PONTIFICIA UNIVERSIDAD
CATÓLICA DEL PERÚ

FACULTAD DE DERECHO


# Informe sobre el Expediente de relevancia jurídica N° E-02501. Caso relativo a la aplicación de la Convención para la Prevención y Sanción del delito de Genocidio (Bosnia y Herzegovina v. Serbia y Montenegro)

Trabajo de Suficiencia Profesional para obtener el título profesional de Abogada presentado por:

Natalia Chirinos Arévalo

Docente revisora:

Michelle Elisa Reyes Milk

Lima, 2024

## INFORME DE SIMILITUD

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**Informe sobre expediente de relevancia jurídica, E-2501. Caso relativo a la aplicación de la Convención para la Prevención y Sanción del delito de Genocidio (Bosnia y Herzegovina v. Serbia y Montenegro)**

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| Apellidos y nombres del asesor / de la asesora: **Reyes Milk, Michelle Elisa** | |
|---|---|
| DNI: 40514122 |  Firma |
| ORCID: https://orcid.org/0000-0003-2909-5026 | |

*“Día Internacional de Reflexión y Conmemoración del Genocidio de Srebrenica de 1995" cada 11 de julio desde el 2024.*

*A los familiares de las víctimas afectadas por el genocidio de Srebrenica ocurrido en 1995, que este informe permita que sus voces sigan resonando, buscando justicia y que jamás quede en el olvido la peor masacre ocurrida en Europa tras el fin de la Segunda Guerra Mundial.*

*A mi querida familia, mis padres, hermana y novio, quienes, con su apoyo constante, palabras de aliento y comprensión han sido una gran fuente de motivación e influencia positiva en este camino de titularme como abogada. ¡A todos ustedes, les extiendo mi más sincero agradecimiento!*

## RESUMEN

El presente informe de relevancia jurídica aborda la demanda de Bosnia y Herzegovina en contra de Serbia ante la Corte Internacional de Justicia en virtud de la Convención para la Prevención y la Sanción del Delito de Genocidio. La motivación de la investigación de este expediente se debe a que aquella controversia suscita un caso emblemático que estuvo en análisis durante catorce años por la CIJ. Asimismo, resulta muy llamativo analizar una controversia de Estados que enlazan diversos puntos del derecho internacional público y el derecho penal internacional.

El informe se centra en el análisis de la decisión tomada por la CIJ en su fallo del 26 de febrero de 2007. Se identifica que Serbia tuvo responsabilidad ante hechos internacionalmente ilícitos en virtud de la violación de la Convención de Genocidio. A lo largo del informe se revela que los hechos ocurridos en Bosnia y Herzegovina durante los años 1992 y 1995 constituyeron no solo la violación de la obligación de prevenir y sancionar de la Convención, sino que también Serbia violó la obligación de no ser cómplice de genocidio. Se plantea que la CIJ no consiguió todos los medios de prueba necesarios que tuvo a su alcance, y que de haberlo hecho quizás se habría probado la violación de la obligación de no cometer genocidio por parte de Serbia.

Los problemas jurídicos del expediente abarcan lo siguiente: a) si hubo un genocidio en Bosnia y Herzegovina, b) si Serbia se encontraba obligada a cumplir con la Convención de Genocidio, c) si los hechos relacionados con Serbia entre 1992 y 1995 vulneraron las obligaciones establecidas en la Convención de Genocidio y d) si aquellos actos internacionalmente ilícitos ocurridos entre 1992 y 1995 fueron atribuibles a Serbia.

Finalmente, a manera de conclusión, coincido parcialmente con la decisión tomada por la CIJ en su fallo del 2007. Coincido en el ámbito en que Serbia violó la obligación de prevenir y sancionar, sin embargo, respecto de las otras obligaciones, como la complicidad, considero que la CIJ no realizó un correcto análisis de esta. Asimismo, considero que la CIJ no debió de basar sus decisiones solo en base a pruebas y juzgamientos del TPIY, sino también la CIJ debió de haber analizado por sí misma y solicitado más pruebas que permitan realizar un adecuado juzgamiento respecto de los hechos internacionalmente ilícitos por parte de Serbia.



**Palabras clave:** genocidio, actus reus, mens rea, dolo genocida, atribución de responsabilidad, control efectivo, control general, medios de prueba.

**INDICE**

## 1. Introducción

El presente informe versa sobre uno de los casos más emblemáticos de la Corte Internacional de Justicia, (en adelante "CIJ") que muestra el nexo entre el derecho internacional público y el derecho penal internacional. La controversia internacional fue iniciada por el Estado de Bosnia y Herzegovina (en adelante, "BYH" o "el demandante") el 20 de marzo de 1993, en contra del Estado de Serbia y Montenegro (en adelante "Serbia[1]" o "la demandada"), en el que se cuestiona la responsabilidad de Serbia de un hecho internacionalmente ilícito en virtud de la violación de la Convención para la Prevención y la Sanción del Delito de Genocidio (en adelante "la Convención o Convención de Genocidio").

La CIJ, en su fallo del 26 de febrero del 2007, decidió que Serbia no había cometido genocidio, no había incitado a la comisión de genocidio, ni había sido cómplice de genocidio a través de sus órganos o agentes estatales cuyos actos determinaran su responsabilidad. Asimismo, la CIJ decidió que Serbia incumplió con la obligación de prevenir el genocidio e incumplió la obligación de sancionar al no trasladar a Ratko Mladic para ser juzgado por el Tribunal Penal Internacional para la Ex Yugoslavia. Por último, la CIJ declaró que únicamente se cometió genocidio en Srebrenica en julio de 1995 pero que este no fue atribuible a Serbia.

Entonces, a raíz de las decisiones tomadas por la CIJ en su fallo del 2007, considero que existen elementos esenciales que no han sido abordados y que requieren exploración, tales como el análisis empleado en la complicidad. De manera que, con la finalidad de aterrizar y analizar aquella problemática jurídica, se ha dividido el presente expediente en un problema principal y cuatro problemas secundarios. Ahora bien, antes de iniciar con los problemas jurídicos, se abordarán los hechos relevantes del caso.

Como primer punto se presentarán los antecedentes junto con un breve relato del contexto histórico de la República de la Ex- Yugoslavia. Luego se narrarán los hechos tanto de la demandante como de la demanda, después, se procederá también a mencionar las decisiones tomadas por la CIJ respecto de las medidas provisionales, excepciones preliminares y del fallo del 27 de febrero del 2007.

Como segundo punto se encuentra el análisis de los problemas jurídicos hallados en el caso. Se desarrollará un problema principal con cuatro problemas secundarios. En el primer problema secundario se discutirá el tema sobre la definición del crimen de genocidio junto con la composición de sus elementos estipulados en jurisprudencia, doctrina y la Convención de Genocidio. En el segundo problema secundario se analizará si Serbia se encontraba obligada por la Convención de Genocidio a no cometer el crimen de genocidio en el momento en que ocurrieron los hechos.

Como tercer problema secundario se explorará si los hechos ocurridos en Bosnia y Herzegovina entre 1992 y 1995 vulneraron las obligaciones de la Convención de Genocidio. Por último, en el cuarto problema secundario se analizará si los actos

[1] Para efectos del presente informe se utilizará la referencia de "RFY" o "Serbia", dependiendo del periodo tiempo en que ocurrieron los hechos

internacionalmente ilícitos que vulneraron las obligaciones de la Convención de Genocidio fueron atribuibles a Serbia. En suma, frente a todas estas interrogantes y problemas jurídicos de estudio que se extraen del caso, se realiza un análisis sobre hechos internacionalmente ilícitos que pudieron ser atribuidos a Serbia por la CIJ en su fallo del 2007.

### 1.1. Identificación de áreas del derecho sobre las que versa el Expediente

El expediente elegido sobre el caso de Bosnia y Herzegovina vs Serbia y Montenegro aborda dos ramas del derecho: el derecho internacional público y el derecho penal internacional. Este caso se abordan varias cuestiones esenciales del derecho internacional junto con el tema de la responsabilidad propia del crimen del genocidio.

Por un lado, en el fallo de excepciones preliminares de 1996, cuestión que no se abordará de manera profunda en el informe, la CIJ analizó cuestiones relacionadas a la sucesión de Estados con el propósito de aclarar las dudas del demandado. Por otro lado, en el fallo del 26 de febrero de 2007, la CIJ analizó hechos internacionalmente ilícitos ocurridos entre los años 1992 y 1995 por parte de Serbia y si estos fueron atribuibles a aquel Estado.

### 1.2. Justificación de la elección del Expediente

Han transcurrido veinte y ocho años desde el genocidio ocurrido en Srebrenica, y aún existen familias que no logran encontrar los restos de sus familiares que fueron víctimas del genocidio en julio de 1995 (ONU, 2023). De manera que, llamó mi atención el explorar los crímenes acontecidos en BYH durante el periodo de 1992-1995 y analizar si hubo un Estado responsable respecto de la comisión o complicidad del crimen de genocidio.

El caso fue presentado por BYH contra Serbia ante la CIJ en 1993, sin embargo, el dictamen del fallo del caso se emitió en febrero del 2007, es decir, catorce años después de la presentación de la demanda. Sin duda existieron muchas razones por las cuales ocurrió el atraso en la toma de decisión, razones como la disolución de la Ex Yugoslavia, la cantidad de pruebas presentadas a la CIJ, las extensiones de plazo solicitadas por Serbia, entre otras. Sin embargo, desde mi parecer, catorce años resulta un plazo muy extenso para poder resolver una controversia entre Estados. Por ello, considero interesante indagar si el procedimiento realizado por la CIJ fue el idóneo o pudo haber otras vías alternativas que permitieran llegar a una decisión más acertada y pronta.

## 2. Hechos relevantes

A continuación, se detallan los hechos más relevantes del caso, como es el contexto histórico de la República de Yugoslavia y las pretensiones de las partes:

### 2.1. Contexto histórico de la República de la Ex- Yugoslavia

La creación de la primera Yugoslavia se llevó a cabo después de la firma del Tratado de Versalles. Al término de la Primera Guerra Mundial en 1918, esta fue denominada en un inicio como el “Reino de los Serbios, Croatas y Eslovenos”; sin embargo, en 1929, cambió su nombre al Reino de Yugoslavia (en adelante “RY“). La idea de la creación de

este nuevo Reino fue con la intención de unir a todos los eslavos del sur que, “aparentemente” poseían una cultura en común.

El RY fue un Estado compuesto por la coexistencia de pueblos con diferentes culturas y religiones: cristianos, católicos, ortodoxos e islámicos; asimismo, aquel Estado constituyó en la unión de seis repúblicas: Eslovenia, Croacia, Bosnia-Herzegovina, Serbia, Montenegro y Macedonia, además de dos provincias autónomas de Vojvodina y Kosovo. Sin embargo, como señala Hernández (1997) no hubo la existencia de una igualdad ni de una solidaridad multiétnica, ya que, los serbios siempre tuvieron la intención de convertir al RY en una Serbia más grande. (p.46). En ese sentido, no había integración o identificación patriótica por parte de los ciudadanos de la RY en su propio país.

En el siglo XX hubo dos periodos distintos de la RY, el primero fue desde su creación en 1918 hasta 1941 y, el segundo fue a partir de 1945 hasta 1980 con el gobierno de Josip Broz Tito (en adelante “Tito"). El primer periodo se llevó a cabo a raíz de la culminación de la Primera Guerra Mundial, cuando las Potencias Centrales aceptaron firmar tratados con los aliados, con la finalidad de garantizar un régimen democrático en base al derecho de la libre determinación, y al principio de las nacionalidades (Martinic ,2015). En ese sentido, fueron los Imperios Centrales quienes fueron destituidos del poder, lo cual permitió que apareciera la oportunidad de la creación de nuevos estados europeos tales como Polonia, Checoslovaquia, Austria y el Reino de los Serbios, Croatas y Eslovenos.

Ahora bien, en relación con el segundo periodo, el Reino de Yugoslavia pasó a denominarse “la República Federativa Socialista de Yugoslavia” (en adelante “RFSY”) o también llamada la “Yugoslavia de Tito”. Este fue un periodo comprendido entre 1945 y 1980, y como menciona la autora Mariana Casanova (2004) “fue un campo de batalla entre una visión nacionalista unitaria, y otra basada en particularismos de las diferentes repúblicas” (p.337). La explicación de ello se debe a que el régimen del gobierno de Tito fue un régimen autoritario y personal, sobre el cual se tuvo la intención de preponderar una etnia, la serbia, sobre las demás. Tras la muerte de Tito en 1980, se decidió escoger cada año un nuevo presidente de la RFSY.

Según la autora Casanova (2004), el orden de la rotación de presidentes ya se había acordado en antemano desde el año 1980 en adelante, por lo que la elección anual era puramente una formalidad.  Sin embargo, aquel sistema rotatorio de presidentes se estancó en mayo de 1991, cuando Borislav Jovic le debió de entregar el poder al representante de Croacia, Stipe Mesic ya que los serbios rechazaron su nombramiento. Como consecuencia de aquellos actos, Eslovenia fue el primer país que decidió convocar un referéndum para alcanzar la independencia. Este fue convocado en diciembre de 1990 y el resultado fue exitoso, aproximadamente de 90% de población participante, 95% votaron a favor de la independencia.

Es, así pues, que todo el proceso de dictadura y represión alejó a los demás Estados de la RFSY, generando también a su vez una serie de conflictos armados a partir de 1991. Asimismo, a raíz del rechazo del representante de Croacia al poder, Stipe Mesic, en mayo de 1991, junto con los representantes del país, decidieron convocar un referéndum para alcanzar la independencia de Croacia. El resultado fue fructífero, un

93% de la población estuvo a favor de un total de 84% de población votante. Cabe mencionar que Croacia y Eslovenia alcanzaron su total independencia el 27 de junio de 1991. La tensión durante aquella época continuó atrayendo a que otras repúblicas siguieran los pasos de Croacia y Eslovenia. La inestabilidad tanto política como económica en la RFSY atrajo mucha incertidumbre y temor entre sus ciudadanos.

En tanto, BYH y Macedonia se fueron preparando junto con sus líderes políticos no serbios para abandonar la RFSY. Fue así como, en septiembre de 1991 Macedonia declaró su independencia, e inmediatamente después, BYH fue en busca de la suya. BYH finalmente decidió convocar un referéndum en 1992, el cual obtuvo un resultado exitoso, ya que el 63% de los votos se mostraron a favor de su independencia. En ese sentido, BYH declaró su independencia, en marzo de 1992. En suma, lo que había sido la RFSY, quedó compuesta únicamente por Serbia y Montenegro, y las provincias autónomas de Vojvodina y Kosovo.

Ahora bien, durante el mismo periodo en 1992, ciudadanos serbiobosnios crearon dentro de BYH una República "independiente" la cual la autoproclamaron como "la República Srpska" (en adelante "RS"). Esta fue una República creada dentro de BYH, la cual controlaba *de facto* parte del territorio de BYH. Sin embargo, esta no estaba dominada por los bosnios, sino que, como menciona la autora Ariaz (2008) quienes estaban a cargo del apoyo militar y financiero de la RS era la RFSY. Resulta importante mencionar que, la RS conformó su propio ejército, el cual estaba conformado por fuerzas armadas serbio bosnias - Vojska Republike Srpskse (en adelante "VRS"). Estas fuerzas eran rebeldes respaldados por Serbia, eran opositores y luchaban en contra del gobierno de Sarajevo (capital de BYH). Cabe resaltar que, aquella República nunca obtuvo el reconocimiento internacional como Estado soberano.

Para efectos del presente informe, es importante resaltar que, el 27 de abril de 1992, la República Federativa de Yugoslavia (en adelante "RFY") emitió una declaración formal a través de la cual aceptó su rol de continuadora de la personalidad jurídica de la República Federativa Socialista de Yugoslavia (RFSY) por lo que, también aceptó ser miembro de las Naciones Unidas. (Fuente, 2010). Aquel hecho es de suma relevancia ya que hubo un debate en la comunidad internacional respecto de aclarar si es que la RFY tenía o no un carácter de Estado sucesor de la RFSY. Razón de ello es que en los párrafos posteriores del informe se mencionará la conclusión decidida por la CIJ respecto de si la RFY era parte o no de la Convención de Genocidio cuando BYH inició el procedimiento ante la CIJ contra la RFY en marzo de 1993.

La consecuencia de las independencias mencionadas anteriormente trajo consigo un enfrentamiento de "todos contra todos". Como fue señalado por el Tribunal Penal Internacional para la Ex Yugoslavia (en adelante TPIY) en la sentencia de Tadic, el conflicto armado en BYH fue un conflicto armado internacional. (TPIY, 1999, párr.145). Durante este periodo fue también que se llevó a cabo la Guerra de Bosnia, la cual inició en abril de 1992 y culminó en diciembre de 1994 con la firma del Acuerdo Marco General para la Paz en Bosnia y Herzegovina, también conocido como Acuerdo de Dayton. (en adelante "Acuerdo de Dayton"). Aquel Acuerdo fue firmado con el propósito de poner fin a la Guerra de Bosnia y a los conflictos armados acontecidos debido a la desintegración de la RFY entre 1991 y 1995. Quienes firmaron el Acuerdo fueron las siguientes autoridades: Slobodan Milosevic, presidente de Serbia (1989 a 1997 – presidente de la

RFY de 1997 a 2000); Alija Izetbegovic, presidente de BYH (1990 a 2000) y Franjo Tudjman, presidente de Croacia (1990 a 1999).

Resulta importante mencionar que, durante el año 1991, en medio de las disputas políticas que existían en la desintegrada RFY, Jovica Stanisic, jefe de los Servicios de Seguridad del Estado de Serbia, formó la unidad de "Los Escorpiones" con la finalidad de brindar seguridad a los campos petrolíferos del este de Eslovenia. Luego, en 1995 esta unidad se habría convertido en la Unidad Especial Antiterrorista del Servicio de Seguridad Pública de Serbia, quienes en la práctica serían unidades paramilitares quienes estaban dirigidas por la RFY.

Para fines prácticos, a continuación, se explicará brevemente, el paso de la RFY hacia Serbia y Montenegro y cómo fue que al final, estas dos últimas repúblicas se independizaron y en consecuencia, solo Serbia se mantuvo presente en la controversia internacional de BYH vs Serbia en la CIJ. Según la autora Babic (2006), menciona que, aunque la República de Serbia y Montenegro era reconocida como un país, había diferencias bastante marcadas. Diferencias tales como por ejemplo la extensión de estas, el tamaño de Serbia era seis veces más grande que Montenegro, con once veces más el número de habitantes. En el aspecto económico había una diferencia muy notoria (p.70).

Por tanto, no contento con ello, Montenegro convocó a referéndum en mayo de 2006 y obtuvo un resultado favorable. Este logró independizarse, y con ello bajo su voluntad expresa, decidió no ser juzgado por la CIJ. Por lo tanto, en el presente informe se abordará las responsabilidades internacionales por hechos cometidos por la República Federativa Socialista de Yugoslavia (RFSY 1943 - 1992), la República Federativa de Yugoslavia (RFY 1992 - 2003), Serbia y Montenegro (2003-2006), Serbia (2006 en adelante).

### 2.2. Procedimiento ante la Corte Internacional de Justicia

El proceso judicial entre BYH contra Serbia y Montenegro inició en 1992 y culminó en el 2007. Existieron diferentes motivos por los cuales hubo un retraso en la emisión de la sentencia final del 2007. Sin embargo, considero que, la CIJ debió de haber acelerado y cuestionado mejor los hechos ocurridos, con la finalidad de declarar cómplice a Serbia por la violación de las obligaciones citadas en la Convención.

### 2.3. Pretensiones de las Partes[2]

El 20 de marzo de 1993, BYH presentó en la Secretaría de la CIJ una demanda por la que se incoaba un procedimiento contra la República Federativa de Yugoslavia (a partir del 4 de febrero de 2003, "Serbia y Montenegro" y a partir del 3 de junio de 2006, la República de Serbia) en relación con una controversia sobre supuestas violaciones de la Convención de Genocidio, adoptada por la Asamblea General de las Naciones Unidas el 9 de diciembre de 1948, así como diversos asuntos BYH alegaba que estaban relacionados con la misma. La demanda invocaba el artículo IX de la Convención sobre el Genocidio como fundamento de la competencia de la CIJ.

[2] En este acápite se resume lo señalado por las Partes en la Sentencia del 26 de febrero del 2007, caso BYH vs Serbia.

### 2.3.1. Pretensión de la demandante

- Con fecha de 20 de marzo de 1993, el demandante presentó en la Secretaría de la CIJ, una demanda por la que se incoaba un procedimiento contra la RFY respecto del artículo IX de la Convención sobre el Genocidio como fundamento de la competencia de la CIJ:

  > Las controversias entre las Partes contratantes, relativas a la interpretación, aplicación o ejecución de la presente Convención, incluso las relativas a la responsabilidad de un Estado en materia de genocidio o en materia de cualquiera de los otros actos enumerados en el artículo III, serán sometidas a la Corte Internacional de Justicia a petición de una de las Partes en la controversia.

- La demandante solicitó a la CIJ que considere las pruebas adicionales presentadas en apoyo de la "Solicitud de indicación de medidas provisionales de protección".

- El 27 de julio de 1993, BYH presentó una nueva solicitud de indicación de medidas provisionales.

- El 15 de abril de 1994, BYH, representada por su agente Muhammad Sacirbey, presentó el memorial solicitado por la CIJ. En este memorial la demandante invoca la competencia de la CIJ en virtud del artículo IX de la Convención de Genocidio. Asimismo, narró los actos cometidos por la RFY y realizó siete pedidos a la CIJ.[3]

- El 14 de noviembre de 1995, BYH presentó su declaración sobre las excepciones preliminares presentadas por la RFY[4].

- BYH y la RFY presentaron sus observaciones a la CIJ el 10 de octubre de 1997 y el 24 de octubre de 1997, respectivamente.

- El 23 de abril de 1998, BYH presentó su réplica, en esta, se presentaron hechos que sustentan la pretensión de la demandante, por sí mismos y en su totalidad, constituyen precisamente lo que la Convención de Genocidio pretendía proscribir.

- Mediante carta de 20 de febrero de 2006, el agente adjunto de BYH informó a la CIJ que estos no tenían intención de formular observaciones sobre los nuevos documentos presentados por Serbia y Montenegro.

### 2.3.2. Pretensión de la demandada

- El 1 de abril de 1993, la RFY presentó a la CIJ observaciones escritas sobre la "Solicitud de indicación de medidas provisionales de protección" presentadas por BYH. Estas observaciones eran recomendaciones hacia la CIJ sobre la indicación de aquellas medidas provisionales que se aplicarían a BYH.

[3] Serán explicadas en párrafos posteriores al informe.

[4] Aquella información será detallada de manera posterior, en la sección de análisis.

- El 10 de agosto de 1993, la RFY presentó también una solicitud de indicación de medidas provisionales y los días 10 y 23 de agosto de 1993 presentó observaciones escritas sobre la nueva solicitud de Bosnia y Herzegovina.

- El 26 de junio de 1995, la RFY presentó sus excepciones preliminares sobre las pretensiones de BYH, de acuerdo con el artículo 79 párrafo 1 del Reglamento de la CIJ. A través de este documento, se indica también que la RFY se abstendrá por el momento, de acuerdo con el artículo 79 párrafo 3 del Reglamento de la CIJ a presentar el memorial de contestación.

- El 24 de abril de 2001, la RFY presentó en la Secretaría de la CIJ una demanda de incoación de procedimiento por la que, remitiéndose al artículo 61 del Estatuto, solicitaba a la CIJ la revisión de la sentencia dictada el 11 de julio de 1996 sobre las excepciones preliminares a la sentencia de 11 de julio de 1996 en el asunto relativo a la aplicación de la Convención de Genocidio.

- El 4 de mayo de 2001, el agente de la RFY presentó a la CIJ un documento titulado "Iniciativa al Tribunal para que reconsidere de oficio la competencia sobre Yugoslavia", acompañado de un volumen de anexos. En la Iniciativa, la RFY solicitaba al Tribunal que se pronunciara y declarara que no tenía jurisdicción *ratione personae* sobre la RFY, sosteniendo que no había sido parte del Estatuto del Tribunal hasta su admisión en las Naciones Unidas (en adelante “ONU”) el 1 de noviembre de 2000, que no había sido y seguía sin ser parte de la Convención sobre el Genocidio.

- Mediante carta de 5 de febrero de 2003, la RFY informó a la CIJ de que, tras la adopción y promulgación de la Carta Constitucional de Serbia y Montenegro por la Asamblea de la RFY el 4 de febrero de 2003, el nombre del Estado había cambiado de "República Federal de Yugoslavia" a "Serbia y Montenegro".

### 2.3.3. Medidas provisionales[5]

El 8 de abril de 1993, la CIJ dictó dos medidas provisionales a ser cumplidas por la RFY. La primera medida era que la RFY se encontraba en la obligación de adoptar de manera inmediata todas las medidas a su alcance para prevenir la comisión del crimen de genocidio, en orden con el cumplimiento de su compromiso contraído en la Convención de Genocidio. La segunda medida se basaba en que la RFY debía de garantizar en particular, que ninguna unidad armada militar, paramilitar o irregular del conflicto pudiese estar dirigida o apoyada por él, así como las organizaciones y personas que pudiese estar sujetas a su control, dirección o influencia. Todo ello de acuerdo con lo previsto por el artículo III de la Convención, esto aplica en caso sea en contra de la población musulmana de BYH como contra cualquier grupo nacional, étnico, racial o religioso.

Por último, la CIJ señaló que la RFY y BYH no deberán tomar ninguna medida y deben asegurarse de que no se tome ninguna medida que pueda agravar o ampliar la disputa existente sobre la prevención o castigo del crimen de genocidio.[6] El 13 de setiembre de 1993, la CIJ reafirmó la medida provisional indicada el 8 de abril de 1993 y añadió que

[5] En este acápite se resume la decisión de la CIJ del 8 de abril y 13 de setiembre de 1993 respecto de la Solicitud de Indicación de Medidas Provisionales.

[6] Decisión unánime.

esta debe de ser inmediata y efectivamente aplicada sobre lo dispuesto por la Convención de Genocidio.

### 2.3.4. Fallo de excepciones preliminares del 11 de julio 1996[7]

Se celebraron audiencias públicas sobre las excepciones preliminares entre el 29 de abril y 3 de mayo de 1996. La primera y segunda excepción preliminar se basaba en señalar que BYH carecía de admisibilidad para presentar la demanda ante la CIJ. La tercera, cuarta y quinta excepción preliminar consistía en que la CIJ carecía de jurisdicción para atender el caso. Finalmente, la sexta y séptima excepción preliminar consistió en señalar que la CIJ era competente para conocer el caso a partir del 29 de diciembre de 1992 debido a que, a partir de esa fecha, BYH se habría adherido a la Convención de Genocidio.

Mediante sentencia de 11 de julio de 1996, la CIJ desestimó las excepciones preliminares y se declaró competente para resolver la controversia sobre la base del artículo IX de la Convención de Genocidio y admitió la demanda. La CIJ, declaró que tenía competencia sobre la base del artículo IX de la Convención de Genocidio de 1948 y desestimó las bases adicionales de competencia invocadas por BYH considerando que la demanda presentada por este último era admisible. Posteriormente, con fecha 24 de abril de 2001, la CIJ consideró que la admisión de Yugoslavia en la ONU el 1 de noviembre de 2000, mucho después del fallo de 1996, no podía considerarse un hecho nuevo capaz de fundamentar una solicitud de revisión de ese fallo.

### 2.3.5. Fallo del 26 de febrero de 2007

En la presente sección se abordarán los principales temas decididos por la CIJ en su fallo del 26 de febrero de 2007. Primero, resulta importante destacar qué puntos destacó la CIJ de manera preliminar, para aterrizar su análisis sobre el incumplimiento de las obligaciones señaladas en la Convención de Genocidio.

La CIJ analizó la Convención de Genocidio y destacó lo siguiente:

> a) que los principios de la Convención están reconocidos por los Estados como obligatorios, independientemente de la existencia de una obligación convencional;
> b) el carácter universal de la condena del crimen de genocidio y de la cooperación requerida para liberar a la humanidad de ese flagelo;
> c) que la norma que prohíbe el genocidio es una norma de carácter imperativo del derecho internacional;
> d) que, si bien la Convención no prevé expresamente la obligación de los Estados de no cometer genocidio, ésta se infiere del objeto y fin del tratado y de la obligación de prevenir el genocidio;
> e) que la Convención sobre Genocidio puede dar lugar a una doble responsabilidad: penal individual y del Estado.

[7] En este acápite se resume la decisión de la CIJ respecto del fallo del 11 de julio de 1996.

En segundo lugar, la CIJ analizó los hechos solicitados en la demanda de BYH, de acuerdo con la ley aplicable en los actos enumerados del artículo II inciso a,b,c,d y e de la Convención de Genocidio:

> Artículo II
>
> En la presente Convención, se entiende por genocidio cualquiera de los actos mencionados a continuación, perpetrados con la intención de destruir, total o parcialmente, a un grupo nacional, étnico, racial o religioso, como tal:
>
> a) Matanza de miembros del grupo;
> b) Lesión grave a la integridad física o mental de los miembros del grupo;
> c) Sometimiento intencional del grupo a condiciones de existencia que hayan de acarrear su destrucción física, total o parcial;
> d) Medidas destinadas a impedir los nacimientos en el seno del grupo;
> e) Traslado por fuerza de niños del grupo a otro grupo.

Y con ello, la finalidad de la CIJ era determinar lo siguiente: a) si las atrocidades mencionadas por Bosnia y Herzegovina ocurrieron y b) si aquellas atrocidades fueron ocasionadas con la intención especial de destruir, total o parcialmente, a un grupo determinado. Los grupos protegidos deben ser definidos en términos positivos, por lo que la CIJ analiza los hechos con la intención especial de destruir (en todo o en parte) a la población de musulmanes bosnios.

En tercer lugar, la CIJ analizó la responsabilidad del Estado de acuerdo con el artículo III de la Convención de Genocidio:

> Artículo III
>
> Serán castigados los actos siguientes:
> a) El genocidio;
> b) La asociación para cometer genocidio;
> c) La instigación directa y pública a cometer genocidio;
> d) La tentativa de genocidio;
> e) La complicidad en el genocidio.

Por último, la CIJ analizó la responsabilidad del Estado por violación de la obligación de prevenir y sancionar el crimen de genocidio:

> Artículo I
>
> Las Partes contratantes confirman que el genocidio, ya sea cometido en tiempo de paz o en tiempo de guerra, es un crimen de derecho internacional que ellas se comprometen a prevenir y a sancionar.

Finalmente, frente a los análisis de los artículos mencionados anteriormente, la CIJ llegó a la siguiente decisión final:

#### 2.3.5.1. Decisión de la Corte Internacional de Justicia

1) Rechazar las excepciones de la accionada y afirmar su jurisdicción sobre la base del artículo IX de la Convención sobre Genocidio;

2) Declara que Serbia no cometió genocidio a través de actos de sus órganos o de personas cuyas conductas comprometen su responsabilidad de conformidad con el derecho internacional consuetudinario, en violación de sus obligaciones en virtud de la Convención sobre Genocidio

3) Declara que Serbia no conspiró para cometer genocidio, ni incitó su comisión en violación de sus obligaciones por la Convención sobre Genocidio

4) Considera que Serbia no fue cómplice de genocidio en violación de sus obligaciones por la Convención sobre Genocidio

5) Declara que Serbia violó su obligación de prevenir genocidio conforme a la Convención sobre Genocidio con relación al ocurrido en Srebrenica en 1995

6) Declara que Serbia violó sus obligaciones debido a la Convención sobre Genocidio al no haber transferido a Ratko Mladic, acusado de genocidio y complicidad en el genocidio, al Tribunal Penal Internacional para la ex – Yugoslavia y al no cooperar plenamente con dicho Tribunal

7) Declara que Serbia violó su obligación de cumplir con las medidas provisionales ordenadas por la Corte el 8 de abril y el 13 de septiembre de 1995 al no haber tomado todas las medidas a su alcance para prevenir el genocidio en Srebrenica en julio de 1995

#### 2.3.5.2. Opiniones de los jueces [8]

El vicepresidente Al-Khasawneh se mostró en desacuerdo con la decisión tomada por la CIJ, debido a que esta logró absolver la responsabilidad de Serbia por el genocidio cometido en BYH. Mencionó también que hubo un criterio de valoración de la prueba muy alto y exigente, y que, a pesar de ello, no se permitió la posibilidad de invertir la carga de la prueba, por lo que BYH se mostró en desventaja frente a Serbia. Por un lado, los magistrados Ranjeva, Shi, Koroma, Owada, Tomka y Skotnikov expresaron dudas respecto de la interpretación dada por el fallo a la Convención de Genocidio. Estos señalaron que la interpretación derivada “por implicación” del artículo I de la Convención, era incompatible con el objeto y fin de esta en su conjunto. Los Magistrados en mención consideraron que la Convención prevé el juicio y castigo de las personas por el crimen de genocidio y que la responsabilidad del Estado se define en términos de diversas obligaciones especificas relacionadas con el compromiso de prevenir el crimen de genocidio y castigar a quienes lo cometieron.

[8] En este acápite se resume la opinión de los jueces en la CIJ en la Sentencia del 26 de febrero del 2007 caso BYH vs Serbia.

Aquellos seis magistrados compartían la opinión que sería absurdo que un Estado, al formar parte de la Convención, se comprometa a castigarse a sí mismo como Estado. Por ello, estos seis magistrados sostuvieron que, si la Convención hubiera tenido la intención de prevenir la responsabilidad estatal de los Estados, esto hubiera sido estipulado expresamente en la Convención, sin embargo, no existe estipulación alguna sobre ello. A pesar de todo ello, los Magistrados votaron a favor de las conclusiones relativas a la prevención del genocidio en Srebrenica en julio de 1995.

Por otro lado, los Magistrados Keith y Bennouna, señalaron que existían todos los elementos para justificar que Serbia era cómplice del genocidio cometido en Srebrenica con arreglo al inciso e) del artículo III de la Convención. Sobre la opinión disidente del Magistrado Mahiou, este hace una crítica respecto a que la CIJ no pudo llegar a establecer la responsabilidad de Serbia sin ayuda del Tribunal Penal Internacional para la ex Yugoslavia, asimismo, señalaron que la demandada incurrió en responsabilidad directa en algunos crímenes internacionales. Por último, sobre el Magistrado Kreca, este señaló que la masacre de Srebrenica cabe más en el marco de crímenes de lesa humanidad y crimen de guerra que en genocidio.

Respecto de la decisión de la CIJ sobre complicidad, once jueces estuvieron de acuerdo con la decisión de la CIJ y cuatro en desacuerdo. Dentro de los jueces quienes se mostraron disconformes con la decisión sobre complicidad de la CIJ fueron el vicepresidente Al-Khasawneh, jueces Keith, Bennouna y el juez ad hoc Mahiou.

## 3. Identificación de los problemas jurídicos del expediente y posición de la candidata

### 3.1. Respuestas preliminares a los problemas principales y secundarios

El problema principal consiste en determinar si Serbia fue responsable de un hecho internacionalmente ilícito en virtud de la violación de la Convención de Genocidio. La respuesta que se analiza en el presente informe sostiene que sí hubo responsabilidad estatal internacional por parte de Serbia en la complicidad. Dentro de las obligaciones incumplidas en virtud de la Convención de Genocidio se encuentra no solo la obligación de prevenir el genocidio y de cooperar con el traslado a Ratko Mladic, sino que no se cumplió con la obligación de no ser cómplice de genocidio. Así pues, para explicar y fundamentar la afirmación señalada anteriormente la pregunta principal se ha dividido en cuatro preguntas secundarias.

La primera pregunta secundaria responde a que si hubo un genocidio en BYH durante los años 1992-1995. Para este acápite se abordará la definición de genocidio junto con sus elementos. Para ello se ha añadido jurisprudencia que brinda la definición de *actus reus* y *mens rea* de otros Tribunales, tales como el TPIY y el Tribunal Penal Internacional para Ruanda (en adelante “TPIR). Luego, se hace una crítica a los medios probatorios utilizados por la CIJ y cómo este no buscó la mejor manera para obtener mejores recursos que mejoraran el análisis de la masacre ocurrida en BYH.

Sobre la pregunta secundaria, esta responde a si Serbia se encontraba obligada a cumplir con la Convención de Genocidio cuando ocurrieron los hechos. En este acápite se centra en analizar la sucesión de la RFSY hacia la RFY y como esta se encontraba bajo la obligación de cumplir con la Convención de Genocidio. Asimismo, se confirma

que BYH sí era parte de aquella Convención y que BYH contaba tanto con capacidad de comparecer ante la CIJ, como con competencia para analizar el caso. Por último, se comenta sobre la importancia del principio de cosa juzgada (*res judicata*) aplicado por la CIJ, frente a la solicitud que realizó Serbia en el año 2001 respecto de que la CIJ debía de revisar nuevamente el fallo dictado en 1996.

En la tercera pregunta secundaria se responde a si hubo hechos que vulneraron las obligaciones señaladas en la Convención de Genocidio en el caso de Serbia. Primero se recordará que los hechos ocurridos en el periodo de 1992-1995 sí constituyeron violaciones en virtud de la Convención. Luego de ello se analiza de manera concreta las obligaciones incumplidas por parte de Serbia. Frente a ello, me encuentro de acuerdo con que se reconoció que ocurrió un genocidio en Srebrenica en 1992, sin embargo, no concuerdo con que ese fue el único evento en el que se cometió genocidio ya que ocurrieron otras masacres durante los años 1992-1995. En el acápite también se comenta sobre la inacción que tuvo la CIJ frente a la solicitud de pruebas claves por parte de BYH hacia Serbia.

Por último, en el cuarto problema secundario se aborda que si hubo actos que vulneraron las obligaciones de la Convención de Genocidio que fueron atribuibles a Serbia como Estado. Dentro de esas obligaciones, me encuentro de acuerdo con la decisión de la CIJ cuando comentó que no se cumplió la obligación de prevenir ni de cooperar con el traslado de Ratko Mladic al TPIY. Sin embargo, me encuentro en desacuerdo con la decisión de la CIJ cuando comenta que Serbia no cometió genocidio ni fue cómplice de genocidio ya que sí hubo responsabilidad estatal en cuanto a la complicidad del crimen de genocidio. Luego, culmino la pregunta secundaria con una reflexión sobre los controles de atribución de responsabilidad y como estos podrían modificarse debido a los conflictos que existen en la actualidad.

## 4. Análisis de los problemas jurídicos

### 4.1. Problema principal

El problema principal del presente informe indaga si Serbia fue responsable de un hecho internacionalmente ilícito en virtud de la Convención de Genocidio. En ese sentido, en los siguientes acápites se analizará el fallo de la CIJ del 2007 y se abordará si se pudo atribuir responsabilidad a Serbia respecto de los hechos ocurridos entre 1992 y 1995 en BYH.

### 4.2. Problemas secundarios

#### 4.2.1. ¿Hubo un genocidio en Bosnia y Herzegovina conforme con la definición de la Convención para la Prevención y la Sanción del Delito de Genocidio?

La presente sección contará con dos secciones, la primera explicará brevemente la historia del crimen de genocidio. Primero, se explicará la definición a través su instrumento normativo, luego, se procederá a mencionar los elementos de este y, por último, se enunciará la lista de actos que forman parte del crimen. La segunda parte

será abordada bajo la mención de hechos que ocurrieron en Srebrenica por el ejército de la República de Srpska (VRS) y mi opinión sobre si estos constituyeron el crimen de genocidio de acuerdo con el artículo II de la Convención de Genocidio.

Para empezar, el crimen de genocidio junto con el crimen de lesa humanidad, crimen de guerra y crimen de agresión, forman parte de los crímenes del derecho internacional. Estos crímenes tienen una característica particular, forman parte de "los crímenes internacionales más graves". De acuerdo con el párrafo 3 del preámbulo del Estatuto de Roma de la Corte Penal Internacional, estos son crímenes internacionales que "constituyen una amenaza para la paz, la seguridad y el bienestar de la humanidad". Aquellos crímenes generan una trascendencia a la comunidad internacional por lo que no deben de quedar sin castigo. (preámbulo, párrafo 4). En ese sentido, en la actualidad, toda persona se encuentra obligada por el derecho internacional a no cometer aquellos crímenes, independientemente de que se trate de un actor estatal o no estatal.

Ahora bien, en referencia al crimen de genocidio, según el autor Stahn (2018), el término se creó pensando en los hechos ocurridos en el Holocausto y el exterminio de los armenios en el marco de la Primera Guerra Mundial. Ambos crímenes tuvieron varias similitudes, como afirma Yves Ternon (1991) en el caso de la masacre de los armenios, había un Estado controlado por un partido, los Ittihad ve Terakki Cemiyeti (Comité Unión y Progreso), o también llamado "Jóvenes turcos". Y en el caso del Holocausto, estaba el Partido Nacionalsocialista Obrero alemán, conocido como el "Partido Nazi". (p.201) Ambos grupos asesinaron a grupos minoritarios con la finalidad de limpiar su territorio. En el caso de los Jóvenes Turcos se encargaron de eliminar a sirios y griegos, y en el caso de los Nazis a gitanos, judíos y testigos de Jehová.

Centrándonos en el caso del Holocausto, el 24 de agosto en 1941, el primer ministro británico Winston Churchill, en una transmisión de radio comentó lo siguiente: "estamos ante un crimen sin nombre", aquella referencia narraba los crímenes cometidos por los nazis. Asimismo, la filósofa y teórica política judía, Hannah Arendt señaló a través de cartas junto con Karl Jaspers que los crímenes que estaban siendo cometidos por los nazis hacían estallar los límites de la ley. (p.333) Sin embargo, en aquella época, debido a que no existía el término de genocidio, no había una figura jurídica que describiera los actos que abarcaban aquel crimen.

Fue en 1944, cuando el término de genocidio fue utilizado por primera vez por el abogado judío-polaco Rafael Lemkin en su obra Axis rule in Occupied Europe. Como menciona el autor Pérez (2014), la palabra genocidio apareció en aquella obra como la definición de la destrucción de una nación o de un grupo étnico (p.233). Debido a que Lemkin había sido testigo del Holocausto, este utilizó la palabra genocidio para describir la destrucción de la vida de los judíos en Europa del Este. El significado del término surge con la unión de la palabra griega *"geno",* que significa tribu o raza, y el vocablo latino *"cida"* que significa matar.

La esencia del crimen de genocidio se basa en la destrucción de la cohesión y dignidad moral de un grupo nacional, étnico, racial o religioso como elemento de la sociedad internacional. Entonces, la razón principal para destruir al grupo se debe al "ser" y no al "hacer". Es decir, se les ataca por quienes son, mas no por lo que hacen como grupo.

La intención principal de Lemkin era convencer al Tribunal Militar Internacional de Nuremberg (en adelante “TMIN”), que incluyeran en el juicio de Nuremberg el crimen de genocidio, sin embargo, su persuasión no fue exitosa. El Holocausto finalmente se catalogó como crimen contra la humanidad (ahora crimen de lesa humanidad), el cual se caracteriza por el ataque sistemático o generalizado contra una población.

La diferencia del crimen de genocidio con el de lesa humanidad, es que este último no se centra en la eliminación parcial o total de un grupo específico nacional, étnico, religioso o racial; sino que se realiza el acto de atacar sistemáticamente o generalizado contra una población civil. Como señala el autor Liñan (2020) la intención de destruir no existe en el crimen de lesa humanidad ya que no hay un dolo especifico en cuanto a la destrucción de un grupo especifico como el grupo nacional, étnico, religioso o racial. (p.389)

Ahora bien, luego de dictada la sentencia del TMIN en octubre de 1946, por primera vez en su resolución 96 (I) del 11 de diciembre de 1946, la Asamblea General de la ONU, declaró que el genocidio es un crimen del derecho internacional. La intención de confirmar la pertenencia del crimen del genocidio como un crimen internacional se debió a que, tras finalizar la Segunda Guerra Mundial, la comunidad internacional tomó consciencia de la magnitud de afectaciones que ocurrieron debido a los crímenes nazis. (Perez, 2013). Por ello, los países afectados tanto como los no afectados, decidieron tomar acciones futuras para prevenir actos atroces como los que sucedieron en el Holocausto. De manera pronta, dos años después, en 1948, se adoptó la definición jurídica del crimen de genocidio a través de la Convención de Genocidio.

Es entonces que, la Convención se encarga de obligar a los Estados a prevenir y sancionar el crimen de genocidio. Los artículos IV a VII de la Convención establecen obligaciones para los Estados Parte en relación con los individuos que cometen los actos señalados en el artículo III. Es decir, los Estados deben de sancionar a los individuos que cometan genocidio, se asocien, instiguen la comisión del genocidio o sean cómplices del crimen. Ahora bien, de acuerdo con el inciso a) del artículo 38 del Estatuto de la CIJ, la Convención formaría parte de las fuentes convencionales. Lo cual implicaría que las obligaciones de la Convención recaerían solo para Estados que son parte de esta, es decir, excluiría a terceros Estados que no hayan brindado un previo consentimiento, todo ello de acuerdo con el artículo 34 de la Convención de Viena de 1969. Sin embargo, existen otras fuentes del derecho internacional mencionadas en el inciso c) del artículo 38 del Estatuto de la CIJ que permiten que las disposiciones de la Convención sean de carácter obligatorio para todos los Estados sean Parte o no lo sean.

Esto es, el que la obligación de prevenir y sancionar el genocidio se encuentre incluida en otras fuentes implica que todos los Estados cumplan con aquellas obligaciones. Ejemplo de ello es la Opinión Consultiva de la CIJ del 28 de mayo de 1951, la cual señala lo siguiente: “los principios establecidos en la Convención son principios reconocidos como obligatorios para los Estados por parte de las naciones civilizadas, aún en ausencia de una obligación convencional”. Como menciona el autor Charles Rousseau (1966), no existe una jerarquía entre las fuentes del derecho internacional citadas en el Estatuto de la CIJ.

Ahora bien, resulta importante señalar que, de la Opinión Consultiva anterior, la CIJ indicó también que había un "carácter universal de la condena del genocidio". Es decir, hay un carácter universal o "ius cogens" de las normas imperativas del derecho internacional general, respecto del crimen de genocidio. En ese sentido, en el caso del crimen de genocidio, Virally (1991), comenta lo siguiente: "existe una superioridad del ius cogens que tiende a la naturaleza de los intereses o de los valores cuya protección asegura y que deben de ser puestos de toda acción jurídica contraria" (p.175). En tanto, todos los Estados, sean Estado Parte o no de la Convención, deben de seguir las obligaciones de prevenir y sancionar el crimen del genocidio.

Retomando al concepto de la definición del crimen de genocidio, de acuerdo con la Convención de Genocidio existen cuatro grupos protegidos, en línea con el artículo II de la Convención de Genocidio: "se entiende por genocidio cualquiera de los actos que se mencionarán de manera posterior, perpetrados con la intención de destruir, total o parcialmente, a un grupo nacional, étnico, racial o religioso".

En esa misma línea, se procederá a mencionar brevemente los conceptos de los grupos protegidos. Para empezar, por grupo se puede entender a un número considerable de personas que tienen determinadas características que las diferencian de los demás miembros de la población. Sobre el grupo nacional, son un grupo de personas que comparten un origen, procedencia en común. Mayormente son miembros que comparten la misma nacionalidad/residencia. Respecto del grupo étnico, son minoría que comparten el mismo lenguaje o cultura. Sobre el grupo racial, son miembros que cuentan con rasgos físicos iguales entre sí, y que se vinculan generalmente en una misma región demográfica. Por último, sobre el grupo religioso, estos son aquellos miembros quienes comparten la misma religión o culto (Sanchez, 2016).

De acuerdo con la Convención de Genocidio, existen dos elementos centrales que conforman la definición del genocidio, el primero son las series de acciones materiales (el *actus reus*) y el segundo es la intención con que son realizadas (el *mens rea*). Sobre este último, existe jurisprudencia sobre la definición del *mens rea* de genocidio. En la sentencia de Krstic, el TPIY, respecto de la intencionalidad del genocidio ocurrido en Srebrenica, se planteó la siguiente pregunta ¿existió la intencionalidad de destruir en el caso en el que solo se asesinó sistemáticamente a hombres en edad militar? Frente a ello, la Sala de Primera Instancia del TPIY respondió de manera afirmativa a la pregunta. La conclusión de dicha Sala fue que la intención de matar a todos los hombres musulmanes bosnios en edad militar en Srebrenica evidenciaba la intención de destruir en parte al grupo musulmán bosnio, por lo que se calificaba el acto como una intención genocida. (TPIY, 2001, párr. 594)

Ahora bien, en el artículo II de la Convención de Genocidio se definen las conductas materiales que pueden constituir el genocidio:

a) Matanza de miembros del grupo;
b) Lesión grave a la integridad física o mental de los miembros del grupo;
c) Sometimiento intencional del grupo a condiciones de existencia que hayan de acarrear su destrucción física, total o parcial;
d) Medidas destinadas a impedir los nacimientos en el seno del grupo;
e) Traslado por fuerza de niños del grupo a otro grupo.

De una parte, se procederá a explicar brevemente sobre cada conducta material (el *actus reus*) enumerada anteriormente. De acuerdo con Cassese (2008) en el inciso a) el significado de matar a miembros del grupo se debe de interpretar como “asesinato”, sea este voluntario o intencionado (p.133). Respecto del inciso b), en la sentencia del caso Akayesu la Sala de Primera Instancia del TPIR indicó que, la lesión grave (daño físico o mental grave) no implica necesariamente que el daño causado debe de ser permanente o irremediable. (TPIR, 1998, párr. 502). Sin embargo, esta acción debe de causar un daño que va más allá de la infelicidad momentánea, es decir, debe de ser un daño que genere humillación o vergüenza en la víctima. Asimismo, se señaló que, aquel daño debe de generar afectaciones de largo plazo, por ejemplo, que la víctima no pueda llevar una vida regular o plena. En ese sentido, el TPIR señaló también que podrán causar lesiones graves a la integridad física o mental del grupo lo siguiente: el trato inhumano, la tortura, la violación y abuso sexual, deportación. (TPIR, 1998, párr. 502).

Sobre el inciso c), sometimiento intencional del grupo a condiciones de existencia que hayan de acarrear su destrucción física, en la sentencia de Akayesu el TPIR señaló que esta expresión incluye someter a un grupo de personas a una dieta de subsistencia, la expulsión sistemática de sus hogares y la reducción de los servicios médicos esenciales por debajo de los requisitos mínimos. (TPIR, 1998, párr. 505). En la sentencia de Kayishema y Ruzindana el TPIR señaló también que, aquel inciso puede comprender la privación deliberada de recursos indispensables para la supervivencia, tales como alimentación o servicios médicos. (TPIR, 1999, párr. 115). Por último, el TPIY de la sentencia de Brdanin señaló que se incluye al inciso c) la creación de circunstancias que conduzcan a una muerte lenta como falta de hospedaje, vestido e higiene adecuados, o también el trabajo o esfuerzo físico excesivo. (TPIY, 2004, párr. 691).

En cuanto al inciso d) medidas destinadas a impedir los nacimientos en el seno del grupo, el TPIR en la sentencia de Akayesu señaló que se podría incluir mutilaciones sexuales, esterilización, control forzoso de la natalidad, separación de los sexos y prohibición de los matrimonios (TPIR, 1998, párr. 507). En adición de ello, las medidas no solo son físicas sino también mentales, como, por ejemplo, el TPIR en la sentencia de Akayesu, indicó que puede incluir violación sexual como un acto dirigido a impedir los nacimientos cuando la víctima se niega posteriormente a procrear, de la misma manera que los miembros de un grupo pueden ser inducidos, mediante amenazas o traumas, a no procrear. (TPIR, 1998, párr. 508).

Por último, respecto del inciso e), sobre el traslado por fuerza de niños del grupo a otro grupo, el TPIR en la sentencia de Akayesu señaló como en el caso de las medidas destinadas a prevenir nacimientos, el objetivo no es sólo sancionar un acto directo de traslado físico forzoso, sino también para sancionar actos de amenazas o traumas que llevarían al traslado forzoso de niños de un grupo a otro. (TPIR, 1998, párr. 509).

Ahora bien, existen algunos ámbitos grises en este elemento, ¿será un crimen de genocidio si es que alguno de los actos del artículo II de la Convención se llevan a cabo con la intención especial, pero en contra de un único miembro del grupo protegido? En ese caso, el TPIR en la sentencia de Akayesu señaló que sí habría genocidio incluso si aquellas acciones del crimen son cometidas en contra de solo un miembro del grupo (TPIR, 1998, párr. 521). Asimismo, según el autor Robinson (1960), la esencia del

genocidio no se basa en la destrucción real de un grupo, sino en la intención de destruir aquel grupo como tal, de manera parcial o total. (p.58).

En ese sentido, calificaría como genocidio cualquiera de los actos del artículo II de la Convención si se afecta a un solo individuo porque formaría parte de una serie de actos destinados a la destrucción total o parcial del grupo. Sin embargo, mi postura sobre ello se encuentra en línea con lo señalado de manera explícita por la Convención. Es decir, ocurre un genocidio cuando se realizan los actos del inciso a) al e) a "miembros de un grupo". La razón de aquella postura se debe a que podría resultar muy complicado comprobar que efectivamente se intentó destruir parcial o totalmente a un grupo nacional, racial, religioso o étnico con los actos cometidos hacia solo un miembro del grupo.

De otra parte, se procederá a comentar sobre el segundo elemento del genocidio, la intención (el *mens rea*). Parte de los requisitos para poder determinar si se ha cometido el crimen de genocidio, es identificar que el autor haya actuado con la intención especifica de destruir a aquel grupo. Este requisito fue propuesto con la finalidad de que se presentara el crimen de genocidio como un crimen con especial gravedad (Perez, 2013). Entonces el daño hacia la víctima no se debe a sus características o cualidades individuales, sino que este año se debe a su pertenencia a un grupo determinado, el cual puede ser grupo nacional, étnico, religioso o racial. Por ello, la intención de daño no recae en atacar a la víctima en calidad de individuo, sino que recae cuando ven a la víctima como miembro de aquel grupo que se tiene la intención de destruir.

Dentro de este marco, resulta cuestionable el cómo identificar la intención genocida del individuo hacia el grupo protegido. Para ello, el TPIR ha contribuido a aterrizar sobre aquella cuestión. Por ejemplo, en la sentencia de Akayesu, el Tribunal indicó que es un factor mental difícil, incluso imposible de determinar. (TPIR, 1998, párr. 523). Por ello, normalmente, en ausencia de confesión del acusado, para comprobar que realmente existió una intención genocida por parte de este, se deduce la intención a través de una serie de presunciones de hechos. Ya que, resulta muy complicado encontrar y probar los hechos de genocidio a través de documentaciones, o encontrar testigos que declaren de manera explícita que aquel individuo tuvo la intención de destruir a todo un grupo. Por lo que, Sala de Primera Instancia del TPIR señaló lo siguiente:

> Se puede inferir la intención especial de todos los actos o declaraciones del acusado, o del contexto general en el que se perpetraron sistemáticamente otros actos culpables contra el mismo grupo, independientemente de si esos otros actos fueron cometidos por el mismo autor o incluso por otros autores. Otros factores, como la escala de las atrocidades cometidas, su naturaleza general, en una región o un país, o, además, el hecho de dirigirse deliberada y sistemáticamente contra las víctimas por su pertenencia a un grupo concreto, excluyendo a los miembros de otros grupos, pueden permitir al magistrado determinar la intención genocida de un acto concreto. (TPIR, 1998, párr. 523)

Llegados a este punto, se procederá a continuar con la segunda parte del acápite. Se mencionarán los hechos perpetrados en Srebrenica por el ejército de la República de Srpska (VRS) y mi opinión sobre si estos constituyeron el crimen de genocidio. El primer paso para abordar la respuesta del problema principal, es decir, si Serbia fue

responsable de un hecho internacionalmente ilícito en virtud de la Convención de Genocidio, es identificar si es que los hechos ocurridos en contra de la población bosnio-musulmana entre 1992 y 1995 en BYH constituyeron el crimen de genocidio.

Para ello, como fue explicado en los párrafos anteriores, se debe de aterrizar con los conceptos objetivos del crimen, es decir, identificar si los hechos cumplen con los elementos del *mens rea* y *actus reus* del artículo II de la Convención de Genocidio. En la sentencia del 2007, la CIJ realizó el análisis de los hechos que fueron invocados en la demanda recibida por BYH en 1993. A continuación, se narrará cada inciso analizado por la CIJ y luego se añadirá mi opinión respecto de ello.

Como primer punto, la CIJ[9] analizó el inciso a) matanza de miembros del grupo. De un lado, la BYH señaló en su demanda la gran cantidad de asesinatos que ocurrieron en Sarajevo a través de bombardeos y francotiradores. Asimismo, la Sala de Primera Instancia del TPIY, en su sentencia del caso Galic del 5 de diciembre de 2003, exploró incidentes en Sarajevo. Por ejemplo, se hizo mención del bombardeo ocurrido el 5 de febrero de 1994, el cual causó la muerte de 60 personas. Parte de lo concluido por aquella Sala fue que hubo zonas de Sarajevo que estuvieron controladas por el ejército de BYH (ARBiH), sin embargo, civiles fueron atacados indiscriminadamente por el ejército serbio bosnio (VRS). (TPIY, 2003, párr. 591). Luego, en el Informe de la Comisión de Expertos de la ONU[10] se incluyó el asesinato de 3.000 musulmanes y la ejecución de 200 detenidos supervivientes.

De otro lado, el TPIY declaró culpable a Dragan Nikolic, comandante del campo de detención Susica en la zona del valle del río Dina, por haber asesinado a nueve prisioneros no serbios y torturado a otros cinco. Según el TPIY, como parte de la campaña de limpieza étnica local, hubo aproximadamente 3.000 musulmanes que fueron confinados en el campo de Susica entre mayo y octubre de 1992. (TPIY, 2003, párr.67). Luego, en el caso de Stakic, la Sala de Primera Instancia del TPIY señaló que frente a los actos ocurridos en el municipio de Prijedor, se demostró más allá de toda duda que hubo un cuadro de atrocidades contra los musulmanes ubicados en aquel municipio. (TPIY, 2003, párr.544 y 546).

Un protagonista relevante que aparece en los hechos del caso es el grupo paramilitar “Los Escorpiones”, estos fueron convocados por Jovica Stanisic, jefe de los Servicios de Seguridad del Estado de Serbia, como fue mencionado en los antecedentes del informe, con la finalidad de brindar seguridad a los campos petrolíferos del este de Eslovenia. La situación cambia cuando en 1995 estos pasarían a ser parte de la Unidad Especial Antiterrorista del Servicio de Seguridad Pública de Serbia. Sin embargo, en la práctica esta unidad era en realidad un grupo paramilitar, bajo el control de Serbia, quienes se encargaron de asesinar a bosnios musulmanes en la localidad de Trnovo, ubicada al este de Sarajevo en julio de 1995. Asimismo, BYH presentó una prueba de la videograbación a través de la cual se mostraba la ejecución por parte de los paramilitares “Los Escorpiones” en contra de seis bosnios musulmanes en julio de 1995 y un documento del 2005, sobre la cual el Consejo de Ministros de Serbia declaraba que

[9] En este acápite se resume lo señalado por la CIJ en la Sentencia del 26 de febrero del 2007, caso BYH vs Serbia.

[10] En octubre de 1992 se creó la Comisión de Expertos para investigar las acusaciones de genocidio y crímenes contra la humanidad en la antigua Yugoslavia. El equipo de expertos fue autorizado por la Resolución 780 del Consejo de Seguridad de la ONU (14 de septiembre de 1992). La Comisión presentó su informe [S/1994/674] al Consejo de Seguridad de la ONU el 27 de mayo de 1994.

la matanza ocurrida en Srebrenica fue responsabilidad del gobierno de Serbia de Milosevic.

Respecto de los hechos acontecidos en Srebrenica, procederé a citar un extracto de lo señalado por la Sala de Primera Instancia del TPIY en el caso Kristic:

> Los acontecimientos que rodearon la toma por los serbobosnios de la "zona segura" de la ONU de Srebrenica, en BYH, en julio de 1995, son bien conocidos en todo el mundo. A pesar de una resolución del Consejo de Seguridad de la ONU que declaraba que el enclave debía estar "libre de ataques armados o de cualquier otro acto hostil", unidades del Ejército Serbio de Bosnia ("VRS") lanzaron un ataque y capturaron la ciudad. En pocos días, aproximadamente 25.000 bosnios musulmanes, en su mayoría mujeres, niños y ancianos que vivían en la zona, fueron desarraigados y, en un ambiente de terror, cargados en autobuses abarrotados por las fuerzas serbobosnias y transportados a través de las líneas de confrontación al territorio controlado por los bosnios musulmanes. Sin embargo, los hombres musulmanes bosnios en edad militar de Srebrenica corrieron una suerte distinta. Cuando miles de ellos intentaron huir de la zona, fueron hechos prisioneros, detenidos en condiciones brutales y ejecutados. Nunca se volvió a ver a más de 7.000 personas. (TPIY, 2001, párr. 1)

Ante ello, la Sala de Primera Instancia de los casos Krstic y Blagojevic concluyeron que las fuerzas serbiobosnias (VRS) mataron a más de 7.000 hombres bosnios musulmanes en julio de 1995 en Srebrenica (TPIY, 2001 párrs. 426 427) (TPIY, 2005, para. 643). Entonces, el TPIY en ambos casos determinó que se cumplió el *actus reus* del inciso a) del artículo II de la Convención. Sobre esto, la CIJ indicó que, efectivamente se comprobó los asesinatos masivos en contra los bosnios musulmanes. Sin embargo, respecto de la intencionalidad del hecho, la CIJ indicó que no existió prueba concluyente, salvo en los hechos ocurridos en Srebrenica, que demostrara la intencionalidad de destruir en todo o en parte al grupo como tal. Aquel ataque ocurrió a pesar de que Srebrenica fue declarada zona segura por el Consejo de Seguridad de la ONU en julio de 1995.

A su vez, los hombres bosnios musulmanes en edad militar fueron detenidos, tomados como prisioneros, torturados y luego ejecutados. En total, la CIJ señaló que más de 7.000 personas desaparecieron. Por ello, la CIJ consideró que sí había pruebas suficientes para demostrar que existió la intencionalidad de destruir a un grupo protegido como fueron los bosnios musulmanes de BYH. Entonces, según la CIJ, los actos realizados por los VRS desde el 13 de julio de 1995, van acorde con lo señalado en la Convención de Genocidio en el inciso a) y también con el inciso b) lesión grave a la integridad física o mental de los miembros del grupo. Ya que, como fue explicado anteriormente, hubo la intención de matar a todos los hombres musulmanes bosnios en edad militar en Srebrenica, lo cual evidenció la intención de destruir en parte al grupo musulmán bosnio, por lo que se calificaba el acto como una intención genocida. (TPIY, 2001, párr. 594)

Ampliando un poco más los actos relacionados con el inciso b), el TPIY de los casos Krstic y Blagojevic indicaron también que las acciones cometidas por el VRS cumplen con el *actus reus* de causar lesiones corporales o mentales graves. Ello se debe a que

el VRS causó lesiones mentales graves a aquellas personas que se vieron forzadas a desplazarse a los campos de detención. (TPIY, 2001 párr. 543) (TPIY, 2005, párr. 644-654).

Otro punto para señalar sobre el inciso b) lesión grave a la integridad física o mental de los miembros del grupo son las violaciones sexuales sistemáticas hacia mujeres musulmanas en Bosnia que ocurrieron durante el conflicto. De un lado, BYH menciona que hubo una práctica común por parte del ejército VRS de aterrorizar a la población no serbia. Dentro de los actos de genocidio descritos por BYH se encuentra la imposición del dolor, la administración de tortura y la práctica de humillación sistemática. De otro lado, la demandada reconoce los actos de violación sexual podría ser catalogado como genocidio, sin embargo, la demandada indica que aquellos actos no fueron cometidos con ninguna intención específica en contra de las mujeres bosnio-musulmanas de BYH. Es decir, la RFY indica que no hubo *mens rea* y que estos actos de violación sexual fueron cometidos por todas las partes del conflicto.

Respecto del inciso c) sometimiento intencional del grupo a condiciones de existencia que hayan de acarrear su destrucción física, total o parcial, hay dos incidentes sobre las cuales se prueban que la demandada cometió aquellos hechos. Primero, sobre el bombardeo ocurrido en Sarajevo cometido por las fuerzas serbiobosnias en abril de 1992. Según la Comisión de Expertos, entre principios de abril de 1992 y febrero de 1994, 56.000 personas resultaron heridas. Asimismo, se informó que durante los bombardeos ocurridos en Sarajevo hubo una media aproximada de 329 impactos de proyectiles al día, y el punto más alto fue alcanzado el 22 de julio de 1993 con 3.777 impactos de proyectiles. (Informe de la Comisión de Expertos, 1994, párr. 247). Ante esta postura, nuevamente la CIJ indicó que no encontró pruebas suficientes para determinar que aquellos actos fueron cometidos con la intención específica de destruir total o parcialmente al grupo bosnio musulmán.

Sobre el segundo incidente el cual fue la deportación y expulsión, el Relator Especial de la ONU en Personas Desaparecidas, Manfred Nowak, redactó un informe del 21 de abril de 1995 sobre personas desaparecidas dedicado a la situación de Banja Luka. En este informe se observó que, desde el inicio del conflicto, en 1992 hubo una reducción del 90% de la población musulmana local. (Informe de Personas Desaparecidas, 1995, párr. 4). Debido a que por orden de las autoridades *de facto* de Banja Luka, la población fue forzada a realizar trabajos que ocasionaran que los no serbios abandonaran la zona. Parte de las indicaciones dadas por el gobierno de Banja Luka era que todo aquel que abandonara la zona debía de pagar tasas y renunciar por escrito al reclamo de sus viviendas, todo ello sin ofrecer algún reembolso a cambio. (Informe de Personas Desaparecidas, 1995, párr 26).

Según el Relator Especial, solo en un día en junio de 1994, 460 musulmanes y croatas fueron desplazados de Banja Luka. La posición de la CIJ frente a estos hechos era que sí existen pruebas convincentes y concluyentes que en BYH se produjeron deportaciones y expulsiones de bosnios musulmanes. Sin embargo, nuevamente la CIJ indicó que no se pudo encontrar, en base a las pruebas presentadas, que las deportaciones y expulsiones fueron con la intención de destruir a aquel grupo protegido en su totalidad o parte.

Luego, en el inciso d) medidas destinadas a impedir los nacimientos en el seno del grupo, primero la demandante señaló que la separación forzosa de musulmanas y musulmanes en BYH provocó que la tasa de natalidad descendiera notablemente. Sin embargo, la CIJ indicó que no se aportó ninguna prueba fehaciente para confirmar aquella afirmación. En segundo lugar, la demandante indicó que debido a las violaciones sexuales sistemáticas practicadas por las fuerzas serbiobosnias hacia los hombres, generó que estos últimos no pudieran procrear de manera posterior. La prueba presentada sobre aquella afirmación fue un extracto de la sentencia del caso Tadic. La Sala de la Primera Instancia del TPIY concluyó que en el campo de Omarska "los guardias de la prisión obligaron a un hombre bosnio musulmán a arrancarle los testículos a mordiscos a otro hombre bosnio musulmán". (TPIY, 1997, párr. 198).

Sobre las violaciones sexuales sistemáticas ocurridas en mujeres musulmanas, BYH citó un fragmento de la sentencia de Akayesu, en la cual el TPIR consideró lo siguiente: "la violación puede ser una medida destinada a evitar nacimientos cuando la persona violada se niega posteriormente a procrear". (TPIR, 1998, párr. 508). Luego, BYH también señaló que, debido a las violaciones sexuales hacia mujeres, muchas de ellas eran rechazadas por sus esposos o les era muy complicado encontrar una pareja debido a los estereotipos marcados en el país. Sin embargo, frente a todas estas pruebas, la CIJ concluyó que no se presentaron pruebas concluyentes que puedan determinar que efectivamente la tasa de natalidad se redujo luego del desplazamiento forzado, que las violaciones sexuales hacia hombres y mujeres afectaran la procreación de manera posterior.

Respecto del inciso e) traslado por fuerza de niños del grupo a otro grupo, la demandante señaló que, en la revisión de la acusación de las sentencias Karadzic y Mladic, la Sala de Primera Instancia del TPIY declaró lo siguiente:

> en algunos campos se practicaban especialmente violaciones sexuales, con el objetivo de forzar el nacimiento de ascendencia serbia, las mujeres a menudo eran internadas hasta que era demasiado tarde para abortar y que parecería que el objetivo de muchas violaciones era la impregnación forzada. (Regla 61 de las Reglas de Procedimiento y Prueba, 1996, párr. 64).

Ante ello, la CIJ señaló que la conclusión de dicha Sala fue basaba en un *amicus curie* y el informe de la Comisión de Expertos. Asimismo, la CIJ señaló que las pruebas presentadas no permiten demostrar que hubo la intención de que hubiera un embarazo forzado o un objetivo de transferir niños del grupo protegido a otro grupo.

Acto seguido, procederé a señalar mi opinión sobre el análisis realizado por la CIJ. Para empezar, la CIJ tuvo un seguimiento muy cercano respecto de las conclusiones tomadas por el TPIY. Por ejemplo, cuando la CIJ señaló que solo se había demostrado el elemento de intención específica en el caso de las masacres de Srebrenica, esto fue sustraído de la sentencia de primera instancia y de apelación del TPIY en la sentencia de Krstic. Sin embargo, respecto de los otros hechos ocurridos fuera de Srebrenica durante los años 1992-1995, la CIJ negó que haya ocurrido un genocidio. La justificación de la CIJ para afirmar que no hubo la intención de destruir durante los hechos ocurridos en 1992-1995 fuera de Srebrenica fue que examinó cuidadosamente los procedimientos penales del TPIY y las conclusiones de sus Salas, y observa que no se determinó que

ninguno de los condenados hubiera actuado con intención específica (CIJ, 2007, párr. 277). Otra frase de la CIJ fue también que en ninguno de los casos del TPIY relativos a los campos citados anteriormente, el Tribunal determinó que los acusados hubieran actuado con dicha intención específica (CIJ, 2007, párr. 354).

Entonces, por un lado, la CIJ se apoya en los alegatos determinados por el TPIY, ya que aquel Tribunal tiene competencia para decidir respecto de la comisión del genocidio en cuanto a la asignación de responsabilidad de individuos. Sin embargo, no concuerdo con el análisis de la CIJ basado en las decisiones del TPIY. El motivo se debe a que como mencionan los autores Goldstone y Hamilton (2011), el TPIY no contaba con todos los recursos para investigar todas las posibles acusaciones de genocidio desde 1992 hasta 1995, como sí tuvo la oportunidad de hacerlo la CIJ. (p.106). Por el contrario, la función del TPIY es de juzgar la responsabilidad del individuo respecto de un acto concreto de genocidio, no analizar la responsabilidad del Estado de Serbia frente a hechos internacionalmente ilícitos. Entonces, resulta incorrecto que la CIJ haya basado gran parte de su análisis sobre el crimen del genocidio en lineamiento con lo concluido por el TPIY. Ya que como se mencionó anteriormente, el TPIY no es el tribunal que se encarga de analizar la violación de hechos internacionalmente ilícitos en Estados sino únicamente en individuos.

Otro punto por criticar es cuando la CIJ señala que no hubo genocidio en zonas distintas que Srebrenica debido a que no se pudo comprobar que se cometió aquel crimen con la intención de destruir total o parcialmente a miembros de un grupo protegido. Es decir, según la CIJ, el problema principal era la falta de pruebas suficientes para determinar los actos del crimen de genocidio. No obstante, considero que la CIJ no buscó la manera de obtener las mejores pruebas posibles. Entonces, desde mi parecer, existe una contradicción por parte de la CIJ al no contar con pruebas suficientes, pero a la vez optar por no utilizar o buscar las mejores pruebas posibles.

Ejemplo de ello es cuando BYH solicitó copias inéditas de documentos que contenían información de actas de las reuniones del Consejo Supremo de Defensa de Serbia, el cual era el máximo órgano de decisión del país en 1995, y estaba compuesto por dirigentes políticos y militares de la RFY. Sin duda, aquellos documentos pudieron haber brindado un mejor análisis de los hechos ocurridos en 1992-1995 y descubrir o descartar si había algún plan de genocidio, se pudo haber descubierto lo discutido en las reuniones y llegar a la conclusión si es que había una intención de destruir y un control por parte de la RFY con RS. Ya que, en contraste de la CIJ, el TPIY pudo tener acceso de aquella documentación en el año 2012, posterior a la sentencia emitida por la CIJ en el 2007, y se reveló que el 90% de las municiones utilizadas por las tropas de Mladic durante toda la guerra fueron administradas por Serbia.

En esa misma línea, el vicepresidente de la CIJ, Al-Khasawneh, señaló también que aquel documento “pudo haber arrojado luz sobre cuestiones centrales del caso”. Asimismo, hubo otro documento que podría haber sido crucial para la determinación de responsabilidad de Serbia. Este documento era la declaración[11] oficial realizada por el

[11] En este documento, se encontraba la declaración oficial realizada por el Consejo de ministros de Serbia el 15 de junio un canal de televisión de Belgrado, de 2005, tras la exhibición en el 2 de junio de 2005, de una grabación en vídeo del asesinato por una unidad paramilitar de seis prisioneros musulmanes bosnios. En la declaración del documento se condenaba la matanza de Srebrenica, se decía que los autores y organizadores no representaban a Serbia ni Montenegro, sino que un régimen antidemocrático de terror. Los ministros de Serbia reconocieron el crimen, pero no responsabilizaron al nuevo gobierno de Serbia sobre este, sino a la administración del antiguo gobierno bajo Milosevic.

Consejo de ministros de Serbia el 15 de junio de 2005, sobre la cual se aceptaba la responsabilidad de Serbia cuando estuvo bajo el gobierno de Milosevic. Esta declaración de responsabilidad hacia referencia a una videograbación con fecha el 2 de junio de 2005 en la cual se mostró el asesinato de seis prisioneros bosnios musulmanes por una unidad paramilitar. Este se explicará de manera más detallada en párrafos posteriores al informe.

Sin embargo, a pesar de que la CIJ, en virtud del artículo 49 de su Estatuto[12], pudo haberle solicitado la entrega de aquella documentación a la RFY, la CIJ no lo hizo. Por el contrario, la respuesta de la CIJ a la solicitud de aquel documento por parte de BYH fue que la CIJ ya disponía de plena documentación y otras pruebas especialmente en los expedientes del TPIY los cuales son de fácil acceso para todo el público (SáCuoto, 2007). Notablemente, el hecho de que la CIJ tenga acceso a otro tipo de documentación no implica que aquellos documentos brinden más medios probatorios que el otro documento perteneciente al Consejo Supremo de Defensa de Serbia o la declaración del Consejo de ministros de Serbia, cuyo resultado de prueba podría haber sido más sólido.

Resulta importante mencionar que la CIJ no logró explicar el motivo por el cual no decidió buscar más pruebas como por ejemplo la mencionada en párrafos anteriores. A su vez, se debe mencionar que la CIJ no reconoce ninguna norma formal o rígida en cuanto a la valoración de las pruebas o el peso relativo de cada una. La CIJ dispone de un amplio margen de discrecionalidad en la materia el cual está limitado únicamente por la prohibición de arbitrariedad. (Kolb, 2013, p.932). En ese sentido, la CIJ cuenta con libre decisión de valorar como desee las pruebas obtenidas, no existe ninguna regla relativa sobre el peso de las pruebas.

Sin embargo, a pesar de esa libre discrecionalidad, reitero mi posición, sobre la lógica de la CIJ respecto al tema de valoración de la prueba. Considero que hubo incongruencias, ya que, al ser la intención de destruir un elemento sumamente difícil de comprobar, la CIJ pudo haber intentado el máximo esfuerzo para reunir pruebas con sustento cuando tuvo la oportunidad de haberlo hecho. Como muestra de ello, el artículo 62 de su Reglamento señala que la CIJ pudo haber invitado, en cualquier momento, a las Partes a presentar medios de prueba o brindar explicaciones que considera necesarias para aclarar cualquier duda. Sin embargo, la CIJ no solicitó más pruebas ni tampoco revirtió la carga de la prueba contra la RFY como sucedió en 1948, en el asunto del Estrecho de Corfú (Reino Unido contra Albania) como será explicado con más detalle en los párrafos posteriores del informe.

Considero también que hubo otro desacierto en las decisiones tomadas por la CIJ al momento del análisis del caso, este se basa en que muchas de sus conclusiones fueron en base al razonamiento de otros Tribunales Penales Internacionales. Estos últimos señalaron en diversas sentencias que no se cumplió el elemento de intención específica cuando juzgaron a los actores responsables del genocidio en el ámbito de individuos, sin embargo, considero que la CIJ no debió de haber basado la mayoría de sus decisiones en el análisis de otro Tribunal, sino analizar sus propias decisiones.

[12] Artículo 49: Aun antes de empezar una vista, la Corte puede pedir a los agentes que produzcan cualquier documento o den cualesquiera explicaciones. Si se negaren a hacerlo, se dejará constancia formal del hecho.

En la misma línea que los autores Goldstone y Hamilton (2011), el problema del razonamiento de la CIJ es que este tenía que analizar si es que en ese momento se había producido un genocidio en BYH. En contrario a lo que realmente sucedió que fue que la CIJ pareciera que habría analizado si el genocidio fue cometido por un grupo de individuos que fueron procesados ante el TPIY. (p 105) Entonces, el tomar como referencia decisiones pasadas de otros Tribunales no resulta prudente ya que el TPIY no cuenta con los mismos recursos de medios de prueba que la CIJ sí cuenta.

Asimismo, la CIJ cuenta con otro mandato de investigar el genocidio ocurrido en BYH. Es decir, desde mi punto de vista, la CIJ debió de haber reunido sus recursos y haberlos analizado por su propia cuenta. El TPIY no se encarga de juzgar si se produjo un genocidio en un lugar determinado, sino que este se encarga de determinar si un individuo es o no responsable de un acto concreto de genocidio. En suma, considero que fue errada la decisión de la CIJ en basar su opinión de si hubo o no genocidio durante los años 1992-1995 en base a la opinión de otro Tribunal cuyas competencias son muy diferentes a la de la CIJ.

No obstante, cabe mencionar que, no resulta del todo negativo la cercanía de la CIJ hacia el TPIY puesto que, resulta lógico que la CIJ determine hechos que ya han sido analizados por el TPIY. El problema aparece cuando la CIJ toma los vacíos de conclusiones que el TPIY no pudo abarcar respecto de si el genocidio se había llevado a cabo en Srebrenica. Pues el TPIY solo probó que el acusado había cometido el genocidio. Es decir, las búsquedas de pruebas no fueron las mismas en el CIJ y TPIY ya que en una se buscaba la atribución de responsabilidad de un Estado sobre los hechos ocurridos en un determinado lugar por las fuerzas armadas VRS, a diferencia del análisis que realizó el TPIY sobre el análisis de la prueba de si el acusado cometió o no genocidio. Por lo tanto, resulta poco congruente cuando se extraen las conclusiones de un órgano jurisdiccional por otro.

Entonces, de manera concluyente, la definición del crimen del genocidio según el artículo II en virtud de la Convención del Genocidio, se da cuando existen dos elementos que demuestran los actos que comprenden el genocidio (del inciso a) el e). El primer elemento es el *actus reus* o también llamado las conductas materiales, esto se encuentra estipulado en el inciso a) al e). El segundo elemento es el *mens rea* o también llamado la intención de destruir a un grupo protegido. Estos grupos son grupos nacionales, raciales, étnicos y religiosos. Segundo, desde mi punto de vista, el análisis de la CIJ en cuanto a medios probatorios resulta incongruente. Todo ello basado en que la CIJ, a pesar de que aplicó un alto nivel de prueba, este no solicitó ni buscó la mejor manera posible de obtener todos los recursos que pudieran permitir un correcto análisis de las atrocidades cometidas entre 1992 y 1995 en Bosnia y Herzegovina. Por último, también se concluyó que se pudo haber realizado un mejor trabajo si es que no se hubiera seguido estrictamente lo analizado por el TPIY. Ya que de esa forma se hubiera confirmado el genocidio no solamente en Srebrenica, sino también en otros lugares de BYH.

### 4.2.2. ¿Estaba Serbia obligada por la Convención para la Prevención y la Sanción del Delito de Genocidio al momento en que ocurrieron los hechos?

La importancia de la respuesta a este problema secundario se basa en dejar en claro las obligaciones que tenían los Estados luego de la disolución de la RFSY. Como fue mencionado anteriormente, el 27 de abril de 1992, la RFY, emitió una declaración formal a través de la cual aceptaba su carácter de continuadora de la personalidad jurídica de la RFSY. En ese sentido, la pregunta de esta sección se basa si Serbia, quien formaba parte de la RFY en 1992, tenía la obligación de cumplir con la Convención de Genocidio durante los años 1992 a 1995.

Entonces, este segundo problema secundario contará con tres secciones, la primera será un análisis que se centrará en el principio de sucesión de Estados a la luz del derecho internacional. Asimismo, se desarrollará la solicitud de Serbia de no ser juzgado por la CIJ debido a su falta de competencia. Como segundo punto, se comentará brevemente sobre la decisión de la CIJ en las excepciones preliminares de 1996 y también el análisis realizado en el 2001. Como último punto, mencionaré mi postura sobre el análisis realizado del segundo problema secundario.

Dentro de este marco, se explicará de acuerdo con el derecho internacional, conceptos relacionados con la personalidad jurídica internacional. Para empezar, es importante mencionar que no existe una norma internacional universal que determine los elementos del Estado como sujeto de derecho internacional. Por ello, para efectos del presente informe se recurrirá a la normativa regional y doctrina a fin de cubrir aquella laguna jurídica. Sobre la normativa regional se encuentra la Convención sobre los derechos y deberes de los Estados o también denominada Convención de Montevideo de 1933. En su artículo 1 se señala que el Estado, como sujeto del derecho internacional debe de reunir cuatro requisitos. El primero es la población permanente, el segundo es el territorio determinado, el tercero es el gobierno y por último se señala a la capacidad de entrar en relaciones con los demás Estados.

Con la finalidad de complementar lo señalado en la Convención de Montevideo, recurriré a doctrina del autor Pierre-Marie Dupuy (2003). Aquel autor señala que para que un Estado se conforme se requieren tres elementos: la población, el territorio y el gobierno (p.97). En cuanto a la población, esta consiste en un grupo de personas que residen en un determinado territorio. El vínculo común entre los mismos sería la nacionalidad. Sobre el territorio, se refiere a un espacio geográfico, terrestre, aéreo y marítimo donde el Estado ejerce su competencia de manera exclusiva y excluyente. (Rodríguez, 2009, p.80). Por último, se encuentra el gobierno, el cual se encarga de mantener el orden interno y las relaciones internacionales externas con otros países. Adicionalmente, el autor Carrillo Salcedo considera que existe un cuarto elemento para la conformación de un Estado:

> El derecho internacional exige tres requisitos para que exista un Estado: un territorio, una población y un gobierno capaz de mantener el control efectivo de su territorio y de encargarse de las relaciones internacionales con otros Estados. Pero estos elementos han de presentar ciertos caracteres y estar organizados de cierta manera, exigencias éstas que se expresan en la noción de soberanía

> que, en definitiva, es el criterio básico del concepto de Estado en derecho Internacional. (Carrillo, 1976, p. 441)

Asimismo, el autor Rezek (1998) indica que además de los tres elementos del territorio, población y gobierno, el Estado existe siempre y cuando se cumpla con el elemento de la soberanía. Soberanía en el sentido que el gobierno no se subordine a ninguna otra autoridad estatal. (p.226). Entonces, en la línea con lo mencionado por los autores anteriores, la soberanía consiste en que un Estado tenga la capacidad jurídica de decidir libremente sobre sus asuntos tanto internos como externos. En cuanto a asuntos internos, son las decisiones que el Estado toma de manera independiente al momento de establecer su sistema de gobierno, representantes políticos, asignación de poderes, etc. En contraste de los asuntos externos que es la capacidad que tiene un Estado de establecer relaciones diplomáticas con otros Estados.

No debe confundirse los términos gobierno y soberanía. El primero significa la acción de gobernar a un Estado que ha sido elegido a través de un sistema de votación el cual definirá y administrará las instituciones públicas del Estado. En cambio, el segundo es el poder o capacidad jurídica que tiene un Estado para responder de manera independiente frente a cuestiones jurídicas internas o externas.

En este breve desarrollo de conceptos de los elementos del Estado, se puede ilustrar que tanto BYH como la RFY son Estados de acuerdo con la definición del derecho internacional público. La razón de ello se debe a que ambos cumplen con la definición de los elementos territorio, población, gobierno y soberanía. En el caso de BYH, en 1992 contaba con 51.209 km² de extensión territorial, 4.276 millones de personas, se encontraba bajo el gobierno de la presidencia estatal de Alija Izetbegovic y gozaba de soberanía interna y externa. Sobre la RFY, en 1992 contaba con 255.804 km² de extensión territorial, 21.271 millones de habitantes (antes de la disolución), se encontraba bajo el gobierno de la presidencia colectiva de Branko Kostic y también gozaba de soberanía tanto interna y externa.

Ahora bien, el siguiente punto a mencionar será sobre la formación y transformación de los Estados, en especial se enfocará en el reconocimiento de Estados y la sucesión. En función de lo planteado, según la autora Salamanca (2012), luego de que se reúnen los elementos mencionados anteriormente, el siguiente paso es el reconocimiento del Estado. Este reconocimiento, puede darse de dos maneras, a través de un acto unilateral, el cual no necesita la reacción o consentimiento del nuevo Estado y a través de un acto discrecional, sobre este último se refiere a que los Estados no se encuentran obligados a reconocer a otros nuevos Estados (p.151). No obstante, la creación del nuevo Estado no depende de la aprobación o reconocimiento de los otros Estados. Es decir, el hecho de que un Estado no reconozca al nuevo Estado, no quiere decir que este no gozará de soberanía territorial o de alguno de los elementos mencionados anteriormente.

A continuación, se desarrollará brevemente el significado de la sucesión de Estados, de acuerdo con el autor Remiro (1997), la sucesión consiste en el cambio de titularidad de la soberanía territorial entre un Estado predecesor y un Estado sucesor. Ocurre cuando un Estado que existía antes del nacimiento del nuevo Estado, se extinguirá cuando aparezca el nuevo Estado, es decir, el nuevo Estado sucesor reemplazará al anterior

(Estado predecesor). Ello implica que, hay un cambio en la soberanía territorial, pero no necesariamente desaparece todo el Estado preexistente, además de ello, este cambio de titularidad se realiza de manera pacífica. (p.58). Ahora bien, existen dos convenciones sobre la Sucesión de Estados, la primera es la Convención de Viena sobre la Sucesión de Estados en Materia de Tratados de 1978 (en adelante la Convención de Sucesión) y la segunda es la Convención sobre la Sucesión de Estados en materia de Bienes, Archivos y Deudas del Estado de 1983.

Respecto de la primera Convención, BYH y la RFY son Estados Parte, sin embargo, respecto de la segunda Convención, esta no fue universalmente aceptada. Como comenta el autor Odriozola (1999), esta fue aprobada con 54 votos a favor, 11 en contra y 11 abstenciones. Por lo que esta no entró en vigor en términos del artículo 50[13] de su propia convención. (p.191). Actualmente cuenta con 6 signatarios y 7 Estados Parte.

Para aterrizar un poco más a la definición de sucesión aceptada por la comunidad internacional, se citará lo mencionado en la Opinión N°1 (29 de noviembre de 1991) de la Comisión de Arbitraje de la Conferencia sobre Yugoslavia:

> Que, de conformidad con la definición aceptada en el derecho internacional, la expresión "sucesión de Estados" significa la sustitución de un Estado por otro en la responsabilidad de las relaciones internacionales del territorio. Esto ocurre cuando hay un cambio en el territorio del Estado. El fenómeno de la sucesión de Estados se rige por los principios del derecho Internacional, de los cuales se inspiraron las Convenciones de Viena del 23 de agosto de 1978 y abril de 1983 (Ragazzi, 1992, p. 1495).

Entonces, sobre la definición de sucesión de Estado, se puede verificar que luego de la disolución de la RFY, hubo Estados que mantuvieron obligaciones que eran parte de Yugoslavia, como Serbia y Montenegro. Para seguir indagando sobre ello, a continuación, se mencionarán los supuestos que encajan en la sucesión de un Estado. Según el autor Daillier (2009) entre los principales supuestos sobre la sucesión de Estados se encuentran los siguientes: secesión, cesión de territorio, independencia (descolonización), disolución, y unificación. (pp.49-52) Para fines del expediente, se procederá a explicar sobre la disolución, el cual aplica a la RFSY-RFY con Serbia y Montenegro, así como también la RSFY con BYH.

La disolución se refiere a cuando el Estado predecesor se desintegra en dos o más Estados, entonces, estos mismos serían los Estados sucesores (Daillier, 2009, p.35). La disolución quiere decir que, debido a la desaparición de un Estado predecesor, aparece la creación de nuevos Estados (Remiro, 1997, pp.49). Al aterrizar este concepto al informe, se puede colegir que lo ocurrido con la RFSY a partir de 1991 fue una disolución. Además, ello también fue confirmado por la misma Opinión N°1 del 29 de noviembre de 1991 por la Comisión, ya que esta indicó que "la RSFY se hallaba en un proceso de disolución". Esta disolución, según la Comisión habría culminado en julio de 1992, así fue señalado en su Opinión N°8.

[13] La presente Convención entrará en vigor el trigésimo día a partir de la fecha en que haya sido depositado el decimoquinto instrumento de ratificación o de adhesión.

¿Pero qué sucede en el caso de una disolución con las obligaciones que se encuentran emanadas de los tratados de los que la antigua Yugoslavia fue parte? De un lado, en el caso de los nuevos Estados como Croacia, Eslovenia, Macedonia, entre otros, las obligaciones emanadas de los tratados dejan de estar en vigor y cada Estado puede hacerse parte de los tratados de manera voluntaria y explícita. Aquello se encuentra señalado en el artículo 16 de la Convención de Sucesión, cuando señala que ningún Estado de reciente independencia se encuentra obligado a mantener en vigor un tratado del Estado predecesor. Asimismo, los Estados tienen la posibilidad de hacerse parte del tratado mediante una notificación de sucesión conforme al artículo 17 del mismo tratado.

De otro lado para los Estados continuadores, de acuerdo con el artículo 29 de la Convención de Viena sobre el derecho de los tratados de 1969, señala que un Tratado será obligatorio para la totalidad de su territorio, es decir, la RFY debe de seguir cumpliendo los tratados de la RFSY. Asimismo, de acuerdo con el autor Andaluz (2007) en los supuestos de cesión y descolonización, se aplica la regla de tabula rasa, es decir, que los tratados del Estado predecesor no vincular al sucesor. Para el caso de secesión, disolución y unificación son regulados bajo el principio de continuidad. (p.396). Entonces, en el caso de la RFY se aplicaría el principio de continuidad en el caso de disolución, es decir, se transfiere automáticamente los derechos y obligaciones de la RFSY (Estado predecesor) a la RFY (Estado sucesor).

De este modo, luego de haber explicado los conceptos de reconocimiento y sucesión de Estados, se procederá a analizar el proceso de solicitud de la RFY hacia la CIJ respecto de su jurisdicción. A pesar de que, la cronología de los hechos de la disolución de la RFSY ya ha sido abordada de manera detallada en la sección de antecedentes, se traerá nuevamente a la sección algunos hechos cruciales que sucedieron en los años ochenta. La disolución de la República Federativa Socialista de Yugoslavia y su vinculación con la capacidad de un Estado para comparecer ante la CIJ fue un punto relevante sobre la sentencia dictada sobre el caso de BYH. (Gutierrez, 2009). Para empezar, la RFSY fue uno de los miembros originales de la ONU. Es decir, fue uno de los miembros que firmó la Carta de la ONU el 26 de junio de 1945 y la ratificó el 19 de octubre de 1945.

Pero ¿por qué resulta relevante el hecho de que la RFSY haya sido miembro original de la ONU? Sucede pues que, de acuerdo con el artículo 92 de la Carta de la ONU, la CIJ es un órgano principal de la ONU. Asimismo, en su artículo 93 inciso 1 de la misma Carta se señala que “todos los miembros de la ONU son ipso facto partes en el Estatuto de la CIJ”. Entonces, la RFSY al haber sido miembro de la ONU, fue miembro también del Estatuto de la CIJ, por lo que se encuentra bajo la jurisdicción de la CIJ. No obstante, en el ámbito del derecho internacional, es necesario que para que un caso se someta a la CIJ, tanto el demandante como el demandado debe de expresar de manera explícita su consentimiento. En ese sentido, la CIJ solo tendrá competencia para conocer de un asunto si los Estados implicados han aceptado su jurisdicción de las siguientes maneras:

1. En virtud de un acuerdo especial concluido entre los Estados con el propósito de someter su controversia a la Corte;
2. En virtud de una cláusula jurisdiccional. Este es el caso en que los Estados son partes de un tratado en el que una de sus cláusulas prevé que, en caso

de que surja en el futuro una controversia acerca de la interpretación o la aplicación de dicho tratado, uno de ellos la someta a la Corte;

3. Por el efecto recíproco de declaraciones hechas por ellos bajo los términos del Estatuto, mediante las cuales cada uno de ellos ha aceptado la jurisdicción de la Corte como obligatoria en caso de controversia con cualquier otro Estado que acepte la misma obligación. Cierto número de estas declaraciones, que deben depositarse en poder del Secretario General de las Naciones Unidas, contienen reservas que excluyen determinadas categorías de controversias. (Corte Internacional de Justicia, s/f.)

Entonces, el hecho de que un Estado forme parte de la Carta de la ONU y en ese sentido, del Estatuto de la CIJ no quiere decir que la CIJ tenga jurisdicción automática en su caso en particular. Como menciona la autora Gutierrez (2009)

> para que la Corte conozca deben reunirse dos recaudos; en primer lugar, que los Estados gocen de la capacidad de comparecer ante el Tribunal y, si este requisito se cumple, que además se haya reconocido la obligatoriedad de su jurisdicción (p.135)

Visto de esta forma, la capacidad para comparecer ante la CIJ la tienen todos los Estados miembros de la ONU, esto se encuentra en el artículo 35 inciso 1 del Estatuto de la CIJ. Sin embargo, de acuerdo con el inciso 2 del mismo artículo, esta capacidad también podrán obtenerla Estados que no formen parte del Estatuto, no obstante, aquello dependerá de lo que el Consejo de Seguridad fije en sus disposiciones especiales de acuerdo con los tratados vigentes.

Continuando con la narrativa inicial, la RFSY era miembro de la ONU y, por tanto, tenía la capacidad para comparecer ante la CIJ. Asimismo, la RFSY ratificó la Convención de Genocidio el 29 de agosto de 1950, por lo que, bajo el artículo IX[14] de la Convención en mención, se reconoce la competencia de la CIJ en la controversia entre BYH y RFSY. A partir de ello, se desprende que el consentimiento por parte de la RFSY de comparecer ante la CIJ se encontraría en el apartado segundo: en virtud de una cláusula jurisdiccional. El cual justifica que el consentimiento de la RFSY se basa no en la membresía a la ONU sino en las disposiciones de la Convención. A través de una cláusula jurisdiccional, el artículo IX, prevé que, en caso de que surja en el futuro una controversia acerca de la interpretación o la aplicación de dicho tratado este será sometido a la CIJ.

Ahora bien, poco antes de la disolución de la RFSY hubo una serie de conflictos armados en la región de los Balcanes que afectaron la unión de la RFSY, la cual estaba conformada por las seis repúblicas y dos provincias autónomas. A raíz de la disolución de la RFSY, los Estados miembros de la esta empezaron a independizarse. En primer lugar, Croacia y Eslovenia se independizan el 25 de junio de 1991, luego Macedonia se independiza el 8 de setiembre de 1991. Más tarde BYH se independiza el 6 de marzo de 1992. No obstante, en el caso de la RFSY, no hubo una declaración de independencia, sino que, frente a aquellos sucesos, Serbia y Montenegro decidieron en

[14] Las controversias entre las Partes contratantes, relativas a la interpretación, aplicación o ejecución de la presente Convención, incluso las relativas a la responsabilidad de un Estado en materia de genocidio o en materia de cualquiera de los otros actos enumerados en el artículo III, serán sometidas a la Corte Internacional de Justicia a petición de una de las Partes en la controversia.

abril de 1992 crear un nuevo Estado yugoslavo. Por ello, fue en el 27 de abril del mismo año, en la Conferencia de sus Asambleas junto con la Asamblea de la RFSY, se declaró que la nueva República, la RFY continuaría con la personalidad jurídica de la RFSY.

En mayo de 1992, a través de la Resolución 757 de 1992 del Consejo de Seguridad de la ONU, fueron admitidas BYH, Croacia y Eslovenia como nuevos miembros de la ONU, por lo que ellos ya gozaban de independencia y reconocimiento internacional. Sin embargo, en el caso de la RFY, es decir Serbia y Montenegro, el 1 de junio de 1992, de acuerdo con la Resolución 777 de 1992, el Consejo de Seguridad observó que la reivindicación de la RFSY hacia la nueva RFY no había gozado de aceptación general (Gutierrez, 2009, 141). En ese sentido, el Consejo de Seguridad, siguiendo sus funciones, le recomendó a la Asamblea General que decidiera si la RFY deberá de solicitar su admisión como miembro a la ONU. La respuesta por parte de la Asamblea General en su Resolución 47/1, 22-IX-1992 del 15 de diciembre, fue que la RFY no podía asumir la continuidad en calidad de miembro de la ONU ni podría participar en los trabajos de este órgano, por lo que tenía que presentar una solicitud de admisión a la Organización.

Años más tarde, el 31 de octubre de 2000, el Consejo de Seguridad examinó la solicitud de la RFY para ser admitida como miembro de la ONU y recomendó a la Asamblea General que fuera admitida como miembro de la ONU a través de su Resolución 55/12. (Gutierrez, 2009, 144). Fue así como el 1 de noviembre del 2001 la RFY fue el nuevo Estado miembro tanto de la ONU y parte del Estatuto de la CIJ.

En ese sentido a partir del 2000 es que la RFY podría emitir su consentimiento en someterse a la competencia de la CIJ. Sin embargo, la autora Gutiérrez (2009) cuestiona si el consentimiento por parte de RFY es válido a partir del 2000 o este consentimiento ya estaba implícito a partir de la cláusula mencionada anteriormente sobre el artículo IX de la Convención de Genocidio. Por lo que, considero que, independientemente de que la RFY haya sido aceptada y reconocida como miembro de la ONU en el 2000, el Estado ya se encontraba anteriormente obligado a cumplir con las obligaciones de prevenir y sancionar el genocidio.

Entonces, de acuerdo con los supuestos de sucesión mencionados anteriormente, el caso de la RFY es un caso de disolución, por lo que se producen efectos que modifican la personalidad jurídica al nuevo Estado. De igual manera se debe de recordar que la RFY acordó el 27 de abril de 1992 que continuaría con la personalidad jurídica de la RFSY, por lo que este debía de continuar cumpliendo con las obligaciones internacionales que ratificó la RFSY en sus tratados. Dentro de este orden de ideas se procederá a narrar las excepciones preliminares presentadas tanto por la RFY, y la declaración de aquellas excepciones por BYH. Pero antes, brevemente se definirá lo que es una excepción preliminar.

> Este es el medio procesal por el que una Parte en el asunto, normalmente es el demandado puede plantear objeciones a la competencia o admisibilidad de la demanda. Se denomina excepción ya que se establece una excepción al proceso que analiza el fondo de la demanda con la finalidad de que el Tribunal se ocupe de estas excepciones de manera prioritaria. (Kolb, 2013, p.224).

Entonces, es necesario que la CIJ revise aquellas excepciones antes de que se analice la cuestión de fondo, por ende, antes de ese análisis se debe confirmar que la CIJ es competente y que la demanda es admisible. Por un lado, el 26 de junio de 1995, la RFY presentó siete excepciones preliminares sobre las pretensiones de BYH[15], de acuerdo con el artículo 79 párrafo 1 del Reglamento de la CIJ. A través de este documento, se indicó también que la RFY se abstendrá por el momento, de acuerdo con el artículo 79 párrafo 3 del Reglamento de la CIJ a presentar el memorial de contestación. En estas excepciones preliminares, la RFY señaló que los hechos del fondo del caso son elementos de lucha civil, por lo que no se trata de una controversia internacional sobre la que la CIJ pueda ejercer su competencia. En ese sentido, la RFY considera que la CIJ se ha extralimitado de su competencia, y que la demanda no debería de ser admisible.

Entonces, de las siete excepciones preliminares presentadas por la RFY se pueden resumir lo siguiente: la primera excepción preliminar se refirió a la existencia de la guerra civil lo cual excluye la existencia de un conflicto jurídico de carácter internacional, por lo que resulta una aplicación inadmisible, fuera de la competencia de la CIJ. La segunda excepción preliminar señalaba que, Allja Izetbegovic no era presidente de la BYH en el momento en que concedió la autorización para incoar el procedimiento, y que la decisión de incoar el procedimiento no fue adoptada por la Presidencia ni por el Gobierno como órganos competentes. Por lo tanto, RFY señala que, la autorización para incoar y llevar a cabo el procedimiento se concedió en violación de las normas de derecho internacional privado. En tanto, la RFY indica que la demanda de BYH no es admisible.

Luego, la tercera excepción preliminar presentada por la RFY señaló que, BYH no estableció su Estado de conformidad con el principio de igualdad de derechos y autodeterminación de los pueblos, por ello, no pudo suceder a la Convención de Genocidio. Asimismo, la RFY señala que BYH no se adhirió a la Convención de conformidad con las disposiciones de la propia Convención. En tanto, BYH no es parte de la Convención y la CIJ no tiene jurisdicción para ese caso. Respecto de la cuarta excepción, la RFY renunció a esta y la CIJ aceptó el retiro de esta.

La quinta excepción se basó en que, según la RFY, la Convención de Genocidio solo puede aplicarse cuando el Estado Parte tiene jurisdicción territorial en las zonas en las que se ha violado las obligaciones de la misma Convención. Las obligaciones en mención son las siguientes: prevenir y sancionar el crimen de genocidio (artículo I), la promulgación de la legislación necesaria para dar efecto a la Convención (artículo V) y la obligación de enjuiciar a las personas acusadas de genocidio por un tribunal competente del Estado en cuyo territorio se haya cometido el crimen (artículo VI). Ante ello, la RFY señala que ellos no contaban con la jurisdicción territorial en las zonas donde BYH refirieron la demanda.

La sexta excepción es en caso la CIJ no acepte ninguna de las excepciones preliminares, la RFY indicó que, si hubiera que interpretar la Notificación de sucesión presentada por BYH el 29 de diciembre de 1992, esta constituiría un instrumento de adhesión de acuerdo con el artículo IX de la Convención. Entonces, solo habría podido surtir efecto la adhesión a la Convención, a partir del nonagésimo día siguiente a su

[15] En este acápite se resume lo señalado en las Excepciones preliminares de la República Federativa de Yugoslavia - 26 de junio de 1995

depósito[16], es decir el 29 de marzo de 1993. Por ello, RFY señaló que la CIJ solo era competente para conocer el asunto a partir del 29 de marzo de 1993, y en consecuencia, todas las pretensiones del demandante relativas a los hechos ocurridos con anterioridad no son competencia de la CIJ.

Por último, en la séptima excepción preliminar, la RFY indicó que, no considera posible que la fecha de notificación de sucesión del 29 de diciembre de 1992 de BYH sea igual a la fecha de su adhesión, todo ello de acuerdo con el artículo XIII de la Convención. Por ello, según la RFY, la Convención surtió efecto a partir del 29 de marzo de 1993, tal como fue señalado en el párrafo anterior. Por ello, si la CIJ considera que la notificación de sucesión surgió efectos jurídicos válidos, la Convención de Genocidio ha sido operativa entre las partes desde el 29 de diciembre de 1992. Entonces, la CIJ no tendría competencia para juzgar los hechos anteriores al 29 de diciembre de 1992.

Por otro lado, el 14 de noviembre de 1995, se presentó la declaración de BYH sobre las excepciones preliminares presentadas por la RFY. A continuación, se mencionan brevemente las respuestas a cada una de las excepciones preliminares planteadas por la RFY, en la primera, BYH indica que carece de fundamento. La participación de fuerzas y personal de la RFY en el combate en BYH, en el curso del cual se cometió genocidio, convierte a la RFY en parte en una "disputa" con la BYH. En lo que respecta a este tipo de controversias entre Estados Parte en la Convención sobre el Genocidio, el artículo IX de la Convención prevé el recurso obligatorio a la CIJ. Por lo tanto, la demanda es totalmente admisible. La respuesta de la segunda excepción preliminar, BYH, indica que Allja Izetbegovic era reconocido por la ONU como jefe de Estado de BYH. Asimismo, su condición de jefe fue reconocida en el Acuerdo de Dayton ya que este fue quien consignó su firma. Por ello, BYH indica que debe rechazarse esta excepción.

Respecto de la respuesta de la tercera excepción, mencionan que cuando BYH actuó de acuerdo con el derecho inherente de autodeterminación e inició el proceso de traducir la soberanía de su pueblo en independencia formal, tenía derecho a hacerlo - unilateralmente, de acuerdo con la voluntad libremente expresada de los representantes de su pueblo. El derecho a la secesión estaba claramente expresado en la Constitución Federal y no se impusieron restricciones ni condiciones al ejercicio de este derecho. Incluso si la aplicación del derecho a la independencia hubiera estado sujeta a un requisito de acuerdo de los órganos federales o de otro tipo dentro del sistema constitucional de la RFY (que no lo estaba), tal requisito habría sido irrelevante en este caso.

La RFY renunció la cuarta excepción y la CIJ aceptó el retiro de esta. Sobre la quinta excepción, BYH señaló que la Convención no se limita ni al territorio del Estado demandado ni a los actos cometidos por particulares. Solamente existe una disposición de la Convención que prevé una aplicación territorial limitada de la misma Convención, esta se encuentra en el artículo VI. En la primera parte de dicho artículo se señala que las personas acusadas de genocidio o de otros actos del artículo IV serán juzgadas por el tribunal competente del territorio en que el acto fue cometido o ante la Corte Penal Internacional competente.

[16] Convención de Genocidio: Artículo XIII (…) La presente Convención entrará en vigor el nonagésimo día después de la fecha en que se haga el depósito del vigésimo instrumento de ratificación o de adhesión. (…)

Respecto de la sexta excepción, BYH señaló que contrariamente a lo que afirman los Estados demandados, la notificación de sucesión no puede transformarse en una notificación de adhesión. Asimismo, BYH señaló que la CIJ en el Auto-Solicitud de indicación de medidas provisionales del 8 de abril de 1993, observó que el secretario general trató a BYH no como adherente sino como sucesora de la Convención de Genocidio.

Sobre la séptima excepción, BYH señala que, de acuerdo con la Comisión de Derecho Internacional en adelante (CDI), una notificación de sucesión surte efecto en la fecha de independencia del Estado sucesor. Esto se encuentra en la sección de la notificación de la sucesión en su comentario al proyecto de artículos sobre sucesión de Estados en materia de tratados A/CONF.80/4 Volumen III. En su artículo 22, la CDI señala que la práctica convencional parece confirmar que, al hacer una notificación de sucesión, un Estado de reciente independencia debe considerarse Parte del tratado desde la fecha de la independencia. (p.62)

De este modo, ahora se presentará brevemente el análisis realizado por la CIJ frente a las posiciones sobre excepciones preliminares de BYH y la RFY[17]. En el Fallo de excepciones preliminares del 11 de julio 1996, la CIJ consideró que, en la primera excepción preliminar de la RFY, la controversia que existe entre ambas partes en virtud de la Convención de Genocidio y el artículo IX, corresponde a una controversia de carácter internacional. La CIJ señala también que no puede considerar que la demanda sea inadmisible por el único motivo que, los hechos fueron llevados a cabo en un contexto de conflictos armados internos como lo señala la RFY. Por ello, aquella primera excepción fue desestimada por la CIJ.

En cuanto a la segunda excepción de la RFY, en el auto del 8 de abril de 1993, Allja Izetbegovic era reconocido en la ONU como jefe de Estado de BYH. Esta condición de jefe continuó siendo reconocida en otras organizaciones internacionales, y acuerdos internacionales tales como los Acuerdos de Dayton (este lleva su firma). Por lo tanto, la segunda excepción es rechazada por la CIJ y se concluye que la demanda presentada por BYH el 20 de marzo de 1993 es admisible.

Respecto de la tercera excepción, la CIJ indica que BYH se convirtió en miembro de la ONU tras las decisiones adoptadas el 22 de mayo de 1992 por el Consejo de Seguridad y la Asamblea General, órganos competentes en virtud de la Carta de la ONU. En ese sentido, al ser miembro de la ONU, la BYH puede aplicar el artículo IX de la Convención y someter su solicitud de demanda ante la CIJ. Así pues, según la CIJ, BYH fue parte de la Convención desde el momento en que la notificación de sucesión surtió efectos. Es decir, desde que BYH adquirió su independencia el 6 de marzo de 1992, por lo que, desde aquella fecha la CIJ es competente de revisar los hechos controvertidos por parte de ambas Partes. Sobre la cuarta excepción preliminar, esta fue retirada por la RFY, ya que la RFY renunció a la misma durante el procedimiento oral.

Sobre la quinta excepción preliminar, la CIJ señaló que, respecto de los problemas territoriales vinculados a la aplicación de la Convención, el artículo VI se limita a prever

[17] En este acápite se resume lo señalado el fallo por la CIJ el 11 de julio de 1996

que las personas juzgadas por uno de los actos prohibidos de la Convención serán juzgadas por un tribunal competente del Estado en cuyo territorio se cometió el acto. Asimismo, la CIJ recuerda a la RFY que en la Resolución 96 (1) de la Asamblea General de la ONU del 11 de diciembre de 1946, dejó en claro que se debe condenar y castigar el crimen de genocidio como un crimen del derecho internacional. En ese sentido, lo señalado en la Convención son principios que las naciones civilizadas reconocen como vinculantes para los Estados, incluso sin ninguna obligación convencional. Entonces, se deduce que los derechos y obligaciones consagrados en la Convención son *erga omnes*. Por lo tanto, la CIJ indicó también que la obligación que tiene cada Estado de prevenir y sancionar el crimen de genocidio no se encuentra limitada territorialmente por la Convención. Por todo ello, la CIJ rechaza la quinta excepción.

Sobre las sexta y séptima excepciones, la RFY, se basó en el principio de irretroactividad de actos jurídicos, ya que indica que la CIJ solo puede ocuparse de hechos posteriores a las diferentes fechas en las que la Convención de Genocidio pudo haber sido aplicable a las Partes. Sobre ello, la CIJ señala que en la Convención no existe ninguna cláusula cuyo objeto o efecto sea limitar de tal modo el alcance de su competencia *ratione temporaris*, ni tampoco las Partes formularon ninguna reserva a la Convención

Entonces, luego de que la CIJ llegó a la conclusión de que existe tanto *ratione personae* como *ratione materiae*, en virtud del artículo IX de la Convención, la CIJ se declara competente para dar efecto a la Convención sobre Genocidio en relación con los hechos relevantes acontecidos desde el inicio del conflicto que tuvo lugar en BYH. En consecuencia, la CIJ rechaza las excepciones preliminares sexta y séptima.

Luego la RYF el 24 de abril de 2001, presentó una solicitud de revisión del fallo dictado por la CIJ el 11 de julio de 1996 sobre las excepciones preliminares planteadas en el caso interpuesto contra ella por BYH. El principal argumento era que, la CIJ debía de revisar el fallo ya que, ahora quedó claro que antes del 1 de noviembre de 2000, la RFY no continuó con la personalidad jurídica de la RFSY, por lo que no era miembro de la ONU, entonces no era parte del Estatuto de la CIJ ni de la Convención de Genocidio.

Ante ello, la CIJ recuerda en los hechos que, en 1992, la RFY indicó que era continuador de la RFSY y que, en ese sentido, mantenía la calidad de miembro de la ONU, la misma que tenía la RFSY, es decir, que era Parte de la Convención de Genocidio. Entonces, luego de que la CIJ identificara las intenciones del documento presentado por la RFY en el 2001, en su fallo del 3 de febrero de 2003 en el asunto Solicitud de revisión, la CIJ declaró inadmisible la solicitud de revisión presentada por la RFY, con arreglo al artículo 61 del Estatuto del Tribunal, de la sentencia de 11 de julio de 1996 sobre excepciones preliminares.

En adición de ello, la CIJ aplicó el principio de la *res judicata,* el cual resulta de los términos del Estatuto de la CIJ y la Carta de la ONU. Según lo indicado por la CIJ en su fallo del 2003:

> dicho principio significa que las decisiones de la CIJ no son sólo vinculantes para las partes, sino que son definitivas, en el sentido de que no pueden ser reabiertas por las Partes en lo tocante a las cuestiones que han sido determinadas, salvo

> mediante procedimientos, de naturaleza excepcional, especialmente establecidos con tal fin (el procedimiento de revisión establecido en el Artículo 61 del Estatuto). (CIJ, 2003, párr. 121)

Asimismo, la CIJ indica que, la finalidad del principio *res judicata* se apoya en dos finalidades, la primera es que es importante que exista una estabilidad de las relaciones jurídicas en controversias con la finalidad de que estas lleguen a su fin. Y la segunda finalidad es que, siempre habrá interés de las Partes en que la cuestión que ha sido objeto de análisis en el pasado no vuelva a serlo en el futuro (CIJ, 2007, párr.116).

Ahora bien, a continuación, expondré mi punto de vista sobre la decisión tomada por la CIJ. Para fines del propósito del expediente, sólo desarrollaré dos temas: la jurisdicción y la *res judicata*. Como primer punto, antes de abordar la jurisdicción mencionaré sobre la capacidad de comparecer de los Estados ante la CIJ. Según la autora Gutiérrez (2009) para que un caso sea sometido ante la CIJ, es necesario que ambas Partes brinden su consentimiento ya que en el ámbito internacional la jurisdicción es voluntaria. (p.135). Entonces, para que la CIJ conozca la controversia, deben de cumplirse dos supuestos, el primero es la capacidad de comparecer ante la CIJ, y el segundo es que se haya reconocido la obligatoriedad de su jurisdicción.

Según la autora Gutiérrez (2009) la capacidad de comparecer la tienen todos los Estados miembros de la ONU de acuerdo con el artículo 93 de la Carta de la ONU. Pero también otros Estados que, pese a no ser parte de la organización, puede llegar a tener esa capacidad de acuerdo con las condiciones que determine la Asamblea General en recomendación por el Consejo de Seguridad. (p.135). Pero ¿qué es la capacidad de comparecer ante la CIJ y la jurisdicción? Con capacidad nos referimos a la calidad de miembro que un Estado tiene ante la ONU o a la posibilidad de que este Estado, al no ser miembro de la ONU, acceda a serlo a través de una potestad permitida por el Consejo de Seguridad. Como menciona el artículo 93 de la Carta de la ONU, todos los miembros de la ONU son *ipso facto* Partes en el Estatuto de la CIJ. Asimismo, estas afirmaciones se interpretan a través del artículo 35 del Estatuto de la CIJ cuando señala que la CIJ estará abierta a todos los Estados Parte del Estatuto y que la CIJ estará abierta a otros Estados de acuerdo con las condiciones fijadas por el Consejo de Seguridad, sin embargo, en este caso de BYHY, este no fijó alguna condición.

Respecto de la jurisdicción de la CIJ, esta se refiere a aquellas cuestiones que se derivan de la facultad que tiene la CIJ para conocer el caso presentado por un Estado. (Corzantes, 2022, p.3). Es decir, la CIJ antes de conocer el caso presentado por la demandante, primero revisa si es que existe consentimiento para comparecer ante la CIJ. Este consentimiento puede manifestarse primero en virtud de un Tratado, de una aceptación unilateral o a través de una aceptación bajo un Acuerdo Especial. Luego de verificar el consentimiento, la jurisdicción aparece como la posibilidad de que la CIJ tenga la potestad de ver la controversia. Como menciona la autora Campuzano (2002) la jurisdicción es la facultad de juzgar y hacer ejecutar lo juzgado. Asimismo, las normas de competencia judicial internacional lo que hacen es delimitar el ejercicio de ese poder en los supuestos internacionales. (pp.19-20). Entonces, jurisdicción sería el poder de la CIJ para conocer el caso y la competencia sería la medida del poder o facultad otorgada a un Tribunal internacional.

Como se comentó párrafos arriba, la RFY presentó el 24 de abril del 2001 una solicitud de revisión del fallo dictado sobre la CIJ. En esta solicitud, la RFY indicaba que, ya que la CIJ había señalado que la RFY fue admitida como nuevo miembro de la ONU, eso quiere decir que antes de esa fecha, la RFY no sería miembro de la ONU ni Estado Parte de la Convención de Genocidio. Sin embargo, de acuerdo con los hechos, la RFY acordó el 27 de abril de 1992 que continuaría con la personalidad jurídica de la RFSY. Entonces, es a partir de ese momento que la RFY adquirió la capacidad de comparecer ante la CIJ. Sin embargo, el hecho de que la RFY haya sido aceptada como nuevo miembro de la ONU el 1 de noviembre de 2001 no quiere decir que a partir de ese momento es que recién es parte de la Convención de Genocidio, sino que lo es desde antes y tiene capacidad para comparecer ante la CIJ. Y lo que recién aparece desde el 1 de noviembre de 2001 es su derecho de voz y voto en la Asamblea General de la ONU.

Otro punto interesante para discutir es el tema de la respuesta de la CIJ ante la solicitud presentada por la RFY el 24 de abril del 2001. La CIJ comentó que el fallo del 11 de julio de 1996 tenía carácter de cosa juzgada o también llamado *res judicata*. Entonces, según la autora Gonzáles (2009) la cosa juzgada es un principio general del derecho internacional público aceptado por todos los sistemas jurídicos del mundo (p.165). Este principio quiere decir que, se reconoce que una sentencia emitida por un Tribunal arbitral o judicial en un caso es de carácter definitivo o final y también de carácter obligatorio para las Partes. Esta obligatoriedad se encuentra estipulada en los artículos 59 y 60 del Estatuto de la CIJ, en estos párrafos se señala que “la decisión de la Corte no es obligatoria sino para las partes en controversia y respecto del caso que ha sido decidido” y que “el fallo será definitivo e inapelable”. (Gonzáles, 2009). En ese sentido, me encuentro de acuerdo con la decisión tomada por la CIJ ya que el tema ya había sido objeto de análisis por la CIJ y no tendría sentido tener que analizarlo nuevamente, cuando además de todo ello, la controversia se ha prolongado más años de lo debido.

Ahora bien, como último punto, me gustaría comentar acerca de las opiniones de los jueces respecto del fallo por la CIJ en 1996, de un total de quince jueces, seis de ellos discrepaban respecto de que una decisión no puede ser *res judicata* sobre una cuestión que no aborda. Y es que, la RFY no abordó en sus excepciones preliminares de 1995 la cuestión de si ellos formaban parte o no de la Convención del Genocidio. Sin embargo, visto de esta forma, de acuerdo con Marqués (2008), la CIJ no puede actuar *ultra vires* y *ultra petita.* (p.898). Esto quiere decir que la CIJ, como órgano judicial no puede ir más allá de sus facultades *(ultra vires)* ni brindar opinión sobre algo que no se le ha solicitado *(ultra petita)*, como fue el caso de la RFY, ellos solicitan que se reexamine el fallo de 1996 sobre un punto que ellos no habían mencionado en las excepciones preliminares de 1995. Sin embargo, como fue mencionado anteriormente, esto no puede ser reexaminado ya que este fallo tiene res *judicata*. En ese sentido, y respondiendo a la pregunta secundaria, Serbia se encontraba obligada por la Convención de Genocidio al momento en que ocurrieron los hechos.

### 4.2.3. ¿Hubo hechos que vulneraron las obligaciones de la Convención para la Prevención y la Sanción del Delito de Genocidio en el caso de Serbia?

Después de haber explicado en los párrafos anteriores que sí hubo un genocidio en BYH de acuerdo con la definición de la Convención de Genocidio, así como también, que se haya explicado que Serbia sí se encontraba obligada a cumplir lo estipulado en la misma Convención, a continuación, se procederá a narrar cuáles son las obligaciones de la Convención que se vulneraron en el caso del presente expediente.

Como primer punto, se recordarán las conclusiones de los hechos[18] más relevantes ocurridos en BYH durante los años 1992-1995, los cuales ya fueron mencionados en la primera pregunta secundaria. Sobre estos hechos se demostrará que no se cumplieron las obligaciones emanadas de la Convención de Genocidio y brindaré mi opinión sobre ello en tres secciones. La primera será sobre la violación de la RFY en las obligaciones de no cometer ni ser cómplice de genocidio. Como segundo punto se abordará las conclusiones de los hechos que violaron la obligación de prevenir. En esta sección, se desarrollarán las medidas provisionales que fueron dictadas por la CIJ el 8 de abril y 13 de setiembre de 1995 y las cuales a pesar de que la RFY se encontraba obligada a cumplir, no sucedió de esa forma. Como tercer punto se explorará sobre las conclusiones de la violación de la obligación de sancionar por parte de la RFY.

Para empezar, resulta importante señalar cuáles son las obligaciones que todo Estado que es parte de la Convención de Genocidio debe de cumplir. Según el artículo III de la Convención, se indica que serán castigados los siguientes actos:

a) El genocidio;
b) La asociación para cometer genocidio;
c) La instigación directa y pública a cometer genocidio;
d) La tentativa de genocidio;
e) La complicidad de genocidio

Sin embargo, los Estados que forman parte de la Convención como es Serbia, no solo deben de cumplir con el artículo III mencionado anteriormente, sino que también deben de cumplir lo siguiente: prevenir y sancionar el crimen de genocidio (artículo I), cumplir con la promulgación de legislación necesaria para dar efecto a la Convención (artículo V), y el enjuiciamiento de las personas acusadas de genocidio por un Tribunal competente del Estado (artículo VI). A continuación, se dará opinión sobre las conclusiones abordadas por la CIJ y las decisiones personales de los jueces y magistrados de la CIJ.

#### 4.2.3.1. La obligación de no cometer ni ser cómplice de genocidio.

En este apartado se analizarán los actos que están prohibidos de acuerdo con el artículo II de la Convención de Genocidio. La conclusión principal de la CIJ frente a los hechos ocurridos en BYH de 1992-1995 fue que no se pudo obtener suficientes medios probatorios para poder llegar a la conclusión que existió la intención específica de destruir total o parcialmente a los bosnios musulmanes. Únicamente la CIJ reconoció que hubo un genocidio en Srebrenica a partir del 13 de julio de 1995. Pero que estos actos no pudieron ser atribuibles a la RFY ya que no se hallaron pruebas suficientes

[18] En este acápite se resume lo señalado por las Partes en la Sentencia del 26 de febrero del 2007, caso BYH vs Serbia.

para determinar que los agentes de la RFY ejercieron control efectivo en las fuerzas serbiobosnias.

Me encuentro en desacuerdo con lo señalado por la CIJ, considero que este se excusó en la falta de pruebas para no poder demostrar que hubo intencionalidad de destruir total o parcialmente a bosnios musulmanes durante los hechos ocurridos en los años 1992-1995. No hubo una exigencia por parte de la CIJ hacia la RFY para la obtención de las copias no editadas de los documentos de su Consejo Supremo de Defensa, las cuales demostraban evidencia sobre el control de Serbia sobre las fuerzas serbiobosnias. Esto último se explicará de manera posterior.

Respecto del análisis de hechos concretos, sobre el bombardeo ocurrido en el campo de Susica, el Informe de la Comisión de Expertos de la ONU incluyó el testimonio de un ex guardia del campo el cual visualizó de manera presencial el asesinato de 3.000 musulmanes y la ejecución de 200 sobrevivientes detenidos. Se añade la conclusión de la Sala de Primera Instancia del TPIY en la sentencia de Stakic, la cual señaló que los ataques del ejército serbiobosnio en todo el municipio de Prijedor produjeron la masacre de musulmanes. Por ello, se demostró más allá de toda duda razonable la existencia de un cuadro completo de atrocidades contra los musulmanes en el municipio de Prijedor (TPIY, 2003, párr.544 y 546).

Frente a aquellos hechos considero que, debido a que la CIJ adoptó un estándar más alto de probar como es el de control efectivo, pudo haber aceptado documentación que podría haber ayudado a resolver las posibles dudas que aparecerían en el análisis del caso. Sin embargo, a pesar de que la CIJ señalaba que no contaba con suficiente documentación para probar la intención específica de Serbia en los ataques ocurridos en Srebrenica, esta no solicitaba documentación adicional que tenía a su disposición. Por consiguiente, al final, a pesar de que, la CIJ no contaba con documentación probatoria suficiente, tampoco solicitaba mayor cantidad de pruebas, ni tampoco infería la intencionalidad de Serbia a través de los hechos sobre los cuales ya tenía conocimiento, lo cual resulta lamentable.

Sobre este último, la CIJ se negó a inferir la intención genocida que tuvo el ejército serbiobosnio en contra del grupo bosnio musulmán, lo cual resulta incoherente con lo que se determinó en el TPIY en el caso Akayesu, cuando se menciona que es posible inferir la intención especial de todos los actos o declaraciones del acusado o del contexto general en el que se perpetraron sistemáticamente otros actos culpables contra el mismo grupo, independientemente de si esos otros actos fueron cometidos por el mismo autor o incluso por otros autores. (TPIR, 1998, párr. 523).

Asimismo, en la misma línea de la opinión discrepante del vicepresidente Al-Khasawneh, la declaración del Consejo de ministros serbio en respuesta a la masacre de hombres musulmanes por parte de los Escorpiones pudo haber significado una clara admisión de responsabilidad frente a los hechos ocurridos. Para mencionar, los Escorpiones era una unidad paramilitar serbia que participó en los sucesos de Srebrenica y sus alrededores. Ellos se encontraban bajo el control de Serbia y este último les proporcionaba apoyo y asistencia a través de suministro de armas y logística en sus operaciones.

Dentro de las otras formas de participación del crimen de genocidio, además de la comisión, se encuentra ser cómplice del crimen. De acuerdo con la Sala de Primera Instancia del TPIR en la sentencia de Akayesu, el cómplice del crimen de genocidio no necesariamente debería de demostrar la misma intención de destruir que el autor principal del crimen. Sino que este debe de saber o haber sabido la intención de destruir que tenía el autor principal frente a la destrucción total o parcial de un grupo protegido.

En este caso Serbia contaba con conocimiento sobre los hechos ocurridos en Srebrenica, asimismo como señala la CIJ "no cabe duda de que la RFY brindaba considerable ayuda de naturaleza política, militar y financiera a la RS y al VRS, la cual comenzó antes de la matanza en Srebrenica y continuó después de aquel acto" (CIJ, 2007, párr.422). Por lo que como se puede demostrar, había un conocimiento sobre las acciones que ocurrieron antes de Srebrenica y después de Srebrenica y aun así continuaron apoyando las acciones de destrucción parcial o total al grupo protegido.

Entonces, según la CIJ la conducta de complicidad implica la provisión de medios para facilitar la comisión del crimen y también es una conducta que brinda ayuda o asistencia por un Estado para la comisión de un acto ilícito por otro Estado. (CIJ, 2007, párr. 419). Entonces, Serbia fue cómplice del crimen de genocidio cuando autoridades de Belgrado suministraron activamente armas y material a la VRS durante toda la guerra de BYH, es decir había una provisión de medios para facilitar el crimen. Asimismo, Vladimir Lukic, quien fue el primer ministro de la República de Sprska declaró que la VRS recibía suministros de diversas fuentes incluida la RFY pero que la VRS pagaba por el material militar obtenido. Otro ejemplo se da respecto de la financiación recibida de VRS por parte de la RFY, sobre esto la RFY señaló que la financiación se llevó a cabo a base de créditos que debían de ser reembolsados.

Ante ello la CIJ consideró que la RFY dispuso un considerable apoyo tanto militar como financiero y que, de no haber brindado ese apoyo, la República de Srpska habría estado limitada de tomar acciones en los ataques planificados hacia la población bosnio-musulmana. (CIJ, 2007,241). En ese sentido, a pesar de que las provisiones recibidas según Lukic no provenían únicamente de la RFY, la CIJ confirmó que había un "considerable apoyo militar y financiero" por parte de la RFY hacia la República de Srpska. Entonces si existe una relación entre la dependencia de la VRS con las provisiones brindadas por la RFY, ya que como se mencionó anteriormente, de haber limitado esas provisiones, la VRS no habría continuado atacando a la población bosnio-musulmana.

Ahora bien, como menciona Crawford (2013) cuando un Estado proporciona asistencia a otro con el conocimiento real de que la ayuda se utilizará para cometer un acto ilícito, se puede inferir la intención del Estado de que su ayuda facilitará a ese acto (p.160). Entonces, la CIJ pudo haber inferido la intención genocida por parte de la RFY cuando este proporcionó su ayuda y asistencia con el rol de cómplice hacia la VRS y Los Escorpiones. Asimismo, una cuestión de principio jurídico general se debe suponer que los Estados tienen la intención de lograr las consecuencias previsibles de sus actos. (Crawford, 2013, p.162). Especialmente en este caso particular cuando la RFY es consciente de que con su ayuda se están cometiendo hechos ilícitos vulnerando las obligaciones emanadas en la Convención de Genocidio, perpetrando violaciones de derechos humanos.

Cabe mencionar que la conducta del cómplice es delictiva cuando el crimen ha sido consumado, ya que el cómplice no cometió el crimen de manera autónoma, sino que facilitó al autor principal la comisión del crimen. (TPIR, 1998, párr. 545-548). Sobre el caso de la conspiración para cometer genocidio, la Sala de Primera Instancia del TPIR en la sentencia de Musema señaló que la intención requerida para el crimen de la conspiración para cometer genocidio debe ser la misma intención que la comisión del crimen de genocidio, es decir la intención especial de destruir. (Tribunal Penal Internacional para Ruanda, 2000, párr.192). De igual manera, a pesar de que la CIJ solo admitió que hubo genocidio en Srebrenica, eso no implica que el genocidio no haya tenido lugar en otras partes de BYH. En ese sentido, la RFY fue responsable no solamente por no haber impedido el genocidio sino también por haber participado activamente en el acto como cómplice del crimen.

La participación en el acto de complicidad por parte de la RFY se dio cuando como se mencionó anteriormente, se brindó el apoyo financiero y suministro de armas a pesar de que se tuvo conocimiento que se estuvieron llevando a cabo ataques hacia la población bosnio-musulmana, es decir, se apoyó con conocimiento que se estaban cometiendo hechos ilícitos hacia un grupo protegido. La complicidad aparece cuando la RFY no recorta la ayuda y continúa brindando provisiones a la República de Srspka, ya que como menciona la CIJ de haber limitado aquel apoyo, la VRS no habría continuado perpetrando daños a aquel grupo protegido.

Un punto para considerar es que, de acuerdo con lo que se señalará más adelante, según la CIJ, no se pudo confirmar que la RFY cometió genocidio, debido a la falta de pruebas. Sin embargo, considero que la CIJ se centró en analizar la modalidad de comisión y no examinó de manera detallada la modalidad de complicidad. En mi opinión Serbia actuó como cómplice del crimen de genocidio. Como menciona la CIJ, la RFY tuvo una innegable influencia sobre las fuerzas serbiobosnios que operaron en Srebrenica, es decir, RFY tuvo conocimiento de lo que ocurría en aquel lugar. Por ello, la CIJ determinó que la RFY violó la obligación de prevenir el genocidio.

Asimismo, de acuerdo con lo señalado por la Sala de Primera Instancia del TPIR en la sentencia de Akayesu, la intención específica de destruir no debe de ser demostrada al mismo nivel o exigencia que con el del autor principal. Por ello, considero que en este caso la evaluación de pruebas y recopilación de hechos realizada por la CIJ podría haber satisfecho el comprobar que la RYF sí fue cómplice de la masacre ocurrida en Srebrenica y sobre los hechos ocurridos entre 1992-1995. Esta afirmación parte de lo señalado por la CIJ cuando concluyó que la RFY tuvo inminente conocimiento de los hechos ocurridos en Srebrenica por lo que no previno aquellos actos de genocidio.

Esto último me lleva a nombrar el segundo aspecto importante que son los estrictos métodos de prueba que utilizó la CIJ en un caso que pudo haber tomado otra vía para poder abordarlo de mejor manera. Como, por ejemplo, el hecho de que la CIJ no analizó todo el material que se le entregó ni tampoco solicitó material extra cuando tuvo la oportunidad de hacerlo. Asimismo, cuando BYH solicitó copias inéditas de documentos que contenían actas de las reuniones del Consejo Supremo de Defensa de Serbia, el cual era el máximo órgano de decisión del país en aquel momento, y estaba compuesto por dirigentes políticos y militares de la RFY.

Sin embargo, cuando la CIJ solicitó aquella documentación, la RFY señaló que los documentos habían sido clasificados por decisión del Consejo como secreto militar y como confidencial por decisión del Consejo de ministros de Serbia por ser de asunto de interés para la seguridad nacional. (CIJ, 2007, párr.205). La respuesta de la CIJ fue que BYH tenía a disposición amplia documentación y pruebas que conllevan a fácil acceso. Ante ello, la BYH conversó con el miembro de las fuerzas armadas británicas, General Richard Dannatt, quien mencionó que aquella documentación demostraba la relación entre las autoridades de la RFY y la República de Srpska sobre cuestiones de control e instrucción. (CIJ, 2007, párr. 206). Por lo que, debido al rechazo del acceso de esta prueba por parte de la RFY no se pudo verificar lo descrito por aquel general británico respecto de la documentación que estaba relacionada al periodo de la masacre de Srebrenica en julio de 1995.

Lamentablemente esta no es la primera vez que la CIJ recibe una negativa por parte de un Estado. En el caso del Canal de Corfú, Reino Unido también invocó la justificación de no presentar una documentación que incluía “secretos de Estado”, material “confidencial”. A lo que la CIJ tomó nota de ello, pero no extrajo ninguna conclusión relevante a partir de ese comportamiento, el artículo 49 del Estatuto de la CIJ tampoco plantea ninguna solución ante negativas de presentación de pruebas de Estados. Considero que, la CIJ debería de tener un mecanismo a través del cual pueda cerciorarse de la credibilidad de aquellas justificaciones sobre “secretos de Estado” cuando una Parte se niegue a presentar documentación solicitada por la CIJ.

En conclusión, considero que, sí hubo hechos que vulneraron las obligaciones de la Convención de Genocidio, especialmente la complicidad, sin embargo, estos no fueron visibilizados por la CIJ como consecuencia de los altos y limitados estándares de prueba propuestos por la CIJ. En el próximo y último problema secundario se abordará si el apoyo y asistencia que recibió la República de Srpska fueron atribuibles a Serbia como Estado.

#### 4.2.3.2. La obligación de prevenir

A continuación, se procederá a desarrollar las medidas provisionales la CIJ era consciente del peligro inminente por el cual atravesaban los bosnios musulmanes frente a los hechos mencionados anteriormente. El 19 de abril de 1992 el ejercito VRS bombardeó el centro de Sarajevo con granadas de mortero, el 20 de abril de 1992, el ejercito VRS bombardeo Mostar, los proyectiles cayeron durante al menos 3 horas en ciudades pobladas e incendiaron varios departamentos. El 6 de mayo de 1992 avionetas del ejercito VRS lanzaron cohetes contra varios objetivos de Sarajevo y también continuaron los ataques en la ciudad, así pues, los ataques continuaron en BYH durante todo el año.

Fue por ello por lo que, como menciona el autor Toufayan (2005) en un hecho sin precedentes, la CIJ declaró que tenía competencia *prima facie* para ordenar medidas provisionales con la finalidad de proteger los derechos dentro de la RFY (p.235). Es así como, el 8 de abril y el 13 de septiembre de 1993, respectivamente, la CIJ dictó ordenanzas a la RFY para que "tomara todas las medidas a su alcance para prevenir la

comisión del crimen de genocidio" y para que "asegurara que cualesquiera de las organizaciones y personas que puedan estar bajo su influencia no cometan ningún acto de genocidio".

Pero ¿qué son las medidas provisionales? Para empezar, la CIJ desempeña un doble rol: el arreglo de controversias entre los Estados que se encuentren sometidos a estos, esto es lo que se denomina procedimiento contencioso. Y, la segunda función de la CIJ es emitir dictámenes consultivos sobre cualquier consulta que se le someta algún órgano u organismo de la ONU, el cual se denomina el procedimiento consultivo.

Entonces, dentro del procedimiento contencioso como es el del caso de BYH y la RFY, la CIJ toma decisiones que ambas partes deben de seguir. De acuerdo con el artículo 73 del Reglamento de la CIJ y del artículo 41 del Estatuto de la CIJ se encuentra la indicación de las medidas provisionales. Esto significa que el Estado Parte, si lo cree conveniente, puede solicitar una acción por parte de la CIJ si considera que los derechos que constituyen el objeto de su solicitud se encuentran en peligro inmediato. Asimismo, en su artículo 75 de su Estatuto, la CIJ puede decidir examinar de oficio si las circunstancias del asunto requieren indicación de medidas provisionales que deban cumplir ambas partes o una de ellas.

Según el autor Kolb (2013) la finalidad de las medidas es permitir al Tribunal preservar el valor de sus funciones judiciales como es el preservar los derechos de las Partes que se encuentran a la espera de la decisión de la demanda. (p.616). Las medidas provisionales pueden ser dictadas de oficio o a través de la respuesta de una solicitud de una Parte. Según el autor Kolb, la idea también es que el Tribunal al preservar los derechos esenciales de las Partes, reduzca la posibilidad de la agravación de la controversia y promover la resolución pacífica de la controversia. (Kolb, 2013, p.617)

Ahora bien, el 20 de marzo de 1993, día en que BYH presentó su demanda en contra de la RFY, presentó también una solicitud de medidas provisionales en virtud del artículo 41 del Estatuto de la CIJ. La motivación de solicitar medidas de protección por parte de BYH se debió a que desde 1992 había bombardeos en Sarajevo. Asimismo, según el TPIY, como parte de la campaña de limpieza étnica local, hubo aproximadamente 3.000 musulmanes que fueron confinados en el campo de Susica entre mayo y octubre de 1992. (TPIY, 2003, párr.67). Por ello, se debía de tomar acciones inmediatas para cesar el fuego en BYH. En respuesta a ello el 2 de abril de 1993 la CIJ dictó una orden sobre medidas provisionales el 8 de abril de 1993 ya que consideró que había un grave riesgo de que se cometieran actos de genocidio.

La CIJ dictó tres medidas: la primera medida era que la RFY se encontraba en la obligación de adoptar de manera inmediata todas las medidas a su alcance para prevenir la comisión del crimen de genocidio, en orden con el cumplimiento de su compromiso contraído en la Convención de Genocidio. La segunda medida se basaba en que la RFY debía de garantizar que no dirigirá ninguna unidad armada militar, paramilitar o irregular del conflicto que pudiese estar dirigida o apoyada por él, así como las organizaciones y personas que pudiese estar sujetas a su control, dirección o influencia. Por último, la CIJ señaló que la RFY y BYH no deberán tomar ninguna medida y deben asegurarse de que no se tome ninguna medida que pueda agravar o ampliar la disputa existente sobre la prevención o castigo del crimen de genocidio.

Sin embargo, estas medidas no fueron cumplidas por la RFY, así pues, Vladimir Lukic, primer ministro de la República de Srpska mencionó que entre el 20 de enero de 1993 y el 18 de agosto de 1994 estos recibieron suministros de diferentes fuentes incluida la de la RFY. Ante ello la RFY afirmó aquella declaración, pero mencionó que ellos recibieron un pago sobre el material militar que les brindaban. Entonces, a pesar de las medidas provisionales que la CIJ dictó en 1993 estas no fueron cumplidas.

Por lo tanto, debido al incumplimiento por parte de la RFY de cumplir con las medidas provisionales dictadas por la CIJ el 8 de abril de 1993, la CIJ decide dictar nuevamente las tres medidas el 13 de setiembre de 1993. Sin embargo, lamentablemente aquellas medidas tampoco fueron cumplidas por la RFY. Por mencionar los principales hechos que demuestran aquel incumplimiento se encuentran los ataques en Markale el 5 de febrero de 1994 el cual causó la muerte de 60 personas. Otro ataque y el más importante fue el ocurrido en Srebrenica en julio de 1995 en el cual se bombardeó la supuesta zona segura en Srebrenica que estaba protegida por el batallón holandés (dutchbat). El bombardeo se intensificó hacia el 9 de julio hasta el 11 de julio de 1995.

En suma, en este punto, respecto del incumplimiento de la obligación de prevenir, me encuentro de acuerdo con lo señalado por la CIJ, ya que concluyó que las autoridades de la RFY tenían una innegable influencia sobre las fuerzas VRS que operaron en Srebrenica sumado a la información que poseían, que también era información pública de conocimiento internacional no previno el riesgo del crimen de genocidio. Por ello, la RFY omitió adoptar medidas para prevenir los ataques de las fuerzas VRS hacia los bosnios musulmanes.

#### 4.2.3.3. La obligación de sancionar

Respecto de la obligación de sancionar, según el artículo VI de la Convención de Genocidio, los Estados se encuentran obligados a cooperar con el tribunal penal internacional siempre y cuando el Estado haya aceptado su jurisdicción. Entonces, la obligación de cooperar resulta relevante para poder condenar a las personas que cometieron genocidio y así entregarlos al tribunal penal internacional asignado. Sobre esto, la CIJ señaló que la RFY incumplió con la obligación de cooperar con el TPIY, al no arrestar al General Mladic.

El General Mladic fue comandante general del ejército de la República de Srska, es decir de la VRS. Mladic se encargó de dar instrucciones a sus coroneles subordinados para atacar Sarajevo con granadas de mortero en mayo de 1992. Asimismo, Mladic fue responsable del ataque ocurrido en Srebrenica en 1995, donde se aproxima que fueron 8.000 hombres y niños musulmanes los que fueron asesinados por orden de Mladic. A partir de ello fue que Mladic en julio de 1995 fue acusado en el TPIY por la comisión de genocidio por sus actos y omisiones incurridas a partir de abril de 1992.

En mayo del 2002 fue que el Tribunal de Belgrado emitió órdenes de arresto para diecisiete serbios sospechosos de crímenes internacionales, entre ellos estaba Mladic. Sin embargo, Mladic desapareció en 2001 cuando el expresidente yugoslavo Slobodan Milosevic fue arrestado. Su supuesta desaparición habría ocurrido en el territorio de la

RFY, por lo que las autoridades serbias debieron de haber realizado el máximo esfuerzo posible para poder hallar y arrestar a Mladic. No obstante, no fue hasta dieciséis años después de la orden de arresto en mayo del 2011 que Mladic fue hallado en Serbia y arrestado por autoridades serbias. Posterior de ello, su apelación sobre su orden de extradición fue rechazada, por lo que Mladic fue finalmente trasladado a La Haya para ser juzgado por los crímenes cometidos entre 1992-1995. En ese sentido, coincido con la CIJ cuando mencionan que la RFY no cooperó con el TPIY y violó la obligación de sancionar ya que Mladic por dieciséis años que estuvo "desaparecido" este se encontraba en la RFY.

Considero que, la CIJ centró la obligación de sancionar en la obligación de cooperar con un Tribunal Penal Internacional que tuviera jurisdicción en los Estados Parte que aceptaron su jurisdicción. Para ello, la CIJ, de acuerdo con el artículo VI de la Convención de Genocidio señaló que, el TPIY debía de considerarse como el Tribunal Penal Internacional y que la RFY aceptó la jurisdicción de este. En ese sentido, comparto la opinión de la CIJ frente al incumplimiento de la obligación de cooperar planamente al no arrestar al General Mladic y transferirlo al TPIY para su posterior juzgamiento. Ante ello, resulta importante mencionar que la RFY al incumplir con la obligación del artículo IV de la Convención, también incumplió con sus deberes del Acuerdo de Dayton y como miembro de la ONU.

La relevancia de los deberes del Acuerdo de Dayton radica en que su finalidad fue poner fin a la Guerra de Bosnia y a los conflictos armados acontecidos debido a la desintegración de la RFSY entre 1991 y 1995. Entonces para que ello ocurra, lo primordial sería que se castiguen a los responsables que cometieron crímenes de gran magnitud. El General Mladic fue el comandante quien estuvo a cargo de las fuerzas serbiobosnias durante el conflicto de 1992 a 1995. El ataque que tuvo más número de víctimas fue el sucedido en Srebrenica en julio de 1995, el también llamado "la masacre de Srebrenica".

A manera de conclusión, me encuentro parcialmente de acuerdo con las decisiones tomadas por la CIJ, en la presente sección concuerdo con lo señalado por la CIJ respecto de que la RFY no cumplió con la obligación de prevenir ni sancionar en relación con cooperar con la transferencia de Mladic. Sin embargo, me encuentro en desacuerdo con lo decidido por la CIJ respecto del crimen de genocidio, considero que la RFY actuó como cómplice, actor secundario en los hechos ocurridos en Srebrenica en julio de 1995.

### 4.2.4. ¿Los actos que vulneraron las obligaciones de la Convención para la Prevención y la Sanción del Delito de Genocidio fueron atribuibles a Serbia como Estado?

En este último apartado se analizarán tres cuestiones importantes. En primer lugar, se desarrollará una explicación acerca de lo que es la responsabilidad estatal internacional junto con sus elementos: agentes estatales y las modalidades de responsabilidad estatal. En segundo lugar, se desarrollará, de acuerdo con mi opinión, cuál habría sido un análisis correcto de control efectivo en el fallo del 2007. En tercer lugar, se señalarán las obligaciones mencionadas en la pregunta secundaria anterior, en la medida en cómo estas se encuentran relacionadas con la responsabilidad de Serbia. Asimismo, a manera

de reflexión, se mencionará cuál sería una postura válida para analizar el crimen de genocidio en la actualidad. Se debe de considerar que, actualmente, debido al uso de la tecnología, muchos medios de prueba ya no pueden ser analizados como se solían realizar cuando la Convención de Genocidio fue creada en 1948.

Resulta cotidiano que las personas suelan relacionar los crímenes internacionales con la aplicación del derecho penal internacional, y a su vez con la activación de la responsabilidad penal individual. No obstante, como menciona el autor Arrocha (2014) ello no siempre resulta cierto. Existen dos tipos de responsabilidades internacionales, la individual y la estatal. Eso quiere decir que, en algunos casos, como el caso del presente informe, la comisión de crímenes internacionales permite la atribución de responsabilidad a un Estado. (p.199). Siendo el Estado una entidad abstracta, es posible que también pueda ser responsable de la comisión de crímenes y que estos sean juzgados en la CIJ. Entonces, sostengo que, los Estados son juzgados en la CIJ y los responsables individuales de crímenes internacionales son juzgados en Tribunales Penales Nacionales e Internacionales.

Un punto interesante para aclarar es el siguiente: ¿será relevante que la CIJ pueda determinar la responsabilidad de un Estado por la violación de un hecho internacionalmente ilícito cuando no ha existido una condena de un individuo por alguno de esos crímenes en un Tribunal Penal Internacional? En el caso en particular, la entidad competente de encargarse de juzgar a los individuos responsables de hechos internacionalmente ilícitos de ese periodo fue el TPIY. Para ello, la CIJ en su fallo del 2007 menciona que, para determinar que un Estado es responsable por genocidio en virtud de la Convención de Genocidio, solo será necesario determinar el acto ilícito de genocidio sin considerar si existen o no responsables individuales de dichos actos.

En ese sentido, la CIJ centra parte de su análisis en la violación de hechos internacionalmente ilícitos a través del Proyecto de artículos sobre la Responsabilidad del Estado por hechos internacionalmente ilícitos (en adelante “el Proyecto REHII”). Este proyecto fue adoptado en el 2001 por la Comisión de Derecho Internacional de la ONU en adelante “CDI”) y en el 2002, fue aprobado en su Resolución 56/83 en la sesión N°56 de la Asamblea General de la ONU. El Proyecto REHII no es una normativa que tenga carácter vinculante a los Estados, sin embargo, este constituye reglas de costumbre internacional como principios de derecho internacional que le aportan valor jurídico. Para efectos del presente informe, solamente se abordarán los artículos pertinentes al caso de BYH y Serbia del Proyecto REHII. De ese modo, para determinar la responsabilidad internacional de un Estado se requiere identificar dos elementos los cuales se encuentran señalados en el artículo II del Proyecto REHII:

> Artículo II
>
> Hay hecho internacionalmente ilícito del Estado cuando un comportamiento consistente en una acción u omisión:
>
> a) Es atribuible al Estado según el derecho internacional; y
> b) Constituye una violación de una obligación internacional del Estado

Eso quiere decir que, según la autora Stern (2010) para afirmar la constitución de un hecho internacionalmente ilícito se requiere que, primero, el comportamiento, mediante una acción o una omisión, sea atribuible al Estado. Y segundo, que este comportamiento constituya una violación de una obligación internacional del Estado, o de carácter primario, es decir, proveniente de la costumbre, un tratado internacional, acto jurídico unilateral, o cualquier otro proceso de creación de obligaciones jurídicas que hayan sido reconocidas por el derecho internacional (p.201).

Pero ¿cómo se identifica el comportamiento de una acción u omisión de un Estado? Como se sabe, los Estados no son entidades físicas ni personas que se desenvuelven y ejecutan acciones por sí mismas. Sino que, el Estado puede ser identificado por comportamientos que ocasionaron hechos internacionalmente ilícitos a través de órganos, agentes y personas que actúan bajo control del Estado. Esta representación normalmente se realiza en el ámbito normativo interno, son las personas quienes han sido designadas por el Estado para desempeñar determinadas acciones. En esa misma línea, de acuerdo con el artículo IV del Proyecto REHII, se señala el comportamiento de los órganos del Estado:

> Artículo IV
>
> 1. Se considerará hecho del Estado según el derecho internacional el comportamiento de todo órgano del Estado ya sea que ejerza funciones legislativas, ejecutivas, judiciales o de otra índole, cualquiera que sea su posición en la organización del Estado y tanto si pertenece al gobierno central como a una división territorial del Estado.
> 2. Se entenderá que un órgano incluye toda persona o entidad que tenga esa condición según el derecho interno del Estado

Entonces, respecto del inciso 2 artículo IV del Proyecto REHII, cuando la CDI menciona a “toda persona o entidad” se refiere a personas que ejercen dicha función conforme al derecho interno, es decir, en este inciso se refiere a los órganos *de iure*. Como ejemplo se puede comentar sobre la sentencia dictada por la CIJ sobre Nicaragua contra Estados Unidos. La demandante acusó al gobierno de Estados Unidos de haber tenido el control respecto de las actividades ejecutadas por los “Contras” en el conflicto armado interno en Nicaragua. Este caso será explicado en los próximos párrafos junto con el caso emblemático del Fiscal vs Dusko Tadic el cual estuvo a cargo del TPIY. Cabe preguntarse, ¿cuándo se considera que un comportamiento se encuentra bajo el control de un Estado? Según el artículo VIII del Proyecto REHII:

> Artículo VIII
>
> Se considerará hecho del Estado según el derecho internacional el comportamiento de una persona o de un grupo de personas si esa persona o ese grupo de personas actúa de hecho por instrucciones o bajo la dirección o control de ese Estado al observar ese comportamiento.

Sobre este artículo, la CDI hace referencia al tipo de comportamiento de una persona o grupo de personas que se encuentran bajo el control de un Estado, pero que este no tiene una posición dentro del gobierno, es decir, aquellas personas serán órganos *de*

*facto*. En síntesis, sostengo que órgano *de iure* se refiere a la persona o entidad que tiene un vínculo con determinado Estado y que el tipo de control que ejerce se encuentra sustentado en el derecho. En el caso de órgano *de facto* se refiere a la persona o entidad que si bien es cierto no mantiene un vínculo con un Estado en el derecho, en los hechos ocurre lo contrario, sí se ejerce control sobre el mismo. Entonces, en órganos *de iure* existe una dependencia total del Estado y en órganos *de facto* existe una dependencia parcial del Estado.

Como menciona el autor Abass (2008), existen tres fundamentos principales provenientes del Proyecto REDHII que permiten realizar el análisis de si hubo o no atribución por parte de Serbia en los hechos ocurridos en Srebrenica. El primero es la conducta de los órganos que, de acuerdo con las leyes internas de Serbia, son órganos de ese Estado. El segundo es la conducta de entidades que, aunque no constituyen órganos de Serbia en virtud de su derecho interno, se considera que actúan en su nombre y son considerados órganos *de iure* de Serbia. Por último, el tercer fundamento es la conducta de entidades que no son órganos de Serbia en virtud del derecho interno, ni constituyen sus órganos *de iure* pero que, en virtud de operar bajo algún control o instrucción de Serbia o de sus órganos *de iure*, son consideradas órganos *de facto* de Serbia (p. 888).

Se debe mencionar que, no solamente los Estados asumen la responsabilidad de sus acciones cuando estos actúan directamente, sino también cuando actúan de manera indirecta. Ese es el caso de cuando un Estado provee ayuda o asistencia en un hecho internacionalmente ilícito, aquello fue afirmado por la CIJ en su opinión consultiva del 9 de julio del 2004 en "Consecuencias jurídicas de la construcción de un muro en el territorio palestino ocupado". Por ello, la acción de ayuda o asistencia se convierte en crimen de complicidad el cual, al igual que el crimen de comisión, se sanciona. Aquel hecho de complicidad se encuentra estipulado en el artículo XVI del Proyecto de REHII:

> Artículo XVI
> El Estado que presta ayuda o asistencia a otro Estado en la comisión por éste último de un hecho internacionalmente ilícito es responsable internacionalmente por prestar esa ayuda o asistencia sí:
>
> a) Lo hace conociendo las circunstancias del hecho internacionalmente ilícito;
> b) El hecho sería internacionalmente ilícito si fuese cometido por el Estado que presta la ayuda o asistencia.

Luego de haber explicado brevemente los elementos de la responsabilidad internacional estatal, a continuación, se explicará los dos tipos de atribución de responsabilidad de acuerdo con lo estipulado por la CIJ en jurisprudencia pasada. Los tipos de atribución se referirán a personas o entidades que actúan *de facto* bajo el control del Estado, es decir, se analizará a órganos *de facto*.

Los Escorpiones fueron un grupo paramilitar quienes inicialmente fueron una unidad que brindaba seguridad a los campos petrolíferos en el este de Eslovenia. Sin embargo, en 1995, Los Escorpiones se convirtieron en la Unidad Especial Antiterrorista del Servicio de Seguridad Pública de Serbia. No obstante, en la práctica estos fueron reclutados por Mladic en 1995 con la finalidad de conformar una unidad paramilitar que participara en

la planificación de la destrucción del grupo bosnio musulmán. Así pues, Los Escorpiones participaron en los sucesos de Srebrenica y alrededores y estuvieron al mando de estos. Un ataque conocido fue el que se llevó a cabo en la municipalidad de Trnovo, a 80km de Srebrenica, en el cual se filmó la videograbación del asesinato de seis bosnios musulmanes en 1995 por parte de Los Escorpiones.

Ahora bien, lo relevante de la participación de Los Escorpiones en los ataques ocurridos entre 1992-1995 se basa en la prueba que presentó BYH a la CIJ sobre la pertenencia de este grupo paramilitar. BYH presentó documentación que interceptaba las comunicaciones entre funcionarios de las fuerzas policiales de la República de Srpska (Ljubisa Borovc y Sabo Cvjetinovic), las cuales señalaban a Los Escorpiones como "MUP de Serbia" y "una unidad del Ministerio del Interior de Serbia" que demostraba que Los Escorpiones eran órganos *de facto* de Serbia cuando ocurrieron los ataques en 1995. Sin embargo, la CIJ señaló que aquel documento era una copia del original por lo que no podía ser considerado como prueba suficiente para determinar que Los Escorpiones eran órganos *de facto* de la RFY

En este punto considero que la CIJ al no haber encontrado prueba suficiente pudo haber solicitado la documentación original sobre aquella intercepción, sin embargo, esto no sucedió, sino que la CIJ se limitó a indicar que no recibió material el cual indique total dependencia de Los Escorpiones por parte de la RFY. Luego, otra prueba que pudo haber determinado la dependencia total de Los Escorpiones por parte de la RFY fueron los hechos descritos en la sentencia del TPIY, pendiente en ese entonces, sobre Stanisic y Simatovic

Jovica Stanisic fue el ex jefe del servicio secreto serbio y Franko Simatovic fue su adjunto, ambos fueron figuras claves en el Servicio de Seguridad de Serbia. Stanisic y Simatovic fueron acusados de complicidad por participar en una empresa criminal cuyo objetivo era la expulsión forzosa y permanente de gran mayoría de los no serbios, especialmente los croatas y musulmanes bosnios. Esta empresa criminal conjunta (JCE por sus iniciales Joint Criminal Enterprise) existió desde 1991 hasta finales 1995 y fue liderada por Milosevic. Principalmente Stanisic y Simatovic fueron condenados por actuar de manera individual y por medio de la empresa en la formación, suministro, financiación, formación y apoyo de unidades especiales de Serbia a grupos paramilitares como Los Escorpiones, con la finalidad de planificar, preparar y ejecutar a croatas y bosnios musulmanes musulmanes en la zona de Bosanki Samac en abril de 1992.

Considero relevante el juzgamiento de ambos personajes debido a que se estableció que Serbia jugó un rol directo en los conflictos de BYH a pesar de que la CIJ no lo catalogó de la misma manera. Así pues, el hecho de que dos ex personajes del servicio secreto de Serbia participaran en la planificación, formación, suministro y financiamiento demuestra el control total que ejercía Serbia a través de sus órganos de facto. Por ello, con esta prueba la CIJ pudo haber considerado que esta controversia sí cumplía con el control efectivo de Serbia en los grupos paramilitares responsables de la comisión de genocidio en Bosnia.

Sin embargo, sobre esta prueba la CIJ indicó que no podía sacar conclusiones ya que la sentencia se encontraba en la fase de acusación. Lo cual resulta lamentable ya que,

considero que, a pesar de que la CIJ mostraba notable dependencia sobre las sentencias emitidas por el TPIY, la CIJ debía de tomar independencia y aterrizar sobre sus propias conclusiones respecto de hechos relevantes como la responsabilidad de Stanisic y Simatovic en los hechos y pruebas recolectadas. Asimismo, discrepo de la CIJ cuando comentó que la prueba no podía ser analizada ya que se encontraba en fase de acusación en otro Tribunal, ya que el hecho de que no existiera sentencia firme por parte del TPIY en el caso de Stanisic y Simatovic no significa que las pruebas que se analizaron no podrían haber llegado hasta la CIJ si esta las hubiera solicitado.

Por lo que, de haber ocurrido un juicio más rápido, la CIJ habría tenido pruebas de que los Escorpiones dependían completamente de Serbia y el resultado del fallo del 2007 habría sido diferente. En tanto, luego de que la CIJ concluyó que no había dependencia total de los órganos *de facto* hacia Serbia, la CIJ procedió analizar si estos órganos tenían dependencia parcial de Serbia a través del control efectivo.

Antes de entrar al control efectivo, en este apartado se explicarán los dos tipos de modalidades de atribución de responsabilidad estatal. La primera se da a través del control efectivo criterio estipulado por la CIJ, y la segunda a través del control general, criterio estipulado por el TPIY. Por un lado, la sentencia del 27 de junio de 1986, en el Caso relativo a las actividades militares y paramilitares en Nicaragua y contra Nicaragua (Nicaragua vs Estados Unidos) la CIJ determinó si es que los “Contras” eran órganos de *iure* o *de facto* de EE. UU. y si estos actuaban en contra de Nicaragua. Los Contras inicialmente eran opositores del gobierno nicaragüense, quienes fueron miembros de la Guardia Nacional y militares afiliados al gobierno de Somoza, es en 1979 cuando se formaron las fuerzas contrarrevolucionarias o también llamados Los Contras. Si bien es cierto su conformación inicial fue de manera autónoma, EEUU elaboró estrategias, brindó apoyo directo en cuanto a financiamiento, adiestramiento y armas. Por ello, se podría indicar que EEUU ejerció control efectivo en Los Contras.

Sin embargo, la CIJ[19] determinó que, con las pruebas presentadas, no se encontraba convencida de que todas las operaciones lanzadas por la fuerza contra, en todas las etapas del conflicto, demuestran la estrategia y tácticas trazadas por EE. UU. No obstante, debe tenerse en cuenta que, el punto de vista de la CIJ fue un análisis del soporte que brindó EE. UU. a las actividades de los Contras a lo largo de los años.

Las actividades en mención fueron: soporte logístico, suministro de información sobre los sitios y movimientos de las tropas sandinistas, el uso de sofisticados métodos de comunicación, la instalación en el campo de sistemas de comunicaciones, cubrimiento de radar, etc. La CIJ afirmó que, en el caso de Nicaragua, un cierto número de operaciones militares y paramilitares fueron planeadas y decididas por asesores de EE.UU., o al menos hubo una estrecha colaboración con estos. Asimismo, la CIJ indicó que EE. UU. pudo entregar suministros aéreos a los Contras. Entonces, a pesar de que, según la CIJ, la participación de EE. UU. fue preponderante y decisiva en el financiamiento, organización, entrenamiento, suministro y equipamiento de los Contras, así como también en la selección de objetivos militares o paramilitares y planeación de toda la operación, para la CIJ no existió suficiente prueba para atribuir a EE. UU. los actos cometidos por los Contras en Nicaragua.

[19] En este acápite se resume la decisión del control efectivo del caso Nicaragua vs Estados Unidos (27 de junio de 1986)

La CIJ concluyó que, a pesar de que hay un control general y alto grado de dependencia por parte de EE. UU., sin pruebas adicionales sobre EE. UU. perpetrando o imponiendo actos contrarios a los derechos humanos o derecho internacional humanitario, no se puede afirmar que hubo responsabilidad internacional por parte de EE. UU. Asimismo, la CIJ señaló que, para alcanzar ese grado de responsabilidad, se tuvo que haber probado que EE. UU. tenía el control efectivo de las operaciones militares y paramilitares.

En suma, como menciona el autor Nieto (2010) para la CIJ, para atribuir los actos de los Contras a EE. UU., tuvo que haber una prueba que demuestre que estos eran un órgano que actuaban en nombre de EE. UU. Ese grado de demostración es tan alto que, al alcanzarlo, determinaría que una total dependencia de los Contras hacia EE. UU (pp.34-36). Entonces, el control efectivo consiste en que se pruebe que la entidad no estatal actuaba en nombre del Estado a través de una orden directa, dirigiendo operaciones o brindando instrucciones específicas. La orden que dicta el Estado a la entidad no estatal debe de relacionarse con el acto cometido por este último.

Por otro lado, la Sala de Apelaciones del TPIY en el caso de Dusko Tadic[20] respecto a la atribución de responsabilidad señaló que el requisito en el derecho internacional, para atribuir a los Estados actos llevados a cabo por individuos privados, el Estado debe de ejercer el control sobre aquellos individuos. Este grado de control resulta variable de acuerdo con el tipo de circunstancias, es casuístico. La Sala de Apelaciones del TPIY hizo una crítica sobre el alto umbral en el derecho internacional para realizar un examen de control. Ya que, se puede hallar atribución de responsabilidad sin que un Estado brinde instrucciones específicas de un grupo organizado y jerárquicamente estructurado, ejemplo de ello: unidad militar, bandas armadas, rebeldes, entre otros.

La Sala de Apelaciones del TPIY hace mención también que, un grupo organizado es diferente de un individuo ya que el primero tiene una estructura, cadena de mando, reglas y símbolos exteriores de autoridad. Entonces, suele suceder que un miembro de un grupo no actúa de manera individual, sino que se ciñe por los estándares del grupo y lo que la autoridad del grupo le indique. Concluye entonces el TPIY en el caso de Dusko Tadic que, para atribuir a un Estado los actos de tales grupos, es suficiente que el grupo se encuentre bajo control general del Estado. En suma, el TPIY indica que la normativa intencional no requeriría que el control se extienda a la expedición de ordenes específicas en determinadas acciones militares, sean o no contrarias al derecho internacional humanitario.

Entonces, el control general sucede cuando el Estado interviene en la organización, coordinación, o planificación de las actividades militares del grupo militar, además de la financiación, la formación y el equipamiento o el apoyo operacional a ese grupo. (Stewart, 2003). En suma, la diferencia entre el control efectivo y el control general es que el control efectivo exige que se prueben los hechos que relacionan al órgano no estatal con el Estado de manera muy específica, a través de instrucciones específicas, órdenes directas o dirigiendo operaciones. En cambio, el control general ofrece un

[20] En este acápite se resume la decisión del control general del caso el Fiscal vs Dusko Tadic (15 de julio de 1999)

estándar más bajo de prueba para atribuir las acciones realizadas por el órgano no estatal al Estado en cuestión.

Dentro de este orden de ideas, a continuación, se aterrizará al caso del presente informe. De acuerdo con los hechos explicados en el anterior problema secundario, se procederá a analizar cómo estas obligaciones señaladas en el artículo III de la Convención de Genocidio sí estaban relacionadas con Serbia. Para empezar, la CIJ determinó que los acontecimientos de BYH desde 1992 hasta el 13 de julio de 1995 no constituyeron el crimen de genocidio. Es decir, la CIJ consideró que las matanzas del grupo bosnio musulmán en áreas de Bosnia como: Sarajevo, Prijedor, Banja Luka y Breco, no cumplían con el requisito de la comisión de genocidio debido a que no se probó la intención de destruir a la población bosnio-musulmana.

La CIJ consideró que no hubo evidencia suficiente que permitiera demostrar que la intención de aquellas matanzas se llevó a cabo con la intención de destruir al grupo como tal (dolo especial). La base del CIJ para determinar aquella postura fue la siguiente "examinó cuidadosamente los procedimientos penales del TPIY y las conclusiones de sus salas… y observó que no se determinó que ninguno de los condenados hubiera actuado con intención específica" (CIJ, 2007, párr. 277). Asimismo, la CIJ comentó en el fallo del 2007 que, en ninguno de los casos del TPIY referentes a las matanzas realizadas fuera de Srebrenica, el Tribunal determinó que los acusados hayan cometido sus crímenes con dicha intención específica.

De manera central, la CIJ se enfocó en hallar responsabilidad internacional de Serbia por conspiración de comisión, complicidad y la doble obligación de prevenir y sancionar actos de genocidio. En esa misma línea, la CIJ consideró que las matanzas ocurridas a más de 8.000 musulmanes en Srebrenica a partir del 13 de julio de 1995 fueron cometidas con la intención específica de destruir en parte al grupo de los musulmanes bosnios de BYH. La CIJ también reconoció que aquellos actos fueron perpetrados por miembros del ejército de la República de Srpska. La base de aquellas afirmaciones fueron las sentencias de primera instancia y apelación del TPIY en el caso Fiscal vs Krstic. En esta, la Sala de Primera Instancia y de apelación concluyeron que "no había ninguna duda de que se había cometido genocidio en Srebenica". Todo ello, con la finalidad de determinar si aquellos hechos son atribuibles a Serbia.

Entonces, como fue explicado anteriormente, existen dos tipos de control, el control efectivo y el control general. En este caso, la CIJ debía de analizar entre los dos tipos de controles, si hubo atribución por parte de Serbia en los actos cometidos por las fuerzas del VRS (o pro-serbias) contra los bosnios musulmanes. Asimismo, como fue mencionado anteriormente, según el autor Abass (2008) existen tres fundamentos que permiten identificar la atribución de responsabilidad de un Estado. El primero es la conducta de los órganos internos del Estado, el segundo es la conducta de entidades que no forman parte del Estado pero que actúan en su nombre y son considerados como tal, los órganos *de iure* y el tercero son conductas de entidades que no son órganos del Estado ni órganos *de iure* pero que en la práctica son considerados como órganos *de facto*. (p.888)

Ahora bien, para el análisis de la jurisprudencia de Nicaragua, como fue mencionado anteriormente, la CIJ tuvo que determinar que EE. UU. era responsable de las

actividades de los Contras contra el gobierno de Nicaragua. Entonces, como menciona el autor Abass (2008), eran dos elementos los que debían de determinarse para poder afirmar que las conductas de órganos *de facto* pueden atribuirse a un Estado: el primero es la "total dependencia" y el segundo "el control". (p.891). Cabe mencionar que estos dos elementos deben ir juntos.

Ante ello, la CIJ en el fallo del 2007 añadió que, los órganos del Estado, a efectos de determinar la responsabilidad internacional, estos pueden ser personas o entidades que, aunque esta condición no derive del derecho interno, actúan con total dependencia del Estado. En este orden de ideas, la CIJ analizó la dependencia de las fuerzas del VRS respecto de la RFY. Ante ello la CIJ reconoció que "las relaciones políticas, militares y logísticas entre las autoridades federales de Belgrado y las autoridades de Pale, entre el ejército yugoslavo y el VRS, habían sido fuertes y estrechas en los años anteriores y sin duda seguían siendo poderosos". (CIJ, 2007, párr. 394). Sin embargo, la CIJ consideró que, ni la República de Srpska ni el VRS podían ser considerados como instrumentos que actuaban bajo dependencia total de RFY. Entonces, el primer elemento no cumplió con los requerimientos de dependencia según lo analizado por la CIJ.

Para el segundo elemento, el control, el cual se encuentra estipulado en el artículo 8 del Proyecto de REHII, como fue mencionado anteriormente, señala que la finalidad de esta prueba de control, instrucción o dirección es identificar si la entidad actúa bajo órdenes de Serbia o de sus representantes competentes (Abass, 2008). La prueba del control se encuentra estipulada en la jurisprudencia de la CIJ en el caso de Nicaragua. Sobre este caso, como fue explicado anteriormente, luego de que la CIJ determinó que no hubo dependencia por parte de órganos *de facto* de EE. UU. en los hechos cometidos por los Contras, la CIJ procedió a analizar si EE. UU. habrían dirigido o impuesto aquella perpetración cometida por los Contras.

En ese sentido, el siguiente punto era que la CIJ determinara si el Estado tenía control efectivo de las operaciones militares o paramilitares ocurridas en Nicaragua, para esto, se determinó que de las pruebas no se podía determinar que EE. UU. ejerció tal grado de control sobre los Contras. Ahora bien, plasmando aquellos enfoques en el presente caso, la CIJ determinó que la RFY no tenía el control efectivo de VRS ni de "Los Escorpiones", ni tampoco hubo órganos de Serbia que dieran instrucciones a VRS como para justificar que las conductas cometidas por estos fueron atribuibles a Serbia.

Resulta curioso que, para un caso donde la CIJ tiene conocimiento que "no hay suficientes pruebas para demostrar los hechos" se utilice un control tan estricto como es el control efectivo. Especialmente teniendo como antecedente el caso de Nicaragua sobre el cual también hubo falta de pruebas para demostrar la atribución de los hechos cometidos por los Contras a EE. UU. Entonces, ¿por qué no se utilizó el control general en este caso? BYH cuestionó sobre ello a la CIJ, su argumento se basaba en que la evaluación del control efectivo de Serbia debería de realizarse en base al conjunto de operaciones llevadas a cabo por los autores del genocidio y no con los actos en específico.

Como menciona el autor Abass (2008) la CIJ se negó a adoptar la propuesta presentada por BYH debido a que la aplicación del "control general" implicaría una rebaja del umbral

de la prueba (894). Sin embargo, otros tribunales internacionales utilizan el control requerido con flexibilidad, tal como sucedió con el caso de Tadic, en el que la Sala de Apelaciones prefirió aplicar el "control general" al "control efectivo". Dicha Sala declaró también que, la aplicación de estos controles va en función con las circunstancias fácticas de cada caso. Un asunto importante mencionado por la Sala fue que, esta no ve por qué en todas las circunstancias en el derecho internacional se debería de exigir un umbral elevado para la prueba de control. (TPIY, 1999, párr.117)

Con respecto a la decisión tomada por la CIJ en cuanto al tipo de control escogido, considero que primero, no se abordaron de manera adecuada las pruebas recibidas en el caso, por lo que el análisis del control efectivo no pudo realizarse apropiadamente. Es decir, considero que, la CIJ de haber solicitado a Serbia pruebas sugeridas por BYH del documento perteneciente al Consejo Supremo de Defensa de Serbia y de la declaración del Consejo de ministros de Serbia, de haber analizado todas las pruebas que recibieron y de haber analizado cada una de ellas de manera particular, sin repetir todo lo señalado por el TPIY, la CIJ hubiera quizás descubierto que sí hubo comisión del crimen de genocidio atribuible a Serbia con Los Escorpiones. A continuación, explicaré de manera más detallada las afirmaciones anteriores. Para empezar, dentro del análisis realizado por la CIJ, esta comentó que el genocidio debe ser probado con evidencia concluyente. Sin embargo, uno de los aspectos más curiosos es el uso que le daba a las pruebas que recibieron sobre los hechos ocurridos de 1992-1995.

Por ejemplo, BYH solicitó a la CIJ que se presentaran versiones no editadas de los documentos del Consejo Supremo de Defensa de Serbia. BYH indicó que en este documento Serbia había aceptado formalmente responsabilidad del crimen que BYH lo acusaba, de acuerdo con el General Richard Dannatt, quien mencionó que aquella documentación demostraba la relación entre las autoridades de la RFY y la República de Srpska sobre cuestiones de control e instrucción. (CIJ, 2007, párr. 206). Sin embargo, luego de que la CIJ solicitó aquella documentación, la RFY se negó a entregar lo solicitado con la justificación de que dichos documentos estaban clasificados como confidenciales y secreto militar. La CIJ no tomó acción sobre ello lo cual resulta lamentable ya que pudo haber sido una prueba clave para la decisión final del caso.

Luego, como menciona el autor Marques (2008), si bien es cierto, durante el proceso judicial la CIJ permitió un gran margen para que ambas partes presentaran sus pruebas, la CIJ dejó de lado mucha documentación también proveniente del TPIY. (p.905). Entonces, apareció un gran problema ya que la CIJ no analizó gran parte del material que se le brindó, sino que, hizo una selección limitada de acuerdo con lo que los jueces consideraron relevante para el caso. La justificación de la CIJ fue que, a pesar de que existieron vínculos políticos, financieros, militares y administrativos entre la VRS y Serbia, no había intención demostrada de querer destruir, total o parcialmente a los bosnios musulmanes.

Sin embargo, considero que resulta incoherente que, la CIJ indique que no analizó mayor documentación probatoria debido a que no había intención de destruir cuándo cómo podría llegar a esa conclusión sin siquiera haber revisado el material que se rechazó. En ese sentido, la omisión de la CIJ de no aceptar ni analizar medios probatorios importantes de la RFY para la determinación del genocidio genera

preocupación respecto de la decisión final de la sentencia, si esta hubiera dado un giro drástico o no.

Ahora bien, de acuerdo con el principio *onus probandi incumbit actori*, la carga de la prueba siempre recae en el que acusa y no en el acusado. No obstante, en 1948, en el asunto del Estrecho de Corfú (Reino Unido vs Albania), debido a la imposibilidad de obtener pruebas concluyentes sobre la responsabilidad albanesa por parte del demandante, ya que los hechos habían ocurrido en el territorio albanés, la CIJ de manera implícita revirtió la carga de la prueba hacia el demandado. (Marques, 2008). Como señala el autor en mención, la carga de la prueba fue transferida de instancia parte y no *motu proprio* de la CIJ.

BYH le mencionó a la CIJ que en algunos casos la carga de la prueba debería de invertirse especialmente para identificar la atribuibilidad de los supuestos de actos de genocidio, especialmente cuando Serbia se niega a entregar documentos (CIJ, 2007, párr.204). La respuesta de la CIJ fue negativa, como menciona Kolb (2013), la CIJ consideró que no era útil actuar como actuó en el Asunto de Estrecho de Corfú a pesar de que Serbia tenía el control exclusivo de la mayor parte del territorio en el que debían de encontrarse las pruebas (p. 948). La justificación sobre la cual la CIJ basó su negativa en invertir la carga de la prueba fue porque BYH disponía de amplia documentación y otras pruebas de fácil acceso que brinda el TPIY. (CIJ, 2007, párr.206).

Entonces, la CIJ consideraba que había "una cuidadosa selección de documentos disponibles en el TPIY" por lo que, no era necesario invertir la carga de la prueba. Sin embargo, aparece una contradicción respecto de lo que la CIJ señala en repetidas ocasiones respecto de que no disponía de pruebas suficientes para probar un hecho ilícito, pero a la vez que la CIJ tenía fácil acceso a través del TPY de documentación suficiente y pruebas. En tanto, considero que la actitud de la CIJ no fue apropiada ya que BYH se encontraba en una posición dificultosa de obtener pruebas cuando Serbia poseía toda la documentación y este se negaba de entregarla.

En ese mismo orden de ideas, en la misma línea que el autor Abass (2008), lo que la CIJ también pudo haber hecho fue considerar la jurisprudencia de los TPIY respecto de pruebas circunstanciales halladas. Por ejemplo, en el caso Krstic, la Sala de Apelaciones del TPIY indicó que "cuando no existen pruebas directas de la intención genocida, esta puede deducirse de las circunstancias de hecho del crimen" (TPIY, 2001, párr.344). Asimismo, la Sala de Apelaciones del ICTR en el caso Fiscal vs Rutaganda señaló lo siguiente:

> Es posible deducir la intención genocida inherente a un acto concreto imputado a partir del contexto general de la comisión de otros actos culpables dirigidos sistemáticamente contra el mismo grupo, ya hayan sido cometidos por el mismo autor o por otros. Otros factores, como la magnitud de las atrocidades cometidas, su carácter general, en una región o un país, o, además, el hecho de dirigirse deliberada y sistemáticamente contra las víctimas por su pertenencia a un grupo concreto, excluyendo al mismo tiempo a los miembros de otros grupos, puede permitir a la Sala inferir la intención genocida de un acto concreto.

Por ello, como mencioné anteriormente, considero que la CIJ no hizo un adecuado análisis en el control efectivo al no permitir flexibilidad del umbral de la prueba a pesar de que, era de conocimiento que no existía "prueba suficiente" para demostrar la atribución del crimen hacia Serbia. Sin embargo, considero que sí hubo pruebas suficientes tales como la aceptación de responsabilidad por parte del Consejo de ministros de Serbia en 2005, las acusaciones hacia Mladic, Jovica Stanisic, y a su adjunto Franko Simatovic. Asimismo, la declaración del General Wesley Clark ante el TPIY en la sentencia de Milosevic. Cuando este último señaló que el presidente de Serbia, Milosevic era consciente de la masacre que iba a ocurrir en Srebrenica en julio de 1995 y fue tomado como prueba válida en aquel juicio. También la documentación que BYH presentó a la CIJ sobre la interceptación de comunicaciones entre funcionarios Ljubisa Borovcanin y Savo Cvjetinovic pertenecientes a las fuerzas policiales quienes señalaron que Los Escorpiones tenían una estrecha relación con el Ministerio de Interior de Serbia.

Entonces, si bien es cierto que la CIJ es libre de extraer sus propias conclusiones, como señaló el juez Al-Khasawneh en su opinión discrepante (CIJ, 2007, párr.42), pareciera que la CIJ actuara de acuerdo con su conveniencia. Es decir, considero que la CIJ le dio más importancia a cumplir con los criterios altos de exactitud de la evaluación del criterio del control efectivo, antes que identificar que lo importante es sancionar a lo ocurrido debido a la consecuencia de haber violado esa norma. Además de ello, la CIJ adoptó un criterio tan estricto que no pudo satisfacer la demostración de atribución de responsabilidad debido a que la misma CIJ no solicitó las pruebas señaladas por BYH que demostraban relación directa entre las fuerzas de VRS y Serbia.

Ahora bien, luego de haber analizado el control utilizado por la CIJ[21], y mi postura sobre ello, a continuación, procederé a comentar las decisiones sobre las obligaciones explicadas anteriormente en la tercera pregunta secundaria. Primero, respecto de la obligación de no cometer genocidio, la CIJ señaló que no se probó que los órganos del Estado o personas actuando por instrucción del Estado o bajo su control efectivo hubiesen cometido actos que pudiesen calificarse como "asociación" para cometer genocidio (b), "instigación directa y pública" a cometer genocidio (c) o "tentativa" de genocidio (d). Como mencioné anteriormente, considero que no se pudo llegar a la confirmación de atribución de genocidio respecto de lo ocurrido en Srebrenica a Serbia debido a que la CIJ no realizó un adecuado análisis del caso. El factor probatorio resulta fundamental cuando se requiere afirmar la relación entre órganos *de facto* o *de iure*. Especialmente, si la misma CIJ es quien señala que no había prueba suficiente cuando en realidad sí había pruebas, como mencioné anteriormente, solo que estas no fueron analizadas o no solicitadas por la CIJ.

Respecto del ámbito de la complicidad de genocidio, la CIJ realiza un análisis sobre la relación entre la complicidad estipulada en el artículo XVI del Proyecto REHII y lo señalado en la Convención de Genocidio. Según la autora Novinec (2011), la complicidad requiere alguna acción positiva o negativa para prestar ayuda o asistencia, es decir, puede aparecer una acción positiva o negativa (p.29). Ahora bien, respecto del ámbito conceptual del término de complicidad, en 1978, Roberto Ago, Relator Especial de la ONU de la CDI sobre temas relacionados a la responsabilidad del Estado, presentó

[21] En este acápite se resume las conclusiones señaladas por la CIJ en la Sentencia del 26 de febrero del 2007 caso BYH vs Serbia.

el proyecto de artículo “Complicidad de un Estado en el hecho internacionalmente ilícito de otro Estado”.

Sobre ello, Ago explicaba que la ayuda y asistencia de un Estado a otro Estado frente a un hecho internacionalmente ilícito equivalía que este Estado era responsable sobre el que le presta ayuda. Asimismo, Ago indicó que la ayuda se da cuando se brinda suministro de armas a otro Estado con la finalidad de perpetrar un genocidio. (Ago,1978, como se citó en Novinec, 2011). Frente a este principio, considero que puede ser utilizado no solo para entidades estatales sino también para aplicar a otras situaciones de apoyo a entidades no estatales como es el caso de la VRS y Los Escorpiones.

Ago verificó que esta complicidad de genocidio también se encontraba señalada en el Convenio de Genocidio, sin embargo, señaló que la ayuda o asistencia de un Estado a otro no era una indicación explícita en el Convenio, por lo que especificó el alcance exacto entre el concepto de su proyecto de artículos de 1978 y la Convención de Genocidio. Luego de algunos años, aquel proyecto de complicidad de Ago fue adoptado y modificado quitando el término explícito de “complicidad” ya que algunos miembros del CDI mencionaron que no era recomendable utilizar un término del derecho penal internacional en el proyecto. Por ello, aquella definición convertida y adoptada solo con los términos de asistencia y ayuda en el artículo XVI del Proyecto REHII.

La Convención de Genocidio no ha definido el término de “complicidad”, sin embargo, la CIJ aclaró que el artículo III de la Convención se refiere tanto a la responsabilidad penal individual como a la responsabilidad internacional del Estado (CIJ, 2007, párr.167). Entonces, como señala la autora Novinec (2011), lo conveniente sería utilizar el artículo XVI del Proyecto REDIIH como complicidad a pesar de que esto no se haya descrito de manera explícita ya que, como sabemos, aquella definición del artículo fue creada con la intención de explicar la responsabilidad de complicidad de un Estado. (p.96). Asimismo, la CIJ tomó una posición importante sobre la definición de complicidad del Estado, este concluyó lo siguiente:

> Que no había ninguna razón para hacer una distinción de fondo entre la complicidad en el genocidio en el sentido del artículo III párrafo e) del Convenio de Genocidio y la ayuda o asistencia de un Estado en la comisión de un hecho ilícito por otro Estado en el artículo 16 del Proyecto REDIIH. Es decir, para determinar si el Estado es responsable de complicidad en genocidio se debe de examinar si los órganos del Estado demandado, o las personas que actuaron siguiendo sus instrucciones o bajo su control efectivo, prestaron ayuda o asistencia en la comisión del genocidio de Srebrenica. (CIJ, 2007, párr.420)

Entonces, con lo concluido por la CIJ respecto del concepto de complicidad se colige que tanto el concepto de complicidad del artículo III de la Convención de Genocidio como el concepto del artículo XVI del Proyecto REDIIH no son distintos. Ahora bien, la CIJ señaló también que “no cabe duda de que la complicidad incluye la provisión de medios para permitir o facilitar la comisión del delito” (CIJ, 2007, párr.420). Es decir, como señala la autora Novinec (2011), la complicidad no se limita a una situación en la que un Estado ayuda y asiste a otro Estado en la comisión del genocidio. (p.101) Sino que también existe complicidad cuando un Estado ayuda y asiste a entidades no estatales.

Asimismo, como fue señalado en párrafos anteriores, la CIJ, señaló que la definición de complicidad en el genocidio del artículo III inciso e) de la Convención no difiere del artículo XVI del Proyecto REDIIH, y que un Estado es cómplice cuando tanto sus órganos estatales como los no estatales prestan ayuda o asistencia a la comisión del genocidio. Entonces no hay una limitación de que la ayuda o asistencia sea de Estado a Estado, sino que también según la CIJ aplica de Estado a órganos no estatales. A partir de ello, considero que se puede afirmar que Serbia sí fue cómplice de genocidio ya que financió y suministró armas a los VRS para que puedan cometer el crimen de genocidio en distintas provincias de BYH.

El artículo 16 del Proyecto REDIIH no exige que la ayuda o asistencia siempre tengan que contar con una acción positiva, sino que resulta suficiente que la conducta del Estado, en este caso Serbia asista o contribuya materialmente con el acto ilícito del Estado asistido en este caso la República de Srpska. Entonces, considero que, contraria a la posición de la CIJ, y en la misma línea que el artículo XVI del Proyecto REHII, la complicidad en el genocidio también puede resultar de la omisión de acción del Estado frente a las conductas ilícitas provenientes de terceros, sobre la cual además se le suministra asistencia y ayuda para la perpetración del genocidio. Esta asistencia y ayuda aparece cuando no se recorta el financiamiento hacia la VRS o se detiene el suministro de armamento a pesar de que como menciona la CIJ, Serbia contaba con conocimiento de las masacres que ocurrían en 1992-1995.

En continuación de lo analizado por la CIJ, me encuentro de acuerdo con la CIJ cuando señala que, la responsabilidad del Estado puede surgir por la comisión de genocidio o por complicidad, sin que un individuo sea condenado por el crimen o uno asociado. (CIJ, 2007, párr. 182). La complicidad requiere que, tenga o haya tenido conocimiento de la intención especial de destruir a los musulmanes bosnios. Asimismo, en la complicidad, quien presta apoyo no debe tener el mismo dolo genocida, sino que sería suficiente con que el cómplice conozca que el autor tiene esa intención. Sin embargo, considero que esta definición incurre en contradicción respecto de lo que señaló la CIJ sobre la violación del deber de prevención de Serbia.

Es decir, la CIJ en su párrafo 431 del fallo del 2007 señaló que Serbia había incurrido en la violación de la prevención del genocidio. Y señaló también que violó aquella obligación ya que, a pesar de que tenía una “innegable influencia sobre las fuerzas serbiobosnias que operaron en Serbia” (CIJ, 2007, párr. 434), sumado a la información que poseían sobre ello más el conocimiento de lo que ocurría, no previno el posible riesgo de que se produjera un genocidio. Ahora viene lo contradictorio, cuando la CIJ también menciona que no se cumplió con el acto de complicidad de genocidio porque las autoridades serbias no tenían el conocimiento sobre el dolo genocida, lo cual es incorrecto, ya que Serbia sí tenía conocimiento de las masacres que ocurrieron.

Asimismo, la CIJ en su fallo del 2007 determinó que para que la conducta de un Estado encuadre en este acto ilícito, los órganos del Estado o las personas que actúen por su orden o bajo su control efectivo deben haber prestado “ayuda o asistencia” en la comisión del genocidio. Esta ayuda o asistencia se ve reflejada cuando Serbia tiene conocimiento del hecho ilícito y no lo previene o castiga a pesar de que es consciente de que aquellos actos son contrarios a las obligaciones estipuladas por la Convención

de Genocidio. Entonces, como señala la autora Novinec (2011), un Estado que es consciente de un hecho ilícito pero que no toma las medidas correctas para impedir aquel acto u ofrece apoyo, en este caso financiero y de suministro de armas, y además de ello no castiga a Mladic ni apoya a su búsqueda para la efectiva orden de arresto, se convierte en cómplice del crimen de genocidio. (p.27).

Así pues, concluyo que la responsabilidad de Serbia aparece cuando Serbia, teniendo conocimiento de las acciones de VRS y Los Escorpiones, siguió brindando financiamiento y suministros. Asimismo, la responsabilidad aparece cuando Serbia es incapaz de prevenir aquellos actos y de castigar a Mladic, quien estuvo prófugo durante 16 años luego de que se le acusara de cometer crímenes internacionales cuando estuvo al mando de la VRS.

Como señala la autora Ariaz (2008) la CIJ negó que Serbia tuviera la información de que había intención específica de eliminar a los musulmanes bosnios, por lo que no hubo complicidad. (p.64). Frente a ello, considero que la CIJ al concluir que Serbia no había cumplido con el deber de prevención, debido a que tenía conocimiento sobre lo que ocurría, entonces también se debió de concluir que Serbia actúo en complicidad en el crimen de genocidio.

El siguiente apartado corresponde a la obligación de prevenir el genocidio. Según la CIJ, la obligación de prevención nace cuando el Estado toma conocimiento de la existencia de un riesgo de que se cometerá genocidio y que, frente a ello, responde por incumplimiento de esta obligación si el genocidio se produce. (CIJ, párr. 431).

Asimismo, la CIJ mencionó que, no será exento de responsabilidad el Estado que, haya probado que utilizó todos los medios para prevenir, pero que estos medios hayan sido insuficientes para prevenir el genocidio. Entonces, sobre este punto, la CIJ concluyó que, Serbia incumplió la obligación contenida en el artículo I de la Convención. La atribución de responsabilidad estuvo relacionada con un órgano estatal, es decir las autoridades de Serbia tenían influencia sobre las fuerzas serbiobosnias que operaron en Srebrenica, sin embargo, los órganos de Serbia omitieron adoptar medidas para prevenir el genocidio.

Es decir, la CIJ atribuyó responsabilidad a Serbia ya que hubo una omisión de acción por parte de los órganos de su Estado, todo ello de acuerdo con el artículo II del Proyecto REHII cuando menciona que “todo hecho internacionalmente ilícito de un Estado genera la responsabilidad internacional de ese Estado”, también lo señalado por el artículo XII del mismo Proyecto cuando señala que, “el Estado no está en conformidad con lo que exige la obligación internacional”. Asimismo, la RFY se encontraba obligada a cumplir con dos medidas provisionales dictadas el 8 de abril y 13 de setiembre de 1993, sin embargo, estas no fueron cumplidas. Por lo que, a pesar de que se pudo haber prevenido la comisión de genocidio de los hechos ocurridos en Srebrenica esto no fue alcanzado.

Luego, respecto de la obligación de sancionar, de acuerdo con el artículo VI de la Convención de Genocidio, los Estados se encuentran obligados a instituir y ejercer la jurisdicción penal en su territorio. Sin embargo, según la CIJ, Serbia no podía ser juzgada por incumplir esta disposición ya que los crímenes no fueron cometidos en su

territorio. Pero, los Estados de igual forma se encuentran obligados a cooperar con el TPIY, una vez que este se haya creado y el Estado haya aceptado su jurisdicción. (CIJ, 2007, párr.443). Asimismo, según la CIJ, Serbia se encuentra obligada a cooperar con el TPIY desde el momento en que firmaron el Acuerdo de Dayton en 1995. Sin embargo, los órganos estatales de Serbia no cumplieron con el deber de aquel acuerdo ni del artículo VI de la Convención, al no haber arrestado al General Mladic, uno de los responsables de cometer la masacre de Srebrenica.

En tanto, la CIJ concluye que Serbia incumplió con el deber de prevenir y sancionar el crimen de genocidio. Respecto de este último punto, me encuentro de acuerdo con lo señalado por la CIJ tanto en la obligación de prevenir como sancionar, puesto que, considero que Serbia no adoptó todas las medidas que estuvieron a su alcance para prevenir el genocidio. De ahí que, Serbia difícilmente pudo haber ignorado el grave riesgo que corría BYH una vez que las fuerzas serbobosnias decidieron ocupar el enclave de Srebrenica. Por ejemplo, luego de los bombardeos de Sarajevo en 1992, las autoridades de Belgrado pudieron haber previsto que podría haber el riesgo de genocidio y haber prevenido futuros hechos similares a los ocurridos aquel año. Sin embargo, no se tomaron acciones por parte de la RFY para frenar los hechos delictivos ocurridos entre 1992-1995.

Entonces, ¿Serbia pudo o no pudo conocer los hechos que iban a ocurrir en Srebrenica? En este caso tomo la posición de que Serbia sí tuvo conocimiento sobre la intención especial del genocidio. Debido a que, de no haber tenido conocimiento no habrían podido prevenir el hecho y la CIJ no hubiera considerado que se violó la obligación de prevenir. Porque para prevenir un hecho ilícito internacional se debe de tener conocimiento de que este puede o va a ocurrir. En ese sentido, considero que Serbia sí violó la obligación de no ser cómplice, de prevenir y de sancionar en virtud de la Convención de Genocidio. Por lo tanto, sí se puede atribuir la prestación de ayuda o asistencia (complicidad) por parte de Serbia hacia las fuerzas serbiobosnias. Debido a que Serbia brindó el apoyo financiero y suministro de armas a pesar de que se tiene en conocimiento que se estuvieron llevando a cabo ataques hacia la población bosnio-musulmana. Entonces existe complicidad cuando Serbia incurre en una acción negativa y omite el recorte de provisiones materiales como el financiamiento y suministro de armas a la VRS.

Como mencionó el TPIY en la sentencia de Krstic, fue considerable la ayuda de carácter político, militar y financiero presentada por Serbia a la República de Srpska. (TPIY, 2004, párr. 140-142). En ese sentido, se puede inferir las atrocidades cometidas en Srebrenica recibieron el apoyo por parte de Serbia.

De este modo, considero que hubo un incorrecto análisis por parte de la CIJ respecto del acto de complicidad. La CIJ mencionó que no hubo prueba suficiente para demostrar que Serbia suministrara ayuda a los autores del genocidio (CIJ, 2007, párr.423). Sin embargo, considero que la CIJ pudo haber percibido el hecho de que no es posible masacrar a más de 7.000 personas de forma improvisada o espontanea sin haber planificado o preparado previamente el acto. Asimismo, considero que pudo haber demostrado prueba suficiente de complicidad por parte de Serbia el testimonio del General Wesley Clark ante el TPIY en la sentencia de Milosevic. Sobre este, el General

indicó que el presidente de Serbia, Milosevic era consciente de la masacre que iba a ocurrir en Srebrenica en julio de 1995.

Es así pues que en el párrafo 437 del fallo del 2007 la CIJ reconoce que Milosevic tenía información que obraba en su poder, y que los órganos *de iure* de Serbia pudieron haber prevenido el suceso ocurrido en Srebrenica. Por ello, considero que existieron pruebas que demostraran que sí había conocimiento por parte de autoridades de Serbia de los hechos que iban a ocurrir en Srebrenica. Es decir, la ayuda brindada de Serbia a las fuerzas de VRS fue con pleno conocimiento y consciencia de que el genocidio ocurriría o ya estaba ocurriendo.

Por todo ello, mi posición final es que, la CIJ no logró abarcar un análisis adecuado en cuanto a las pruebas que permitieron demostrar la intencionalidad de destruir parcial o totalmente a ciudadanos no serbios. Asimismo, considero que la CIJ no logró analizar adecuadamente el control efectivo porque no solicitó las pruebas que podrían haber demostrado que había instrucciones específicas de destruir por parte de Serbia hacia las fuerzas de VRS. Sin embargo, con las pruebas que no fueron aceptadas por la CIJ, pero sí mostradas por BYH, considero que Serbia fue cómplice del crimen del genocidio en Srebrenica y en los campos de detención en 1992-1995.

Ahora bien, a manera de reflexión, me gustaría traer otro estándar de atribución de responsabilidad que podría ser utilizado para casos a futuro. Es decir, considero que la CIJ pudo reunir las pruebas suficientes para indagar más respecto a si hubo un genocidio o no en Srebrenica, ya que, en aquella época, en 1992-1995, el uso de la tecnología era muy limitado y era muy probable que toda la documentación se encuentre escrita en documentos físicos. Por ello, el hallar aquella documentación sin que exista algún tipo de edición o modificación por alguna fuente electrónica, permitía que se analicen pruebas de manera verídica. Pero, como mencioné anteriormente, la CIJ no realizó un trabajo profundo sobre ello. Entonces, volviendo a la reflexión mencionada, considero que la CIJ debería de considerar el usar otro estándar para determinar si los hechos ilícitos de un grupo o un Estado pueden ser atribuidos a otro Estado o reducir su estándar tan alto para la atribución de responsabilidad en el caso del control efectivo.

Desde mi punto de vista, por un lado, la CIJ podría flexibilizarse y utilizar el estándar de control general. De acuerdo con las tendencias globales recientes, se deben de modificar los criterios utilizados por la CIJ al momento de abordar un caso sobre responsabilidad estatal (Cassese, 2007). Con tendencias globales me refiero a que, debido a los cambios tecnológicos y avances de la inteligencia artificial, cabe la posibilidad de que en la actualidad conseguir un tipo de prueba verídica sea muy complicado. Debido a que podría haber modificaciones en medios de prueba, por ejemplo, se podría alterar una declaración impresa hecha por una autoridad, o se podría distorsionar medios de prueba presentados por medio de grabaciones de mensajes de voz, o también crear videograbaciones con imágenes yuxtapuestas de rostros de personas con la intención de culpabilizar a personas inocentes, etc.

Por otro lado, existen posturas contrarias las cuales señalan que, la inteligencia artificial podría contribuir el conseguir pruebas adecuadas. Por ejemplo, en diciembre del 2023 el diario El Confidencial publicó una nota sobre un programa de inteligencia artificial que analiza el uso del lenguaje genocida. Este programa ha sido creado por el Instituto

Ucraniano y la agencia creativa “Bickerstaff.932”, la herramienta llamada Genocide Speech Monitor (Monitor de Discursos Genocidas) permite analizar los discursos de líderes políticos de varios países para identificar si el discurso utilizado podría estar vinculado a acciones genocidas. Entonces, reconozco también que los usos de la inteligencia artificial no son solamente negativos sino también que pueden contribuir a no solo conseguir pruebas adecuadas como el análisis de lideres que promueven discursos genocidas, sino también prevenir que se difundan este tipo de discursos de odio.

Retomando al tema de los controles, si se continúa aplicando los rígidos criterios del estándar de control efectivo en casos actuales, puede que exista un alto riesgo que los Estados continúen cometiendo crímenes sin temer las consecuencias futuras. Pues el que el Estado sea consciente de que será difícil demostrar a través de pruebas las órdenes directas o instrucciones especificas por parte de los órganos no estatales, podría conllevar consecuencias perjudiciales ya que no serían tan fácil que los Estados asuman atribución de responsabilidad por crímenes internacionales. Entonces, además de la implementación de flexibilización de criterios rígidos del control efectivo, también se podría empezar a utilizar la aplicación del control general. Este control permite que se pruebe de manera amplia que un Estado presta apoyo a un grupo militar o paramilitar o bandas armadas en otro Estado o en su propio país.

El autor Cassese (2007) señala como ejemplo que, con base al control global, se podría determinar que las milicias Janjaweed de las tribus árabes actuaron en nombre del gobierno sudanés en su lucha contra los insurgentes de Darfur. Ya que, según menciona el autor, aquellas milicias fueron acusadas de atrocidades contra la población de Darfur, sin embargo, el gobierno Sudán niega responsabilidad sobre ello. (p. 665). Entonces, debido a que la Comisión Internacional de Investigación de la ONU demostró que el gobierno de Sudán apoyó, financió, armó, equipó y entrenó al grupo, se podría plantear que el grupo actúa bajo el control general de Sudán. Lo cual permitiría que, las violaciones de derechos humanos que fueron causadas por las milicias de Janjaweed sean atribuibles de manera directa a Sudán, sin que se demuestre caso por caso que la violación de las obligaciones si las instrucciones o directrices fueron emitidas por Jartum. (Cassese, 2007).

Otro ejemplo que brinda el autor Cassese (2007) es que, actualmente hay una tendencia en que los grupos terroristas sean apoyados por Estados (p.666). Por lo tanto, será muy útil para la CIJ el hecho de que puedan atribuir la responsabilidad del hecho ilícito a través del control general. Ya que, el control efectivo es muy exigente y como lo mencioné anteriormente, plantearía problemas en el ámbito probatorio, a menos que estos criterios rigurosos empiecen a flexibilizarse.

El tema de los grupos terroristas resulta muy relevante respecto de cómo probar que aquellos grupos actuaron siguiendo directrices o instrucciones bajo un control específico del Estado. Como menciona el autor Cassese (2007) debido a la naturaleza de esos grupos, su división en pequeñas unidades o subunidades (dentro del mismo grupo) sumado a que se deba probar el contacto entre esta unidad o subunidad y el órgano *de iure* o *de facto* del Estado ante la CIJ, sería muy difícil probar la relación entre ambos. (p.666) Ya que, tal como exige la CIJ en los estándares de prueba del control efectivo, sería casi imposible probar cada relación entre ambos actores respecto a cada

operación terrorista. Por lo tanto, en estos casos sería más efectivo que se utilice el control general, para poder identificar y sancionar la conducta de los Estados que realicen los actos del crimen de genocidio.

En suma, resulta importante que la CIJ se plantee el hecho de flexibilizar el criterio de control efectivo o empezar a usar el control general en sus juicios de atribución de responsabilidad por el crimen de genocidio. Dado que, de lo contrario, como lo mencioné anteriormente, difícilmente algún Estado podrá afrontar las consecuencias de sus hechos, es decir ser sancionados por una Corte. Por ello, algunos Estados tomarán ventaja de los altos requisitos que se necesita para alcanzar el umbral de la prueba en el control efectivo.

## 5. Conclusiones

El caso de BYH contra Serbia ha sido uno de los más largos en la CIJ: tomó catorce años. Lo cual genera una expectativa entusiasta respecto del juzgamiento realizado, no obstante, muchas de las decisiones tomadas por la CIJ en el proceso de cuestiones jurídicas y fácticas del caso fueron algunas de ellas decisiones anteriormente tomadas por el TPIY. Coincido con algunas decisiones tomadas por la CIJ en base a las pruebas y decisiones del TPIY, sin embargo, considero que la CIJ pudo haber ejercido su autonomía como órgano jurisdiccional y haber llegado a conclusiones por sí misma.

En síntesis, considero que en este caso que duró catorce años, no hubo un juzgamiento detallado que permitiera atribuir responsabilidad a Serbia por todos los crímenes cometidos dentro del periodo de 1992-1995. A pesar de que este caso representaba una gran disputa jurídica, la CIJ desarrolló un rol limitado. Esta tuvo una grandiosa oportunidad para poder desarrollar y mejorar dos pruebas. La primera es relacionada a la identificación de la existencia de un genocidio, como se mencionó anteriormente, para identificar si hubo un genocidio se deben de abordar dos elementos, el primero es el *actus reus* y el segundo el *mens rea* y el segundo es la demostración que hubo un control efectivo por parte de Serbia con las fuerzas de VRS de Los Escorpiones.

En el primer punto, frente al análisis del genocidio considero que la CIJ debió de haber solicitado los documentos clave que podrían haber demostrado la responsabilidad directa por parte de Serbia en el crimen de genocidio. Como fue explicado anteriormente, la intención específica de destruir total o parcialmente a los bosnios musulmanes del elemento del *mens rea* es muy complicado conseguir pruebas para demostrar aquella intención. Por ello, debió de haber solicitado estas pruebas indicadas por BYH y no declinar el pedido, ya que a raíz de esa acción solo se pudo probar que Srebrenica fue el único lugar donde ocurrió el genocidio, lo cual en la práctica no es correcto.

Sobre el segundo punto, considero que la CIJ teniendo como precedente el estándar utilizado en Nicaragua, en este caso en particular donde le tomó tantos años llegar al fallo final, pudo haber desarrollado y mejorado la aplicación del control efectivo. Sin embargo, la CIJ continuó con el mismo análisis del caso de Nicaragua y a pesar de que la CIJ condenó a Serbia por haber violado la obligación de prevención y sanción,

considero que el enfoque de atribución fue limitado frente a la relación que tuvo las fuerzas de VRS, Los Escorpiones y Serbia.

En este caso, las pruebas declinadas de la CIJ pudieron haber demostrado la atribución directa que había entre las fuerzas de VRS y Serbia. Como se mencionó en párrafos anteriores en una de las pruebas se demostró órdenes directas e instrucciones específicas por parte de autoridades de Serbia frente a los hechos ocurridos en Srebrenica. Asimismo, en casos posteriormente juzgados por el TPIY, se demostró que la culpabilidad de los hechos de genocidio y la relación entre Serbia y las fuerzas de VRS en la sentencia de Ratko Mladić y en la sentencia de Jovica Stanisic y Franko Simatovic.

Para finalizar, considero que la CIJ no realizó un análisis detallado de las pruebas que recibió, a pesar de que el caso de BYH y Serbia fue una de las más grandes masacres ocurrida en los últimos años. Desafortunadamente, no se aprovechó adecuadamente los recursos que tenía la CIJ como órgano judicial de la ONU.

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## 7. Anexos

**ANEXO 1**

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

# CASE CONCERNING APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

(BOSNIA AND HERZEGOVINA *v.* SERBIA AND MONTENEGRO)

**JUDGMENT OF 26 FEBRUARY 2007**

# 2007

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

# AFFAIRE RELATIVE À L'APPLICATION DE LA CONVENTION POUR LA PRÉVENTION ET LA RÉPRESSION DU CRIME DE GÉNOCIDE

(BOSNIE-HERZÉGOVINE c. SERBIE-ET-MONTÉNÉGRO)

**ARRÊT DU 26 FÉVRIER 2007**

Official citation:

*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43

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Mode officiel de citation:

*Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Serbie-et-Monténégro), arrêt, C.I.J. Recueil 2007*, p. 43

ISSN 0074-4441
ISBN 978-92-1-071029-9

**Sales number**
**N° de vente:** **921**

26 FEBRUARY 2007

JUDGMENT

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(BOSNIA AND HERZEGOVINA *v.* SERBIA AND MONTENEGRO)

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(BOSNIE-HERZÉGOVINE c. SERBIE-ET-MONTÉNÉGRO)

26 FÉVRIER 2007

ARRÊT

TABLE OF CONTENTS

## LIST OF ACRONYMS

| *Abbreviation* | *Full name* | *Comments* |
|---|---|---|
| ARBiH | Army of the Republic of Bosnia and Herzegovina | |
| FRY | Federal Republic of Yugoslavia | Name of Serbia and Montenegro between 27 April 1992 (adoption of the Constitution) and 3 February 2003 |
| ICTR | International Criminal Tribunal for Rwanda | |
| ICTY | International Criminal Tribunal for the former Yugoslavia | |
| ILC | International Law Commission | |
| JNA | Yugoslav People's Army | Army of the SFRY (ceased to exist on 27 April 1992, with the creation of the VJ) |
| MUP | Ministarstvo Unutrašnjih Pollova | Ministry of the Interior |
| NATO | North Atlantic Treaty Organization | |
| SFRY | Socialist Federal Republic of Yugoslavia | |
| TO | Teritorijalna Odbrana | Territorial Defence Forces |
| UNHCR | United Nations High Commissioner for Refugees | |
| UNPROFOR | United Nations Protection Force | |
| VJ | Yugoslav Army | Army of the FRY, under the Constitution of 27 April 1992 (succeeded to the JNA) |
| VRS | Army of the Republika Srpska | |

INTERNATIONAL COURT OF JUSTICE

2007
26 February
General List
No. 91

YEAR 2007

**26 February 2007**

# CASE CONCERNING APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

(BOSNIA AND HERZEGOVINA *v.* SERBIA AND MONTENEGRO)

## JUDGMENT

*Present:* *President* HIGGINS; *Vice-President* AL-KHASAWNEH; *Judges* RANJEVA, SHI, KOROMA, OWADA, SIMMA, TOMKA, ABRAHAM, KEITH, SEPÚLVEDA-AMOR, BENNOUNA, SKOTNIKOV; *Judges* ad hoc MAHIOU, KREĆA; *Registrar* COUVREUR.

In the case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide,

*between*

Bosnia and Herzegovina,

represented by

Mr. Sakib Softić,

as Agent;

Mr. Phon van den Biesen, Attorney at Law, Amsterdam,

as Deputy Agent;

Mr. Alain Pellet, Professor at the University of Paris X-Nanterre, Member and former Chairman of the United Nations International Law Commission,

Mr. Thomas M. Franck, Professor Emeritus of Law, New York University School of Law,

Ms Brigitte Stern, Professor at the University of Paris I,

Mr. Luigi Condorelli, Professor at the Faculty of Law of the University of Florence,
Ms Magda Karagiannakis, B.Ec., LL.B., LL.M., Barrister at Law, Melbourne, Australia,
Ms Joanna Korner Q.C., Barrister at Law, London,
Ms Laura Dauban, LL.B. (Hons),
Mr. Antoine Ollivier, Temporary Lecturer and Research Assistant, University of Paris X-Nanterre,

as Counsel and Advocates;

Mr. Morten Torkildsen, BSc., MSc., Torkildsen Granskin og Rådgivning, Norway,

as Expert Counsel and Advocate;

H.E. Mr. Fuad Šabeta, Ambassador of Bosnia and Herzegovina to the Kingdom of the Netherlands,
Mr. Wim Muller, LL.M., M.A.,
Mr. Mauro Barelli, LL.M. (University of Bristol),
Mr. Ermin Sarajlija, LL.M.,
Mr. Amir Bajrić, LL.M.,
Ms Amra Mehmedić, LL.M.,
Ms Isabelle Moulier, Research Student in International Law, University of Paris I,
Mr. Paolo Palchetti, Associate Professor at the University of Macerata, Italy,

as Counsel,

*and*

Serbia and Montenegro,

represented by

H.E. Mr. Radoslav Stojanović, S.J.D., Head of the Law Council of the Ministry of Foreign Affairs of Serbia and Montenegro, Professor at the Belgrade University School of Law,

as Agent;

Mr. Saša Obradović, First Counsellor of the Embassy of Serbia and Montenegro in the Kingdom of the Netherlands,
Mr. Vladimir Cvetković, Second Secretary of the Embassy of Serbia and Montenegro in the Kingdom of the Netherlands,

as Co-Agents;

Mr. Tibor Varady, S.J.D. (Harvard), Professor of Law at the Central European University, Budapest, and Emory University, Atlanta,
Mr. Ian Brownlie, C.B.E., Q.C., F.B.A., Member of the International Law Commission, member of the English Bar, Distinguished Fellow of All Souls College, Oxford,
Mr. Xavier de Roux, Maîtrise de droit, avocat à la cour, Paris,
Ms Nataša Fauveau-Ivanović, avocat à la cour, Paris, member of the Council of the International Criminal Bar,
Mr. Andreas Zimmerman, LL.M. (Harvard), Professor of Law at the University of Kiel, Director of the Walther-Schücking Institute,

Mr. Vladimir Djerić, LL.M. (Michigan), Attorney at Law, Mikijelj, Janković & Bogdanović, Belgrade, President of the International Law Association of Serbia and Montenegro,
Mr. Igor Olujić, Attorney at Law, Belgrade,

as Counsel and Advocates;

Ms Sanja Djajić, S.J.D, Associate Professor at the Novi Sad University School of Law,
Ms Ivana Mroz, LL.M. (Minneapolis),
Mr. Svetislav Rabrenović, Expert-associate at the Office of the Prosecutor for War Crimes of the Republic of Serbia,
Mr. Aleksandar Djurdjić, LL.M., First Secretary at the Ministry of Foreign Affairs of Serbia and Montenegro,
Mr. Miloš Jastrebić, Second Secretary at the Ministry of Foreign Affairs of Serbia and Montenegro,
Mr. Christian J. Tams, LL.M., Ph.D. (Cambridge), Walther-Schücking Institute, University of Kiel,
Ms Dina Dobrkovic, LL.B.,

as Assistants,

THE COURT,

composed as above,

after deliberation,

*delivers the following Judgment:*

1. On 20 March 1993, the Government of the Republic of Bosnia and Herzegovina (with effect from 14 December 1995 "Bosnia and Herzegovina") filed in the Registry of the Court an Application instituting proceedings against the Federal Republic of Yugoslavia (with effect from 4 February 2003, "Serbia and Montenegro" and with effect from 3 June 2006, the Republic of Serbia — see paragraphs 67 and 79 below) in respect of a dispute concerning alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly of the United Nations on 9 December 1948 (hereinafter "the Genocide Convention" or "the Convention"), as well as various matters which Bosnia and Herzegovina claimed were connected therewith. The Application invoked Article IX of the Genocide Convention as the basis of the jurisdiction of the Court.

2. Pursuant to Article 40, paragraph 2, of the Statute of the Court, the Application was immediately communicated to the Government of the Federal Republic of Yugoslavia (hereinafter "the FRY") by the Registrar; and in accordance with paragraph 3 of that Article, all States entitled to appear before the Court were notified of the Application.

3. In conformity with Article 43 of the Rules of Court, the Registrar addressed the notification provided for in Article 63, paragraph 1, of the Statute to all the States appearing on the list of the parties to the Genocide Convention held by the Secretary-General of the United Nations as depositary. The Registrar also sent to the Secretary-General the notification provided for in Article 34, paragraph 3, of the Statute.

4. On 20 March 1993, immediately after the filing of its Application, Bosnia

and Herzegovina submitted a request for the indication of provisional measures pursuant to Article 73 of the Rules of Court. On 31 March 1993, Bosnia and Herzegovina filed in the Registry, and invoked as an additional basis of jurisdiction, the text of a letter dated 8 June 1992, addressed jointly by the President of the then Republic of Montenegro and the President of the then Republic of Serbia to the President of the Arbitration Commission of the International Conference for Peace in Yugoslavia. On 1 April 1993, the FRY submitted written observations on Bosnia and Herzegovina's request for provisional measures, in which it, in turn, recommended that the Court indicate provisional measures to be applied to Bosnia and Herzegovina. By an Order dated 8 April 1993, the Court, after hearing the Parties, indicated certain provisional measures with a view to the protection of rights under the Genocide Convention.

5. By an Order dated 16 April 1993, the President of the Court fixed 15 October 1993 as the time-limit for the filing of the Memorial of Bosnia and Herzegovina and 15 April 1994 as the time-limit for the filing of the Counter-Memorial of the FRY.

6. Since the Court included upon the Bench no judge of the nationality of the Parties, each of them exercised its right under Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case: Bosnia and Herzegovina chose Mr. Elihu Lauterpacht and the FRY chose Mr. Milenko Kreća.

7. On 27 July 1993, Bosnia and Herzegovina submitted a new request for the indication of provisional measures. By letters of 6 August and 10 August 1993, the Agent of Bosnia and Herzegovina indicated that his Government wished to invoke additional bases of jurisdiction in the case: the Treaty between the Allied and Associated Powers and the Kingdom of the Serbs, Croats and Slovenes on the Protection of Minorities, signed at Saint-Germain-en-Laye on 10 September 1919, and customary and conventional international laws of war and international humanitarian law. By a letter of 13 August 1993, the Agent of Bosnia and Herzegovina confirmed his Government's intention also to rely on the above-mentioned letter from the Presidents of Montenegro and Serbia dated 8 June 1992 as an additional basis of jurisdiction (see paragraph 4).

8. On 10 August 1993, the FRY also submitted a request for the indication of provisional measures and on 10 August and 23 August 1993, it filed written observations on Bosnia and Herzegovina's new request. By an Order dated 13 September 1993, the Court, after hearing the Parties, reaffirmed the measures indicated in its Order of 8 April 1993 and stated that those measures should be immediately and effectively implemented.

9. By an Order dated 7 October 1993, the Vice-President of the Court, at the request of Bosnia and Herzegovina, extended the time-limit for the filing of the Memorial to 15 April 1994 and accordingly extended the time-limit for the filing of the Counter-Memorial to 15 April 1995. Bosnia and Herzegovina filed its Memorial within the time-limit thus extended. By a letter dated 9 May 1994, the Agent of the FRY submitted that the Memorial filed by Bosnia and Herzegovina failed to meet the requirements of Article 43 of the Statute and Articles 50 and 51 of the Rules of Court. By letter of 30 June 1994, the Registrar, acting on the instructions of the Court, requested Bosnia and Herzegovina, pursuant to Article 50, paragraph 2, of the Rules of Court, to file as annexes to its Memorial the extracts of the documents to which it referred therein. Bosnia and

Herzegovina accordingly filed Additional Annexes to its Memorial on 4 January 1995.

10. By an Order dated 21 March 1995, the President of the Court, at the request of the FRY, extended the time-limit for the filing of the Counter-Memorial to 30 June 1995. Within the time-limit thus extended, the FRY, referring to Article 79, paragraph 1, of the Rules of Court of 14 April 1978, raised preliminary objections concerning the Court's jurisdiction to entertain the case and to the admissibility of the Application. Accordingly, by an Order of 14 July 1995, the President of the Court noted that, by virtue of Article 79, paragraph 3, of the 1978 Rules of Court, the proceedings on the merits were suspended, and fixed 14 November 1995 as the time-limit within which Bosnia and Herzegovina might present a written statement of its observations and submissions on the preliminary objections raised by the FRY. Bosnia and Herzegovina filed such a statement within the time-limit thus fixed.

11. By a letter dated 2 February 1996, the Agent of the FRY submitted to the Court the text of the General Framework Agreement for Peace in Bosnia and Herzegovina and the annexes thereto, initialled in Dayton, Ohio, on 21 November 1995, and signed in Paris on 14 December 1995 (hereinafter the "Dayton Agreement").

12. Public hearings were held on preliminary objections between 29 April and 3 May 1996. By a Judgment of 11 July 1996, the Court dismissed the preliminary objections and found that it had jurisdiction to adjudicate on the dispute on the basis of Article IX of the Genocide Convention and that the Application was admissible.

13. By an Order dated 23 July 1996, the President fixed 23 July 1997 as the time-limit for the filing of the Counter-Memorial of the FRY. The Counter-Memorial, which was filed on 22 July 1997, contained counter-claims. By a letter dated 28 July 1997, Bosnia and Herzegovina, invoking Article 80 of the 1978 Rules of Court, challenged the admissibility of the counter-claims. On 22 September 1997, at a meeting held between the President of the Court and the Agents of the Parties, the Agents accepted that their respective Governments submit written observations on the question of the admissibility of the counter-claims. Bosnia and Herzegovina and the FRY submitted their observations to the Court on 10 October 1997 and 24 October 1997, respectively. By an Order dated 17 December 1997, the Court found that the counter-claims submitted by the FRY were admissible as such and formed part of the current proceedings since they fulfilled the conditions set out in Article 80, paragraphs 1 and 2, of the 1978 Rules of Court. The Court further directed Bosnia and Herzegovina to submit a Reply and the FRY to submit a Rejoinder relating to the claims of both Parties and fixed 23 January 1998 and 23 July 1998 as the respective time-limits for the filing of those pleadings. The Court also reserved the right of Bosnia and Herzegovina to present its views on the counter-claims of the FRY in an additional pleading.

14. By an Order dated 22 January 1998, the President, at the request of Bosnia and Herzegovina, extended the time-limit for the filing of the Reply of Bosnia and Herzegovina to 23 April 1998 and accordingly extended the time-limit for the filing of the Rejoinder of the FRY to 22 January 1999.

15. On 15 April 1998, the Co-Agent of the FRY filed "Additional Annexes

to the Counter-Memorial of the Federal Republic of Yugoslavia". By a letter dated 14 May 1998, the Deputy Agent of Bosnia and Herzegovina, referring to Articles 50 and 52 of the Rules of Court, objected to the admissibility of these documents in view of their late filing. On 22 September 1998, the Parties were informed that the Court had decided that the documents in question "[were] admissible as Annexes to the Counter-Memorial to the extent that they were established, in the original language, on or before the date fixed by the Order of 23 July 1996 for the filing of the Counter-Memorial" and that "[a]ny such document established after that date [would] have to be submitted as an Annex to the Rejoinder, if Yugoslavia so wishe[d]".

16. On 23 April 1998, within the time-limit thus extended, Bosnia and Herzegovina filed its Reply. By a letter dated 27 November 1998, the FRY requested the Court to extend the time-limit for the filing of its Rejoinder to 22 April 1999. By a letter dated 9 December 1998, Bosnia and Herzegovina objected to any extension of the time-limit fixed for the filing of the Rejoinder. By an Order of 11 December 1998, the Court, having regard to the fact that Bosnia and Herzegovina had been granted an extension of the time-limit for the filing of its Reply, extended the time-limit for the filing of the Rejoinder of the FRY to 22 February 1999. The FRY filed its Rejoinder within the time-limit thus extended.

17. On 19 April 1999, the President of the Court held a meeting with the representatives of the Parties in order to ascertain their views with regard to questions of procedure. Bosnia and Herzegovina indicated that it did not intend to file an additional pleading concerning the counter-claims made by the FRY and considered the case ready for oral proceedings. The Parties also expressed their views about the organization of the oral proceedings.

18. By a letter dated 9 June 1999, the then Chairman of the Presidency of Bosnia and Herzegovina, Mr. Zivko Radisić, informed the Court of the appointment of a Co-Agent, Mr. Svetozar Miletić. By a letter dated 10 June 1999, the thus appointed Co-Agent informed the Court that Bosnia and Herzegovina wished to discontinue the case. By a letter of 14 June 1999, the Agent of Bosnia and Herzegovina asserted that the Presidency of Bosnia and Herzegovina had taken no action to appoint a Co-Agent or to terminate the proceedings before the Court. By a letter of 15 June 1999, the Agent of the FRY stated that his Government accepted the discontinuance of the proceedings. By a letter of 21 June 1999, the Agent of Bosnia and Herzegovina reiterated that the Presidency had not made any decision to discontinue the proceedings and transmitted to the Court letters from two members of the Presidency, including the new Chairman of the Presidency, confirming that no such decision had been made.

19. By letters dated 30 June 1999 and 2 September 1999, the President of the Court requested the Chairman of the Presidency to clarify the position of Bosnia and Herzegovina regarding the pendency of the case. By a letter dated 3 September 1999, the Agent of the FRY submitted certain observations on this matter, concluding that there was an agreement between the Parties to discontinue the case. By a letter dated 15 September 1999, the Chairman of the Presidency of Bosnia and Herzegovina informed the Court that at its 58th session held on 8 September 1999, the Presidency had concluded that: (i) the Presidency "did not make a decision to discontinue legal proceedings before the International Court of Justice"; (ii) the Presidency "did not make a decision to name a Co-Agent in this case"; (iii) the Presidency would "inform [the Court] timely about any further decisions concerning this case".

20. By a letter of 20 September 1999, the President of the Court informed

the Parties that the Court intended to schedule hearings in the case beginning in the latter part of February 2000 and requested the Chairman of the Presidency of Bosnia and Herzegovina to confirm that Bosnia and Herzegovina's position was that the case should so proceed. By a letter of 4 October 1999, the Agent of Bosnia and Herzegovina confirmed that the position of his Government was that the case should proceed and he requested the Court to set a date for the beginning of the oral proceedings as soon as possible. By a letter dated 10 October 1999, the member of the Presidency of Bosnia and Herzegovina from the Republika Srpska informed the Court that the letter of 15 September 1999 from the Chairman of the Presidency was "without legal effects" *inter alia* because the National Assembly of the Republika Srpska, acting pursuant to the Constitution of Bosnia and Herzegovina, had declared the decision of 15 September "destructive of a vital interest" of the Republika Srpska. On 22 October 1999, the President informed the Parties that, having regard to the correspondence received on this matter, the Court had decided not to hold hearings in the case in February 2000.

21. By a letter dated 23 March 2000 transmitting to the Court a letter dated 20 March 2000 from the Chairman of the Presidency, the Agent of Bosnia and Herzegovina reaffirmed that the appointment of a Co-Agent by the former Chairman of the Presidency of Bosnia and Herzegovina on 9 June 1999 lacked any legal basis and that the communications of the Co-Agent did not reflect the position of Bosnia and Herzegovina. Further, the Agent asserted that, contrary to the claims of the member of the Presidency of Bosnia and Herzegovina from the Republic of Srpska, the letter of 15 September 1999 was not subject to the veto mechanism contained in the Constitution of Bosnia and Herzegovina. The Agent requested the Court to set a date for oral proceedings at its earliest convenience.

22. By a letter dated 13 April 2000, the Agent of the FRY transmitted to the Court a document entitled "Application for the Interpretation of the Decision of the Court on the Pendency of the case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia)", requesting an interpretation of the decision of the Court to which the President of the Court had referred in his letter dated 22 October 1999. By a letter dated 18 April 2000, the Registrar informed the Agent of the FRY that, according to Article 60 of the Statute, a request for interpretation could relate only to a judgment of the Court and therefore the document transmitted to the Court on 13 April 2000 could not constitute a request for interpretation and had not been entered on the Court's General List. The Registrar further explained that the sole decision to which reference was made in the letter of 22 October 1999 was that no hearings would be held in February 2000. The Registrar requested the Agent to transmit as soon as possible any comments he might have on the letter dated 23 March 2000 from the Agent of Bosnia and Herzegovina and the letter from the Chairman of the Presidency enclosed therewith. By a letter dated 25 April 2000, the Agent of the FRY submitted such comments to the Court and requested that the Court record and implement the agreement for the discontinuance of the case evidenced by the exchange of the letter of the Co-Agent of the Applicant dated 10 June 1999 and the letter of the Agent of the FRY dated 15 June 1999. By a letter dated 8 May 2000, the Agent of Bosnia and Herzegovina submitted certain observations regarding the letter dated 25 April 2000 from the Agent of the FRY and reiterated the wish of his Government to continue with the proceedings in the case. By letters dated 8 June, 26 June and 4 October 2000 from the

FRY and letters dated 9 June and 21 September 2000 from Bosnia and Herzegovina, the Agents of the Parties restated their positions.

23. By a letter dated 29 September 2000, Mr. Svetozar Miletić, who had purportedly been appointed Co-Agent on 9 June 1999 by the then Chairman of the Presidency of Bosnia and Herzegovina, reiterated his position that the case had been discontinued. By a letter dated 6 October 2000, the Agent of Bosnia and Herzegovina stated that this letter and the recent communication from the Agent of the FRY had not altered the commitment of the Government of Bosnia and Herzegovina to continue the proceedings.

24. By letters dated 16 October 2000 from the President of the Court and from the Registrar, the Parties were informed that, at its meeting of 10 October 2000, the Court, having examined all the correspondence received on this question, had found that Bosnia and Herzegovina had not demonstrated its will to withdraw the Application in an unequivocal manner. The Court had thus concluded that there had been no discontinuance of the case by Bosnia and Herzegovina. Consequently, in accordance with Article 54 of the Rules, the Court, after having consulted the Parties, would, at an appropriate time, fix a date for the opening of the oral proceedings.

25. By a letter dated 18 January 2001, the Minister for Foreign Affairs of the FRY requested the Court to grant a stay of the proceedings or alternatively to postpone the opening of the oral proceedings for a period of 12 months due, *inter alia*, to the change of Government of the FRY and the resulting fundamental change in the policies and international position of that State. By a letter dated 25 January 2001, the Agent of Bosnia and Herzegovina communicated the views of his Government on the request made by the FRY and reserved his Government's final judgment on the matter, indicating that, in the intervening period, Bosnia and Herzegovina's position continued to be that there should be an expedited resolution of the case.

26. By a letter dated 20 April 2001, the Agent of the FRY informed the Court that his Government wished to withdraw the counter-claims submitted by the FRY in its Counter-Memorial. The Agent also informed the Court that his Government was of the opinion that the Court did not have jurisdiction *ratione personae* over the FRY and further that the FRY intended to submit an application for revision of the Judgment of 11 July 1996. On 24 April 2001, the FRY filed in the Registry of the Court an Application instituting proceedings whereby, referring to Article 61 of the Statute, it requested the Court to revise the Judgment delivered on Preliminary Objections on 11 July 1996 (*Application for Revision of the Judgment of 11 July 1996 in the Case concerning* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia), Preliminary Objections *(Yugoslavia* v. *Bosnia and Herzegovina)*, hereinafter referred to as "the *Application for Revision* case"). In the present case the Agent of the FRY submitted, under cover of a letter dated 4 May 2001, a document entitled "Initiative to the Court to Reconsider *ex officio* Jurisdiction over Yugoslavia", accompanied by one volume of annexes (hereinafter "the Initiative"). The Agent informed the Court that the Initiative was based on facts and arguments which were essentially identical to those submitted in the FRY's Application for revision of the Judgment of 11 July 1996 since his Government believed that these were both appropriate procedural avenues. In the Initiative, the FRY requested the Court to adjudge and declare that it had no jurisdiction *ratione personae* over the FRY, contending that it had not been a party to the Statute of the Court until its admission to the United Nations on 1 November 2000, that it had not been

and still was not a party to the Genocide Convention; it added moreover that its notification of accession to that Convention dated 8 March 2001 contained a reservation to Article IX thereof. The FRY asked the Court to suspend the proceedings on the merits until a decision was rendered on the Initiative.

27. By a letter dated 12 July 2001 and received in the Registry on 15 August 2001, Bosnia and Herzegovina informed the Court that it had no objection to the withdrawal of the counter-claims by the FRY and stated that it intended to submit observations regarding the Initiative. By an Order dated 10 September 2001, the President of the Court placed on record the withdrawal by the FRY of the counter-claims submitted in its Counter-Memorial.

28. By a letter dated 3 December 2001, Bosnia and Herzegovina provided the Court with its views regarding the Initiative and transmitted a memorandum on "differences between the Application for Revision of 23 April 2001 and the 'Initiative' of 4 May 2001" as well as a copy of the written observations and annexes filed by Bosnia and Herzegovina on 3 December 2001 in the *Application for Revision* case. In that letter, Bosnia and Herzegovina submitted that "there [was] no basis in fact nor in law to honour this so-called 'Initiative'" and requested the Court *inter alia* to "respond in the negative to the request embodied in the 'Initiative'".

29. By a letter dated 22 February 2002 to the President of the Court, Judge *ad hoc* Lauterpacht resigned from the case.

30. Under cover of a letter of 18 April 2002, the Registrar, referring to Article 34, paragraph 3, of the Statute, transmitted copies of the written proceedings to the Secretary-General of the United Nations.

31. In its Judgment of 3 February 2003 in the *Application for Revision* case, the Court found that the FRY's Application for revision, under Article 61 of the Statute of the Court, of the Judgment of 11 July 1996 on preliminary objections was inadmissible.

32. By a letter dated 5 February 2003, the FRY informed the Court that, following the adoption and promulgation of the Constitutional Charter of Serbia and Montenegro by the Assembly of the FRY on 4 February 2003, the name of the State had been changed from the "Federal Republic of Yugoslavia" to "Serbia and Montenegro". The title of the case was duly changed and the name "Serbia and Montenegro" was used thereafter for all official purposes of the Court.

33. By a letter of 17 February 2003, Bosnia and Herzegovina reaffirmed its position with respect to the Initiative, as stated in the letter of 3 December 2001, and expressed its desire to proceed with the case. By a letter dated 8 April 2003, Serbia and Montenegro submitted that, due to major new developments since the filing of the last written pleading, additional written pleadings were necessary in order to make the oral proceedings more effective and less time-consuming. On 24 April 2003, the President of the Court held a meeting with the Agents of the Parties to discuss questions of procedure. Serbia and Montenegro stated that it maintained its request for the Court to rule on its Initiative while Bosnia and Herzegovina considered that there was no need for additional written pleadings. The possible dates and duration of the oral proceedings were also discussed.

34. By a letter dated 25 April 2003, Bosnia and Herzegovina chose Mr. Ahmed Mahiou to sit as judge *ad hoc* in the case.

35. By a letter of 12 June 2003, the Registrar informed Serbia and Montenegro that the Court could not accede to its request that the proceedings be suspended until a decision was rendered on the jurisdictional issues raised in the Initiative; however, should it wish to do so, Serbia and Montenegro would be free to present further argument on jurisdictional questions during the oral proceedings on the merits. In further letters of the same date, the Parties were informed that the Court, having considered Serbia and Montenegro's request, had decided not to authorize the filing of further written pleadings in the case.

36. In an exchange of letters in October and November 2003, the Agents of the Parties made submissions as to the scheduling of the oral proceedings.

37. Following a further exchange of letters between the Parties in March and April 2004, the President held a meeting with the Agents of the Parties on 25 June 2004, at which the Parties presented their views on, *inter alia*, the scheduling of the hearings and the calling of witnesses and experts.

38. By letters dated 26 October 2004, the Parties were informed that, after examining the list of cases before it ready for hearing and considering all the relevant circumstances, the Court had decided to fix Monday 27 February 2006 for the opening of the oral proceedings in the case.

39. On 14 March 2005, the President met with the Agents of the Parties in order to ascertain their views with regard to the organization of the oral proceedings. At this meeting, both Parties indicated that they intended to call witnesses and experts.

40. By letters dated 19 March 2005, the Registrar, referring to Articles 57 and 58 of the Rules of Court, requested the Parties to provide, by 9 September 2005, details of the witnesses, experts and witness-experts whom they intended to call and indications of the specific point or points to which the evidence of the witness, expert or witness-expert would be directed. By a letter of 8 September 2005, the Agent of Serbia and Montenegro transmitted to the Court a list of eight witnesses and two witness-experts whom his Government wished to call during the oral proceedings. By a further letter of the same date, the Agent of Serbia and Montenegro communicated a list of five witnesses whose attendance his Government requested the Court to arrange pursuant to Article 62, paragraph 2, of the Rules of Court. By a letter dated 9 September 2005, Bosnia and Herzegovina transmitted to the Court a list of three experts whom it wished to call at the hearings.

41. By a letter dated 5 October 2005, the Deputy Agent of Bosnia and Herzegovina informed the Registry of Bosnia and Herzegovina's views with regard to the time that it considered necessary for the hearing of the experts it wished to call and made certain submissions, *inter alia*, with respect to the request made by Serbia and Montenegro pursuant to Article 62, paragraph 2, of the Rules of Court. By letters of 4 and 11 October 2005, the Agent and the Co-Agent of Serbia and Montenegro, respectively, informed the Registry of the views of their Government with respect to the time necessary for the hearing of the witnesses and witness-experts whom it wished to call.

42. By letters of 15 November 2005, the Registrar informed the Parties, *inter alia*, that the Court had decided that it would hear the three experts and ten witnesses and witness-experts that Bosnia and Herzegovina and Serbia and Montenegro respectively wished to call and, moreover, that it had decided not to arrange for the attendance, pursuant to Article 62, paragraph 2, of the Rules

of Court, of the five witnesses proposed by Serbia and Montenegro. However, the Court reserved the right to exercise subsequently, if necessary, its powers under that provision to call persons of its choosing on its own initiative. The Registrar also requested the Parties to provide certain information related to the hearing of the witnesses, experts and witness-experts including, *inter alia*, the language in which each witness, expert or witness-expert would speak and, in respect of those speaking in a language other than English or French, the arrangements which the Party intended to make, pursuant to Article 70, paragraph 2, of the Rules of Court, for interpretation into one of the official languages of the Court. Finally the Registrar transmitted to the Parties the calendar for the oral proceedings as adopted by the Court.

43. By a letter dated 12 December 2005, the Agent of Serbia and Montenegro informed the Court, *inter alia*, that eight of the ten witnesses and witness-experts it wished to call would speak in Serbian and outlined the arrangements that Serbia and Montenegro would make for interpretation from Serbian to one of the official languages of the Court. By a letter dated 15 December 2005, the Deputy Agent of Bosnia and Herzegovina informed the Court, *inter alia,* that the three experts called by Bosnia and Herzegovina would speak in one of the official languages of the Court.

44. By a letter dated 28 December 2005, the Deputy Agent of Bosnia and Herzegovina, on behalf of the Government, requested that the Court call upon Serbia and Montenegro, under Article 49 of the Statute and Article 62, paragraph 1, of the Rules of Court, to produce a certain number of documents. By a letter dated 16 January 2006, the Agent of Serbia and Montenegro informed the Court of his Government's views on this request. By a letter dated 19 January 2006, the Registrar, acting on the instructions of the Court, asked Bosnia and Herzegovina to provide certain further information relating to its request under Article 49 of the Statute and Article 62, paragraph 2, of the Rules of Court. By letters dated 19 and 24 January 2006, the Deputy Agent of Bosnia and Herzegovina submitted additional information and informed the Court that Bosnia and Herzegovina had decided, for the time being, to restrict its request to the redacted sections of certain documents. By a letter dated 31 January 2006, the Co-Agent of Serbia and Montenegro communicated his Government's views regarding this modified request. By letters dated 2 February 2006, the Registrar informed the Parties that the Court had decided, at this stage of the proceedings, not to call upon Serbia and Montenegro to produce the documents in question. However, the Court reserved the right to exercise subsequently, if necessary, its powers under Article 49 of the Statute and Article 62, paragraph 1, of the Rules of Court, to request, *proprio motu*, the production by Serbia and Montenegro of the documents in question.

45. By a letter dated 16 January 2006, the Deputy Agent of Bosnia and Herzegovina transmitted to the Registry copies of new documents that Bosnia and Herzegovina wished to produce pursuant to Article 56 of the Rules of Court. Under cover of the same letter and of a letter dated 23 January 2006, the Deputy Agent of Bosnia and Herzegovina also transmitted to the Registry copies of video material, extracts of which Bosnia and Herzegovina intended to present at the oral proceedings. By a letter dated 31 January 2006, the Co-Agent of Serbia and Montenegro informed the Court that his Government did not object to the production of the new documents by Bosnia and Herzegovina. Nor did it object to the video material being shown at the oral proceedings. By

letters of 2 February 2006, the Registrar informed the Parties that, in view of the fact that no objections had been raised by Serbia and Montenegro, the Court had decided to authorize the production of the new documents by Bosnia and Herzegovina pursuant to Article 56 of the Rules of Court and that it had further decided that Bosnia and Herzegovina could show extracts of the video material at the hearings.

46. Under cover of a letter dated 18 January 2006 and received on 20 January 2006, the Agent of Serbia and Montenegro provided the Registry with copies of new documents which his Government wished to produce pursuant to Article 56 of the Rules of Court. By a letter of 1 February 2006, the Deputy Agent of Bosnia and Herzegovina informed the Court that Bosnia and Herzegovina did not object to the production of the said documents by Serbia and Montenegro. By a letter dated 2 February 2006, the Registrar informed the Parties that, in view of the fact that no objection had been raised by Bosnia and Herzegovina, the Court had decided to authorize the production of the new documents by Serbia and Montenegro. By a letter dated 9 February 2006, the Co-Agent of Serbia and Montenegro transmitted to the Court certain missing elements of the new documents submitted on 20 January 2006 and made a number of observations concerning the new documents produced by Bosnia and Herzegovina. By a letter dated 20 February 2006, the Deputy Agent of Bosnia and Herzegovina informed the Court that Bosnia and Herzegovina did not intend to make any observations regarding the new documents produced by Serbia and Montenegro.

47. Under cover of a letter dated 31 January 2006, the Co-Agent of Serbia and Montenegro transmitted to the Court a list of public documents that his Government would refer to in its first round of oral argument. By a further letter dated 14 February 2006, the Co-Agent of Serbia and Montenegro transmitted to the Court copies of folders containing the public documents referred to in the list submitted on 31 January 2006 and informed the Court that Serbia and Montenegro had decided not to submit the video materials included in that list. By a letter dated 20 February 2006, the Deputy Agent of Bosnia and Herzegovina informed the Court that Bosnia and Herzegovina had no observations to make regarding the list of public documents submitted by Serbia and Montenegro on 31 January 2006. He also stated that Bosnia and Herzegovina would refer to similar sources during its pleadings and was planning to provide the Court and the Respondent, at the end of the first round of its oral argument, with a CD-ROM containing materials it had quoted (see below, paragraph 54).

48. By a letter dated 26 January 2006, the Registrar informed the Parties of certain decisions taken by the Court with regard to the hearing of the witnesses, experts and witness-experts called by the Parties including, *inter alia*, that, exceptionally, the verbatim records of the sittings at which the witnesses, experts and witness-experts were heard would not be made available to the public or posted on the website of the Court until the end of the oral proceedings.

49. By a letter dated 13 February 2006, the Agent of Serbia and Montenegro informed the Court that his Government had decided not to call two of the witnesses and witness-experts included in the list transmitted to the Court on 8 September 2005 and that the order in which the remaining witnesses and witness-expert would be heard had been modified. By a letter dated 21 February 2006, the Agent of Serbia and Montenegro requested the Court's per-

mission for the examination of three of the witnesses called by his Government to be conducted in Serbian (namely, Mr. Dušan Mihajlović, Mr. Vladimir Milićević, Mr. Dragoljub Mićunović). By a letter dated 22 February 2006, the Registrar informed the Agent of Serbia and Montenegro that there was no objection to such a procedure being followed, pursuant to the provisions of Article 39, paragraph 3, of the Statute and Article 70 of the Rules of Court.

50. Pursuant to Article 53, paragraph 2, of the Rules, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and documents annexed would be made available to the public at the opening of the oral proceedings.

51. Public sittings were held from 27 February to 9 May 2006, at which the Court heard the oral arguments and replies of:

*For Bosnia and Herzegovina:* Mr. Sakib Softić,
Mr. Phon van den Biesen,
Mr. Alain Pellet,
Mr. Thomas M. Franck,
Ms Brigitte Stern,
Mr. Luigi Condorelli,
Ms Magda Karagiannakis,
Ms Joanna Korner,
Ms Laura Dauban,
Mr. Antoine Ollivier,
Mr. Morten Torkildsen.

*For Serbia and Montenegro:* H.E. Mr. Radoslav Stojanović,
Mr. Saša Obradović,
Mr. Vladimir Cvetković,
Mr. Tibor Varady,
Mr. Ian Brownlie,
Mr. Xavier de Roux,
Ms Nataša Fauveau-Ivanović,
Mr. Andreas Zimmerman,
Mr. Vladimir Djerić,
Mr. Igor Olujić.

52. On 1 March 2006, the Registrar, on the instructions of the Court, requested Bosnia and Herzegovina to specify the precise origin of each of the extracts of video material and of the graphics, charts and photographs shown or to be shown at the oral proceedings. On 2 March 2006 Bosnia and Herzegovina provided the Court with certain information regarding the extracts of video material shown at the sitting on 1 March 2006 and those to be shown at the sittings on 2 March 2006 including the source of such video material. Under cover of a letter dated 5 March 2006, the Agent of Bosnia and Herzegovina transmitted to the Court a list detailing the origin of the extracts of video material, graphics, charts and photographs shown or to be shown by it during its first round of oral argument, as well as transcripts, in English and in French, of the above-mentioned extracts of video material.

53. By a letter dated 5 March 2006, the Agent of Bosnia and Herzegovina informed the Court that it wished to withdraw one of the experts it had intended to call. In that letter, the Agent of Bosnia and Herzegovina also asked the Court to request each of the Parties to provide a one-page outline per wit-

ness, expert or witness-expert detailing the topics which would be covered in his evidence or statement. By letters dated 7 March 2006, the Parties were informed that the Court requested them to provide, at least three days before the hearing of each witness, expert or witness-expert, a one-page summary of the latter's evidence or statement.

54. On 7 March 2006, Bosnia and Herzegovina provided the Court and the Respondent with a CD-ROM containing "ICTY Public Exhibits and other Documents cited by Bosnia and Herzegovina during its Oral Pleadings (07/03/2006)". By a letter dated 10 March 2006, Serbia and Montenegro informed the Court that it objected to the production of the CD-ROM on the grounds that the submission at such a late stage of so many documents "raise[d] serious concerns related to the respect for the Rules of Court and the principles of fairness and equality of the parties". It also pointed out that the documents included on the CD-ROM "appear[ed] questionable from the point of [view of] Article 56, paragraph 4, of the Rules [of Court]". By a letter dated 13 March 2006, the Agent of Bosnia and Herzegovina informed the Court of his Government's views regarding the above-mentioned objections raised by Serbia and Montenegro. In that letter, the Agent submitted, *inter alia*, that all the documents on the CD-ROM had been referred to by Bosnia and Herzegovina in its oral argument and were documents which were in the public domain and were readily available within the terms of Article 56, paragraph 4, of the Rules of Court. The Agent added that Bosnia and Herzegovina was prepared to withdraw the CD-ROM if the Court found it advisable. By a letter of 14 March 2006, the Registrar informed Bosnia and Herzegovina that, given that Article 56, paragraph 4, of the Rules of Court did not require or authorize the submission to the Court of the full text of a document to which reference was made during the oral proceedings pursuant to that provision and since it was difficult for the other Party and the Court to come to terms, at the late stage of the proceedings, with such an immense mass of documents, which in any case were in the public domain and could thus be consulted if necessary, the Court had decided that it was in the interests of the good administration of justice that the CD-ROM be withdrawn. By a letter dated 16 March 2006, the Agent of Bosnia and Herzegovina withdrew the CD-ROM which it had submitted on 7 March 2006.

55. On 17 March 2006, Bosnia and Herzegovina submitted a map for use during the statement to be made by one of its experts on the morning of 20 March 2006. On 20 March 2006, Bosnia and Herzegovina produced a folder of further documents to be used in the examination of that expert. Serbia and Montenegro objected strongly to the production of the documents at such a late stage since its counsel would not have time to prepare for cross-examination. On 20 March 2006, the Court decided that the map submitted on 17 March 2006 could not be used during the statement of the expert. Moreover, having consulted both Parties, the Court decided to cancel the morning sitting and instead hear the expert during an afternoon sitting in order to allow Serbia and Montenegro to be ready for cross-examination.

56. On 20 March 2006, Serbia and Montenegro informed the Court that one of the witnesses it had intended to call finally would not be giving evidence.

57. The following experts were called by Bosnia and Herzegovina and made their statements at public sittings on 17 and 20 March 2006: Mr. András J. Riedlmayer and General Sir Richard Dannatt. The experts were examined by

counsel for Bosnia and Herzegovina and cross-examined by counsel for Serbia and Montenegro. The experts were subsequently re-examined by counsel for Bosnia and Herzegovina. Questions were put to Mr. Riedlmayer by Judges Kreća, Tomka, Simma and the Vice-President and replies were given orally. Questions were put to General Dannatt by the President, Judge Koroma and Judge Tomka and replies were given orally.

58. The following witnesses and witness-expert were called by Serbia and Montenegro and gave evidence at public sittings on 23, 24, 27 and 28 March 2006: Mr. Vladimir Lukić; Mr. Vitomir Popović; General Sir Michael Rose; Mr. Jean-Paul Sardon (witness-expert); Mr. Dušan Mihajlović; Mr. Vladimir Milićević; Mr. Dragoljub Mićunović. The witnesses and witness-expert were examined by counsel for Serbia and Montenegro and cross-examined by counsel for Bosnia and Herzegovina. General Rose, Mr. Mihajlović and Mr. Milićević were subsequently re-examined by counsel for Serbia and Montenegro. Questions were put to Mr. Lukić by Judges Ranjeva, Simma, Tomka and Bennouna and replies were given orally. Questions were put to General Rose by the Vice-President and Judges Owada and Simma and replies were given orally.

59. With the exception of General Rose and Mr. Jean-Paul Sardon, the above-mentioned witnesses called by Serbia and Montenegro gave their evidence in Serbian and, in accordance with Article 39, paragraph 3, of the Statute and Article 70, paragraph 2, of the Rules of Court, Serbia and Montenegro made the necessary arrangements for interpretation into one of the official languages of the Court and the Registry verified this interpretation. Mr. Stojanović conducted his examination of Mr. Dragoljub Mićunović in Serbian in accordance with the exchange of correspondence between Serbia and Montenegro and the Court on 21 and 22 February 2006 (see paragraph 49 above).

60. In the course of the hearings, questions were put by Members of the Court, to which replies were given orally and in writing, pursuant to Article 61, paragraph 4, of the Rules of Court.

61. By a letter of 8 May 2006, the Agent of Bosnia and Herzegovina requested the Court to allow the Deputy Agent to take the floor briefly on 9 May 2006, in order to correct an assertion about one of the counsel of and one of the experts called by Bosnia and Herzegovina which had been made by Serbia and Montenegro in its oral argument. By a letter dated 9 May 2006, the Agent of Serbia and Montenegro communicated the views of his Government on that matter. On 9 May 2006, the Court decided, in the particular circumstances of the case, to authorize the Deputy Agent of Bosnia and Herzegovina to make a very brief statement regarding the assertion made about its counsel.

62. By a letter dated 3 May 2006, the Agent of Bosnia and Herzegovina informed the Court that there had been a number of errors in references included in its oral argument presented on 2 March 2006 and provided the Court with the corrected references. By a letter dated 8 May 2006, the Agent of Serbia and Montenegro, "in light of the belated corrections by the Applicant, and for the sake of the equality between the parties", requested the Court to accept a paragraph of its draft oral argument of 2 May 2006 which responded to one of the corrections made by Bosnia and Herzegovina but had been left out of the final version of its oral argument "in order to fit the schedule of [Serbia and Montenegro's] presentations". By a letter dated 7 June 2006, the Parties were informed that the Court had taken due note of both the explana-

tion given by the Agent of Bosnia and Herzegovina and the observations made in response by the Agent of Serbia and Montenegro.

63. In January 2007, Judge Parra-Aranguren, who had attended the oral proceedings in the case, and had participated in part of the deliberation, but had for medical reasons been prevented from participating in the later stages thereof, informed the President of the Court, pursuant to Article 24, paragraph 1, of the Statute, that he considered that he should not take part in the decision of the case. The President took the view that the Court should respect and accept Judge Parra-Aranguren's position, and so informed the Court.

*

64. In its Application, the following requests were made by Bosnia and Herzegovina:

> "Accordingly, while reserving the right to revise, supplement or amend this Application, and subject to the presentation to the Court of the relevant evidence and legal arguments, Bosnia and Herzegovina requests the Court to adjudge and declare as follows:
>
> *(a)* that Yugoslavia (Serbia and Montenegro) has breached, and is continuing to breach, its legal obligations toward the People and State of Bosnia and Herzegovina under Articles I, II *(a)*, II *(b)*, II *(c)*, II *(d)*, III *(a)*, III *(b)*, III *(c)*, III *(d)*, III *(e)*, IV and V of the Genocide Convention;
>
> *(b)* that Yugoslavia (Serbia and Montenegro) has violated and is continuing to violate its legal obligations toward the People and State of Bosnia and Herzegovina under the four Geneva Conventions of 1949, their Additional Protocol I of 1977, the customary international laws of war including the Hague Regulations on Land Warfare of 1907, and other fundamental principles of international humanitarian law;
>
> *(c)* that Yugoslavia (Serbia and Montenegro) has violated and continues to violate Articles 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26 and 28 of the Universal Declaration of Human Rights with respect to the citizens of Bosnia and Herzegovina;
>
> *(d)* that Yugoslavia (Serbia and Montenegro), in breach of its obligations under general and customary international law, has killed, murdered, wounded, raped, robbed, tortured, kidnapped, illegally detained, and exterminated the citizens of Bosnia and Herzegovina, and is continuing to do so;
>
> *(e)* that in its treatment of the citizens of Bosnia and Herzegovina, Yugoslavia (Serbia and Montenegro) has violated, and is continuing to violate, its solemn obligations under Articles 1 (3), 55 and 56 of the United Nations Charter;
>
> *(f)* that Yugoslavia (Serbia and Montenegro) has used and is continuing to use force and the threat of force against Bosnia and Herzegovina in violation of Articles 2 (1), 2 (2), 2 (3), 2 (4) and 33 (1), of the United Nations Charter;
>
> *(g)* that Yugoslavia (Serbia and Montenegro), in breach of its obligations under general and customary international law, has used and is using force and the threat of force against Bosnia and Herzegovina;

*(h)* that Yugoslavia (Serbia and Montenegro), in breach of its obligations under general and customary international law, has violated and is violating the sovereignty of Bosnia and Herzegovina by:

— armed attacks against Bosnia and Herzegovina by air and land;

— aerial trespass into Bosnian airspace;
— efforts by direct and indirect means to coerce and intimidate the Government of Bosnia and Herzegovina;

*(i)* that Yugoslavia (Serbia and Montenegro), in breach of its obligations under general and customary international law, has intervened and is intervening in the internal affairs of Bosnia and Herzegovina;

*(j)* that Yugoslavia (Serbia and Montenegro), in recruiting, training, arming, equipping, financing, supplying and otherwise encouraging, supporting, aiding, and directing military and paramilitary actions in and against Bosnia and Herzegovina by means of its agents and surrogates, has violated and is violating its express charter and treaty obligations to Bosnia and Herzegovina and, in particular, its charter and treaty obligations under Article 2 (4), of the United Nations Charter, as well as its obligations under general and customary international law;

*(k)* that under the circumstances set forth above, Bosnia and Herzegovina has the sovereign right to defend Itself and its People under United Nations Charter Article 51 and customary international law, including by means of immediately obtaining military weapons, equipment, supplies and troops from other States;

*(l)* that under the circumstances set forth above, Bosnia and Herzegovina has the sovereign right under United Nations Charter Article 51 and customary international law to request the immediate assistance of any State to come to its defence, including by military means (weapons, equipment, supplies, troops, etc.);

*(m)* that Security Council resolution 713 (1991), imposing a weapons embargo upon the former Yugoslavia, must be construed in a manner that shall not impair the inherent right of individual or collective self-defence of Bosnia and Herzegovina under the terms of United Nations Charter Article 51 and the rules of customary international law;

*(n)* that all subsequent Security Council resolutions that refer to or reaffirm resolution 713 (1991) must be construed in a manner that shall not impair the inherent right of individual or collective self-defence of Bosnia and Herzegovina under the terms of United Nations Charter Article 51 and the rules of customary international law;

*(o)* that Security Council resolution 713 (1991) and all subsequent Security Council resolutions referring thereto or reaffirming thereof must not be construed to impose an arms embargo upon Bosnia and Herzegovina, as required by Articles 24 (1) and 51 of the United

Nations Charter and in accordance with the customary doctrine of *ultra vires*;

*(p)* that pursuant to the right of collective self-defence recognized by United Nations Charter Article 51, all other States parties to the Charter have the right to come to the immediate defence of Bosnia and Herzegovina — at its request — including by means of immediately providing It with weapons, military equipment and supplies, and armed forces (soldiers, sailors, air-people, etc.);

*(q)* that Yugoslavia (Serbia and Montenegro) and its agents and surrogates are under an obligation to cease and desist immediately from its breaches of the foregoing legal obligations, and is under a particular duty to cease and desist immediately:

— from its systematic practice of so-called 'ethnic cleansing' of the citizens and sovereign territory of Bosnia and Herzegovina;
— from the murder, summary execution, torture, rape, kidnapping, mayhem, wounding, physical and mental abuse, and detention of the citizens of Bosnia and Herzegovina;
— from the wanton devastation of villages, towns, districts, cities, and religious institutions in Bosnia and Herzegovina;
— from the bombardment of civilian population centres in Bosnia and Herzegovina, and especially its capital, Sarajevo;
— from continuing the siege of any civilian population centres in Bosnia and Herzegovina, and especially its capital, Sarajevo;
— from the starvation of the civilian population in Bosnia and Herzegovina;
— from the interruption of, interference with, or harassment of humanitarian relief supplies to the citizens of Bosnia and Herzegovina by the international community;
— from all use of force — whether direct or indirect, overt or covert — against Bosnia and Herzegovina, and from all threats of force against Bosnia and Herzegovina;
— from all violations of the sovereignty, territorial integrity or political independence of Bosnia and Herzegovina, including all intervention, direct or indirect, in the internal affairs of Bosnia and Herzegovina;
— from all support of any kind — including the provision of training, arms, ammunition, finances, supplies, assistance, direction or any other form of support — to any nation, group, organization, movement or individual engaged or planning to engage in military or paramilitary actions in or against Bosnia and Herzegovina;

*(r)* that Yugoslavia (Serbia and Montenegro) has an obligation to pay Bosnia and Herzegovina, in its own right and as *parens patriae* for its citizens, reparations for damages to persons and property as well as to the Bosnian economy and environment caused by the foregoing violations of international law in a sum to be determined by the Court. Bosnia and Herzegovina reserves the right to introduce to the Court a precise evaluation of the damages caused by Yugoslavia (Serbia and Montenegro)."

65. In the written proceedings, the following submissions were presented by the Parties:

*On behalf of the Government of Bosnia and Herzegovina,*

in the Memorial:

"On the basis of the evidence and legal arguments presented in this Memorial, the Republic of Bosnia and Herzegovina,

Requests the International Court of Justice to adjudge and declare,

1. That the Federal Republic of Yugoslavia (Serbia and Montenegro), directly, or through the use of its surrogates, has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide, by destroying in part, and attempting to destroy in whole, national, ethnical or religious groups within the, but not limited to the, territory of the Republic of Bosnia and Herzegovina, including in particular the Muslim population, by

— killing members of the group;
— causing deliberate bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
— imposing measures intended to prevent births within the group;

2. That the Federal Republic of Yugoslavia (Serbia and Montenegro) has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide by conspiring to commit genocide, by complicity in genocide, by attempting to commit genocide and by incitement to commit genocide;

3. That the Federal Republic of Yugoslavia (Serbia and Montenegro) has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide by aiding and abetting individuals and groups engaged in acts of genocide;

4. That the Federal Republic of Yugoslavia (Serbia and Montenegro) has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide by virtue of having failed to prevent and to punish acts of genocide;

5. That the Federal Republic of Yugoslavia (Serbia and Montenegro) must immediately cease the above conduct and take immediate and effective steps to ensure full compliance with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide;

6. That the Federal Republic of Yugoslavia (Serbia and Montenegro) must wipe out the consequences of its international wrongful acts and must restore the situation existing before the violations of the Convention on the Prevention and Punishment of the Crime of Genocide were committed;

7. That, as a result of the international responsibility incurred for the above violations of the Convention on the Prevention and Punishment of the Crime of Genocide, the Federal Republic of Yugoslavia (Serbia and Montenegro) is required to pay, and the Republic of Bosnia and Herzegovina is entitled to receive, in its own right and as *parens patriae* for its citizens, full compensation for the damages and losses caused, in the

amount to be determined by the Court in a subsequent phase of the proceedings in this case.

The Republic of Bosnia and Herzegovina reserves its right to supplement or amend its submissions in the light of further pleadings.

The Republic of Bosnia and Herzegovina also respectfully draws the attention of the Court to the fact that it has not reiterated, at this point, several of the requests it made in its Application, on the formal assumption that the Federal Republic of Yugoslavia (Serbia and Montenegro) has accepted the jurisdiction of this Court under the terms of the Convention on the Prevention and Punishment of the Crime of Genocide. If the Respondent were to reconsider its acceptance of the jurisdiction of the Court under the terms of that Convention — which it is, in any event, not entitled to do — the Government of Bosnia and Herzegovina reserves its right to invoke also all or some of the other existing titles of jurisdiction and to revive all or some of its previous submissions and requests."

*On behalf of the Government of Serbia and Montenegro,*

in the Counter-Memorial[1]:

"The Federal Republic of Yugoslavia requests the International Court of Justice to adjudge and declare:

1. In view of the fact that no obligations established by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide have been violated with regard to Muslims and Croats,

— since the acts alleged by the Applicant have not been committed at all, or not to the extent and in the way alleged by the Applicant, or

— if some have been committed, there was absolutely no intention of committing genocide, and/or

— they have not been directed specifically against the members of one ethnic or religious group, i.e. they have not been committed against individuals just because they belong to some ethnic or religious group, consequently, they cannot be qualified as acts of genocide or other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide; and/or

2. In view of the fact that the acts alleged by the Applicant in its submissions cannot be attributed to the Federal Republic of Yugoslavia,

— since they have not been committed by the organs of the Federal Republic of Yugoslavia,

— since they have not been committed on the territory of the Federal Republic of Yugoslavia,

— since they have not been committed by the order or under control of the organs of the Federal Republic of Yugoslavia,

— since there is no other grounds based on the rules of international law to consider them as acts of the Federal Republic of Yugoslavia,

[1] Submissions 3 to 6 relate to counter-claims which were subsequently withdrawn (see paragraphs 26 and 27 above).

therefore the Court rejects all claims of the Applicant; and

3. Bosnia and Herzegovina is responsible for the acts of genocide committed against the Serbs in Bosnia and Herzegovina and for other violations of the obligations established by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide,

— because it has incited acts of genocide by the 'Islamic Declaration', and in particular by the position contained in it that 'there can be no peace or coexistence between "Islamic faith" and "non-Islamic" social and political institutions',

— because it has incited acts of genocide by the *Novi Vox*, paper of the Muslim youth, and in particular by the verses of a 'Patriotic Song' which read as follows:

'Dear mother, I'm going to plant willows,
We'll hang Serbs from them.
Dear mother, I'm going to sharpen knives,
We'll soon fill pits again';

— because it has incited acts of genocide by the paper *Zmaj od Bosne*, and in particular by the sentence in an article published in it that 'Each Muslim must name a Serb and take oath to kill him';

— because public calls for the execution of Serbs were broadcast on radio 'Hajat' and thereby acts of genocide were incited;

— because the armed forces of Bosnia and Herzegovina, as well as other organs of Bosnia and Herzegovina have committed acts of genocide and other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, against the Serbs in Bosnia and Herzegovina, which have been stated in Chapter Seven of the Counter-Memorial;

— because Bosnia and Herzegovina has not prevented the acts of genocide and other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, against the Serbs on its territory, which have been stated in Chapter Seven of the Counter-Memorial;

4. Bosnia and Herzegovina has the obligation to punish the persons held responsible for the acts of genocide and other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide;

5. Bosnia and Herzegovina is bound to take necessary measures so that the said acts would not be repeated in the future;

6. Bosnia and Herzegovina is bound to eliminate all consequences of the violation of the obligations established by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and provide adequate compensation."

*On behalf of the Government of Bosnia and Herzegovina,*

in the Reply:

"Therefore the Applicant persists in its claims as presented to this Court on 14 April 1994, and recapitulates its Submissions in their entirety.

Bosnia and Herzegovina requests the International Court of Justice to adjudge and declare,

1. That the Federal Republic of Yugoslavia, directly, or through the use of its surrogates, has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide, by destroying in part, and attempting to destroy in whole, national, ethnical or religious groups within the, but not limited to the, territory of Bosnia and Herzegovina, including in particular the Muslim population, by

— killing members of the group;
— causing deliberate bodily or mental harm to members of the group;
— deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
— imposing measures intended to prevent births within the group;

2. That the Federal Republic of Yugoslavia has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide by conspiring to commit genocide, by complicity in genocide, by attempting to commit genocide and by incitement to commit genocide;

3. That the Federal Republic of Yugoslavia has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide by aiding and abetting individuals and groups engaged in acts of genocide;

4. That the Federal Republic of Yugoslavia has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide by virtue of having failed to prevent and to punish acts of genocide;

5. That the Federal Republic of Yugoslavia must immediately cease the above conduct and take immediate and effective steps to ensure full compliance with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide;

6. That the Federal Republic of Yugoslavia must wipe out the consequences of its international wrongful acts and must restore the situation existing before the violations of the Convention on the Prevention and Punishment of the Crime of Genocide were committed;

7. That, as a result of the international responsibility incurred for the above violations of the Convention on the Prevention and Punishment of the Crime of Genocide, the Federal Republic of Yugoslavia is required to pay, and Bosnia and Herzegovina is entitled to receive, in its own right and as *parens patriae* for its citizens, full compensation for the damages and losses caused, in the amount to be determined by the Court in a subsequent phase of the proceedings in this case.

Bosnia and Herzegovina reserves its right to supplement or amend its submissions in the light of further pleadings;

8. On the very same grounds the conclusions and submissions of the Federal Republic of Yugoslavia with regard to the submissions of Bosnia and Herzegovina need to be rejected;

9. With regard to the Respondent's counter-claims the Applicant comes to the following conclusion. There is no basis in fact and no basis in law

for the proposition that genocidal acts have been committed against Serbs in Bosnia and Herzegovina. There is no basis in fact and no basis in law for the proposition that any such acts, if proven, would have been committed under the responsibility of Bosnia and Herzegovina or that such acts, if proven, would be attributable to Bosnia and Herzegovina. Also, there is no basis in fact and no basis in law for the proposition that Bosnia and Herzegovina has violated any of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide. On the contrary, Bosnia and Herzegovina has continuously done everything within its possibilities to adhere to its obligations under the Convention, and will continue to do so;

10. For these reasons, Bosnia and Herzegovina requests the International Court of Justice to reject the counter-claims submitted by the Respondent in its Counter-Memorial of 23 July 1997."

*On behalf of the Government of Serbia and Montenegro,*

in the Rejoinder[2] :

"The Federal Republic of Yugoslavia requests the International Court of Justice to adjudge and declare:

1. In view of the fact that no obligations established by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide have been violated with regard to Muslims and Croats,

— since the acts alleged by the Applicant have not been committed at all, or not to the extent and in the way alleged by the Applicant, or

— if some have been committed, there was absolutely no intention of committing genocide, and/or
— they have not been directed specifically against the members of one ethnic or religious group, i.e. they have not been committed against individuals just because they belong to some ethnic or religious group,

consequently they cannot be qualified as acts of genocide or other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, and/or

2. In view of the fact that the acts alleged by the Applicant in its submissions cannot be attributed to the Federal Republic of Yugoslavia,

— since they have not been committed by the organs of the Federal Republic of Yugoslavia,
— since they have not been committed on the territory of the Federal Republic of Yugoslavia,
— since they have not been committed by the order or under control of the organs of the Federal Republic of Yugoslavia,
— since there are no other grounds based on the rules of international law to consider them as acts of the Federal Republic of Yugoslavia,

[2] Submissions 3 to 6 relate to counter-claims which were subsequently withdrawn (see paragraphs 26 and 27 above).

therefore the Court rejects all the claims of the Applicant, and

3. Bosnia and Herzegovina is responsible for the acts of genocide committed against Serbs in Bosnia and Herzegovina and for other violations of the obligations established by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide,

— because it has incited acts of genocide by the 'Islamic Declaration', and in particular by the position contained in it that *'there can be no peace or coexistence between "Islamic faith" and "non-Islamic" social and political institutions'*,

— because it has incited acts of genocide by the *Novi Vox*, paper of the Muslim youth, and in particular by the verses of a 'Patriotic Song' which read as follows:

'Dear mother, I'm going to plant willows,
We'll hang Serbs from them.
Dear mother, I'm going to sharpen knives,
We'll soon fill pits again';

— because it has incited acts of genocide by the paper *Zmaj od Bosne*, and in particular by the sentence in an article published in it that 'Each Muslim' must name a Serb and take oath to kill him;

— because public calls for the execution of Serbs were broadcast on radio 'Hajat' and thereby acts of genocide were incited;

— because the armed forces of Bosnia and Herzegovina, as well as other organs of Bosnia and Herzegovina have committed acts of genocide and other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (enumerated in Article III), against Serbs in Bosnia and Herzegovina, which have been stated in Chapter Seven of the Counter-Memorial;

— because Bosnia and Herzegovina has not prevented the acts of genocide and other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (enumerated in Article III), against Serbs on its territory, which have been stated in Chapter Seven of the Counter-Memorial;

4. Bosnia and Herzegovina has the obligation to punish the persons held responsible for the acts of genocide and other acts prohibited by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide;

5. Bosnia and Herzegovina is bound to take necessary measures so that the said acts would not be repeated in the future;

6. Bosnia and Herzegovina is bound to eliminate all the consequences of violation of the obligations established by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and to provide adequate compensation."

66. At the oral proceedings, the following final submissions were presented by the Parties:

*On behalf of the Government of Bosnia and Herzegovina,*

at the hearing of 24 April 2006:

"Bosnia and Herzegovina requests the International Court of Justice to adjudge and declare:

1. That Serbia and Montenegro, through its organs or entities under its control, has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by intentionally destroying in part 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, by

— killing members of the group;
— causing serious bodily or mental harm to members of the group;
— deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
— imposing measures intended to prevent births within the group;
— forcibly transferring children of the group to another group;

2. Subsidiarily:

(i) that Serbia and Montenegro has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by complicity in genocide as defined in paragraph 1, above; and/or

(ii) that Serbia and Montenegro has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by aiding and abetting individuals, groups and entities engaged in acts of genocide, as defined in paragraph 1 above;

3. That Serbia and Montenegro has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by conspiring to commit genocide and by inciting to commit genocide, as defined in paragraph 1 above;

4. That Serbia and Montenegro has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide for having failed to prevent genocide;

5. That Serbia and Montenegro has violated and is violating its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide for having failed and for failing to punish acts of genocide or any other act prohibited by the Convention on the Prevention and Punishment of the Crime of Genocide, and for having failed and for failing to transfer individuals accused of genocide or any other act prohibited by the Convention to the International Criminal Tribunal for the former Yugoslavia and to fully co-operate with this Tribunal;

6. That the violations of international law set out in submissions 1 to 5 constitute wrongful acts attributable to Serbia and Montenegro which entail its international responsibility, and, accordingly,

*(a)* that Serbia and Montenegro shall immediately take effective steps to ensure full compliance with its obligation to punish acts of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide or any other act prohibited by the Convention and to transfer individuals accused of genocide or any other act pro-

hibited by the Convention to the International Criminal Tribunal for the former Yugoslavia and to fully co-operate with this Tribunal;

*(b)* that Serbia and Montenegro must redress the consequences of its international wrongful acts and, as a result of the international responsibility incurred for the above violations of the Convention on the Prevention and Punishment of the Crime of Genocide, must pay, and Bosnia and Herzegovina is entitled to receive, in its own right and as *parens patriae* for its citizens, full compensation for the damages and losses caused. That, in particular, the compensation shall cover any financially assessable damage which corresponds to:

(i) damage caused to natural persons by the acts enumerated in Article III of the Convention, including non-material damage suffered by the victims or the surviving heirs or successors and their dependants;

(ii) material damage caused to properties of natural or legal persons, public or private, by the acts enumerated in Article III of the Convention;

(iii) material damage suffered by Bosnia and Herzegovina in respect of expenditures reasonably incurred to remedy or mitigate damage flowing from the acts enumerated in Article III of the Convention;

*(c)* that the nature, form and amount of the compensation shall be determined by the Court, failing agreement thereon between the Parties one year after the Judgment of the Court, and that the Court shall reserve the subsequent procedure for that purpose;

*(d)* that Serbia and Montenegro shall provide specific guarantees and assurances that it will not repeat the wrongful acts complained of, the form of which guarantees and assurances is to be determined by the Court;

7. That in failing to comply with the Orders for indication of provisional measures rendered by the Court on 8 April 1993 and 13 September 1993 Serbia and Montenegro has been in breach of its international obligations and is under an obligation to Bosnia and Herzegovina to provide for the latter violation symbolic compensation, the amount of which is to be determined by the Court."

*On behalf of the Government of Serbia and Montenegro,*

at the hearing of 9 May 2006:

"Serbia and Montenegro asks the Court to adjudge and declare:

— that this Court has no jurisdiction because the Respondent had no access to the Court at the relevant moment; or, in the alternative;

— that this Court has no jurisdiction over the Respondent because the Respondent never remained or became bound by Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, and because there is no other ground on which jurisdiction over the Respondent could be based.

In case the Court determines that jurisdiction exists Serbia and Montenegro asks the Court to adjudge and declare:

— That the requests in paragraphs 1 to 6 of the Submissions of Bosnia

and Herzegovina relating to alleged violations of the obligations under the Convention on the Prevention and Punishment of the Crime of Genocide be rejected as lacking a basis either in law or in fact.

— In any event, that the acts and/or omissions for which the respondent State is alleged to be responsible are not attributable to the respondent State. Such attribution would necessarily involve breaches of the law applicable in these proceedings.
— Without prejudice to the foregoing, that the relief available to the applicant State in these proceedings, in accordance with the appropriate interpretation of the Convention on the Prevention and Punishment of the Crime of Genocide, is limited to the rendering of a declaratory judgment.
— Further, without prejudice to the foregoing, that any question of legal responsibility for alleged breaches of the Orders for the indication of provisional measures, rendered by the Court on 8 April 1993 and 13 September 1993, does not fall within the competence of the Court to provide appropriate remedies to an applicant State in the context of contentious proceedings, and, accordingly, the request in paragraph 7 of the Submissions of Bosnia and Herzegovina should be rejected."

* * *

## II. Identification of the Respondent Party

67. The Court has first to consider a question concerning the identification of the Respondent Party before it in these proceedings. 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 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". He further stated that "in the United Nations the name 'Republic of Serbia' [was] to be henceforth used instead of the name 'Serbia and Montenegro' " and added that the Republic of Serbia "remain[ed] responsible in full for all the rights and obligations of the state union of Serbia and Montenegro under the UN Charter".

68. By a letter of 16 June 2006, the Minister for Foreign Affairs of the Republic of Serbia informed the Secretary-General, *inter alia*, that "[t]he Republic of Serbia continue[d] to exercise its rights and honour its commitments deriving from international treaties concluded by Serbia and Montenegro" and requested that "the Republic of Serbia be considered a party to all international agreements in force, instead of Serbia and Montenegro". By a letter addressed to the Secretary-General dated 30 June

2006, the Minister for Foreign Affairs confirmed the intention of the Republic of Serbia to continue to exercise its rights and honour its commitments deriving from international treaties concluded by Serbia and Montenegro. He specified that "all treaty actions undertaken by Serbia and Montenegro w[ould] continue in force with respect to the Republic of Serbia with effect from 3 June 2006", and that, "all declarations, reservations and notifications made by Serbia and Montenegro w[ould] be maintained by the Republic of Serbia until the Secretary-General, as depositary, [were] duly notified otherwise".

69. On 28 June 2006, by its resolution 60/264, the General Assembly admitted the Republic of Montenegro (hereinafter "Montenegro") as a new Member of the United Nations.

70. By letters dated 19 July 2006, the Registrar requested the Agent of Bosnia and Herzegovina, the Agent of Serbia and Montenegro and the Foreign Minister of Montenegro to communicate to the Court the views of their Governments on the consequences to be attached to the above-mentioned developments in the context of the case. By a letter dated 26 July 2006, the Agent of Serbia and Montenegro explained that, in his Government's opinion, "there [was] continuity between Serbia and Montenegro and the Republic of Serbia (on the grounds of Article 60 of the Constitutional Charter of Serbia and Montenegro)". He noted that the entity which had been Serbia and Montenegro "ha[d] been replaced by two distinct States, one of them [was] Serbia, the other [was] Montenegro". In those circumstances, the view of his Government was that "the Applicant ha[d] first to take a position, and to decide whether it wishe[d] to maintain its original claim encompassing both Serbia and Montenegro, or whether it [chose] to do otherwise".

71. By a letter to the Registrar dated 16 October 2006, the Agent of Bosnia and Herzegovina referred to the letter of 26 July 2006 from the Agent of Serbia and Montenegro, and observed that Serbia's definition of itself as the continuator of the former Serbia and Montenegro had been accepted both by Montenegro and the international community. He continued however as follows:

> "this acceptance cannot have, and does not have, any effect on the applicable rules of state responsibility. Obviously, these cannot be altered bilaterally or retroactively. At the time when genocide was committed and at the time of the initiation of this case, Serbia and Montenegro constituted a single state. Therefore, Bosnia and Herzegovina is of the opinion that both Serbia and Montenegro, jointly and severally, are responsible for the unlawful conduct that constitute the cause of action in this case."

72. By a letter dated 29 November 2006, the Chief State Prosecutor of Montenegro, after indicating her capacity to act as legal representative of the Republic of Montenegro, referred to the letter from the Agent of

Bosnia and Herzegovina dated 16 October 2006, quoted in the previous paragraph, expressing the view that "both Serbia and Montenegro, jointly and severally, are responsible for the unlawful conduct that constitute[s] the cause of action in this case". The Chief State Prosecutor stated that the allegation concerned the liability in international law of the sovereign State of Montenegro, and that Montenegro regarded it as an attempt to have it become a participant in this way, without its consent, "i.e. to become a respondent in this procedure". The Chief State Prosecutor drew attention to the fact that, following the referendum held in Montenegro on 21 May 2006, the National Assembly of Montenegro had adopted a decision pronouncing the independence of the Republic of Montenegro. In the view of the Chief State Prosecutor, the Republic of Montenegro had become "an independent state with full international legal personality within its existing administrative borders", and she continued:

> "The issue of international-law succession of [the] State union of Serbia and Montenegro is regulated in Article 60 of [the] Constitutional Charter, and according to [that] Article the legal successor of [the] State union of Serbia and Montenegro is the Republic of Serbia, which, as a sovereign state, [has] become [the] follower of all international obligations and successor in international organizations."

The Chief State Prosecutor concluded that in the dispute before the Court, "the Republic of Montenegro may not have [the] capacity of respondent, [for the] above mentioned reasons".

73. By a letter dated 11 December 2006, the Agent of Serbia referred to the letters from the Applicant and from Montenegro described in paragraphs 71 and 72 above, and observed that there was "an obvious contradiction between the position of the Applicant on the one hand and the position of Montenegro on the other regarding the question whether these proceedings may or may not yield a decision which would result in the international responsibility of Montenegro" for the unlawful conduct invoked by the Applicant. The Agent stated that "Serbia is of the opinion that this issue needs to be resolved by the Court".

74. 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.

75. The Court notes that Serbia has accepted "continuity between Serbia and Montenegro and the Republic of Serbia" (paragraph 70 above), and has assumed responsibility for "its commitments deriving from international treaties concluded by Serbia and Montenegro" (paragraph 68 above), thus including commitments under the Genocide Convention. Montenegro, on the other hand, does not claim to be the continuator of Serbia and Montenegro.

76. The Court recalls a fundamental principle that no State may be subject to its jurisdiction without its consent; as the Court observed in the case of *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)*, the Court's "jurisdiction depends on the consent of States and, consequently, the Court may not compel a State to appear before it . . ." (*Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 260, para. 53). In its Judgment of 11 July 1996 (see paragraph 12 above), the significance of which will be explained below, the Court found that such consent existed, for the purposes of the present case, on the part of the FRY, which subsequently assumed the name of Serbia and Montenegro, without however any change in its legal personality. The events related in paragraphs 67 to 69 above 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 present case. It is also clear from the letter of 29 November 2006 quoted in paragraph 72 above that it does not give its consent to the jurisdiction of the Court over it for the purposes of the present dispute. Furthermore, the Applicant did not in its letter of 16 October 2006 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.

77. 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 part of the present Judgment are to be addressed to Serbia.

78. That being said, it has to be borne in mind that any responsibility for past events determined in the present Judgment involved at the relevant time the State of Serbia and Montenegro.

79. The Court observes that the Republic of Montenegro is a party to the Genocide Convention. 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.

* * *

## III. The Court's Jurisdiction

### *(1) Introduction: The Jurisdictional Objection of Serbia and Montenegro*

80. Notwithstanding the fact that in this case the stage of oral proceedings on the merits has been reached, and the fact that in 1996 the Court gave a judgment on preliminary objections to its jurisdiction (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II),* p. 595, hereinafter "the 1996 Judgment"), an important issue of a jurisdictional character has

since been raised by the Initiative, and the Court has been asked to rule upon it (see paragraphs 26-28 above). The basis of jurisdiction asserted by the Applicant, and found applicable by the Court by the 1996 Judgment, is Article IX of the Genocide Convention. The Socialist Federal Republic of Yugoslavia (hereinafter "the SFRY") became a party to that Convention on 29 August 1950. In substance, the central question now raised by the Respondent is whether at the time of the filing of the Application instituting the present proceedings the Respondent was or was not the continuator of the 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 present 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.

81. This contention was first raised, in the context of the present case, by the "Initiative to the Court to Reconsider *ex officio* Jurisdiction over Yugoslavia" filed by the Respondent on 4 May 2001 (paragraph 26 above). The circumstances underlying that Initiative will be examined in more detail below (paragraphs 88-99). 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. The Respondent contended that it had in 2000 become apparent that it had not been a Member of the United Nations in the period 1992-2000, and was thus not a party to the Statute at the date of the filing of the Application in this case; and that it was not a party to the Genocide Convention on that date. The Respondent concluded that "the Court has no jurisdiction over [the Respondent] *ratione personae*". It requested the Court "to suspend proceedings regarding the merits of the Case until a decision on this Initiative is rendered".

82. By a letter of 12 June 2003, the Registrar, acting on the instructions of the Court, informed the Respondent that the Court could not accede to the request made in that document, that the proceedings be suspended until a decision was rendered on the jurisdictional issues raised therein. The Respondent was informed, nevertheless, that the Court "w[ould] not give judgment on the merits in the present case unless it [was] satisfied that it ha[d] jurisdiction" and that, "[s]hould Serbia and Montenegro wish to present further argument to the Court on jurisdictional questions during the oral proceedings on the merits, it w[ould] be free to do so". The Respondent accordingly raised, as an "issue of procedure", the question whether the Respondent had access to the Court at the date of the Application, and each of the parties has now addressed

argument to the Court on that question. It has however at the same time been argued by the Applicant that the Court may not deal with the question, or that the Respondent is debarred from raising it at this stage of the proceedings. These contentions will be examined below.

83. Subsequently, on 15 December 2004, the Court delivered judgment in eight cases brought by Serbia and Montenegro against Member States of NATO (cases concerning the *Legality of Use of Force*). The Applications instituting proceedings in those cases had been filed on 29 April 1999, that is to say prior to the admission of Serbia and Montenegro (then known as the Federal Republic of Yugoslavia) to the United Nations on 1 November 2000. In each of these cases, the Court held that it had no jurisdiction to entertain the claims made in the Application (see, for example, *Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 328, para. 129), on the grounds that "Serbia and Montenegro did not, at the time of the institution of the present proceedings, have access to the Court under either paragraph 1 or paragraph 2 of Article 35 of the Statute" (*ibid.*, p. 327, para. 127). It held, "in light of the legal consequences of the new development since 1 November 2000", that "Serbia and Montenegro was not a Member of the United Nations, and in that capacity a State party to the Statute of the International Court of Justice, at the time of filing its Application . . ." (*ibid.*, p. 311, para. 79). No finding was made in those judgments on the question whether or not the Respondent was a party to the Genocide Convention at the relevant time.

84. Both Parties recognize that each of these Judgments has the force of *res judicata* in the specific case for the parties thereto; but they also recognize that these Judgments, not having been rendered in the present case, and involving as parties States not parties to the present case, do not constitute *res judicata* for the purposes of the present proceedings. In view however of the findings in the cases concerning the *Legality of Use of Force* as to the status of the FRY vis-à-vis the United Nations and the Court in 1999, the Respondent has invoked those decisions as supportive of its contentions in the present case.

85. The grounds upon which, according to Bosnia and Herzegovina, the Court should, at this late stage of the proceedings, decline to examine the questions raised by the Respondent as to the status of Serbia and Montenegro in relation to Article 35 of the Statute, and its status as a party to the Genocide Convention, are because the conduct of the Respondent in relation to the case has been such as to create a sort of *forum prorogatum,* or an estoppel, or to debar it, as a matter of good faith, from asserting at this stage of the proceedings that it had no access to the Court at the date the proceedings were instituted; and because the questions raised by the Respondent had already been resolved by the 1996 Judgment, with the authority of *res judicata*.

86. As a result of the Initiative of the Respondent (paragraph 81 above), and its subsequent argument on what it has referred to as an "issue of procedure", the Court has before it what is essentially an objection by the Respondent to its jurisdiction, which is preliminary in the sense that, if it is upheld, the Court will not proceed to determine the merits. The Applicant objects in turn to the Court examining further the Respondent's jurisdictional objection. These matters evidently require to be examined as preliminary points, and it was for this reason that the Court instructed the Registrar to write to the Parties the letter of 12 June 2003, referred to in paragraph 82 above. The letter was intended to convey that the Court would listen to any argument raised by the Initiative which might be put to it, but not as an indication of what its ruling might be on any such arguments.

87. In order to make clear the background to these issues, the Court will first briefly review the history of the relationship between the Respondent and the United Nations during the period from the break-up of the SFRY in 1992 to the admission of Serbia and Montenegro (then called the Federal Republic of Yugoslavia) to the United Nations on 1 November 2000. The previous decisions of the Court in this case, and in the *Application for Revision* case, have been briefly recalled above (paragraphs 4, 8, 12 and 31). They will be referred to more fully below (paragraphs 105-113) for the purpose of (in particular) an examination of the contentions of Bosnia and Herzegovina on the question of *res judicata*.

* *

### *(2) History of the Status of the FRY with Regard to the United Nations*

88. In the early 1990s the SFRY, a founding Member State of the United Nations, made up of Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia, began to disintegrate. On 25 June 1991 Croatia and Slovenia both declared independence, followed by Macedonia on 17 September 1991 and Bosnia and Herzegovina on 6 March 1992. On 22 May 1992, Bosnia and Herzegovina, Croatia and Slovenia were admitted as Members to the United Nations; as was the former Yugoslav Republic of Macedonia on 8 April 1993.

89. On 27 April 1992 the "participants of the joint session of the SFRY Assembly, the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro" had adopted a declaration, stating in pertinent parts:

"

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

. . . . . .

Remaining bound by all obligations to international organizations and institutions whose member it is . . ." (United Nations doc. A/46/915, Ann. II).

90. An official Note dated 27 April 1992 from the Permanent Mission of Yugoslavia to the United Nations, addressed to the Secretary-General of the United Nations, stated *inter alia* that:

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

Strictly respecting the continuity of the international personality of Yugoslavia, the Federal Republic of Yugoslavia shall continue to fulfil all the rights conferred to, and obligations assumed by, the Socialist Federal Republic of Yugoslavia in international relations, including its membership in all international organizations and participation in international treaties ratified or acceded to by Yugoslavia." (United Nations doc. A/46/915, Ann. I.)

91. On 30 May 1992, the Security Council adopted resolution 757 (1992), in which, *inter alia*, it noted that "the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations has not been generally accepted".

92. On 19 September 1992, the Security Council adopted resolution 777 (1992) which read as follows:

"*The Security Council,*

*Reaffirming* its resolution 713 (1991) of 25 September 1991 and all subsequent relevant resolutions,

*Considering* that the state formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist,

*Recalling* in particular resolution 757 (1992) which notes that 'the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations has not been generally accepted',

1. *Considers* that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and therefore *recommends* to the General Assembly that it decide that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly;

2. *Decides* to consider the matter again before the end of the main part of the forty-seventh session of the General Assembly."

The resolution was adopted by 12 votes in favour, none against, and 3 abstentions.

93. On 22 September 1992 the General Assembly adopted resolution 47/1, according to which:

"*The General Assembly,*

*Having received* the recommendation of the Security Council of 19 September 1992 that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly,

1. *Considers* that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and therefore *decides* that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly;

2. *Takes note* of the intention of the Security Council to consider the matter again before the end of the main part of the forty-seventh session of the General Assembly."

The resolution was adopted by 127 votes to 6, with 26 abstentions.

94. On 25 September 1992, the Permanent Representatives of Bosnia and Herzegovina and Croatia addressed a letter to the Secretary-General, in which, with reference to Security Council resolution 777 (1992) and

General Assembly resolution 47/1, they stated their understanding as follows: "At this moment, there is no doubt that the Socialist Federal Republic of Yugoslavia is not a member of the United Nations any more. At the same time, the Federal Republic of Yugoslavia is clearly not yet a member." They concluded that "[t]he flag flying in front of the United Nations and the name-plaque bearing the name 'Yugoslavia' do not represent anything or anybody any more" and "kindly request[ed] that [the Secretary-General] provide a legal explanatory statement concerning the questions raised" (United Nations doc. A/47/474).

95. In response, on 29 September 1992, the Under-Secretary-General and Legal Counsel of the United Nations addressed a letter to the Permanent Representatives of Bosnia and Herzegovina and Croatia, in which he stated that the "considered view of the United Nations Secretariat regarding the practical consequences of the adoption by the General Assembly of resolution 47/1" was as follows:

> "While the General Assembly has stated unequivocally that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot automatically continue the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations and that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations, the only practical consequence that the resolution draws is that the Federal Republic of Yugoslavia (Serbia and Montenegro) shall not *participate* in the work of the General Assembly. It is clear, therefore, that representatives of the Federal Republic of Yugoslavia (Serbia and Montenegro) can no longer *participate* in the work of the General Assembly, its subsidiary organs, nor conferences and meetings convened by it.
>
> On the other hand, the resolution neither terminates nor suspends Yugoslavia's *membership* in the Organization. Consequently, the seat and nameplate remain as before, but in Assembly bodies representatives of the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot sit behind the sign 'Yugoslavia'. Yugoslav missions at United Nations Headquarters and offices may continue to function and may receive and circulate documents. At Headquarters, the Secretariat will continue to fly the flag of the old Yugoslavia as it is the last flag of Yugoslavia used by the Secretariat. The resolution does not take away the right of Yugoslavia to participate in the work of organs other than Assembly bodies. The admission to the United Nations of a new Yugoslavia under Article 4 of the Charter will terminate the situation created by resolution 47/1." (United Nations doc. A/47/485; emphasis in the original.)

96. On 29 April 1993, the General Assembly, upon the recommendation contained in Security Council resolution 821 (1993) (couched in terms similar to those of Security Council resolution 777 (1992)), adopted resolution 47/229 in which it decided that "the Federal Republic of Yugoslavia (Serbia and Montenegro) shall not participate in the work of the Economic and Social Council".

97. In its Judgments in the cases concerning the *Legality of Use of Force* (paragraph 83 above), the Court commented on this sequence of events by observing that "all these events testify to the rather confused and complex state of affairs that obtained within the United Nations surrounding the issue of the legal status of the Federal Republic of Yugoslavia in the Organization during this period" (*Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 308, para. 73), and earlier the Court, in another context, had referred to the "*sui generis* position which the FRY found itself in" during the period between 1992 to 2000 (*loc. cit.*, citing *I.C.J. Reports 2003*, p. 31, para. 71).

98. This situation, however, came to an end with a new development in 2000. On 24 September 2000, Mr. Koštunica was elected President of the FRY. In that capacity, on 27 October 2000 he sent a letter to the Secretary-General requesting admission of the FRY to membership in the United Nations, in the following terms:

> "In the wake of fundamental democratic changes that took place in the Federal Republic of Yugoslavia, in the capacity of President, I have the honour to request the admission of the Federal Republic of Yugoslavia to the United Nations *in light of the implementation of the Security Council resolution 777 (1992)*." (United Nations doc. A/55/528-S/2000/1043; emphasis added.)

99. Acting upon this application by the FRY for membership in the United Nations, the Security Council on 31 October 2000 "*recommend[ed]* to the General Assembly that the Federal Republic of Yugoslavia be admitted to membership in the United Nations" (United Nations doc. S/RES/1326). On 1 November 2000, the General Assembly, by resolution 55/12, "*[h]aving received* the recommendation of the Security Council of 31 October 2000" and "*[h]aving considered* the application for membership of the Federal Republic of Yugoslavia", decided to "admit the Federal Republic of Yugoslavia to membership in the United Nations".

* *

*(3) The Response of Bosnia and Herzegovina*

100. The Court will now consider the Applicant's response to the jurisdictional objection raised by the Respondent, that is to say the conten-

tion of Bosnia and Herzegovina that the Court should not examine the question, raised by the Respondent in its Initiative (paragraph 81 above), of the status of the Respondent at the date of the filing of the Application instituting proceedings. It is first submitted by Bosnia and Herzegovina that the Respondent was under a duty to raise the issue of whether the FRY (Serbia and Montenegro) 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. Secondly, the Applicant argues 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*.

101. The first contention, as to the alleged consequences of the fact that Serbia did not raise the question of access to the Court under Article 35 at the preliminary objection stage, can be dealt with succinctly. Bosnia and Herzegovina has argued that to uphold the Respondent's objection "would mean that a respondent, after having asserted one or more preliminary objections, could still raise others, to the detriment of the effective administration of justice, the smooth conduct of proceedings, and, in the present case, the doctrine of *res judicata*". It should however be noted 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. As the Court stated in the case of *Avena and Other Mexican Nationals (Mexico* v. *United States of America)*,

> "There are of course circumstances in which the party failing to put forward an objection to jurisdiction might be held to have acquiesced in jurisdiction (*Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports 1972*, p. 52, para. 13). However, apart from such circumstances, a party failing to avail itself of the Article 79 procedure may forfeit the right to bring about a suspension of the proceedings on the merits, but can still argue the objection along with the merits." (*Judgment, I.C.J. Reports 2004*, p. 29, para. 24).

This first contention of Bosnia and Herzegovina must thus be understood as a claim that the Respondent, by its conduct in relation to the case, including the failure to raise the issue of the application of Article 35 of the Statute, by way of preliminary objection or otherwise, at an earlier stage of the proceedings, should be held to have acquiesced in jurisdiction. This contention is thus parallel to the argument mentioned above (paragraph 85), also advanced by Bosnia and Herzegovina, that the Respondent is debarred from asking the Court to examine that issue for

reasons of good faith, including estoppel and the principle *allegans contraria nemo audietur*.

102. The Court does not however find it necessary to consider here 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, and in particular jurisdiction *ratione materiae* under Article IX of the Genocide Convention, but not to the question whether a State has the capacity under the Statute to be a party to proceedings before the Court.

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. As the Court observed in the cases concerning the *Legality of Use of Force*,

> "a distinction has to be made between a question of jurisdiction that relates to the consent of a party and the question of the right of a party to appear before the Court under the requirements of the Statute, which is not a matter of consent. The question is whether *as a matter of law* Serbia and Montenegro was entitled to seise the Court as a party to the Statute at the time when it instituted proceedings in these cases. Since that question is independent of the views or wishes of the Parties, even if they were now to have arrived at a shared view on the point, the Court would not have to accept that view as necessarily the correct one. The function of the Court to enquire into the matter and reach its own conclusion is thus mandatory upon the Court irrespective of the consent of the parties and is in no way incompatible with the principle that the jurisdiction of the Court depends on consent." (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 295, para. 36; emphasis in the original.)

103. It follows that, whether or not the Respondent should be held to have acquiesced in the jurisdiction of the Court in this case, such acquiescence would in no way debar the Court from examining and ruling upon the question stated above. 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. All such considerations can, at the end of the day, only amount to attributing to the Respondent an implied acceptance, or deemed consent, in relation to the jurisdiction of the Court; but, as explained above, *ad hoc* consent of a party is distinct from the question of its capacity to be a party to proceedings before the Court.

104. However Bosnia and Herzegovina's second contention is that,

objectively and apart from any effect of the conduct of the Respondent, the question of the application of Article 35 of the Statute in this case has already been resolved as a matter of *res judicata,* and that if the Court were to go back on its 1996 decision on jurisdiction, it would disregard fundamental rules of law. In order to assess the validity of this contention, the Court will first review its previous decisions in the present case in which its jurisdiction, or specifically the question whether Serbia and Montenegro could properly appear before the Court, has been in issue.

* *

*(4) Relevant Past Decisions of the Court*

105. On 8 April 1993, the Court made an Order in this case indicating certain provisional measures. In that Order the Court briefly examined the circumstances of the break-up of the SFRY, and the claim of the Respondent (then known as "Yugoslavia (Serbia and Montenegro)") to continuity with that State, and consequent entitlement to continued membership in the United Nations. It noted that "the solution adopted" within the United Nations was "not free from legal difficulties", but concluded that "the question whether or not Yugoslavia is a Member of the United Nations and as such a party to the Statute of the Court is one which the Court does not need to determine definitively at the present stage of the proceedings" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993,* p. 14 para. 18). This conclusion was based in part on a provisional view taken by the Court as to the effect of the proviso to Article 35, paragraph 2, of the Statute (*ibid.*, para. 19). The Order contained the reservation, normally included in orders on requests for provisional measures, that "the decision given in the present proceedings in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case . . . and leaves unaffected the right of the Governments of Bosnia-Herzegovina and Yugoslavia to submit arguments in respect of [that question]" (*ibid.*, p. 23, para. 51). It is therefore evident that no question of *res judicata* arises in connection with the Order of 8 April 1993. A further Order on provisional measures was made on 13 September 1993, but contained nothing material to the question now being considered.

106. In 1995 the Respondent raised seven preliminary objections (one of which was later withdrawn), three of which invited the Court to find that it had no jurisdiction in the case. None of these objections were however founded on a contention that the FRY was not a party to the Statute at the relevant time; that was not a contention specifically advanced in the proceedings on the preliminary objections. At the time of those

proceedings, the FRY was persisting in the claim, that it was continuing the membership of the former SFRY in the United Nations; and while that claim was opposed by a number of States, the position taken by the various organs gave rise to a "confused and complex state of affairs . . . within the United Nations" (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004,* p. 308, para. 73). Neither party raised the matter before the Court: Bosnia and Herzegovina as Applicant, while denying that the FRY was a Member of the United Nations as a continuator of the SFRY, was asserting before this Court that the FRY was nevertheless a party to the Statute, either under Article 35, paragraph 2, thereof, or on the basis of the declaration of 27 April 1992 (see paragraphs 89 to 90 above); and for the FRY to raise the issue would have involved undermining or abandoning its claim to be the continuator of the SFRY as the basis for continuing membership of the United Nations.

107. By the 1996 Judgment, the Court rejected the preliminary objections of the Respondent, and found that, "on the basis of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, it has jurisdiction to adjudicate upon the dispute" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 623, para. 47 (2) *(a)*). It also found that the Application was admissible, and stated that "the Court may now proceed to consider the merits of the case . . ." (*ibid.*, p. 622, para. 46).

108. However, on 24 April 2001 Serbia and Montenegro (then known as the Federal Republic of Yugoslavia) filed an Application instituting proceedings seeking revision, under Article 61 of the Statute, of the 1996 Judgment on jurisdiction in this case. That Article requires that there exist "some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court . . .". The FRY claimed in its Application that:

> "The admission of the FRY to the United Nations as a new Member on 1 November 2000 is certainly a new fact . . .
>
> . . . . . .
>
> The admission of the FRY to the United Nations as a new Member clears ambiguities and sheds a different light on the issue of the membership of the FRY in the United Nations, in the Statute and in the Genocide Convention." (*Application for Revision, I.C.J. Reports 2003,* p. 12, para. 18.)

Essentially the contention of the FRY was that its admission to membership in 2000 necessarily implied that it was not a Member of the United Nations and thus not a party to the Statute in 1993, when the proceed-

ings in the present case were instituted, so that the Court would have had no jurisdiction in the case.

109. The history of the relationship between the FRY and the United Nations, from the break-up of the SFRY in 1991-1992 up to the admission of the FRY as a new Member in 2000, has been briefly recalled in paragraphs 88 to 99 above. That history has been examined in detail on more than one occasion, both in the context of the Application for revision referred to in paragraph 108 and in the Court's Judgments in 2004 in the cases concerning the *Legality of Use of Force*. In its Judgment of 3 February 2003 on the Application for revision, the Court carefully studied that relationship; it also recalled the terms of its 1996 Judgment finding in favour of jurisdiction. The Court noted that

> "the FRY claims that the facts which existed at the time of the 1996 Judgment and upon the discovery of which its request for revision of that Judgment is based 'are that the FRY was *not* a party to the Statute, and that it did *not* remain bound by the Genocide Convention continuing the personality of the former Yugoslavia'. It argues that these 'facts' were 'revealed' by its admission to the United Nations on 1 November 2000 and by [a letter from the United Nations Legal Counsel] of 8 December 2000.
>
> . . . . . .
>
> In the final version of its argument, the FRY claims that its admission to the United Nations and the Legal Counsel's letter of 8 December 2000 simply 'revealed' two facts which had existed in 1996 but had been unknown at the time: that it was not then a party to the Statute of the Court and that it was not bound by the Genocide Convention." (*I.C.J. Reports 2003*, p. 30, paras. 66 and 69.)

110. The Court did not consider that the admission of the FRY to membership was itself a "new fact", since it occurred after the date of the Judgment of which the revision was sought (*ibid.*, para. 68). As to the argument that facts on which an application for revision could be based were "revealed" by the events of 2000, the Court ruled as follows:

> "In advancing this argument, the FRY does not rely on facts that existed in 1996. In reality, it bases its Application for revision on the legal consequences which it seeks to draw from facts subsequent to the Judgment which it is asking to have revised. Those consequences, even supposing them to be established, cannot be regarded as facts within the meaning of Article 61. The FRY's argument cannot accordingly be upheld." (*Ibid.*, pp. 30-31, para. 69.)

111. The Court therefore found the Application for revision inadmissible. However, as the Court has observed in the cases concerning *Legal-*

*ity of Use of Force*, it did not, in its Judgment on the Application for revision,

> "regard the alleged 'decisive facts' specified by Serbia and Montenegro as 'facts that existed in 1996' for the purpose of Article 61. The Court therefore did not have to rule on the question whether 'the legal consequences' could indeed legitimately be deduced from the later facts; in other words, it did not have to say whether it was correct that Serbia and Montenegro had not been a party to the Statute or to the Genocide Convention in 1996." (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 313, para. 87.)

112. In a subsequent paragraph of the 2003 Judgment on the Application for revision of the 1996 Judgment, the Court had stated:

> "It follows from the foregoing that it has not been established that the request of the FRY is based upon the discovery of 'some fact' which was 'when the judgment was given, unknown to the Court and also to the party claiming revision'. The Court therefore concludes that one of the conditions for the admissibility of an application for revision prescribed by paragraph 1 of Article 61 of the Statute has not been satisfied." (*I.C.J. Reports 2003*, p. 31, para. 72.)

In its 2004 decisions in the *Legality of Use of Force* cases the Court further commented on this finding:

> "The Court thus made its position clear that there could have been no retroactive modification of the situation in 2000, which would amount to a new fact, and that therefore the conditions of Article 61 were not satisfied. This, however, did not entail any finding by the Court, in the revision proceedings, as to what that situation actually was." (*Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 314, para. 89.)

113. For the purposes of the present case, it is thus clear that the Judgment of 2003 on the Application by the FRY for revision, while binding between the parties, and final and without appeal, did not contain any finding on the question whether or not that State had actually been a Member of the United Nations in 1993. The question of the status of the FRY in 1993 formed no part of the issues upon which the Court pronounced judgment when dismissing that Application.

* *

### (5) *The Principle of* Res Judicata

114. The Court will now consider the principle of *res judicata*, and its application to the 1996 Judgment in this case. The Applicant asserts that the 1996 Judgment, whereby the Court found that it had jurisdiction

under the Genocide Convention, "enjoys the authority of *res judicata* and is not susceptible of appeal" and that "any ruling whereby the Court reversed the 1996 Judgment . . . would be incompatible both with the *res judicata* principle and with Articles 59, 60 and 61 of the Statute". The Applicant submits that, like its judgments on the merits, "the Court's decisions on jurisdiction are *res judicata*". It further observes that, pursuant to Article 60 of the Statute, the Court's 1996 Judgment is "final and without appeal" subject only to the possibility of a request for interpretation and revision; and the FRY's request for revision was rejected by the Court in its Judgment of 3 February 2003. The Respondent contends that jurisdiction once upheld may be challenged by new objections; and considers that this does not contravene the principle of *res judicata* or the wording of Article 79 of the Rules of Court. It emphasizes "the right and duty of the Court to act *proprio motu*" to examine its jurisdiction, mentioned in the case of the *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan)* (see paragraph 118 below), and contends that the Court cannot "forfeit" that right by not having itself raised the issue in the preliminary objections phase.

115. There is no dispute between the Parties as to the existence of the principle of *res judicata* even if they interpret it differently as regards judgments deciding questions of jurisdiction. The fundamental character of that principle appears from the terms of the Statute of the Court and the Charter of the United Nations. The underlying character and purposes of the principle are reflected in the judicial practice of the Court. 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. Article 59 of the Statute, notwithstanding its negative wording, has at its core the positive statement that the parties are bound by the decision of the Court in respect of the particular case. Article 60 of the Statute provides that the judgment is final and without appeal; Article 61 places close limits of time and substance on the ability of the parties to seek the revision of the judgment. The Court stressed those limits in 2003 when it found inadmissible the Application made by Serbia and Montenegro for revision of the 1996 Judgment in the *Application for Revision* case (*I.C.J. Reports 2003*, p. 12, para. 17).

116. Two purposes, one general, the other specific, underlie the principle of *res judicata*, internationally as nationally. First, the stability of legal relations requires that litigation come to an end. The Court's function, according to Article 38 of its Statute, is to "decide", that is, to bring to an end, "such disputes as are submitted to it". 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. Article 60 of the Statute articu-

lates this finality of judgments. Depriving a litigant of the benefit of a judgment it has already obtained must in general be seen as a breach of the principles governing the legal settlement of disputes.

117. It has however been suggested 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; specifically, the Respondent contends that "decisions on preliminary objections do not and cannot have the same consequences as decisions on the merits". The Court will however observe that the decision on questions of jurisdiction, pursuant to Article 36, paragraph 6, of the Statute, 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. In its Judgment of 25 March 1999 on the request for interpretation of the Judgment of 11 June 1998 in the case of the *Land and Maritime Boundary between Cameroon and Nigeria*, the Court expressly recognized that the 1998 Judgment, given on a number of preliminary objections to jurisdiction and admissibility, constituted *res judicata*, so that the Court could not consider a submission inconsistent with that judgment (*Judgment, I.C.J. Reports 1999 (I)*, p. 39, para. 16). Similarly, in its Judgment of 3 February 2003 in the *Application for Revision* case, the Court, when it began by examining whether the conditions for the opening of the revision procedure, laid down by Article 61 of the Statute, were satisfied, undoubtedly recognized that an application could be made for revision of a judgment on preliminary objections; this could in turn only derive from a recognition that such a judgment is "final and without appeal". Furthermore, the contention put forward by the Respondent would signify that the principle of *res judicata* would not prevent a judgment dismissing a preliminary objection from remaining open to further challenge indefinitely, while a judgment upholding such an objection, and putting an end to the case, would in the nature of things be final and determinative as regards that specific case.

118. The Court recalls that, as it has stated in the case of the *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan)*, it "must however always be satisfied that it has jurisdiction, and must if necessary go into that matter *proprio motu*" (*Judgment, I.C.J. Reports 1972*, p. 52, para. 13). That decision in its context (in a case in which there was no question of reopening a previous decision of the Court) does not support the Respondent's contention. It does not signify that jurisdictional decisions remain reviewable indefinitely, nor that the Court may, *proprio motu* or otherwise, reopen matters already decided with the force of *res judicata*. The Respondent has argued that there is a principle that "an international court may consider or reconsider the issue of juris-

diction at any stage of the proceedings". It has referred in this connection both to the dictum just cited from the *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan)*, and to the *Corfu Channel (United Kingdom* v. *Albania)* case. It is correct that the Court, having in the first phase of that case rejected Albania's preliminary objection to jurisdiction, and having decided that proceedings on the merits were to continue (*Preliminary Objection, Judgment, I.C.J. Reports 1947-1948*, p. 15), did at the merits stage consider and rule on a challenge to its jurisdiction, in particular whether it had jurisdiction to assess compensation (*I.C.J. Reports 1949*, pp. 23-26; 171). But no reconsideration at all by the Court of its earlier Judgment was entailed in this because, following that earlier Judgment, the Parties had concluded a special agreement submitting to the Court, *inter alia*, the question of compensation. The later challenge to jurisdiction concerned only the scope of the jurisdiction conferred by that subsequent agreement.

119. The Respondent also invokes certain international conventions and the rules of other international tribunals. It is true that the European Court of Human Rights may reject, at any stage of the proceedings, an application which it considers inadmissible; and the International Criminal Court may, in exceptional circumstances, permit the admissibility of a case or the jurisdiction of the Court to be challenged after the commencement of the trial. However, these specific authorizations in the instruments governing certain other tribunals reflect their particular admissibility procedures, which are not identical with the procedures of the Court in the field of jurisdiction. They thus do not support the view that there exists a general principle which would apply to the Court, whose Statute not merely contains no such provision, but declares, in Article 60, the *res judicata* principle without exception. The Respondent has also cited certain jurisprudence of the European Court of Human Rights, and an arbitral decision of the German-Polish Mixed Arbitral Tribunal (*von Tiedemann* case); but, in the view of the Court, these too, being based on their particular facts, and the nature of the jurisdictions involved, do not indicate the existence of a principle of sufficient generality and weight to override the clear provisions of the Court's Statute, and the principle of *res judicata*.

120. This does not however mean 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 decision must remain final, even if it is in apparent contradiction to reality. The Statute provides for only one procedure in such an event: the procedure under Article 61, which offers the possibility for the revision of judgments, subject to the restrictions stated in that Article. In the interests of the stability of legal relations, those restrictions must be rigorously applied. As noted above (para-

graph 110) the FRY's Application for revision of the 1996 Judgment in this case was dismissed, as not meeting the conditions of Article 61. Subject only to this possibility of revision, the applicable principle is *res judicata pro veritate habetur*, that is to say that the findings of a judgment are, for the purposes of the case and between the parties, to be taken as correct, and may not be reopened on the basis of claims that doubt has been thrown on them by subsequent events.

* *

*(6) Application of the Principle of* Res Judicata *to the 1996 Judgment*

121. In the light of these considerations, the Court reverts to the effect and significance of the 1996 Judgment. That Judgment was essentially addressed, so far as questions of jurisdiction were concerned, to the question of the Court's jurisdiction under the Genocide Convention. It resolved in particular certain questions that had been raised as to the status of Bosnia and Herzegovina in relation to the Convention; as regards the FRY, the Judgment stated simply as follows:

> "the former Socialist Federal Republic of Yugoslavia . . . signed the Genocide Convention on 11 December 1948 and deposited its instrument of ratification, without reservation, on 29 August 1950. At the time of the proclamation of the Federal Republic of Yugoslavia, on 27 April 1992, a formal declaration was adopted on its behalf to the effect that:
>
> > 'The Federal Republic of Yugoslavia, continuing the State, international legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all the commitments that the Socialist Federal Republic of Yugoslavia assumed internationally.'
>
> This intention thus expressed by Yugoslavia to remain bound by the international treaties to which the former Yugoslavia was party was confirmed in an official Note of 27 April 1992 from the Permanent Mission of Yugoslavia to the United Nations, addressed to the Secretary-General. The Court observes, furthermore, that it has not been contested that Yugoslavia was party to the Genocide Convention. Thus, Yugoslavia was bound by the provisions of the Convention on the date of the filing of the Application in the present case, namely, on 20 March 1993." (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia) Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 610, para. 17.)

122. Nothing was stated in the 1996 Judgment about the status of the FRY in relation to the United Nations, or the question whether it could participate in proceedings before the Court; for the reasons already mentioned above (paragraph 106), both Parties had chosen to refrain from asking for a decision on these matters. The Court however considers it necessary to emphasize that the question whether a State may properly come before the Court, on the basis of the provisions of the Statute, whether it be classified as a matter of capacity to be a party to the proceedings or as an aspect of jurisdiction *ratione personae*, is a matter which precedes that of jurisdiction *ratione materiae*, that is, whether that State has consented to the settlement by the Court of the specific dispute brought before it. The question is in fact one which the Court is bound to raise and examine, if necessary, ex officio, and if appropriate after notification to the parties. Thus if the Court considers that, in a particular case, the conditions concerning the capacity of the parties to appear before it are not satisfied, while the conditions of its jurisdiction *ratione materiae* are, it should, even if the question has not been raised by the parties, find that the former conditions are not met, and conclude that, for that reason, it could not have jurisdiction to decide the merits.

123. The operative part of a judgment of the Court possesses the force of *res judicata*. The operative part of the 1996 Judgment stated, in paragraph 47 (2) *(a)*, 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". 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, for the reason given in the preceding paragraph, to call in question the force as *res judicata* of the operative clause of the Judgment. At first sight, therefore, the Court need not examine the Respondent's objection to jurisdiction based on its contention as to its lack of status in 1993.

124. The Respondent has however advanced a number of arguments tending to show that the 1996 Judgment is not conclusive on the matter, and the Court will now examine these. The passage just quoted from the 1996 Judgment is of course not the sole provision of the operative clause of that Judgment: as, the Applicant has noted, the Court first dismissed *seriatim* the specific preliminary objections raised (and not withdrawn) by the Respondent; it then made the finding quoted in paragraph 123 above; and finally it dismissed certain additional bases of jurisdiction invoked by the Applicant. The Respondent suggests that, for the purposes of applying the principle of *res judicata* to a judgment of this kind on preliminary objections, the operative clause *(dispositif)* 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 Respondent has drawn attention to the provisions of Article 79, paragraph 7, of the 1978 Rules of Court, which provides that the judgment on preliminary objections shall, in respect of each objection "either uphold the objection, reject it, or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character". The Respondent suggests therefore that only the clauses of a judgment on preliminary objections that are directed to these ends have the force of *res judicata*, which is, it contends, consistent with the view that new objections may be raised subsequently.

125. The Court does not however 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. There are many examples in the Court's jurisprudence of decisions on preliminary objections which contain a general finding that the Court has jurisdiction, or that the application is admissible, as the case may be; and it would be going too far to suppose that all of these are necessarily superfluous conclusions. In the view of the Court, 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 (cf. *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the* Continental Shelf (Tunisia/Libyan Arab Jamahiriya) *(Tunisia* v. *Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1985*, pp. 218-219, para. 48).

126. For this purpose, in respect of a particular judgment 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. Thus an application for interpretation of a judgment under Article 60 of the Statute may well require the Court to settle "[a] difference of opinion [between the parties] as to whether a particular point has or has not been decided with binding force" (*Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J. Series A, No. 13*, pp. 11-12). If a matter has not in fact been determined, expressly or by necessary implication, then no force of *res judicata* attaches to it; and a general finding may have to be read in context in order to ascertain whether a particular matter is or is not contained in it.

127. In particular, the fact that a judgment may, in addition to rejecting specific preliminary objections, contain a finding that "the Court has jurisdiction" in the case does not necessarily prevent subsequent examination of any jurisdictional issues later arising that have not been resolved, with the force of *res judicata*, by such judgment. The Parties have each referred in this connection to the successive decisions in the *Corfu Chan-*

*nel* case, which the Court has already considered above (paragraph 118). Mention may also be made of the judgments on the merits in the two cases concerning *Fisheries Jurisdiction (United Kingdom* v. *Iceland) (Federal Republic of Germany* v. *Iceland)* (*I.C.J. Reports 1974*, p. 20, para. 42; pp. 203-204, para. 74), which dealt with minor issues of jurisdiction despite an express finding of jurisdiction in previous judgments (*I.C.J. Reports 1973*, p. 22, para. 46; p. 66, para. 46). Even where the Court has, in a preliminary judgment, specifically reserved certain matters of jurisdiction for later decision, the judgment may nevertheless contain a finding that "the Court has jurisdiction" in the case, this being understood as being subject to the matters reserved (see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 442, para. 113 (1) *(c)*, and pp. 425-426, para. 76; cf. also, in connection with an objection to admissibility, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom) (Libyan Arab Jamahiriya* v. *United States of America), I.C.J. Reports 1998*, p. 29, para. 51, and pp. 30-31, paras. 53 (2) *(b)* and 53 (3); p. 134, para. 50, and p. 156, paras. 53 (2) *(b)* and 53 (3)).

128. On the other hand, the fact that the Court has in these past cases dealt 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*. The essential difference between the cases mentioned in the previous paragraph and the present case is this: 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. In the *Fisheries Jurisdiction* cases, the issues raised related to the extent of the jurisdiction already established in principle with the force of *res judicata*; in the *Military and Paramilitary Activities* case, the Court had clearly indicated in the 1984 Judgment that its finding in favour of jurisdiction did not extend to a definitive ruling on the interpretation of the United States reservation to its optional clause declaration. By contrast, the contentions of the Respondent in the present case would, if upheld, effectively reverse the 1996 Judgment; that indeed is their purpose.

129. The Respondent has contended that the issue whether the FRY had access to the Court under Article 35 of the Statute has in fact never been decided in the present case, so that no barrier of *res judicata* would prevent the Court from examining that issue at the present stage of the

proceedings. It has drawn attention to the fact that when commenting on the 1996 Judgment, in its 2004 Judgments in the cases concerning the *Legality of Use of Force*, the Court observed that "[t]he question of the status of the Federal Republic of Yugoslavia in relation to Article 35 of the Statute was not raised and the Court saw no reason to examine it" (see, for example, *Legality of Use of Force (Serbia and Montenegro* v. *Belgium), I.C.J. Reports 2004*, p. 311, para. 82), and that "in its pronouncements in incidental proceedings" in the present case, the Court "did not commit itself to a definitive position on the issue of the legal status of the Federal Republic of Yugoslavia in relation to the Charter and the Statute" (*ibid.*, pp. 308-309, para. 74).

130. That does not however signify that in 1996 the Court was unaware of the fact that the solution adopted in the United Nations to the question of continuation of the membership of the SFRY "[was] not free from legal difficulties", as the Court had noted in its Order of 8 April 1993 indicating provisional measures in the case (*I.C.J. Reports 1993*, p. 14, para. 18; above, paragraph 105). The FRY was, at the time of the proceedings on its preliminary objections culminating in the 1996 Judgment, maintaining that it was the continuator State of the SFRY. As the Court indicated in its Judgments in the cases concerning the *Legality of Use of Force*,

> "No specific assertion was made in the Application [of 1993, in the present case] that the Court was open to Serbia and Montenegro under Article 35, paragraph 1, of the Statute of the Court, but it was later made clear that the Applicant claimed to be a Member of the United Nations and thus a party to the Statute of the Court, by virtue of Article 93, paragraph 1, of the Charter, at the time of filing of the Application . . . [T]his position was expressly stated in the Memorial filed by Serbia and Montenegro on 4 January 2000 . . ." (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004,* p. 299, para. 47.)

The question whether the FRY was a continuator or a successor State of the SFRY was mentioned in the Memorial of Bosnia and Herzegovina. The view of Bosnia and Herzegovina was that, while the FRY was not a Member of the United Nations, as a successor State of the SFRY which had expressly declared that it would abide by the international commitments of the SFRY, it was nevertheless a party to the Statute. It is also essential, when examining the text of the 1996 Judgment, to take note of the context in which it was delivered, in particular as regards the contemporary state of relations between the Respondent and the United Nations, as recounted in paragraphs 88 to 99 above.

131. The "legal difficulties" referred to were finally dissipated when in 2000 the FRY abandoned its former insistence that it was the continuator of the SFRY, and applied for membership in the United Nations (paragraph 98 above). As the Court observed in its 2004 Judgments in the cases concerning the *Legality of Use of Force*,

> "the significance of this new development in 2000 is that it has clarified the thus far amorphous legal situation concerning the status of the Federal Republic of Yugoslavia vis-à-vis the United Nations. It is in that sense that the situation that the Court now faces in relation to Serbia and Montenegro is manifestly different from that which it faced in 1999. If, at that time, the Court had had to determine definitively the status of the Applicant vis-à-vis the United Nations, its task of giving such a determination would have been complicated by the legal situation, which was shrouded in uncertainties relating to that status. However, from the vantage point from which the Court now looks at the legal situation, and in light of the legal consequences of the new development since 1 November 2000, the Court is led to the conclusion that Serbia and Montenegro was not a Member of the United Nations, and in that capacity a State party to the Statute of the International Court of Justice, at the time of filing its Application to institute the present proceedings before the Court on 29 April 1999." (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004*, pp. 310-311, para. 79.)

As the Court here recognized, 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 at the relevant time. The inconsistencies of approach expressed by the various United Nations organs are apparent from the passages quoted in paragraphs 91 to 96 above.

132. As already noted, the legal complications of the position of the Respondent in relation to the United Nations were not specifically mentioned in the 1996 Judgment. The Court stated, as mentioned in paragraph 121 above, that "Yugoslavia was bound by the provisions of the [Genocide] Convention on the date of the filing of the Application in the present case" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 610, para. 17), and found that "on the basis of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, it has jurisdiction to adjudicate upon the dispute" (*ibid.*, p. 623, para. 47 (2) *(a)*). Since, as observed above, the question of a State's capacity to be a party to proceedings is a matter which precedes that of jurisdiction *ratione materiae*, and one which the Court must, if necessary, raise ex officio (see

paragraph 122 above), this finding must as a matter of construction be understood, by necessary implication, to mean that the Court at that time perceived the Respondent as being in a position to participate in cases before the Court. On that basis, it proceeded to make a finding on jurisdiction which would have the force of *res judicata*. The Court does not need, for the purpose of the present proceedings, to go behind that finding and consider on what basis the Court was able to satisfy itself on the point. Whether the Parties classify the matter as one of "access to the Court" or of "jurisdiction *ratione personae*", the fact remains that the Court could not have proceeded to determine the merits unless the Respondent had had the capacity under the Statute to be a party to proceedings before the Court.

133. In the view of the Court, the express finding in the 1996 Judgment that the Court had jurisdiction in the case *ratione materiae*, on the basis of Article IX of the Genocide Convention, seen in its context, is a finding which is only consistent, in law and logic, with the proposition that, in relation to both Parties, it had jurisdiction *ratione personae* in its comprehensive sense, that is to say, that the status of each of them was such as to comply with the provisions of the Statute concerning the capacity of States to be parties before the Court. As regards Bosnia and Herzegovina, there was no question but that it was a party to the Statute at the date of filing its Application instituting proceedings; and in relation to the Convention, the Court found that it "could . . . become a party to the Convention" from the time of its admission to the United Nations (*I.C.J. Reports 1996 (II)*, p. 611, para. 19), and had in fact done so. As regards the FRY, the Court found that it "was bound by the provisions of the Convention", i.e. was a party thereto, "on the date of the filing of the Application" (*ibid.*, p. 610, para. 17); in this respect the Court took note of the declaration made by the FRY on 27 April 1992, set out in paragraph 89 above, whereby the FRY "continuing the State, international legal and political personality" of the SFRY, declared that it would "strictly abide by" the international commitments of the SFRY. The determination by the Court that it had jurisdiction under the Genocide Convention is thus to be interpreted as incorporating a determination that all the conditions relating to the capacity of the Parties to appear before it had been met.

134. It has been suggested by the Respondent that the Court's finding of jurisdiction in the 1996 Judgment was based merely upon an assumption: an assumption of continuity between the SFRY and the FRY. It has drawn attention to passages, already referred to above (paragraph 129), in the Judgments in the *Legality of Use of Force* cases, to the effect that in 1996 the Court saw no reason to examine the question of access, and that, in its pronouncements in incidental proceedings, the Court did not commit itself to a definitive position on the issue of the legal status of the Respondent.

135. 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. That element is not one which can at any time be reopened and re-examined, for the reasons already stated above. As regards the passages in the 2004 Judgments relied on by the Respondent, it should be borne in mind that the concern of the Court was not then with the scope of *res judicata* of the 1996 Judgment, since in any event such *res judicata* could not extend to the proceedings in the cases that were then before it, between different parties. It was simply appropriate in 2004 for the Court to consider whether there was an expressly stated finding in another case that would throw light on the matters before it. No such express finding having been shown to exist, the Court in 2004 did not, as it has in the present case, have to go on to consider what might be the unstated foundations of a judgment given in another case, between different parties.

136. The Court thus considers that the 1996 Judgment contained a finding, whether it be regarded as one of jurisdiction *ratione personae*, or as one anterior to questions of jurisdiction, which was necessary as a matter of logical construction, and related to the question of the FRY's capacity to appear before the Court under the Statute. The force of *res judicata* attaching to that judgment thus extends to that particular finding.

137. However it has been argued by the Respondent that even were that so,

> "the fundamental nature of access as a precondition for the exercise of the Court's judicial function means that positive findings on access cannot be taken as definitive and final until the final judgment is rendered in proceedings, because otherwise it would be possible that the Court renders its final decision with respect to a party over which it cannot exercise [its] judicial function. In other words, access is so fundamental that, until the final judgment, it overrides the principle of *res judicata*. Thus, even if the 1996 Judgment had made a finding on access, *quod non*, that would not be a bar for the Court to re-examine this issue until the end of the proceedings."

A similar argument advanced by the Respondent is based on the principle that the jurisdiction of the Court derives from a treaty, namely the Statute of the Court; the Respondent questions whether the Statute could have endowed the 1996 Judgment with any effects at all, since the Respondent was, it alleges, not a party to the Statute. Counsel for the Respondent argued that

> "Today it is known that in 1996 when the decision on preliminary objections was rendered, the Respondent was not a party to the Statute. Thus, there was no foothold, Articles 36 (6), 59, and 60 did

not represent a binding treaty provision providing a possible basis for deciding on jurisdiction with *res judicata* effects."

138. It appears to the Court that these contentions are inconsistent with the nature of the principle of *res judicata*. That principle signifies that once the Court has made a determination, whether on a matter of the merits of a dispute brought before it, or on a question of its own jurisdiction, that determination is definitive both for the parties to the case, in respect of the case (Article 59 of the Statute), and for the Court itself in the context of that case. However fundamental the question of the capacity of States to be parties in cases before the Court may be, it remains a question to be determined by the Court, in accordance with Article 36, paragraph 6, of the Statute, and once a finding in favour of jurisdiction has been pronounced with the force of *res judicata*, it is not open to question or re-examination, except by way of revision under Article 61 of the Statute. There is thus, *as a matter of law*, no possibility that the Court might render "its final decision with respect to a party over which it cannot exercise its judicial function", because the question whether a State is or is not a party subject to the jurisdiction of the Court is one which is reserved for the sole and authoritative decision of the Court.

139. Counsel for the Respondent contended further that, in the circumstances of the present case, reliance on the *res judicata* principle "would justify the Court's *ultra vires* exercise of its judicial functions contrary to the mandatory requirements of the Statute". However, the operation of the "mandatory requirements of the Statute" falls to be determined by the Court in each case before it; and once the Court has determined, with the force of *res judicata*, that it has jurisdiction, then for the purposes of that case no question of *ultra vires* action can arise, the Court having sole competence to determine such matters under the Statute. For the Court *res judicata pro veritate habetur*, and the judicial truth within the context of a case is as the Court has determined it, subject only to the provision in the Statute for revision of judgments. This result is required by the nature of the judicial function, and the universally recognized need for stability of legal relations.

* *

*(7) Conclusion: Jurisdiction Affirmed*

140. The Court accordingly 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 above 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 does not therefore find it necessary to examine the argument of the Applicant that the failure of the Respondent to advance at the time the reasons why it now contends that it was not a party to the Genocide Convention might raise considerations of estoppel, or *forum prorogatum* (cf. paragraphs 85 and 101 above). 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 brought before it by the Application filed on 20 March 1993. It follows from the above 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.

*

141. There has been some reference in the Parties' arguments before the Court to the question whether Article 35, paragraphs 1 and 2, of the Statute apply equally to applicants and to respondents. This matter, being one of interpretation of the Statute, would be one for the Court to determine. However, in the light of the conclusion that the Court has reached as to the *res judicata* status of the 1996 decision, it does not find at present the necessity to do so.

* * *

## IV. The Applicable Law: The Convention on the Prevention and Punishment of the Crime of Genocide

### *(1) The Convention in Brief*

142. The Contracting Parties to the Convention, adopted on 9 December 1948, offer the following reasons for agreeing to its text:

> "The Contracting Parties,
>
> Having considered the declaration made by the General Assembly of the United Nations in its resolution 96 (I) dated 11 December 1946 that genocide is a crime under international law, contrary

to the spirit and aims of the United Nations and condemned by the civilized world,

Recognizing that at all periods of history genocide has inflicted great losses on humanity, and

Being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required,

Hereby agree as hereinafter provided . . .”

143. Under Article I “[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”. Article II defines genocide in these terms:

> “In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> *(a)* Killing members of the group;
> *(b)* Causing serious bodily or mental harm to members of the group;
> *(c)* Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> *(d)* Imposing measures intended to prevent births within the group;
> *(e)* Forcibly transferring children of the group to another group.”

Article III provides as follows:

> “The following acts shall be punishable:
>
> *(a)* Genocide;
> *(b)* Conspiracy to commit genocide;
> *(c)* Direct and public incitement to commit genocide;
> *(d)* Attempt to commit genocide;
> *(e)* Complicity in genocide.”

144. According to Article IV, persons committing any of those acts shall be punished whether they are constitutionally responsible rulers, public officials or private individuals. Article V requires the parties to enact the necessary legislation to give effect to the Convention, and, in particular, to provide effective penalties for persons guilty of genocide or other acts enumerated in Article III. Article VI provides that

> “[p]ersons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction”.

Article VII provides for extradition.

145. Under Article VIII

> "Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III."

146. Article IX provides for certain disputes to be submitted to the Court:

> "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."

The remaining ten Articles are final clauses dealing with such matters as parties to the Convention and its entry into force.

147. The jurisdiction of the Court in this case is based solely on Article IX of the Convention. All the other grounds of jurisdiction invoked by the Applicant were rejected in the 1996 Judgment on jurisdiction (*I.C.J. Reports 1996 (II)*, pp. 617-621, paras. 35-41). It follows that the Court may rule only on the disputes between the Parties to which that provision refers. The Parties disagree on whether the Court finally decided the scope and meaning of that provision in its 1996 Judgment and, if it did not, on the matters over which the Court has jurisdiction under that provision. The Court rules on those two matters in following sections of this Judgment. 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*.

148. As it has in other cases, the Court recalls the fundamental distinction between the existence and binding force of obligations arising under international law and the existence of a court or tribunal with jurisdiction to resolve disputes about compliance with those obligations. The fact that there is not such a court or tribunal does not mean that the obligations do not exist. They retain their validity and legal force. States are required to fulfil their obligations under international law, including international humanitarian law, and they remain responsible for acts contrary to international law which are attributable to them (e.g. case concerning *Armed Activities on the Territory of the Congo (New Appli-*

*cation: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction of the Court and Admissibility of the Application, Judgment, I.C.J. Reports 2006*, pp. 52-53, para. 127).

149. The jurisdiction of the Court is founded on Article IX of the Convention, and the disputes subject to that jurisdiction are those "relating to the interpretation, application or fulfilment" of the Convention, but it does not follow that the Convention stands alone. In order to determine whether the Respondent breached its obligation under the Convention, as claimed by the Applicant, and, if a breach was committed, to determine its legal consequences, the Court will have recourse not only to the Convention itself, but also to the rules of general international law on treaty interpretation and on responsibility of States for internationally wrongful acts.

* *

*(2) The Court's 1996 Decision about the Scope and Meaning of Article IX*

150. According to the Applicant, the Court in 1996 at the preliminary objections stage decided that it had jurisdiction under Article IX of the Convention to adjudicate upon the responsibility of the respondent State, as indicated in that Article, "for genocide or any of the other acts enumerated in article III", and that that reference "does not exclude any form of State responsibility". The issue, it says, is *res judicata*. The Respondent supports a narrower interpretation of the Convention: the Court's jurisdiction is confined to giving a declaratory judgment relating to breaches of the duties to prevent and punish the commission of genocide by individuals.

151. The Respondent accepts that the first, wider, interpretation "was preferred by the majority of the Court in the preliminary objections phase" and quotes the following passage in the Judgment:

> "The Court now comes to the second proposition advanced by Yugoslavia [in support of one of its preliminary objections], regarding the type of State responsibility envisaged in Article IX of the Convention. According to Yugoslavia, that Article would only cover the responsibility flowing from the failure of a State to fulfil its obligations of prevention and punishment as contemplated by Articles V, VI and VII; on the other hand, the responsibility of a State for an act of genocide perpetrated by the State itself would be excluded from the scope of the Convention.
>
> *The Court would observe that the reference to Article IX to 'the responsibility of a State for genocide or for any of the other acts enumerated in Article III', does not exclude any form of State responsibility.*
>
> *Nor is the responsibility of a State for acts of its organs excluded*

*by Article IV of the Convention, which contemplates the commission of an act of genocide by 'rulers' or 'public officials'.*

In the light of the foregoing, the Court considers that it must reject the fifth preliminary objection of Yugoslavia. It would moreover observe that it is sufficiently apparent from the very terms of that objection that the Parties not only differ with respect to the facts of the case, their imputability and the applicability to them of the provisions of the Genocide Convention, but are moreover in disagreement with respect to the meaning and legal scope of several of those provisions, including Article IX. For the Court, there is accordingly no doubt that there exists a dispute between them relating to 'the interpretation, application or fulfilment of the . . . Convention, including . . . the responsibility of a State for genocide . . .', according to the form of words employed by that latter provision (cf. *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988,* pp. 27-32)." (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, pp. 616-617, paras. 32-33; emphasis now added to 1996 text.)

The Applicant relies in particular on the sentences in paragraph 32 which have been emphasized in the above quotation. The Respondent submits that

"this expression of opinion is of marked brevity and is contingent upon the dismissal of the preliminary objection based upon the existence or otherwise of a dispute relating to the interpretation of the Genocide Convention. The interpretation adopted in this provisional mode by the Court is not buttressed by any reference to the substantial preparatory work of the Convention.

In the circumstances, there is no reason of principle or consideration of common sense indicating that the issue of interpretation is no longer open."

While submitting that the Court determined the issue and spoke emphatically on the matter in 1996 the Applicant also says that this present phase of the case

"will provide an additional opportunity for this Court to rule on [the] important matter, not only for the guidance of the Parties here before you, but for the benefit of future generations that should not have to fear the immunity of States from responsibility for their genocidal acts".

152. The Court has already examined above the question of the authority of *res judicata* attaching to the 1996 Judgment, and indicated that it cannot reopen issues decided with that authority. Whether or not the issue now raised by the Respondent falls in that category, the Court

observes that the final part of paragraph 33 of that Judgment, quoted above, must be taken as indicating that "the meaning and legal scope" of Article IX and of other provisions of the Convention remain in dispute. In particular a dispute "exists" about whether the only obligations of the Contracting Parties for the breach of which they may be held responsible under the Convention are to legislate, and to prosecute or extradite, or whether the obligations extend to the obligation not to commit genocide and the other acts enumerated in Article III. That dispute "exists" and was left by the Court for resolution at the merits stage. In these circumstances, and taking into account the positions of the Parties, the Court will determine at this stage whether the obligations of the Parties under the Convention do so extend. That is to say, the Court will decide "the meaning and legal scope" of several provisions of the Convention, including Article IX with its reference to "the responsibility of a State for genocide or any of the other acts enumerated in Article III".

* *

*(3) The Court's 1996 Decision about the Territorial Scope of the Convention*

153. A second issue about the *res judicata* effect of the 1996 Judgment concerns the territorial limits, if any, on the obligations of the States parties to prevent and punish genocide. In support of one of its preliminary objections the Respondent argued that it did not exercise jurisdiction over the Applicant's territory at the relevant time. In the final sentence of its reasons for rejecting this argument the Court said this: "[t]he Court notes that the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention" (*I.C.J. Reports 1996 (II)*, p. 616, para. 31).

154. The Applicant suggests that the Court in that sentence ruled that the obligation extends without territorial limit. The Court does not state the obligation in that positive way. The Court does not say that the obligation is "territorially unlimited by the Convention". Further, earlier in the paragraph, it had quoted from Article VI (about the obligation of any State in the territory of which the act was committed to prosecute) as "the only provision relevant to" territorial "problems" related to the application of the Convention. The quoted sentence is therefore to be understood as relating to the undertaking stated in Article I. The Court did not in 1996 rule on the territorial scope of each particular obligation arising under the Convention. Accordingly the Court has still to rule on that matter. It is not *res judicata*.

* *

*(4) The Obligations Imposed by the Convention on the Contracting Parties*

155. The Applicant, in the words of its Agent, contends that "[t]his case is about State responsibility and seeks to establish the responsibilities of a State which, through its leadership, through its organs, committed the most brutal violations of one of the most sacred instruments of international law". The Applicant has emphasized that in its view, the Genocide Convention "created a universal, treaty-based concept of State responsibility", and that "[i]t is State responsibility for genocide that this legal proceeding is all about". It relies in this respect on Article IX of the Convention, which, it argues, "quite explicitly impose[s] on States a direct responsibility themselves not to commit genocide or to aid in the commission of genocide". As to the obligation of prevention under Article I, a breach of that obligation, according to the Applicant, "is established — it might be said is 'eclipsed' — by the fact that [the Respondent] is *itself* responsible for the genocide committed; . . . a State which commits genocide has not fulfilled its commitment to prevent it" (emphasis in the original). The argument moves on from alleged breaches of Article I to "violations [by the Respondent] of its obligations under Article III . . . to which express reference is made in Article IX, violations which stand at the heart of our case. This fundamental provision establishes the obligations whose violation engages the responsibility of States parties." It follows that, in the contention of the Applicant, the Court has jurisdiction under Article IX over alleged violations by a Contracting Party of those obligations.

156. The Respondent contends to the contrary that

> "the Genocide Convention does not provide for the responsibility of States for acts of genocide as such. The duties prescribed by the Convention relate to 'the prevention and punishment of the crime of genocide' when this crime is committed by individuals: and the provisions of Articles V and VI [about enforcement and prescription] . . . make this abundantly clear."

It argues that the Court therefore does not have jurisdiction *ratione materiae* under Article IX; and continues:

> "[t]hese provisions [Articles I, V, VI and IX] do not extend to the responsibility of a Contracting Party as such for acts of genocide but [only] to responsibility for failure to prevent or to punish acts of genocide committed by individuals within its territory or . . . its control".

The sole remedy in respect of that failure would, in the Respondent's view, be a declaratory judgment.

157. As a subsidiary argument, the Respondent also contended that

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

(This contention went on to mention responsibility based on breach of the obligation to prevent and punish, matters considered later in this Judgment.)

158. The Respondent has in addition presented what it refers to as "alternative arguments concerning solely State responsibility for breaches of Articles II and III". Those arguments addressed the necessary conditions, especially of intent, as well as of attribution. When presenting those alternative arguments, counsel for the Respondent repeated the principal submission set out above that "the Convention does not suggest in any way that States themselves can commit genocide".

159. The Court notes that there is no disagreement between the Parties that the reference in Article IX to disputes about "the responsibility of a State" as being among the disputes relating to the interpretation, application or fulfilment of the Convention which come within the Court's jurisdiction, indicates that provisions of the Convention do impose obligations on States in respect of which they may, in the event of breach, incur responsibility. Articles V, VI and VII requiring legislation, in particular providing effective penalties for persons guilty of genocide and the other acts enumerated in Article III, and for the prosecution and extradition of alleged offenders are plainly among them. Because those provisions regulating punishment also have a deterrent and therefore a preventive effect or purpose, they could be regarded as meeting and indeed exhausting the undertaking to prevent the crime of genocide stated in Article I and mentioned in the title. On that basis, in support of the Respondent's principal position, that Article would rank as merely hortatory, introductory or purposive and as preambular to those specific obligations. The remaining specific provision, Article VIII about competent organs of the United Nations taking action, may be seen as completing the system by supporting both prevention and suppression, in this case at the political level rather than as a matter of legal responsibility.

160. 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. To confirm the meaning resulting from that process or to remove ambiguity or obscurity or a manifestly absurd or unreasonable result, the supplementary means of interpretation to which recourse may be had include the preparatory work of the Convention and the circumstances of its conclusion. Those propositions, reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, are well recognized as part of customary international law: see *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004,* p. 174, para. 94; case concerning *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004,* p. 48, para. 83; *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001,* p. 501, para. 99; and *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002,* p. 645, para. 37, and the other cases referred to in those decisions.

161. To determine what are the obligations of the Contracting Parties under the Genocide Convention, the Court will begin with the terms of its Article I. It contains two propositions. The first is the affirmation that genocide is a crime under international law. That affirmation is to be read in conjunction with the declaration that genocide is a crime under international law, unanimously adopted by the General Assembly two years earlier in its resolution 96 (I), and referred to in the Preamble to the Convention (paragraph 142, above). The affirmation recognizes the existing requirements of customary international law, a matter emphasized by the Court in 1951:

> "The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (I) of the General Assembly, December 11th 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required 'in order to liberate mankind from such an odious scourge' (Preamble to the Convention) . . .
>
> The objects of such a convention must also be considered. The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human

> groups and on the other to confirm and endorse the most elementary principles of morality." (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23.)

Later in that Opinion, the Court referred to "the moral and humanitarian principles which are its basis" (*ibid.,* p. 24). In earlier phases of the present case the Court has also recalled resolution 96 (I) (*I.C.J. Reports 1993*, p. 23; see also pp. 348 and 440) and has quoted the 1951 statement (*I.C.J. Reports 1996 (II)*, p. 616). The Court reaffirmed the 1951 and 1996 statements in its Judgment of 3 February 2006 in the case concerning *Armed Activities on the Territory of the Congo (New Application 2002) (Democratic Republic of the Congo* v. *Rwanda)*, paragraph 64, when it added that the norm prohibiting genocide was assuredly a peremptory norm of international law *(jus cogens)*.

162. Those characterizations of the prohibition on genocide and the purpose of the Convention are significant for the interpretation of the second proposition stated in Article I — the undertaking by the Contracting Parties to prevent and punish the crime of genocide, and particularly in this context the undertaking to prevent. Several features of that undertaking are significant. The ordinary meaning of the word "undertake" is to give a formal promise, to bind or engage oneself, to give a pledge or promise, to agree, to accept an obligation. It is a word regularly used in treaties setting out the obligations of the Contracting Parties (cf., for example, International Convention on the Elimination of All Forms of Racial Discrimination (7 March 1966), Art. 2, para. 1; International Covenant on Civil and Political Rights (16 December 1966), Art. 2, para. 1, and 3, for example). It is not merely hortatory or purposive. The undertaking is unqualified (a matter considered later in relation to the scope of the obligation of prevention); and it is not to be read merely as an introduction to later express references to legislation, prosecution and extradition. Those features support the conclusion that Article I, in particular its undertaking to prevent, creates obligations distinct from those which appear in the subsequent Articles. That conclusion is also supported by the purely humanitarian and civilizing purpose of the Convention.

163. The conclusion is confirmed by two aspects of the preparatory work of the Convention and the circumstances of its conclusion as referred to in Article 32 of the Vienna Convention. In 1947 the United Nations General Assembly, in requesting the Economic and Social Council to submit a report and a draft convention on genocide to the Third Session of the Assembly, declared "that genocide is an international crime entailing national and international responsibility on the part of individuals and States" (A/RES/180 (II)). That duality of responsibilities

is also to be seen in two other associated resolutions adopted on the same day, both directed to the newly established International Law Commission (hereinafter "the ILC"): the first on the formulation of the Nuremberg principles, concerned with the rights (Principle V) and duties of individuals, and the second on the draft declaration on the rights and duties of States (A/RES/177 and A/RES/178 (II)). The duality of responsibilities is further considered later in this Judgment (paragraphs 173-174).

164. The second feature of the drafting history emphasizes the operative and non-preambular character of Article I. The Preamble to the draft Convention, prepared by the *Ad Hoc* Committee on Genocide for the Third Session of the General Assembly and considered by its Sixth Committee, read in part as follows:

> "The High Contracting Parties
>
> . . . . . .
>
> Being convinced that the prevention and punishment of genocide requires international co-operation,
>
> *Hereby agree to prevent and punish the crime as hereinafter provided.*"

The first Article would have provided "[g]enocide is a crime under international law whether committed in time of peace or in time of war" (report of the *Ad Hoc* Committee on Genocide, 5 April to 10 May 1948, United Nations, *Official Records of the Economic and Social Council, Seventh Session, Supplement No. 6*, doc. E/794, pp. 2, 18).

Belgium was of the view that the undertaking to prevent and punish should be made more effective by being contained in the operative part of the Convention rather than in the Preamble and proposed the following Article I to the Sixth Committee of the General Assembly: "The High Contracting Parties undertake to prevent and punish the crime of genocide." (United Nations doc. A/C.6/217.) The Netherlands then proposed a new text of Article I combining the *Ad Hoc* Committee draft and the Belgian proposal with some changes: "The High Contracting Parties reaffirm that genocide is a crime under international law, which they undertake to prevent and to punish, in accordance with the following articles." (United Nations docs. A/C.6/220; United Nations, *Official Records of the General Assembly, Third Session, Part I, Sixth Committee*, Summary Records of the 68th meeting, p. 45.) The Danish representative thought that Article I should be worded more effectively and proposed the deletion of the final phrase — "in accordance with the following articles" (*ibid.*, p. 47). The Netherlands representative agreed with that suggestion (*ibid.*, pp. 49-50). After the USSR's proposal to delete Article I was rejected by 36 votes to 8 with 5 abstentions and its proposal to transfer its various points to the Preamble was rejected by 40 votes to 8, and the phrase "whether committed in time of peace or of

war" was inserted by 30 votes to 7 with 6 abstentions, the amended text of Article I was adopted by 37 votes to 3 with 2 abstentions (*ibid.*, pp. 51 and 53).

165. For the Court both changes — the movement of the undertaking from the Preamble to the first operative Article and the removal of the linking clause ("in accordance with the following articles") — confirm that Article I does impose distinct obligations over and above those imposed by other Articles of the Convention. In particular, the Contracting Parties have a direct obligation to prevent genocide.

166. The Court next considers whether the Parties are also under an obligation, by virtue of the Convention, not to commit genocide themselves. It must be observed at the outset that such an obligation is not expressly imposed by the actual terms of the Convention. The Applicant has however advanced as its main argument that such an obligation is imposed by Article IX, which confers on the Court jurisdiction over disputes "including those relating to the responsibility of a State for genocide or any of the other acts enumerated in Article III". Since Article IX is essentially a jurisdictional provision, the Court considers that it should first ascertain whether the substantive obligation on States not to commit genocide may flow from the other provisions of the Convention. Under Article I the States parties are bound to prevent such an act, which it describes as "a crime under international law", being committed. The Article does not *expressis verbis* require States to refrain from themselves committing genocide. However, in the view of the Court, taking into account the established purpose of the Convention, the effect of Article I is to prohibit States from themselves committing genocide. Such a prohibition follows, first, from the fact that the Article 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. That obligation requires the States parties, *inter alia*, to employ the means at their disposal, in circumstances to be described more specifically later in this Judgment, to prevent persons or groups not directly under their authority from committing an act of genocide or any of the other acts mentioned in Article III. It would be paradoxical if States were thus under an obligation to prevent, so far as within their power, commission of genocide by persons over whom they have a certain influence, but were not forbidden to commit such acts through their own organs, 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 the commission of genocide.

167. The Court accordingly concludes that Contracting Parties to the Convention are bound not to commit genocide, through the actions of their organs or persons or groups whose acts are attributable to them. That conclusion must also apply to the other acts enumerated in Article III. Those acts are forbidden along with genocide itself in the list included in Article III. They are referred to equally with genocide in Article IX and without being characterized as "punishable"; and the "purely humanitarian and civilizing purpose" of the Convention may be seen as being promoted by the fact that States are subject to that full set of obligations, supporting their undertaking to prevent genocide. It is true that the concepts used in paragraphs *(b)* to *(e)* of Article III, and particularly that of "complicity", refer to well known categories of criminal law and, as such, appear particularly well adapted to the exercise of penal sanctions against individuals. It would however not be in keeping with the object and purpose of the Convention to deny that the international responsibility of a State — even though quite different in nature from criminal responsibility — can be engaged through one of the acts, other than genocide itself, enumerated in Article III.

168. The conclusion that the Contracting Parties are bound in this way by the Convention not to commit genocide and the other acts enumerated in Article III is confirmed by one unusual feature of the wording of Article IX. But for that unusual feature and the addition of the word "fulfilment" to the provision conferring on the Court jurisdiction over disputes as to the "interpretation and application" of the Convention (an addition which does not appear to be significant in this case), Article IX would be a standard dispute settlement provision.

169. The unusual feature of Article IX is the phrase "including those [disputes] relating to the responsibility of a State for genocide or any of the other acts enumerated in Article III". The word "including" tends to confirm that disputes relating to the responsibility of Contracting Parties for genocide, and the other acts enumerated in Article III to which it refers, are comprised within a broader group of disputes relating to the interpretation, application or fulfilment of the Convention. The responsibility of a party for genocide and the other acts enumerated in Article III arises from its failure to comply with the obligations imposed by the other provisions of the Convention, and in particular, in the present context, with Article III read with Articles I and II. According to the English text of the Convention, the responsibility contemplated is responsibility "for genocide" (in French, "responsabilité . . . en matière de génocide"), 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 responsible for genocide and the other acts enumerated in Article III of the Convention.

*

170. The Court now considers three arguments, advanced by the Respondent 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 general 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. On the matter of principle the Respondent calls attention to the rejection by the ILC of the concept of international crimes when it prepared the final draft of its Articles on State Responsibility, a decision reflecting the strongly negative reactions of a number of States to any such concept. The Applicant accepts that general international law does not recognize the criminal responsibility of States. It contends, on the specific issue, 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. The Court observes that the obligations in question in this case, arising from the terms of the Convention, 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. This argument accordingly cannot be accepted.

171. The second argument of the Respondent 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 focused essentially on the criminal prosecution and punishment of individuals and not on the responsibility of States. The emphasis of the Convention on the obligations and responsibility of individuals excludes any possibility of States being liable and responsible in the event of breach of the obligations reflected in Article III. In particular, it is said, that possibility cannot stand in the face of the references, in Article III to punishment (of individuals), and in Article IV to individuals being punished, and the requirement, in Article V for legislation in particular for effective penalties for persons guilty of genocide, the provision in Article VI for the prosecution of persons charged with genocide, and requirement in Article VII for extradition.

172. The Court is mindful of the fact that the famous sentence in the Nuremberg Judgment that "[c]rimes against international law are committed by men, not by abstract entities . . ." (Judgment of the International Military Tribunal, Trial of the Major War Criminals, 1947, *Official Documents*, Vol. 1, p. 223) might be invoked in support of the proposition that only individuals can breach the obligations set out in Article III. But the Court notes that that Tribunal was answering the argument that "international law is concerned with the actions of sov-

ereign States, and provides no punishment for individuals" (Judgment of the International Military Tribunal, *op. cit.*, p. 222), and that thus States alone were responsible under international law. The Tribunal rejected that argument in the following terms: "[t]hat international law imposes duties and liabilities upon individuals as well as upon States has long been recognized" (*ibid.*, p. 223; the phrase "as well as upon States" is missing in the French text of the Judgment).

173. The Court observes that that duality of responsibility continues to be a constant feature of international law. This feature is reflected in Article 25, paragraph 4, of the Rome Statute for the International Criminal Court, now accepted by 104 States: "No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law." The Court notes also that the ILC's Articles on the Responsibility of States for Internationally Wrongful Acts (Annex to General Assembly resolution 56/83, 12 December 2001), to be referred to hereinafter as "the ILC Articles on State Responsibility", affirm in Article 58 the other side of the coin: "These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State." In its Commentary on this provision, the Commission said:

> "Where crimes against international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them. In certain cases, in particular aggression, the State will by definition be involved. Even so, the question of individual responsibility is in principle distinct from the question of State responsibility. The State is not exempted from its own responsibility for internationally wrongful conduct by the prosecution and punishment of the State officials who carried it out." (ILC Commentary on the Draft Articles on Responsibility of States for Internationally Wrongful Acts, ILC Report A/56/10, 2001, Commentary on Article 58, para. 3.)

The Commission quoted Article 25, paragraph 4, of the Rome Statute, and concluded as follows:

> "Article 58 . . . [makes] it clear that the Articles do not address the question of the individual responsibility under international law of any person acting on behalf of a State. The term 'individual responsibility' has acquired an accepted meaning in light of the Rome Statute and other instruments; it refers to the responsibility of individual persons, including State officials, under certain rules of international law for conduct such as genocide, war crimes and crimes against humanity."

174. 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. Furthermore, the fact that Articles V, VI and VII focus on individuals cannot itself establish that the Contracting Parties may not be subject to obligations not to commit genocide and the other acts enumerated in Article III.

175. The third and final argument of the Respondent against the proposition that the Contracting Parties are bound by the Convention not to commit genocide is based on the preparatory work of the Convention and particularly of Article IX. The Court has already used part of that work to confirm the operative significance of the undertaking in Article I (see paragraphs 164 and 165 above), an interpretation already determined from the terms of the Convention, its context and purpose.

176. The Respondent, claiming that the Convention and in particular Article IX is ambiguous, submits that the drafting history of the Convention, in the Sixth Committee of the General Assembly, shows that "there was no question of direct responsibility of the State for acts of genocide". It claims that the responsibility of the State was related to the "key provisions" of Articles IV-VI: the Convention is about the criminal responsibility of individuals supported by the civil responsibility of States to prevent and punish. This argument against any wider responsibility for the Contracting Parties is based on the records of the discussion in the Sixth Committee, and is, it is contended, supported by the rejection of United Kingdom amendments to what became Articles IV and VI. Had the first amendment been adopted, Article IV, concerning the punishment of individuals committing genocide or any of the acts enumerated in Article III, would have been extended by the following additional sentence: "[Acts of genocide] committed by or on behalf of States or governments constitute a breach of the present Convention."(A/C.6/236 and Corr. 1.) That amendment was defeated (United Nations, *Official Records of the General Assembly, Third Session, Part I, Sixth Committee, Summary Records of the 96th Meeting*, p. 355). What became Article VI would have been replaced by a provision conferring jurisdiction on the Court if an act of genocide is or is alleged to be the act of a State or government or its organs. The United Kingdom in response to objections that the proposal was out of order (because it meant going back on a decision already taken) withdrew the amendment in favour of the joint amendment to what became Article IX, submitted by the United Kingdom and Belgium (*ibid., 100th Meeting*, p. 394). In speaking to that joint amendment the United Kingdom delegate acknowledged that the debate had clearly shown the Committee's decision to confine what is now Article VI to the responsibility of individuals (*ibid., 100th Meeting*, p. 430). The United Kingdom/Belgium amendment would have added

the words "including disputes relating to the responsibility of a State for any of the acts enumerated in Articles II and IV [as the Convention was then drafted]". The United Kingdom delegate explained that what was involved was civil responsibility, not criminal responsibility (United Nations, *Official Records of the General Assembly, op. cit.*, *103rd Meeting*, p. 440). A proposal to delete those words failed and the provision was adopted (*ibid., 104th Meeting*, p. 447), with style changes being made by the Drafting Committee.

177. At a later stage a Belgium/United Kingdom/United States proposal which would have replaced the disputed phrase by including "disputes arising from a charge by a Contracting Party that the crime of genocide or any other of the acts enumerated in article III has been committed within the jurisdiction of another Contracting Party" was ruled by the Chairman of the Sixth Committee as a change of substance and the Committee did not adopt the motion (which required a two-thirds majority) for reconsideration (A/C.6/305). The Chairman gave the following reason for his ruling which was not challenged:

> "it was provided in article IX that those disputes, among others, which concerned the responsibility of a State for genocide or for any of the acts enumerated in article III, should be submitted to the International Court of Justice. According to the joint amendment, on the other hand, the disputes would not be those which concerned the responsibility of the State but those which resulted from an accusation to the effect that the crime had been committed in the territory of one of the contracting parties." (United Nations, *Official Records of the General Assembly, Third Session, Part I, Sixth Committee, Summary Records of the 131st Meeting*, p. 690.)

By that time in the deliberations of the Sixth Committee it was clear that only individuals could be held criminally responsible under the draft Convention for genocide. The Chairman was plainly of the view that the Article IX, as it had been modified, provided for State responsibility for genocide.

178. In the view of the Court, two points may be drawn from the drafting history just reviewed. The first is that much of it was concerned with proposals supporting the criminal responsibility of States; but those proposals were *not* adopted. The second is that the amendment which was adopted — to Article IX — is about jurisdiction in respect of the responsibility of States *simpliciter*. Consequently, the drafting history may be seen as supporting the conclusion reached by the Court in paragraph 167 above.

179. Accordingly, having considered the various arguments, the Court

affirms that the Contracting Parties are bound by the obligation under the Convention not to commit, through their organs or persons or groups whose conduct is attributable to them, genocide and the other acts enumerated in Article III. Thus if an organ of the State, or a person or group whose acts are legally attributable to the State, commits any of the acts proscribed by Article III of the Convention, the international responsibility of that State is incurred.

* *

*(5) 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*

180. 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, as explained below (paragraph 431) for purposes of the obligation to prevent genocide. The Respondent has raised the question whether it is necessary, as a matter of law, for the Court to be able to uphold a claim of the responsibility of a State for an act of genocide, or any other act enumerated in Article III, that there should have been a finding of genocide by a court or tribunal exercising criminal jurisdiction. 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.

181. The different procedures followed by, and powers available to, this 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 (paragraphs 209-210 below). 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.

182. Any other interpretation could entail that there would be no legal recourse available under the Convention in some readily conceivable circumstances: genocide has allegedly been committed within a State by its leaders but they have not been brought to trial because, for instance, they are still very much in control of the powers of the State including the

police, prosecution services and the courts and there is no international penal tribunal able to exercise jurisdiction over the alleged crimes; or the responsible State may have acknowledged the breach. 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.

* *

*(6) The Possible Territorial Limits of the Obligations*

183. 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 extent of that ability in law and fact is considered, so far as the obligation to prevent the crime of genocide is concerned, in the section of the Judgment concerned with that obligation (cf. paragraph 430 below). The significant relevant condition concerning the obligation not to commit genocide and the other acts enumerated in Article III is provided by the rules on attribution (paragraphs 379 ff. below).

184. 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 (cf. paragraph 442 below), or by an international penal tribunal with jurisdiction (paragraphs 443 ff. below).

* *

*(7) The Applicant's Claims in Respect of Alleged Genocide Committed Outside Its Territory against Non-Nationals*

185. In its final submissions the Applicant requests the Court to make rulings about acts of genocide and other unlawful acts allegedly committed against "non-Serbs" outside its own territory (as well as within it) by the Respondent. Insofar as that request might relate to non-Bosnian victims, it could raise questions about the legal interest or standing of the Applicant in respect of such matters and the significance of the *jus cogens* character of the relevant norms, and the *erga omnes* character of the relevant obligations. For the reasons explained in paragraphs 368 and 369 below, the Court will not however need to address those questions of law.

* *

*(8) The Question of Intent to Commit Genocide*

186. The Court notes that genocide as defined in Article II of the Convention comprises "acts" and an "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. "Killing" must be intentional, as must "causing serious bodily or mental harm". Mental elements are made explicit in paragraphs *(c)* and *(d)* of Article II by the words "deliberately" and "intended", quite apart from the implications of the words "inflicting" and "imposing"; and forcible transfer too requires deliberate intentional acts. The acts, in the words of the ILC, are by their very nature conscious, intentional or volitional acts (Commentary on Article 17 of the 1996 Draft Code of Crimes against the Peace and Security of Mankind, ILC Report 1996, *Yearbook of the International Law Commission, 1996*, Vol. II, Part Two, p. 44, para. 5).

187. In addition to those mental elements, Article II requires a further mental element. It requires the establishment of the "intent to destroy, in whole or in part, . . . [the protected] group, as such". It is not enough to establish, for instance in terms of paragraph *(a)*, that deliberate unlawful killings of members of the group have occurred. The additional intent must also be established, and is defined very precisely. It is often referred to as a special or specific intent or *dolus specialis*; in the present Judgment it will usually be referred to as the "specific intent *(dolus specialis)*". It is not enough that the members of the group are targeted because they belong to that group, that is because the perpetrator has a discriminatory intent. 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.

188. The specificity of the intent and its particular requirements are highlighted when genocide is placed in the context of other related criminal acts, notably crimes against humanity and persecution, as the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (hereinafter "ICTY" or "the Tribunal") did in the *Kupreškić et al.* case:

"the *mens rea* requirement for persecution is higher than for ordinary crimes against humanity, although lower than for genocide. In this context the Trial Chamber wishes to stress that persecution as a crime against humanity is an offence belonging to the same *genus* as genocide. Both persecution and genocide are crimes perpetrated against persons that belong to a particular group and who are targeted because of such belonging. In both categories what matters is the intent to discriminate: to attack persons on account of their ethnic, racial, or religious characteristics (as well as, in the case of persecution, on account of their political affiliation). While in the case of persecution the discriminatory intent can take multifarious inhumane forms and manifest itself in a plurality of actions including murder, in the case of genocide that intent must be accompanied by the intention to destroy, in whole or in part, the group to which the victims of the genocide belong. Thus, it can be said that, from the viewpoint of *mens rea*, genocide is an extreme and most inhuman form of persecution. To put it differently, when persecution escalates to the extreme form of wilful and deliberate acts designed to destroy a group or part of a group, it can be held that such persecution amounts to genocide." (IT-95-16-T, Judgment, 14 January 2000, para. 636.)

189. The specific intent is also to be distinguished from other reasons or motives the perpetrator may have. Great care must be taken in finding in the facts a sufficiently clear manifestation of that intent.

* *

*(9) Intent and "Ethnic Cleansing"*

190. The term "ethnic cleansing" has frequently been employed to refer to the events in Bosnia and Herzegovina which are the subject of this case; see, for example, Security Council resolution 787 (1992), para. 2; resolution 827 (1993), Preamble; and the Report with that title attached as Annex IV to the Final Report of the United Nations Commission of Experts (S/1994/674/Add.2) (hereinafter "Report of the Commission of Experts"). General Assembly resolution 47/121 referred in its Preamble to "the abhorrent policy of 'ethnic cleansing', which is a form of genocide", as being carried on in Bosnia and Herzegovina. It will be convenient at this point to consider what legal significance the expression may have. It is in practice used, by reference to a specific region or area, to mean "rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area" (S/35374 (1993), para. 55, Interim Report by the Commission of Experts). It does not appear in the Genocide Convention; indeed, a proposal

during the drafting of the Convention to include in the definition "measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment" was not accepted (A/C.6/234). It 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: the intent that characterizes genocide is "to destroy, in whole or in part" a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement. This is not to say 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. As the ICTY has observed, while "there are obvious similarities between a genocidal policy and the policy commonly known as 'ethnic cleansing'" (*Krstić*, IT-98-33-T, Trial Chamber Judgment, 2 August 2001, para. 562), yet "[a] clear distinction must be drawn between physical destruction and mere dissolution of a group. The expulsion of a group or part of a group does not in itself suffice for genocide." (*Stakić*, IT-97-24-T, Trial Chamber Judgment, 31 July 2003, para. 519.) In other words, whether a particular operation described as "ethnic cleansing" amounts to genocide depends on the presence or absence of acts listed in Article II of the Genocide Convention, and of the intent to destroy the group as such. In fact, in the context of the Convention, the term "ethnic cleansing" has no legal significance of its own. That said, it is clear that acts of "ethnic cleansing" may occur in parallel to acts prohibited by Article II of the Convention, and may be significant as indicative of the presence of a specific intent *(dolus specialis)* inspiring those acts.

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*(10) Definition of the Protected Group*

191. When examining the facts brought before the Court in support of the accusations of the commission of acts of genocide, it is necessary to have in mind the identity of the group against which genocide may be considered to have been committed. The Court will therefore next consider the application in this case of the requirement of Article II of the Genocide Convention, as an element of genocide, that the proscribed acts be "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". The Parties disagreed on aspects of the definition of the "group". The Applicant in its final submission 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" (paragraph 66 above). It thus follows what is termed the negative approach to the definition of the group in question. The Respondent sees two legal problems with that formulation:

> "First, the group targeted is not sufficiently well defined as such, since, according to the Applicant's allegation, that group consists of the non-Serbs, thus an admixture of all the individuals living in Bosnia and Herzegovina except the Serbs, but more particularly the Muslim population, which accounts for only a part of the non-Serb population. Second, the intent to destroy concerned only a part of the non-Serb population, but the Applicant failed to specify which part of the group was targeted."

In addition to those issues of the negative definition of the group and its geographic limits (or their lack), the Parties also discussed the choice between subjective and objective approaches to the definition. The Parties essentially agree that international jurisprudence accepts a combined subjective-objective approach. The issue is not in any event significant on the facts of this case and the Court takes it no further.

192. While the Applicant has employed the negative approach to the definition of a protected group, it places major, for the most part exclusive, emphasis on the Bosnian Muslims as the group being targeted. The Respondent, for instance, makes the point that the Applicant did not mention the Croats in its oral arguments relating to sexual violence, Srebrenica and Sarajevo, and that other groups including "the Jews, Roma and Yugoslavs" were not mentioned. The Applicant does however maintain the negative approach to the definition of the group in its final submissions and the Court accordingly needs to consider it.

193. The Court recalls first 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. The intent must also relate to the group "as such". That means that the crime requires an intent to destroy

a collection of people who have a particular group identity. It is a matter of who those people are, not who they are not. The etymology of the word — killing a group — also indicates a positive definition; and Raphael Lemkin has explained that he created the word from the Greek *genos*, meaning race or tribe, and the termination "-cide", from the Latin *caedere*, to kill (*Axis Rule in Occupied Europe* (1944), p. 79). In 1945 the word was used in the Nuremberg indictment which stated that the defendants "conducted deliberate and systematic genocide, viz., the extermination of racial and national groups . . . in order to destroy particular races and classes of people and national, racial or religious groups . . ." (Indictment, Trial of the Major War Criminals before the International Military Tribunal, *Official Documents*, Vol. 1, pp. 43 and 44). As the Court explains below (paragraph 198), when part of the group is targeted, that part must be significant enough for its destruction to have an impact on the group as a whole. Further, each of the acts listed in Article II require that the proscribed action be against members of the "group".

194. The drafting history of the Convention confirms that a positive definition must be used. Genocide as "the denial of the existence of entire human groups" was contrasted with homicide, "the denial of the right to live of individual human beings" by the General Assembly in its 1946 resolution 96 (I) cited in the Preamble to the Convention. The drafters of the Convention also gave close attention to the positive identification of groups with specific distinguishing characteristics in deciding which groups they would include and which (such as political groups) they would exclude. The Court spoke to the same effect in 1951 in declaring as an object of the Convention the safeguarding of "the very existence of certain human groups" (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23). Such an understanding of genocide requires a positive identification of the group. The rejection of proposals to include within the Convention political groups and cultural genocide also demonstrates that the drafters were giving close attention to the positive identification of groups with specific distinguishing well-established, some said immutable, characteristics. A negatively defined group cannot be seen in that way.

195. The Court observes that the ICTY Appeals Chamber in the *Stakić* case (IT-97-24-A, Judgment, 22 March 2006, paras. 20-28) also came to the conclusion that the group must be defined positively, essentially for the same reasons as the Court has given.

196. Accordingly, the Court concludes that it should deal with the matter on the basis that the targeted group must in law be defined posi-

tively, 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.

197. The Parties also addressed a specific question relating to the impact of geographic criteria on the group as identified positively. The question concerns in particular the atrocities committed in and around Srebrenica in July 1995, and the question whether in the circumstances of that situation the definition of genocide in Article II was satisfied so far as the intent of destruction of the "group" "in whole or in part" requirement is concerned. This question arises because of a critical finding in the *Krstić* case. In that case the Trial Chamber was "ultimately satisfied that murders and infliction of serious bodily or mental harm were committed with the intent to kill all the Bosnian Muslim men of military age at Srebrenica" (IT-98-33, Judgment, 2 August 2001, para. 546). Those men were systematically targeted whether they were civilians or soldiers *(ibid.)*. The Court addresses the facts of that particular situation later (paragraphs 278-297). For the moment, it considers how as a matter of law the "group" is to be defined, in territorial and other respects.

198. In terms of that question of law, the Court refers to three matters relevant to the determination of "part" of the "group" for the purposes of Article II. In the first place, 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. That requirement of substantiality is supported by consistent rulings of the ICTY and the International Criminal Tribunal for Rwanda (ICTR) and by the Commentary of the ILC to its Articles in the draft Code of Crimes against the Peace and Security of Mankind (e.g. *Krstić*, IT-98-33-A, Appeals Chamber Judgment, 19 April 2004, paras. 8-11 and the cases of *Kayishema*, *Byilishema*, and *Semanza* there referred to; and *Yearbook of the International Law Commission, 1996*, Vol. II, Part Two, p. 45, para. 8 of the Commentary to Article 17).

199. 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. In the words of the ILC, "it is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe" *(ibid.)*. The area of the perpetrator's activity and control are to be considered. As the ICTY Appeals

Chamber has said, and indeed as the Respondent accepts, the opportunity available to the perpetrators is significant (*Krstić*, IT-98-33-A, Judgment, 19 April 2004, para. 13). This criterion of opportunity must however be weighed against the first and essential factor of substantiality. It may be that the opportunity available to the alleged perpetrator is so limited that the substantiality criterion is not met. The Court observes that the ICTY Trial Chamber has indeed indicated the need for caution, lest this approach might distort the definition of genocide (*Stakić*, IT-97-24-T, Judgment, 31 July 2003, para. 523). The Respondent, while not challenging this criterion, does contend that the limit militates against the existence of the specific intent *(dolus specialis)* at the national or State level as opposed to the local level — a submission which, in the view of the Court, relates to attribution rather than to the "group" requirement.

200. A third suggested criterion is qualitative rather than quantitative. The Appeals Chamber in the *Krstić* case put the matter in these carefully measured terms:

> "The number of individuals targeted should be evaluated not only in absolute terms, but also in relation to the overall size of the entire group. In addition to the numeric size of the targeted portion, its prominence within the group can be a useful consideration. If a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial within the meaning of Article 4 [of the Statute which exactly reproduces Article II of the Convention]." (IT-98-33-A, Judgment, 19 April 2004, para. 12; footnote omitted.)

Establishing the "group" requirement will not always depend on the substantiality requirement alone although it is an essential starting point. It follows in the Court's opinion that the qualitative approach cannot stand alone. The Appeals Chamber in *Krstić* also expresses that view.

201. The above list of criteria is not exhaustive, but, as just indicated, the substantiality criterion is critical. They are essentially those stated by the Appeals Chamber in the *Krstić* case, although the Court does give this first criterion priority. Much will depend on the Court's assessment of those and all other relevant factors in any particular case.

* * *

## V. Questions of Proof: Burden of Proof, the Standard of Proof, Methods of Proof

202. When turning to the facts of the dispute, the Court must note that many allegations of fact made by the Applicant are disputed by the

Respondent. That is so notwithstanding increasing agreement between the Parties on certain matters through the course of the proceedings. The disputes relate to issues about the facts, for instance the number of rapes committed by Serbs against Bosnian Muslims, and the day-to-day relationships between the authorities in Belgrade and the authorities in Pale, and the inferences to be drawn from, or the evaluations to be made of, facts, for instance about the existence or otherwise of the necessary specific intent *(dolus specialis)* and about the attributability of the acts of the organs of Republika Srpska and various paramilitary groups to the Respondent. The allegations also cover a very wide range of activity affecting many communities and individuals over an extensive area and over a long period. They have already been the subject of many accounts, official and non-official, by many individuals and bodies. The Parties drew on many of those accounts in their pleadings and oral argument.

203. Accordingly, before proceeding to an examination of the alleged facts underlying the claim in this case, the Court first considers, in this section of the Judgment, in turn the burden or onus of proof, the standard of proof, and the methods of proof.

204. On the burden or onus of proof, it is well established in general that the applicant must establish its case and that a party asserting a fact must establish it; as the Court observed in the case of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, "it is the litigant seeking to establish a fact who bears the burden of proving it" (*Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 437, para. 101). While the Applicant accepts that approach as a general proposition, it contends that in certain respects the onus should be reversed, especially in respect of the attributability of alleged acts of genocide to the Respondent, given the refusal of the Respondent to produce the full text of certain documents.

205. The particular issue concerns the "redacted" sections of documents of the Supreme Defence Council of the Respondent, i.e. sections in which parts of the text had been blacked out so as to be illegible. The documents had been classified, according to the Co-Agent of the Respondent, by decision of the Council as a military secret, and by a confidential decision of the Council of Ministers of Serbia and Montenegro as a matter of national security interest. The Applicant contends that the Court should draw its own conclusions from the failure of the Respondent to produce complete copies of the documents. It refers to the power of the Court, which it had invoked earlier (paragraph 44 above), to call for documents under Article 49 of the Statute, which provides that "[f]ormal note shall be taken of any refusal". In the second round of oral argument the Applicant's Deputy Agent submitted that

> "Serbia and Montenegro should not be allowed to respond to our quoting the redacted SDC reports if it does not provide at the very same time the Applicant and the Court with copies of entirely

unredacted versions of *all* the SDC shorthand records and of *all* of the minutes of the same. Otherwise, Serbia and Montenegro would have an overriding advantage over Bosnia and Herzegovina with respect to documents, which are apparently, and not in the last place in the Respondent's eyes, of direct relevance to winning or losing the present case. We explicitly, Madam President, request the Court to instruct the Respondent accordingly." (Emphasis in the original.)

206. On this matter, the Court observes that the Applicant has extensive documentation and other evidence available to it, especially from the readily accessible ICTY records. It has made very ample use of it. In the month before the hearings it submitted what must be taken to have been a careful selection of documents from the very many available from the ICTY. The Applicant called General Sir Richard Dannatt, who, drawing on a number of those documents, gave evidence on the relationship between the authorities in the Federal Republic of Yugoslavia and those in the Republika Srpska and on the matter of control and instruction. Although the Court has not agreed to either of the Applicant's requests to be provided with unedited copies of the documents, it has not failed to note the Applicant's suggestion that the Court may be free to draw its own conclusions.

207. On a final matter relating to the burden of proof, the Applicant contends that the Court should draw inferences, notably about specific intent *(dolus specialis)*, from established facts, i.e., from what the Applicant refers to as a "pattern of acts" that "speaks for itself". The Court considers that matter later in the Judgment (paragraphs 370-376 below).

208. The Parties also differ on the second matter, the standard of proof. The Applicant, emphasizing that the matter is not one of criminal law, says that the standard is the balance of evidence or the balance of probabilities, inasmuch as what is alleged is breach of treaty obligations. According to the Respondent, the proceedings "concern the most serious issues of State responsibility and . . . a charge of such exceptional gravity against a State requires a proper degree of certainty. The proofs should be such as to leave no room for reasonable doubt."

209. The Court has long recognized that claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive (cf. *Corfu Channel (United Kingdom* v. *Albania), Judgment, I.C.J. Reports 1949*, p. 17). The Court 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.

210. 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.

211. The Court now turns to the third matter — the method of proof. The Parties submitted a vast array of material, from different sources, to the Court. It included reports, resolutions and findings by various United Nations organs, including the Secretary-General, the General Assembly, the Security Council and its Commission of Experts, and the Commission on Human Rights, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities and the Special Rapporteur on Human Rights in the former Yugoslavia; documents from other intergovernmental organizations such as the Conference for Security and Cooperation in Europe; 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 (paragraphs 57-58 above).

212. 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. This case does however have an unusual feature. Many of the allegations before this Court have already been the subject of the processes and decisions of the ICTY. The Court considers their significance later in this section of the Judgment.

213. The assessment made by the Court of the weight to be given to a particular item of evidence may lead to the Court rejecting the item as unreliable, or finding it probative, as appears from the practice followed for instance in the case concerning *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, pp. 9-10, paras. 11-13; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, pp. 39-41, paras. 59-73; and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, pp. 200-201, paras. 57-61. In the most recent case the Court said this:

> "The Court will treat with caution evidentiary materials specially prepared for this case and also materials emanating from a single source. It will prefer contemporaneous evidence from persons with direct knowledge. It will give particular attention to reliable evidence acknowledging facts or conduct unfavourable to the State represented by the person making them (*Military and Paramilitary Activi-*

*ties in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 41, para. 64). The Court will also give weight to evidence that has not, even before this litigation, been challenged by impartial persons for the correctness of what it contains. The Court moreover notes 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 thus will give appropriate consideration to the Report of the Porter Commission, which gathered evidence in this manner. The Court further notes that, since its publication, there has been no challenge to the credibility of this Report, which has been accepted by both Parties." (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 35, para. 61. See also paras. 78-79, 114 and 237-242.)

214. The fact-finding process of the ICTY falls within this formulation, as "evidence obtained by examination of persons directly involved", tested by cross-examination, the credibility of which has not been challenged subsequently. The Court has been referred to extensive documentation arising from the Tribunal's processes, including indictments by the Prosecutor, various interlocutory decisions by judges and Trial Chambers, oral and written evidence, decisions of the Trial Chambers on guilt or innocence, sentencing judgments following a plea agreement and decisions of the Appeals Chamber.

215. By the end of the oral proceedings the Parties were in a broad measure of agreement on the significance of the ICTY material. The Applicant throughout has given and gives major weight to that material. At the written stage the Respondent had challenged the reliability of the Tribunal's findings, the adequacy of the legal framework under which it operates, the adequacy of its procedures and its neutrality. At the stage of the oral proceedings, its position had changed in a major way. In its Agent's words, the Respondent now based itself on the jurisprudence of the Tribunal and had "in effect" distanced itself from the opinions about the Tribunal expressed in its Rejoinder. The Agent was however careful to distinguish between different categories of material:

"[W]e do not regard all the material of the Tribunal for the former Yugoslavia as having the same relevance or probative value. We have primarily based ourselves upon the judgments of the Tribunal's Trial and Appeals Chambers, given that only the judgments can be

regarded as establishing the facts about the crimes in a credible way."

And he went on to point out that the Tribunal has not so far, with the exception of Srebrenica, held that genocide was committed in any of the situations cited by the Applicant. He also called attention to the criticisms already made by Respondent's counsel of the relevant judgment concerning General Krstić who was found guilty of aiding and abetting genocide at Srebrenica.

216. The Court was referred to actions and decisions taken at various stages of the ICTY processes:

(1) The Prosecutor's decision to include or not certain changes in an indictment;
(2) The decision of a judge on reviewing the indictment to confirm it and issue an arrest warrant or not;
(3) If such warrant is not executed, a decision of a Trial Chamber (of three judges) to issue an international arrest warrant, provided the Chamber is satisfied that there are reasonable grounds for believing that the accused has committed all or any of the crimes charged;

(4) The decision of a Trial Chamber on the accused's motion for acquittal at the end of the prosecution case;

(5) The judgment of a Trial Chamber following the full hearings;

(6) The sentencing judgment of a Trial Chamber following a guilty plea.

The Court was also referred to certain decisions of the Appeals Chamber.

217. The Court will consider these stages in turn. The Applicant placed some weight on indictments filed by the Prosecutor. But the claims made by the Prosecutor in the indictments are just that — allegations made by one party. They have still to proceed through the various phases outlined earlier. The Prosecutor may, instead, decide to withdraw charges of genocide or they may be dismissed at trial. Accordingly, as a general proposition the inclusion of charges in an indictment cannot be given weight. What may however be significant is the decision of the Prosecutor, either initially or in an amendment to an indictment, not to include or to exclude a charge of genocide.

218. The second and third stages, relating to the confirmation of the indictment, issues of arrest warrants and charges, are the responsibility of the judges (one in the second stage and three in the third) rather than the Prosecutor, and witnesses may also be called in the third, but the accused is generally not involved. Moreover, the grounds for a judge to act are, at the second stage, that a prima facie case has been established, and at the

third, that reasonable grounds exist for belief that the accused has committed crimes charged.

219. The accused does have a role at the fourth stage — motions for acquittal made by the defence at the end of the prosecution's case and after the defence has had the opportunity to cross-examine the prosecution's witnesses, on the basis that "there is no evidence capable of supporting a conviction". This stage is understood to require a decision, not that the Chamber trying the facts *would* be satisfied beyond reasonable doubt by the prosecution's evidence (if accepted), but rather that it *could* be so satisfied (*Jelisić*, IT-95-10-A, Appeals Chamber Judgment, 5 July 2001, para. 37). The significance of that lesser standard for present purposes appears from one case on which the Applicant relied. The Trial Chamber in August 2005 in *Krajišnik* dismissed the defence motion that the accused who was charged with genocide and other crimes had no case to answer (IT-00-39-T, transcript of 19 August 2005, pp. 17112-17132). But following the full hearing the accused was found not guilty of genocide nor of complicity in genocide. While the *actus reus* of genocide was established, the specific intent *(dolus specialis)* was not (Trial Chamber Judgment, 27 September 2006, paras. 867-869). Because the judge or the Chamber does not make definitive findings at any of the four stages described, the Court does not consider that it can give weight to those rulings. The standard of proof which the Court requires in this case would not be met.

220. The processes of the Tribunal at the fifth stage, leading to a judgment of the Trial Chamber following the full hearing are to be contrasted with those earlier stages. The processes of the Tribunal leading to final findings are rigorous. Accused are presumed innocent until proved guilty beyond reasonable doubt. They are entitled to listed minimum guarantees (taken from the International Covenant on Civil and Political Rights), including the right to counsel, to examine witness against them, to obtain the examination of witness on their behalf, and not to be compelled to testify against themselves or to confess guilt. The Tribunal has powers to require Member States of the United Nations to co-operate with it, among other things, in the taking of testimony and the production of evidence. Accused are provided with extensive pre-trial disclosure including materials gathered by the prosecution and supporting the indictment, relevant witness statements and the pre-trial brief summarizing the evidence against them. The prosecutor is also to disclose exculpatory material to the accused and to make available in electronic form the collections of relevant material which the prosecution holds.

221. In practice, now extending over ten years, the trials, many of important military or political figures for alleged crimes committed over long periods and involving complex allegations, usually last for months, even years, and can involve thousands of documents and numerous witnesses. The Trial Chamber may admit any relevant evidence which has probative value. The Chamber is to give its reasons in writing and separate and dissenting opinions may be appended.

222. Each party has a right of appeal from the judgment of the Trial Chamber to the Appeals Chamber on the grounds of error of law invalidating the decision or error of fact occasioning a miscarriage of justice. The Appeals Chamber of five judges does not rehear the evidence, but it does have power to hear additional evidence if it finds that it was not available at trial, is relevant and credible and could have been a decisive factor in the trial. It too is to give a reasoned opinion in writing to which separate or dissenting opinions may be appended.

223. In view of the above, 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.

224. There remains for consideration the sixth stage, that of sentencing judgments given following a guilty plea. The process involves a statement of agreed facts and a sentencing judgment. Notwithstanding the guilty plea the Trial Chamber must be satisfied that there is sufficient factual basis for the crime and the accused's participation in it. It must also be satisfied that the guilty plea has been made voluntarily, is informed and is not equivocal. Accordingly the agreed statement and the sentencing judgment may when relevant be given a certain weight.

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225. The Court will now comment in a general way on some of the other evidence submitted to it. Some of that evidence has been produced to prove that a particular statement was made so that the Party may make use of its content. In many of these cases the accuracy of the document as a record is not in doubt; rather its significance is. That is often the case for instance with official documents, such as the record of parliamentary bodies and budget and financial statements. Another instance is when the statement was recorded contemporaneously on audio or videotape. Yet another is the evidence recorded by the ICTY.

226. In some cases the account represents the speaker's own knowledge of the fact to be determined or evaluated. In other cases the account may set out the speaker's opinion or understanding of events after they have occurred and in some cases the account will not be based on direct observation but may be hearsay. In fact the Parties rarely disagreed about the authenticity of such material but rather about whether it was being accurately presented (for instance with contention that passages were being taken out of context) and what weight or significance should be given to it.

227. The Court was also referred to a number of reports from official or independent bodies, giving accounts of relevant events. Their value depends, among other things, on (1) the source of the item of evidence (for instance partisan, or neutral), (2) the process by which it has been generated (for instance an anonymous press report or the product of a careful court or court-like process), and (3) the quality or character of the item (such as statements against interest, and agreed or uncontested facts).

228. One particular instance is the comprehensive report, "The Fall of Srebrenica", which the United Nations Secretary-General submitted in November 1999 to the General Assembly (United Nations doc. A/54/549). It was prepared at the request of the General Assembly, and covered the events from the establishing by the Security Council of the "safe area" on 16 April 1993 (Security Council resolution 819 (1993)) until the endorsement by the Security Council on 15 December 1995 of the Dayton Agreement. Member States and others concerned had been encouraged to provide relevant information. The Secretary-General was in a very good position to prepare a comprehensive report, some years after the events, as appears in part from this description of the method of preparation:

> "This report has been prepared on the basis of archival research within the United Nations system, as well as on the basis of interviews with individuals who, in one capacity or another, participated in or had knowledge of the events in question. In the interest of gaining a clearer understanding of these events, I have taken the exceptional step of entering into the public record information from the classified files of the United Nations. In addition, I would like to record my thanks to those Member States, organizations and individuals who provided information for this report. A list of persons interviewed in this connection is attached as annex 1. While that list is fairly extensive, time, as well as budgetary and other constraints, precluded interviewing many other individuals who would be in a position to offer important perspectives on the subject at hand. In most cases, the interviews were conducted on a non-attribution basis to encourage as candid a disclosure as possible. I have also honoured the request of those individuals who provided informa-

tion for this report on the condition that they not be identified." (A/54/549, para. 8.)

229. The chapter, "Fall of Srebrenica: 6-11 July 1995", is preceded by this note:

> "The United Nations has hitherto not publicly disclosed the full details of the attack carried out on Srebrenica from 6 to 11 July 1995. The account which follows has now been reconstructed mainly from reports filed at that time by Dutchbat and the United Nations military observers. The accounts provided have also been supplemented with information contained in the Netherlands report on the debriefing of Dutchbat, completed in October 1995, and by information provided by Bosniac, Bosnian Serb and international sources. In order to independently examine the information contained in various secondary sources published over the past four years, as well to corroborate key information contained in the Netherlands debriefing report, interviews were conducted during the preparation of this report with a number of key personnel who were either in Srebrenica at the time, or who were involved in decision-making at higher levels in the United Nations chain of command." (A/54/549, Chap. VII, p. 57.)

The introductory note to the next chapter, "The Aftermath of the fall of Srebrenica: 12-20 July 1995", contains this description of the sources:

> "The following section attempts to describe in a coherent narrative how thousands of men and boys were summarily executed and buried in mass graves within a matter of days while the international community attempted to negotiate access to them. It details how evidence of atrocities taking place gradually came to light, but too late to prevent the tragedy which was unfolding. In 1995, the details of the tragedy were told in piecemeal fashion, as survivors of the mass executions began to provide accounts of the horrors they had witnessed; satellite photos later gave credence to their accounts.
>
> The first official United Nations report which signalled the possibility of mass executions having taken place was the report of the Special Rapporteur of the Commission on Human Rights, dated 22 August 1995 (E/CN.4/1996/9). It was followed by the Secretary-General's reports to the Security Council, pursuant to resolution 1010 (1995), of 30 August (S/1995/755) and 27 November 1995 (S/1995/988). Those reports included information obtained from governmental and non-governmental organizations, as well as information that had appeared in the international and local press. By the end of 1995, however, the International Tribunal for the Former

Yugoslavia had still not been granted access to the area to corroborate the allegations of mass executions with forensic evidence.

The Tribunal first gained access to the crime scenes in January 1996. The details of many of their findings were made public in July 1996, during testimony under rule 60 of the Tribunal's rules of procedure, in the case against Ratio [*sic:* Ratko] Mladić and Radovan Karadžić. Between that time and the present, the Tribunal has been able to conduct further investigations in the areas where the executions were reported to have taken place and where the primary and secondary mass graves were reported to have been located. On the basis of the forensic evidence obtained during those investigations, the Tribunal has now been able to further corroborate much of the testimony of the survivors of the massacres. On 30 October 1998, the Tribunal indicted Radislav Krstić, Commander of the BSA's Drina Corps, for his alleged involvement in those massacres. The text of the indictment provides a succinct summary of the information obtained to date on where and when the mass executions took place.

The aforementioned sources of information, coupled with certain additional confidential information that was obtained during the preparation of this report, form the basis of the account which follows. Sources are purposely not cited in those instances where such disclosure could potentially compromise the Tribunal's ongoing work." (A/54/549, Chap. VIII, p. 77.)

230. The care taken in preparing the report, its comprehensive sources and the independence of those responsible for its preparation all lend considerable authority to it. As will appear later in this Judgment, the Court has gained substantial assistance from this report.

* * *

## VI. The Facts Invoked by the Applicant, in Relation to Article II

### *(1) The Background*

231. In this case the Court is seised of a dispute between two sovereign States, each of which is established in part of the territory of the former State known as the Socialist Federal Republic of Yugoslavia, concerning the application and fulfilment of an international convention to which they are parties, the Convention on the Prevention and Punishment of the Crime of Genocide. The task of the Court is to deal with the legal claims and factual allegations advanced by Bosnia and Herzegovina against Serbia and Montenegro; the counter-claim advanced earlier in the proceedings by Serbia and Montenegro against Bosnia and Herzegovina has been withdrawn.

232. Following the death on 4 May 1980 of President Tito, a rotating presidency was implemented in accordance with the 1974 Constitution of the SFRY. After almost ten years of economic crisis and the rise of nationalism within the republics and growing tension between different ethnic and national groups, the SFRY began to break up. On 25 June 1991, Slovenia and Croatia declared independence, followed by Macedonia on 17 September 1991. (Slovenia and Macedonia are not concerned in the present proceedings; Croatia has brought a separate case against Serbia and Montenegro, which is still pending on the General List.) On the eve of the war in Bosnia and Herzegovina which then broke out, according to the last census (31 March 1991), some 44 per cent of the population of the country described themselves as Muslims, some 31 per cent as Serbs and some 17 per cent as Croats (*Krajišnik*, IT-00-39-T and 40-T, Trial Chamber Judgment, 27 September 2006, para. 15).

233. By a "sovereignty" resolution adopted on 14 October 1991, the Parliament of Bosnia and Herzegovina declared the independence of the Republic. The validity of this resolution was contested at the time by the Serbian community of Bosnia and Herzegovina (Opinion No. 1 of the Arbitration Commission of the Conference on Yugoslavia (the Badinter Commission), p. 3). On 24 October 1991, the Serb Members of the Bosnian Parliament proclaimed a separate Assembly of the Serb Nation/Assembly of the Serb People of Bosnia and Herzegovina. On 9 January 1992, the Republic of the Serb People of Bosnia and Herzegovina (subsequently renamed the Republika Srpska on 12 August 1992) was declared with the proviso that the declaration would come into force upon international recognition of the Republic of Bosnia and Herzegovina. On 28 February 1992, the Constitution of the Republic of the Serb People of Bosnia and Herzegovina was adopted. The Republic of the Serb People of Bosnia and Herzegovina (and subsequently the Republika Srpska) was not and has not been recognized internationally as a State; it has however enjoyed some *de facto* independence.

234. On 29 February and 1 March 1992, a referendum was held on the question of independence in Bosnia and Herzegovina. On 6 March 1992, Bosnia and Herzegovina officially declared its independence. With effect from 7 April 1992, Bosnia and Herzegovina was recognized by the European Community. On 7 April 1992, Bosnia and Herzegovina was recognized by the United States. On 27 April 1992, the Constitution of the Federal Republic of Yugoslavia was adopted consisting of the Republic of Serbia and the Republic of Montenegro. As explained above (paragraph 67), Montenegro declared its independence on 3 June 2006. All three States have been admitted to membership of the United Nations: Bosnia and Herzegovina on 22 May 1992; Serbia and Montenegro, under the name of the Federal Republic of Yugoslavia on 1 November 2000; and the Republic of Montenegro on 28 June 2006.

* *

*(2) The Entities Involved in the Events Complained of*

235. It will be convenient next to define the institutions, organizations or groups that were the actors in the tragic events that were to unfold in Bosnia and Herzegovina. Of the independent sovereign States that had emerged from the break-up of the SFRY, two are concerned in the present proceedings: on the one side, the FRY (later to be called Serbia and Montenegro), which was composed of the two constituent republics of Serbia and Montenegro; on the other, the Republic of Bosnia and Herzegovina. At the time when the latter State declared its independence (15 October 1991), the independence of two other entities had already been declared: in Croatia, the Republika Srpska Krajina, on 26 April 1991, and the Republic of the Serb People of Bosnia and Herzegovina, later to be called the Republika Srpska, on 9 January 1992 (paragraph 233 above). The Republika Srpska 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.

236. The Parties both recognize that there were a number of entities at a lower level the activities of which have formed part of the factual issues in the case, though they disagree as to the significance of those activities. Of the military and paramilitary units active in the hostilities, there were in April 1992 five types of armed formations involved in Bosnia: first, the Yugoslav People's Army (JNA), subsequently the Yugoslav Army (VJ); second, volunteer units supported by the JNA and later by the VJ, and the Ministry of the Interior (MUP) of the FRY; third, municipal Bosnian Serb Territorial Defence (TO) detachments; and, fourth, police forces of the Bosnian Serb Ministry of the Interior. The MUP of the Republika Srpska controlled the police and the security services, and operated, according to the Applicant, in close co-operation and co-ordination with the MUP of the FRY. On 15 April 1992, the Bosnian Government established a military force, based on the former Territorial Defence of the Republic, the Army of the Republic of Bosnia and Herzegovina (ARBiH), merging several non-official forces, including a number of paramilitary defence groups, such as the Green Berets, and the Patriotic League, being the military wing of the Muslim Party of Democratic Action. The Court does not overlook the evidence suggesting the existence of Muslim organizations involved in the conflict, such as foreign Mujahideen, although as a result of the withdrawal of the Respondent's counter-claims, the activities of these bodies are not the subject of specific claims before the Court.

237. 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 administra-

tion and control of the army of the Republika Srpska (VRS). The Court observes that insofar as the political sympathies of the Respondent lay with the Bosnian Serbs, this is not contrary to any legal rule. It is however argued by the Applicant that the Respondent, under the guise of protecting the Serb population of Bosnia and Herzegovina, in fact conceived and shared with them the vision of a "Greater Serbia", in pursuit of which it gave its support to those persons and groups responsible for the activities which allegedly constitute the genocidal acts complained of. The Applicant bases this contention first on the "Strategic Goals" articulated by President Karadžić at the 16th Session of the FRY Assembly on 12 May 1992, and subsequently published in the *Official Gazette* of the Republika Srpska (paragraph 371), and secondly on the consistent conduct of the Serb military and paramilitary forces vis-à-vis the non-Serb Bosnians showing, it is suggested, an overall specific intent *(dolus specialis)*. These activities will be examined below.

238. As regards the relationship between the armies of the FRY and the Republika Srpska, the Yugoslav Peoples' Army (JNA) of the SFRY had, during the greater part of the period of existence of the SFRY, been effectively a federal army, composed of soldiers from all the constituent republics of the Federation, with no distinction between different ethnic and religious groups. It is however contended by the Applicant that even before the break-up of the SFRY arrangements were being made to transform the JNA into an effectively Serb army. The Court notes that on 8 May 1992, all JNA troops who were not of Bosnian origin were withdrawn from Bosnia-Herzegovina. However, JNA troops of Bosnian Serb origin who were serving in Bosnia and Herzegovina were transformed into, or joined, the army of the Republika Srpska (the VRS) which was established on 12 May 1992, or the VRS Territorial Defence. Moreover, Bosnian Serb soldiers serving in JNA units elsewhere were transferred to Bosnia and Herzegovina and subsequently joined the VRS. The remainder of the JNA was transformed into the Yugoslav army (VJ) and became the army of the Federal Republic of Yugoslavia. On 15 May 1992 the Security Council, by resolution 752, demanded that units of the JNA in Bosnia and Herzegovina "be withdrawn, or be subject to the authority of the Government of Bosnia and Herzegovina, or be disbanded and disarmed". On 19 May 1992, the Yugoslav army was officially withdrawn from Bosnia and Herzegovina. The Applicant contended that from 1993 onwards, around 1,800 VRS officers were "administered" by the 30th Personnel Centre of the VJ in Belgrade; this meant that matters like their payment, promotions, pensions, etc., were handled, not by the Republika Srpska, but by the army of the Respondent. According to the Respondent, the importance of this fact was greatly exaggerated by the Applicant: the VRS had around 14,000 officers and thus only a small number of them were dealt with by the 30th Personnel Centre; this Centre only gave a certain degree of assistance to the VRS. The Applicant maintains that all VRS officers remained members of the

FRY army — only the label changed; according to the Respondent, there is no evidence for this last allegation. The Court takes note however of the comprehensive description of the processes involved set out in paragraphs 113 to 117 of the Judgment of 7 May 1997 of the ICTY Trial Chamber in the *Tadić* case (IT-94-1-T) quoted by the Applicant which mainly corroborate the account given by the latter. Insofar as the Respondent does not deny the fact of these developments, it insists that they were normal reactions to the threat of civil war, and there was no premeditated plan behind them.

239. The Court further notes the submission of the Applicant that the VRS was armed and equipped by the Respondent. The Applicant contends that when the JNA formally withdrew on 19 May 1992, it left behind all its military equipment which was subsequently taken over by the VRS. This claim is supported by the Secretary-General's report of 3 December 1992 in which he concluded that "[t]hough the JNA has completely withdrawn from Bosnia and Herzegovina, former members of Bosnian Serb origin have been left behind with their equipment and constitute the Army of the 'Serb Republic' " (A/47/747, para. 11). Moreover, the Applicant submits that Belgrade actively supplied the VRS with arms and equipment throughout the war in Bosnia and Herzegovina. On the basis of evidence produced before the ICTY, the Applicant contended that up to 90 per cent of the material needs of the VRS were supplied by Belgrade. General Dannatt, one of the experts called by the Applicant (paragraph 57 above), testified that, according to a "consumption review" given by General Mladić at the Bosnian Serb Assembly on 16 April 1995, 42.2 per cent of VRS supplies of infantry ammunition were inherited from the former JNA and 47 per cent of VRS requirements were supplied by the VJ. For its part, the Respondent generally denies that it supplied and equipped the VRS but maintains that, even if that were the case, such assistance "is very familiar and is an aspect of numerous treaties of mutual security, both bilateral and regional". The Respondent adds that moreover it is a matter of public knowledge that the armed forces of Bosnia and Herzegovina received external assistance from friendly sources. However, one of the witnesses called by the Respondent, Mr. Vladimir Lukić, who was the Prime Minister of the Republika Srpska from 20 January 1993 to 18 August 1994 testified that the army of the Republika Srpska was supplied from different sources "including but not limited to the Federal Republic of Yugoslavia" but asserted that the Republika Srpska "mainly paid for the military materiel which it obtained" from the States that supplied it.

240. As regards effective links between the two Governments in the financial sphere, the Applicant maintains that the economies of the FRY, the Republika Srpska, and the Republika Srpska Krajina were integrated through the creation of a single economic entity, thus enabling the FRY Government to finance the armies of the two other bodies in addition to its own. The Applicant argued that the National Banks of the

Republika Srpska and of the Republika Srpska Krajina were set up as under the control of, and directly subordinate to, the National Bank of Yugoslavia in Belgrade. The national budget of the FRY was to a large extent financed through primary issues from the National Bank of Yugoslavia, which was said to be entirely under governmental control, i.e. in effect through creating money by providing credit to the FRY budget for the use of the JNA. The same was the case for the budgets of the Republika Srpska and the Republika Srpska Krajina, which according to the Applicant had virtually no independent sources of income; the Respondent asserts that income was forthcoming from various sources, but has not specified the extent of this. The National Bank of Yugoslavia was making available funds (80 per cent of those available from primary issues) for "special purposes", that is to say "to avoid the adverse effects of war on the economy of the Serbian Republic of Bosnia and Herzegovina". The Respondent has denied that the budget deficit of the Republika Srpska was financed by the FRY but has not presented evidence to show how it was financed. Furthermore, the Respondent emphasizes that any financing supplied was simply on the basis of credits, to be repaid, and was therefore quite normal, particularly in view of the economic isolation of the FRY, the Republika Srpska and the Republika Srpska Krajina; it also suggested that any funds received would have been under the sole control of the recipient, the Republika Srpska or the Republika Srpska Krajina.

241. The Court finds it established that the Respondent was thus 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.

* *

*(3) Examination of Factual Evidence: Introduction*

242. The Court will therefore now examine the facts alleged by the Applicant, in order to satisfy itself, first, whether 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 *(dolus specialis)*. The group taken into account for this purpose will, for the reasons explained above (paragraphs 191-196), be that of the Bosnian Muslims; while the Applicant has presented evidence said to relate to the wider group of non-Serb Bosnians, the Bosnian Muslims formed such a substantial part of this wider group that that evidence appears to have equal probative value as regards the facts, in relation to the more restricted

group. The Court will also consider the facts alleged in the light of the question whether there is persuasive and consistent evidence for a pattern of atrocities, as alleged by the Applicant, which would constitute evidence of *dolus specialis* on the part of the Respondent. For this purpose it is not necessary to examine every single incident reported by the Applicant, nor is it necessary to make an exhaustive list of the allegations; the Court finds it sufficient to examine those facts that would illuminate the question of intent, or illustrate the claim by the Applicant of a pattern of acts committed against members of the group, such as to lead to an inference from such pattern of the existence of a specific intent *(dolus specialis)*.

243. The Court will examine the evidence following the categories of prohibited acts to be found in Article II of the Genocide Convention. The nature of the events to be described is however such that there is considerable overlap between these categories: thus, for example, the conditions of life in the camps to which members of the protected group were confined have been presented by the Applicant as violations of Article II, paragraph *(c)*, of the Convention (the deliberate infliction of destructive conditions of life), but since numerous inmates of the camps died, allegedly as a result of those conditions, or were killed there, the camps fall to be mentioned also under paragraph *(a)*, killing of members of the protected group.

244. In the evidentiary material submitted to the Court, and that referred to by the ICTY, frequent reference is made to the actions of "Serbs" or "Serb forces", and it is not always clear what relationship, if any, the participants are alleged to have had with the Respondent. In some cases it is contended, for example, that the JNA, as an organ *de jure* of the Respondent, was involved; in other cases it seems clear that the participants were Bosnian Serbs, with no *de jure* link with the Respondent, but persons whose actions are, it is argued, attributable to the Respondent on other grounds. Furthermore, as noted in paragraph 238 above, it appears that JNA troops of Bosnian Serb origin were transformed into, or joined the VRS. At this stage of the present Judgment, the Court is not yet concerned with the question of the attributability to the Respondent of the atrocities described; it will therefore use the terms "Serb" and "Serb forces" purely descriptively, without prejudice to the status they may later, in relation to each incident, be shown to have had. When referring to documents of the ICTY, or to the Applicant's pleadings or oral argument, the Court will use the terminology of the original.

* *

*(4) Article II* (a)*: Killing Members of the Protected Group*

245. Article II *(a)* of the Convention deals with acts of killing members of the protected group. The Court will first examine the evidence of killings of members of the protected group in the principal areas of Bosnia and in the various detention camps, and ascertain whether there is evidence of a specific intent *(dolus specialis)* in one or more of them. The Court will then consider under this heading the evidence of the massacres reported to have occurred in July 1995 at Srebrenica.

*Sarajevo*

246. The Court notes that the Applicant refers repeatedly to killings, by shelling and sniping, perpetrated in Sarajevo. The Fifth Periodic Report of the United Nations Special Rapporteur is presented by the Applicant in support of the allegation that between 1992 and 1993 killings of Muslim civilians were perpetrated in Sarajevo, partly as a result of continuous shelling by Bosnian Serb forces. The Special Rapporteur stated that on 9 and 10 November 1993 mortar attacks killed 12 people (E/CN.4/1994/47, 17 November 1992, p. 4, para. 14). In his periodic Report of 5 July 1995, the Special Rapporteur observed that as from late February 1995 numerous civilians were killed by sniping activities of Bosnian Serb forces and that "one local source reported that a total of 41 civilians were killed . . . in Sarajevo during the month of May 1995" (Report of 5 July 1995, para. 69). The Report also noted that, in late June and early July 1995, there was further indiscriminate shelling and rocket attacks on Sarajevo by Bosnian Serb forces as a result of which many civilian deaths were reported (Report of 5 July 1995, para. 70).

247. The Report of the Commission of Experts gives a detailed account of the battle and siege of Sarajevo. The Commission estimated that over the course of the siege nearly 10,000 persons had been killed or were missing in the city of Sarajevo (Report of the Commission of Experts, Vol. II, Ann. VI, p. 8). According to the estimates made in a report presented by the Prosecution before the ICTY in the *Galić* case (IT-98-29-T, Trial Chamber Judgment, 5 December 2003, paras. 578 and 579), the monthly average of civilians killed fell from 105 in September to December 1992, to around 64 in 1993 and to around 28 in the first six months of 1994.

248. The Trial Chamber of the ICTY, in its Judgment of 5 December 2003 in the *Galić* case examined specific incidents in the area of Sarajevo, for instance the shelling of the Markale market on 5 February 1994 which resulted in the killing of 60 persons. The majority of the Trial

Chamber found that "civilians in ARBiH-held areas of Sarajevo were directly or indiscriminately attacked from SRK-controlled territory during the Indictment Period, and that as a result and as a minimum, hundreds of civilians were killed and thousands others were injured" (*Galić*, IT-98-29-T, Judgment, 5 December 2003, para. 591), the Trial Chamber further concluded that "[i]n sum, the Majority of the Trial Chamber finds that each of the crimes alleged in the Indictment — crime of terror, attacks on civilians, murder and inhumane acts — were committed by SRK forces during the Indictment Period" (*ibid.*, para. 600).

249. In this connection, the Respondent makes the general point that in a civil war it is not always possible to differentiate between military personnel and civilians. It does not deny that crimes were committed during the siege of Sarajevo, crimes that "could certainly be characterized as war crimes and certain even as crimes against humanity", but it does not accept that there was a strategy of targeting civilians.

*Drina River Valley*

(a) *Zvornik*

250. The Applicant made a number of allegations with regard to killings that occurred in the area of Drina River Valley. The Applicant, relying on the Report of the Commission of Experts, claims that at least 2,500 Muslims died in Zvornik from April to May 1992. The Court notes that the findings of the Report of the Commission of Experts are based on individual witness statements and one declassified United States State Department document No. 94-11 (Vol. V, Ann. X, para. 387; Vol. IV, Ann. VIII, p. 342 and para. 2884; Vol. I, Ann. III.A, para. 578). Further, a video reporting on massacres in Zvornik was shown during the oral proceedings (excerpts from "The Death of Yugoslavia", BBC documentary). With regard to specific incidents, the Applicant alleges that Serb soldiers shot 36 Muslims and mistreated 27 Muslim children in the local hospital of Zvornik in the second half of May 1992.

251. The Respondent contests those allegations and contends that all three sources used by the Applicant are based solely on the account of one witness. It considers that the three reports cited by the Applicant cannot be used as evidence before the Court. The Respondent produced the statement of a witness made before an investigating judge in Zvornik which claimed that the alleged massacre in the local hospital of Zvornik had never taken place. The Court notes that the Office of the Prosecutor of the ICTY had never indicted any of the accused for the alleged massacres in the hospital.

(b) *Camps*

(i) *Sušica camp*

252. The Applicant further presents claims with regard to killings perpetrated in detention camps in the area of Drina River Valley. The Report of the Commission of Experts includes the statement of an exguard at the Sušica camp who personally witnessed 3,000 Muslims being killed (Vol. IV, Ann. VIII, p. 334) and the execution of the last 200 surviving detainees (Vol. I, Ann. IV, pp. 31-32). In proceedings before the ICTY, the Commander of that camp, Dragan Nikolić, pleaded guilty to murdering nine non-Serb detainees and, according to the Sentencing Judgment of 18 December 2003, "the Accused persecuted Muslim and other non-Serb detainees by subjecting them to murders, rapes and torture as charged specifically in the Indictment" (*Nikolić*, IT-94-2-S, para. 67).

(ii) *Foča Kazneno-Popravní Dom camp*

253. The Report of the Commission of Experts further mentions numerous killings at the camp of Foča Kazneno-Popravní Dom (Foča KP Dom). The Experts estimated that the number of prisoners at the camp fell from 570 to 130 over two months (Vol. IV, Ann. VIII, p. 129). The United States State Department reported one eye-witness statement of regular executions in July 1992 and mass graves at the camp.

254. The Trial Chamber of the ICTY made the following findings on several killings at this camp in its Judgment in the *Krnojelac* case:

> "The Trial Chamber is satisfied beyond reasonable doubt that all but three of the persons listed in Schedule C to the Indictment were killed at the KP Dom. The Trial Chamber is satisfied that these persons fell within the pattern of events that occurred at the KP Dom during the months of June and July 1992, and that the only reasonable explanation for the disappearance of these persons since that time is that they died as a result of acts or omissions, with the relevant state of mind [sc. that required to establish murder], at the KP Dom." (IT-97-25-T, Judgment, 15 March 2002, para. 330.)

(iii) *Batković camp*

255. As regards the detention camp of Batković, the Applicant claims that many prisoners died at this camp as a result of mistreatment by the Serb guards. The Report of the Commission of Experts reports one witness statement according to which there was a mass grave located next to the Batković prison camp. At least 15 bodies were buried next to a cow stable, and the prisoners neither knew the identity of those buried at the stable nor the circumstances of their deaths (Report of the Commission

of Experts, Vol. V, Ann. X, p. 9). The Report furthermore stresses that

> "[b]ecause of the level of mistreatment, many prisoners died. One man stated that during his stay, mid-July to mid-August, 13 prisoners were beaten to death. Another prisoner died because he had gangrene which went untreated. Five more may have died from hunger. Allegedly, 20 prisoners died prior to September." (Vol. IV, Ann. VIII, p. 63.)

Killings at the Batković camp are also mentioned in the Dispatch of the United States State Department of 19 April 1993. According to a witness, several men died as a result of bad conditions and beatings at the camp (United States Dispatch, 19 April 1993, Vol. 4, No. 30, p. 538).

256. On the other hand, the Respondent stressed that, when the United Nations Special Rapporteur visited the Batković prison camp, he found that: "The prisoners did not complain of ill-treatment and, in general appeared to be in good health." (Report of 17 November 1992, para. 29) However, the Applicant contends that "it is without any doubt that Mazowiecki was shown a 'model' camp".

*Prijedor*

(a) *Kozarac and Hambarine*

257. With regard to the area of the municipality of Prijedor, the Applicant has placed particular emphasis on the shelling and attacks on Kozarac, 20 km east of Prijedor, and on Hambarine in May 1992. The Applicant contends that after the shelling, Serb forces shot people in their homes and that those who surrendered were taken to a soccer stadium in Kozarac where some men were randomly shot. The Report of the Commission of Experts (Vol. I, Ann. III, pp. 154-155) states that:

> "The attack on Kozarac lasted three days and caused many villagers to flee to the forest while the soldiers were shooting at 'every moving thing'. Survivors calculated that at least 2,000 villagers were killed in that period. The villagers' defence fell on 26 May . . .
>
> Serbs then reportedly announced that the villagers had 10 minutes to reach the town's soccer stadium. However, many people were shot in their homes before given a chance to leave. One witness reported that several thousand people tried to surrender by carrying white flags, but three Serb tanks opened fire on them, killing many."

The Respondent submits that the number of killings is exaggerated and that "there was severe fighting in Kozarac, which took place on 25 and 26 May, and naturally, it should be concluded that a certain number of the victims were Muslim combatants".

258. As regards Hambarine, the Report of the Commission of Experts (Vol. I, p. 39) states that:

> "Following an incident in which less than a handful of Serb[ian] soldiers were shot dead under unclear circumstances, the village of Hambarine was given an ultimatum to hand over a policeman who lived where the shooting had occurred. As it was not met, Hambarine was subjected to several hours of artillery bombardment on 23 May 1992.
>
> The shells were fired from the aerodrome Urije just outside Prijedor town. When the bombardment stopped, the village was stormed by infantry, including paramilitary units, which sought out the inhabitants in every home. Hambarine had a population of 2,499 in 1991."

The Report of the Special Rapporteur of 17 November 1992, states that:

> "Between 23 and 25 May, the Muslim village of Hambarine, 5 km south of Prijedor, received an ultimatum: all weapons must be surrendered by 11 a.m. Then, alleging that a shot was fired at a Serbian patrol, heavy artillery began to shell the village and tanks appeared, firing at homes. The villagers fled to Prijedor. Witnesses reported many deaths, probably as many as 1,000." (Periodic Report of 17 November 1992, p. 8, para. 17 *(c)*.)

The Respondent says, citing the indictment in the *Stakić* case, that "merely 11 names of the victims are known" and that it is therefore impossible that the total number of victims in Hambarine was "as many as 1,000".

259. The Report of the Commission of Experts found that on 26, 27 or 28 May, the Muslim village of Kozarac, came under attack of heavy Serb artillery. It furthermore notes that:

> "The population, estimated at 15,000, suffered a great many summary executions, possibly as many as 5,000 persons according to some witnesses." (Report of the Commission of Experts, Vol. IV, pt. 4.)

260. The Applicant also claimed that killings of members of the protected group were perpetrated in Prijedor itself. The Report of the Commission of Experts, as well as the United Nations Special Rapporteur collected individual witness statements on several incidents of killing in the town of Prijedor (Report of the Commission of Experts, Vol. I, Ann. V, pp. 54 *et seq.*). In particular, the Special Rapporteur received

testimony "from a number of reliable sources" that 200 people were killed in Prijedor on 29 May 1992 (Report of 17 November 1992, para. 17).

261. In the *Stakić* case, the ICTY Trial Chamber found that "many people were killed during the attacks by the Bosnian Serb army on predominantly Bosnian Muslim villages and towns throughout the Prijedor municipality and several massacres of Muslims took place", and that "a comprehensive pattern of atrocities against Muslims in Prijedor municipality in 1992 ha[d] been proved beyond reasonable doubt" (IT-97-24-T, Judgment, 31 July 2003, paras. 544 and 546). Further, in the *Brđanin* case, the Trial Chamber was satisfied that "at least 80 Bosnian Muslim civilians were killed when Bosnian Serb soldiers and police entered the villages of the Kozarac area" (IT-99-36, Judgment, 1 September 2004, para. 403).

(b) *Camps*

(i) *Omarska camp*

262. With respect to the detention camps in the area of Prijedor, the Applicant has stressed that the camp of Omarska was "arguably the cruellest camp in Bosnia and Herzegovina". The Report of the Commission of Experts gives an account of seven witness statements reporting between 1,000 to 3,000 killings (Vol. IV, Ann. VIII, p. 222). The Report noted that

> "[s]ome prisoners estimate that on an average there may have been 10 to 15 bodies displayed on the grass each morning, when the first prisoners went to receive their daily food rations. But there were also other dead bodies observed in other places at other times. Some prisoners died from their wounds or other causes in the rooms where they were detained. Constantly being exposed to the death and suffering of fellow prisoners made it impossible for anyone over any period of time to forget in what setting he or she was. Given the length of time Logor Omarska was used, the numbers of prisoners detained in the open, and the allegations that dead bodies were exhibited there almost every morning."

The Report of the Commission of Experts concludes that "all information available . . . seems to indicate that [Omarska] was more than anything else a death camp" (Vol. I, Ann. V, p. 80). The United Nations Secretary-General also received submissions from Canada, Austria and the United States, containing witness statements about the killings at Omarska.

263. In the Opinion and Judgment of the Trial Chamber in the *Tadić* case, the ICTY made the following findings on Omarska: "Perhaps the most notorious of the camps, where the most horrific conditions existed,

was the Omarska camp." (IT-94-1-T, Judgment, 7 May 1997, para. 155.) "The Trial Chamber heard from 30 witnesses who survived the brutality to which they were systematically subjected at Omarska. By all accounts, the conditions at the camp were horrendous; killings and torture were frequent." (*Ibid.*, para. 157.) The Trial Chamber in the *Stakić* Judgment found that "over a hundred people were killed in late July 1992 in the Omarska camp" and that

> "[a]round late July 1992, 44 people were taken out of Omarska and put in a bus. They were told that they would be exchanged in the direction of Bosanska Krupa; they were never seen again. During the exhumation in Jama Lisac, 56 bodies were found: most of them had died from gunshot injuries." (IT-97-24-T, Judgment, 31 July 2003, paras. 208 and 210).

At least 120 people detained at Omarska were killed after having been taken away by bus.

> "The corpses of some of those taken away on the buses were later found in Hrastova Glavica and identified. A large number of bodies, 126, were found in this area, which is about 30 kilometres away from Prijedor. In 121 of the cases, the forensic experts determined that the cause of death was gunshot wounds." (*Ibid.*, para. 212.)

264. In the *Brđanin* case, the Trial Chamber, in its Judgment of 1 September 2004 held that between 28 May and 6 August, a massive number of people were killed at Omarska camp. The Trial Chamber went on to say specifically that "[a]s of late May 1992, a camp was set up at Omarska, where evidence shows that several hundred Bosnian Muslim and Bosnian Croat civilians from the Prijedor area were detained, and where killings occurred on a massive scale" (IT-99-36-T, Trial Chamber Judgment, 1 September 2004, para. 441). "The Trial Chamber is unable to precisely identify all detainees that were killed at Omarska camp. It is satisfied beyond reasonable doubt however that, at a minimum, 94 persons were killed, including those who disappeared." (*Ibid.*, para. 448.)

(ii) *Keraterm camp*

265. A second detention camp in the area of Prijedor was the Keraterm camp where, according to the Applicant, killings of members of the protected group were also perpetrated. Several corroborating accounts of a mass execution on the morning of 25 July 1992 in Room 3 at Keraterm camp were presented to the Court. This included the United States Dispatch of the State Department and a letter from the Permanent Repre-

sentative of Austria to the United Nations dated 5 March 1993, addressed to the Secretary-General. The Report of the Commission of Experts cites three separate witness statements to the effect that ten prisoners were killed per day at Keraterm over three months (Vol. IV, para. 1932; see also Vol. I, Ann. V, para. 445).

266. The Trial Chamber of the ICTY, in the *Sikirica et al.* case, concerning the Commander of Keraterm camp, found that 160 to 200 men were killed or wounded in the so-called Room 3 massacre (IT-95-8-S, Sentencing Judgment, 13 November 2001, para. 103). According to the Judgment, Sikirica himself admitted that there was considerable evidence "concerning the murder and killing of other named individuals at Keraterm during the period of his duties". There was also evidence that "others were killed because of their rank and position in society and their membership of a particular ethnic group or nationality" (*ibid.*, para. 122). In the *Stakić* case, the Trial Chamber found that "from 30 April 1992 to 30 September 1992 . . . killings occurred frequently in the Omarska, Keraterm and Trnopolje camps" (IT-97-24-T, Judgment, 31 July 2003, para. 544).

(iii) *Trnopolje camp*

267. The Applicant further contends that there is persuasive evidence of killing at Trnopolje camp, with individual eye-witnesses corroborating each other. The Report of the Commission of Experts found that "[i]n Trnopolje, the regime was far better than in Omarska and Keraterm. Nonetheless, harassment and malnutrition was a problem for all the inmates. Rapes, beatings and other kinds of torture, and even killings, were not rare." (Report of the Commission of Experts, Vol. IV, Ann. V, p. 10.)

> "The first period was allegedly the worst in Trnopolje, with the highest numbers of inmates killed, raped, and otherwise mistreated and tortured . . .
>
> The people killed in the camp were usually removed soon after by some camp inmates who were ordered by the Serbs to take them away and bury them . . .
>
> Albeit *Logor* Trnopolje was not a death camp like *Logor* Omarska or *Logor* Keraterm, the label 'concentration camp' is none the less justified for *Logor* Trnopolje due to the regime prevailing in the camp." (*Ibid.*, Vol. I, Ann. V, pp. 88-90.)

268. With regard to the number of killings at Trnopolje, the ICTY considered the period between 25 May and 30 September 1992, the relevant period in the *Stakić* case (IT-97-24-T, Trial Chamber Judgment, 31 July 2003, paras. 226-227). The Trial Chamber came to the conclusion that "killings occurred frequently in the Omarska, Keraterm and Trno-

polje camps and other detention centres" (IT-97-24-T, para. 544). In the Judgment in the *Brđanin* case, the Trial Chamber found that in the period from 28 May to October 1992,

> "numerous killings occurred in Trnopolje camp. A number of detainees died as a result of the beatings received by the guards. Others were killed by camp guards with rifles. The Trial Chamber also [found] that at least 20 inmates were taken outside the camp and killed there." (IT-99-36-T, Judgment, 1 September 2004, para. 450.)

269. In response to the allegations of killings at the detention camps in the area of Prijedor, the Respondent questions the number of victims, but not the fact that killings occurred. It contends that killings in Prijedor "were committed sporadically and against individuals who were not a significant part of the group". It further observed that the ICTY had not characterized the acts committed in the Prijedor region as genocide.

*Banja Luka*

*Manjača camp*

270. The Applicant further contends that killings were also frequent at Manjača camp in Banja Luka. The Court notes that multiple witness accounts of killings are contained in the Report of the Commission of Experts (Vol. IV, paras. 370-376) and a mass grave of 540 bodies, "presumably" from prisoners at Manjača, is mentioned in a report on missing persons submitted by Manfred Nowak, the United Nations Expert on Missing Persons:

> "In September 1995, mass graves were discovered near Krasulje in northwest Bosnia and Herzegovina. The Government has exhumed 540 bodies of persons who were presumably detained at Manjaca concentration camp in 1992. In January 1996, a mass grave containing 27 bodies of Bosnian Muslims was discovered near Sanski Most; the victims were reportedly killed in July 1992 during their transfer from Sanski Most to Manjaca concentration camp (near Banja Luka)." (E/CN.4/1996/36 of 4 March 1996, para. 52.)

*Brčko*

*Luka camp*

271. The Applicant claims that killings of members of the protected group were also perpetrated at Luka camp and Brčko. The Report of the Commission of Experts confirms these allegations. One witness reported that "[s]hootings often occurred at 4.00 a.m. The witness estimates that during his first week at Luka more than 2,000 men were killed and

thrown into the Sava River." (Report of the Commission of Experts Vol. IV, Ann. VIII, p. 93.) The Report further affirms that "[a]pparently, murder and torture were a daily occurrence" (*ibid.*, p. 96), and that it was reported that

> "[t]he bodies of the dead or dying internees were often taken to the camp dump or moved behind the prisoner hangars. Other internees were required to move the bodies. Sometimes the prisoners who carried the dead were killed while carrying such bodies to the dump. The dead were also taken and dumped outside the Serbian Police Station located on Majevička Brigada Road in Brčko." (*Ibid.*)

These findings are corroborated by evidence of a mass grave being found near the site (Report of the Commission of Experts, Vol. IV, Ann. VIII, p. 101, and United States State Department Dispatch).

272. In the *Jelisić* case, eight of the 13 murders to which the accused pleaded guilty were perpetrated at Luka camp and five were perpetrated at the Brčko police station (IT-95-10-T, Trial Chamber Judgment, 14 December 1999, paras. 37-38). The Trial Chamber further held that "[a]lthough the Trial Chamber is not in a position to establish the precise number of victims ascribable to Goran Jelisić for the period in the indictment, it notes that, in this instance, the material element of the crime of genocide has been satisfied" (*ibid.*, para. 65).

273. In the *Milošević* Decision on Motion for Judgment of Acquittal, the Trial Chamber found that many Muslims were detained in Luka camp in May and June 1992 and that many killings were observed by witnesses (IT-02-54-T, Decision on Motion for Judgment of Acquittal, 16 June 2004, paras. 159, 160-168), it held that "[t]he conditions and treatment to which the detainees at Luka Camp were subjected were terrible and included regular beatings, rapes, and killings" (*ibid.*, para. 159). "At Luka Camp . . . The witness personally moved about 12 to 15 bodies and saw approximately 100 bodies stacked up like firewood at Luka Camp; each day a refrigerated meat truck from the local Bimeks Company in Brčko would come to take away the dead bodies." (*Ibid.*, para. 161.)

274. The Court notes that the *Brđanin* Trial Chamber Judgment of 1 September 2004 made a general finding as to killings of civilians in camps and municipalities at Banja Luka, Prijedor, Sanski Most, Ključ, Kotor Varoš and Bosanski Novi. It held that:

> "In sum, the Trial Chamber is satisfied beyond reasonable doubt that, considering all the incidents described in this section of the judgment, at least 1,669 Bosnian Muslims and Bosnian Croats were killed by Bosnian Serb forces, all of whom were non-combatants." (IT-99-36-T, Judgment, 1 September 2004, para. 465.)

There are contemporaneous Security Council and General Assembly resolutions condemning the killing of civilians in connection with ethnic cleansing, or expressing alarm at reports of mass killings (Security Council resolution 819 (1993), Preamble, paras. 6 and 7; General Assembly resolution 48/153 (1993), paras. 5 and 6; General Assembly resolution 49/196 (1994), para. 6).

275. The Court further notes that several resolutions condemn specific incidents. These resolutions, *inter alia*, condemn "the Bosnian Serb forces for their continued offensive against the safe area of Goražde, which has resulted in the death of numerous civilians" (Security Council resolution 913 (1994), Preamble, para. 5); condemn ethnic cleansing "perpetrated in Banja Luka, Bijeljina and other areas of the Republic of Bosnia and Herzegovina under the control of Bosnian Serb forces" (Security Council resolution 941 (1994), para. 2); express concern at "grave violations of international humanitarian law and of human rights in and around Srebrenica, and in the areas of Banja Luka and Sanski Most, including reports of mass murder" (Security Council resolution 1019 (1995), Preamble, para. 2); and condemn "the indiscriminate shelling of civilians in the safe areas of Sarajevo, Tuzla, Bihać and Goražde and the use of cluster bombs on civilian targets by Bosnian Serb and Croatian Serb forces" (General Assembly resolution 50/193 (1995) para. 5).

*

276. On the basis of the facts set out above, the Court 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 notes in fact that, while the Respondent contested the veracity of certain allegations, and the number of victims, or the motives of the perpetrators, as well as the circumstances of the killings and their legal qualification, it never contested, as a matter of fact, that members of the protected group were indeed killed in Bosnia and Herzegovina. The Court thus finds that it has been established by conclusive evidence that massive killings of members of the protected group occurred and that therefore the requirements of the material element, as defined by Article II *(a)* of the Convention, are fulfilled. At this stage of its reasoning, the Court is not called upon to list the specific killings, nor even to make a conclusive finding on the total number of victims.

277. 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 Court has carefully examined the criminal proceedings of the ICTY and the findings of its Chambers, cited above, and observes that none of those convicted were found to have acted with specific intent *(dolus specialis)*. 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. In the exercise of its jurisdiction under the Genocide Convention, the Court finds that it has not been established by the Applicant that the killings amounted to acts of genocide prohibited by the Convention. As to the Applicant's contention that the specific intent *(dolus specialis)* can be inferred from the overall pattern of acts perpetrated throughout the conflict, examination of this must be reserved until the Court has considered all the other alleged acts of genocide (violations of Article II, paragraphs *(b)* to *(e)*) (see paragraph 370 below).

* *

*(5) The Massacre at Srebrenica*

278. The atrocities committed in and around Srebrenica are nowhere better summarized than in the first paragraph of the Judgment of the Trial Chamber in the *Krstić* case:

> "The events surrounding the Bosnian Serb take-over of the United Nations ('UN') 'safe area' of Srebrenica in Bosnia and Herzegovina, in July 1995, have become well known to the world. Despite a UN Security Council resolution declaring that the enclave was to be 'free from armed attack or any other hostile act', units of the Bosnian Serb Army ('VRS') launched an attack and captured the town. Within a few days, approximately 25,000 Bosnian Muslims, most of them women, children and elderly people who were living in the area, were uprooted and, in an atmosphere of terror, loaded onto overcrowded buses by the Bosnian Serb forces and transported across the confrontation lines into Bosnian Muslim-held territory. The military-aged Bosnian Muslim men of Srebrenica, however, were consigned to a separate fate. As thousands of them attempted to flee the area, they were taken prisoner, detained in brutal conditions and then executed. More than 7,000 people were never seen again." (IT-98-33-T, Judgment, 2 August 2001, para. 1; footnotes omitted.)

While the Respondent raises a question about the number of deaths, it does not essentially question that account. What it does question is whether specific intent *(dolus specialis)* existed and whether the acts complained of can be attributed to it. It also calls attention to the attacks carried out by the Bosnian army from within Srebrenica and the fact that the enclave was never demilitarized. In the Respondent's view the military action taken by the Bosnian Serbs was in revenge and part of a war for territory.

279. The Applicant contends that the planning for the final attack on Srebrenica must have been prepared quite some time before July 1995. It refers to a report of 4 July 1994 by the commandant of the Bratunac Brigade. He outlined the "final goal" of the VRS: "an entirely Serbian Podrinje. The enclaves of Srebrenica, Žepa and Goražde must be militarily defeated." The report continued:

> "We must continue to arm, train, discipline, and prepare the RS Army for the execution of this crucial task — the expulsion of Muslims from the Srebrenica enclave. There will be no retreat when it comes to the Srebrenica enclave, we must advance. The enemy's life has to be made unbearable and their temporary stay in the enclave impossible so that they leave *en masse* as soon as possible, realising that they cannot survive there."

The Chamber in the *Blagojević* case mentioned testimony showing that some "members of the Bratunac Brigade . . . did not consider this report to be an order. Testimony of other witnesses and documentary evidence show that the strategy was in fact implemented." (IT-02-60-T, Trial Chamber Judgment, 17 January 2005, para. 104; footnotes omitted.) The Applicant sees the "final goal" described here as "an entirely Serbian Podrinje", in conformity with the objective of a Serbian region 50 km to the west of the Drina river identified in an April or a May 1991 meeting of the political and State leadership of Yugoslavia. The Court observes that the object stated in the report, like the 1992 Strategic Objectives, does not envisage the destruction of the Muslims in Srebrenica, but rather their departure. The Chamber did not give the report any particular significance.

280. The Applicant, like the Chamber, refers to a meeting on 7 March 1995 between the Commander of the United Nations Protection Force (UNPROFOR) and General Mladić, at which the latter expressed dissatisfaction with the safe area régime and indicated that he might take military action against the eastern enclaves. He gave assurances however for the safety of the Bosnian Muslim population of those enclaves. On the following day, 8 March 1995, President Karadžić issued the Directive for Further Operations 7, also quoted by the Chamber and the Applicant: " 'Planned and well-thought-out combat operations' were

to create 'an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants of both enclaves'." The *Blagojević* Chamber continues as follows:

> "The separation of the Srebrenica and Žepa enclaves became the task of the Drina Corps. As a result of this directive, General Ratko Mladić on 31 March 1995 issued Directive for Further Operations, Operative No. 7/1, which further directive specified the Drina Corps' tasks." (IT-02-60-T, pp. 38-39, para. 106.)

281. Counsel for the Applicant asked in respect of the first of those directives "[w]hat could be a more clear-cut definition of the genocidal intent to destroy on the part of the authorities in Pale?". As with the July 1994 report, the Court observes that the expulsion of the inhabitants would achieve the purpose of the operation. That observation is supported by the ruling of the Appeals Chamber in the *Krstić* case that the directives were "insufficiently clear" to establish specific intent *(dolus specialis)* on the part of the members of the Main Staff who issued them. "Indeed, the Trial Chamber did not even find that those who issued Directives 7 and 7.1 had genocidal intent, concluding instead that the genocidal plan crystallized at a later stage." (IT-98-33-A, Judgment, 19 April 2004, para. 90.)

282. A Netherlands Battalion (Dutchbat) was deployed in the Srebrenica safe area. Within that area in January 1995 it had about 600 personnel. By February and through the spring the VRS was refusing to allow the return of Dutch soldiers who had gone on leave, causing their numbers to drop by at least 150, and were restricting the movement of international convoys of aid and supplies to Srebrenica and to other enclaves. It was estimated that without new supplies about half of the population of Srebrenica would be without food after mid-June.

283. On 2 July the Commander of the Drina Corps issued an order for active combat operations; its stated objective on the Srebrenica enclave was to reduce "the enclave to its urban area". The attack began on 6 July with rockets exploding near the Dutchbat headquarters in Potočari; 7 and 8 July were relatively quiet because of poor weather, but the shelling intensified around 9 July. Srebrenica remained under fire until 11 July when it fell, with the Dutchbat observation posts having been taken by the VRS. Contrary to the expectations of the VRS, the Bosnia and Herzegovina army showed very little resistance (*Blagojević*, IT-02-60-T, Trial Chamber Judgment, 17 January 2005, para. 125). The United Nations Secretary-General's report quotes an assessment made by United Nations military observers on the afternoon of 9 July which concluded as follows:

> "'the BSA offensive will continue until they achieve their aims. These aims may even be widening since the United Nations response has been almost non-existent and the BSA are now in a position to overrun the enclave if they wish.' Documents later obtained from Serb sources appear to suggest that this assessment was correct. Those documents indicate that the Serb attack on Srebrenica initially had limited objectives. Only after having advanced with unexpected ease did the Serbs decide to overrun the entire enclave. Serb civilian and military officials from the Srebrenica area have stated the same thing, adding, in the course of discussions with a United Nations official, that they decided to advance all the way to Srebrenica town when they assessed that UNPROFOR was not willing or able to stop them." (A/54/549, para. 264.)

Consistently with that conclusion, the Chamber in the *Blagojević* case says this:

> "As the operation progressed its military object changed from 'reducing the enclave to the urban area' [the objective stated in a Drina Corps order of 2 July] to the taking-over of Srebrenica town and the enclave as a whole. The Trial Chamber has heard no direct evidence as to the exact moment the military objective changed. The evidence does show that President Karadžić was 'informed of successful combat operations around Srebrenica . . . which enable them to occupy the very town of Srebrenica' on 9 July. According to Miroslav Deronjić, the President of the Executive Board of the Bratunac Municipality, President Karadžić told him on 9 July that there were two options in relation to the operation, one of which was the complete take-over of Srebrenica. Later on 9 July, President Karadžić 'agreed with continuation of operations for the takeover of Srebrenica'. By the morning of 11 July the change of objective of the 'Krivaja 95' operation had reached the units in the field; and by the middle of the afternoon, the order to enter Srebrenica had reached the Bratunac Brigade's IKM in Pribićevac and Colonel Blagojević. Miroslav Deronjić visited the Bratunac Brigade IKM in Pribićevac on 11 July. He briefly spoke with Colonel Blagojević about the Srebrenica operation. According to Miroslav Deronjić, the VRS had just received the order to enter Srebrenica town." (IT-02-60-T, Trial Chamber Judgment, 17 January 2005, para. 130.)

284. The Chamber then begins an account of the dreadful aftermath of the fall of Srebrenica. A Dutchbat Company on 11 July started directing the refugees to the UNPROFOR headquarters in Potočari which was

considered to be the only safe place for them. Not all the refugees went towards Potočari; many of the Bosnian Muslim men took to the woods. Refugees were soon shelled and shot at by the VRS despite attempts to find a safe route to Potočari where, to quote the ICTY, chaos reigned:

> "The crowd outside the UNPROFOR compound grew by the thousands during the course of 11 July. By the end of the day, an estimated 20,000 to 30,000 Bosnian Muslims were in the surrounding area and some 4,000 to 5,000 refugees were in the UNPROFOR compound.
>
> *(b)* Conditions in Potočari
>
> The standards of hygiene within Potočari had completely deteriorated. Many of the refugees seeking shelter in the UNPROFOR headquarters were injured. Medical assistance was given to the extent possible; however, there was a dramatic shortage of medical supplies. As a result of the VRS having prevented aid convoys from getting through during the previous months, there was hardly any fresh food in the DutchBat headquarters. There was some running water available outside the compound. From 11 to 13 July 1995 the temperature was very high, reaching 35 degrees centigrade and this small water supply was insufficient for the 20,000 to 30,000 refugees who were outside the UNPROFOR compound." (IT-02-60-T, paras. 146-147.)

The Tribunal elaborates on those matters and some efforts made by Bosnian Serb and Serbian authorities, i.e., the local Municipal Assembly, the Bratunac Brigade and the Drina Corps, as well as UNHCR, to assist the Bosnian Muslim refugees (*ibid.*, para. 148).

285. On 10 July at 10.45 p.m., according to the Secretary-General's 1999 Report, the delegate in Belgrade of the Secretary-General's Special Representative telephoned the Representative to say that he had seen President Milošević who had responded that not much should be expected of him because "the Bosnian Serbs did not listen to him" (A/54/549, para. 292). At 3 p.m. the next day, the President rang the Special Representative and, according to the same report, "stated that the Dutchbat soldiers in Serb-held areas had retained their weapons and equipment, and were free to move about. This was not true." (*Ibid.*, para. 307.) About 20 minutes earlier two NATO aircraft had dropped two bombs on what were thought to be Serb vehicles advancing towards the town from the south. The Secretary-General's report gives the VRS reaction:

> "Immediately following this first deployment of NATO close air support, the BSA radioed a message to Dutchbat. They threatened

> to shell the town and the compound where thousands of inhabitants had begun to gather, and to kill the Dutchbat soldiers being held hostage, if NATO continued with its use of air power. The Special Representative of the Secretary-General recalled having received a telephone call from the Netherlands Minister of Defence at this time, requesting that the close air support action be discontinued, because Serb soldiers on the scene were too close to Netherlands troops, and their safety would be jeopardized. The Special Representative considered that he had no choice but to comply with this request." (A/54/549, para. 306.)

286. The Trial Chamber in the *Blagojević* case recorded that on 11 July at 8 p.m. there was a meeting between a Dutch colonel and General Mladić and others. The former said that he had come to negotiate the withdrawal of the refugees and to ask for food and medicine for them. He sought assurances that the Bosnian Muslim population and Dutchbat would be allowed to withdraw from the area. General Mladić said that the civilian population was not the target of his actions and the goal of the meeting was to work out an arrangement. He then said "'you can all leave, all stay, or all die here' . . . 'we can work out an agreement for all this to stop and for the issues of the civilian population, your soldiers and the Muslim military to be resolved in a peaceful way'" (*Blagojević*, IT-02-60-T, Trial Chamber Judgment, 17 January 2005, paras. 150-152). Later that night at a meeting beginning at 11 p.m., attended by a representative of the Bosnian Muslim community, General Mladić said:

> "'Number one, you need to lay down your weapons and I guarantee that all those who lay down their weapon will live. I give you my word, as a man and a General, that I will use my influence to help the innocent Muslim population which is not the target of the combat operations carried out by the VRS . . . In order to make a decision as a man and a Commander, I need to have a clear position of the representatives of your people on whether you want to survive . . . stay or vanish. I am prepared to receive here tomorrow at 10 a.m. hrs. a delegation of officials from the Muslim side with whom I can discuss the salvation of your people from . . . the former enclave of Srebrenica . . . Nesib [a Muslim representative], the future of your people is in your hands, not only in this territory . . . Bring the people who can secure the surrender of weapons and save your people from destruction.'
>
> The Trial Chamber finds, based on General Mladić's comments, that he was unaware that the Bosnian Muslim men had left the Srebrenica enclave in the column.
>
> General Mladić also stated that he would provide the vehicles to transport the Bosnian Muslims out of Potočari. The Bosnian

Muslim and Bosnian Serb sides were not on equal terms and Nesib Mandžić felt his presence was only required to put up a front for the international public. Nesib Mandžić felt intimidated by General Mladić. There was no indication that anything would happen the next day." (IT-02-60-T, paras. 156-158.)

287. A third meeting was held the next morning, 12 July. The Tribunal in the *Blagojević* case gives this account:

"After the Bosnian Muslim representatives had introduced themselves, General Mladić stated:

> 'I want to help you, but I want absolute co-operation from the civilian population because your army has been defeated. There is no need for your people to get killed, your husband, your brothers or your neighbours . . . As I told this gentleman last night, you can either survive or disappear. For your survival, I demand that all your armed men, even those who committed crimes, and many did, against our people, surrender their weapons to the VRS . . . You can choose to stay or you can choose to leave. If you wish to leave, you can go anywhere you like. When the weapons have been surrendered every individual will go where they say they want to go. The only thing is to provide the needed gasoline. You can pay for it if you have the means. If you can't pay for it, UNPROFOR should bring four or five tanker trucks to fill up trucks . . .'

Čamila Omanović [one of the Muslim representatives] interpreted this to mean that if the Bosnian Muslim population left they would be saved, but that if they stayed they would die. General Mladić did not give a clear answer in relation to whether a safe transport of the civilian population out of the enclave would be carried out. General Mladić stated that the male Bosnian Muslim population from the age of 16 to 65 would be screened for the presence of war criminals. He indicated that after this screening, the men would be returned to the enclave. This was the first time that the separation of men from the rest of the population was mentioned. The Bosnian Muslim representatives had the impression that 'everything had been prepared in advance, that there was a team of people working together in an organized manner' and that 'Mladić was the chief organizer.'

The third Hotel Fontana meeting ended with an agreement that the VRS would transport the Bosnian Muslim civilian population out of the enclave to ARBiH-held territory, with the assistance of UNPROFOR to ensure that the transportation was carried out in a humane manner." (*Ibid.*, paras. 160-161.)

The Court notes that the accounts of the statements made at the meetings come from transcripts of contemporary video recordings.

288. The VRS and MUP of the Republika Srpska from 12 July separated men aged 16 to approximately 60 or 70 from their families. The Bosnian Muslim men were directed to various locations but most were sent to a particular house ("The White House") near the UNPROFOR headquarters in Potočari, where they were interrogated. During the afternoon of 12 July a large number of buses and other vehicles arrived in Potočari including some from Serbia. Only women, children and the elderly were allowed to board the buses bound for territory held by the Bosnia and Herzegovina military. Dutchbat vehicles escorted convoys to begin with, but the VRS stopped that and soon after stole 16-18 Dutchbat jeeps, as well as around 100 small arms, making further escorts impossible. Many of the Bosnian Muslim men from Srebrenica and its surroundings including those who had attempted to flee through the woods were detained and killed.

289. Mention should also be made of the activities of certain paramilitary units, the "Red Berets" and the "Scorpions", who are alleged by the Applicant to have participated in the events in and around Srebrenica. The Court was presented with certain documents by the Applicant, which were said to show that the "Scorpions" were indeed sent to the Trnovo area near Srebrenica and remained there through the relevant time period. The Respondent cast some doubt on the authenticity of these documents (which were copies of intercepts, but not originals) without ever formally denying their authenticity. There was no denial of the fact of the relocation of the "Scorpions" to Trnovo. The Applicant during the oral proceedings presented video material showing the execution by paramilitaries of six Bosnian Muslims, in Trnovo, in July 1995.

290. 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 Srebrenica in July 1995 (*Krstić*, IT-98-33-T, Judgment, 2 August 2001, paras. 426-427 and *Blagojević*, IT-02-60-T, Judgment, 17 January 2005, para. 643). 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 (*Krstić*, *ibid.*, para. 543, and *Blagojević*, *ibid.*, paras. 644-654).

291. The Court is fully persuaded that both killings within the terms of Article II *(a)* of the Convention, and acts causing serious bodily or men-

tal harm within the terms of Article II *(b)* thereof occurred during the Srebrenica massacre. Three further aspects of the ICTY decisions relating to Srebrenica require closer examination — the specific intent *(dolus specialis)*, the date by which the intent was formed, and the definition of the "group" in terms of Article II. A fourth issue which was not directly before the ICTY but which this Court must address is the involvement, if any, of the Respondent in the actions.

292. The issue of intent has been illuminated by the *Krstić* Trial Chamber. In its findings, it was convinced of the existence of intent by the evidence placed before it. Under the heading "A Plan to Execute the Bosnian Muslim Men of Srebrenica", the Chamber "finds that, following the takeover of Srebrenica in July 1995, the Bosnian Serbs devised and implemented a plan to execute as many as possible of the military aged Bosnian Muslim men present in the enclave" (IT-98-33-T, Judgment, 2 August 2001, para. 87). All the executions, the Chamber decided, "systematically targeted Bosnian Muslim men of military age, regardless of whether they were civilians or soldiers" (*ibid.*, para. 546). While "[t]he VRS may have initially considered only targeting military men for execution, . . . [the] evidence shows, however, that a decision was taken, at some point, to capture and kill all the Bosnian Muslim men indiscriminately. No effort was made to distinguish the soldiers from the civilians." (*Ibid.*, para. 547.) Under the heading "Intent to Destroy", the Chamber reviewed the Parties' submissions and the documents, concluding that it would "adhere to the characterization of genocide which encompass[es] only acts committed with the *goal* of destroying all or part of a group" (*ibid.*, para. 571; original emphasis). The acts of genocide need not be premeditated and the intent may become the goal later in an operation (*ibid.*, para. 572).

> "Evidence presented in this case has shown that the killings were planned: the number and nature of the forces involved, the standardized coded language used by the units in communicating information about the killings, the scale of the executions, the invariability of the killing methods applied, indicate that a decision was made to kill all the Bosnian Muslim military aged men.
>
> The Trial Chamber is unable to determine the precise date on which the decision to kill all the military aged men was taken. Hence, it cannot find that the killings committed in Potočari on 12 and 13 July 1995 formed part of the plan to kill all the military aged men. Nevertheless, the Trial Chamber is confident that the mass executions and other killings committed from 13 July onwards were part of this plan." (*Ibid.*, paras. 572-573; see also paras. 591-598.)

293. The Court has already quoted (paragraph 281) the passage from the Judgment of the Appeals Chamber in the *Krstić* case rejecting the Prosecutor's attempted reliance on the Directives given earlier in July, and it would recall the evidence about the VRS's change of plan in the course of the operation in relation to the complete takeover of the enclave. The Appeals Chamber also rejected the appeal by General Krstić against the finding that genocide occurred in Srebrenica. It held that the Trial Chamber was entitled to conclude that the destruction of such a sizeable number of men, one fifth of the overall Srebrenica community, "'would inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica'" (IT-98-33-A, Appeals Chamber Judgment, 19 April 2004, paras. 28-33); and the Trial Chamber, as the best assessor of the evidence presented at trial, was entitled to conclude that the evidence of the transfer of the women and children supported its finding that some members of the VRS Main Staff intended to destroy the Bosnian Muslims in Srebrenica. The Appeals Chamber concluded this part of its Judgment as follows:

> "The gravity of genocide is reflected in the stringent requirements which must be satisfied before this conviction is imposed. These requirements — the demanding proof of specific intent and the showing that the group was targeted for destruction in its entirety or in substantial part — guard against a danger that convictions for this crime will be imposed lightly. Where these requirements are satisfied, however, the law must not shy away from referring to the crime committed by its proper name. By seeking to eliminate a part of the Bosnian Muslims, the Bosnian Serb forces committed genocide. They targeted for extinction the forty thousand Bosnian Muslims living in Srebrenica, a group which was emblematic of the Bosnian Muslims in general. They stripped all the male Muslim prisoners, military and civilian, elderly and young, of their personal belongings and identification, and deliberately and methodically killed them solely on the basis of their identity. The Bosnian Serb forces were aware, when they embarked on this genocidal venture, that the harm they caused would continue to plague the Bosnian Muslims. The Appeals Chamber states unequivocally that the law condemns, in appropriate terms, the deep and lasting injury inflicted, and calls the massacre at Srebrenica by its proper name: genocide. Those responsible will bear this stigma, and it will serve as a warning to those who may in future contemplate the commission of such a heinous act.

In concluding that some members of the VRS Main Staff intended to destroy the Bosnian Muslims of Srebrenica, the Trial Chamber

did not depart from the legal requirements for genocide. The Defence appeal on this issue is dismissed." (*Ibid.*, paras. 37-38.)

294. On one view, taken by the Applicant, the *Blagojević* Trial Chamber decided that the specific intent *(dolus specialis)* was formed earlier than 12 or 13 July, the time chosen by the *Krstić* Chamber. The Court has already called attention to that Chamber's statement that at some point (it could not determine "the exact moment") the military objective in Srebrenica changed, from "reducing the enclave to the urban area" (stated in a Drina Corps order of 2 July 1995 referred to at times as the "Krivaja 95 operation") to taking over Srebrenica town and the enclave as a whole. Later in the Judgment, under the heading "Findings: was genocide committed?", the Chamber refers to the 2 July document:

> "The Trial Chamber is convinced that the criminal acts committed by the Bosnian Serb forces were all parts of one single scheme to commit genocide of the Bosnian Muslims of Srebrenica, as reflected in the 'Krivaja 95 operation', the ultimate objective of which was to eliminate the enclave and, therefore, the Bosnian Muslim community living there." (*Blagojević*, IT-02-60-T, Judgment, 17 January 2005, para. 674.)

The Chamber immediately goes on to refer only to the events — the massacres and the forcible transfer of the women and children — after the fall of Srebrenica, that is sometime after the change of military objective on 9 or 10 July. The conclusion on intent is similarly focused:

> "The Trial Chamber has no doubt that all these acts constituted a single operation executed with the intent to destroy the Bosnian Muslim population of Srebrenica. The Trial Chamber finds that the Bosnian Serb forces not only knew that the combination of the killings of the men with the forcible transfer of the women, children and elderly, would inevitably result in the physical disappearance of the Bosnian Muslim population of Srebrenica, but clearly intended through these acts to physically destroy this group." (*Ibid.*, para. 677.) (See similarly all but the first item in the list in paragraph 786.)

295. The Court's conclusion, fortified by the Judgments of the Trial Chambers in the *Krstić* and *Blagojević* cases, is that the necessary intent was not established until after the change in the military objective 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 (paragraph 423 below). 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.

296. The Court now turns to the requirement of Article II that there must be the intent to destroy a protected "group" in whole or in part. It recalls its earlier statement of the law and in particular the three elements there discussed: substantiality (the primary requirement), relevant geographic factors and the associated opportunity available to the perpetrators, and emblematic or qualitative factors (paragraphs 197-201). Next, the Court recalls the assessment it made earlier in the Judgment of the persuasiveness of the ICTY's findings of facts and its evaluation of them (paragraph 223). Against that background it turns to the findings in the *Krstić* case (IT-98-33-T, Trial Chamber Judgment, 2 August 2001, paras. 551-599 and IT-98-33-A, Appeals Chamber Judgment, 19 April 2004, paras. 6-22), 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." (IT-98-33-A, Judgment, 19 April 2004, para. 15; footnotes omitted.)

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

297. 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.

* *

*(6) Article II* (b)*: Causing Serious Bodily or Mental Harm to Members of the Protected Group*

298. The Applicant contends that besides the massive killings, systematic serious harm was caused to the non-Serb population of Bosnia and Herzegovina. The Applicant includes the practice of terrorizing the non-Serb population, the infliction of pain and the administration of torture as well as the practice of systematic humiliation into this category of acts of genocide. Further, the Applicant puts a particular emphasis on the issue of systematic rapes of Muslim women, perpetrated as part of genocide against the Muslims in Bosnia during the conflict.

299. The Respondent does not dispute that, as a matter of legal qualification, the crime of rape may constitute an act of genocide, causing serious bodily or mental harm. It disputes, however, that the rapes in the territory of Bosnia and Herzegovina were part of a genocide perpetrated therein. The Respondent, relying on the Report of the Commission of Experts, maintains that the rapes and acts of sexual violence committed during the conflict, were not part of genocide, but were committed on all sides of the conflict, without any specific intent *(dolus specialis)*.

300. The Court notes that there is no dispute between the Parties that rapes and sexual violence could constitute acts of genocide, if accompanied by a specific intent to destroy the protected group. It notes also that the ICTR, in its Judgment of 2 September 1998 in the *Akayesu* case, addressed the issue of acts of rape and sexual violence as acts of genocide in the following terms:

> "Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of inflicting harm on the victim as he or she suffers both bodily and mental harm." (ICTR-96-4-T, Trial Chamber Judgment, 2 September 1998, para. 731.)

The ICTY, in its Judgment of 31 July 2003 in the *Stakić* case, recognized that:

> "'Causing serious bodily and mental harm' in subparagraph *(b)* [of Article 4 (2) of the Statute of the ICTY] is understood to mean, *inter alia*, acts of torture, inhumane or degrading treatment, sexual violence including rape, interrogations combined with beatings, threats of death, and harm that damages health or causes disfigurement or injury. The harm inflicted need not be permanent and irremediable." (IT-97-24-T, Trial Chamber Judgment, 31 July 2003, para. 516.)

301. The Court notes furthermore that Security Council and General Assembly resolutions contemporary with the facts are explicit in referring

to sexual violence. These resolutions were in turn based on reports before the General Assembly and the Security Council, such as the Reports of the Secretary-General, the Commission of Experts, the Special Rapporteur for Human Rights, Tadeusz Mazowiecki, and various United Nations agencies in the field. The General Assembly stressed the "extraordinary suffering of the victims of rape and sexual violence" (General Assembly resolution 48/143 (1993), Preamble; General Assembly resolution 50/192 (1995), para. 8). In resolution 48/143 (1993), the General Assembly declared it was:

> "*Appalled* at the recurring and substantiated reports of widespread rape and abuse of women and children in the areas of armed conflict in the former Yugoslavia, in particular its systematic use against the Muslim women and children in Bosnia and Herzegovina by Serbian forces" (Preamble, para. 4).

302. Several Security Council resolutions expressed alarm at the "massive, organised and systematic detention and rape of women", in particular Muslim women in Bosnia and Herzegovina (Security Council resolutions 798 (1992), Preamble, para. 2; resolution 820 (1993), para. 6; 827 (1993), Preamble, para. 3). In terms of other kinds of serious harm, Security Council resolution 1034 (1995) condemned

> "in the strongest possible terms the violations of international humanitarian law and of human rights by Bosnian Serb and paramilitary forces in the areas of Srebrenica, Žepa, Banja Luka and Sanski Most as described in the report of the Secretary-General of 27 November 1995 and showing a consistent pattern of summary executions, rape, mass expulsions, arbitrary detentions, forced labour and large-scale disappearances" (para. 2).

The Security Council further referred to a "persistent and systematic campaign of terror" in Banja Luka, Bijeljina and other areas under the control of Bosnian Serb forces (Security Council resolution 941 (1994), Preamble, para. 4). It also expressed concern at reports of mass murder, unlawful detention and forced labour, rape and deportation of civilians in Banja Luka and Sanski Most (Security Council resolution 1019 (1995), Preamble, para. 2).

303. The General Assembly also condemned specific violations including torture, beatings, rape, disappearances, destruction of houses, and other acts or threats of violence aimed at forcing individuals to leave their homes (General Assembly resolution 47/147 (1992), para. 4; see also General Assembly resolution 49/10 (1994), Preamble, para. 14, and General Assembly resolution 50/193 (1995), para. 2).

304. The Court will now examine the specific allegations of the Applicant under this heading, in relation to the various areas and camps identified as having been the scene of acts causing "bodily or mental harm" within the meaning of the Convention. As regards the events of Srebrenica, the Court has already found it to be established that such acts were committed (paragraph 291 above).

*Drina River Valley*

(a) *Zvornik*

305. As regards the area of the Drina River Valley, the Applicant has stressed the perpetration of acts and abuses causing serious bodily or mental harm in the events at Zvornik. In particular, the Court has been presented with a report on events at Zvornik which is based on eye-witness accounts and extensive research (Hannes Tretter *et al.*, "'Ethnic cleansing' Operations in the Northeast Bosnian-City of Zvornik from April through June 1992", Ludwig Boltzmann Institute of Human Rights (1994), p. 48). The report of the Ludwig Boltzmann Institute gives account of a policy of terrorization, forced relocation, torture, rape during the takeover of Zvornik in April-June 1992. The Report of the Commission of Experts received 35 reports of rape in the area of Zvornik in May 1992 (Vol. V, Ann. IX, p. 54).

(b) *Foča*

306. Further acts causing serious bodily and mental harm were perpetrated in the municipality of Foča. The Applicant, relying on the Judgment in the *Kunarac et al.* case (IT-96-23-T and IT-96-23/1-T, Trial Chamber Judgment, 22 February 2001, paras. 574 and 592), claims, in particular, that many women were raped repeatedly by Bosnian Serb soldiers or policemen in the city of Foča.

(c) *Camps*

(i) *Batković camp*

307. The Applicant further claims that in Batković camp, prisoners were frequently beaten and mistreated. The Report of the Commission of Experts gives an account of a witness statement according to which "prisoners were forced to perform sexual acts with each other, and sometimes with guards". The Report continues: "Reports of the frequency of beatings vary from daily beatings to beatings 10 times each day." (Report of the Commission of Experts, Vol. IV, Ann. VIII, p. 62, para. 469.) Individual witness accounts reported by the Commission of Experts (Report of the Commission of Experts, Vol. IV, Ann. VIII, pp. 62-63, and Ann. X, p. 9) provide second-hand testimony that beatings occurred and prisoners lived in terrible conditions. As already noted

above (paragraph 256), however, the periodic Report of Special Rapporteur Mazowiecki of 17 November 1992 stated that "[t]he prisoners . . . appeared to be in good health" (p. 13); but according to the Applicant, Mazowiecki was shown a "model" camp and therefore his impression was inaccurate. The United States Department of State Dispatch of 19 April 1993 (Vol. 4, No. 16), alleges that in Batković camp, prisoners were frequently beaten and mistreated. In particular, the Dispatch records two witness statements according to which "[o]n several occasions, they and other prisoners were forced to remove their clothes and perform sex acts on each other and on some guards".

(ii) *Sušica camp*

308. According to the Applicant, rapes and physical assaults were also perpetrated at Sušica camp; it pointed out that in the proceedings before the ICTY, in the "Rule 61 Review of the Indictment" and the Sentencing Judgment, in the *Nikolić* case, the accused admitted that many Muslim women were raped and subjected to degrading physical and verbal abuse in the camp and at locations outside of it (*Nikolić*, IT-94-2-T, Sentencing Judgment, 18 December 2003, paras. 87-90), and that several men were tortured in that same camp.

(iii) *Foča Kazneno-Popravní Dom camp*

309. With regard to the Foča Kazneno-Popravní Dom camp, the Applicant asserts that beatings, rapes of women and torture were perpetrated. The Applicant bases these allegations mainly on the Report of the Commission of Experts and the United States State Department Dispatch. The Commission of Experts based its findings on information provided by a Helsinki Watch Report. A witness claimed that some prisoners were beaten in Foča KP Dom (Report of the Commission of Experts, Vol. IV, pp. 128-132); similar accounts are contained in the United States State Department Dispatch. One witness stated that

> "Those running the center instilled fear in the Muslim prisoners by selecting certain prisoners for beatings. From his window in Room 13, the witness saw prisoners regularly being taken to a building where beatings were conducted. This building was close enough for him to hear the screams of those who were being beaten." (Dispatch of the United States Department of State, 19 April 1993, No. 16, p. 262.)

310. The ICTY Trial Chamber in its *Kunarac* Judgment of 22 February 2001, described the statements of several witnesses as to the poor and brutal living conditions in Foča KP Dom. These seem to confirm that the Muslim men and women from Foča, Gacko and Kalinovik municipalities were arrested, rounded up, separated from each other, and imprisoned or detained at several detention centres like the Foča KP

Dom where some of them were killed, raped or severely beaten (*Kunarac et al*, IT-96-23-T and IT-96-23/1-T, Trial Chamber Judgment, 22 February 2001).

*Prijedor*

(a) *Municipality*

311. Most of the allegations of abuses said by the Applicant to have occurred in Prijedor have been examined in the section of the present Judgment concerning the camps situated in Prijedor. However, the Report of the Commission of Experts refers to a family of nine found dead in Stara Rijeka in Prijedor, who had obviously been tortured (Vol. V, Ann. X, p. 41). The Trial Chamber of the ICTY, in its Judgment in the *Tadić* case made the following factual finding as to an attack on two villages in the Kozarac area, Jaskići and Sivci:

> "On 14 June 1992 both villages were attacked. In the morning the approaching sound of shots was heard by the inhabitants of Sivci and soon after Serb tanks and Serb soldiers entered the village . . . There they were made to run along that road, hands clasped behind their heads, to a collecting point in the yard of one of the houses. On the way there they were repeatedly made to stop, lie down on the road and be beaten and kicked by soldiers as they lay there, before being made to get up again and run some distance further, where the whole performance would be repeated . . . In all some 350 men, mainly Muslims but including a few Croats, were treated in this way in Sivci.
>
> On arrival at the collecting point, beaten and in many cases covered with blood, some men were called out and questioned about others, and were threatened and beaten again. Soon buses arrived, five in all, and the men were made to run to them, hands again behind the head, and to crowd on to them. They were then taken to the Keraterm camp.
>
> The experience of the inhabitants of the smaller village of Jaskići, which contained only 11 houses, on 14 June 1992 was somewhat similar but accompanied by the killing of villagers. Like Sivci, Jaskići had received refugees after the attack on Kozarac but by 14 June 1992 many of those refugees had left for other villages. In the afternoon of 14 June 1992 gunfire was heard and Serb soldiers arrived in Jaskići and ordered men out of their homes and onto the village street, their hands clasped behind their heads; there they were made to lie down and were severely beaten." (IT-94-1-T, Judgment, 7 May 1997, paras. 346-348.)

(b) *Camps*

(i) *Omarska camp*

312. As noted above in connection with the killings (paragraph 262), the Applicant has been able to present abundant and persuasive evidence of physical abuses causing serious bodily harm in Omarska camp. The Report of the Commission of Experts contains witness accounts regarding the "white house" used for physical abuses, rapes, torture and, occasionally, killings, and the "red house" used for killings (Vol. IV, Ann. VIII, pp. 207-222). Those accounts of the sadistic methods of killing are corroborated by United States submissions to the Secretary-General. The most persuasive and reliable source of evidence may be taken to be the factual part of the Opinion and Judgment of the ICTY in the *Tadić* case (IT-94-1-T, Trial Chamber Judgment, 7 May 1997). Relying on the statements of 30 witnesses, the *Tadić* Trial Judgment made findings as to interrogations, beatings, rapes, as well as the torture and humiliation of Muslim prisoners in Omarska camp (in particular: *ibid.*, paras. 155-158, 163-167). The Trial Chamber was satisfied beyond reasonable doubt of the fact that several victims were mistreated and beaten by Tadić and suffered permanent harm, and that he had compelled one prisoner to sexually mutilate another (*ibid.*, paras. 194-206). Findings of mistreatment, torture, rape and sexual violence at Omarska camp were also made by the ICTY in other cases; in particular, the Trial Judgment of 2 November 2001 in the *Kvočka et al.* case (IT-98-30/1-T, Trial Chamber Judgment, paras. 21-50, and 98-108) — upheld on appeal, the Trial Judgment of 1 September 2004 in the *Brđanin* case (IT-99-36-T, Trial Chamber Judgment, paras. 515-517) and the Trial Judgment of 31 July 2003 in the *Stakić* case (IT-97-24-T, Trial Chamber Judgment, paras. 229-336).

(ii) *Keraterm camp*

313. The Applicant also pointed to evidence of beatings and rapes at Keraterm camp. Several witness accounts are reported in the Report of the Commission of Experts (Vol. IV, Ann. VIII, pp. 225, 231, 233, 238) and corroborated by witness accounts reported by the Permanent Mission of Austria to the United Nations and Helsinki Watch. The attention of the Court has been drawn to several judgments of the ICTY which also document the severe physical abuses, rapes and sexual violence that occurred at this camp. The Trial Judgment of 1 September 2004 in the *Brđanin* case found that:

> "At Keraterm camp, detainees were beaten on arrival . . . Beatings were carried out with wooden clubs, baseball bats, electric cables and police batons . . .

> In some cases the beatings were so severe as to result in serious injury and death. Beatings and humiliation were often administered in front of other detainees. Female detainees were raped in Keraterm camp." (IT-99-36-T, Trial Chamber Judgment, paras. 851-852.)

The Trial Chamber in its Judgment of 31 July 2003 in the *Stakić* case found that

> "the detainees at the Keraterm camp were subjected to terrible abuse. The evidence demonstrates that many of the detainees at the Keraterm camp were beaten on a daily basis. Up until the middle of July, most of the beatings happened at night. After the detainees from Brdo arrived, around 20 July 1992, there were 'no rules', with beatings committed both day and night. Guards and others who entered the camp, including some in military uniforms carried out the beatings. There were no beatings in the rooms since the guards did not enter the rooms — people were generally called out day and night for beatings." (IT-97-24-T, Trial Chamber Judgment, para. 237.)

The Chamber also found that there was convincing evidence of further beatings and rape perpetrated in Keraterm camp (*ibid.*, paras. 238-241).

In the Trial Judgment in the *Kvočka et al.* case, the Chamber held that, in addition to the "dreadful" general conditions of life, detainees at Keraterm camp were "mercilessly beaten" and "women were raped" (IT-98-30/1-T, Trial Chamber Judgment, 2 November 2001, para. 114).

(iii) *Trnopolje camp*

314. The Court has furthermore been presented with evidence that beatings and rapes occurred at Trnopolje camp. The rape of 30-40 prisoners on 6 June 1992 is reported by both the Report of the Commission of Experts (Vol. IV, Ann. VIII, pp. 251-253) and a publication of the United States State Department. In the *Tadić* case the Trial Chamber of the ICTY concluded that at Trnopolje camp beatings occurred and that "[b]ecause this camp housed the largest number of women and girls, there were more rapes at this camp than at any other" (IT-94-1-T, Judgment, 7 May 1997, paras. 172-177 (para. 175)). These findings concerning beatings and rapes are corroborated by other Judgments of the ICTY, such as the Trial Judgment in the *Stakić* case where it found that,

> "although the scale of the abuse at the Trnopolje camp was less than that in the Omarska camp, mistreatment was commonplace. The

> Serb soldiers used baseball bats, iron bars, rifle butts and their hands and feet or whatever they had at their disposal to beat the detainees. Individuals were who taken out for questioning would often return bruised or injured" (IT-97-24-T, Trial Chamber Judgment, 31 July 2003, para. 242);

and that, having heard the witness statement of a victim, it was satisfied beyond reasonable doubt "that rapes did occur in the Trnopolje camp" (*ibid.*, para. 244). Similar conclusions were drawn in the Judgment of the Trial Chamber in the *Brđanin* case (IT-99-36-T, 1 September 2004, paras. 513-514 and 854-857).

*Banja Luka*

*Manjača camp*

315. With regard to the Manjača camp in Banja Luka, the Applicant alleges that beatings, torture and rapes were occurring at this camp. The Applicant relies mainly on the witnesses cited in the Report of the Commission of Experts (Vol. IV, Ann. VIII, pp. 50-54). This evidence is corroborated by the testimony of a former prisoner at the Joint Hearing before the Select Committee on Intelligence in the United States Senate on 9 August 1995, and a witness account reported in the Memorial of the Applicant (United States State Department Dispatch, 2 November 1992, p. 806). The Trial Chamber, in its Decision on Motion for Judgment of Acquittal of 16 June 2004, in the *Milošević* case reproduced the statement of a witness who testified that,

> "at the Manjaca camp, they were beaten with clubs, cables, bats, or other similar items by the military police. The men were placed in small, bare stables, which were overcrowded and contained no toilet facilities. While at the camp, the detainees received inadequate food and water. Their heads were shaved, and they were severely beaten during interrogations." (IT-02-54-T, Decision on Motion for Judgment of Acquittal, 16 June 2004, para. 178.)

316. The Applicant refers to the Report of the Commission of Experts, which contains reports that the Manjača camp held a limited number of women and that during their stay they were "raped repeatedly". Muslim male prisoners were also forced to rape female prisoners (Report of the Commission of Experts, Vol. IV, Annex VIII, pp. 53-54). The Respondent points out that the *Brđanin* Trial Judgment found no evidence had been presented that detainees were subjected to "acts of sexual degradation" in Manjača.

*Brčko*

*Luka camp*

317. The Applicant alleges that torture, rape and beatings occurred at Luka camp (Brčko). The Report of the Commission of Experts contains multiple witness accounts, including the evidence of a local guard forced into committing rape (Vol. IV, Ann. VIII, pp. 93-97). The account of the rapes is corroborated by multiple sources (United States State Department Dispatch, 19 April 1993). The Court notes in particular the findings of the ICTY Trial Chamber in the *Češić* case, with regard to acts perpetrated in the Luka camp. In his plea agreement the accused admitted several grave incidents, such as beatings and compelling two Muslim brothers to perform sexual acts with each other (IT-95-10/1-S, Sentencing Judgment, 11 March 2004, paras. 8-17). These findings are corroborated by witness statements and the guilty plea in the *Jelisić* case.

318. The Respondent does not deny that the camps in Bosnia and Herzegovina were "in breach of humanitarian law and, in most cases, in breach of the law of war", but argues that the conditions in all the camps were not of the kind described by the Applicant. It stated that all that had been demonstrated was "the existence of serious crimes, committed in a particularly complex situation, in a civil and fratricidal war", but not the requisite specific intent *(dolus specialis)*.

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319. Having carefully examined the evidence presented before it, and taken note of that 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 requirements of the material element, as defined by Article II *(b)* of the Convention are thus fulfilled. The Court finds, however, on the basis of the evidence before it, 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, required for a finding that genocide has been perpetrated.

* *

*(7) Article II* (c)*: Deliberately Inflicting on the Group Conditions of Life Calculated to Bring about Its Physical Destruction in Whole or in Part*

320. Article II *(c)* of the Genocide Convention concerns the deliberate infliction on the group of conditions of life calculated to bring about its physical destruction in whole or in part. Under this heading, the Applicant first points to an alleged policy by the Bosnian Serb forces to encircle civilians of the protected group in villages, towns or entire regions and to subsequently shell those areas and cut off all supplies in order to starve the population. Secondly, the Applicant claims that Bosnian Serb forces attempted to deport and expel the protected group from the areas which those forces occupied. Finally, the Applicant alleges that Bosnian Serb forces attempted to eradicate all traces of the culture of the protected group through the destruction of historical, religious and cultural property.

321. The Respondent argues that the events referred to by the Applicant took place in a context of war which affected the entire population, whatever its origin. In its view, "it is obvious that in any armed conflict the conditions of life of the civilian population deteriorate". The Respondent considers that, taking into account the civil war in Bosnia and Herzegovina which generated inhuman conditions of life for the entire population in the territory of that State, "it is impossible to speak of the deliberate infliction on the Muslim group alone or the non-Serb group alone of conditions of life calculated to bring about its destruction".

322. The Court will 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 will also go on to consider the evidence presented regarding the conditions of life in the detention camps already extensively referred to above (paragraphs 252-256, 262-273, 307-310 and 312-318).

*Alleged encirclement, shelling and starvation*

323. The principal incident referred to by the Applicant in this regard is the siege of Sarajevo by Bosnian Serb forces. Armed conflict broke out in Sarajevo at the beginning of April 1992 following the recognition by the European Community of Bosnia and Herzegovina as an independent State. The Commission of Experts estimated that, between the beginning of April 1992 and 28 February 1994, in addition to those killed or missing in the city (paragraph 247 above), 56,000 persons had been wounded (Report of the Commission of Experts, Vol. II, Ann. VI, p. 8). It was further estimated that, "over the course of the siege, the city [was] hit by an average of approximately 329 shell impacts per day, with a high of 3,777 shell impacts on 22 July 1993" *(ibid.)*. In his report of 28 August 1992, the Special Rapporteur observed that:

"The city is shelled on a regular basis . . . Snipers shoot innocent civilians . . .

The civilian population lives in a constant state of anxiety, leaving their homes or shelters only when necessary . . . The public systems for distribution of electrical power and water no longer function. Food and other basic necessities are scarce, and depend on the airlift organized by UNHCR and protected by UNPROFOR." (Report of 28 August 1992, paras. 17-18.)

324. The Court notes that, in resolutions adopted on 16 April and 6 May 1993, the Security Council declared Sarajevo, together with Tuzla, Žepa, Goražde, Bihać and Srebrenica, to be "safe areas" which should be free from any armed attack or any other hostile act and fully accessible to UNPROFOR and international humanitarian agencies (resolutions 819 of 16 April 1993 and 824 of 6 May 1993). However, these resolutions were not adhered to by the parties to the conflict. In his report of 26 August 1993, the Special Rapporteur noted that

"Since May 1993 supplies of electricity, water and gas to Sarajevo have all but stopped . . . a significant proportion of the damage caused to the supply lines has been deliberate, according to United Nations Protection Force engineers who have attempted to repair them. Repair crews have been shot at by both Bosnian Serb and government forces . . ." (Report of 26 August 1993, para. 6.)

He further found that UNHCR food and fuel convoys had been "obstructed or attacked by Bosnian Serb and Bosnian Croat forces and sometimes also by governmental forces" (Report of 26 August 1993, para. 15). The Commission of Experts also found that the "blockade of humanitarian aid ha[d] been used as an important tool in the siege" (Report of the Commission of Experts, Ann. VI, p. 17). According to the Special Rapporteur, the targeting of the civilian population by shelling and sniping continued and even intensified throughout 1994 and 1995 (Report of 4 November 1994, paras. 27-28; Report of 16 January 1995, para. 13; Report of 5 July 1995, paras. 67-70). The Special Rapporteur noted that

"[a]ll sides are guilty of the use of military force against civilian populations and relief operations in Sarajevo. However, one cannot lose sight of the fact that the main responsibility lies with the [Bosnian Serb] forces, since it is they who have adopted the tactic of laying siege to the city." (Report of 17 November 1992, para. 42.)

325. The Court notes that in the *Galić* case, the Trial Chamber of the ICTY found that the Serb forces (the SRK) conducted a campaign of sniping and shelling against the civilian population of Sarajevo (*Galić*, IT-98-29-T, Judgment, 5 December 2003, para. 583). It was

> "convinced by the evidence in the Trial Record that civilians in ARBiH-held areas of Sarajevo were directly or indiscriminately attacked from SRK-controlled territory . . ., and that as a result and as a minimum, hundreds of civilians were killed and thousands others were injured" (*ibid.*, para. 591).

These findings were subsequently confirmed by the Appeals Chamber (*Galić*, IT-98-29-A, Judgment, 30 November 2006, paras. 107-109). The ICTY also found that the shelling which hit the Markale market on 5 February 1994, resulting in 60 persons killed and over 140 injured, came from behind Bosnian Serb lines, and was deliberately aimed at civilians (*ibid.*, paras. 333 and 335 and *Galić*, IT-98-29-T, Trial Chamber Judgment, 5 December 2003, para. 496).

326. The Respondent argues that the safe areas proclaimed by the Security Council had not been completely disarmed by the Bosnian army. For instance, according to testimony given in the *Galić* case by the Deputy Commander of the Bosnian army corps covering the Sarajevo area, the Bosnian army had deployed 45,000 troops within Sarajevo. The Respondent also pointed to further testimony in that case to the effect that certain troops in the Bosnian army were wearing civilian clothes and that the Bosnian army was using civilian buildings for its bases and positioning its tanks and artillery in public places. Moreover, the Respondent observes that, in his book, *Fighting for Peace*, General Rose was of the view that military equipment was installed in the vicinity of civilians, for instance, in the grounds of the hospital in Sarajevo and that "[t]he Bosnians had evidently chosen this location with the intention of attracting Serb fire, in the hope that the resulting carnage would further tilt international support in their favour" (Michael Rose, *Fighting for Peace*, 1998, p. 254).

327. The Applicant also points to evidence of sieges of other towns in Bosnia and Herzegovina. For instance, with regard to Goražde, the Special Rapporteur found that the enclave was being shelled and had been denied convoys of humanitarian aid for two months. Although food was being air-dropped, it was insufficient (Report of 5 May 1992, para. 42). In a later report, the Special Rapporteur noted that, as of spring 1994, the town had been subject to a military offensive by Bosnian Serb forces, during which civilian objects including the hospital had been targeted and the water supply had been cut off (Report of 10 June 1994, paras. 7-12). Humanitarian convoys were harassed including by the detention of UNPROFOR personnel and the theft of equipment (Report of

19 May 1994, paras. 17 *et seq.*). Similar patterns occurred in Bihać, Tuzla, Cerska and Maglaj (Bihać: Special Rapporteur's Report of 28 August 1992, para. 20; Report of the Secretary-General pursuant to resolution 959 (1994), para. 17; Special Rapporteur's Report of 16 January 1995, para. 12; Tuzla: Report of the Secretary-General pursuant to resolutions 844 (1993), 836 (1993) and 776 (1992), paras. 2-4; Special Rapporteur's Report of 5 July 1995; Cerska: Special Rapporteur's Report of 5 May 1993, paras. 8-17; Maglaj: Special Rapporteur's Report of 17 November 1993, para. 93).

328. The Court finds that virtually all the incidents recounted by the Applicant have been established by the available evidence. It takes account of the assertion that the Bosnian army may have provoked attacks on civilian areas by Bosnian Serb forces, but does not consider that this, even if true, can provide any justification for attacks on civilian areas. On the basis of a careful examination of the evidence presented by the Parties, the Court concludes that civilian members of the protected group were deliberately targeted by Serb forces in Sarajevo and other cities. However, reserving the question whether such acts are in principle capable of falling within the scope of Article II, paragraph *(c)*, of the Convention, the Court does not find sufficient evidence that the alleged acts were committed with the specific intent to destroy the protected group in whole or in part. For instance, in the *Galić* case, the ICTY found that

> "the attacks on civilians were numerous, but were not consistently so intense as to suggest an attempt by the SRK to wipe out or even deplete the civilian population through attrition . . . the only reasonable conclusion in light of the evidence in the Trial Record is that the primary purpose of the campaign was to instil in the civilian population a state of extreme fear" (*Galić*, IT-98-29-T, Trial Chamber Judgment, 5 December 2003, para. 593).

These findings were not overruled by the judgment of the Appeals Chamber of 30 November 2006 (*Galić*, IT-98-29-A, Judgment: see e.g., paras. 107-109, 335 and 386-390). The Special Rapporteur of the United Nations Commission on Human Rights was of the view that "[t]he siege, including the shelling of population centres and the cutting off of supplies of food and other essential goods, is another tactic used to force Muslims and ethnic Croatians to flee" (Report of 28 August 1992, para. 17). The Court thus finds that it has not been conclusively established that the acts were committed with the specific intent *(dolus specialis)* to destroy the protected group in whole or in part.

*Deportation and expulsion*

329. The Applicant claims that deportations and expulsions occurred systematically all over Bosnia and Herzegovina. With regard to Banja Luka, the Special Rapporteur noted that since late November 1993, there had been a "sharp rise in repossessions of apartments, whereby Muslim and Croat tenants [were] summarily evicted" and that "a form of housing agency ha[d] been established . . . which chooses accommodation for incoming Serb displaced persons, evicts Muslim or Croat residents and reputedly receives payment for its services in the form of possessions left behind by those who have been evicted" (Report of 21 February 1994, para. 8). In a report dated 21 April 1995 dedicated to the situation in Banja Luka, the Special Rapporteur observed that since the beginning of the war, there had been a 90 per cent reduction in the local Muslim population (Report of 21 April 1995, para. 4). He noted that a forced labour obligation imposed by the *de facto* authorities in Banja Luka, as well as "the virulence of the ongoing campaign of violence" had resulted in "practically all non-Serbs fervently wishing to leave the Banja Luka area" (Report of 21 April 1995, para. 24). Those leaving Banja Luka were required to pay fees and to relinquish in writing their claim to their homes, without reimbursement (Report of 21 April 1995, para. 26). The displacements were "often very well organized, involving the bussing of people to the Croatian border, and involve[d] large numbers of people" (Report of 4 November 1994, para. 23). According to the Special Rapporteur, "[o]n one day alone in mid-June 1994, some 460 Muslims and Croats were displaced" *(ibid.)*.

330. As regards Bijeljina, the Special Rapporteur observed that, between mid-June and 17 September 1994, some 4,700 non-Serbs were displaced from the Bijeljina and Janja regions. He noted that many of the displaced, "whether forced or choosing to depart, were subject to harassment and theft by the Bosnian Serb forces orchestrating the displacement" (Report of 4 November 1994, para. 21). These reports were confirmed by those of non-governmental organizations based on witness statements taken on the ground (Amnesty International, "Bosnia and Herzegovina: Living for the Day — Forced expulsions from Bijeljina and Janja", December 1994, p. 2).

331. As for Zvornik, the Commission of Experts, relying on a study carried out by the Ludwig Boltzmann Institute of Human Rights based on an evaluation of 500 interviews of individuals who had fled the area, found that a systematic campaign of forced deportation had occurred (Report of the Commission of Experts, Vol. I, Ann. IV, pp. 55 *et seq*). The study observed that Bosnian Muslims obtained an official stamp on their identity card indicating a change of domicile in exchange for transferring their property to an "agency for the exchange of houses" which was subsequently a prerequisite for being able to leave the town (Lud-

wig Boltzmann Institute of Human Rights, "'Ethnic Cleansing Operations' in the northeast Bosnian city of Zvornik from April through June 1992", pp. 28-29). According to the study, forced deportations of Bosnian Muslims began in May/June 1992 by bus to Mali Zvornik and from there to the Bosnian town of Tuzla or to Subotica on the Serbian-Hungarian border (*ibid.*, pp. 28 and 35-36). The Special Rapporteur's report of 10 February 1993 supports this account, stating that deportees from Zvornik had been "ordered, some at gunpoint, to board buses and trucks and later trains", provided with Yugoslav passports and subsequently taken to the Hungarian border to be admitted as refugees (Report of 10 February 1993, para. 99).

332. According to the Trial Chamber of the ICTY in its review of the indictment in the cases against *Karadžić and Mladić*, "[t]housands of civilians were unlawfully expelled or deported to other places inside and outside the Republic of Bosnia and Herzegovina" and "[t]he result of these expulsions was the partial or total elimination of Muslims and Bosnian Croats in some of [the] Bosnian Serb-held regions of Bosnia and Herzegovina". The Chamber further stated that "[i]n the municipalities of Prijedor, Foča, Vlasenica, Brčko and Bosanski Šamac, to name but a few, the once non-Serbian majority was systematically exterminated or expelled by force or intimidation" (*Karadžić and Mladić*, IT-95-5-R61 and IT-95-18-R61, Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, para. 16).

333. The Respondent argues that displacements of populations may be necessary according to the obligations set down in Articles 17 and 49, paragraph 2, of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, for instance if the security of the population or imperative military reasons so demand. It adds that the displacement of populations has always been a way of settling certain conflicts between opposing parties and points to a number of examples of forced population displacements in history following an armed conflict. The Respondent also argues that the mere expulsion of a group cannot be characterized as genocide, but that, according to the ICTY Judgment in the *Stakić* case, "[a] clear distinction must be drawn between physical destruction and mere dissolution of a group" and "[t]he expulsion of a group or part of a group does not in itself suffice for genocide" (*Stakić*, IT-97-24-T, Trial Chamber Judgment, 31 July 2003, para. 519).

334. The Court considers that there is persuasive and conclusive evidence that deportations and expulsions of members of the protected group occurred in Bosnia and Herzegovina. With regard to the Respondent's argument that in time of war such deportations or expulsions may be justified under the Geneva Convention, or may be a normal way of settling a conflict, the Court would observe that no such justification

could be accepted in the face of proof of specific intent *(dolus specialis)*. However, even assuming that deportations and expulsions may be categorized as falling within Article II, paragraph *(c)*, of the Genocide Convention, the Court cannot find, on the basis of the evidence presented to it, that it is conclusively established that such deportations and expulsions were accompanied by the intent to destroy the protected group in whole or in part (see paragraph 190 above).

*Destruction of historical, religious and cultural property*

335. The Applicant claims that throughout the conflict in Bosnia and Herzegovina, Serb forces engaged in the deliberate destruction of historical, religious and cultural property of the protected group in "an attempt to wipe out the traces of their very existence".

336. In the *Tadić* case, the ICTY found that "[n]on-Serb cultural and religious symbols throughout the region were targeted for destruction" in the Banja Luka area (*Tadić*, IT-94-1-T, Trial Chamber Judgment, 7 May 1997, para. 149). Further, in reviewing the indictments of Karadžić and Mladić, the Trial Chamber stated that:

> "Throughout the territory of Bosnia and Herzegovina under their control, Bosnian Serb forces . . . destroyed, quasi-systematically, the Muslim and Catholic cultural heritage, in particular, sacred sites. According to estimates provided at the hearing by an expert witness, Dr. Kaiser, a total of 1.123 mosques, 504 Catholic churches and five synagogues were destroyed or damaged, for the most part, in the absence of military activity or after the cessation thereof.
>
> This was the case in the destruction of the entire Islamic and Catholic heritage in the Banja Luka area, which had a Serbian majority and the nearest area of combat to which was several dozen kilometres away. All of the mosques and Catholic churches were destroyed. Some mosques were destroyed with explosives and the ruins were then levelled and the rubble thrown in the public dumps in order to eliminate any vestige of Muslim presence.
>
> Aside from churches and mosques, other religious and cultural symbols like cemeteries and monasteries were targets of the attacks." (*Karadžić and Mladić*, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, para. 15.)

In the *Brđanin* case, the Trial Chamber was "satisfied beyond reasonable doubt that there was wilful damage done to both Muslim and Roman Catholic religious buildings and institutions in the relevant municipalities by Bosnian Serb forces" (*Brđanin*, IT-99-36-T, Judgment, 1 September 2004, paras. 640 and 658). On the basis of the findings regarding a number of incidents in various regions of Bosnia and Herzegovina, the

Trial Chamber concluded that a "campaign of devastation of institutions dedicated to religion took place throughout the conflict" but "intensified in the summer of 1992" and that this concentrated period of significant damage was "indicative that the devastation was targeted, controlled and deliberate" (*Brđanin*, IT-99-36-T, paras. 642-657). For instance, the Trial Chamber found that the Bosanska Krupa town mosque was mined by Bosnian Serb forces in April 1992, that two mosques in Bosanski Petrovac were destroyed by Bosnian Serb forces in July 1992 and that the mosques in Staro Šipovo, Bešnjevo and Pljeva were destroyed on 7 August 1992 (*ibid.*, paras. 644, 647 and 656).

337. The Commission of Experts also found that religious monuments especially mosques and churches had been destroyed by Bosnian Serb forces (Report of the Commission of Experts, Vol. I, Ann. IV, pp. 5, 9, 21 ff.). In its report on the Prijedor region, the Commission found that at least five mosques and associated buildings in Prijedor town had been destroyed and noted that it was claimed that all 16 mosques in the Kozarac area had been destroyed and that not a single mosque, or other Muslim religious building, remained intact in the Prijedor region (Report of the Commission of Experts, Vol. I, Ann. V, p. 106). The report noted that those buildings were "allegedly not desecrated, damaged and destroyed for any military purpose nor as a side-effect of the military operations as such" but rather that the destruction "was due to later separate operations of dynamiting" *(ibid.)*.

338. The Special Rapporteur found that, during the conflict, "many mosques, churches and other religious sites, including cemeteries and monasteries, have been destroyed or profaned" (Report of 17 November 1992, para. 26). He singled out the "systematic destruction and profanation of mosques and Catholic churches in areas currently or previously under [Bosnian Serb] control" (Report of 17 November 1992, para. 26).

339. Bosnia and Herzegovina called as an expert Mr. András Riedlmayer, who had carried out a field survey on the destruction of cultural heritage in 19 municipalities in Bosnia and Herzegovina for the Prosecutor of the ICTY in the *Milošević* case and had subsequently studied seven further municipalities in two other cases before the ICTY ("Destruction of Cultural Heritage in Bosnia and Herzegovina, 1992-1996: A Post-war Survey of Selected Municipalities", *Milošević*, IT-02-54-T, Exhibit Number P486). In his report prepared for the *Milošević* case, Mr. Riedlmayer documented 392 sites, 60 per cent of which were inspected first hand while for the other 40 per cent his assessment was based on photographs and information obtained from other sources judged to be reliable and where there was corroborating documentation (Riedlmayer Report, p. 5).

340. The report compiled by Mr. Riedlmayer found that of the 277 mosques surveyed, none were undamaged and 136 were almost or entirely destroyed (Riedlmayer Report, pp. 9-10). The report found that:

> "The damage to these monuments was clearly the result of attacks directed against them, rather than incidental to the fighting. Evidence of this includes signs of blast damage indicating explosives placed inside the mosques or inside the stairwells of minarets; many mosques [were] burnt out. In a number of towns, including Bijeljina, Janja (Bijeljina municipality), Foča, Banja Luka, Sanski Most, Zvornik and others, the destruction of mosques took place while the area was under the control of Serb forces, at times when there was no military action in the immediate vicinity." (*Ibid.*, p. 11.)

The report also found that, following the destruction of mosques:

> "the ruins [of the mosques] were razed and the sites levelled with heavy equipment, and all building materials were removed from the site . . . Particularly well-documented instances of this practice include the destruction and razing of 5 mosques in the town of Bijeljina; of 2 mosques in the town of Janja (in Bijeljina municipality); of 12 mosques and 4 turbes in Banja Luka; and of 3 mosques in the city of Brčko." (*Ibid.*, p. 12.)

Finally, the Report noted that the sites of razed mosques had been "turned into rubbish tips, bus stations, parking lots, automobile repair shops, or flea markets" (*ibid.*, p. 14), for example, a block of flats and shops had been erected on the site of the Zamlaz Mosque in Zvornik and a new Serbian Orthodox church was built on the site of the destroyed Divic Mosque (*ibid.*, p. 14).

341. Mr. Riedlmayer's report together with his testimony before the Court and other corroborative sources detail the destruction of the cultural and religious heritage of the protected group in numerous locations in Bosnia and Herzegovina. For instance, according to the evidence before the Court, 12 of the 14 mosques in Mostar were destroyed or damaged and there are indications from the targeting of the minaret that the destruction or damage was deliberate (Council of Europe, *Information Report: The Destruction by War of the Cultural Heritage in Croatia and Bosnia-Herzegovina*, Parliamentary Assembly doc. 6756, 2 February 1993, paras. 129 and 155). In Foča, the town's 14 historic mosques were allegedly destroyed by Serb forces. In Banja Luka, all 16 mosques were destroyed by Serb forces including the city's two largest mosques,

the Ferhadija Mosque (built in 1578) and the Arnaudija Mosque (built in 1587) (United States Department of State, Bureau of Public Affairs, *Dispatch*, 26 July 1993, Vol. 4, No. 30, pp. 547-548; "War Crimes in Bosnia-Herzegovina: UN Cease-Fire Won't Help Banja Luka", Human Rights Watch/Helsinki Watch, June 1994, Vol. 6, No. 8, pp. 15-16; The Humanitarian Law Centre, Spotlight Report, No. 14, August 1994, pp. 143-144).

342. The Court notes that archives and libraries were also subjected to attacks during the war in Bosnia and Herzegovina. On 17 May 1992, the Institute for Oriental Studies in Sarajevo was bombarded with incendiary munitions and burnt, resulting in the loss of 200,000 documents including a collection of over 5,000 Islamic manuscripts (Riedlmayer Report, p. 18; Council of Europe, Parliamentary Assembly; Second Information Report on War Damage to the Cultural Heritage in Croatia and Bosnia-Herzegovina, doc. 6869, 17 June 1993, p. 11, Ann. 38). On 25 August 1992, Bosnia's National Library was bombarded and an estimated 1.5 million volumes were destroyed (Riedlmayer Report, p. 19). The Court observes that, although the Respondent considers that there is no certainty as to who shelled these institutions, there is evidence that both the Institute for Oriental Studies in Sarajevo and the National Library were bombarded from Serb positions.

343. The Court notes that, in cross-examination of Mr. Riedlmayer, counsel for the Respondent pointed out that the municipalities included in Mr. Riedlmayer's report only amounted to 25 per cent of the territory of Bosnia and Herzegovina. Counsel for the Respondent also called into question the methodology used by Mr. Riedlmayer in compiling his report. However, having closely examined Mr. Riedlmayer's report and having listened to his testimony, the Court considers that Mr. Riedlmayer's findings do constitute persuasive evidence as to the destruction of historical, cultural and religious heritage in Bosnia and Herzegovina albeit in a limited geographical area.

344. In light of the foregoing, the Court considers that there is conclusive evidence of the deliberate destruction of the historical, cultural and religious heritage of the protected group during the period in question. The Court takes note of the submission of the Applicant that the destruction of such heritage was "an essential part of the policy of ethnic purification" and was "an attempt to wipe out the traces of [the] very existence" of the Bosnian Muslims. However, in the Court's view, the destruction of historical, cultural and religious heritage cannot be considered to constitute the deliberate infliction of conditions of life calculated to bring about the physical destruction of the group. Although such destruction may be highly significant inasmuch as it is directed to the elimination of all traces of the cultural or religious presence of a group,

and contrary to other legal norms, it does not fall within the categories of acts of genocide set out in Article II of the Convention. In this regard, the Court observes that, during its consideration of the draft text of the Convention, the Sixth Committee of the General Assembly decided not to include cultural genocide in the list of punishable acts. Moreover, the ILC subsequently confirmed this approach, stating that:

> "As clearly shown by the preparatory work for the Convention . . ., the destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group." (Report of the International Law Commission on the work of its Forty-eighth Session, *Yearbook of the International Law Commission 1996*, Vol. II, Part Two, pp. 45-46, para. 12.)

Furthermore, the ICTY took a similar view in the *Krstić* case, finding that even in customary law, "despite recent developments", the definition of acts of genocide is limited to those seeking the physical or biological destruction of a group (*Krstić*, IT-98-33-T, Trial Chamber Judgment, 2 August 2001, para. 580). The Court concludes that the destruction of historical, religious and cultural heritage cannot be considered to be a genocidal act within the meaning of Article II of the Genocide Convention. At the same time, it also endorses the observation made in the *Krstić* case that "where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group" *(ibid.)*.

*Camps*

345. The Court notes that the Applicant has presented substantial evidence as to the conditions of life in the detention camps and much of this evidence has already been discussed in the sections regarding Articles II *(a)* and *(b)*. The Court will briefly examine the evidence presented by the Applicant which relates specifically to the conditions of life in the principal camps.

(a) *Drina River Valley*

(i) *Sušica camp*

346. In the Sentencing Judgment in the case of Dragan Nikolić, the Commander of Sušica camp, the ICTY found that he subjected detainees to inhumane living conditions by depriving them of adequate food, water, medical care, sleeping and toilet facilities (*Nikolić*, IT-94-2-S, Sentencing Judgment, 18 December 2003, para. 69).

(ii) *Foča Kazneno-Popravní Dom camp*

347. In the *Krnojelac* case, the ICTY Trial Chamber made the following findings regarding the conditions at the camp:

> "the non-Serb detainees were forced to endure brutal and inadequate living conditions while being detained at the KP Dom, as a result of which numerous individuals have suffered lasting physical and psychological problems. Non-Serbs were locked in their rooms or in solitary confinement at all times except for meals and work duty, and kept in overcrowded rooms even though the prison had not reached its capacity. Because of the overcrowding, not everyone had a bed or even a mattress, and there were insufficient blankets. Hygienic conditions were poor. Access to baths or showers, with no hot water, was irregular at best. There were insufficient hygienic products and toiletries. The rooms in which the non-Serbs were held did not have sufficient heating during the harsh winter of 1992. Heaters were deliberately not placed in the rooms, windowpanes were left broken and clothes made from blankets to combat the cold were confiscated. Non-Serb detainees were fed starvation rations leading to severe weight loss and other health problems. They were not allowed to receive visits after April 1992 and therefore could not supplement their meagre food rations and hygienic supplies". (*Krnojelac*, IT-97-25-T, Judgment, 15 March 2002, para. 440.)

(b) *Prijedor*

(i) *Omarska camp*

348. In the Trial Judgment in the *Kvočka et al.* case, the ICTY Trial Chamber provided the following description of the poor conditions in the Omarska camp based on the accounts of detainees:

> "Detainees were kept in inhuman conditions and an atmosphere of extreme mental and physical violence pervaded the camp. Intimidation, extortion, beatings, and torture were customary practices. The arrival of new detainees, interrogations, mealtimes, and use of the toilet facilities provided recurrent opportunities for abuse. Outsiders entered the camp and were permitted to attack the detainees at random and at will . . .
>
> . . . . . .
>
> The Trial Chamber finds that the detainees received poor quality food that was often rotten or inedible, caused by the high temperatures and sporadic electricity during the summer of 1992. The food

was sorely inadequate in quantity. Former detainees testified of the acute hunger they suffered in the camp: most lost 25 to 35 kilograms in body weight during their time at Omarska; some lost considerably more." (*Kvočka et al.*, IT-98-30/1-T, Trial Chamber Judgment, 2 November 2001, paras. 45 and 55.)

(ii) *Keraterm camp*

349. The *Stakić* Trial Judgment contained the following description of conditions in the Keraterm camp based on multiple witness accounts:

"The detainees slept on wooden pallets used for the transport of goods or on bare concrete in a big storage room. The conditions were cramped and people often had to sleep on top of each other. In June 1992, Room 1, which according to witness statements was slightly larger than Courtroom 2 of this Tribunal (98.6 $m^2$), held 320 people and the number continued to grow. The detainees were given one meal a day, made up of two small slices of bread and some sort of stew. The rations were insufficient for the detainees. Although families tried to deliver food and clothing every day they rarely succeeded. The detainees could see their families walking to the camp and leaving empty-handed, so in all likelihood someone at the gates of the camp took the food and prevented it from being distributed to the detainees." (*Stakić*, IT-97-24-T, Trial Chamber Judgment, 31 July 2003, para. 163.)

(iii) *Trnopolje camp*

350. With respect to the Trnopolje camp, the *Stakić* Trial Judgment described the conditions as follows, noting that they were slightly better than at Omarska and Keraterm:

"The detainees were provided with food at least once a day and, for some time, the families of detainees were allowed to bring food. However the quantity of food available was insufficient and people often went hungry. Moreover, the water supply was insufficient and the toilet facilities inadequate. The majority of the detainees slept in the open air. Some devised makeshift . . . shelters of blankets and plastic bags. While clearly inadequate, the conditions in the Trnopolje camp were not as appalling as those that prevailed in Omarska and Keraterm." (*Ibid.*, para. 190.)

(c) *Banja Luka*

*Manjača camp*

351. According to ICTY Trial Chamber in the *Plavšić* Sentencing Judgment:

> "the sanitary conditions in Manjača were 'disastrous . . . inhuman and really brutal': the concept of sanitation did not exist. The temperature inside was low, the inmates slept on the concrete floor and they relieved themselves in the compound or in a bucket placed by the door at night. There was not enough water, and any water that became available was contaminated. In the first three months of Adil Draganović's detention, Manjača was a 'camp of hunger' and when there was food available, it was of a very poor quality. The inmates were given two small meals per day, which usually consisted of half a cup of warm tea, which was more like warm water, and a small piece of thin, 'transparent' bread. Between two and a half thousand men there were only 90 loaves of bread, with each loaf divided into 20 or 40 pieces. Most inmates lost between 20 and 30 kilograms of body weight while they were detained at Manjača. The witness believes that had the ICRC and UNHCR not arrived, the inmates would have died of starvation." (*Plavšić*, IT-00-39-S and 40/1-S, Sentencing Judgment, 27 February 2003, para. 48.)

(d) *Bosanski Šamac*

352. In its Judgment in the *Simić* case, the Trial Chamber made the following findings:

> "the detainees who were imprisoned in the detention centres in Bosanski Šamac were confined under inhumane conditions. The prisoners were subjected to humiliation and degradation. The forced singing of 'Chetnik' songs and the verbal abuse of being called 'ustasha' or 'balija' were forms of such abuse and humiliation of the detainees. They did not have sufficient space, food or water. They suffered from unhygienic conditions, and they did not have appropriate access to medical care. These appalling detention conditions, the cruel and inhumane treatment through beatings and the acts of torture caused severe physical suffering, thus attacking the very fundamentals of human dignity . . . This was done because of the non-Serb ethnicity of the detainees." (*Simić*, IT-95-9-T, Judgment, 17 October 2003, para. 773.)

353. The Respondent does not deny that the camps in Bosnia and Herzegovina were in breach of humanitarian law and, in most cases, in breach of the law of war. However, it notes that, although a number of

detention camps run by the Serbs in Bosnia and Herzegovina were the subject of investigation and trials at the ICTY, no conviction for genocide was handed down on account of any criminal acts committed in those camps. With specific reference to the Manjača camp, the Respondent points out that the Special Envoy of the United Nations Secretary-General visited the camp in 1992 and found that it was being run correctly and that a Muslim humanitarian organization also visited the camp and found that "material conditions were poor, especially concerning hygiene [b]ut there were no signs of maltreatment or execution of prisoners".

354. On the basis of the elements presented to it, 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)*.

* *

### *(8) Article II* (d)*: Imposing Measures to Prevent Births within the Protected Group*

355. The Applicant invoked several arguments to show that measures were imposed to prevent births, contrary to the provision of Article II, paragraph *(d)*, of the Genocide Convention. First, the Applicant claimed that the

> "forced separation of male and female Muslims in Bosnia and Herzegovina, as systematically practised when various municipalities were occupied by the Serb forces . . . in all probability entailed a decline in the birth rate of the group, given the lack of physical contact over many months".

The Court notes that no evidence was provided in support of this statement.

356. Secondly, the Applicant submitted that rape and sexual violence against women led to physical trauma which interfered with victims' reproductive functions and in some cases resulted in infertility. However, the only evidence adduced by the Applicant was the indictment in the *Gagović* case before the ICTY in which the Prosecutor stated that one witness could no longer give birth to children as a result of the sexual abuse she suffered (*Gagović et al.*, IT-96-23-I, Initial Indictment, 26 June 1996, para. 7.10). In the Court's view, an indictment by the Prosecutor

does not constitute persuasive evidence (see paragraph 217 above). Moreover, it notes that the *Gagović* case did not proceed to trial due to the death of the accused.

357. Thirdly, the Applicant referred to sexual violence against men which prevented them from procreating subsequently. In support of this assertion, the Applicant noted that, in the *Tadić* case, the Trial Chamber found that, in Omarska camp, the prison guards forced one Bosnian Muslim man to bite off the testicles of another Bosnian Muslim man (*Tadić*, IT-94-1-T, Judgment, 7 May 1997, para. 198). The Applicant also cited a report in the newspaper, *Le Monde*, on a study by the World Health Organization and the European Union on sexual assaults on men during the conflict in Bosnia and Herzegovina, which alleged that sexual violence against men was practically always accompanied by threats to the effect that the victim would no longer produce Muslim children. The article in *Le Monde* also referred to a statement by the President of a non-governmental organization called the Medical Centre for Human Rights to the effect that approximately 5,000 non-Serb men were the victims of sexual violence. However, the Court notes that the article in *Le Monde* is only a secondary source. Moreover, the results of the World Health Organization and European Union study were only preliminary, and there is no indication as to how the Medical Centre for Human Rights arrived at the figure of 5,000 male victims of sexual violence.

358. Fourthly, the Applicant argued that rape and sexual violence against men and women led to psychological trauma which prevented victims from forming relationships and founding a family. In this regard, the Applicant noted that in the *Akayesu* case, the ICTR considered that "rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate" (*Akayesu*, ICTR-96-4-T, Trial Chamber Judgment, 2 September 1998, para. 508). However, the Court notes that the Applicant presented no evidence that this was the case for women in Bosnia and Herzegovina.

359. Fifthly, the Applicant considered that Bosnian Muslim women who suffered sexual violence might be rejected by their husbands or not be able to find a husband. Again, the Court notes that no evidence was presented in support of this statement.

360. The Respondent considers that the Applicant "alleges no fact, puts forward no serious argument, and submits no evidence" for its allegations that rapes were committed in order to prevent births within a group and notes that the Applicant's contention that there was a decline in births within the protected group is not supported by any evidence concerning the birth rate in Bosnia and Herzegovina either before or after the war.

361. Having carefully examined the arguments of the Parties, the Court finds that the evidence placed before it by the Applicant does not enable it to conclude that Bosnian Serb forces committed acts which could be qualified as imposing measures to prevent births in the protected group within the meaning of Article II *(d)* of the Convention.

* *

*(9) Article II* (e)*: Forcibly Transferring Children of the Protected Group to Another Group*

362. The Applicant claims that rape was used "as a way of affecting the demographic balance by impregnating Muslim women with the sperm of Serb males" or, in other words, as "procreative rape". The Applicant argues that children born as a result of these "forced pregnancies" would not be considered to be part of the protected group and considers that the intent of the perpetrators was to transfer the unborn children to the group of Bosnian Serbs.

363. As evidence for this claim, the Applicant referred to a number of sources including the following. In the indictment in the *Gagović et al.* case, the Prosecutor alleged that one of the witnesses was raped by two Bosnian Serb soldiers and that "[b]oth perpetrators told her that she would now give birth to Serb babies" (*Gagović et al.*, IT-96-23-I, Initial Indictment, 26 June 1996, para. 9.3). However, as in paragraph 356 above, the Court notes that an indictment cannot constitute persuasive evidence for the purposes of the case now before it and that the *Gagović* case did not proceed to trial. The Applicant further referred to the Report of the Commission of Experts which stated that one woman had been detained and raped daily by three or four soldiers and that "[s]he was told that she would give birth to a chetnik boy" (Report of the Commission of Experts, Vol. I, p. 59, para. 248).

364. The Applicant also cited the Review of the Indictment in the *Karadžić and Mladić* cases in which the Trial Chamber stated that "[s]ome camps were specially devoted to rape, with the aim of forcing the birth of Serbian offspring, the women often being interned until it was too late to undergo an abortion" and that "[i]t would seem that the aim of many rapes was enforced impregnation" (*Karadžić and Mladić*, IT-95-5-R61 and IT-95-18-R61, Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, para. 64). However, the Court notes that this finding of the Trial Chamber was based only on the testimony of one *amicus curiae* and on the above-mentioned incident reported by the Commission of Experts (*ibid.*, para. 64, footnote 154).

365. Finally, the Applicant noted that in the *Kunarac* case, the ICTY Trial Chamber found that, after raping one of the witnesses, the accused had told her that "she would now carry a Serb baby and would not know who the father would be" (*Kunarac et al.* cases, Nos. IT-96-23-T and IT-96-23/1-T, Judgment, 22 February 2001, para. 583).

366. The Respondent points out that Muslim women who had been raped gave birth to their babies in Muslim territory and consequently the babies would have been brought up not by Serbs but, on the contrary, by Muslims. Therefore, in its view, it cannot be claimed that the children were transferred from one group to the other.

367. The Court, on the basis of the foregoing elements, finds that the evidence placed before it by the Applicant does not establish that there was any form of policy of forced pregnancy, nor that there was any aim to transfer children of the protected group to another group within the meaning of Article II *(e)* of the Convention.

* *

*(10) Alleged Genocide outside Bosnia and Herzegovina*

368. In the submissions in its Reply, the Applicant has claimed that the Respondent has violated its obligations under the Genocide Convention "by destroying in part, and attempting to destroy in whole, national, ethnical or religious groups within the, *but not limited to* the, territory of Bosnia and Herzegovina, including in particular the Muslim population . . ." (emphasis added). The Applicant devoted a section in its Reply to the contention that acts of genocide, for which the Respondent was allegedly responsible, also took place on the territory of the FRY; these acts were similar to those perpetrated on Bosnian territory, and the constituent elements of "ethnic cleansing as a policy" were also found in the territory of the FRY. This question of genocide committed within the FRY was not actively pursued by the Applicant in the course of the oral argument before the Court; however, the submission quoted above was maintained in the final submissions presented at the hearings, and the Court must therefore address it. It was claimed by the Applicant that the genocidal policy was aimed not only at citizens of Bosnia and Herzegovina, but also at Albanians, Sandžak Muslims, Croats, Hungarians and other minorities; however, the Applicant has not established to the satisfaction of the Court any facts in support of that allegation. The Court has already found (paragraph 196 above) that, for purposes of establishing genocide, the targeted group must be defined positively, and not as a "non-Serb" group.

369. The Applicant has not in its arguments dealt separately with the question of the nature of the specific intent *(dolus specialis)* alleged to accompany the acts in the FRY complained of. It does not appear to be

contending that actions attributable to the Respondent, and committed on the territory of the FRY, were accompanied by a specific intent *(dolus specialis)*, peculiar to or limited to that territory, in the sense that the objective was to eliminate the presence of non-Serbs in the FRY itself. The Court finds in any event that the evidence offered does not in any way support such a contention. What the Applicant has sought to do is to convince the Court of a pattern of acts said to evidence specific intent *(dolus specialis)* inspiring the actions of Serb forces in Bosnia and Herzegovina, involving the destruction of the Bosnian Muslims in that territory; and that same pattern lay, it is contended, behind the treatment of Bosnian Muslims in the camps established in the FRY, so that that treatment supports the pattern thesis. The Applicant has emphasized that the same treatment was meted out to those Bosnian Muslims as was inflicted on their compatriots in Bosnia and Herzegovina. The Court will thus now turn to the question whether the specific intent *(dolus specialis)* can be deduced, as contended by the Applicant, from the pattern of actions against the Bosnian Muslims taken as a whole.

* *

*(11) The Question of Pattern of Acts Said to Evidence an Intent to Commit Genocide*

370. In the light of its review of the factual evidence before it of the atrocities committed in Bosnia and Herzegovina in 1991-1995, the Court has concluded that, save for the events of July 1995 at Srebrenica, the necessary intent required to constitute genocide has not been conclusively shown in relation to each specific incident. The Applicant however relies on the alleged existence of an overall plan to commit genocide, indicated by the pattern of genocidal or potentially acts of genocide committed throughout the territory, against persons identified everywhere and in each case on the basis of their belonging to a specified group. In the case, for example, of the conduct of Serbs in the various camps (described in paragraphs 252-256, 262-273, 307-310 and 312-318 above), it suggests that "[t]he genocidal intent of the Serbs becomes particularly clear in the description of camp practices, due to their striking similarity all over the territory of Bosnia and Herzegovina". Drawing attention to the similarities between actions attributed to the Serbs in Croatia, and the later events at, for example, Kosovo, the Applicant observed that

> "it is not surprising that the picture of the takeovers and the following human and cultural destruction looks indeed similar from 1991

through 1999. These acts were perpetrated as the expression of one single project, which basically and effectively included the destruction in whole or in part of the non-Serb group, wherever this ethnically and religiously defined group could be conceived as obstructing the all-Serbs-in-one-State group concept."

371. 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. In the absence of an official statement of aims reflecting such an intent, the Applicant contends that the specific intent *(dolus specialis)* of those directing the course of events is clear from the consistency of practices, particularly in the camps, showing that the pattern was of acts committed "within an organized institutional framework". However, something approaching an official statement of an overall plan is, the Applicant contends, to be found in the Decision on Strategic Goals issued on 12 May 1992 by Momčilo Krajišnik as the President of the National Assembly of Republika Srpska, published in the *Official Gazette* of the Republika Srpska, and the Court will first consider what significance that Decision may have in this context. The English translation of the Strategic Goals presented by the Parties during the hearings, taken from the Report of Expert Witness Donia in the *Milošević* case before the ICTY, Exhibit No. 537, reads as follows:

"DECISION ON THE STRATEGIC GOALS OF THE SERBIAN PEOPLE IN BOSNIA AND HERZEGOVINA

The Strategic Goals, i.e., the priorities, of the Serbian people in Bosnia and Herzegovina are:

1. Separation as a state from the other two ethnic communities.
2. A corridor between Semberija and Krajina.
3. The establishment of a corridor in the Drina River valley, i.e., the elimination of the border between Serbian states.
4. The establishment of a border on the Una and Neretva rivers.
5. The division of the city of Sarajevo into a Serbian part and a Muslim part, and the establishment of effective state authorities within each part.
6. An outlet to the sea for the Republika Srpska."

While the Court notes that this document did not emanate from the Government of the Respondent, evidence before the Court of intercepted exchanges between President Milošević of Serbia and President Karadžić of the Republika Srpska is sufficient to show that the objectives defined represented their joint view.

372. The Parties have drawn the Court's attention to statements in the Assembly by President Karadžić which appear to give conflicting interpretations of the first and major goal of these objectives, the first on the day they were adopted, the second two years later. On that first occasion, the Applicant contended, he said: "It would be much better to solve this situation by political means. It would be best if a truce could be established right away and the borders set up, even if we lose something." Two years later he said (according to the translation of his speech supplied by the Applicant):

> "We certainly know that we must give up something — that is beyond doubt in so far as we want to achieve our first strategic goal: to drive our enemies by the force of war from their homes, that is the Croats and Muslims, so that we will no longer be together [with them] in a State."

The Respondent disputes the accuracy of the translation, claiming that the stated goal was not "to drive our enemies by the force of war from their homes" but "to free the homes from the enemy". The 1992 objectives do not include the elimination of the Bosnian Muslim population. The 1994 statement even on the basis of the Applicant's translation, however shocking a statement, does not necessarily involve the intent to destroy in whole or in part the Muslim population in the enclaves. The Applicant's argument does not come to terms with the fact that an essential motive of much of the Bosnian Serb leadership — to create a larger Serb State, by a war of conquest if necessary — did not necessarily require the destruction of the Bosnian Muslims and other communities, but their expulsion. The 1992 objectives, particularly the first one, were capable of being achieved by the displacement of the population and by territory being acquired, actions which the Respondent accepted (in the latter case at least) as being unlawful since they would be at variance with the inviolability of borders and the territorial integrity of a State which had just been recognized internationally. It is significant that in cases in which the Prosecutor has put the Strategic Goals in issue, the ICTY has not characterized them as genocidal (see *Brđanin*, IT-99-36-T, Trial Chamber Judgment, 1 September 2004, para. 303, and *Stakić*, IT-97-24-T, Trial Chamber Judgment, 31 July 2003, paras. 546-561 (in particular para. 548)). The Court does not see the 1992 Strategic Goals as establishing the specific intent.

373. Turning now to the Applicant's contention that the very pattern of the atrocities committed over many communities, over a lengthy period, focused 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 demon-

strated 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.

374. Furthermore, and again significantly, the proposition is not consistent with the findings of the ICTY relating to genocide or with the actions of the Prosecutor, including decisions not to charge genocide offences in possibly relevant indictments, and to enter into plea agreements, as in the *Plavšić* and *Sikirica et al.* cases (IT-00-40 and IT-95-8), by which the genocide-related charges were withdrawn. Those actions of the Prosecution and the Tribunal can be conveniently enumerated here. Prosecutions for genocide and related crimes before the ICTY can be grouped in the following way:

*(a)* convictions in respect of charges involving genocide relating to Srebrenica in July 1995: *Krstić* (IT-98-33) (conviction of genocide at trial was reduced to aiding and abetting genocide on appeal) and *Blagojević* (IT-02-60) (conviction of complicity in genocide "through aiding and abetting" at trial is currently on appeal);

*(b)* plea agreements in which such charges were withdrawn, with the accused pleading guilty to crimes against humanity: *Obrenović* (IT-02-60/2) and *Momir Nikolić* (IT-02-60/1);

*(c)* acquittals on genocide-related charges in respect of events occurring elsewhere: *Krajišnik* (paragraph 219 above) (on appeal), *Jelisić* (IT-95-10) (completed), *Stakić* (IT-97-24) (completed), *Brđanin* (IT-99-36) (on appeal) and *Sikirica* (IT-95-8) (completed);

*(d)* cases in which genocide-related charges in respect of events occurring elsewhere were withdrawn: *Plavšić* (IT-00-39 and 40/1) (plea agreement), *Župljanin* (IT-99-36) (genocide-related charges withdrawn) and *Mejakić* (IT-95-4) (genocide-related charges withdrawn);

*(e)* case in which the indictment charged genocide and related crimes in Srebrenica and elsewhere in which the accused died during the proceedings: *Milošević* (IT-02-54);

*(f)* cases in which indictments charge genocide or related crimes in respect of events occurring elsewhere, in which accused have died before or during proceedings: *Kovačević and Drljača* (IT-97-24) and *Talić* (IT-99-36/1);

*(g)* pending cases in which the indictments charge genocide and related crimes in Srebrenica and elsewhere: *Karadžić and Mladić* (IT-95-5/18); and

*(h)* pending cases in which the indictments charge genocide and related crimes in Srebrenica: *Popović, Beara, Drago Nikolić, Borovčanin, Pandurević and Trbić* (IT-05-88/1) and *Tolimir* (IT-05-88/2).

375. In the cases of a number of accused, relating to events in July 1995 in Srebrenica, charges of genocide or its related acts have not been brought: *Erdemović* (IT-96-22) (completed), *Jokić* (IT-02-60) (on appeal), *Miletić and Gvero* (IT-05-88, part of the *Popović et al.* proceeding referred to in paragraph 374 *(h)* above), *Perišić* (IT-04-81) (pending) and *Stanišić and Simatović* (IT-03-69) (pending).

376. The Court has already concluded above that — save in the case of Srebrenica — the Applicant has not established that any of the widespread and serious atrocities, complained of as constituting violations of Article II, paragraphs *(a)* to *(e)*, of the Genocide Convention, were accompanied by the necessary specific intent *(dolus specialis)* on the part of the perpetrators. It also 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 (paragraph 297 above), in the specific case of the massacres at Srebrenica in July 1995, that acts of genocide were committed in operations led by members of the VRS, the Court now turns to the question whether those acts are attributable to the Respondent.

* * *

## VII. The Question of Responsibility for Events at Srebrenica under Article III, Paragraph *(a)*, of the Genocide Convention

### *(1) The Alleged Admission*

377. 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. The Applicant called attention to the following official 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 (paragraph 289 above). The statement reads as follows:

> "Those who committed the killings in Srebrenica, as well as those who ordered and organized that massacre represented neither Serbia

> nor Montenegro, but an undemocratic regime of terror and death, against whom the majority of citizens of Serbia and Montenegro put up the strongest resistance.
>
> Our condemnation of crimes in Srebrenica does not end with the direct perpetrators. We demand the criminal responsibility of all who committed war crimes, organized them or ordered them, and not only in Srebrenica.
>
> Criminals must not be heroes. Any protection of the war criminals, for whatever reason, is also a crime."

The Applicant requests the Court to declare that this declaration "be regarded as a form of admission and as having decisive probative force regarding the attributability to the Yugoslav State of the Srebrenica massacre".

378. It is for the Court to determine whether the Respondent is responsible for any acts of genocide which may be established. For purposes of a finding of this kind 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 (cf. *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, pp. 263 ff., paras. 32 ff., and *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, pp. 465 ff., paras. 27 ff.; *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, pp. 573-574, paras. 38-39), 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 of 15 June 2005 was of a political nature; it was clearly not intended as an admission, which would have had a legal effect in complete contradiction to the submissions made by the Respondent before this Court, both at the time of the declaration and subsequently. The Court therefore does not find the statement of 15 June 2005 of assistance to it in determining the issues before it in the case.

* *

*(2) The Test of Responsibility*

379. In view of the foregoing conclusions, the Court now must 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. For the reasons set out above, those massacres constituted the crime of genocide within the meaning of the Convention. For this purpose, the Court may be required to consider the following three issues in turn. First, it needs to be determined whether the acts of genocide could be attributed to the Respondent under the rules of customary international law of State responsibility; this means ascertaining whether the acts were committed by persons or organs whose conduct is attributable, specifically in the case of the events at Srebrenica, to the Respondent. Second, the Court

will need to ascertain whether acts of the kind referred to in Article III of the Convention, other than genocide itself, were committed by persons or organs whose conduct is attributable to the Respondent under those same rules of State responsibility: that is to say, the acts referred to in Article III, paragraphs *(b)* to *(e)*, one of these being complicity in genocide. 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.

380. These three issues must be addressed in the order set out above, because they are so interrelated that the answer on one point may affect the relevance or significance of the others. Thus, if and to the extent that consideration of the first issue were to lead to the conclusion that some acts of genocide are attributable to the Respondent, it would be unnecessary to determine whether it may also have incurred responsibility under Article III, paragraphs *(b)* to *(e),* of the Convention for the same acts. Even though it is theoretically possible for the same acts to result in the attribution to a State of acts of genocide (contemplated by Art. III, para. *(a)*), conspiracy to commit genocide (Art. III, para. *(b)*), and direct and public incitement to commit genocide (Art. III, para. *(c)*), there would be little point, where the requirements for attribution are fulfilled under *(a)*, in making a judicial finding that they are also satisfied under *(b)* and *(c)*, since responsibility under *(a)* absorbs that under the other two. The idea of holding the same State responsible by attributing to it acts of "genocide" (Art. III, para. *(a)*), "attempt to commit genocide" (Art. III, para. *(d)*), and "complicity in genocide" (Art. III, para. *(e)*), in relation to the same actions, must be rejected as untenable both logically and legally.

381. On the other hand, there is no doubt that a finding by the Court that no acts that constitute genocide, within the meaning of Article II and Article III, paragraph *(a),* of the Convention, can be attributed to the Respondent will not free the Court from the obligation to determine whether the Respondent's responsibility may nevertheless have been incurred through the attribution to it of the acts, or some of the acts, referred to in Article III, paragraphs *(b)* to *(e)*. In particular, it is clear that acts of complicity in genocide can be attributed to a State to which no act of genocide could be attributed under the rules of State responsibility, the content of which will be considered below.

382. Furthermore, the question whether the Respondent has complied with its obligations to prevent and punish genocide arises in different terms, depending on the replies to the two preceding questions. It is only if the Court answers the first two questions in the negative that it will have to consider whether the Respondent fulfilled its obligation of pre-

vention, in relation to the whole accumulation of facts constituting genocide. If a State is held responsible for an act of genocide (because it was committed by a person or organ whose conduct is attributable to the State), or for one of the other acts referred to in Article III of the Convention (for the same reason), then there is no point in asking whether it complied with its obligation of prevention in respect of the same acts, because logic dictates that a State cannot have satisfied an obligation to prevent genocide in which it actively participated. On the other hand, it is self-evident, as the Parties recognize, that if a State is not responsible for any of the acts referred to in Article III, paragraphs *(a)* to *(e)*, of the Convention, this does not mean that its responsibility cannot be sought for a violation of the obligation to prevent genocide and the other acts referred to in Article III.

383. Finally, it should be made clear that, while, as noted above, a State's responsibility deriving from any of those acts renders moot the question whether it satisfied its obligation of prevention in respect of the same conduct, it does not necessarily render superfluous the question whether the State complied with its obligation to punish the perpetrators of the acts in question. It is perfectly possible for a State to incur responsibility at once for an act of genocide (or complicity in genocide, incitement to commit genocide, or any of the other acts enumerated in Article III) committed by a person or organ whose conduct is attributable to it, and for the breach by the State of its obligation to punish the perpetrator of the act: these are two distinct internationally wrongful acts attributable to the State, and both can be asserted against it as bases for its international responsibility.

384. Having thus explained the interrelationship among the three issues set out above (paragraph 379), the Court will now proceed to consider the first of them. This is the question whether the massacres committed at Srebrenica during the period in question, which constitute the crime of genocide within the meaning of Articles II and III, paragraph *(a)*, of the Convention, are attributable, in whole or in part, to the Respondent. This question has in fact two aspects, which the Court must consider separately. First, it should be ascertained whether the acts committed at Srebrenica were perpetrated by organs of the Respondent, i.e., by persons or entities whose conduct is necessarily attributable to it, because they are in fact the instruments of its action. Next, if the preceding question is answered in the negative, it should be ascertained whether the acts in question were committed by persons who, while not organs of the Respondent, did nevertheless act on the instructions of, or under the direction or control of, the Respondent.

* *

*(3) The Question of Attribution of the Srebrenica Genocide to the Respondent on the Basis of the Conduct of Its Organs*

385. 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. This rule, which is one of customary international law, is reflected in Article 4 of the ILC Articles on State Responsibility as follows:

"*Article 4*

*Conduct of organs of a State*

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State."

386. 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. 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 (see, for example, Security Council resolutions 752 (1992), 757 (1992), 762 (1992), 819 (1993), 838 (1993)). It has however not been shown that there was any such participation in relation to the massacres committed at Srebrenica (see also paragraphs 278 to 297 above). 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.

387. The Applicant has however claimed that all officers in the VRS, including General Mladić, remained under FRY military administration, and that their salaries were paid from Belgrade right up to 2002, and

accordingly contends that these officers "were *de jure* organs of [the FRY], intended by their superiors to serve in Bosnia and Herzegovina with the VRS". On this basis it has been alleged by the Applicant that those officers, in addition to being officers of the VRS, remained officers of the VJ, and were thus *de jure* organs of the Respondent (paragraph 238 above). The Respondent however asserts that only some of the VRS officers were being "administered" by the 30th Personnel Centre in Belgrade, so that matters like their payment, promotion, pension, etc., were being handled from the FRY (paragraph 238 above); and that it has not been clearly established whether General Mladić was one of them. The Applicant has shown that the promotion of Mladić to the rank of Colonel General on 24 June 1994 was handled in Belgrade, but the Respondent emphasizes that this was merely a verification for administrative purposes of a promotion decided by the authorities of the Republika Srpska.

388. 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 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 (cf. paragraph 241 above), and that one of the forms that support took was payment of salaries and other benefits to some officers of the VRS, but this did not automatically make them organs of the FRY. Those officers were appointed to their commands by the President of the Republika Srpska, and were subordinated to the political leadership of the Republika Srpska. In the absence of evidence to the contrary, those officers must be taken to have received their orders from the Republika Srpska or the VRS, not from the FRY. The expression "State organ", as used in customary international law and in Article 4 of the ILC Articles, applies to one or other of the individual or collective entities which make up the organization of the State and act on its behalf (cf. ILC Commentary to Art. 4, para. (1)). The functions of the VRS officers, including General Mladić, were however to act on behalf of the Bosnian Serb authorities, in particular the Republika Srpska, not on behalf of the FRY; they exercised elements of the public authority of the Republika Srpska. 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 therefore such as to lead the Court to modify the conclusion reached in the previous paragraph.

389. The issue also arises as to whether the Respondent might bear responsibility for the acts of the "Scorpions" in the Srebrenica area. In this connection, the Court will consider whether it has been proved that the Scorpions were a *de jure* organ of the Respondent. It is in dispute between the Parties as to when the "Scorpions" became incorporated into the forces of the Respondent. The Applicant has claimed that incorporation occurred by a decree of 1991 (which has not been produced as an Annex). The Respondent states that "these regulations [were] relevant exclusively for the war in Croatia in 1991" and that there is no evidence that they remained in force in 1992 in Bosnia and Herzegovina. The Court observes that, while the single State of Yugoslavia was disintegrating at that time, it is the status of the "Scorpions" in mid-1995 that is of relevance to the present case. In two of the intercepted documents presented by the Applicant (the authenticity of which was queried — see paragraph 289 above), there is reference to the "Scorpions" as "MUP of Serbia" and "a unit of Ministry of Interiors of Serbia". The Respondent identified the senders of these communications, Ljubiša Borovčanin and Savo Cvjetinović, as being "officials of the police forces of Republika Srpska". The Court observes that neither of these communications was addressed to Belgrade. Judging on the basis of these materials, the Court is unable to find that the "Scorpions" 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.

390. The argument of the Applicant however goes beyond mere contemplation of the status, under the Respondent's internal law, of the persons who committed the acts of genocide; it argues that Republika Srpska and the VRS, as well as the paramilitary militias known as the "Scorpions", the "Red Berets", the "Tigers" and the "White Eagles" must be deemed, notwithstanding their apparent status, to have been "*de facto* organs" of the FRY, in particular at the time in question, so that all of their acts, and specifically the massacres at Srebrenica, must be considered attributable to the FRY, just as if they had been organs of that State under its internal law; reality must prevail over appearances. The Respondent rejects this contention, and maintains that these were not *de facto* organs of the FRY.

391. The first issue raised by this argument is whether it is possible in principle to attribute to a State conduct of persons — or groups of persons — who, while they do not have the legal status of State organs, in fact act under such strict control by the State that they must be treated as its organs for purposes of the necessary attribution leading to the State's responsibility for an internationally wrongful act. The Court has in fact already addressed this question, and given an answer to it in principle, in

its Judgment of 27 June 1986 in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* (*Merits, Judgment, I.C.J. Reports 1986*, pp. 62-64). In paragraph 109 of that Judgment the Court stated that it had to

> "determine . . . whether or not the relationship of the *contras* to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the *contras*, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government" (p. 62).

Then, examining the facts in the light of the information in its possession, the Court observed that "there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the *contras* as acting on its behalf" (para. 109), and went on to conclude that "the evidence available to the Court . . . is insufficient to demonstrate [the *contras*'] complete dependence on United States aid", so that the Court was "unable to determine that the *contra* force may be equated for legal purposes with the forces of the United States" (pp. 62-63, para. 110).

392. The passages quoted show that, according to the Court's jurisprudence, 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 such a case, it is appropriate to look beyond legal status alone, in order to grasp the reality of the relationship between the person taking action, and the State to which he is so closely attached as to appear to be nothing more than its agent: any other solution would allow States to escape their international responsibility by choosing to act through persons or entities whose supposed independence would be purely fictitious.

393. However, so to equate persons or entities with State organs when they do not have that status under internal law must be exceptional, for it requires proof of a particularly great degree of State control over them, a relationship which the Court's Judgment quoted above expressly described as "complete dependence". It remains to be determined in the present case whether, at the time in question, 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; it is only if this condition is met that they can be equated with organs of the Respondent for the purposes of its international responsibility.

394. The Court can only answer this question in the negative. At the relevant time, July 1995, 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. While the political, military and logistical relations between the federal authorities in Belgrade and the authorities in Pale, between the Yugoslav army and the VRS, had been strong and close in previous years (see paragraph 238 above), and these ties undoubtedly remained powerful, they were, at least at the relevant time, not such that the Bosnian Serbs' political and military organizations should be equated with organs of the FRY. It is even true that differences over strategic options emerged at the time between Yugoslav authorities and Bosnian Serb leaders; at the very least, these are evidence that the latter had some qualified, but real, margin of independence. Nor, notwithstanding the very important support given by the Respondent to the Republika Srpska, without which it could not have "conduct[ed] its crucial or most significant military and paramilitary activities" (*I.C.J. Reports 1986*, p. 63, para. 111), did this signify a total dependence of the Republika Srpska upon the Respondent.

395. The Court now turns to the question whether the "Scorpions" were in fact acting in complete dependence on the Respondent. The Court has not been presented with materials to indicate this. The Court also notes that, in giving his evidence, General Dannatt, when asked under whose control or whose authority the paramilitary groups coming from Serbia were operating, replied, "they would have been under the command of Mladić and part of the chain of the command of the VRS". The Parties referred the Court to the *Stanišić and Simatović* case (IT-03-69, pending); notwithstanding that the defendants are not charged with genocide in that case, it could have its relevance for illuminating the status of the "Scorpions" as Serbian MUP or otherwise. However, the Court cannot draw further conclusions as this case remains at the indictment stage. In this respect, the Court recalls that it can only form its opinion on the basis of the information which has been brought to its notice at the time when it gives its decision, and which emerges from the pleadings and documents in the case file, and the arguments of the Parties made during the oral exchanges.

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.

* *

*(4) The Question of Attribution of the Srebrenica Genocide to the Respondent on the Basis of Direction or Control*

396. As noted above (paragraph 384), the Court must now determine 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, as the Applicant argues in the alternative; the Respondent denies that such was the case.

397. The Court must emphasize, at this stage in its reasoning, that the question just stated is not the same as those dealt with thus far. It is obvious that it is different from the question whether the persons who committed the acts of genocide had the status of organs of the Respondent under its internal law; nor however, and despite some appearance to the contrary, is it the same as the question whether those persons should be equated with State organs *de facto*, even though not enjoying that status under internal law. The answer to the latter question depends, as previously explained, on whether those persons were in a relationship of such complete dependence on the State that they cannot be considered otherwise than as organs of the State, so that all their actions performed in such capacity would be attributable to the State for purposes of international responsibility. Having answered that question in the negative, the Court now addresses a completely separate issue: whether, in the specific circumstances surrounding the events at Srebrenica the perpetrators of genocide were acting on the Respondent's instructions, or under its direction or control. An affirmative answer to this question would in no way imply that the perpetrators should be characterized as organs of the FRY, or equated with such organs. It would merely mean that the FRY's international responsibility would be incurred owing to the conduct of those of its own organs which gave the instructions or exercised the control resulting in the commission of acts in breach of its international obligations. In other words, it is no longer a question of ascertaining whether the persons who directly committed the genocide were acting as organs of the FRY, or could be equated with those organs — this question having already been answered in the negative. What must be determined is whether FRY organs — incontestably having that status under the FRY's internal law — originated the genocide by issuing instructions to the perpetrators or exercising direction or control, and whether, as a result, the conduct of organs of the Respondent, having been the cause of the commission of acts in breach of its international obligations, constituted a violation of those obligations.

398. On this subject the applicable rule, which is one of customary law of international responsibility, is laid down in Article 8 of the ILC Articles on State Responsibility as follows:

"*Article 8*

*Conduct directed or controlled by a State*

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."

399. 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)* referred to above (paragraph 391). In that Judgment the Court, as noted above, after having rejected the argument that the *contras* were to be equated with organs of the United States because they were "completely dependent" on it, added that the responsibility of the Respondent could still arise if it were proved that it had itself "directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State" (*I.C.J. Reports 1986*, p. 64, para. 115); this led to the following significant conclusion:

"For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed." (*Ibid.*, p. 65.)

400. The test thus formulated differs in two respects from the test — described above — to determine whether a person or entity may be equated with a State organ even if not having that status under internal law. First, in this context it is not necessary to show that the persons who performed the acts alleged to have violated international law were in general in a relationship of "complete dependence" on the respondent State; it has to be proved that they acted in accordance with that State's instructions or under its "effective control". It must however 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.

401. The Applicant has, it is true, contended that the crime of genocide has a particular nature, in that it may be composed of a considerable number of specific acts separate, to a greater or lesser extent, in time and space. According to the Applicant, this particular nature would justify, among other consequences, assessing the "effective control" of the State allegedly responsible, not in relation to each of these specific acts, but in relation to the whole body of operations carried out by the direct perpetrators of the genocide. The Court is however of the view that the particular characteristics of genocide do not justify the Court in departing from the criterion elaborated in the Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* (see paragraph 399 above). The rules

for attributing alleged internationally wrongful conduct to a State do not vary with the nature of the wrongful act in question in the absence of a clearly expressed *lex specialis*. Genocide will be considered as attributable to a State if and to the extent that the physical acts constitutive of genocide that have been committed by organs or persons other than the State's own agents were carried out, wholly or in part, on the instructions or directions of the State, or under its effective control. This is the state of customary international law, as reflected in the ILC Articles on State Responsibility.

402. The Court notes however that the Applicant has further questioned the validity of applying, in the present case, the criterion adopted in the *Military and Paramilitary Activities* Judgment. It has drawn attention to the Judgment of the ICTY Appeals Chamber in the *Tadić* case (IT-94-1-A, Judgment, 15 July 1999). In that case the Chamber did not follow the jurisprudence of the Court in the *Military and Paramilitary Activities* case: it held that the appropriate criterion, applicable in its view both to the characterization of the armed conflict in Bosnia and Herzegovina as international, and to imputing the acts committed by Bosnian Serbs to the FRY under the law of State responsibility, was that of the "overall control" exercised over the Bosnian Serbs by the FRY; and further that that criterion was satisfied in the case (on this point, *ibid.*, para. 145). In other words, the Appeals Chamber took the view that acts committed by Bosnian Serbs could give rise to international responsibility of the FRY on the basis of the overall control exercised by the FRY over the Republika Srpska and the VRS, without there being any need to prove that each operation during which acts were committed in breach of international law was carried out on the FRY's instructions, or under its effective control.

403. The Court has given careful consideration to the Appeals Chamber's reasoning in support of the foregoing conclusion, but finds itself unable to subscribe to the Chamber's view. First, the Court observes that the ICTY was not called upon in the *Tadić* case, nor is it in general called upon, to rule on questions of State responsibility, since its jurisdiction is criminal and extends over persons only. Thus, in that Judgment the Tribunal addressed an issue which was not indispensable for the exercise of its jurisdiction. As stated above, the Court attaches the utmost importance to the factual and legal findings made by the ICTY in ruling on the criminal liability of the accused before it and, in the present case, the Court takes fullest account of the ICTY's trial and appellate judgments dealing with the events underlying the dispute. The situation is not the same for positions adopted by the ICTY on issues of general international law which do not lie within the specific purview of its jurisdiction and, moreover, the resolution of which is not always necessary for deciding the criminal cases before it.

404. This is the case of the doctrine laid down in the *Tadić* Judgment. Insofar as the "overall control" test is employed to determine whether or not an armed conflict is international, which was the sole question which the Appeals Chamber was called upon to decide, it may well be that the test is applicable and suitable; the Court does not however think it appropriate to take a position on the point in the present case, as there is no need to resolve it for purposes of the present Judgment. On the other hand, the ICTY presented the "overall control" test as equally applicable under the law of State responsibility for the purpose of determining — as the Court is required to do in the present case — when a State is responsible for acts committed by paramilitary units, armed forces which are not among its official organs. In this context, the argument in favour of that test is unpersuasive.

405. It should first be observed that logic does not require the same test to be adopted in resolving the two issues, which are very different in nature: the degree and nature of a State's involvement in an armed conflict on another State's territory which is required for the conflict to be characterized as international, can very well, and without logical inconsistency, differ from the degree and nature of involvement required to give rise to that State's responsibility for a specific act committed in the course of the conflict.

406. It must next be noted that the "overall control" test has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf. That is true of acts carried out by its official organs, and also by persons or entities which are not formally recognized as official organs under internal law but which must nevertheless be equated with State organs because they are in a relationship of complete dependence on the State. Apart from these cases, a State's responsibility can be incurred for acts committed by persons or groups of persons — neither State organs nor to be equated with such organs — only if, assuming those acts to be internationally wrongful, they are attributable to it under the rule of customary international law reflected in Article 8 cited above (paragraph 398). This is so where an organ of the State gave the instructions or provided the direction pursuant to which the perpetrators of the wrongful act acted or where it exercised effective control over the action during which the wrong was committed. In this regard the "overall control" test is unsuitable, for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a State's organs and its international responsibility.

407. Thus it is on the basis of its settled jurisprudence that the Court will determine whether the Respondent has incurred responsibility under

the rule of customary international law set out in Article 8 of the ILC Articles on State Responsibility.

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408. The Respondent has emphasized that in the final judgments of the Chambers of the ICTY relating to genocide in Srebrenica, none of its leaders have been found to have been implicated. The Applicant does not challenge that reading, but makes the point that that issue has not been before the ICTY for decision. The Court observes that the ICTY has indeed not up to the present been directly concerned in final judgments with the question whether those leaders might bear responsibility in that respect. The Court notes the fact that the report of the United Nations Secretary-General does not establish any direct involvement by President Milošević with the massacre. The Court has already recorded the contacts between Milošević and the United Nations on 10 and 11 July (paragraph 285). On 14 July, as recorded in the Secretary-General's Report,

> "the European Union negotiator, Mr. Bildt, travelled to Belgrade to meet with President Milošević. The meeting took place at Dobanovci, the hunting lodge outside Belgrade, where Mr. Bildt had met President Milošević and General Mladić one week earlier. According to Mr. Bildt's public account of that second meeting, he pressed the President to arrange immediate access for UNHCR to assist the people of Srebrenica, and for ICRC to start to register those who were being treated by the BSA as prisoners of war. He also insisted that the Netherlands soldiers be allowed to leave at will. Mr. Bildt added that the international community would not tolerate an attack on Goražde, and that a 'green light' would have to be secured for free and unimpeded access to the enclaves. He also demanded that the road between Kiseljak and Sarajevo ('Route Swan') be opened to all non-military transport. President Milošević apparently acceded to the various demands, but also claimed that he did not have control over the matter. Milošević had also apparently explained, earlier in the meeting, that the whole incident had been provoked by escalating Muslim attacks from the enclave, in violation of the 1993 demilitarization agreement.
>
> A few hours into the meeting, General Mladić arrived at Dobanovci. Mr. Bildt noted that General Mladić readily agreed to most of the demands on Srebrenica, but remained opposed to some of the arrangements pertaining to the other enclaves, Sarajevo in particular. Eventually, with President Milošević's intervention, it appeared that an agreement in principle had been reached. It was decided that

another meeting would be held the next day in order to confirm the arrangements. Mr. Bildt had already arranged with Mr. Stoltenberg and Mr. Akashi [the Special Representative of the Secretary-General] that they would join him in Belgrade. He also requested that the UNPROFOR Commander also come to Belgrade in order to finalize some of the military details with Mladić." (A/54/549, paras. 372-373.)

409. By 19 July, on the basis of the Belgrade meeting, Mr. Akashi was hopeful that both President Milošević and General Mladić might show some flexibility. The UNPROFOR Commander met with Mladić on 19 July and throughout the meeting kept in touch with Mr. Bildt who was holding parallel negotiations with President Milošević in Belgrade. Mladić gave his version of the events of the preceding days (his troops had "'finished [it] in a correct way'"; some "'unfortunate small incidents' had occurred"). The UNPROFOR Commander and Mladić then signed an agreement which provided for

"ICRC access to all 'reception centres' where the men and boys of Srebrenica were being held, by the next day;

UNHCR and humanitarian aid convoys to be given access to Srebrenica;

The evacuation of wounded from Potočari, as well as the hospital in Bratunac;

The return of Dutchbat weapons and equipment taken by the BSA;

The transfer of Dutchbat out of the enclave commencing on the afternoon of 21 July, following the evacuation of the remaining women, children and elderly who wished to leave.

Subsequent to the signing of this agreement, the Special Representative wrote to President Milošević, reminding him of the agreement, that had not yet been honoured, to allow ICRC access to Srebrenica. The Special Representative later also telephoned President Milošević to reiterate the same point." (*Ibid.*, para. 392.)

410. The Court was referred to other evidence supporting or denying the Respondent's effective control over, participation in, involvement in, or influence over the events in and around Srebrenica in July 1995. The Respondent quotes two substantial reports prepared seven years after the events, both of which are in the public domain, and readily accessible. The first, *Srebrenica — a "Safe" Area*, published in 2002 by the Netherlands Institute for War Documentation was prepared over a lengthy period by an expert team. The Respondent has drawn attention to the fact that this report contains no suggestion that the FRY leadership was involved in planning the attack or inciting the killing of non-Serbs; nor

any hard evidence of assistance by the Yugoslav army to the armed forces of the Republika Srpska before the attack; nor any suggestion that the Belgrade Government had advance knowledge of the attack. The Respondent also quotes this passage from point 10 of the Epilogue to the Report relating to the "mass slaughter" and "the executions" following the fall of Srebrenica: "There is no evidence to suggest any political or military liaison with Belgrade, and in the case of this mass murder such a liaison is highly improbable." The Respondent further observes that the Applicant's only response to this submission is to point out that "the report, by its own admission, is not exhaustive", and that this Court has been referred to evidence not used by the authors.

411. The Court observes, in respect of the Respondent's submissions, that the authors of the Report do conclude that Belgrade was aware of the intended attack on Srebrenica. They record that the Dutch Military Intelligence Service and another Western intelligence service concluded that the July 1995 operations were co-ordinated with Belgrade (Part III, Chap. 7, Sect. 7). More significantly for present purposes, however, the authors state that "there is no evidence to suggest participation in the preparations for executions on the part of Yugoslav military personnel or the security agency (RDB). In fact there is some evidence to support the opposite view . . ." (Part IV, Chap. 2, Sect. 20). That supports the passage from point 10 of the Epilogue quoted by the Respondent, which was preceded by the following sentence: "Everything points to a central decision by the General Staff of the VRS."

412. The second report is *Balkan Battlegrounds*, prepared by the United States Central Intelligence Agency, also published in 2002. The first volume under the heading "The Possibility of Yugoslav involvement" arrives at the following conclusion:

> "No basis has been established to implicate Belgrade's military or security forces in the post-Srebrenica atrocities. While there are indications that the VJ or RDB [the Serbian State Security Department] may have contributed elements to the Srebrenica battle, there is no similar evidence that Belgrade-directed forces were involved in any of the subsequent massacres. Eyewitness accounts by survivors may be imperfect recollections of events, and details may have been overlooked. Narrations and other available evidence suggest that only Bosnian Serb troops were employed in the atrocities and executions that followed the military conquest of Srebrenica." (*Balkan Battlegrounds*, p. 353.)

The response of the Applicant was to quote an earlier passage which refers to reports which "suggest" that VJ troops and possibly elements of the Serbian State Security Department may have been engaged in the battle in Srebrenica — as indeed the second sentence of the passage quoted by the Respondent indicates. It is a cautious passage, and significantly gives no indication of any involvement by the Respondent in the post-conflict atrocities which are the subject of genocide-related convictions. Counsel for the Respondent also quoted from the evidence of the Deputy Commander of Dutchbat, given in the *Milošević* trial, in which the accused put to the officer the point quoted earlier from the Epilogue to the Netherlands report. The officer responded:

> "At least for me, I did not have any evidence that it was launched in co-operation with Belgrade. And again, I read all kinds of reports and opinions and papers where all kinds of scenarios were analysed, and so forth. Again, I do not have any proof that the action, being the attack on the enclave, was launched in co-operation with Belgrade."

The other evidence on which the Applicant relied relates to the influence, rather than the control, that President Milošević had or did not have over the authorities in Pale. It mainly consists of the evidence given at the *Milošević* trial by Lord Owen and General Wesley Clark and also Lord Owen's publications. It does not establish a factual basis for finding the Respondent responsible on a basis of direction or control.

* *

*(5) Conclusion as to Responsibility for Events at Srebrenica under Article III, Paragraph* (a)*, of the Genocide Convention*

413. In the light of the information available to it, the Court finds, as indicated above, that it has not been established that the massacres at Srebrenica were committed by persons or entities ranking as organs of the Respondent (see paragraph 395 above). 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, as indicated in paragraph 297 above, constituted the crime of genocide, were perpetrated.

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, which would have had to be present in order for the Respondent to be held responsible on this basis. 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.

As for the killings committed by the "Scorpions" paramilitary militias, notably at Trnovo (paragraph 289 above), even if it were accepted that they were an element of the genocide committed in the Srebrenica area, which is not clearly established by the decisions thus far rendered by the ICTY (see, in particular, the Trial Chamber's decision of 12 April 2006 in the *Stanišić and Simatović* case, IT-03-69), it has not been proved that they took place either on the instructions or under the control of organs of the FRY.

414. Finally, the Court observes that none of the situations, other than those referred to in Articles 4 and 8 of the ILC's Articles on State Responsibility, in which specific conduct may be attributed to a State, matches the circumstances of the present case in regard to the possibility of attributing the genocide at Srebrenica to the Respondent. The Court does not see itself required to decide at this stage whether the ILC's Articles dealing with attribution, apart from Articles 4 and 8, express present customary international law, it being clear that none of them apply in this case. The acts constituting genocide were not committed by persons or entities which, while not being organs of the FRY, were empowered by it to exercise elements of the governmental authority (Art. 5), nor by organs placed at the Respondent's disposal by another State (Art. 6), nor by persons in fact exercising elements of the governmental authority in the absence or default of the official authorities of the Respondent (Art. 9); finally, the Respondent has not acknowledged and adopted the conduct of the perpetrators of the acts of genocide as its own (Art. 11).

415. 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.

* * *

## VIII. The Question of Responsibility, in Respect of Srebrenica, for Acts Enumerated in Article III, Paragraphs *(b)* to *(e)*, of the Genocide Convention

416. The Court now comes to the second of the questions set out in paragraph 379 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. These are: conspiracy to

commit genocide (Art. III, para. *(b)*), direct and public incitement to commit genocide (Art. III, para. *(c)*), attempt to commit genocide (Art. III, para. *(d)*) — though no claim is made under this head in the Applicant's final submissions in the present case — and complicity in genocide (Art. III, para. *(e)*). For the reasons already stated (paragraph 380 above), the Court must make a finding on this matter inasmuch as it has replied in the negative to the previous question, that of the Respondent's responsibility in the commission of the genocide itself.

417. It is clear from an examination of the facts of the case that subparagraphs *(b)* and *(c)* of Article III are irrelevant in the present case. It has not been proved that organs of the FRY, or persons acting on the instructions or under the effective control of that State, committed acts that could be characterized as "[c]onspiracy to commit genocide"(Art. III, para. *(b)*), or as "[d]irect and public incitement to commit genocide" (Art. III, para. *(c)*), if one considers, as is appropriate, only the events in Srebrenica. As regards paragraph *(b)*, what was said above regarding the attribution to the Respondent of acts of genocide, namely that the massacres were perpetrated by persons and groups of persons (the VRS in particular) who did not have the character of organs of the Respondent, and did not act on the instructions or under the effective control of the Respondent, is sufficient to exclude the latter's responsibility in this regard. As regards subparagraph *(c)*, none of the information brought to the attention of the Court is sufficient to establish that organs of the Respondent, or persons acting on its instructions or under its effective control, directly and publicly incited the commission of the genocide in Srebrenica; nor is it proven, for that matter, that such organs or persons incited the commission of acts of genocide anywhere else on the territory of Bosnia and Herzegovina. In this respect, the Court must only accept precise and incontrovertible evidence, of which there is clearly none.

418. A more delicate question is whether it can be accepted that acts which could be characterized as "complicity in genocide", within the meaning of Article III, paragraph *(e)*, can be attributed to organs of the Respondent or to persons acting under its instructions or under its effective control.

This question calls for some preliminary comment.

419. First, the question of "complicity" is to be distinguished from the question, already considered and answered in the negative, whether the perpetrators of the acts of genocide committed in Srebrenica acted on the instructions of or under the direction or effective control of the organs of the FRY. It is true that in certain national systems of criminal law, giving instructions or orders to persons to commit a criminal act is considered as the mark of complicity in the commission of that act. However, in the particular context of the application of the law of international responsibility in the domain of genocide, if it were established that a genocidal act had been committed on the instructions or under the direction of a

State, the necessary conclusion would be that the genocide was attributable to the State, which would be directly responsible for it, pursuant to the rule referred to above (paragraph 398), and no question of complicity would arise. But, as already stated, that is not the situation in the present case.

However there is no doubt that "complicity", in the sense of Article III, paragraph *(e)*, of the Convention, includes the provision of means to enable or facilitate the commission of the crime; it is thus on this aspect that the Court must focus. In this respect, it is noteworthy that, although "complicity", as such, is not a notion which exists in the current terminology of the law of international responsibility, it is similar to a category found among the customary rules constituting the law of State responsibility, that of the "aid or assistance" furnished by one State for the commission of a wrongful act by another State.

420. In this connection, reference should be made to Article 16 of the ILC's Articles on State Responsibility, reflecting a customary rule, which reads as follows:

> "*Article 16*
>
> *Aid or assistance in the commission of an internationally wrongful act*
>
> A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
>
> *(a)* That State does so with knowledge of the circumstances of the internationally wrongful act; and
>
> *(b)* The act would be internationally wrongful if committed by that State."

Although this provision, because it concerns a situation characterized by a relationship between two States, is not directly relevant to the present case, it nevertheless merits consideration. The Court sees no reason to make any distinction of substance between "complicity in genocide", within the meaning of Article III, paragraph *(e)*, of the Convention, and the "aid or assistance" of a State in the commission of a wrongful act by another State within the meaning of the aforementioned Article 16 — setting aside the hypothesis of the issue of instructions or directions or the exercise of effective control, the effects of which, in the law of international responsibility, extend beyond complicity. In other words, to ascertain whether the Respondent is responsible for "complicity in genocide" within the meaning of Article III, paragraph *(e)*, which is what the Court now has to do, it must examine whether organs of the respondent State, or persons acting on its instructions or under its direction or effective control, 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.

421. Before the Court turns to an examination of the facts, one further comment is required. It concerns the link between the specific intent *(dolus specialis)* which characterizes the crime of genocide and the motives which inspire the actions of an accomplice (meaning a person providing aid or assistance to the direct perpetrators of the crime): the question arises whether complicity presupposes that the accomplice shares the specific intent *(dolus specialis)* of the principal perpetrator. But whatever the reply to this question, there is no doubt that the conduct of an organ or a person furnishing aid or assistance to a perpetrator of the crime of genocide cannot be treated as complicity in genocide unless at the least that organ or person acted knowingly, that is to say, in particular, was aware of the specific intent *(dolus specialis)* of the principal perpetrator. If that condition is not fulfilled, that is sufficient to exclude categorization as complicity. The Court will thus first consider whether this latter condition is met in the present case. It is only if it replies to that question of fact in the affirmative that it will need to determine the legal point referred to above.

422. The Court is not convinced by the evidence furnished by the Applicant that the above conditions were met. Undoubtedly, the quite substantial aid of a political, military and financial nature provided by the FRY to the Republika Srpska and the VRS, beginning long before the tragic events of Srebrenica, continued during those events. There is thus little doubt that the atrocities in Srebrenica were committed, at least in part, with the resources which the perpetrators of those acts possessed as a result of the general policy of aid and assistance pursued towards them by the FRY. However, the sole task of the Court is to establish the legal responsibility of the Respondent, a responsibility which is subject to very specific conditions. One of those conditions is not fulfilled, because it is not established beyond any doubt in the argument between the Parties whether the authorities of the FRY supplied — and continued to supply — the VRS leaders who decided upon and carried out those acts of genocide with their aid and assistance, at a time when those authorities were clearly aware that genocide was about to take place or was under way; in other words that not only were massacres about to be carried out or already under way, but that their perpetrators had the specific intent characterizing genocide, namely, the intent to destroy, in whole or in part, a human group, as such.

423. 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 has found (paragraph 295 above) that that decision was taken shortly before it was actually carried out, a process which took a very short time (essentially between 13 and 16 July 1995), despite the exceptionally high number of victims. It has therefore not been conclusively established

that, at the crucial time, the FRY supplied aid to the perpetrators of the genocide in full awareness that the aid supplied would be used to commit genocide.

424. 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.

* * *

## IX. The Question of Responsibility for Breach of the Obligations to Prevent and Punish Genocide

425. The Court now turns to the third and last of the questions set out in paragraph 379 above: has the respondent State complied with its obligations to prevent and punish genocide under Article I of the Convention?

Despite the clear links between the duty to prevent genocide and the duty to punish its perpetrators, these are, in the view of the Court, two distinct yet connected obligations, each of which must be considered in turn.

426. It is true that, simply by its wording, Article I of the Convention brings out the close link between prevention and punishment: "The 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." It is also true that one of the most effective ways of preventing criminal acts, in general, is to provide penalties for persons committing such acts, and to impose those penalties effectively on those who commit the acts one is trying to prevent. Lastly, it is true that, although in the subsequent Articles, the Convention includes fairly detailed provisions concerning the duty to punish (Articles III to VII), it reverts to the obligation of prevention, stated as a principle in Article I, only in Article VIII:

> "Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III."

427. However, it is not the case that the obligation to prevent has no separate legal existence of its own; that it is, as it were, absorbed by the

obligation to punish, which is therefore the only duty the performance of which may be subject to review by the Court. The obligation on each contracting State to prevent genocide is both normative and compelling. It is not merged in the duty to punish, nor can it be regarded as simply a component of that duty. It has its own scope, which extends beyond the particular case envisaged in Article VIII, namely reference to the competent organs of the United Nations, for them to take such action as they deem appropriate. Even if and when these organs have been called upon, this does not mean that the States parties to the Convention are relieved of the obligation to take such action as they can to prevent genocide from occurring, while respecting the United Nations Charter and any decisions that may have been taken by its competent organs.

This is the reason why the Court will first consider the manner in which the Respondent has performed its obligation to prevent before examining the situation as regards the obligation to punish.

*(1) The Obligation to Prevent Genocide*

428. As regards the obligation to prevent genocide, the Court thinks it necessary to begin with the following introductory remarks and clarifications, amplifying the observations already made above.

429. 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. Many other instruments include a similar obligation, in various forms: see, for example, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (Art. 2); the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, of 14 December 1973 (Art. 4); the Convention on the Safety of United Nations and Associated Personnel of 9 December 1994 (Art. 11); the International Convention on the Suppression of Terrorist Bombings of 15 December 1997 (Art. 15). The content of the duty to prevent varies from one instrument to another, according to the wording of the relevant provisions, and depending on the nature of the acts to be prevented.

The decision of the Court does not, in this case, purport to establish a general jurisprudence applicable to all cases where a treaty instrument, or other binding legal norm, includes an obligation for States to prevent certain acts. Still less does the decision of the Court purport to find whether, apart from the texts applicable to specific fields, there is a general obligation on States to prevent the commission by other persons or entities of acts contrary to certain norms of general international law. The Court will therefore confine itself to determining the specific scope of the duty to prevent in the Genocide Convention, and to the extent that such a

determination is necessary to the decision to be given on the dispute before it. This will, of course, not absolve it of the need to refer, if need be, to the rules of law whose scope extends beyond the specific field covered by the Convention.

430. 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. In this area the notion of "due diligence", which calls for an assessment *in concreto*, is of critical importance. Various parameters operate when assessing whether a State has duly discharged the obligation concerned. The first, which varies greatly from one State to another, is clearly the capacity to influence effectively the action of persons likely to commit, or already committing, genocide. This capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events. The State's capacity to influence must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law; seen thus, a State's capacity to influence may vary depending on its particular legal position vis-à-vis the situations and persons facing the danger, or the reality, of genocide. On the other hand, it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question, the more so since the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result — averting the commission of genocide — which the efforts of only one State were insufficient to produce.

431. Thirdly, a State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed. It is at the time when commission of the prohibited act (genocide or any of the other acts listed in Article III of the Convention) begins that the breach

of an obligation of prevention occurs. In this respect, the Court refers to a general rule of the law of State responsibility, stated by the ILC in Article 14, paragraph 3, of its Articles on State Responsibility:

> ". . . . . .
> 3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation."

This obviously does not mean that the obligation to prevent genocide only comes into being when perpetration of genocide commences; that would be absurd, since the whole point of the obligation is to prevent, or attempt to prevent, the occurrence of the act. In fact, a State's obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed. From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent *(dolus specialis)*, it is under a duty to make such use of these means as the circumstances permit. However, if neither genocide nor any of the other acts listed in Article III of the Convention are ultimately carried out, then a State that omitted to act when it could have done so cannot be held responsible *a posteriori*, since the event did not happen which, under the rule set out above, must occur for there to be a violation of the obligation to prevent.

In consequence, in the present case the Court will have to consider the Respondent's conduct, in the light of its duty to prevent, solely in connection with the massacres at Srebrenica, because these are the only acts in respect of which the Court has concluded in this case that genocide was committed.

432. 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. There are two main differences; they are so significant as to make it impossible to treat the two types of violation in the same way.

In the first place, as noted above, complicity always requires that some positive action has been taken to furnish aid or assistance to the perpetrators of the genocide, while a violation of the obligation to prevent

results from mere failure to adopt and implement suitable measures to prevent genocide from being committed. In other words, while complicity results from commission, violation of the obligation to prevent results from omission; this is merely the reflection of the notion that the ban on genocide and the other acts listed in Article III, including complicity, places States under a negative obligation, the obligation not to commit the prohibited acts, while the duty to prevent places States under positive obligations, to do their best to ensure that such acts do not occur.

In the second place, as also noted above, there cannot be a finding of complicity against a State unless at the least its organs were aware that genocide was about to be committed or was under way, and if the aid and assistance supplied, from the moment they became so aware onwards, to the perpetrators of the criminal acts or to those who were on the point of committing them, enabled or facilitated the commission of the acts. In other words, an accomplice must have given support in perpetrating the genocide with full knowledge of the facts. By contrast, a State may be found to have violated its obligation to prevent even though it had no certainty, at the time when it should have acted, but failed to do so, that genocide was about to be committed or was under way; for it to incur responsibility on this basis it is enough that the State was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed. As will be seen below, this latter difference could prove decisive in the present case in determining the responsibility incurred by the Respondent.

433. In light of the foregoing, the Court will now consider the facts of the case. For the reasons stated above (paragraph 431), it will confine itself to the FRY's conduct vis-à-vis the Srebrenica massacres.

434. The Court would first note 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.

435. 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 indicating provisional measures delivered by the Court in 1993. In particular, in its Order of 8 April 1993, the Court stated, *inter alia*, that although not able, at that early stage in the proceedings, to make "definitive findings of fact or of imputability" (*I.C.J. Reports 1993*, p. 22, para. 44) 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 . . ." (*I.C.J. Reports 1993*, p. 24, para. 52 A (2)).

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. Although in principle the two issues are separate, and the second will be examined below, it is not possible, when considering the way the Respondent discharged its obligation of prevention under the Convention, to fail to take account of the obligation incumbent upon it, albeit on a different basis, to implement the provisional measures indicated by the Court.

436. 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: paragraph 424), they could hardly have been unaware of the serious risk of it once the VRS forces had decided to occupy the Srebrenica enclave. Among the documents containing information clearly suggesting that such an awareness existed, mention should be made of the above-mentioned report (see paragraphs 283 and 285 above) of the United Nations Secretary-General prepared pursuant to General Assembly resolution 53/35 on the "fall of Srebrenica" (United Nations doc. A/54/549), which recounts the visit to Belgrade on 14 July 1995 of the European Union negotiator Mr. Bildt to meet Mr. Milošević. Mr. Bildt, in substance, informed Mr. Milošević of his serious concern and

> "pressed the President to arrange immediate access for the UNHCR to assist the people of Srebrenica, and for the ICRC to start to register those who were being treated by the BSA [Bosnian Serb Army] as prisoners of war".

437. The Applicant has drawn attention to certain evidence given by General Wesley Clark before the ICTY in the *Milošević* case. General Clark referred to a conversation that he had had with Milošević during the negotiation of the Dayton Agreement. He stated that

> "I went to Milošević and I asked him. I said, 'If you have so much influence over these [Bosnian] Serbs, how could you have allowed

> General Mladić to have killed all those people at Srebrenica?' And he looked to me — at me. His expression was very grave. He paused before he answered, and he said, 'Well, General Clark, I warned him not to do this, but he didn't listen to me.' And it was in the context of all the publicity at the time about the Srebrenica massacre." (*Milošević*, IT-02-54-T, Transcript, 16 December 2003, pp. 30494-30495).

General Clark gave it as his opinion, in his evidence before the ICTY, that the circumstances indicated that Milošević had foreknowledge of what was to be "a military operation combined with a massacre" (*ibid.*, p. 30497). The ICTY record shows that Milošević denied ever making the statement to which General Clark referred, but the Trial Chamber nevertheless relied on General Clark's testimony in its Decision of 16 June 2004 when rejecting the Motion for Judgment of Acquittal (*Milošević*, IT-02-54-T, Decision on Motion for Judgment of Acquittal, 16 June 2004, para. 280).

438. 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. As the Court has noted in paragraph 423 above, it has not been shown that the decision to eliminate physically the whole of the adult male population of the Muslim community of Srebrenica was brought to the attention of the Belgrade authorities. Nevertheless, given all the international concern about what looked likely to happen at Srebrenica, given Milošević's own observations to Mladić, which made it clear that the dangers were known and that these dangers seemed to be of an order that could suggest intent to commit genocide, unless brought under control, it must have been clear that there was a serious risk of genocide in Srebrenica. 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.

* *

*(2) The Obligation to Punish Genocide*

439. The Court now turns to the question of the Respondent's compliance with its obligation to punish the crime of genocide stemming from Article I and the other relevant provisions of the Convention.

440. In its fifth final submission, Bosnia and Herzegovina requests the Court to adjudge and declare:

> "5. That Serbia and Montenegro has violated and is violating its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide for having failed and for failing to punish acts of genocide or any other act prohibited by the Convention on the Prevention and Punishment of the Crime of Genocide, and for having failed and for failing to transfer individuals accused of genocide or any other act prohibited by the Convention to the International Criminal Tribunal for the former Yugoslavia and to fully co-operate with this Tribunal."

441. This submission implicitly refers to Article VI of the Convention, according to which:

> "Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."

442. The Court would first recall 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. Even if Serbian domestic law granted jurisdiction to its criminal courts to try those accused, and even supposing such proceedings were compatible with Serbia's other international obligations, *inter alia* its obligation to co-operate with the ICTY, to which the Court will revert below, an obligation to try the perpetrators of the Srebrenica massacre in Serbia's domestic courts cannot be deduced from Article VI. Article VI only obliges the Contracting Parties to institute and exercise

territorial criminal jurisdiction; while it certainly does not prohibit States, with respect to genocide, from conferring jurisdiction on their criminal courts based on criteria other than where the crime was committed which are compatible with international law, in particular the nationality of the accused, it does not oblige them to do so.

443. It is thus to the obligation for States parties to co-operate with the "international penal tribunal" mentioned in the above provision that the Court must now turn its attention. 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.

444. In order to determine whether the Respondent has fulfilled its obligations in this respect, the Court must first answer two preliminary questions: does the ICTY constitute an "international penal tribunal" within the meaning of Article VI? And must the Respondent be regarded as having "accepted the jurisdiction" of the tribunal within the meaning of that provision?

445. As regards the first question, the Court considers that the reply must definitely be in the affirmative. The notion of an "international penal tribunal" within the meaning of Article VI must at least cover all international criminal courts created after the adoption of the Convention (at which date no such court existed) of potentially universal scope, and competent to try the perpetrators of genocide or any of the other acts enumerated in Article III. The nature of the legal instrument by which such a court is established is without importance in this respect. When drafting the Genocide Convention, its authors probably thought that such a court would be created by treaty: a clear pointer to this lies in the reference to "those Contracting Parties which shall have accepted [the] jurisdiction" of the international penal tribunal. Yet, it would be contrary to the object of the provision to interpret the notion of "international penal tribunal" restrictively in order to exclude from it a court which, as in the case of the ICTY, was created pursuant to a United Nations Security Council resolution adopted under Chapter VII of the Charter. The Court has found nothing to suggest that such a possibility was considered by the authors of the Convention, but no intention of seeking to exclude it can be imputed to them.

446. The question whether the Respondent must be regarded as having "accepted the jurisdiction" of the ICTY within the meaning of Article VI must consequently be formulated as follows: is the Respondent obliged to accept the jurisdiction of the ICTY, and to co-operate with the Tribunal by virtue of the Security Council resolution which established it, or of

some other rule of international law? If so, it would have to be concluded that, for the Respondent, co-operation with the ICTY constitutes both an obligation stemming from the resolution concerned and from the United Nations Charter, or from another norm of international law obliging the Respondent to co-operate, and an obligation arising from its status as a party to the Genocide Convention, this last clearly being the only one of direct relevance in the present case.

447. For the purposes of the present case, the Court only has to determine whether the FRY was under an obligation to co-operate with the ICTY, and if so, on what basis, from when the Srebrenica genocide was committed in July 1995. To that end, suffice it to note that the FRY was under an obligation to co-operate with the ICTY 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 that they must fully co-operate, notably with the ICTY. Thus, from 14 December 1995 at the latest, and at least on the basis of the Dayton Agreement, the FRY must be regarded as having "accepted [the] jurisdiction" of the ICTY within the meaning of Article VI of the Convention. This fact is sufficient for the Court in its consideration of the present case, since its task is to rule upon the Respondent's compliance with the obligation resulting from Article VI of the Convention in relation to the Srebrenica genocide, from when it was perpetrated to the present day, and since the Applicant has not invoked any failure to respect the obligation to co-operate alleged to have occurred specifically between July and December 1995. Similarly, the Court is not required to decide whether, between 1995 and 2000, the FRY's obligation to co-operate had any legal basis besides the Dayton Agreement. Needless to say, the admission of the FRY to the United Nations in 2000 provided a further basis for its obligation to co-operate: but while the legal basis concerned was thereby confirmed, that did not change the scope of the obligation. There is therefore no need, for the purposes of assessing how the Respondent has complied with its obligation under Article VI of the Convention, to distinguish between the period before and the period after its admission as a Member of the United Nations, at any event from 14 December 1995 onwards.

448. Turning now to the facts of the case, the question the Court must answer is whether the Respondent has fully co-operated with the ICTY, in particular by arresting and handing over to the Tribunal any persons accused of genocide as a result of the Srebrenica genocide and finding themselves on its territory. In this connection, the Court would first observe 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. In particular, counsel for the Applicant referred during the hearings to recent statements made by the Respondent's Minister for Foreign Affairs, reproduced in the national press in April 2006, and according to which the intelligence services of that State knew where Mladić was living in Serbia, but refrained from informing the authorities competent to order his arrest because certain members of those services had allegedly remained loyal to the fugitive. The authenticity and accuracy of those statements has not been disputed by the Respondent at any time.

449. 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. The Court is of course without jurisdiction in the present case to declare that the Respondent has breached any obligations other than those under the Convention. But as the Court has jurisdiction to declare a breach of Article VI insofar as it obliges States to co-operate with the "international penal tribunal", the Court may find for that purpose that the requirements for the existence of such a breach have been met. One of those requirements is that the State whose responsibility is in issue must have "accepted [the] jurisdiction" of that "international penal tribunal"; the Court thus finds that the Respondent was under a duty to co-operate with the tribunal concerned pursuant to international instruments other than the Convention, and failed in that duty. 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.

450. It follows from the foregoing considerations that the Respondent failed to comply both with its obligation to prevent and its obligation to punish genocide deriving from the Convention, and that its international responsibility is thereby engaged.

* * *

## X. The Question of Responsibility for Breach of the Court's Orders Indicating Provisional Measures

451. In its seventh submission Bosnia and Herzegovina requests the Court to adjudge and declare:

> "7. That in failing to comply with the Orders for indication of provisional measures rendered by the Court on 8 April 1993 and 13 September 1993 Serbia and Montenegro has been in breach of its international obligations and is under an obligation to Bosnia and Herzegovina to provide for the latter violation symbolic compensation, the amount of which is to be determined by the Court."

452. The Court observes that its "orders on provisional measures under Article 41 [of the Statute] have binding effect" (*LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 506, para. 109). Although the Court only had occasion to make such a finding in a judgment subsequent to the Orders that it made in the present dispute, this does not affect the binding nature of those Orders, since in the Judgment referred to the Court did no more than give the provisions of the Statute the meaning and scope that they had possessed from the outset. It notes that provisional measures are aimed at preserving the rights of each of the parties pending the final decision of the Court. The Court's Orders of 8 April and 13 September 1993 indicating provisional measures created legal obligations which both Parties were required to satisfy.

453. The Court indicated the following provisional measures in the *dispositif*, paragraph 52, of its Order of 8 April 1993:

> "A. (1). . . . . .
>
> The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should immediately, in pursuance of its undertaking in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, take all measures within its power to prevent commission of the crime of genocide;
>
> (2). . . . . .
>
> The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should in particular 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, whether directed against the Muslim population of Bosnia and Herzegovina or against any other national, ethnical, racial or religious group;
>
> . . . . . .

B. . . . . .

The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) and the Government of the Republic of Bosnia and Herzegovina should not take any action and should ensure that no action is taken which may aggravate or extend the existing dispute over the prevention or punishment of the crime of genocide, or render it more difficult of solution."

454. The Court reaffirmed these measures in the *dispositif* of its Order of 13 September 1993.

455. From the Applicant's written and oral pleadings as a whole, it is clear that the Applicant is not accusing the Respondent of failing to respect measure B above, and that its submissions relate solely to the measures indicated in paragraph A, subparagraphs (1) and (2). It is therefore only to that extent that the Court will consider whether the Respondent has fully complied with its obligation to respect the measures ordered by the Court.

456. The answer to this question may be found in the reasoning in the present Judgment relating to the Applicant's other submissions to the Court. From these 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".

457. However, the remainder of the Applicant's seventh submission claiming that the Respondent failed to comply with the provisional measures indicated must be rejected for the reasons set out above in respect of the Applicant's other submissions (paragraphs 415 and 424).

458. As for the request that the Court hold the Respondent to be under an obligation to the Applicant to provide symbolic compensation, in an amount to be determined by the Court, for the breach thus found, the Court observes that the question of compensation for the injury caused to the Applicant by the Respondent's breach of aspects of the Orders indicating provisional measures merges with the question of compensation for the injury suffered from the violation of the corresponding obligations under the Genocide Convention. It will therefore be dealt with below, in connection with consideration of points *(b)* and *(c)* of the Respondent's sixth submission, which concern the financial compensation which the Applicant claims to be owed by the Respondent.

* * *

## XI. The Question of Reparation

459. Having thus found that the Respondent has failed to comply with its obligations under the Genocide Convention in respect of the prevention and punishment of genocide, the Court turns to the question of reparation. The Applicant, in its final submissions, has asked the Court to decide that the Respondent

> "must redress the consequences of its international wrongful acts and, as a result of the international responsibility incurred for . . . violations of the Convention on the Prevention and Punishment of the Crime of Genocide, must pay, and Bosnia and Herzegovina is entitled to receive, in its own right and as *parens patriae* for its citizens, full compensation for the damages and losses caused" (submission 6 *(b)*).

The Applicant also asks the Court to decide that the Respondent

> "shall immediately take effective steps to ensure full compliance with its obligation to punish acts of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide or any other act prohibited by the Convention and to transfer individuals accused of genocide or any other act prohibited by the Convention to the International Criminal Tribunal for the former Yugoslavia and to fully co-operate with this Tribunal" (submission 6 *(a)*),

and that the Respondent "shall provide specific guarantees and assurances that it will not repeat the wrongful acts complained of, the form of which guarantees and assurances is to be determined by the Court" (submission 6 *(d)*). These submissions, and in particular that relating to compensation, were however predicated on the basis that the Court would have upheld, not merely that part of the Applicant's claim as relates to the obligation of prevention and punishment, but also the claim that the Respondent has violated its substantive obligation not to commit genocide, as well as the ancillary obligations under the Convention concerning complicity, conspiracy and incitement, and the claim that the Respondent has aided and abetted genocide. The Court has now to consider what is the appropriate form of reparation for the other forms of violation of the Convention which have been alleged against the Respondent and which the Court has found to have been established, that is to say breaches of the obligations to prevent and punish.

460. The principle governing the determination of reparation for an internationally wrongful act is as stated by the Permanent Court of International Justice in the *Factory at Chorzów* case: that "reparation must, so far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed" (*P.C.I.J., Series A, No. 17*, p. 47: see

also Article 31 of the ILC's Articles on State Responsibility). In the circumstances of this 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" (*I.C.J. Reports 1997*, p. 81, para. 152.; cf. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 198, paras. 152-153; see also Article 36 of the ILC's Articles on State Responsibility). It is therefore appropriate to consider what were the consequences of the failure of the Respondent to comply with its obligations under the Genocide Convention to prevent and punish the crime of genocide, committed in Bosnia and Herzegovina, and what damage can be said to have been caused thereby.

461. The Court has found that the authorities of the Respondent could not have been unaware of the grave risk of genocide once the VRS forces had decided to take possession of the Srebrenica enclave, and that in view of its influence over the events, the Respondent must be held to have had the means of action by which it could seek to prevent genocide, and to have manifestly refrained from employing them (paragraph 438). To that extent therefore it failed to comply with its obligation of prevention under the Convention. The obligation to prevent the commission of the crime of genocide is imposed by the Genocide Convention on any State party which, in a given situation, has it in its power to contribute to restraining in any degree the commission of genocide. To make this finding, the Court did not have to decide whether the acts of genocide committed at Srebrenica would have occurred anyway even if the Respondent had done as it should have and employed the means available to it. This is because, as explained above, the obligation to prevent genocide places a State under a duty to act which is not dependent on the certainty that the action to be taken will succeed in preventing the commission of acts of genocide, or even on the likelihood of that outcome. It therefore does not follow from the Court's reasoning above in finding a violation by the Respondent of its obligation of prevention that the atrocious suffering caused by the genocide committed at Srebrenica would not have occurred had the violation not taken place.

462. The Court cannot however leave it at that. Since it now has to rule on the claim for reparation, it 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 just mentioned, 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, for the definition of the extent of the obligation of reparation borne by the Respondent as a result of its wrongful conduct. The question is whether there is a sufficiently direct and certain causal nexus between the wrongful act, the Respondent's breach of the obligation to prevent genocide, and the injury suffered by the Applicant, consisting of all damage of any type, material or moral, caused by the acts of genocide. Such a nexus could be considered established only if the Court were able to 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. However, the Court clearly cannot do so. As noted above, the Respondent did have significant means of influencing the Bosnian Serb military and political authorities which it could, and therefore should, have employed in an attempt to prevent the atrocities, but it has not been shown that, in the specific context of these events, those means would have sufficed to achieve the result which the Respondent should have sought. Since the Court cannot therefore regard as proven a causal nexus between the Respondent's violation of its obligation of prevention and the damage resulting from the genocide at Srebrenica, financial compensation is not the appropriate form of reparation for the breach of the obligation to prevent genocide.

463. 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. As in the *Corfu Channel (United Kingdom* v. *Albania)* case, the Court considers that a declaration of this kind is "in itself appropriate satisfaction" (*Merits, Judgment, I.C.J. Reports 1949*, pp. 35, 36), and it will, as in that case, include such a declaration in the operative clause of the present Judgment. The Applicant acknowledges that this failure is no longer continuing, and accordingly has withdrawn the request made in the Reply that the Court declare that the Respondent "has violated *and is violating* the Convention" (emphasis added).

464. The Court now turns to the question of the appropriate reparation for the breach by the Respondent of its obligation under the Convention to punish acts of genocide; in this respect, the Applicant asserts the existence of a continuing breach, and therefore maintains *(inter alia)* its request for a declaration in that sense. As noted above (paragraph 440), the Applicant includes under this heading the failure "to transfer individuals accused of genocide or any other act prohibited by the Conven-

tion to the International Criminal Tribunal for the former Yugoslavia and to fully co-operate with this Tribunal"; and the Court has found that in that respect the Respondent is indeed in breach of Article VI of the Convention (paragraph 449 above). A declaration to that effect is therefore one appropriate form of satisfaction, in the same way as in relation to the breach of the obligation to prevent genocide. However, the Applicant asks the Court in this respect to decide more specifically that

> "Serbia and Montenegro shall immediately take effective steps to ensure full compliance with its obligation to punish acts of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide or any other act prohibited by the Convention and to transfer individuals accused of genocide or any other act prohibited by the Convention to the International Criminal Tribunal for the former Yugoslavia and to fully co-operate with this Tribunal."

465. It will be clear from the Court's findings above on the question of the obligation to punish under the Convention 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 (paragraph 448). The Court will therefore make a declaration in these terms in the operative clause of the present Judgment, which will in its view constitute appropriate satisfaction.

466. In its final submissions, the Applicant also requests the Court to decide "that Serbia and Montenegro shall provide specific guarantees and assurances that it will not repeat the wrongful acts complained of, the form of which guarantees and assurances is to be determined by the Court". As presented, this submission relates to all the wrongful acts, i.e. breaches of the Genocide Convention, attributed by the Applicant to the Respondent, thus including alleged breaches of the Respondent's obligation not itself to commit genocide, as well as the ancillary obligations under the Convention concerning complicity, conspiracy and incitement. Insofar as the Court has not upheld these claims, the submission falls. There remains however the question whether it is appropriate to direct that the Respondent provide guarantees and assurances of non-repetition in relation to the established breaches of the obligations to prevent and punish genocide. The Court notes the reasons advanced by counsel for the Applicant at the hearings in support of the submission, which relate for the most part to "recent events [which] cannot fail to cause concern as to whether movements in Serbia and Montenegro calling for genocide have disappeared". It considers that these indications do not constitute sufficient grounds for requiring guarantees of non-repetition. The Applicant also referred in this connection to the question of non-compliance with provisional measures, but this matter has already been examined above (paragraphs 451 to 458), and will be mentioned further below. In

the circumstances, the Court considers that the declaration referred to in paragraph 465 above is sufficient as regards the Respondent's continuing duty of punishment, and therefore does not consider that this is a case in which a direction for guarantees of non-repetition would be appropriate.

467. Finally, the Applicant has presented the following submission:

> "That in failing to comply with the Orders for indication of provisional measures rendered by the Court on 8 April 1993 and 13 September 1993 Serbia and Montenegro has been in breach of its international obligations and is under an obligation to Bosnia and Herzegovina to provide for the latter violation symbolic compensation, the amount of which is to be determined by the Court."

The provisional measures indicated by the Court's Order of 8 April 1993, and reiterated by the Order of 13 September 1993, were addressed specifically to the Respondent's obligation "to prevent commission of the crime of genocide" and to certain measures which should "in particular" be taken to that end (*I.C.J. Reports 1993*, p. 24, para. 52 (A) (1) and (2)).

468. Provisional measures under Article 41 of the Statute are indicated "pending [the] final decision" in the case, and the measures indicated in 1993 will thus lapse on the delivery of the present Judgment (cf. *Anglo-Iranian Oil Co. (United Kingdom* v. *Iran), Preliminary Objections, Judgment, I.C.J. Reports 1952*, p. 114; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 442, para. 112). However, as already observed (paragraph 452 above), orders made by the Court indicating provisional measures under Article 41 of the Statute have binding effect, and their purpose is to protect the rights of either party, pending the final decision in the case.

469. The Court has found above (paragraph 456) that, in respect of the massacres at Srebrenica in July 1995, the Respondent failed to take measures which would have satisfied the requirements of paragraphs 52 (A) (1) and (2) of the Court's Order of 8 April 1993 (reaffirmed in the Order of 13 September 1993). The Court however considers that, for purposes of reparation, the Respondent's non-compliance with the provisional measures ordered is an aspect of, or merges with, its breaches of the substantive obligations of prevention and punishment laid upon it by the Convention. The Court does not therefore find it appropriate to give effect to the Applicant's request for an order for symbolic compensation in this respect. The Court will however include in the operative clause of the present Judgment, by way of satisfaction, a declaration that the Respondent has failed to comply with the Court's Orders indicating provisional measures.

470. The Court further notes that one of the provisional measures indicated in the Order of 8 April and reaffirmed in that of 13 September 1993 was addressed to both Parties. The Court's findings in paragraphs 456 to 457 and 469 are without prejudice to the question whether the Applicant did not also fail to comply with the Orders indicating provisional measures.

* * *

## XII. Operative Clause

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.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-sixth day of February, two thousand and seven, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of Bosnia and Herzegovina and the Government of Serbia, respectively.

*(Signed)* Rosalyn HIGGINS,
President.

*(Signed)* Philippe COUVREUR,
Registrar.

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.

*(Initialled)* R.H.

*(Initialled)* Ph.C.