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Summary
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Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)

Summary of the Judgment of 26 February 2007

History of the proceedings and submissions of the Parties (paras. 1-66)

The Court begins by recapitulating the various stages of the proceedings (this history may be found in Press Release No. 2006/9 of 27 February 2006). It also recalls the final submissions presented by the Parties at the oral proceedings (see Press Release No. 2006/18 of 9 May 2006).

Identification of the respondent party (paras. 67-79)

The Court first identifies the respondent party before it in the proceedings. It observes that after the close of the oral proceedings, by a letter dated 3 June 2006, the President of the Republic of Serbia informed the Secretary-General of the United Nations that, following the Declaration of Independence adopted by the National Assembly of Montenegro on 3 June 2006, "the membership of the state union Serbia and Montenegro in the United Nations, including including all organs and organisations of the United Nations system, [would be] continued by the Republic of Serbia on the basis of Article 60 of the Constitutional Charter of Serbia and Montenegro". On 28 June 2006, by its resolution 60/264, the General Assembly admitted the Republic of Montenegro as a new Member of the United Nations.

After having examined the views expressed on this issue by the Agent of Bosnia and Herzegovina, the Agent of Serbia and Montenegro and the Chief State Prosecutor of Montenegro, the Court observes that the facts and events on which the final submissions of Bosnia and Herzegovina are based occurred at a period of time when Serbia and Montenegro constituted a single State.

It notes that Serbia has accepted "continuity between Serbia and Montenegro and the Republic of Serbia", and has assumed responsibility for "its commitments deriving from international treaties concluded by Serbia and Montenegro", thus including commitments under the Genocide Convention. Montenegro, on the other hand, does not claim to be the continuator of Serbia and Montenegro.

The Court recalls a fundamental principle that no State may be subject to its jurisdiction without its consent. It states that the events related clearly show that the Republic of Montenegro does not continue the legal personality of Serbia and Montenegro; it cannot therefore have acquired, on that basis, the status of Respondent in the case. It is also clear that Montenegro does

not give its consent to the jurisdiction of the Court over it for the purposes of the dispute. Furthermore, the Applicant did not assert that Montenegro is still a party to the present case; it merely emphasized its views as to the joint and several liability of Serbia and of Montenegro.

The Court thus notes that the Republic of Serbia remains a respondent in the case, and at the date of the present Judgment is indeed the only Respondent. Accordingly, any findings that the Court may make in the operative paragraph of the Judgment are to be addressed to Serbia. That being said, the Court recalls that any responsibility for past events determined in the present Judgment involved at the relevant time the State of Serbia and Montenegro. It further observes that the Republic of Montenegro is a party to the Genocide Convention and that Parties to that Convention have undertaken the obligations flowing from it, in particular the obligation to co-operate in order to punish the perpetrators of genocide.

The Court's jurisdiction (paras. 80-141)

— The jurisdictional objection of the Respondent

The Court proceeds to examine an important issue of jurisdictional character raised by the "Initiative to Reconsider ex officio Jurisdiction over Yugoslavia" filed by the Respondent in 2001 (hereinafter "the Initiative"). It explains that the central question raised by the Respondent is whether at the time of the filing of the Application instituting proceedings the Respondent was or was not the continuator of the Socialist Federal Republic of Yugoslavia (SFRY). The Respondent now contends that it was not a continuator State, and that therefore not only was it not a party to the Genocide Convention when the proceedings were instituted, but it was not then a party to the Statute of the Court by virtue of membership in the United Nations; and that, not being such a party, it did not have access to the Court, with the consequence that the Court had no jurisdiction ratione personae over it.

The Court recalls the circumstances underlying that Initiative. Briefly stated, the situation was that the Respondent, after claiming that since the break-up of the SFRY in 1992 it was the continuator of that State, and as such maintained the membership of the SFRY in the United Nations, had on 27 October 2000 applied, "in light of the implementation of the Security Council resolution 777 (1992)" to be admitted to the Organization as a new Member, thereby in effect relinquishing its previous claim.

In order to clarify the background to these issues, the Court reviews the history of the status of the Respondent with regard to the United Nations from the break-up of the SFRY to the admission of Serbia and Montenegro on 1 November 2000 as a new Member.

— The response of Bosnia and Herzegovina

The Court observes that the Applicant contends that the Court should not examine the question raised by the Respondent in its Initiative. Bosnia and Herzegovina firstly argues that the Respondent was under a duty to raise the issue of whether the FRY was a Member of the United Nations at the time of the proceedings on the preliminary objections, in 1996, and that since it did not do so, the principle of res judicata, attaching to the Court's 1996 Judgment on those objections, prevents it from reopening the issue. Bosnia and Herzegovina secondly maintains that the Court itself, having decided in 1996 that it had jurisdiction in the case, would be in breach of the principle of res judicata if it were now to decide otherwise, and that the Court cannot call in question the authority of its decisions as res judicata.

With respect to the first contention of Bosnia and Herzegovina. the Court notes that if a party to proceedings before the Court chooses not to raise an issue of jurisdiction by way of the preliminary objection procedure under Article 79 of the Rules, that party is not necessarily thereby debarred from raising such issue during the proceedings on the merits of the case.

The Court does not find it necessary to consider whether the conduct of the Respondent could be held to constitute an acquiescence in the jurisdiction of the Court. Such acquiescence, if established, might be relevant to questions of consensual jurisdiction, but not to the question whether a State has the capacity under the Statute to be a party to proceedings before the Court. The Court observes that the latter question may be regarded as an issue prior to that of jurisdiction ratione personae, or as one constitutive element within the concept of jurisdiction ratione personae. Either way, unlike the majority of questions of jurisdiction, it is not a matter of the consent of the parties. It follows that, whether or not the Respondent should be held to have acquiesced in the jurisdiction of the Court in the case, such acquiescence would in no way debar the Court from examining and ruling upon the question it raised. The same reasoning applies to the argument that the Respondent is estopped from raising the matter at this stage, or debarred from doing so by considerations of good faith. The Court therefore turns to examine the second contention of Bosnia and Herzegovina that the question of the capacity of the Respondent to be a party to proceedings before the Court has already been resolved as a matter of res judicata by the 1996 Judgment on jurisdiction.

— The principle of res judicata

After having reviewed its relevant past decisions, notably its 1996 Judgment on Preliminary Objections in the case and the 2003 Judgment in the Application for Revision case, the Court considers the principle of res judicata, and its application to the 1996 Judgment.

The Court recalls that the principle of res judicata appears from the terms of the Statute of the Court and the Charter of the United Nations. That principle signifies that the decisions of the Court are not only binding on the parties, but are final, in the sense that they cannot be reopened by the parties as regards the issues that have been determined, save by procedures, of an exceptional nature, specially laid down for that purpose (the procedure for revision set down in Article 61 of the Statute). In the view of the Court, two purposes underlie the principle of res judicata: first, the stability of legal relations requires that litigation come to an end; secondly, it is in the interest of each party that an issue which has already been adjudicated in favour of that party be not argued again.

The Court observes that it has been suggested inter alia by the Respondent that a distinction may be drawn between the application of the principle of res judicata to judgments given on the merits of a case and judgments determining the Court's jurisdiction, in response to preliminary objections. The Respondent contends that the latter "do not and cannot have the same consequences as decisions on the merits". The Court dismisses this contention, explaining that the decision on questions of jurisdiction is given by a judgment, and Article 60 of the Statute provides that "[t]he judgment is final and without appeal", without distinguishing between judgments on jurisdiction and admissibility, and judgments on the merits. The Court does not uphold the other arguments of the Respondent in respect of res judicata. It states that, should a party to a case believe that elements have come to light subsequent to the decision of the Court which tend to show that the Court's conclusions may have been based on incorrect or insufficient facts, the Statute provides for only one procedure: that under Article 61, which offers the possibility of the revision of judgments, subject to the restrictions stated in that Article. In this regard, it recalls that the Respondent's Application for revision of the 1996 Judgment in the case was dismissed, as not meeting the conditions of Article 61.

— Application of the principle of res judicata to the 1996 Judgment

The Court recalls that the operative part of a judgment of the Court possesses the force of res judicata. The operative part of the 1996 Judgment stated that the Court found "that, on the basis of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, it has jurisdiction to decide upon the dispute". According to the Court, that jurisdiction is thus established with the full weight of the Court's judicial authority. For a party to assert today that, at

the date the 1996 Judgment was given, the Court had no power to give it, because one of the parties can now be seen to have been unable to come before the Court is to call in question the force as res judicata of the operative clause of the Judgment. Therefore, the Court need not examine the Respondent's objection to jurisdiction based on its contention as to its lack of status in 1993.

The Respondent has however advanced a number of arguments tending to show that the 1996 Judgment is not conclusive on the matter. It has been inter alia suggested that, for the purposes of applying the principle of res judicata to a judgment on preliminary objections, the operative clause to be taken into account and given the force of res judicata is the decision rejecting specified preliminary objections, rather than the broad ascertainment upholding jurisdiction. The Court does not uphold this contention, explaining that it does not consider that it was the purpose of Article 79 of the Rules of Court to limit the extent of the force of res judicata attaching to a judgment on preliminary objections, nor that, in the case of such judgment, such force is necessarily limited to the clauses of the dispositif specifically rejecting particular objections. If any question arises as to the scope of res judicata attaching to a judgment, it must be determined in each case having regard to the context in which the judgment was given. It may be necessary to distinguish between, first, the issues which have been decided with the force of res judicata, or which are necessarily entailed in the decision of those issues; secondly any peripheral or subsidiary matters, or obiter dicta; and finally matters which have not been ruled upon at all.

The Court notes that the fact that it has dealt, in a number of past cases, with jurisdictional issues after having delivered a judgment on jurisdiction does not support the contention that such a judgment can be reopened at any time, so as to permit reconsideration of issues already settled with the force of res judicata. There is an essential difference between those cases mentioned in paragraph 127 of the Judgment and the present case: the jurisdictional issues examined at a late stage in those cases were such that the decision on them would not contradict the finding of jurisdiction made in the earlier judgment. By contrast, the contentions of the Respondent in the present case would, if upheld, effectively reverse the 1996 Judgment.

Addressing the argument of the Respondent that the issue whether the FRY had access to the Court had not been decided in the 1996 Judgment, the Court notes that the statements it made in the 2004 Judgments in the Legality of Use of Force cases do not signify that in 1996 the Court was unaware of the fact that the solution adopted in the United Nations as to the question of continuation of the membership of the SFRY "[was] not free from legal difficulties". As the Court recognized in the 2004 Judgments, in 1999 — and even more so in 1996 — it was by no means so clear as the Court found it to be in 2004 that the Respondent was not a Member of the United Nations. Although the legal complications of the position of the Respondent in relation to the United Nations were not specifically mentioned in the 1996 Judgment, the Court affirmed its jurisdiction to adjudicate upon the dispute and since the question of a State's capacity to be a party to proceedings is a matter which the Court must, if necessary, raise ex officio, this finding must as a matter of construction be understood, by necessary implication, to mean that the Court at that time perceived the Respondent as being in a position to participate in cases before the Court. On that basis, it proceeded to make a finding on jurisdiction which would have the force of res judicata. The Court does not need to go behind that finding and consider on what basis the Court was able to satisfy itself on the point. Whether the Parties classify the matter as one of "access to the Court" or of "jurisdiction ratione personae", the fact remains that the Court could not have proceeded to determine the merits unless the Respondent had had the capacity under the Statute to be a party to proceedings before the Court. That the FRY had the capacity to appear before the Court in accordance with the Statute was an element in the reasoning of the 1996 Judgment which can — and indeed must — be read into the Judgment as a matter of logical construction.

— Conclusion: jurisdiction affirmed

The Court concludes that, in respect of the contention that the Respondent was not, on the date of filing of the Application instituting proceedings, a State having the capacity to come before the Court under the Statute, the principle of res judicata precludes any reopening of the decision embodied in the 1996 Judgment. The Respondent has however also argued that the 1996 Judgment is not res judicata as to the further question whether the FRY was, at the time of institution of proceedings, a party to the Genocide Convention, and has sought to show that at that time it was not, and could not have been, such a party. The Court however considers that the reasons given for holding that the 1996 Judgment settles the question of jurisdiction in this case with the force of res judicata are applicable a fortiori as regards this contention, since on this point the 1996 Judgment was quite specific, as it was not on the question of capacity to come before the Court. The Court thus concludes that, as stated in the 1996 Judgment, it has jurisdiction, under Article IX of the Genocide Convention, to adjudicate upon the dispute. It follows that the Court does not find it necessary to consider the questions, extensively addressed by the Parties, of the status of the Respondent under the Charter of the United Nations and the Statute of the Court, and its position in relation to the Genocide Convention at the time of the filing of the Application.

The applicable law (paras. 142-201)

The Court first recalls that its jurisdiction in the case is based solely on Article IX of the Genocide Convention, since all the other grounds of jurisdiction invoked by the Applicant were rejected in the 1996 Judgment on jurisdiction. Article IX provides that

> "Disputes 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".

It follows that the Court may rule only on disputes between the States parties relating to the interpretation, application or fulfilment of the Convention and that it has no power to rule on alleged breaches of other obligations under international law, not amounting to genocide, particularly those protecting human rights in armed conflict. That is so even if the alleged breaches are of obligations under peremptory norms, or of obligations which protect essential humanitarian values, and which may be owed erga omnes.

— Obligations imposed by the Convention on the Contracting Parties

The Court notes that there exists a dispute between the Parties as to the meaning and the legal scope of Article IX of the Convention, especially about whether the obligations the Convention imposes upon the Parties are limited to legislate, and to prosecute or extradite, or whether the obligations of the States parties extend to the obligation not to commit genocide and the other acts enumerated in Article III.

The Court observes that what obligations the Convention imposes upon the parties to it depends on the ordinary meaning of the terms of the Convention read in their context and in the light of its object and purpose. It reviews the wording of Article I, which provides inter alia that "[t]he Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish". The Court finds that Article I, in particular its undertaking to prevent, creates obligations distinct from those which appear in the subsequent Articles. This finding is confirmed by the preparatory work of the Convention and the circumstances of its conclusion.

The Court then considers whether the Parties are under an obligation not to commit genocide themselves since such an obligation is not expressly imposed by the actual terms of the Convention. In the view of the Court, taking into account the established purpose of the Convention, the effets of Article I is to prohibit States from themselves commiting genocide. Such a prohibition follows, first, from the fact that Article I categorizes genocide as "a crime under international law": by agreeing to such a categorization, the States parties must logically be undertaking not to commit the act so described. Secondly, it follows from the expressly stated obligation to prevent the commission of acts of genocide. It would be paradoxical, if States were thus under an obligation to prevent, but were not forbidden to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law. In short, the obligation to prevent genocide necessarily implies the prohibition of commission of genocide. The Court notes that its conclusion is confirmed by one unusual feature of the wording of Article IX, namely the phrase "including those [disputes] relating to the responsibility of a State for genocide or any of the other acts enumerated in Article III". According to the English text of the Convention, the responsibility contemplated is responsibility "for genocide", not merely responsibility "for failing to prevent or punish genocide". The particular terms of the phrase as a whole confirm that Contracting Parties may be held responsible for genocide and the other acts enumerated in Article III of the Convention.

The Court subsequently discusses three further arguments which may be seen as contradicting the proposition that the Convention imposes a duty on the Contracting Parties not to commit genocide and the other acts enumerated in Article III.

The first is that, as a matter of principle, international law does not recognize the criminal responsibility of the State, and the Genocide Convention does not provide a vehicle for the imposition of such criminal responsibility. The Court observes that the obligation for which the Respondent may be held responsible, in the event of breach, in proceedings under Article IX, is simply an obligation arising under international law, in this case the provisions of the Convention, and that the obligations in question and the responsibilities of States that would arise from breach of such obligations are obligations and responsibilities under international law. They are not of a criminal nature.

The second is that the nature of the Convention is such as to exclude from its scope State responsibility for genocide and the other enumerated acts. The Convention, it is said, is a standard international criminal law convention focussed essentially on the criminal prosecution and punishment of individuals and not on the responsibility of States. However, the Court sees nothing in the wording or the structure of the provisions of the Convention relating to individual criminal liability which would displace the meaning of Article I, read with paragraphs (a) to (e) of Article III, so far as these provisions impose obligations on States distinct from the obligations which the Convention requires them to place on individuals.

Concerning the third and final argument, the Court examines the drafting history of the Convention, in the Sixth Committee of the General Assembly, which is said to show that "there was no question of direct responsibility of the State for acts of genocide". However, having reviewed said history, the Court concludes that it may be seen as supporting the conclusion that Contracting Parties are bound not to commit genocide, through the actions of their organs or persons or groups whose acts are attributable to them.

— Question whether the Court may make a finding of genocide by a State in the absence of a prior conviction of an individual for genocide by a competent court?

The Court observes that if a State is to be responsible because it has breached its obligation not to commit genocide, it must be shown that genocide as defined in the Convention has been committed. That will also be the case with conspiracy under Article III, paragraph (b), and complicity under Article III, paragraph (e); and, for purposes of the obligation to prevent genocide.

According to the Respondent, the condition sine qua non for establishing State responsibility is the prior establishment, according to the rules of criminal law, of the individual responsibility of a perpetrator engaging the State's responsibility.

In the view of the Court, the different procedures followed by, and powers available to, the Court and to the courts and tribunals trying persons for criminal offences, do not themselves indicate that there is a legal bar to the Court itself finding that genocide or the other acts enumerated in Article III have been committed. Under its Statute the Court has the capacity to undertake that task, while applying the standard of proof appropriate to charges of exceptional gravity. Turning to the terms of the Convention itself, the Court has already held that it has jurisdiction under Article IX to find a State responsible if genocide or other acts enumerated in Article III are committed by its organs, or persons or groups whose acts are attributable to it.

The Court accordingly concludes that State responsibility can arise under the Convention for genocide and complicity, without an individual being convicted of the crime or an associated one.

— Possible territorial limits of the obligations

The Court observes that the substantive obligations arising from Articles I and III are not on their face limited by territory. They apply to a State wherever it may be acting or may be able to act in ways appropriate to meeting the obligations in question.

The obligation to prosecute imposed by Article VI is by contrast subject to an express territorial limit. The trial of persons charged with genocide is to be in a competent tribunal of the State in the territory of which the act was committed, or by an international penal tribunal with jurisdiction.

— The question of intent to commit genocide

The Court notes that genocide as defined in Article II of the Convention comprises "acts" and "intent". It is well established that the acts —

"(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"; and

(e) "Forcibly transferring children of the group to another group" —

themselves include mental elements. The Court stresses that, in addition to those mental elements, Article II requires a further mental element: the establishment of the "intent to destroy, in whole or in part, . . . [the protected] group, as such". It is often referred to as a special or specific intent or dolus specialis. It is not enough that the members of the group are targeted because they belong to that group. Something more is required. The acts listed in Article II must be done with intent to destroy the group as such in whole or in part. The words "as such" emphasize that intent to destroy the protected group.

— Intent and "ethnic cleansing"

The Court states that "ethnic cleansing" can only be a form of genocide within the meaning of the Convention, if it corresponds to or falls within one of the categories of acts prohibited by Article II of the Convention. Neither the intent, as a matter of policy, to render an area "ethnically homogeneous", nor the operations that may be carried out to implement such policy, can as such be designated as genocide. However, this does not mean that acts described as "ethnic cleansing" may never constitute genocide, if they are such as to be characterized as, for example, "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part", contrary to Article II, paragraph (c), of the Convention, provided such action is carried out with the necessary specific intent (dolus specialis), that is to say with a view to the destruction of the group, as distinct from its removal from the region.

— Definition of the protected group

The Court needs to identify the group against which genocide may be considered to have been committed. It notes that the Parties disagree on aspects of the definition of the "group", the Applicant refers to "the non-Serb national, ethnical or religious group within, but not limited to, the territory of Bosnia and Herzegovina, including in particular the Muslim population". It thus follows what is termed the negative approach to the definition of the protected group under the Convention.

The Court recalls that the essence of the intent is to destroy the protected group, in whole or in part, as such. It is a group which must have particular positive characteristics — national, ethnical, racial or religious — and not the lack of them. This interpretation is confirmed by the drafting history of the Convention.

Accordingly, the Court concludes that it should deal with the matter on the basis that the targeted group must in law be defined positively, and thus not negatively as the "non-Serb" population. The Applicant has made only very limited reference to the non-Serb populations of Bosnia and Herzegovina other than the Bosnian Muslims, e.g. the Croats. The Court will therefore examine the facts of the case on the basis that genocide may be found to have been committed if an intent to destroy the Bosnian Muslims, as a group, in whole or in part, can be established.

The Court further specifies that for the purposes of Article II, first, the intent must be to destroy at least a substantial part of the particular group. That is demanded by the very nature of the crime of genocide: since the object and purpose of the Convention as a whole is to prevent the intentional destruction of groups, the part targeted must be significant enough to have an impact on the group as a whole. Second, the Court observes that it is widely accepted that genocide may be found to have been committed where the intent is to destroy the group within a geographically limited area.

Questions of proof (paras. 202-230)

The Court first considers the burden or onus of proof, the standard of proof, and the methods of proof.

— Burden of proof

The Court states that it is well established in general that the applicant must establish its case and that a party asserting a fact must establish it.

With regard to the refusal of the Respondent to produce the full text of certain documents, the Court observes that the Applicant has had extensive documentation and other evidence available to it, especially from the readily accessible records of the International Criminal Tribunal

for the former Yugoslavia (ICTY), and that it has made very ample use of it. The Court finally observes that although it has not agreed to either of the Applicant's requests to be provided with unedited copies of certain documents, it has not failed to note the Applicant's suggestion that the Court may be free to draw its own conclusions.

— Standard of proof

The Parties also differ on the standard of proof.

The Court has long recognized that claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive. It requires that it be fully convinced that allegations made in the proceedings, that the crime of genocide or the other acts enumerated in Article III have been committed, have been clearly established. The same standard applies to the proof of attribution for such acts.

In respect of the Applicant's claim that the Respondent has breached its undertakings to prevent genocide and to punish and extradite persons charged with genocide, the Court requires proof at a high level of certainty appropriate to the seriousness of the allegation.

— Methods of proof

The Court recalls that the Parties submitted a vast array of material, from different sources. It included reports, resolutions and findings by various United Nations organs; documents from other intergovernmental organizations; documents, evidence and decisions from the ICTY; publications from governments; documents from non-governmental organizations; media reports, articles and books. They also called witnesses, experts and witness-experts.

The Court must itself make its own determination of the facts which are relevant to the law which the Applicant claims the Respondent has breached. It however acknowledges that the present case does have an unusual feature since many of the allegations before it have already been the subject of the processes and decisions of the ICTY. The Court has thus to consider their significance.

It recalls that in the case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), it notably said that "evidence obtained by examination of persons directly involved, and who were subsequently cross-examined by judges skilled in examination and experienced in assessing large amounts of factual information, some of it of a technical nature, merits special attention".

The Court states that the fact-finding process of the ICTY falls within this formulation, as "evidence obtained by persons directly involved", tested by cross-examination, the credibility of which has not been challenged subsequently.

After having set out the arguments of the Parties on the weight to be given to the ICTY material and after having reviewed the various ICTY processes, the Court concludes that it should in principle accept as highly persuasive relevant findings of fact made by the Tribunal at trial, unless of course they have been upset on appeal. For the same reasons, any evaluation by the Tribunal based on the facts as so found for instance about the existence of the required intent, is also entitled to due weight.

The Court finally comments on some of the other evidence submitted to it. Evoking inter alia the report entitled "The Fall of Srebrenica", which the United Nations Secretary-General submitted in November 1999 to the General Assembly, it observes that the care taken in preparing said report, its comprehensive sources and the independence of those responsible for its preparation all lend considerable authority to it. It assures having gained substantial assistance from this report.

The facts (paras. 231-376)

The Court reviews the background of the facts invoked by the Applicant, as well as the entities involved in the events complained of. It notes that on 9 January 1992, the Republic of the Serb People of Bosnia and Herzegovina, later to be called the Republika Srpska (RS), declared its independence. According to the Court, this entity never attained international recognition as a sovereign State, but it had de facto control of substantial territory, and the loyalty of large numbers of Bosnian Serbs.

The Court observes that the Applicant has asserted the existence of close ties between the Government of the Respondent and the authorities of the Republika Srpska, of a political and financial nature, and also as regards administration and control of the army of the Republika Srpska (VRS). The Court finds it established that the Respondent was making its considerable military and financial support available to the Republika Srpska, and had it withdrawn that support, this would have greatly constrained the options that were available to the Republika Srpska authorities.

The Court then embarks on the examination of the facts alleged by the Applicant, in order to satisfy itself, first, that the alleged atrocities occurred; secondly, whether such atrocities, if established, fall within the scope of Article II of the Genocide Convention, that is to say whether the facts establish the existence of an intent, on the part of the perpetrators of those atrocities, to destroy, in whole or in part, a defined group, namely that of the Bosnian Muslims.

— Article II (a): Killing members of the protected group

The Court examines the evidence of killings of members of the protected group (Article II (a) of the Genocide Convention) in the principal areas of Bosnia: Sarajevo, Drina River Valley, Prijedor, Banja Luka and Brčko — and in the various detention camps.

It finds that it is established by overwhelming evidence that massive killings in specific areas and detention camps throughout the territory of Bosnia and Herzegovina were perpetrated during the conflict. Furthermore, the evidence presented shows that the victims were in large majority members of the protected group, which suggests that they may have been systematically targeted by the killings.

The Court is however not convinced, on the basis of the evidence before it, that it has been conclusively established that the massive killings of members of the protected group were committed with the specific intent (dolus specialis) on the part of the perpetrators to destroy, in whole or in part, the group as such. The killings outlined above may amount to war crimes and crimes against humanity, but the Court has no jurisdiction to determine whether this is so.

— The massacre at Srebrenica

Having recapitulated the events surrounding the takeover of Srebrenica, the Court observes that the Trial Chambers in the Krstić and Blagojević cases both found that Bosnian Serb forces killed over 7,000 Bosnian Muslim men following the takeover of the "safe area" in July 1995. Accordingly they found that the actus reus of killings in Article II (a) of the Convention was satisfied. Both also found that actions of Bosnian Serb forces also satisfied the actus reus of causing serious bodily or mental harm, as defined in Article II (b) of the Convention — both to those who where about to be executed, and to the others who were separated from them in respect of their forced displacement and the loss suffered by survivors among them. The Court is thus fully persuaded that both killings within the terms of Article II (a) of the Convention, and acts causing serious bodily or mental harm within the terms of Article II (b) thereof occurred during the Srebrenica massacre.

The Court goes on to examine whether there was specific intent (dolus specialis) on the part of the perpetrators. Its conclusion, fortified by the Judgments of the ICTY Trial Chambers in the Krstić and Blagojević cases, is that the necessary intent was not established until after the change in the military objective (from "reducing the enclave to the urban area" to taking over Srebrenica town and the enclave as a whole) and after the takeover of Srebrenica, on about 12 or 13 July. This may be significant for the application of the obligations of the Respondent under the Convention. The Court has no reason to depart from the Tribunal's determination that the necessary specific intent (dolus specialis) was established and that it was not established until that time.

The Court turns to the findings in the Krstić case, in which the Appeals Chamber endorsed the findings of the Trial Chamber in the following terms:

> "In this case, having identified the protected group as the national group of Bosnian Muslims, the Trial Chamber concluded that the part the VRS Main Staff and Radislav Krstić targeted was the Bosnian Muslims of Srebrenica, or the Bosnian Muslims of Eastern Bosnia. This conclusion comports with the guidelines outlined above. The size of the Bosnian Muslim population in Srebrenica prior to its capture by the VRS forces in 1995 amounted to approximately forty thousand people. This represented not only the Muslim inhabitants of the Srebrenica municipality but also many Muslim refugees from the surrounding region. Although this population constituted only a small percentage of the overall Muslim population of Bosnia and Herzegovina at the time, the importance of the Muslim community of Srebrenica is not captured solely by its size."

The Court sees no reason to disagree with the concordant findings of the Trial Chamber and the Appeals Chamber.

The Court concludes that the acts committed at Srebrenica falling within Article II (a) and (b) of the Convention were committed with the specific intent to destroy in part the group of the Muslims of Bosnia and Herzegovina as such; and accordingly that these were acts of genocide, committed by members of the VRS in and around Srebrenica from about 13 July 1995.

— Article II (b): Causing serious bodily or mental harm to members of the protected group

Having examined the specific allegations of the Applicant under this heading, and having taken note of the evidence presented to the ICTY, the Court considers that it has been established by fully conclusive evidence that members of the protected group were systematically victims of massive mistreatment, beatings, rape and torture causing serious bodily and mental harm, during the conflict and, in particular, in the detention camps. The Court finds, however, that it has not been conclusively established that those atrocities, although they too may amount to war crimes and crimes against humanity, were committed with the specific intent (dolus specialis) to destroy the protected group, in whole or in part.

— Article II (c): Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part

The Court goes on to examine in turn the evidence concerning the three sets of claims made by the Applicant: encirclement, shelling and starvation; deportation and expulsion; destruction of historical, religious and cultural property. It considers the evidence presented regarding the conditions of life in the detention camps already referred to above.

On the basis of a careful examination of the evidence submitted by the Parties with respect to encirclement, shelling and starvation on the one hand, and deportation and expulsion on the other hand, the Court cannot establish that the alleged acts were accompanied by the specific intent to destroy the protected group in whole or in part.

With respect to the destruction of historical, religious and cultural property, the Court finds that there is conclusive evidence of the deliberate destruction of the historical, cultural and religious heritage of the protected group. However, such destruction does not fall as such within the categories of acts of genocide set out in Article II of the Convention.

On the basis of the elements presented to it concerning the camps, the Court considers that there is convincing and persuasive evidence that terrible conditions were inflicted upon detainees of the camps. However, the evidence presented has not enabled the Court to find that those acts were accompanied by specific intent (dolus specialis) to destroy the protected group, in whole or in part. In this regard, the Court observes that, in none of the ICTY cases concerning camps cited above, has the Tribunal found that the accused acted with such specific intent (dolus specialis).

— Article II (d): Imposing measures to prevent births within the protected group

— Article II (e): Forcibly transferring children of the protected group to another group

Having carefully examined the arguments of the Parties under these two headings, the Court finds that the evidence placed before it by the Applicant does not enable it to conclude that Bosnian Serb forces committed such acts.

— Alleged genocide outside Bosnia and Herzegovina

The Court finds that the Applicant has not established to the satisfaction of the Court any facts in support of the allegation according to which acts of genocide, for which the Respondent was allegedly responsible, also took place on the territory of the FRY.

— The question of pattern of acts said to evidence an intent to commit genocide

The Applicant relies on the alleged existence of an overall plan to commit genocide throughout the territory, against persons identified everywhere and in each case on the basis of their belonging to a specified group.

The Court notes that this argument of the Applicant moves from the intent of the individual perpetrators of the alleged acts of genocide complained of, to the intent of higher authority, whether within the VRS or the Republika Srpska, or at the level of the Government of the Respondent itself. Having examined, in context, the Decision on Strategic Goals issued in May 1992 by Momčilo Krajišnik as the President of the National Assembly of Republika Srpska, which in the Applicant's view approaches an official statement of an overall plan, the Court does not see the 1992 Strategic Goals as establishing the specific intent.

Turning to the Applicant's contention that the very pattern of the atrocities committed over many communities, over a lengthy period, focussed on Bosnian Muslims and also Croats, demonstrates the necessary intent, the Court cannot agree with such a broad proposition. The dolus specialis, the specific intent to destroy the group in whole or in part, has to be convincingly shown by reference to particular circumstances, unless a general plan to that end can be convincingly demonstrated to exist; and for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it could only point to the existence of such intent.

The Court finds that the Applicant has not established the existence of that intent on the part of the Respondent, either on the basis of a concerted plan, or on the basis that the events reviewed above reveal a consistent pattern of conduct which could only point to the existence of such intent. Having however concluded, in the specific case of the massacres at Srebrenica in July 1995, that acts of genocide were committed, the Court turns to the question whether those acts are attributable to the Respondent.

Responsibility for events at Srebrenica (paras. 377-415)

— The alleged admission

The Court first notes that the Applicant contends that the Respondent has in fact recognized that genocide was committed at Srebrenica, and has accepted legal responsibility for it. For purposes of determining whether the Respondent has recognized its responsibility, the Court may take into account any statements made by either party that appear to bear upon the matters in issue, and have been brought to its attention, and may accord to them such legal effect as may be appropriate. However, in the present case, it appears to the Court that the declaration made by the Council of Ministers of the Respondent on 15 June 2005 following the showing on a Belgrade television channel on 2 June 2005 of a video-recording of the murder by a paramilitary unit of six Bosnian Muslim prisoners near Srebrenica was of a political nature; it was clearly not intended as an admission.

— The test of responsibility

In order to ascertain whether the international responsibility of the Respondent can have been incurred, on whatever basis, in connection with the massacres committed in the Srebrenica area during the period in question, the Court must consider three questions in turn. First, it needs to be determined whether the acts of genocide could be attributed to the Respondent on the basis that those acts where committed by its organs or persons whose acts are attributable to it under customary rules of State Responsibility. Second, the Court needs to ascertain whether acts of the kind referred to in Article III, paragraphs (b) to (e), of the Convention, other than genocide itself, were committed by persons or organs whose conduct is attributable to the Respondent. Finally, it will be for the Court to rule on the issue as to whether the Respondent complied with its twofold obligation deriving from Article I of the Convention to prevent and punish genocide.

— The question of attribution of the Srebrenica genocide to the Respondent on the basis of the conduct of its organs

The first of these two questions relates to the well-established rule, one of the cornerstones of the law of State responsibility, that the conduct of any State organ is to be considered an act of the State under international law, and therefore gives rise to the responsibility of the State if it constitutes a breach of an international obligation of the State.

When applied to the present case, this rule first calls for a determination whether the acts of genocide committed in Srebrenica were perpetrated by "persons or entities" having the status of organs of the Federal Republic of Yugoslavia (as the Respondent was known at the time) under its internal law, as then in force. According to the Court, it must be said that there is nothing which could justify an affirmative response to this question. It has not been shown that the FRY army took part in the massacres, nor that the political leaders of the FRY had a hand in preparing, planning or in any way carrying out the massacres. It is true that there is much evidence of direct or indirect participation by the official army of the FRY, along with the Bosnian Serb armed forces, in military operations in Bosnia and Herzegovina in the years prior to the events at Srebrenica.

That participation was repeatedly condemned by the political organs of the United Nations, which demanded that the FRY put an end to it. It has however not been shown that there was any such participation in relation to the massacres committed at Srebrenica. Further, neither the Republika Srpska, nor the VRS were de jure organs of the FRY, since none of them had the status of organ of that State under its internal law.

With regard to the particular situation of General Mladić, the Court notes first 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 in Belgrade were, according to the internal law of the Respondent, officers of the army of the Respondent — a de jure organ of the Respondent. Nor has it been conclusively established that General Mladić was one of those officers; and even on the basis that he might have been, the Court does not consider that he would, for that reason alone, have to be treated as an organ of the FRY for the purposes of the application of the rules of State responsibility. There is no doubt that the FRY was providing substantial support, inter alia, financial support, to the Republika Srpska, and that one of the forms that support took was payment of salaries and other benefits to some officers of the VRS, but the Court considers that this did not automatically make them organs of the FRY. The particular situation of General Mladić, or of any other VRS officer present at Srebrenica who may have been being "administered" from Belgrade, is not such as to lead the Court to modify the conclusion reached in the previous paragraph.

The issue also arises as to whether the Respondent might bear responsibility for the acts of the paramilitary militia known as the "Scorpions" in the Srebrenica area. Judging on the basis of materials submitted to it, the Court is unable to find that the "Scorpions" — referred to as "a unit of Ministry of Interiors of Serbia" in those documents — were, in mid-1995, de jure organs of the Respondent. Furthermore, the Court notes that in any event the act of an organ placed by a State at the disposal of another public authority shall not be considered an act of that State if the organ was acting on behalf of the public authority at whose disposal it had been placed.

The Court observes that, according to its jurisprudence (notably its 1986 Judgment in the case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)), persons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in "complete dependence" on the State, of which they are ultimately merely the instrument. In the present case, the Court however cannot find that the persons or entities that committed the acts of genocide at Srebrenica had such ties with the FRY that they can be deemed to have been completely dependent on it.

At the relevant time, July 1995, according to the Court, neither the Republika Srpska nor the VRS could be regarded as mere instruments through which the FRY was acting, and as lacking any real autonomy. The Court further states that it has not been presented with materials indicating that the "Scorpions" were in fact acting in complete dependence on the Respondent.

The Court therefore finds that the acts of genocide at Srebrenica cannot be attributed to the Respondent as having been committed by its organs or by persons or entities wholly dependent upon it, and thus do not on this basis entail the Respondent's international responsibility.

— The question of attribution of the Srebrenica genocide to the Respondent on the basis of direction or control

The Court then determines whether the massacres at Srebrenica were committed by persons who, though not having the status of organs of the Respondent, nevertheless acted on its instructions or under its direction or control.

The Court indicates that the applicable rule, which is one of customary law of international responsibility, is that the conduct of a person or group of persons shall be considered an act of a

State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct. This provision must be understood in the light of the Court's jurisprudence on the subject, particularly that of the 1986 Judgment in the case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America).

Under the test set out above, it must be shown that this "effective control" was exercised, or that the State's instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.

The Court finds that in the light of the information available to it, it has not been established that the massacres at Srebrenica were committed by persons or entities ranking as organs of the Respondent. It finds also that it has not been established that those massacres were committed on the instructions, or under the direction of organs of the Respondent State, nor that the Respondent exercised effective control over the operations in the course of which those massacres, which constituted the crime of genocide, were perpetrated.

In the view of the Court, the Applicant has not proved that instructions were issued by the federal authorities in Belgrade, or by any other organ of the FRY, to commit the massacres, still less that any such instructions were given with the specific intent (dolus specialis) characterizing the crime of genocide. All indications are to the contrary: that the decision to kill the adult male population of the Muslim community in Srebrenica was taken by some members of the VRS Main Staff, but without instructions from or effective control by the FRY.

The Court concludes from the foregoing that the acts of those who committed genocide at Srebrenica cannot be attributed to the Respondent under the rules of international law of State responsibility: thus, the international responsibility of the Respondent is not engaged on this basis.

Responsibility, in respect of Srebrenica, for acts enumerated in Article III, paragraphs (b) to (e), of the Genocide Convention (paras. 416-424)

The Court comes to the second of the questions set out above, namely, that relating to the Respondent's possible responsibility on the ground of one of the acts related to genocide enumerated in Article III of the Convention. It notes that it is clear from an examination of the facts that only alleged acts of complicity in genocide, within the meaning of Article III, paragraph (e), are relevant in the present case.

The question is whether such acts can be attributed to organs of the Respondent or to persons acting under its instructions or under its effective control.

The Court states that, in order to ascertain whether the Respondent is responsible for "complicity in genocide", it must examine whether those organs or persons furnished "aid or assistance" in the commission of the genocide in Srebrenica, in a sense not significantly different from that of those concepts in the general law of international responsibility. It also needs to consider whether the organ or person furnishing aid or assistance to a perpetrator of the crime of genocide acted knowingly, that is to say, in particular, was aware or should have been aware of the specific intent (dolus specialis) of the principal perpetrator.

The Court is not convinced by the evidence furnished by the Applicant that the above conditions were met. In particular, it has not been 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.

The Court notes that a point which is clearly decisive in this connection is that it was not conclusively shown that the decision to eliminate physically the adult male population of the Muslim community from Srebrenica was brought to the attention of the Belgrade authorities when it was taken.

The Court concludes from the above that the international responsibility of the Respondent is not engaged for acts of complicity in genocide mentioned in Article III, paragraph (e), of the Convention. In the light of this finding, and of the findings above relating to the other paragraphs of Article III, the international responsibility of the Respondent is not engaged under Article III as a whole.

Responsibility for breach of the obligations to prevent and punish genocide (paras. 425-450)

The Court points out that in the Genocide Convention, the duty to prevent genocide and the duty to punish its perpetrators are two distinct yet connected obligations. Each of them must accordingly be considered in turn.

— The obligation to prevent genocide (paras. 428-438)

The Court makes a few preliminary remarks. First, the Genocide Convention is not the only international instrument providing for an obligation on the States parties to it to take certain steps to prevent the acts it seeks to prohibit. Secondly, it is clear that the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible. A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide. Thirdly, a State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed. Fourth and finally, the Court believes it especially important to lay stress on the differences between the requirements to be met before a State can be held to have violated the obligation to prevent genocide — within the meaning of Article I of the Convention — and those to be satisfied in order for a State to be held responsible for "complicity in genocide" — within the meaning of Article III, paragraph (e) — as previously discussed.

The Court then considers the facts of the case, confining itself to the FRY's conduct vis-à-vis the Srebrenica massacres. It first notes that, during the period under consideration, the FRY was in a position of influence, over the Bosnian Serbs who devised and implemented the genocide in Srebrenica, unlike that of any of the other States parties to the Genocide Convention owing to the strength of the political, military and financial links between the FRY on the one hand and the Republika Srpska and the VRS on the other, which, though somewhat weaker than in the preceding period, nonetheless remained very close.

Secondly, the Court cannot but note that, on the relevant date, the FRY was bound by very specific obligations by virtue of the two Orders of the Court indicating provisional measures delivered in 1993. In particular, in its Order of 8 April 1993, the Court stated, inter alia, that the FRY was required to ensure "that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity in genocide . . .". The Court's use, in the above passage, of the term "influence" is particularly revealing of the fact that the Order concerned not only the persons or entities whose conduct was attributable to the FRY, but also all those with whom the Respondent maintained close links and on which it could exert a certain influence.

Thirdly, the Court recalls that although it has not found that the information available to the Belgrade authorities indicated, as a matter of certainty, that genocide was imminent (which is why complicity in genocide was not upheld above), they could hardly have been unaware of the serious risk of it once the VRS forces had decided to occupy the Srebrenica enclave.

In view of their undeniable influence and of the information, voicing serious concern, in their possession, the Yugoslav federal authorities should, in the view of the Court, have made the best efforts within their power to try and prevent the tragic events then taking shape, whose scale, though it could not have been foreseen with certainty, might at least have been surmised. The FRY leadership, and President Milošević above all, were fully aware of the climate of deep-seated hatred which reigned between the Bosnian Serbs and the Muslims in the Srebrenica region. Yet the Respondent has not shown that it took any initiative to prevent what happened, or any action on its part to avert the atrocities which were committed. It must therefore be concluded that the organs of the Respondent did nothing to prevent the Srebrenica massacres, claiming that they were powerless to do so, which hardly tallies with their known influence over the VRS. As indicated above, for a State to be held responsible for breaching its obligation of prevention, it does not need to be proven that the State concerned definitely had the power to prevent the genocide; it is sufficient that it had the means to do so and that it manifestly refrained from using them.

Such is the case here. In view of the foregoing, the Court concludes that the Respondent violated its obligation to prevent the Srebrenica genocide in such a manner as to engage its international responsibility.

— The obligation to punish genocide (paras. 439-450)

The Court first recalls that the genocide in Srebrenica, the commission of which it has established above, was not carried out in the Respondent's territory. It concludes from this that the Respondent cannot be charged with not having tried before its own courts those accused of having participated in the Srebrenica genocide, either as principal perpetrators or as accomplices, or of having committed one of the other acts mentioned in Article III of the Convention in connection with the Srebrenica genocide.

The Court needs then to consider whether the Respondent fulfilled its obligation to co-operate with the "international penal tribunal" referred to in Article VI of the Convention. For it is certain that once such a court has been established, Article VI obliges the Contracting Parties "which shall have accepted its jurisdiction" to co-operate with it, which implies that they will arrest persons accused of genocide who are in their territory — even if the crime of which they are accused was committed outside it — and, failing prosecution of them in the parties' own courts, that they will hand them over for trial by the competent international tribunal.

The Court establishes that the ICTY constitutes an "international penal tribunal" within the meaning of Article VI and that the Respondent must be regarded has having "accepted the jurisdiction" of the tribunal within the meaning of the provision from 14 December 1995 at the latest, the date of the signing and entry into force of the Dayton Agreement between Bosnia and Herzegovina, Croatia and the FRY. Annex 1A of that treaty, made binding on the parties by virtue of its Article II, provides namely that they must fully co-operate, notably with the ICTY.

In this connection, the Court first observes that, during the oral proceedings, the Respondent asserted that the duty to co-operate had been complied with following the régime change in Belgrade in the year 2000, thus implicitly admitting that such had not been the case during the preceding period. The conduct of the organs of the FRY before the régime change however engages the Respondent's international responsibility just as much as it does that of its State authorities from that date. Further, the Court cannot but attach a certain weight to the plentiful, and mutually corroborative, information suggesting that General Mladić, indicted by the ICTY for genocide, as one of those principally responsible for the Srebrenica massacres, was on the territory

of the Respondent at least on several occasions and for substantial periods during the last few years and is still there now, without the Serb authorities doing what they could and can reasonably do to ascertain exactly where he is living and arrest him.

It therefore appears to the Court sufficiently established that the Respondent failed in its duty to co-operate fully with the ICTY. This failure constitutes a violation by the Respondent of its duties as a party to the Dayton Agreement, and as a Member of the United Nations, and accordingly a violation of its obligations under Article VI of the Genocide Convention. On this point, the Applicant's submissions relating to the violation by the Respondent of Articles I and VI of the Convention must therefore be upheld.

Responsibility for breach of the Court's Orders indicating provisional measures (paras. 451-458)

Having recalled that its "orders on provisional measures under Article 41 [of the Statute] have binding effect", the Court finds that it is clear that in respect of the massacres at Srebrenica in July 1995 the Respondent failed to fulfil its obligation indicated in paragraph 52 A (1) of the Order of 8 April 1993 and reaffirmed in the Order of 13 September 1993 to "take all measures within its power to prevent commission of the crime of genocide". Nor did it comply with the measure indicated in paragraph 52 A (2) of the Order of 8 April 1993, reaffirmed in the Order of 13 September 1993, insofar as that measure required it to "ensure that any . . . organizations and persons which may be subject to its . . . influence . . . do not commit any acts of genocide".

The question of reparation (paras. 459-470)

In the circumstances of the present case, as the Applicant recognizes, it is inappropriate to ask the Court to find that the Respondent is under an obligation of restitutio in integrum. Insofar as restitution is not possible, as the Court stated in the case of the Gabčíkovo-Nagymaros Project (Hungary/Slovakia), "[i]t is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it".

The Court, in order to rule on the claim for reparation must ascertain whether, and to what extent, the injury asserted by the Applicant is the consequence of wrongful conduct by the Respondent with the consequence that the Respondent should be required to make reparation for it, in accordance with the principle of customary international law stated above. In this context, the question whether the genocide at Srebrenica would have taken place even if the Respondent had attempted to prevent it by employing all means in its possession, becomes directly relevant. However, the Court clearly cannot conclude from the case as a whole and with a sufficient degree of certainty that the genocide at Srebrenica would in fact have been averted if the Respondent had acted in compliance with its legal obligations. Since the Court cannot regard as proven a causal nexus between the Respondent's violation of its obligation of prevention and the genocide at Srebrenica, financial compensation is not the appropriate form of reparation for the breach of the obligation to prevent genocide.

It is however clear that the Applicant is entitled to reparation in the form of satisfaction, and this may take the most appropriate form, as the Applicant itself suggested, of a declaration in the present Judgment that the Respondent has failed to comply with the obligation imposed by the Convention to prevent the crime of genocide.

Turning to the question of the appropriate reparation for the breach by the Respondent of its obligation under the Convention to punish acts of genocide, the Court notes that it is satisfied that the Respondent has outstanding obligations as regards the transfer to the ICTY of persons accused of genocide, in order to comply with its obligations under Articles I and VI of the Genocide Convention, in particular in respect of General Ratko Mladić.

The Court does not find it appropriate to give effect to the Applicant's request for an order for symbolic compensation in respect of the non-compliance of the Respondent with the Court's Order of 8 April 1993 on provisional measures.

Operative paragraph (para. 471)

"For these reasons,

The COURT,

(1) by ten votes to five,

Rejects the objections contained in the final submissions made by the Respondent to the effect that the Court has no jurisdiction; and affirms that it has jurisdiction, on the basis of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, to adjudicate upon the dispute brought before it on 20 March 1993 by the Republic of Bosnia and Herzegovina;

IN FAVOUR: President Higgins; Vice-President Al-Khasawneh; Judges Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna; Judge ad hoc Mahiou;

AGAINST: Judges Ranjeva, Shi, Koroma, Skotnikov; Judge ad hoc Kreća;

(2) by thirteen votes to two,

Finds that Serbia has not committed genocide, through its organs or persons whose acts engage its responsibility under customary international law, in violation of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide;

IN FAVOUR: President Higgins; Judges Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judge ad hoc Kreća;

AGAINST: Vice-President Al-Khasawneh; Judge ad hoc Mahiou;

(3) by thirteen votes to two,

Finds that Serbia has not conspired to commit genocide, nor incited the commission of genocide, in violation of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide;

IN FAVOUR: President Higgins; Judges Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judge ad hoc Kreća;

AGAINST: Vice-President Al-Khasawneh; Judge ad hoc Mahiou;

(4) by eleven votes to four,

Finds that Serbia has not been complicit in genocide, in violation of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide;

IN FAVOUR: President Higgins; Judges Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Sepúlveda-Amor, Skotnikov; Judge ad hoc Kreća;

AGAINST: Vice-President Al-Khasawneh; Judges Keith, Bennouna; Judge ad hoc Mahiou;

(5) by twelve votes to three,

Finds that Serbia has violated the obligation to prevent genocide, under the Convention on the Prevention and Punishment of the Crime of Genocide, in respect of the genocide that occurred in Srebrenica in July 1995;

IN FAVOUR: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Owada, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna; Judge ad hoc Mahiou;

AGAINST: Judges Tomka, Skotnikov; Judge ad hoc Kreća;

(6) by fourteen votes to one,

Finds that Serbia has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by having failed to transfer Ratko Mladić, indicted for genocide and complicity in genocide, for trial by the International Criminal Tribunal for the former Yugoslavia, and thus having failed fully to co-operate with that Tribunal;

IN FAVOUR: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judge ad hoc Mahiou;

AGAINST: Judge ad hoc Kreća;

(7) by thirteen votes to two,

Finds that Serbia has violated its obligation to comply with the provisional measures ordered by the Court on 8 April and 13 September 1993 in this case, inasmuch as it failed to take all measures within its power to prevent genocide in Srebrenica in July 1995;

IN FAVOUR: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna; Judge ad hoc Mahiou;

AGAINST: Judge Skotnikov; Judge ad hoc Kreća;

(8) by fourteen votes to one,

Decides that Serbia shall immediately take effective steps to ensure full compliance with its obligation under the Convention on the Prevention and Punishment of the Crime of Genocide to punish acts of genocide as defined by Article II of the Convention, or any of the other acts proscribed by Article III of the Convention, and to transfer individuals accused of genocide or any of those other acts for trial by the International Criminal Tribunal for the former Yugoslavia, and to co-operate fully with that Tribunal;

IN FAVOUR: President Higgins; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judge ad hoc Mahiou;

AGAINST: Judge ad hoc Kreća;

(9) by thirteen votes to two,

Finds that, as regards the breaches by Serbia of the obligations referred to in subparagraphs (5) and (7) above, the Court's findings in those paragraphs constitute appropriate satisfaction, and that the case is not one in which an order for payment of compensation, or, in respect of the violation referred to in subparagraph (5), a direction to provide assurances and guarantees of non-repetition, would be appropriate.

IN FAVOUR: President Higgins; Judges Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judge ad hoc Kreća;

AGAINST: Vice-President Al-Khasawneh; Judge ad hoc Mahiou."

*

Vice-President AL-KHASAWNEH appends a dissenting opinion to the Judgment of the Court; Judges RANJEVA, SHI and KOROMA append a joint dissenting opinion to the Judgment of the Court; Judge RANJEVA appends a separate opinion to the Judgment of the Court; Judges SHI and KOROMA append a joint declaration to the Judgment of the Court; Judges OWADA and TOMKA append separate opinions to the Judgment of the Court; Judges KEITH, BENNOUNA and SKOTNIKOV append declarations to the Judgment of the Court; Judge ad hoc MAHIOU appends a dissenting opinion to the Judgment of the Court; Judge ad hoc KREĆA appends a separate opinion to the Judgment of the Court.

Dissenting opinion of Vice-President Al-Khasawneh

Vice-President Al-Khasawneh felt that he should explain the nature of his dissent before explaining the reasons for it. He believed his disagreement with the majority, relating as it did, not only to their conclusions but also to their reasoning, assumptions and methodology was deep enough to justify his dissent notwithstanding his agreement with certain other parts of the Judgment notably: Jurisdiction — Serbian failure to prevent genocide in Srebrenica — failure to co-operate with the ICTY — failure to comply with earlier provisional measures.

On jurisdiction, the Vice-President recalled that an unprecedented number of jurisdictional rounds has been partly responsible for the huge delay in dispensing justice in the present case. Jurisdiction centred on the Federal Republic of Yugoslavia's (FRY) international status and its United Nations membership and consequently the question of "access" — blown out of proportion, in an attempt to undermine the Court's clearly established jurisdiction in the 1996 Judgment — came to play a central role. He analysed the context in which the issue of FRY membership in the United Nations and its claim to be a continuator of the Socialist Federal Republic of Yugoslavia (SFRY) arose and came to the conclusions that the FRY was always a United Nations Member and could not have been otherwise and that the sole effect of relevant Security Council and General Assembly resolutions was FRY non-participation in the work of the General Assembly. This conclusion was based on the objectively verifiable criterion that the SFRY was an original Member of the United Nations and that it was never extinguished and that there is a general presumption against loss of United Nations membership.

The Vice-President also recalled that only the FRY could, of its own will, give up its membership as a continuator of SFRY and apply as a new Member, i.e. as a successor. Therefore, when it did so in 2000 this meant that it was a continuator from 1992-2000 and a successor from 2000 and not that it was a non-Member before 2000 as the 2004 Judgments on the Legality of Use of Force found. Because no conclusion, for the past, could be derived from the fact of FRY admission to the United Nations in 2000, and because an independent analysis of the FRY status in 1992-2000 (an analysis independent from the fact of admission) could lead only to one conclusion, i.e. 1992-2000 membership, he felt the logic of the 2004 Judgments was defective. He also felt it contradicted earlier jurisprudence, i.e. 1993 Order, 1996 Judgment and particularly the 2003 Application for Revision Judgment which correctly found that no retroactive consequences for FRY membership in the United Nations could be derived from FRY admission in 2000.

The Vice-President also felt that FRY initiative to the Court to reconsider ex officio its jurisdiction to be irregular and felt it regrettable that the Court in 2003 accepted that initiative because that contradicted its own jurisdiction. Thus, he thought, the initiative led to contradictions in the Court's jurisprudence and had no place under the Court's Statute. He felt that precedents cited in support of the propositions that the "Court must always be satisfied it has jurisdiction" to be inapplicable.

With all these contradictions — for which the Court itself had been mainly responsible — being quoted back at the Court and the contagion spreading, the Court had to rely unduly on the principle of res judicata which was correct but not very satisfying. Clearly the Court had retreated to the last line of defence partly because of its own doing.

On the merits, Vice-President Al-Khasawneh felt that through a combination of methods and assumptions, uncalled for in law and not suitable to the facts of the case, the Court achieved the extraordinary feat of absolving Serbia of its responsibility for genocide in Bosnia and Herzegovina save for failure to prevent the genocide at Srebrenica, where in any case he thought Serbian responsibility was more actively involved than the mere failure to prevent.

Firstly, since intent is usually elusive and, together with attributability, often carefully concealed, the Court should have sought access to the papers of the "Serbian Defence Council" which would probably have made the Court's task much easier. Refusal of Serbia to divulge documents should have led at least to more liberal recourse to evidence. By insisting on a very high evidentiary "standard" and no shifting of "Burden of proof", the Applicant was put at a huge disadvantage. Secondly, the Court also applied a strict test of effective control: the Nicaragua test to a different situation where inter alia shared ethnicity and shared purpose to commit international crimes, e.g. ethnic cleansing require only an overall control test. Thirdly, the Court also refused to infer genocide from a "consistent pattern of conduct" disregarding in this respect a rich and relevant jurisprudence of other courts. Fourthly, the Court failed to appreciate genocide as a complex crime and not a single murder. Therefore, events which when looked at comprehensively gave rise to responsibility of Serbia, were instead seen in a disconnected manner, e.g. the participation of General Mladić in Srebrenica and the role of the "Scorpions". Fifthly, even when there was a clear admission of guilt, e.g. the Serbian Council of Ministers' statement as a reaction to the video showing the execution of Muslim prisoners by the "Scorpions" was dismissed as a political statement though legal weight is attached to such statements in previous Court jurisprudence some of which the Court did not even invoke.

The Vice-President concluded that had the Court tried to see for itself it most probably would have found Serbia responsible either as principal or an accomplice in the genocide in Bosnia. This it could have done without losing the rigor of its reasoning or the high standards of evidence it required. With regard to Srebrenica he was sure that active Serbian involvement was proved to satisfactory to standards in facts and in law.

Joint dissenting opinion of Judges Ranjeva, Shi, and Koroma

In a joint dissenting opinion attached to the Judgment (Merits), Judges Ranjeva, Shi, and Koroma have expressed their serious misgivings about the Judgment's application of the doctrine of res judicata [that a matter has been finally adjudicated] to the Court's 1996 Judgment on Preliminary Objections to conclude by "necessary implication" that the issue of jurisdiction ratione personae had been decided. In taking this position the judges pointed out that theirs is purely a legal one, not involving any political or moral judgment in respect of the merits of the case. In their view, the Judgment's reliance on res judicata largely sidesteps two fundamental and related questions before the Court which have a bearing on the existence of the Court's jurisdiction at the time the Application was filed: namely, whether Serbia and Montenegro was a United Nations Member and whether it was a party to and/or bound by the Genocide Convention.

According to the judges, the scope and effect of res judicata is properly derived from constitutional and statutory requirements and from the submissions by the parties to a particular dispute. Moreover, Article 56 of the Statute provides: "The judgment shall state the reasons on which it is based." In the present case, the Judgment implies that the issue of access had been considered and decided, but the issue of access had not been addressed by the Parties — who the Judgment acknowledges did not have "any interest" in raising the issue at the time — or decided by the Court in its 1996 Judgment. Moreover, the judges have pointed out, the 2004 Judgment in Legality of Use of Force (Serbia and Montenegro v. Belgium) concluded that Serbia and Montenegro was not a Member of the United Nations in 1999 and that the Genocide Convention

did not contain any of the "special provisions contained in treaties in force" that would grant States parties access to the Court. Accordingly, in the view of the judges, from both factual and legal perspectives it would seem clear that, if Serbia and Montenegro was not a United Nations Member in 1999, then it also must not have been a Member when the Application in this case was filed on 28 March 1993 and the Respondent was thus ineligible to accede to the Genocide Convention pursuant to one of the two means specified in its Article XI. Res judicata serves a purpose which, in the view of the judges, cannot replace the requirements of the United Nations Charter or the Statute of the Court. They have pointed out that the Court should always face jurisdictional challenges when they are presented, as they are now, and that the Court first examined the issue of access in the Legality of Use of Force in an exception to the general rule that the Court is free to determine which jurisdictional ground to examine first. In any event, the Court's application of res judicata, they have pointed out, is inconsistent even within the present Judgment, as the jurisdictional findings made in the 1996 Judgment and relied on in the present Judgment were addressed to Serbia and Montenegro, whereas the res judicata effect of the 1996 Judgment is applied only to Serbia in the present Judgment.

Judges Ranjeva, Shi, and Koroma have thus concluded that the Judgment has neglected to deal with one of the substantive submissions squarely put before the Court at this juncture and that it would only have been by addressing all of those submissions that the Court could have arrived at a legally valid conclusion.

Separate opinion of Judge Ranjeva

The international responsibility of a State for omission is the sanction which attaches to the obligation to prevent the crime of genocide, which is an obligation erga omnes. To achieve the international solidarity which is its basis, constant vigilance is required in a context of multilateral co-operation. This obligation, which must be fulfilled with discernment, is one incumbent on all States parties. The obligation is assessed in concreto by the Court, a task not without difficulty, for it essentially entails sovereign States acting preventatively through concerted diplomatic action.

Joint declaration of Judges Shi and Koroma

In a joint declaration attached to the Judgment (Merits), Judges Shi and Koroma have expressed their serious doubts about the interpretation given to the Genocide Convention by the Judgment to the effect that a State itself could be held to have committed the crime of genocide and to be held responsible therefor. In their view, such an interpretation, derived "by implication" from Article I of the Convention, is inconsistent with the object and purpose of the Convention as a whole, with its plain meaning, and with the intention of the parties at the time the treaty was concluded. The judges have maintained that what the Convention envisages is the trial and punishment of individuals for the crime of genocide and that State responsibility is defined in terms of various specific obligations related to the undertaking to prevent the crime and to punish those who commit it and that it would be absurd for a State party to the Convention to undertake to punish itself as a State. In the judges' view, if the Convention had been intended to contain an obligation of such importance as to envision the criminal responsibility of States, then this would have been expressly stipulated in the Convention, but there is no such stipulation. They have pointed out that proposals made during the negotiation of the Convention that would have prescribed State responsibility for the commission of genocide itself were rejected. The judges have also pointed out that the purpose of interpreting a treaty is to discover its meaning and the intention of the parties at the time of the treaty's negotiation and not to achieve a desired objective.

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However, notwithstanding their disagreement with the interpretation given to the Convention, including its first Article, in the Judgment, Judges Shi and Koroma voted in favour of the findings regarding the prevention of genocide in Srebrenica in July 1995 as they believe in the intrinsic humanitarian value of the conclusion reached by the Court as well as in the overriding legal imperative established by Article I of the Convention, namely: the duty of a State to do what it properly can, within its means and the law, to try to prevent genocide when there is a serious danger of its occurrence of which the State is or should be aware. Judges Shi and Koroma believe, however, that the conclusion reached by the Judgment in this regard could have been more legally secure if anchored on the relevant Chapter VII Security Council resolutions that identified several clear missed moments of opportunity for the FRY leadership to have acted with respect to the imminent and serious humanitarian risk posed by any advance of Bosnian Serb paramilitary units on Srebrenica and its surroundings. Mr. Milošević could and should have exerted whatever pressure he had at his disposal over the Bosnian Serb leadership to try to prevent the genocide at Srebrenica.

Separate opinion of Judge Owada

Judge Owada has appended his separate opinion to the Judgment of the Court. He argues that while he concurs in general with the conclusions that the Court has reached in its dispositif, he finds that some of the reasonings of the Judgment differ from his own or need some further elaboration in some important respects.

First, Judge Owada finds that the Court's pronouncement on the issue of jus standi of the Respondent in the present case should not be understood based on an oversimplified application of the principle of res judicata. The Applicant has argued in effect that the point raised in the submission of the Respondent in the form of the "Initiative" of 4 May 2001 is in the nature of an objection to jurisdiction, that the 1996 Judgment on Preliminary Objections in this case has settled all issues of jurisdiction and thus constitutes res judicata on the matter of jurisdiction in this case and that ergo that is the end of the story and the objection raised anew by the Respondent should be rejected. According to Judge Owada it is not such a simple case of application of the principle of res judicata simpliciter, and he wishes to expound a little the rationale of the Judgment on this point according to his own view. While fully endorsing the legal ground on which the 2004 Judgments in the Legality of Use of Force cases is based with regard to the same issue of jus standi of the FRY, Judge Owada emphasizes that the 1996 Judgment is to be distinguished from the 2004 Judgment in one important respect. His conclusion is that while it is true that the 1996 Judgment did not specifically address as a matter of fact the issue of jus standi, it nonetheless must be construed as a matter of law as having made the final determination on this point of jus standi of the Respondent, which had been left open in the 1993 Judgment on the Request for Provisional Measures in the present case.

Second, Judge Owada does not associate himself with the position of the Judgment that under Article I of the Genocide Convention the States parties to the Convention have undertaken the obligation, not just to prevent and punish the crime of genocide committed by individuals, but the obligation not to commit genocide themselves under pain of direct international responsibility under the Convention itself in the case of the breach of this obligation. In the view of Judge Owada, while the object and purpose of the Genocide Convention is to banish the heinous crime of genocide, the approach employed by the Convention is specific: in order to achieve this purpose, the Convention purports to go through the channel of prosecuting the individuals in national courts and international tribunals by holding them to account for the crime of genocide. According to Judge Owada, the underlying assumption of the Convention is no doubt that nobody, including States, should be allowed to commit this heinous crime of genocide, but this does not mean, in the absence of a proof to the contrary, that the States parties have undertaken the legal commitment to accept their legal responsibility under the Convention in such a way that in the case of default in this undertaking they can be held to account for this act within the régime of the

Convention. While Judge Owada reaches the same conclusion as the Judgment to the extent that the Court is empowered under Article IX of the Convention to deal with the issue of State responsibility under general international law on the part of a State for an act of individuals whose act is attributable to the State — an issue not covered in his view by the substantive provisions of the Convention — he tries to show that the Court should arrive at the same conclusion on a much less controversial ground.

Separate opinion of Judge Tomka

In his separate opinion, Judge Tomka disagrees with the majority's view that res judicata bars the Court's reconsideration of the issue of its jurisdiction, as "embodied" in its Judgment of 11 July 1996. This finding contradicts the Court's earlier position, communicated to the Parties in 2003 by a letter from the Court's Registrar, that the FRY could present further arguments on jurisdiction at the merits stage. Neither the Court's Statute nor its Rules prohibit objections to jurisdiction during merits proceedings, and the Court must examine such issues proprio motu if necessary. In any event, the Court's decision of 11 July 1996 did not address the specific jurisdictional question now raised — whether the FRY was party to the Court's Statute by virtue of United Nations membership when the Application was filed in March 1993. Therefore, the Court's earlier decision is not preclusive, and the Court should have made this jurisdictional enquiry de novo.

Reviewing jurisdiction de novo, Judge Tomka concludes that the Court has jurisdiction. The exercise of the Court's jurisdiction requires both access to the Court under Article 35 of the Court's Statute and jurisdiction ratione personae. Judge Tomka explains that the access requirement is now met because the FRY became a Member of the United Nations on 1 November 2000, and has therefore had access to the Court since that date. Jurisdiction ratione personae is established because the FRY has been party to the Genocide Convention since April 1992 under the customary rule of ipso jure succession, as applied to cases of State dissolution. The FRY's attempt, in March 2001, to accede to the Genocide Convention, with a reservation to Article IX, was completely inconsistent with its contemporaneous succession to other conventions as the successor State to the SFRY, including the Vienna Convention on Succession of States in Respect of Treaties, which provides that in cases of State dissolution, the treaties of the predecessor State continue in force in respect of each successor State. Moreover, Bosnia and Herzegovina timely raised an objection to the FRY's notification of accession to the Genocide Convention. As such, the FRY's attempt to accede to the Genocide Convention with a reservation to Article IX should be deemed ineffective. The fact that the FRY did not have access to the Court when Bosnia and Herzegovina filed its Application is a remediable defect which, once remedied, does not preclude the exercise of jurisdiction. Therefore, Judge Tomka concludes, (1) it was improper for the Court to decline to consider the FRY's objections to its jurisdiction at the merits stage on the ground of res judicata; and (2) reviewing the FRY's non-precluded objections de novo, the Court has jurisdiction.

Judge Tomka next turns to his divergent views on the purpose of the Genocide Convention and the interpretation of some of its provisions in light of that purpose. The Convention is primarily an instrument of international criminal law which compels States to prevent genocide and to punish its individual perpetrators. The drafting history of the Convention does not support the view that the Convention conceives genocide as a criminal act of a State. Judge Tomka disagrees with the majority's position that the compromissory clause in Article IX of the Convention encompasses the jurisdiction to determine whether a State has committed genocide. He believes that such clause undoubtedly confers jurisdiction on the Court to determine whether a State has fulfilled its duties to prevent genocide and to punish individuals for such crime, as well as the responsibility a State incurs for neglecting those duties. Further, in his view, the jurisdiction of the Court, as a consequence of the addition of the words "including those [disputes] relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III" into the

compromissory clause in Article IX, also includes the power of the Court to determine international "responsibility of a State for genocide" on the basis of attribution to the State of the criminal act of genocide perpetrated by a person. The Court, however, is not the proper forum in which to make a legally binding pronouncement that a crime of genocide was committed. Such a finding is to be made within the framework of a criminal procedure which also provides for a right of appeal. The Court has no criminal jurisdiction and its procedure is not a criminal one.

Judge Tomka further reasons that the Court's findings on the Respondent's breach of its obligation to prevent genocide are not clearly supported by the evidence and fail to fully address the Parties' arguments. Regarding the territorial scope of States parties' obligation to prevent genocide, he takes the view that under Article I of the Genocide Convention the State does have an obligation to prevent genocide outside its territory to the extent that it exercises jurisdiction outside its territory, or exercises control over certain persons in their activities abroad. This obligation exists in addition to the unequivocal duty to prevent the commission of genocide within its territory. It has not been established that the Federal Republic of Yugoslavia exercised jurisdiction in the areas surrounding Srebrenica where atrocious mass killings took place. Nor has it been established before the Court that it exercised control over the perpetrators who conducted these atrocious killings outside the territory of the Federal Republic of Yugoslavia. The plan to execute as many as possible of the military aged Bosnian Muslim men present in the Srebrenica enclave was devised and implemented by the Bosnian Serbs following the take-over of Srebrenica in July 1995. That was the factual finding of the ICTY. It has not been established as a matter of fact before this Court that the Federal Republic of Yugoslavia authorities knew in advance of this plan. In such a situation they could not have prevented the terrible massacres in Srebrenica.

Finally, Judge Tomka explains that although the FRY did not become a party to the Court's Statute until 1 November 2000 when it was admitted as a Member of the United Nations, the FRY claimed to be a United Nations Member at the time the Court rendered its Orders on provisional measures in 1993, and therefore should have perceived itself as bound by those Orders. In any event, orders on provisional measures produce their effects from the time of their notification to the parties and remain in force until a court's final judgment on the case, even if the court eventually finds that it is without jurisdiction. Judge Tomka accordingly agrees that the FRY failed to comply with some of the provisional measures ordered by the Court in 1993 while they were in effect.

Declaration of Judge Keith

Judge Keith explained his reasons for finding that Serbia and Montenegro was complicit in the genocide committed at Srebrenica in July 1995, in terms of Article III (e) of the Genocide Convention.

In summary his position on the law was that Serbia and Montenegro, as an alleged accomplice, had to be proved to have had knowledge of the genocidal intent of the principal perpetrator (but need not share that intent) and, with that knowledge, to have provided aid and assistance to the perpetrator. His position on the facts was that those two elements were proved to the necessary standard.

Declaration of Judge Bennouna

Concurring in the Court's renewed affirmation of jurisdiction in the present case, Judge Bennouna nevertheless wished to point out that the admission of Serbia and Montenegro to the United Nations on 1 November 2000 was effective only prospectively and did not undo its previous status, or that of the FRY, within the Organization; it was on that basis that the State was able to appear before the Court in 1993 and to answer for its acts before the Security Council.

In addition, Judge Bennouna, who voted against point 4 of the operative part concerning Serbia's lack of complicity in genocide, considers that all the elements were present to justify a finding by the Court of complicity on the part of the authorities in Belgrade: not only the various forms of assistance they provided to Republika Srpska and its army but also the knowledge they had or should have had of the genocidal intention of the principal perpetrator of the massacre at Srebrenica.

Declaration of Judge Skotnikov

In Judge Skotnokiv's view, the Court did not have jurisdiction in this case. He points out that in the 2004 Legality of Use of Force cases, which the Respondent brought against the NATO States, the Court decided that Serbia and Montenegro had not been a Member of the United Nations prior to 1 November 2001. The Court determined that membership of the United Nations at the time of filing an application was a requirement of the Court's Statute for it to entertain Serbia and Montenegro's claims, and therefore it had no jurisdiction to hear these cases.

However, in this case the Court has avoided making the same finding, even though in Judge Skotnikov's view it was bound to do so (as this case was also filed before Serbia and Montenegro became a United Nations Member), by stating that its finding on jurisdiction in the 1996 incidental proceedings was final and without appeal.

Judge Skotnikov points out that the question of the Respondent's access to the Court by virtue of its membership of the United Nations was not addressed in the 1996 Judgment on Preliminary Objections. Accordingly, in his view the question of jurisdiction in this case was not then definitively determined. By applying now the principle of res judicata to its finding on jurisdiction in the 1966 proceedings, the Court has created "parallel realities": the one being that the Court has jurisdiction over Serbia and Montenegro in cases filed before 1 November 2001 (in this case) and the other that it does not (in the 2004 Legality of Use of Force cases).

Judge Skotnikov disagrees with the Court's interpretation of the Genocide Convention as containing an implied obligation for States to not themselves commit genocide or the other acts enumerated in Article III of that Convention. He finds the very idea of an unstated obligation to be objectionable in general. In addition, in this particular case it is at odds with the terms of the Convention, an instrument which deals with the criminal culpability of individuals.

However, Judge Skotnikov does not think that such an unstated obligation is necessary at all for a State to be held responsible for genocide under the Genocide Convention. He states that, generally, as a matter of principle, wherever international law criminalizes an act, if that act is committed by someone capable of engaging the State's responsibility, the State can be held responsible. This is, in his view, definitely so in the case of the Genocide Convention.

In Judge Skotnikov's view the Genocide Convention does not empower the Court to go beyond settling disputes relating to a State's responsibility for genocide and to conduct an enquiry and make a determination whether or not the crime of genocide was committed. The Court cannot perform this task because it lacks criminal jurisdiction. In particular, by reason of its lack of criminal jurisdiction, the Court cannot establish the existence or absence of genocidal intent, which is a requisite element, a mental part, of the crime of genocide.

Accordingly, Judge Skotnikov disagrees that the Court has the capacity to determine whether or not the crime of genocide has been committed. In his view this approach is consistent neither with the Genocide Convention or the Court's Statute.

Judge Skotnikov believes that in this case it would have been sufficient for the Court to rely upon the findings of the International Criminal Tribunal for the former Yugoslavia (ICTY) to

determine whether the crime of genocide had been committed. However, he places one important caveat on that statement: those findings can only be relied upon to the extent they are in conformity with the Genocide Convention.

In the view of Judge Skotnikov, the only findings by the ICTY of the commission of genocide-related crimes in the former Yugoslavia, in the Krstić and Blagojević cases, have not been made in conformity with the Genocide Convention. In both cases the defendants were convicted of a crime not recognized in the Genocide Convention, but rather one which is established in the ICTY's Statute, namely "aiding and abetting" genocide without having genocidal intent. In addition, these cases determined that genocide had occurred in Srebrenica by making findings about the genocidal intent of unidentified persons not before the ICTY. For these reasons, Judge Skotnikov considers that the Court should have disregarded these findings and concluded that it had not been sufficiently established that the massacre in Srebrenica can be qualified as genocide.

Consequently, Judge Skotnikov also disagrees with the finding of the Court that the Respondent breached the provisional measures ordered in 1993.

Judge Skotnikov finds that the Court has introduced a concept of the duty to prevent which may be politically appealing, but hardly measurable at all in legal terms. In his view, the obligation to prevent applies only in the territory where a State exercises its jurisdiction or which is under its control. He considers that the duty is one of result and not conduct: if genocide has occurred in that territory, the State is responsible.

Finally, Judge Skotnikov notes that the Respondent has not provided a clear-cut statement before this Court that it has done everything in its power to apprehend and transfer Ratko Mladić to the ICTY. He agrees with the Court that Serbia is under an obligation to co-operate with that Tribunal.

Dissenting opinion of Judge ad hoc Mahiou

This is the first time the Court has been called upon to rule on an accusation of genocide and its consequences, genocide being seen as the most horrible of crimes that can be ascribed to an individual or a State, as in the present proceedings. This case gives the Court the opportunity to enforce the Convention on the Prevention and Punishment of the Crime of Genocide and to interpret the greater part of its provisions, some of which have given rise to much debate over their meaning and scope. The importance, complexity and difficulty of the case lie both in the procedural facet — the case having by now been pending before the Court for 14 years and the proceedings on the merits having suffered repeated delay owing to conduct on the part of the Respondent, conduct which should not go unmarked — and in the substantive facet, this terrible tragedy having taken form in some 100,000 deaths, suffered for the most part under gruesome conditions, and physical and psychological after-effects on an ineffably great scale.

I concur in all the Court's findings on the jurisdictional issue, even though my approach is sometimes quite different in respect of the route taken to those conclusions. Significantly, the Court has not only confirmed its jurisdiction and its 1996 Judgment but has also now made clear how State responsibility, as recognized in the Convention on the Prevention and Punishment of the Crime of Genocide, is to be interpreted.

On the other hand, I cannot subscribe to most of the substantive findings reached by the Court by way of what I believe to be: a timorous, questionable view of its role in the evidentiary process, a deficient examination of the evidence submitted by the Applicant, a rather odd interpretation of the facts in the case and of the rules governing them and, finally, a method of reasoning which remains unconvincing on a number of very important points. It is serious cause

for concern that the Court could not have accomplished its task of establishing the facts and inferring from them the consequences as to responsibility without help from the International Criminal Tribunal for the former Yugoslavia. This raises the problem if not of the efficacy of the Court's rules of procedure then at least of their application by the Court, which did not truly seek to secure for itself the means to accomplish its mission. Further, in my opinion, the Respondent incurred responsibility in this case as a direct perpetrator of some of the crimes, even though I concede that certain instances might be arguable, open to interpretation or matters for the adjudicator's innermost conviction. In my view, the Respondent's responsibility appears clearly established in respect of Republika Srpska's actions, either because of the very close ties between that entity and the Respondent, resulting in the Respondent's implication in the ethnic cleansing plan carried out between 1992 and 1995, or because of the relationship of subordination or control between the Respondent and those who played a crucial role in that ethnic cleansing, which extended to the commission of genocide in Bosnia and Herzegovina. Even assuming the findings in respect of these charges to be problematic, the evidence before the Court appears sufficiently strong and convincing to have at the very least justified a finding of complicity in the crime of genocide; serious weaknesses and contradictions clearly emerge in the reasoning of the Court, which exonerates the Respondent from such responsibility.

Separate opinion of Judge ad hoc Kreća

Although termed as a separate opinion, the opinion of Judge Kreća is, form a substantive point of view, a dissenting opinion for the most part.

It is a separate opinion as regards the principal claim, rejected by the Court, that the Respondent has violated its obligation under the Genocide Convention by committing genocide, conspiracy to commit genocide, incitement to commit genocide and complicity in alleged genocide.

In relation to the remaining parts of the dispositif as well as the reasoning part of the Judgment, the opinion of Judge Kreća is strongly dissenting. Judge Kreća finds not only that the reasoning and findings of the majority are unfounded, but run counter in more than one element to cogent legal considerations and, even, common sense, thus assuming the aroma of argumentum ad casum.

The majority view on the res iudicata rule, exempli causa, is similar to an ode to infallibility of Judges rather than to a proper legal reasoning about the characteristics and effects of that rule in the milieu of the law which the Court is bound to apply. The interpretation of the res iudicata rule in the circumstances surrounding the case inevitably led to the nullification of the relevance of ius standi of the Respondent being an essential condition for the validity of any decision taken by the Court in casu.

It appears that the determination of the tragic massacre in Srebrenica as genocide is, both in the formal and the substantive sense, well beyond the real meaning of the provisions of the Genocide Convention as applicable law in casu. Hardly any of the components of the special intent as a sine qua non of the crime of genocide as established by the Convention is satisfied in the relevant judgments of the ICTY as regards the massacre in Srebrenica. Judge Kreća is of the opinion that the massacre in Srebrenica, according to its characteristics, rather fits in the frame of crimes against humanity and war crimes committed in the fratricidal war in Bosnia and Herzegovina.
