intelligence organs. Other factors which served to place Momcilo Perisić on notice of the crimes that were being committed by VJ personnel or with VJ material and logistical assistance included . . ." [123]

As was attested by numerous documents produced both in the written pleadings and during the oral arguments, not only was a constant stream of communications set up and maintained throughout the war in Bosnia

[121] ICTY, *Tadić*, IT-94-1-A, Trial Chamber, Judgment of 7 May 1997, separate and dissenting opinion of Judge Gabrielle Kirk McDonald.

[122] According to Judge McDonald: "Thus, if effective control is the degree of proof required to establish agency under *Nicaragua*, I conclude that this standard has been met." (*Ibid*., para. 15.)

[123] IT-04-81, Amended Indictment, para. 33.

among the military and political authorities, but there were also regular major co-ordination meetings involving the leading officials of the Respondent and of the Republika Srpska, as illustrated *inter alia* by the famous minutes of the Supreme Defence Council. The main purpose of those meetings was precisely to review the events which had taken place in order to draw the necessary conclusions and decide on further instructions or directions. In such a situation, there is co-ordination among various forms of control resulting in overall control, which is the most relevant way of describing and accounting for the relations between the organs of the Republika Srpska and those of the Respondent that were such as to engage the responsibility of the latter.

113. The Court has had occasion to define this criterion for attributing responsibility to a State on the basis of control in other cases. The Court took the view in its Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* that it should in principle have to be proved that [the United States of America] had effective control of the military or paramilitary operations in the course of which the alleged violations were committed. The Court adopted a restrictive definition of control and was to consider in that same case that

> "United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the *contras*, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself . . . for the purpose of attributing to the United States the acts committed by the *contras* in the course of their military or paramilitary operations in Nicaragua. All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the *contras* without the control of the United States." (*I.C.J. Reports 1986*, pp. 64-65, para. 115.)

114. Following this reasoning with reference to the present case, if responsibility is to be attributed to the Respondent for the acts of the Republika Srpska, the control exerted by it must not only be control of a general character exerted over an extremely dependent force: the control should be such that the Republika Srpska had forfeited its autonomy or "free will". In other words, the requirement is to demonstrate that the extent of the control was such that the Respondent effectively ordered or imposed the perpetration of acts of genocide and that their commission would have been impossible without specific instructions issued by the

organs of the Respondent. While the requirement for such a degree of control, which appears very strict, can be explained in the *Nicaragua* case, it is not certain that the same criterion should be applied in that concerning Bosnia and Herzegovina. A straightforward comparison of the two situations is sufficient to illustrate the limits of such an exercise and to realize that, although there are certain similarities in the circumstances of the *Nicaragua* and the *Bosnia and Herzegovina* cases, the differences between them are both more numerous and more significant.

115. The circumstances in which the Court delivered its Judgment in the *Nicaragua* case were the following: the *contras* were not United States nationals; they were not part of a rank-ordered organic apparatus structurally linked to the United States; they were not fighting to attach the territory of Nicaragua to that of the United States; they exerted no control over any part of the territory of Nicaragua, as they were essentially based on the borders of the neighbouring States. While the United States backed that paramilitary organization, their respective "projects" were fairly far apart and only came together on one aim: that of destabilizing and overthrowing the government in place in Nicaragua. In view of this, it was difficult to demonstrate the involvement of the United States by way of some vague and uncertain general control, and very precise evidence therefore needed to be found to show that the United States exerted effective control over the activities of the *contras*, which may explain, in that case, the criteria for the definition of control adopted by the Court.

116. As to the links between the Republika Srpska and the Respondent, we have just examined at length their nature and the type of control effectively exerted between the two entities. It is for the same reason that the ICTY has endorsed a different criterion of control from that of the *Nicaragua* case, by relying on the facts which it has analysed with considerable rigour and perception to arrive at the notion of "overall control". According to the ICTY, "[t]he degree of control may . . . vary according to the factual circumstances of each case"[124]. In the *Delalić* case, the Appeals Chamber concluded that "[t]he 'overall control' test could . . . be fulfilled even if the armed forces acting on behalf of the 'controlling State' had autonomous choices of means and tactics although participating in a common strategy along with the 'controlling State'"[125]. In the *Tadić* case, the Appeals Chamber also indicated that the degree of control could vary and distinguished at least two eventualities reflecting the situation on the ground and what is at stake for the protagonists[126]:

[124] ICTY, *Tadić*, IT-94-1-A, Judgment of 15 July 1999, para. 117.
[125] ICTY, *Delalić et al.*, IT-96-21, Appeals Chamber, Judgment of 20 February 2001, para. 47.
[126] See above-cited Judgment of 15 July 1999, paras. 138 and 139.

— the State whose responsibility is sought is not that on the territory of which the armed clashes occur, in which event the existence of effective control must be established in each individual case;
— the State exercising control is the immediate neighbour of the State where clashes aimed at satisfying expansionist aims are taking place. In this scenario, general control is sufficient to implicate the Respondent meaningfully and effectively in the actions carried out by the various Serb forces operating in the territory of Bosnia and Herzegovina.

117. This distinction implies a considerable difference with the *Nicaragua* v. *United States of America* case, where the objective of the United States was simply limited to the overthrow of the power in place, while in the present case, there was a perfect similarity of views between the Respondent and the Republika Srpska on the Greater Serbia project bringing together all the Serbs under the authority of the two entities. There is no need in this case to prove an involvement resembling precise control over each operation carried out in the territory of Bosnia and Herzegovina; overall control leading to a decisive influence upon the policies implemented by the Republika Srpska is sufficient. In other words, exerting strict control over each act by the VRS was not particularly necessary, in view of the identical goals of the two partners. By financing and supplying the greater part of its budget and its armaments, by controlling a part of its officers, notably in the highest ranks of the Republika Srpska, and by propagating the idea of an ethnically clean Greater Serbia, the Respondent effectively exerted sufficient overall control, even if that did not rule out a certain degree of autonomy or any differences of view or conflicts regarding the ways and means of achieving the common purpose. Assuming moreover that the Respondent's armed forces did not participate directly in the acts of genocide established by the ICTY, they nevertheless supplied such massive and decisive multifaceted support that it incited the fighting forces of the Republika Srpska to continue their policy of ethnic cleansing, which there was every reason to believe would spill over into acts of genocide.

C. The Responsibility of the Respondent for other Acts related to Genocide

118. According to Article III of the 1948 Genocide Convention, there are three types of punishable acts other than genocide proper, namely direct and public incitement to commit genocide, conspiracy to commit genocide, and complicity in genocide.

119. Incitement and conspiracy are two separate counts of responsibility for genocide. The FRY may be found responsible for these two offences without this calling into question its direct responsibility for the commission of genocide proper. For complicity, according to the ICTR,

"an individual cannot thus be both the principal perpetrator of a particular act and the accomplice thereto. An act with which an accused is charged cannot, therefore, be characterized as both an act of genocide and an act of complicity in genocide."[127] The FRY could not therefore be found to be an accomplice in genocide unless the Court considers that it is not the principal perpetrator.

120. Concerning direct and public incitement to commit genocide (Arts. III *(c)* and IX), the Court has had occasion to affirm the ban on incitement to other violations of international law than genocide. In its Judgment in the *Nicaragua* v. *United States of America* case the Court considered that, "from the general principles of humanitarian law to which the [1949 Geneva] Conventions merely give specific expression", the United States was "under an obligation not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation" (*I.C.J. Reports 1986*, p. 114, para. 220) of their fundamental provisions.

121. The FRY played a role in the incitement of violence of the most extreme kind by propagating the ideology of a Greater Serbia, by calling for the creation of an "all-Serb State" and by laying the ground for ethnic cleansing with the potential to spill over into acts of genocide. In its *Tadić* Judgment of 7 May 1997, the ICTY Trial Chamber observes the facts establishing this direct and public incitement[128]. The propaganda campaign for a Greater Serbia was accompanied by another movement beginning in 1989, with the celebration of the 600th anniversary of the Battle of Kosovo. The Serb-dominated media stated that the Serbs had been left to their fate at the time of the invasion of the Ottoman Muslim Empire. The dangers associated with Muslim fundamentalism within the former SFRY were also emphasized. The line went that if the SFRY were to be dissolved and the Serbs to find themselves in a minority, their entire existence might be imperilled and, in that eventuality, the only alternative would be to wage an all-out war or otherwise, as in the past, end up in a concentration camp. In the early 1990s, gatherings with the participation of Serb leaders were organized to defend and propagate those ideas. In 1992, Radoslav Brdjanin, who presided over the crisis cell in the autonomous Serb region of Banja Luka, stated publicly that 2 per cent was the maximum proportion of non-Serbs that could be tolerated in the region[129]. He advocated getting rid of the non-Serbs in three stages: (1) by the creation of intolerable living conditions for non-Serbs; (2) by deportation and banishment; (3) by liquidation of the remaining non-Serbs. Serb newspapers and Belgrade television denounced the threat of non-Serb extremists and spread the idea that they were arming in order

[127] ICTR, *Prosecutor* v. *Alfred Musema*, ICTR-96-13, Trial Chamber, Judgment and Sentence of 27 January 2000, para. 175.

[128] See *Tadić,* Appeals Chamber, Judgment of 15 July, paras. 30-35.

[129] Statement reported by the ICTY in *Tadić*, IT-94-1-T, Judgment of 7 May 1997, para. 89.

to exterminate the Serbs. That propaganda campaign continued until 1993.

122. As regards conspiracy, the point is to determine that there existed a concerted plan to commit war crimes, crimes against humanity and possibly acts of genocide. Such a plan follows from all the conduct of the Respondent, which, after directly and publicly inciting ethnic cleansing, prepared the necessary conditions for its perpetration. That State thus weeded out from the Yugoslav army all non-Serb elements in order to guarantee its loyalty. It made good the numbers with "volunteers" in their place. While organizing the withdrawal of the JNA under international pressure, it was planned to arm the Bosnian Serbs and to disarm the non-Serbs. It was also planned to incorporate the Serbs of Bosnia and their parallel institutions unofficially into the federal structure, so as to be able to control them and continue providing them with the necessary arms and budget. These precise and meticulous preparations, and the close co-operation between the Republika Srpska and the Belgrade authorities which they involved, attest to the existence of a conspiracy to perpetrate the utmost violence, with the serious risk of sliding down the slope towards genocide. What is important in this case is the existence of a "deliberate act" and that it "must directly affect the commission of the crime itself"[130].

D. Aid or Assistance Provided by the Respondent in the Commission of Genocide

123. The opinion expressed here is that the Respondent was one of the perpetrators of the crimes committed in the territory of Bosnia and Herzegovina, and complicity is therefore ruled out, since logically one cannot be the main perpetrator of and the accomplice to a criminal act at one and the same time. As was recalled by the International Criminal Tribunal for Rwanda and as we noted in paragraph 119: "An act with which an accused is charged cannot, therefore, be characterized as both an act of genocide and an act of complicity in genocide."[131] However, this hypothesis warrants examination, since the Court has not upheld the crime of complicity, whereas, in my opinion, there was sufficient evidence to arrive at a different conclusion.

124. The International Law Commission's Articles on the International Responsibility of the State refer to aid or assistance in the commission of an internationally wrongful act in Article 16, which reads:

"A State which aids or assists another State in the commission of

[130] *Tadić*, IT-94-1-T, Judgment of 7 May 1997, para. 678.
[131] ICTR, *Prosecutor* v. *A. Musema*, *op. cit.*, para. 220.

an internationally wrongful act by the latter is internationally responsible for doing so if:

(a) That State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) The act would be internationally wrongful if committed by that State."

On the face of it, this provision concerning relations between States does not seem directly applicable in the present case, inasmuch as the aid in question concerned an entity, the Republika Srpska, which has no international status. But as the Court rightly asserted, while this provision is not directly relevant, it

> "sees no reason to make any distinction of substance between 'complicity in genocide', within the meaning of Article III, paragraph *(e)*, of the Convention, and the 'aid or assistance' of a State in the commission of a wrongful act by another State within the meaning of the aforementioned Article 16" (Judgment, para. 420).

It thus follows that the State which provided aid or assistance will be responsible in so far as it has facilitated the commission of an internationally wrongful act.

125. Complicity presupposes a number of participants intervening in various ways in the accomplishment of a single criminal enterprise. The direct perpetrator is the person who commits the offence and the accomplice facilitates its commission with full knowledge and awareness of it. The accomplice can intervene after as well as before the criminal act[132]. It is commonly acknowledged in all national penal systems that complicity is inseparable from criminal intent[133]; it is a deliberate offence, in which the accomplice must consciously identify with the principal act. But must he also share the specific intent of the main perpetrator? That question has given rise to some debate, and the Genocide Convention is incomplete in this respect. We know that the ICTY has considered whether evidence needs to be brought that the accomplice himself possessed the intent to commit genocide[134]; it did not uphold such an interpretation and, to be an accomplice to the crime of genocide, it is sufficient to act knowingly, that is to say in the awareness that the unlawful acts constitute or might constitute genocide[135]. The Court makes reference to this issue in paragraph 421, but avoids addressing it on the grounds that it

[132] N. Robinson, *op. cit.*, p. 21.

[133] Thus in the *Zyklon B* case, the judgment of the British Military Court of 8 March 1948 held that the provision of the gas had speeded up extermination in the camps and that the accused knew the use which would be made of it (cited by C. Laucci, "La Responsabilité pénale des détenteurs de l'autorité : étude de la jurisprudence récente des tribunaux pénaux internationaux", *L'Observatoire des Nations Unies*, No. 6, 1999, pp. 151-152).

[134] *Krstić* case, Appeals Chamber, Judgment of 19 April 2004, paras. 140-142.

[135] *Ibid.*, paras. 143-144.

does not arise in the present case. However, it is regrettable that it does not rule clearly when all the underlying reasoning relies on the notion that knowledge is sufficient to result in complicity, as indeed is evident further on in paragraph 432 regarding complicity and violation of the obligation to prevent genocide; the Court should have been clearer in its findings and asserted that complicity does not require the accomplice to share the specific intent of the direct perpetrator of the crime of genocide, but that it is sufficient for him to be aware of that specific intent. It therefore suffices to determine that the FRY knew of the genocidal intent — even if it did not share it — of the criminals to whom it provided assistance, in order to establish its complicity in the crime of genocide.

126. In the present case, the Respondent was aware of the circumstances which made the conduct of the assisted entity internationally wrongful, i.e. a policy of ethnic cleansing which was common knowledge and denounced by the highest international authorities, in particular the United Nations Security Council and General Assembly; it knew full well that its aid was being used to commit all manner of crimes, including acts of genocide which the Republika Srpska would have been unable to commit on such a scale, as in Srebrenica, without the support of the FRY. This is moreover the conclusion at which the Court arrives on three occasions: first, when it notes that: "had [the Respondent] withdrawn that support, this would have greatly constrained the options that were available to the Republika Srpska authorities" (Judgment, para. 241); again, in reference to "the very important support given by the Respondent to the Republika Srpska, without which it could not have 'conduct[ed] its crucial or most significant military and paramilitary activities'" (Judgment, para. 394); and finally, and most importantly, in declaring the following with respect to Srebrenica:

> "Undoubtedly, the quite substantial aid of a political, military and financial nature provided by the FRY to the Republika Srpska and the VRS, beginning long before the tragic events of Srebrenica, continued during those events. There is thus little doubt that the atrocities in Srebrenica were committed, at least in part, with the resources which the perpetrators of those acts possessed as a result of the general policy of aid and assistance pursued towards them by the FRY." (Judgment, para. 422.)

127. After such an acknowledgment, it would have been logical for the Court to draw all the conclusions from it and decide on the complicity of the Respondent. That was not, however, the finding reached by the majority. In other words, the conditions for establishing the material element of aiding and assisting the crime of genocide were present, but the Court did not accept them, dismissing the responsibility of the Respondent on the grounds that the intentional element was lacking and, more particularly, because

> "it is not established beyond any doubt in the argument between the Parties whether the authorities of the FRY supplied — and continued to supply — the VRS leaders who decided upon and carried out those acts of genocide with their aid and assistance, at a time when those authorities were clearly aware that genocide was about to take place or was under way" (Judgment, para. 422).

The Court returns to the lack of evidence of intent in the following paragraph, as if to persuade itself of the argument, stating: "[i]t has therefore not been conclusively established that, at the crucial time, the FRY supplied aid to the perpetrators of the genocide in full awareness that the aid supplied would be used to commit genocide" (Judgment, para. 423). However, this statement and the conclusion which follows from it are no more evident or convincing; they raise a number of questions concerning various points. Must one have acted only "at the critical time", as indicated in paragraph 423, to be an accomplice to genocide? Is it really possible to massacre over 7,000 persons in an improvised or spontaneous way, without some degree of advance preparation and planning? In view of the closeness and regularity of the contacts between the authorities of the FRY and those of the Republika Srpska — especially the human contacts through high-ranking officers of the FRY's army serving in the VRS — can we really regard as indisputable the lack of knowledge of such a project on the part of the authorities of the FRY? Among other evidence accumulated regarding the knowledge of the respondent State's leadership of the intent of the perpetrators of the massacres, does not the testimony of General Wesley Clark, quoted and discussed in paragraph 437, constitute a sufficiently convincing element indicating that President Milošević was very aware of what was about to happen in Srebrenica? And indeed the Court recognizes that he was, since it is on that basis that it establishes the violation of the obligation of prevention provided for by the Convention. Without such knowledge, the violation of that obligation could not be established.

128. It is precisely on this point concerning the element of awareness or knowledge of the crimes committed that one cannot help noting a certain incoherence in or contradiction between the Court's two findings. On the one hand, the Court refuses to acknowledge the existence of complicity on the part of the Respondent's authorities because they were not informed or, more precisely, were not "clearly aware that genocide was about to take place or was under way" (Judgment, para. 422); on the other, it holds nevertheless that those organs breached their obligation to prevent genocide because the Belgrade authorities "could hardly have been unaware of the serious risk" which existed of the perpetration of genocide (Judgment, para. 436). Or even more precisely:

> "[g]iven all the international concern about what looked likely to happen at Srebrenica, given Milošević's own observations to Mladić, which made it clear that the dangers were known and that these dan-

> gers seemed to be of an order that could suggest intent to commit genocide, unless brought under control, it must have been clear that there was a serious risk of genocide in Srebrenica" (Judgment, para. 438).

It is more than merely difficult to follow the Court's reasoning; despite the remarkable subtlety employed in its complex analysis to explain the distinction between the awareness necessary in order to be an accomplice to genocide and the awareness necessary in order to prevent genocide, both from a logical standpoint and in view of the factual circumstances obtaining in this case, it is hard to comprehend that distinction and, therefore, the difference in the findings concerning the implication of the Respondent. In other words, since a clear awareness of the serious danger of genocide existed within the organs of the Respondent, the first obligation for them was to prevent acts of genocide; they then had the further obligation of not continuing to provide the future perpetrators of the criminal acts with the aid or assistance enabling or making it easier for them to commit those acts. The Court should thus have found not only that there had been a breach of the obligation to prevent, but also that there had been complicity, especially as the Respondent's aid and assistance to Republika Srpska continued even after the genocide in Srebrenica, as was found by the ICTY and as confirmed by the Court itself in the present Judgment.

129. The operative part of the Judgment concerns Serbia, since it must address the State which is the Respondent on the date when the Court delivers its Judgment. A judgment cannot be addressed to a fictitious State which has ceased to exist; it is thus Serbia which is addressed in the operative part as the continuator State of Serbia and Montenegro, just as Serbia and Montenegro was the continuator of the FRY. The conduct analysed and judged in the present case is that of the FRY and of Serbia and Montenegro, as the Court indicates in the preamble by referring to one or other of these States depending on the period concerned, in order to identify clearly the perpetrators of the acts and consequently attribute the resulting responsibility to Serbia as the continuator of the two previous States.

It should also be noted that the Court expressly refers, in paragraph 78, to the Republic of Montenegro, which became independent on 3 June 2006, after the end of the public hearings, and which informed the Court by a letter dated 29 November 2006 that the new State did not intend to adopt the capacity of Respondent in the case at hand. It is important to cite that paragraph of the Judgment of the Court: "That being said, it has to be borne in mind that any responsibility for past events determined in the present Judgment involved at the relevant time the State of Serbia and Montenegro."

This paragraph recalls the responsibilities incumbent upon the Republic of Montenegro, and I interpret this reminder as meaning that, even if

the operative part is not directly addressed to the Republic of Montenegro, it is nonetheless responsible as a successor State, in accordance with the rules of international law governing the international responsibility of States, State succession with respect to treaties and State succession with respect to property, archives and State debts. I regret that the Court was not more precise in its reminder of the obligations of the Republic of Montenegro, given the circumstances of the present case. The Republic of Montenegro is a party to the Genocide Convention, which requires it to comply with all the resulting obligations, including that of prosecuting and punishing the perpetrators of acts of genocide. Moreover, it has succeeded to the Dayton Agreements, which commit it to full co-operation in achieving the goals established by those agreements.

(Signed) Ahmed MAHIOU.