APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

BOSNIA AND HERZEGOVINA v SERBIA AND MONTENEGRO*

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I INTRODUCTION AND BACKGROUND TO THE CASE

On 26 February 2007, one of the longest running and most tortuous pieces of litigation in the history of the International Court of Justice came to a close when a decision on the merits was handed down in the case brought by Bosnia and Herzegovina ('Bosnia') against Serbia and Montenegro ('Serbia')[1] in March 1993. The case is truly one of superlatives: a duration of 14 years resulted in a majority judgment running to 171 pages (the first 32 of which are exclusively dedicated to recounting the history of the proceedings); appended to the Court's judgment are three declarations, two separate opinions and four dissenting opinions (one of which unites three Judges but itself contains a joint dissenting opinion of all three on certain points, plus a separate opinion of one of them and a joint declaration for the two others in respect of other points on which all three were not in agreement). Between them, all these declarations, and separate and dissenting opinions are substantially longer than the judgment of the Court,

* *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* [2007] ICJ <http://www.icj-cij.org> at 18 October 2007 ('*Application of the Convention on Genocide*').

1 The Respondent underwent two official changes of name and/or composition in the course of the proceedings: initially called the Federal Republic of Yugoslavia ('FRY'), its name was changed in February 2003 to the State Union of Serbia and Montenegro. With the latter republic's secession from the Union in June 2006, the sole remaining Respondent in the case was, at the time of the judgment, the Republic of Serbia. The Court emphasised that Montenegro does not continue the international legal personality of the former State Union and in any event did not consent to the jurisdiction of the Court for the purposes of the present litigation. It follows that Montenegro as a separate, sovereign state was not found guilty of genocide or failure to prevent genocide: *Application of the Convention on Genocide (Judgment)* [2007] ICJ [67]–[79] <http://www.icj-cij.org> at 18 October 2007.

weighing in at 392 further pages. The multiplicity of opinions put forward by many of the Judges in respect of various specific points in the judgment is testimony to perhaps the most important superlative of all: the subject matter of the case itself. At issue was the extraordinarily complex and contentious question of whether, and if so to what extent, Serbia could be said to bear state responsibility in international law for alleged violations of the *Genocide Convention*[2] committed in the territory of Bosnia during the 1992–95 Bosnian War, which followed the secession of that republic from the former Socialist Federal Republic of Yugoslavia ('SFRY'). It would be no exaggeration to say that the factual events at the heart of the case shook the entire world, such was their ferocity and context as the first sustained armed conflict anywhere in Europe since the end of World War II. On both sides of the dispute, the outcome of the case was widely touted as representing either justice (for the Bosnian Muslims) or vindication (for the Serbs, both in Serbia itself and in the autonomous Serb entity that is one of the constituent parts of Bosnia post-1995). Furthermore, given the notoriety of genocide as 'the crime of crimes'[3] and the fact that international civil litigation alleging state responsibility for such a serious crime against international law was literally without precedent, the potential significance and effect of the decision, both in legal and moral terms, were enormous. Some, indeed, might consider that the ICJ was not the right forum for such a case.

The background to the case is as follows. Following Bosnia's declaration of independence from the former SFRY in March 1992, a civil war broke out in progressive stages between the three ethnic communities that had existed in Bosnia for several centuries.[4] Although initially internal in nature, this conflict was 'internationalised' at various points by the intervention of armed forces from both Serbia[5] and Croatia[6] on the sides of their respective co-ethnic forces. With the internationally recognised government of the new republic in Muslim hands, nationalistic elements in the Serbian component of the population started fighting

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[2] *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) ('*Genocide Convention*').

[3] The first modern use of this phrase was in *Prosecutor v Kambanda (Trial Chamber)* Case No ICTR 97-23-S (4 September 1998) [16] (Judgement and Sentence).

[4] Prior to declaring independence from the SFRY in 1992, Bosnia had not existed as an independent state since 1463 when, in the wake of the destruction of the Byzantine Empire, it fell under Ottoman Turkish rule. Within the Ottoman Empire, Bosnia had the status of a *sandžak* — and later, *vilayet* — that is, military district and province respectively. The province became a protectorate of the Austro-Hungarian Empire in 1878 and was annexed outright by Austria in 1908. After World War I, Bosnia was incorporated into the new Kingdom of Serbs, Croats and Slovenes — soon renamed Yugoslavia — and remained legally part of that state, in its various incarnations (as the Kingdom before and during World War II, including German and Croatian occupation during that conflict, and as the SFRY after 1945), until the turmoil of the early 1990s.

[5] Concerning Serbia's intervention in the Bosnian hostilities on behalf of the Bosnian Serbs, see *Prosecutor v Tadić (Trial Chamber)* Case No IT-94-1-T (7 May 1997) [589]–[606] (Opinion and Judgment) ('*Tadić*').

[6] Concerning Croatia's intervention in the Bosnian hostilities on behalf of the Bosnian Croats, see *Prosecutor v Blaškić (Trial Chamber)* Case No IT-95-14-T (3 March 2000) [83]–[123] (Judgement) ('*Blaškić*').

against the Bosnian Government's forces.[7] Although initially the Croats and Muslims combined forces against the Serbs, subsequent fighting also broke out between Croatian and Government forces (largely over the division of the town of Mostar); the Serbs and Croats also fought against each other. Both of the non-Muslim nationalist leadership groups had similar aims, namely either outright independence for those parts of Bosnia where their ethnic populations primarily resided or, preferably, union with their co-ethnic neighbouring states: the Republics of Serbia and Croatia. As this would inevitably entail the dismemberment of the Bosnian State, the Muslim Government fought against both groups. Conversely, the desires of elements in the Serbian and Croatian leaderships to rule states that would be as ethnically homogenous as possible led to the widespread practice, particularly but not exclusively by the Bosnian Serb forces, of what was euphemistically termed 'ethnic cleansing'[8] — that is, the forcible removal, from various areas as they came under belligerent control, of local inhabitants who were of the 'wrong' ethnicity.[9] Although this loathsome

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[7] The population of Bosnia, since at least the 7th century CE, was Slavic and Christian, albeit split between Serbian and Croatian (that is, Eastern Orthodox and Roman Catholic) local rulers. Furthermore, under Turkish rule, many Bosnians converted to Islam, with the result that by the late 20th century the population was approximately 48 per cent Muslim, 37 per cent Serb and 14 per cent Croat. The Presidency of Bosnia was a rotating one (like that of the SFRY itself) and at the time of independence and the start of hostilities, the incumbent President was Alija Izetbegović, a Muslim — hence the general perception, in the West, that the Government and State of Bosnia were Muslim.

[8] *Application of the Convention on Genocide (Judgment)* [2007] ICJ [274]–[276], [305]–[319] <http://www.icj-cij.org> at 18 October 2007. It should be noted that 'ethnic cleansing' is neither a legal concept nor a crime as such in international law, but a popular phrase which has become something of a term of art, although it has received judicial recognition in the case law of the ICTY: see, eg, *Prosecutor v Kupreškić (Trial Chamber)* Case No IT-95-16-T (14 January 2000) [2] (Judgment). In the context of the former Yugoslavia, 'ethnic cleansing' has been described as 'a purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas': UN Security Council, Commission of Experts, *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, UN Doc S/1994/674 (27 May 1994) [130] ('*Final Report*'). It is not the same thing as genocide, which itself is a particular type of crime against humanity (albeit an exceptionally serious one), although in certain circumstances 'ethnic cleansing' might go towards proving genocidal intent: see *Prosecutor v Karadžić and Mladić (Trial Chamber)* Case No IT-95-5/18-R61 (11 July 1996) [94] (Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence). The purpose of 'ethnic cleansing' is the removal of the targeted group from a particular geographical area, not (as in genocide) its physical destruction, although the latter may well be an incidental result of the action. If 'ethnic cleansing' may be assimilated with any recognised crime in international law, it is most likely to fall within the concept of crimes against humanity as it generally involves persecution: see Guénaël Mettraux, *International Crimes and the Ad Hoc Tribunals* (2005) 247–8; *Prosecutor v Sikirica (Trial Chamber)* Case No IT-95-8-T (3 September 2001) [89] (Judgment on Defence Motions to Acquit). See also GA Res 46/242, UN GAOR, 46th sess, 91st mtg, UN Doc A/RES/46/242 (25 August 1992); GA Res 47/80, UN GAOR, 47th sess, 89th mtg, UN Doc A/RES/47/80 (16 December 1992); Drazen Petrovic, 'Ethnic Cleansing — An Attempt at Methodology' (1994) 5 *European Journal of International Law* 342; Ward Ferdinandusse, 'The Interaction of National and International Approaches in the Repression of International Crimes' (2004) 15 *European Journal of International Law* 1041, 1042. For the ICJ's view of 'ethnic cleansing' in the present case, see below Part V.

[9] Until the 1992–95 conflict, these different ethnic groups were for the most part not segregated, but lived side by side in the same cities and towns.

practice did not necessarily involve killing per se,[10] it did so in enough instances — most notably at Srebrenica — to result in a widespread perception that genocide had occurred.[11] A notable feature of the hostilities in Bosnia was the presence of various militias and irregular forces[12] fighting on all three sides of the conflict, in addition to the official armies of the various competing authorities. The pattern of hostilities was further complicated by the intermittent direct involvement of the regular armed forces of the neighbouring Republics of Serbia and Croatia, who were fighting in support of their respective ethnic kin in Bosnia. In addition to directly intervening in the conflict, both Serbia and Croatia were involved indirectly by providing substantial assistance to their respective Bosnian allies in the form of finance, military equipment and other supplies.[13]

The Bosnian conflict ended in late 1995 with the signing of the *Dayton Agreement*.[14] In 1993 the United Nations Security Council, acting under Chapter VII of the *Charter of the United Nations*, had established the International Criminal Tribunal for the Former Yugoslavia ('ICTY') in order to prosecute persons alleged to have committed serious violations of international humanitarian law — including genocide[15] — anywhere in the territory of the former Yugoslavia; this was largely a response to the atrocities that were being reported from Bosnia in particular.[16] In several cases decided by the ICTY since its creation, Bosnian Serb defendants have been charged with genocide against

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10 The Commission of Experts in their *Final Report*, above n 8, identified as methods of 'ethnic cleansing':

> mass murder, torture, rape and other forms of sexual assault; severe physical injury to civilians; mistreatment of civilian prisoners and prisoners of war; use of civilians as human shields; destruction of personal, public and cultural property; looting, theft and robbery of personal property; forced expropriation of real property; forceful displacement of civilian population; and attacks on hospitals, medical personnel and locations marked with the Red Cross/Red Crescent emblem: at [134].

For examples of various actions described as 'ethnic cleansing' in the context of specific criminal charges brought in the ICTY, see, eg, *Prosecutor v Naletilić and Martinović (Second Amended Indictment)* Case No IT-98-34-PT (16 October 2001) [11]; *Prosecutor v Prlić (Amended Indictment)* Case No IT-04-74-PT (17 November 2005) [15].

11 Srebrenica was a designated 'safe haven' under the protection of Dutch UN peacekeepers. In July 1995, the area was overrun by Bosnian Serb forces who proceeded to deport the Muslims — a mixture of captured government soldiers, local civilians and refugees from the fighting elsewhere in Bosnia — to various locations in the surrounding countryside, where up to 8000 of them were massacred in the worst instance of atrocities anywhere in Europe since World War II: see *Prosecutor v Krstić (Trial Chamber)* Case No IT-98-33-T (2 August 2001) [18]–[95], [421] (Judgement) (*Krstić)*.

12 Two of the more notorious examples include the 'Scorpions' militia on the Bosnian Serb side, and the so-called *mujahedin* — irregular fighters of many different nationalities, who came to Bosnia from all over the Muslim world to fight in support of the Bosnian Government.

13 See, respectively, *Tadić (Trial Chamber)* Case No IT-94-1-T (7 May 1997) [589]–[606] (Opinion and Judgment); *Blaškić (Trial Chamber)* Case No IT-95-14-T (3 March 2000) [83]–[123] (Judgement).

14 *General Framework Agreement for Peace in Bosnia and Herzegovina*, 35 ILM 89 (1996) (signed and entered into force 14 December 1995) ('*Dayton Agreement*').

15 See *Statute to the International Criminal Tribunal for the Former Yugoslavia*, annexed to *Resolution 827*, SC Res 827, UN SCOR, 48th sess, 3217th mtg, UN Doc S/RES/827 (25 May 1993) ('*ICTY Statute*'). Article 4 of the *ICTY Statute* gives the ICTY jurisdiction over the crime of genocide as defined in art III of the *Genocide Convention*.

16 *Resolution 827*, SC Res 827, UN SCOR, 48th sess, 3217th mtg, UN Doc S/RES/827 (25 May 1993) 1.

the Muslims in relation to their conduct during the conflict; particularly notable in this respect was the first decision to affirm that the events at Srebrenica constituted genocide.[17] These cases, of course, have been concerned with adjudicating the criminal responsibility of named individuals; but implicit in the documented fact of participation by troops of the Federal Yugoslav Army ('JNA') in the conflict on Bosnian soil, and the proceedings against the late President of Serbia, Slobodan Milošević,[18] has been the notion that Serbia as a state could be said to bear some legal responsibility for at least some of the atrocities committed in Bosnia. It was to that end that Bosnia filed with the ICJ an application instituting proceedings against the FRY, while the conflict was still ongoing, alleging that the FRY was responsible for genocide in Bosnian territory.[19]

II THE RELIEF REQUESTED AND THE PROCEEDINGS PRIOR TO THE JUDGMENT ON THE MERITS

In its application to the Court, Bosnia requested declarations that the Federal Republic of Yugoslavia ('FRY') 'has breached, and is continuing to breach, its legal obligations'[20] towards Bosnia under a number of international treaties, including the *Genocide Convention*, the *Geneva Conventions* of 1949,[21] *Additional Protocol I* thereto of 1977,[22] the *Hague Regulations* of 1907,[23] and the *Universal Declaration of Human Rights* of 1948.[24] Specifically, Bosnia

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17 *Krstić (Trial Chamber)* Case No IT-98-33-T (2 August 2001) [598] (Judgement).

18 *Prosecutor v Milošević (Kosovo Initial Indictment)* Case No IT-99-37 (24 May 1999). This first indictment, in respect of atrocities in the Serbian province of Kosovo, was supplemented in 2001 by additional indictments in respect of atrocities in Bosnia and Croatia: *Prosecutor v Milošević (Bosnia Initial Indictment)* Case No IT-01-51-1 (22 November 2001); *Prosecutor v Milošević (Croatia Initial Indictment)* Case No IT-01-50-1 (8 October 2001). The defendant died in custody on 11 March 2006, following which the case was closed: *Prosecutor v Milošević (Trial Chamber)* Case No IT-02-54-T (14 March 2006) (Order Terminating the Proceedings).

19 Bosnia, *Application Instituting Proceedings* (20 March 1993) ICJ <http://www.icj-cij.org> at 18 October 2007.

20 Ibid [135].

21 *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) ('*Geneva Convention I*'); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) ('*Geneva Convention II*'); *Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) ('*Geneva Convention III*'); *Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) ('*Geneva Convention IV*') (collectively, '*Geneva Conventions*').

22 *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978).

23 *Hague Convention (IV) respecting the Laws and Customs of War on Land, Annex to the Convention, Regulations respecting the Laws and Customs of War on Land*, opened for signature 18 October 1907, (1910) UKTS 9 (entered into force 26 January 1910) ('*Hague Regulations*').

24 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd mtg, UN Doc A/RES/217A (III) (10 December 1948) 71.

alleged that the FRY, 'has killed, murdered, wounded, raped, robbed, tortured, kidnapped, illegally detained, and exterminated the citizens of Bosnia … and is continuing to do so'.[25] Bosnia alleged that these actions, in addition to being in breach of the various treaties cited, also contravened customary international law. Furthermore, Bosnia claimed that the FRY was illegally using force against Bosnia and was violating the latter's sovereignty through a combination of armed attacks and illegal intervention, and by 'recruiting, training, arming, equipping, financing, supplying and otherwise encouraging, supporting, aiding and directing military and paramilitary actions … by means of its agents and surrogates …'.[26] In the circumstances, Bosnia further sought from the Court declarations that Bosnia was entitled to use force in self-defence and to request assistance from other states, and that the arms embargo imposed on the whole of the former Yugoslavia by the Security Council,[27] and all subsequent resolutions by the Council, must be construed in such a manner as not to impair Bosnia's inherent right to self-defence.[28] In addition to the above declarations, Bosnia also requested the Court to order the FRY 'to cease and desist immediately' from the breaches of the various legal obligations cited,[29] and pay reparations to the state and its citizens for the damage caused to 'persons and property as well as to the Bosnian economy and environment' by the alleged violations.[30]

On the same date as the original application, Bosnia also filed a request for the indication of provisional measures in order to secure urgent protection of its rights under the *Genocide Convention* (it should be remembered that the conflict in Bosnia was still ongoing at the time). Accordingly, on 8 April 1993, the Court indicated provisional measures directing the FRY to 'take all measures within its power to prevent commission of the crime of genocide', and directing both parties not to take any action which might aggravate the dispute between them.[31] This order was reaffirmed within six months, following a new Bosnian request for the indication of provisional measures citing additional bases for the Court's jurisdiction; moreover, the Court specified that the reaffirmed provisional measures 'should be immediately and effectively implemented'.[32]

In mid-1995, the proceedings on the merits of the case were suspended because the FRY raised preliminary objections as to both the Court's jurisdiction

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[25] Bosnia, *Application Instituting Proceedings* (20 March 1993) ICJ [135(d)] <http://www.icj-cij.org> at 18 October 2007.

[26] Ibid [135(g)]–[135(j)].

[27] SC Res 713, UN SCOR, 46th sess, 3009th mtg, UN Doc S/RES/713 (25 September 1991).

[28] Bosnia, *Application Instituting Proceedings* (20 March 1993) ICJ [135(k)]–[135(p)] <http://www.icj-cij.org> at 18 October 2007.

[29] Ibid [135(q)].

[30] Ibid [135(r)].

[31] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro)) (Provisional Measures)* [1993] ICJ Rep 3, 24. This and other phases of the case prior to the recent judgment on the merits will be noted, in order to provide an overview of the proceedings as a whole, but will not otherwise be commented on here.

[32] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro)) (Provisional Measures)* [1993] ICJ Rep 325, 349–50.

and the admissibility of Bosnia's application.[33] The Serbian preliminary objections were dismissed on 11 July 1996, the Court finding that it had jurisdiction to hear the case on the basis of art IX of the *Genocide Convention*, and that Bosnia's application was admissible.[34] In the same judgment, all of Bosnia's additional grounds for jurisdiction — including the *Geneva Conventions* and *Hague Regulations* — were rejected; the sole remaining basis of the Court's jurisdiction *ratione materiae* was thus art IX of the *Genocide Convention*.[35]

In April 2001, Serbia filed with the Court an *Application for Revision of the 1996 Judgment on Preliminary Objections*.[36] This was followed the next month by another document, in which Serbia argued that: (i) it had not been a party to the *Statute of the ICJ* until its admission to the UN on 1 November 2000; (ii) that it never had been, and still was not, a party to the *Genocide Convention*; and (iii) that when it had acceded to the *Genocide Convention* on 8 March 2001, it had entered a reservation to art IX thereof. Serbia accordingly argued that the ICJ lacked jurisdiction over it *ratione personae*.[37] The Court found the Application for Revision of the 1996 Judgment inadmissible on 3 February 2003.[38]

In the final merits phase of the case, therefore, the issues for the Court to decide were: (i) whether it had jurisdiction under art IX of the *Genocide Convention*, in light of Serbia's objections as stated in its Initiative to Reconsider;[39] (ii) whether the provisions of the *Genocide Convention* were applicable vis-à-vis the responsibility of States or only in relation to the criminal liability of individuals;[40] (iii) questions of evidence and proof, in light of the grounding of the case in factual assertions and counter-assertions, which were extremely difficult to adjudicate impartially;[41] (iv) whether Serbia was responsible for genocide in relation to specific places and events in Bosnia;[42] (v) whether Serbia was responsible for failure to prevent and punish genocide,

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[33] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro)) (Order of 14 July 1995)* [1995] ICJ Rep 279, 279–80.

[34] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro)) (Preliminary Objections)* [1996] ICJ Rep 595, 623 ('*1996 Judgment on Preliminary Objections*').

[35] Article IX of the *Genocide Convention*, above n 2, states:

> 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.

[36] Yugoslavia, *Application for Revision of the Judgement of 11 July 1996* (24 April 2001) ICJ <http://www.icj-cij.org> at 18 October 2007.

[37] Yugoslavia, *Initiative to the Court to Reconsider* Ex Officio *Jurisdiction over Yugoslavia* (4 May 2001) ICJ <http://www.icj-cij.org> at 18 October 2007 ('*Initiative to Reconsider*').

[38] *Application for Revision of the Judgement of 11 July 1996 in the Case concerning* Application of the Convention on the Prevention and Punishment of the Crime of Genocide *(Bosnia and Herzegovina v Yugoslavia), Preliminary Objections (Yugoslavia v Bosnia and Herzegovina) (Judgment)* [2003] ICJ Rep 7, 32 ('*Application for Revision*').

[39] *Application of the Convention on Genocide (Judgment)* [2007] ICJ [80] <http://www.icj-cij.org> at 18 October 2007.

[40] Ibid [155]–[158].

[41] Ibid [202].

[42] Ibid [242], [379].

including by its failure to respect the Court's Orders as to provisional measures;[43] and (vi) the appropriate remedy to be awarded by the Court.[44]

The key findings of the Court in its judgment were as follows:

1 The doctrine of *res judicata* precluded reconsideration of the 1996 decision on jurisdiction and the Court accordingly had jurisdiction to make a decision on the merits;[45]

2 The *Genocide Convention* was applicable to states as well as to individuals and the principles of state (civil) responsibility and individual criminal responsibility were therefore coexistent in relation to genocide;[46]

3 On the substantive allegations at the heart of the case, the ICJ accepted, largely on the basis of the ICTY's jurisprudence, that the acts alleged by Bosnia had in fact taken place, but declined to find that any of them amounted to genocide in international law except the massacre at Srebrenica in July 1995;[47]

4 Serbia was not responsible in international law for that act of genocide;[48]

5 On the other hand, Serbia was responsible in international law for failing to prevent and punish that act of genocide;[49] and

6 The most appropriate remedy for Bosnia in relation to that act of genocide was satisfaction — a declaration that genocide had been committed and that Serbia was responsible for failing to prevent and punish it — rather than any form of monetary compensation.[50]

Appended to the judgment of the Court are dissenting opinions by five Judges and a combination of separate opinions or declarations (concurring with the judgment) by nine Judges. Thus, only three Judges were able to resist the temptation to add their contributions separately to the record of decisions in this case. That the Bosnian and Serbian ad hoc Judges would make a point of recording their views separately is unsurprising.[51] This case note will thematically consider each of the main aspects of the Court's judgment, including the relevant portions of the various declarations, and separate and dissenting opinions.

III THE COURT'S JUDGMENT ON THE MERITS: THE JURISDICTIONAL QUESTION

It will be recalled that there was a lengthy dispute, which began in 1992, over whether or not the FRY had succeeded to the SFRY's membership of the UN. Under President Milošević, the FRY insisted that it did not need to apply for

43 Ibid [379], [425], [451].

44 Ibid [459].

45 See below Part III.

46 See below Part IV.

47 See below Part V.

48 See below Part VI.

49 See below Part VII.

50 See below Part VIII.

51 Judge ad hoc Mahiou (Bosnia) dissented from the judgment, while Judge ad hoc Kreća (Serbia) entered a 90 page separate opinion, much of which consists of a critique of the ICTY's jurisprudence, so heavily relied upon by the ICJ in this case.

membership of the organisation as it was the sole continuator State of the SFRY.[52] The UN, on the other hand, maintained that the FRY could not automatically continue the former SFRY's membership and that it would not be allowed to participate in the work of the General Assembly (and, subsequently, the Economic and Social Council) until such time as it applied for new membership.[53] The impasse was only resolved with the September 2000 election as President, in succession to Milošević, of Vojislav Koštunica, who then applied for membership of the UN as had been requested.[54] The issue of the Court's jurisdiction centred on the question, raised by Serbia in its *Initiative to Reconsider*, of whether at the time of filing the proceedings Serbia was or was not the continuator State of the SFRY.[55] If it was not, then it would not have been a party to either the *Genocide Convention*[56] or (by virtue of its consequent non-membership in the UN) the *Statute of the ICJ*. Bosnia's arguments on this point were that: (i) the FRY had been under a duty to raise this jurisdictional protest at the time of the proceedings on the preliminary objections in 1996 and, since it had not done so, the principle of *res judicata* which attached to the Court's 1996 judgment meant that the issue could not be reopened — this was essentially an argument that Serbia, having already acquiesced to the ICJ's jurisdiction in earlier proceedings in the same case, was estopped now from claiming otherwise;[57] and (ii) as the Court had decided in 1996 that it had jurisdiction over the case, the Court itself would be violating the same doctrine of *res judicata* were it now to make a contrary decision.[58]

In its judgment, the Court declined to consider the issue of Serbia's alleged acquiescence as relevant to the issue of jurisdiction *ratione personae*, as in any case

> such acquiescence would in no way debar the Court from examining and ruling upon the question … 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 … *ad hoc* consent of a party is distinct from the question of its capacity to be a party to proceedings before the Court.[59]

As to the second Bosnian argument, the Court found that it had not in its previous judgments on the case or related cases — specifically, the 2003 judgment on the FRY's *Application for Revision* — made any finding as to the legal status of the FRY in 1993 in terms of its membership or otherwise of the UN.[60] As to the application of the doctrine of *res judicata* to the 1996 judgment, the Court concluded that its finding in that judgment that it had jurisdiction to

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52 *Application of the Convention on Genocide (Judgment)* [2007] ICJ [90] <http://www.icj-cij.org> at 18 October 2007.

53 Ibid [91]–[93].

54 For a summary of this 'confused and complex state of affairs', see ibid [88]–[99].

55 Ibid [80]–[81].

56 The FRY formally acceded to the *Genocide Convention* on 12 March 2001: Office of Legal Affairs of the UN, *Status of Multilateral Treaties Deposited with the Secretary-General* (2007).

57 *Application of the Convention on Genocide (Judgment)* [2007] ICJ [101] <http://www.icj-cij.org> at 18 October 2007.

58 Ibid [104].

59 Ibid [103].

60 Ibid [105]–[113].

adjudicate the dispute under art IX of the *Genocide Convention*, 'possesse[d] the full force of *res judicata*'.[61] Because that point related to a question of jurisdiction *ratione materiae* and any question as to whether Serbia had the capacity to come before the Court was an issue of jurisdiction *ratione personae*, which logically preceded questions of jurisdiction *ratione materiae*, it could not now be reopened, as to do so would undermine the stability of the Court's jurisprudence.[62]

The jurisdictional part of the judgment occasioned some of the most vigorous disagreement among most of the Judges who entered separate or dissenting opinions. Judge Owada agreed with the judgment's conclusion, but on different grounds: his interpretation of the doctrine of *res judicata* in relation to the *1996 Judgment on Preliminary Objections* led him to the conclusion that,

> the Court itself, and not the Respondent, is precluded now from taking a different position at [the merits] stage which would be diametrically opposed to the one that the Court itself is deemed in law to have so definitively determined in the present case.[63]

Judge Tomka also agreed with the Court's findings as to jurisdiction, but on different grounds: he held that the Court should have determined *de novo* whether or not it had jurisdiction for the merits phase of the case, rather than relying on *ex post facto* explanations by way of construction or implication of the *1996 Judgment on Preliminary Objections*, a reasoning which he described as 'strained'.[64] Instead, he opined that the grounds for the Court's jurisdiction should have been a finding that the FRY was a party to the *Genocide Convention* at the time of Bosnia's 1993 Application, 'on the basis of the operation of the customary rule of *ipso jure* succession … as applied to cases of the dissolution of a State'.[65]

Judge Skotnikov dissented from the jurisdictional part of the judgment, accusing the Court of creating 'parallel realities' as regards jurisdiction and access to the Court, by refusing to entertain the FRY's lawsuit against the NATO States in connection with the bombing campaign against the FRY in 1999, but insisting that the Court had jurisdiction over Serbia as a respondent when charged with responsibility for genocide.[66] Vice-President Al-Khasawneh, in his dissenting opinion, regretted the judgment's taking 'refuge in the formalism of *res judicata*' when confronted with the FRY's 'irregular request' to present additional arguments to jurisdiction during the merits phase of the proceedings.[67] Judges Ranjeva, Shi and Koroma all disagreed with the majority's finding that the Court had jurisdiction *ratione personae* 'by necessary implication' derived from the *res judicata* effect of the *1996 Judgment on Preliminary Objections*.

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61 Ibid [123].

62 Ibid [121]–[140].

63 *Application of the Convention on Genocide (Judgment)* [2007] ICJ [37] <http://www.icj-cij.org> at 18 October 2007 (Separate Opinion of Judge Owada) (emphasis omitted).

64 *Application of the Convention on Genocide (Judgment)* [2007] ICJ [21] <http://www.icj-cij.org> at 18 October 2007 (Separate Opinion of Judge Tomka).

65 Ibid [35].

66 *Application of the Convention on Genocide (Judgment)* [2007] ICJ 1–4 <http://www.icj-cij.org> at 18 October 2007 (Declaration of Judge Skotnikov).

67 *Application of the Convention on Genocide (Judgment)* [2007] ICJ [28] <http://www.icj-cij.org> at 18 October 2007 (Dissenting Opinion of Vice-President Al-Khasawneh).

The judges reasoned that because the Court had not in 1996 definitively decided the issues of the FRY's membership of the UN or status as a party to the *Genocide Convention*, these matters could not constitute *res judicata*.[68]

It is perhaps somewhat surprising that, in a case concerned with international responsibility for 'the crime of crimes', what would normally be considered the strictly preliminary (and therefore, to an extent, subsidiary) question of the ICJ's jurisdiction should have been the focus of such a large portion of both the judgment of the Court and the various separate pronouncements of individual Judges. On the other hand, the situation of a party to the case suddenly presenting new arguments as to jurisdiction while consideration of the merits was underway was most unusual; and Judge Skotnikov undoubtedly made a valid point when he drew attention to the contradictions between the ICJ's approach to jurisdiction over the FRY in the 2000 litigation in regards to the NATO bombing campaign,[69] and that manifested in the present case. However, it cannot be denied that he was expressing a well-known Russian politico-cultural prejudice with regard to the application of international law to Serbia in international courts and tribunals. This same attitude is manifest in Russia's longstanding criticism of the ICTY, for instance.[70]

Realistically, what could the Court have done in these circumstances? The approaches of Judges Owada and Tomka represent two practical alternatives, respectively either applying a very strict interpretation of *res judicata* and refusing to reopen the jurisdictional aspect of the case; or, deciding the issue of jurisdiction *de novo*. Judge Owada's solution might be considered excessively dogmatic by some. Yet, in a case that had already consumed the best part of 14 years, for the Court to apply Judge Tomka's approach might be seen as being wasteful of time and resources: why spend yet more time debating the supposedly preliminary question of jurisdiction when the really important issue — was genocide committed in Bosnia and, if so, was Serbia legally responsible for it? — was on the table for a final decision, particularly when to do so would risk destabilising the Court's previous jurisprudence? In short, this would come down to striking a balance between expediency and principle. It is

68 *Application of the Convention on Genocide (Judgment)* [2007] ICJ [19] <http://www.icj-cij.org> at 18 October 2007 (Joint Dissenting Opinion of Judges Renjeva, Shi and Koroma).

69 Substantively identical cases were brought by Serbia against the following NATO States that had participated in the 1999 bombing campaign: Belgium, Canada, France, Germany, Italy, the Netherlands, Portugal, Spain, the UK and the US. All of them were dismissed by the Court for lack of jurisdiction: *Legality of Use of Force (Serbia and Montenegro v Belgium) (Preliminary Objections)* [2004] ICJ Rep 279; *Legality of Use of Force (Serbia and Montenegro v Canada) (Preliminary Objections)* [2004] ICJ Rep 429; *Legality of Use of Force (Serbia and Montenegro v France) (Preliminary Objections)* [2004] ICJ Rep 575; *Legality of Use of Force (Serbia and Montenegro v Germany) (Preliminary Objections)* [2004] ICJ Rep 720; *Legality of Use of Force (Serbia and Montenegro v Italy) (Preliminary Objections)* [2004] ICJ Rep 865; *Legality of Use of Force (Serbia and Montenegro v Netherlands) (Preliminary Objections)* [2004] ICJ Rep 1011; *Legality of Use of Force (Serbia and Montenegro v Portugal) (Preliminary Objections)* [2004] ICJ Rep 1160; *Legality of Use of Force (Serbia and Montenegro v UK) (Preliminary Objections)* [2004] ICJ Rep 1307. With respect to Serbia's cases against Spain and the US, no judgments were handed down by the ICJ, as the cases were removed from the Court's list preliminarily: *Legality of Use of Force (Yugoslavia v Spain) (Provisional Measures)* [1999] ICJ Rep 761; *Legality of Use of Force (Yugoslavia v US) (Provisional Measures)* [1999] ICJ Rep 916.

70 See, eg, UN GAOR, 61st sess, 26th plen mtg, UN Doc A/61/PV.26 (9 October 2006) 17 (Statement by Mr Rogachev (Russian Federation)).

submitted that when it is a matter of international justice, principle should always triumph over expediency. Thus the Court, having accepted the FRY's 2001 *Initiative to Reconsider* as to jurisdiction, was duty bound to examine the issue. It is probably true, as Vice-President Al-Khasawneh strongly implied in his dissenting opinion, that the Court should never have acceded to the FRY's request to present new arguments on jurisdiction in the first place; but, the Court having (irregularly) done so, it should not have 'take[n] refuge in the formalism of *res judicata*',[71] as this has in fact undermined that very doctrine. Ultimately, the Court's pronouncements on jurisdiction in this case will have done a disservice to the principle of *res judicata* and failed, as the Vice-President eloquently put it, to strike 'the right compromise between the fallibility of men and courts on the one hand and the need to safeguard the reasonable and legitimate expectations regarding the integrity and stability of its judgments on the other'.[72]

IV GENOCIDE AND STATE RESPONSIBILITY

On the applicability of the *Genocide Convention* to the substantive law of the case, Serbia's principal argument was that the Court lacked jurisdiction *ratione materiae* under the *Genocide Convention*, since the latter provided only a duty on states to prevent and punish genocide committed by individuals and made no provision for state responsibility.[73] In addition, Serbia argued that:

> 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 …[74]

At the heart of these arguments, beneath the surface of the claim that the *Genocide Convention* (as a standard international criminal law treaty) is concerned exclusively with the criminal pursuit of individuals as opposed to the civil responsibility of states, was the assertion that international law does not recognise the concept of a State's criminal responsibility. The Court noted that the 'duality of responsibility continues to be a constant feature of international law',[75] citing art 25(4) of the *Rome Statute*[76] and art 58 of the International Law Commission's ('ILC') 'Draft Articles on State Responsibility',[77] and considered that the obligation not to commit genocide imposed by the *Genocide Convention* on states was completely distinct from, and coextensive with, the obligations

71 *Application of the Convention on Genocide (Judgment)* [2007] ICJ [28] <http://www.icj-cij.org> at 18 October 2007 (Dissenting Opinion of Vice-President Al-Khasawneh).

72 Ibid [24].

73 *Application of the Convention on Genocide (Judgment)* [2007] ICJ [156] <http://www.icj-cij.org> at 18 October 2007.

74 Ibid [157].

75 Ibid [173].

76 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002) ('*Rome Statute*').

77 ILC, 'Draft Articles on State Responsibility' in ILC, *Report of the International Law Commission on the Work of Its 53rd Session*, UN Doc A/56/10 (2001) ('ILC Draft Articles').

imposed on individuals. In the view of the Court, these obligations were not mutually exclusive. In particular, the Court noted that if a criminal violation of international law is imputable to a state by virtue of the identity of the individual perpetrator, that violation will as a matter of course incur the international responsibility of the state in question.[78] On the Serbian argument that there had to be a finding of guilt in relation to genocide in criminal proceedings against a named individual (whose acts were imputable to the state) before the responsibility of the state could be engaged, the Court likewise distinguished between criminal and civil responsibility, holding that as these were two completely separate forms of liability determined by different tribunals and according to different legal rules and standards, it was not necessary for an individual to be convicted of genocide in order for a state to be held responsible for genocide.[79]

As the question of the nature of legal responsibilities for genocide in international law was the most theoretically contentious issue raised in the substance of the case, and was of particular importance as a precedent in relation to future cases of state sanctioned genocide, it unsurprisingly generated some sharp disagreements on the bench. Judge Owada disagreed with the majority's view of the scope of art I of the *Genocide Convention* as creating per se a specific obligation for a state not to commit genocide. In his view, the *Genocide Convention* is solely concerned with the criminal responsibility of individuals who commit genocide, and the state's duty to punish them or prevent the crime from occurring, whereas the state's duty not to commit genocide itself arises separately under general (customary) international law as part of the rules of state responsibility for internationally wrongful acts.[80]

Judge Tomka also disagreed with the majority's interpretation of art I, finding that it was 'conceived as a crime of individuals, and not of a State. The States parties have the obligation to prevent the commission of such crime and, if it was committed, to punish the perpetrators'.[81] Rather more surprisingly, he also considered, on the basis of the drafting history of the provision, that art IX of the *Genocide Convention* should not be used 'to enable charges by one State that another has committed genocide to be brought within the Court's jurisdiction',[82] and that the ICJ, as a civil court without an appeal procedure, was not the proper forum to make a legal determination that a crime of genocide had been committed.[83]

Judge Skotnikov objected to 'the very idea of an unstated obligation' and considered that as the *Genocide Convention* was concerned with the criminal liability of individuals and 'there is no such thing as State criminal responsibility', the net effect of the judgment on this point was 'decriminalization of genocide, which as a result is transformed into an

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78 *Application of the Convention on Genocide (Judgment)* [2007] ICJ [170]–[179] <http://www.icj-cij.org> at 18 October 2007.

79 Ibid [180]–[182].

80 *Application of the Convention on Genocide (Judgment)* [2007] ICJ [38]–[73] <http://www.icj-cij.org> at 18 October 2007 (Separate Opinion of Judge Owada).

81 *Application of the Convention on Genocide (Judgment)* [2007] ICJ [45] <http://www.icj-cij.org> at 18 October 2007 (Separate Opinion of Judge Tomka).

82 Ibid [60].

83 Ibid.

internationally wrongful act'.[84] He also made common cause with Judge Tomka in stating that the ICJ was not the proper forum for determining the existence of the crime of genocide, and in particular the mens rea required for genocide, since it was not a court of criminal jurisdiction.[85]

Judges Shi and Koroma, in a separate joint declaration, also disagreed with the majority's 'expansive interpretation' of the *Genocide Convention*, whereby a state could be held directly responsible for committing genocide. They did so, in common with Judges Owada, Tomka and Skotnikov, on the grounds that the *Genocide Convention* is a criminal law instrument, aimed at the punishment of individuals, whereas international law does not recognise a concept of state criminal responsibility: if a state can commit genocide, they suggested, 'then surely it would have to be viewed as being able to commit other crimes, including murder. But such a situation is neither acceptable nor recognized as part of present-day international law'.[86]

The Court's twin findings that it is not necessary for an individual state agent to be convicted of genocide in order for the relevant state to be held responsible, but that if such an agent is so convicted, the responsibility of the state will be automatically engaged, make sense both theoretically and doctrinally, and may have significant effects in influencing state authorities. It has been suggested in the past that the responsibility of the state must be engaged before any individuals representing the state can be convicted for the crime in question,[87] but this would seem an unrealistic and artificial way to proceed, since the responsibility is *primarily* that of individuals. The ICJ's formulation is surely the right way round and should make it easier, at least in legal theory, for a putative genocide to be attributed to a state, and therefore may well have a knock-on effect as regards states' willingness to engage in or sanction such crimes. Hopefully, it may have something of a deterrent effect on states' policies in the future.

Nevertheless, an interesting doctrinal debate has possibly been reopened by this part of the decision, and it is noteworthy that one third of the ICJ's Judges found it necessary to emphasise that genocide, as an international law crime, cannot be committed by states.[88] However, it is submitted, that that emphasis is a conflation of the very issues that Judges Owada, Tomka, Skotnikov, Shi and Koroma accused the majority of conflating: the judgment did not seek to aver, in criminal law terms, that Serbia was guilty of committing genocide, but rather

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84 *Application of the Convention on Genocide (Judgment)* [2007] ICJ 4 <http://www.icj-cij.org> at 18 October 2007 (Declaration of Judge Skotnikov).

85 Ibid 6.

86 *Application of the Convention on Genocide (Judgment)* [2007] ICJ [4] <http://www.icj-cij.org> at 18 October 2007 (Joint Declaration of Judges Shi and Koroma).

87 See Alain Pellet, 'Can a State Commit a Crime? Definitely, Yes!' (1999) 10 *European Journal of International Law* 425, 432.

88 As recently as 1996, the notion of state criminal responsibility was maintained by the ILC, *Report of the International Law Commission on the Work of Its 48th Session*, UN GAOR, 51st sess, Supp 10, Doc A/51/10 (1996) 131–2. Although all mention of international crimes was deleted from the final version of the ILC Draft Articles, above n 77, for a flavour of the academic debate, see, eg, Georges Abi-Saab, 'The Uses of Article 19' (1999) 10 *European Journal of International Law* 339; Giorgio Gaja, 'Should All References to International Crimes Disappear from the ILC Draft Articles on State Responsibility?' (1999) 10 *European Journal of International Law* 365; Pellet, above n 87.

was concerned with whether Serbia bore civil responsibility for the crime. Civil responsibility and criminal guilt for the same act are quite different legal concepts, and there is no logical reason why a state should not be capable of bearing civil responsibility for something that its agents are individually criminally responsible for. But that is not the same thing as saying that the state is 'guilty' in any criminal sense, and — just as Germany as a state was not considered legally 'guilty' in respect of Nazi atrocities during World War II — the ICJ's interpretation of the scope of art I of the *Genocide Convention* was surely correct. In this respect, the criticisms of Judge Skotnikov in relation to the ICJ not being the proper forum for a determination of the mens rea of genocide appear to have been overstated. When the majority spoke of not being satisfied that the mens rea for genocide was present (except in relation to the events at Srebrenica),[89] they were referring to the mens rea of the individuals who perpetrated the crimes, not to that of the state as such.[90]

V GENOCIDE IN BOSNIA: LEGAL AND FACTUAL ASPECTS OF THE CASE

The Court made findings as to the material elements of genocide, particularly in relation to the intent required by art II of the *Genocide Convention*. The well-known formulation in art II is that genocidal acts be 'committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such'.[91] The first substantive point of note made by the Court was that genocide was distinct from ethnic cleansing[92] inasmuch as

> 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 … in the context of the Convention, the term 'ethnic cleansing' has no legal significance of its own.[93]

Secondly, in relation to the definition of the targeted group, the Court determined that, for the purposes of genocide, the targeted group must be defined positively. Thus, in the instant case, it was not specific enough to claim (as Bosnia had) that 'the non-Serb population' was targeted by Serbs — Bosnian Muslims were only a part of the non-Serb population.[94] As to the old question of how much of a group constitutes a 'part' for the purposes of satisfying the material elements of genocide ('intent to destroy, in whole or in part'), the Court held that, 'the intent must be to destroy at least a substantial part of the particular group … the part targeted must be significant enough to have an impact on the group as a whole'.[95] The Court also accepted the ICTY jurisprudence to the effect that the intent need only be 'to destroy the group within a geographically

89 See below n 115 and accompanying text.

90 See *Application of the Convention on Genocide (Judgment)* [2007] ICJ [179], [186]–[189], [242], [277], [354] <http://www.icj-cij.org> at 18 October 2007.

91 *Genocide Convention*, above n 2, 280.

92 See above n 8 and accompanying text. The Court's opinion in relation to 'ethnic cleansing' (see below n 93 and accompanying text) supports the arguments discussed at above n 8 and accompanying text.

93 *Application of the Convention on Genocide (Judgment)* [2007] ICJ [190] <http://www.icj-cij.org> at 18 October 2007 (Judgment of the Court).

94 Ibid [191]–[196].

95 Ibid [198].

limited area'.[96] But the ICJ was wary of the ICTY's finding in *Krstić* that there was also a qualitative criterion (namely, that the prominence or significance of the targeted part within the group could be a useful consideration); rather, the ICJ opined that, 'the qualitative approach cannot stand alone … the substantiality [that is, quantitative] criterion is critical'.[97]

As to the determination of the facts in the case, the ICJ noted the 'unusual feature' of many of the allegations in the instant case having already been the subject of decisions by the ICTY.[98] In light of its insistence on 'proof at a high level of certainty appropriate to the seriousness of the allegation[s]',[99] the ICJ determined that, 'as a general proposition the inclusion of charges [of genocide] in an [ICTY] indictment cannot be given weight'.[100] Equally, decisions by ICTY judges or chambers confirming indictments and issuing arrest warrants and charges, and deciding defendants' motions for acquittal were denied weight by the ICJ on the grounds that these were not definitive findings and did not satisfy the standard of proof required for the instant case.[101] However, the ICJ acknowledged 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';[102] the same was accepted in relation to sentencing judgments given following a guilty plea.[103] The ICJ also indicated that it placed heavy reliance on a comprehensive report submitted by the UN Secretary-General entitled *The Fall of Srebrenica*.[104] The use by the Court of such evidence was indeed unprecedented but undoubtedly appropriate given the subject matter of the case and the need for non-partisan sources of information. For example, in regard to the issue of whether the *Genocide Convention* was capable of resulting in civil responsibility for a state, the questions of the necessary standard and nature of proof were a most unusual element of criminal law in the ICJ's jurisprudence. Judge Skotnikov, however, criticised the extensive reliance of the ICJ on the ICTY's jurisprudence in *Krstić* and *Blagojević*,[105] on the grounds that those decisions were made on the basis of other rules in addition to the *Genocide Convention*, whereas the present decision was made solely on the basis of the Convention.[106]

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96 Ibid [199].
97 Ibid [200]–[201].
98 Ibid [212].
99 Ibid [210].
100 Ibid [217].
101 Ibid [218]–[219].
102 Ibid [223].
103 Ibid [224].
104 Ibid [228]–[230]. See UN Secretary-General, *Report of the Secretary-General Pursuant to General Assembly Resolution 53/35 — The Fall of Srebrenica*, UN GAOR, 54th sess, Agenda Item 42, UN Doc A/54/549 (15 November 1999).
105 *Prosecutor v Blagojević and Jokić (Trial Chamber I)* Case No IT-02-60-T (17 January 2005) (Judgment).
106 *Application of the Convention on Genocide (Judgment)* [2007] ICJ 7–9 <http://www.icj-cij.org> at 18 October 2007 (Declaration of Judge Skotnikov). As noted earlier, however, Judge Skotnikov appears to have conflated the criminal liability of individuals and civil liability of states for genocide: see above n 88–89 and accompanying text. But see Antonio Cassese, 'On the Use of Criminal Law Notions in Determining State Responsibility for Genocide' (2007) 5 *Journal of International Criminal Justice* 857.

The most important section of the judgment on the charge of genocide in relation to Bosnia required the Court to consider the various actors in the Bosnian conflict and the extent, if any, to which the FRY had entertained close links with the Bosnian Serb entity, Republika Srpska ('RS'). This was necessary in order to establish the former's possible international responsibility for crimes which, it was always acknowledged, were mostly committed by forces owing allegiance to the latter. In other words, did the acts alleged by Bosnia constitute genocide and was the FRY legally responsible for them? The Court found that Serbia made 'its considerable military and financial support available to the [RS], and had it withdrawn that support, this would have greatly constrained the options that were available to the [RS]'.[107] The Court examined all the facts alleged by Bosnia, grouped according to geographical location, in order to determine whether they amounted to genocide under the *Genocide Convention*. The Court did this, in relation to acts alleged to have occurred in the territory of Bosnia, in the order laid out in art II of that Convention. Thus, it first considered the killing of members of the protected group (art II(a)),[108] followed by a special section devoted to the massacres at Srebrenica;[109] causing serious bodily or mental harm to members of the group (art II(b));[110] deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part (art II(c));[111] imposing measures to prevent births within the group (art II(d));[112] and forcibly transferring children of the protected group to another group (art II(e)).[113] In each and every one of these aspects of the crime of genocide and in relation to the events detailed (with one exception), the Court was not convinced that the required specific intention to commit genocide (*dolus specialis*) existed.[114] This was so even where the material elements of genocide were held to have been proven. The only exception to this pattern of findings was in relation to the particular events at Srebrenica in July 1995. In considering these atrocities, the Court relied heavily on the ICTY decisions in *Krstić* and *Blagojević* in accepting 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 [Bosnian Serb Army] …[115]

The facts regarding the atrocities committed in Bosnia were sufficiently incontrovertible that this crucial section of the ICJ's judgment — whether or not they amounted to genocide — fortunately gave rise to comparatively little dissent on the bench. Nevertheless, in Judge Skotnikov's opinion, the commission of genocide at Srebrenica was not sufficiently established in terms

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[107] *Application of the Convention on Genocide (Judgment)* [2007] ICJ [241] <http://www.icj-cij.org> at 18 October 2007.
[108] Ibid [245]–[277].
[109] Ibid [278]–[297].
[110] Ibid [298]–[319].
[111] Ibid [320]–[354].
[112] Ibid [355]–[361].
[113] Ibid [362]–[367].
[114] Ibid [277], [319], [354], [361] and [367] respectively.
[115] Ibid [297].

of the provisions of the *Genocide Convention*, although he concurred in the Court's subsequent findings that Serbia was not responsible for genocide.[116] Vice-President Al-Khasawneh, on the other hand, considered that the Court could and should have found that genocide was committed in Bosnia as a whole (that is, not just at Srebrenica) and that Serbia was responsible for such genocide.[117]

On the latter point, raised by Vice-President Al-Khasawneh in his dissent, the Court considered whether the pattern of actions taken against Bosnian Muslims as a whole, that is also on the territory of the FRY itself, demonstrated the existence of the *dolus specialis* necessary for genocide. The Court was not persuaded that the alleged 'strategic goals of the Serbian people' necessarily required the destruction of Bosnian Muslims as opposed to their expulsion; nor could the Court agree with Bosnia's broad proposition that 'the very pattern of the atrocities committed over many communities, over a lengthy period, focussed on Bosnian Muslims and also Croats, demonstrates the necessary intent'.[118] In relation to the evidence that would be necessary to prove *dolus specialis*, the Court opined that it

> has to be convincingly shown by reference to particular circumstances, unless a general plan to that end can be convincingly demonstrated to exist; and for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it could only point to the existence of such intent.[119]

This issue, of the presence or otherwise of an intention to commit genocide, caused surprisingly little disagreement among the Judges, considering that in criminal proceedings against individuals accused of genocide it has generally been the main determining factor in finding them guilty or not guilty. Vice-President Al-Khasawneh alone stated that the Court could and should have inferred genocidal intent from the consistent pattern of conduct in Bosnia, as to do otherwise was contradictory to the ICTY's jurisprudence: the absolving of Serbia 'from responsibility for genocide in Bosnia … [was an] … extraordinary result in the face of vast and compelling evidence to the contrary'.[120] On the other hand, the majority consensus about the lack of mens rea was perhaps an appropriate reflection of the difficulties encountered in seeking to hold an entire nation criminally responsible for a pattern of crimes as extensive as those which were committed in Bosnia between 1992 and 1995.

Part of the difficulty in so doing, it is suggested, is that ever since 1945 the human mind has found it hard to relate the legal concept of genocide to actual

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116 *Application of the Convention on Genocide (Judgment)* [2007] ICJ 9–10 <http://www.icj-cij.org> at 18 October 2007 (Declaration of Judge Skotnikov).

117 *Application of the Convention on Genocide (Judgment)* [2007] ICJ [40]–[47] <http://www.icj-cij.org> at 18 October 2007 (Dissenting Opinion of Vice-President Al-Khasawneh).

118 *Application of the Convention on Genocide (Judgment)* [2007] ICJ [373] <http://www.icj-cij.org> at 18 October 2007.

119 Ibid.

120 *Application of the Convention on Genocide (Judgment)* [2007] ICJ [62] <http://www.icj-cij.org> at 18 October 2007 (Dissenting Opinion of Vice-President Al-Khasawneh).

events other than the Nazi Holocaust. As Mettraux has put it:

> Because [genocide and crimes against humanity] were so intimately attached to [the crimes committed by Nazi Germany during World War II], they remained for a long time almost indistinguishable from the historical circumstances that gave birth to them. And for many years, discussions and debates about the legal characterization of certain criminal acts as either genocide or crimes against humanity often led to fruitless comparison between the events under consideration and the crimes committed during the Second World War.[121]

The ICTY has commented in its jurisprudence that genocide, more than any other type of crime, has remained associated in the popular — and, to a certain extent, legal — mind with the events of the Nazi Holocaust.[122] This historiography of the crime of genocide is such that, since its articulation as a legal concept in the wake of the Holocaust,[123] it has otherwise been applied unequivocally only to the violence in Rwanda in 1994.[124] The popular description as genocide of the atrocities committed by the Khmer Rouge in Cambodia between 1975 and 1979 is legally debatable,[125] while the UN has failed thus far to characterise events in the Darfur region of Sudan as

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[121] Mettraux, above n 8, 193–4.

[122] *Prosecutor v Jelisić (Trial Chamber)* Case No IT-95-10-T (14 December 1999) [60] (Judgement).

[123] See Raphaël Lemkin, *Axis Rule in Occupied Europe* (1944) 79–95.

[124] See *Preliminary Report of the Independent Commission of Experts Established in Accordance with Security Council Resolution 935 (1994)* [124], [148], annexed to *Letter Dated 1 October 1994 from the Secretary-General Addressed to the President of the Security Council*, UN Doc S/1994/1125 (4 October 1994).

[125] In 1999 the inclusion of jurisdiction over genocide in a tribunal to prosecute the surviving Khmer Rouge leaders was formally recommended because of the identity of some of the regime's victims: see *Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135*, [61]–[65], annexed to *Identical Letters Dated 15 March 1999 from the Secretary-General to the President of the General Assembly and the President of the Security Council*, UN GAOR, 53rd sess, Agenda item 110(b), UN Doc A/53/850 (16 March 1999). Although the Khmer Rouge undoubtedly did systematically target certain groups protected by the *Genocide Convention*, namely the Cham, Vietnamese and other ethnic minorities, and Buddhist monks, these constituted a relatively small proportion of their victims. Some commentators are not persuaded that even these acts amounted to genocide: see, eg, William Schabas, 'Cambodia: Was It Really Genocide?' (2001) 23 *Human Rights Quarterly* 470. Most of those killed by the Khmer Rouge were simply political opponents of the regime, 'intellectuals' or other persons suspected of hostility to the regime, who were targeted on those grounds irrespective of their membership of any particular 'national, ethnical, racial or religious group'. Genocide is included within the relevant jurisdiction: *Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea*, as amended 27 October 2004 (NS/RKM/1004/006) art 4, available from <http://www.eccc.gov.kh> at 18 October 2007. However, to date only two suspects — Kaing Guek Eav, alias Duch (the former commandant of the notorious Security Prison S-21) and Nuon Chea (the former Deputy Secretary of the Communist Party of Kampuchea) — have been detained, and charged only of with crimes against humanity and war crimes (not genocide): *Order of Provisional Detention (Kaing Guek Eav alias Duch)*, Extraordinary Chambers in the Courts of Cambodia, *Criminal Case File No 002/14-08-2006* (31 July 2007), available from <http://www.eccc.gov.kh> at 18 October 2007. *Provisional Detention Order (Nuon Chea)*, Extraordinary Chambers in the Courts of Cambodia, *Criminal Case File No 002/14-08-2006* (19 September 2007), available from <http://www.eccc.gov.kh> at 18 October 2007. Likewise, despite its inclusion in their respective statutes, genocide has not been charged in any indictments or investigations thus far decided or currently pending in the East Timor Special Panels for Serious Crimes, the Special Court for Sierra Leone, or the International Criminal Court.

genocide.[126] An additional factor in the mental difficulty of conceding that genocide may have occurred in Bosnia between 1992 and 1995 is quite simply the fact that the crimes were committed in Europe, in an era when many thought (on grounds that were sincerely held, despite being objectively problematic by contemporary moral standards) that such events would not be possible. But as history teaches us, the terrible reality is that the capacity of human beings to engage in genocidal behaviour is universal. In this context, the ICJ's judgment in the Bosnia-Serbia case will surely assume a critical importance in establishing a historical record of the atrocities in the Bosnian War, and in particular the events at Srebrenica, as well as setting a legal precedent as the first time in history that there has been a judicial determination of charges of the gravity of genocide, brought by one state against another.

VI GENOCIDE AT SREBRENICA: IMPUTABILITY TO SERBIA UNDER THE LAW OF STATE RESPONSIBILITY

Thus, the Court found neither a concerted plan revealing the necessary specific intent to commit genocide against the Bosnian Muslim group, nor actual genocide, in the context of Serbian operations in Bosnia as a whole or in relation to any specific location except Srebrenica. In respect of the latter alone, given that it had been found that genocide had in fact occurred, the critical point to be determined was whether the acts in question were legally attributable to Serbia. The Court laid down three tests that it would use in order to evaluate Serbia's international responsibility: (i) whether the massacres, as violations of arts II and III(a) of the *Genocide Convention*, were imputable to Serbia under the customary international law of state responsibility, as encapsulated in the ILC Draft Articles; (ii) whether inchoate forms of genocide under arts III(b)–(e) of the *Genocide Convention* were imputable to Serbia under the same rules; and (iii) whether Serbia had complied with its obligation under art I of the *Genocide Convention* to prevent and punish genocide.[127]

The first test involved consideration of whether the acts committed at Srebrenica were perpetrated by organs of the FRY[128] or, if not, by persons who were not organs of the FRY but were in fact acting on the FRY's instructions or under its direction or control.[129] As to the status of Bosnian Serb forces as organs of the FRY, the Court noted the very substantial support provided by the FRY to the VRS, but considered nevertheless, in relation to their functions and the public authority that they had exercised, that the latter had clearly acted on behalf of the RS rather than the FRY.[130] Likewise, the Court was unable to find that the most prominent Bosnian Serb militia unit engaged in the atrocities at Srebrenica, the

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126 The International Commission of Inquiry on Darfur was of the view that no genocide has taken place in Darfur, although this finding has been criticised: see, eg, Christine Byron, 'Comment on the Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General' (2005) 5 *Human Rights Law Review* 351, 354–8.

127 *Application of the Convention on Genocide (Judgment)* [2007] ICJ [379] <http://www.icj-cij.org> at 18 October 2007.

128 ILC Draft Articles, above n 77, art 4.

129 Ibid art 8.

130 *Application of the Convention on Genocide (Judgment)* [2007] ICJ [388] <http://www.icj-cij.org> at 18 October 2007.

'Scorpions', was a de jure organ of the FRY.[131] Considering whether the VRS, the 'Scorpions' and other similar units might have been de facto organs of the FRY, the Court referred to its seminal decision in *Nicaragua*, in which it had elaborated a 'dependence and control' test for such forces.[132] Noting that what was required under this test was both 'a particularly great degree of State control' over the relevant forces, and the latter's 'complete dependence' on the state in question, the Court held that the ties between the RS and the VRS on the one hand, and the FRY and the JNA[133] on the other, were 'not such that the Bosnian Serbs' political and military organisations should be equated with organs of the FRY';[134] there was even less evidence to convince the Court of this in relation to the 'Scorpions'.[135]

As to the question of whether the perpetrators of the Srebrenica atrocities had been acting on the FRY's instructions or under its direction and control, the Court again referred to its relevant formulation in *Nicaragua*, where it had held that the 'effective control' of the state was necessary for the conduct in question to give rise to legal responsibility.[136] In this context the ICJ was given its first opportunity to consider the alternative test enunciated by the ICTY for similar purposes, namely that of 'overall control', in *Tadić*.[137] The ICJ noted the fundamentally different issues before the two judicial organs, in that the ICTY was concerned with the criminal responsibility of individuals whereas the ICJ deals with the civil responsibility of states, and the specific context in which the ICTY had preferred the 'overall control' test — namely, the determination of whether the armed conflict in Bosnia was international or non-international for the purposes of the application of international humanitarian law rules.[138] The ICJ, not without some noblesse oblige, conceded that the 'overall control' test might have been appropriate for those purposes in the ICTY, but could not resist a sideswipe at the latter tribunal's insistence that it was also applicable to cases of state responsibility — an argument which the ICJ considered unpersuasive.[139] It concluded its discussion of this point by declaring for the present purposes that: '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'.[140] The Court's conclusion on its first test for state responsibility was thus that the massacres at Srebrenica were perpetrated by forces that were neither de jure nor de facto organs of Serbia; and that the massacres were not committed on the instructions or under the direction

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131 Ibid [389].

132 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US) (Merits)* [1986] ICJ Rep 14, 62 ('*Nicaragua*').

133 The Yugoslav National Army — the official name of the army of the old SFRY, which was retained for several years by the FRY after 1991.

134 *Application of the Convention on Genocide (Judgment)* [2007] ICJ [392]–[394] <http://www.icj-cij.org> at 18 October 2007.

135 Ibid [395].

136 *Nicaragua* [1986] ICJ Rep 14, 64–5.

137 *Prosecutor v Tadić (Appeals Chamber)* Case No IT-94-1-A (15 July 1999) [115]–[162] (Judgment).

138 *Application of the Convention on Genocide (Judgment)* [2007] ICJ [403]–[404] <http://www.icj-cij.org> at 18 October 2007.

139 Ibid [404].

140 Ibid [406].

or control of Serbia, nor that the latter exercised effective control over the Bosnian Serb forces.[141] Therefore, the acts of the perpetrators of the genocide at Srebrenica could not be attributed to Serbia under the rules of the international law of state responsibility.[142]

Vice-President Al-Khasawneh, in his vigorous dissent, thought that the Court should have drawn appropriate inferences as to the FRY's intention from its refusal to divulge the contents of certain 'redacted documents' from its Supreme Defence Council.[143] The Vice-President also disagreed with the majority's use of the *Nicaragua* test of effective control on the grounds that in this case, 'there was a unity of goals, unity of ethnicity and a common ideology, such that effective control over non-State actors would not be necessary'.[144] He distinguished the situation in Nicaragua from that in Bosnia as being one in which the objectives of the US and the Contras were achievable without the commission of international crimes, whereas in Bosnia the shared objective of the Serbs in Bosnia and those in Serbia was precisely the commission of such crimes; in these circumstances, he considered the requirement of effective control to be too high a threshold.[145]

The second test for state responsibility involved the application of the same rules to inchoate forms of genocide: was the FRY responsible for conspiracy to commit genocide (under art III(b) of the *Genocide Convention*), direct and public incitement to commit genocide (art III(c)), attempt to commit genocide (art III(d)), or complicity in genocide (art III(e))? The Court noted that neither conspiracy nor incitement were relevant to the facts of the case as regards the events at Srebrenica, while conspiracy was also excluded by virtue of the findings already reached on the first test; likewise, the evidence was insufficient to establish direct and public incitement by organs of the FRY or persons acting under its effective control.[146] The sole question which the Court needed to address, therefore, was whether the FRY had been complicit in the genocide at Srebrenica by providing means to enable or facilitate the commission of the crime.[147] The Court stated that for a finding of complicity in genocide to be made, the person or organ in question must have been aware of the *dolus specialis* of the principal perpetrator, and it held that:

> it is not established beyond any doubt … whether the authorities of the FRY supplied — and continued to supply — the VRS leaders who decided upon and carried out [the] 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 their perpetrators had the specific intent characterizing genocide …[148]

141 Ibid [413]–[415].

142 Ibid [415].

143 *Application of the Convention on Genocide (Judgment)* [2007] ICJ [35] <http://www.icj-cij.org> at 18 October 2007 (Dissenting Opinion of Vice-President Al-Khasawneh).

144 Ibid [36].

145 Ibid [36]–[39].

146 *Application of the Convention on Genocide (Judgment)* [2007] ICJ [417] <http://www.icj-cij.org> at 18 October 2007.

147 See ILC Draft Articles, above n 77, art 16.

148 *Application of the Convention on Genocide (Judgment)* [2007] ICJ [422] <http://www.icj-cij.org> at 18 October 2007.

Thus, the Court concluded that Serbia could not be held responsible for complicity in genocide at Srebrenica. Judges Keith and Bennouna both disagreed with the Court on this point, separately opining that the Court should have gone further in holding Serbia complicit in genocide in the terms of art III(e) of the *Genocide Convention*. They both took this view on the same grounds, namely, that the FRY must have known of the genocidal intent of the VRS and, with that knowledge, had provided aid and assistance to the VRS.[149] The question of the extent to which the actions of the VRS could be said to be imputable to the FRY went to the heart of Bosnia's case against Serbia, and was the second critical issue for the Court to decide (the first issue being whether the acts complained of were in fact genocide). Although the question has been 'in the air' ever since the ICTY Trial Chamber initially threw out the charges of grave breaches of the *Geneva Conventions* in *Tadić* in 1997[150] — on the grounds that the FRY did not control the VRS and therefore the armed conflict was not, at the time in question, international in nature — it was always going to be inevitable that the ICJ would deal with the issue by reference to the *Nicaragua* test rather than the *Tadić* test. Once again, those who might have thought otherwise — presumably including Judge McDonald in her dissent in *Tadić* — were in fact conflating two fundamentally different types of liability. Notwithstanding the basic strength of the ICJ's judgment in terms of imputing state responsibility, though, Vice-President Al-Khasawneh made a salient point when he distinguished the situation in *Nicaragua* from that in the present case on the basis of the acts necessary to accomplish the perpetrators' objectives: the majority's judgment could have been more nuanced on this aspect.

VII FAILURE TO PREVENT AND PUNISH GENOCIDE: A SECONDARY FORM OF STATE RESPONSIBILITY?

The third and last test for state responsibility in the reasoning of the Court was whether Serbia had complied with its obligations to prevent and punish genocide under art I of the *Genocide Convention*. The Court emphasised that

> the obligation … 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 … is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible. … In this area the notion of "due diligence", which calls for an assessment *in concreto*, is of critical importance.[151]

It further noted that a state could be held responsible for failing to prevent genocide only if genocide had actually occurred, and took care to distinguish

[149] *Application of the Convention on Genocide (Judgment)* [2007] ICJ [9]–[16] <http://www.icj-cij.org> at 18 October 2007 (Declaration of Judge Keith); 3 (Declaration of Judge Bennouna).

[150] *Tadić (Trial Chamber)* Case No IT-94-1-T (7 May 1997) [577]–[606] (Opinion and Judgment).

[151] *Application of the Convention on Genocide (Judgment)* [2007] ICJ [430] <http://www.icj-cij.org> at 18 October 2007.

between complicity in genocide and failure to prevent genocide: the former violation was one of commission, while the latter was one of omission.[152] As to the facts of the genocide at Srebrenica, the Court recalled the influence which the FRY had undoubtedly had over the Bosnian Serbs, the fact that at the time of the ethnic cleansing at Srebrenica the FRY was bound by the very specific obligations of the two 1993 orders indicating provisional measures,[153] and observed that the FRY 'could hardly have been unaware of the serious risk of [genocide] once the VRS forces had decided to occupy the Srebrenica enclave'.[154] In the view of the Court, the authorities in Belgrade could at least have 'surmised' what would happen at Srebrenica once the VRS overran the area, and 'should … have made the best efforts within their power to try and prevent the tragic events then taking shape … [as] it must have been clear that there was a serious risk of genocide in Srebrenica'.[155] The Court therefore concluded that Serbia had done nothing to prevent the genocide at Srebrenica and that this failure to act engaged its international responsibility.[156]

Judge Tomka disagreed, holding that, as the FRY had exercised neither jurisdiction over the area of Srebrenica, nor control over the VRS, nor knew in advance of the plan to commit massacres there, it could not reasonably have prevented the atrocities from occurring.[157] Judge Skotnikov, for his part, called the majority's treatment of the obligation to prevent genocide, 'extraordinarily expansive'.[158] While he thought that it was 'a commendable appeal to the nations of the world to do all they can to prevent genocide …', he considered that it was an incorrect interpretation of the *Genocide Convention* as the obligation to prevent could reasonably extend only to cases where the genocide was committed in an area under a state's jurisdiction or control:

> Instead the Court has introduced a politically appealing, but legally vague, indeed, hardly measurable at all in legal terms, concept of a duty to prevent with the essential element of control being replaced with a highly subjective notion of influence.[159]

Judge Ranjeva did not dissent from this part of the judgment, but filed a separate opinion in which he emphasised that the obligations in the *Genocide Convention* were obligations *erga omnes*, which gave rise to an obligation of permanent vigilance and cooperation against genocide for all states.[160]

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152 Ibid [431]–[432].

153 Ibid [435].

154 Ibid [436].

155 Ibid [438].

156 Ibid.

157 *Application of the Convention on Genocide (Judgment)* [2007] ICJ [66]–[68] <http://www.icj-cij.org> at 18 October 2007 (Separate Opinion of Judge Tomka).

158 *Application of the Convention on Genocide (Judgment)* [2007] ICJ 9 <http://www.icj-cij.org> at 18 October 2007 (Declaration of Judge Skotnikov).

159 Ibid 10.

160 *Application of the Convention on Genocide (Judgment)* [2007] ICJ <http://www.icj-cij.org> at 18 October 2007 (Separate Opinion of Judge Ranjeva).

This latter aspect of the judgment, and Judge Ranjeva's comments, trace a direct line of descent back to the ICJ's famous dictum in *Barcelona Traction*, that

> an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.
>
> Such obligations derive, for example, in contemporary international law, from the outlawing of … genocide …[161]

Indeed, this aspect of the case could be said to represent a fulfilment of the implication of what the Court said in *Barcelona Traction*. Although the introduction of the concept of *erga omnes* was much criticised for a time, and lacked much specificity, it has since attained general acceptance in the literature.[162] What remained lacking was an elucidation of the practical consequences of its violation. The comments by the majority and Judge Ranjeva in the case at hand, therefore, are potentially particularly far-reaching and could have very considerable significance for the future, notably in terms of potential influence on politicians' decisions on whether or not publicly to characterise a particular situation as genocide.[163] The immediate practical implications, however, remain: what, precisely, are states actually to do in the presence of a situation publicly labelled genocide — particularly if, as Judges Tomka and Skotnikov suggested, a state cannot reasonably do anything because it lacks authority or control over the area where the genocide is taking place? The apparent rise, since 1999, of a doctrine of humanitarian intervention which may be in the process of developing into a norm of customary international law,[164] might lead some to champion ever more vociferously for a right or even —

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161 *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (Second Phase)* [1970] ICJ Rep 3, 32 (Judgment) ('*Barcelona Traction*'). The ICJ had already, nearly 20 years before *Barcelona Traction*, noted the 'special characteristics' of the *Genocide Convention*, in that, '[i]n such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention': *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* [1951] ICJ Rep 15, 23. See also ILC Draft Articles, above n 77, art 48; ILC, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc A/CN.4/L.682 (13 April 2006) [385]–[403].

162 For an overview of the initial development of the concept and the legal arguments surrounding it, see Maurizio Ragazzi, *The Concept of International Obligations* Erga Omnes (1997) 1–17. See also Christian Tams, *Enforcing Obligations* Erga Omnes *in International Law* (2005) 1–4.

163 Notwithstanding the International Commission of Inquiry's refusal to do so, the US Government had previously referred to the situation in Darfur as genocide: see Byron, above n 126, 354.

164 See Louis Henkin, 'Kosovo and the Law of "Humanitarian Intervention"' (1999) 93 *American Journal of International Law* 824; Dino Kritsiotis, 'The Kosovo Crisis and NATO's Application of Armed Force against the Federal Republic of Yugoslavia' (2000) 49 *International and Comparative Law Quarterly* 330, 359; Peter Hilpold, 'Humanitarian Intervention: Is There a Need for a Legal Reappraisal?' (2001) 12 *European Journal of International Law* 437, 459–62.

bolstered by the ICJ's judgment in the present case — a duty[165] to intervene by force in order to prevent or stop a genocide from occurring. Such a development would have the potential to save human life and destabilise international relations in almost equal measure.[166] Great political willpower will need to accompany feelings of legal entitlement and moral righteousness if State practice is to pursue and develop this aspect of the judgment through its logical implications. Otherwise, there is a danger that this part of the judgment will be seen as mere empty rhetoric.

Another, less state-centric possibility that may be stimulated by the judgment is the willingness of prosecutors in national jurisdictions to bring domestic proceedings, whether civil or criminal, to establish liability or guilt in alleged cases of genocide, on the basis of the 'universal standing' that violation of an *erga omnes* obligation might be said to confer.[167] That, however, will depend on national law, which will in turn depend on political willingness to countenance proceedings that may prove deleterious to international relations — as illustrated by the Belgian experience with the practice of universal jurisdiction.[168]

The other aspect of the state's obligation under art I of the *Genocide Convention* is that of punishing genocide. The Court noted that art VI of the *Genocide Convention*, which sets out the penal jurisdiction to prosecute persons accused of genocide, only obliges a state to institute and exercise territorial criminal jurisdiction — and Srebrenica was and is not in Serbian territory.[169] The main point here was thus the other obligation in art VI, namely to cooperate with 'such international penal tribunal as may have jurisdiction'.[170] The Court held that the FRY had been under a duty to cooperate with the ICTY, by virtue of the *Dayton Agreement* and as a member of the UN in accordance with art 25 of the *UN Charter*,[171] and was therefore legally responsible for failure to comply with

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165 See UN Secretary-General, *A More Secure World: Our Shared Responsibility*, UN GAOR, 59th sess, Agenda Item 55, UN Doc A/59/565 (2 December 2004) [199]–[203].

166 By way of caution, it should not be forgotten that an alleged imperative to save the Iraqi people from Saddam Hussein's depredations was one of the justifications put forward, at least in the UK, for invading Iraq in 2003. Prime Minister Tony Blair, during the debate in which Parliament was being asked to authorise the use of force by the UK against Iraq, supplemented his arguments on Iraq's alleged weapons of mass destruction with emotional references to '[t]he brutality of the repression' in Iraq and stated that the Iraqi people's 'only true hope lies in the removal of Saddam': UK, *Parliamentary Debates*, House of Commons, 18 March 2003, vol 401, column 772–3 (Tony Blair, Prime Minister).

167 See Alfred Rubin, '*Actio Popularis*, *Jus Cogens* and Offenses *Erga Omnes*?' (2001) 35 *New England Law Review* 265, 277–80.

168 For an overview of Belgium's transition from activism to reticence, see Luc Reydams, 'Universal Criminal Jurisdiction: The Belgian State of Affairs' (2000) 11 *Criminal Law Forum* 183; Luc Reydams, 'Belgium's First Application of Universal Jurisdiction: The *Butare Four* Case' (2003) 1 *Journal of International Criminal Justice* 428; Luc Reydams, 'Belgium Reneges on Universality: The 5 August 2003 Act on Grave Breaches of International Humanitarian Law' (2003) 1 *Journal of International Criminal Justice* 679.

169 *Application of the Convention on Genocide (Judgment)* [2007] ICJ [442] <http://www.icj-cij.org> at 18 October 2007.

170 *Genocide Convention*, above n 2, art VI.

171 Article 25 of the *UN Charter* states: 'The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter'. The ICTY was established, and cooperation therewith required, by SC Res 827, UN SCOR, 48th sess, 3217th mtg, UN Doc S/RES/827 (25 May 1993).

art VI of the *Genocide Convention*.[172]

Bosnia's last substantive claim was that the FRY was responsible for breach of the Court's orders indicating provisional measures, a claim with which the Court agreed[173] in light of the express requirements in the operative provisions of those orders to 'take all measures within its power to prevent commission of the crime of genocide' and to 'ensure that any … organizations and persons which may be subject to its … influence … do not commit any acts of genocide'.[174]

VIII FOOTING THE BILL (OR NOT) FOR GENOCIDE: WHAT REPARATIONS ARE ADEQUATE?

Finally, as to the appropriate reparation to be awarded, the Court was of the view that financial compensation was not appropriate because a causal nexus between the FRY's violation of its obligation of prevention and the actual damage resulting from the genocide at Srebrenica could not be proven, as it could not be conclusively established that genocide would not have occurred at Srebrenica had the FRY acted in full compliance with its legal obligations. The most appropriate remedy, therefore, was deemed to be satisfaction, in the form of a declaration in the *dispositif* that Serbia had failed to comply with its obligation to prevent genocide.[175] Serbia's non-compliance with the Orders on Provisional Measures[176] was seen as an aspect of, or merging with, its substantive obligations of prevention and punishment under the *Genocide Convention*, and therefore not requiring any specific compensation (as requested by Bosnia) other than an additional declaration of non-compliance in the judgment.[177]

This part of the ICJ's judgment was very peculiar and among the least satisfactory aspects of the entire decision.[178] Bosnia's request for reparation was treated in a singularly cursory manner by the Court, which declined to give any real reasons for its failure to award any perceptible compensation for the genocide which it acknowledged had occurred at Srebrenica and which Serbia had been found to have failed to prevent. If genocide occurred at Srebrenica and the FRY failed to prevent it, at least a partial causal link would seem to have been clearly established. In these circumstances, Serbia committed an internationally wrongful act and surely ought to be required to pay *some* compensation to the victims, even if only a reduced amount to reflect the somewhat indirect liability that the Court found. It might have been thought that

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172 *Application of the Convention on Genocide (Judgment)* [2007] ICJ [443]–[447] <http://www.icj-cij.org> at 18 October 2007.

173 Ibid [451]–[456]. However, the court ultimately rejected Bosnia's claim, on the basis of their earlier findings that international responsibility for the acts committed at Srebrenica could not be attributed to Serbia: at [457].

174 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro)) (Provisional Measures)* [1993] ICJ Rep 3, 24.

175 *Application of the Convention on Genocide (Judgment)* [2007] ICJ [459]–[463] <http://www.icj-cij.org> at 18 October 2007.

176 Above n 31 and accompanying text.

177 *Application of the Convention on Genocide (Judgment)* [2007] ICJ [469] <http://www.icj-cij.org> at 18 October 2007.

178 Christian Tomuschat, *Reparation in Cases of Genocide* (2007) <http://www.haguejusticeportal.net/eCache/DEF/7/879.html> at 18 October 2007.

the relatives of the Srebrenica victims would be entitled to something concrete by way of amends, but the Court's decision leaves them with nothing more than perhaps a certain moral satisfaction. On the other hand, considering the well-known statement by the ICJ's predecessor that, 'reparation must, so far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed',[179] it must be admitted that an award of damages would hardly be able to accomplish such an objective. Still, the award of mere declarations as satisfaction seems, in truth, unsatisfactory and leaves an unpleasant aftertaste.

IX CONCLUDING COMMENTS

This note has considered only the most important points from what is surely the longest and most procedurally complex case the ICJ has ever entertained. Considering that the Judges of the ICJ were making their decision without any previous analogous cases to turn to for guidance, in its attempt to grapple with the difficulties of such a case the Court on the whole was conscientious and meticulous in its approach, which resulted in several points that will need to be considered for their implications in future cases of genocide. Possibly the most important thing to come out of the case — indeed, an issue that was at the heart of the argument — has been the duality of international legal responsibilities in relation to genocide. The controversy over state criminality might have been thought to have been laid to rest when the ILC excluded it from its final Draft Articles in 2001, but the ICJ's interpretation of art I of the *Genocide Convention* was seen by several of the Judges as reopening the debate. Such an interpretation was probably inevitable, given the fact that often it is the organs of the state that are in the best position to commit genocide. If that is combined with Judge Ranjeva's comments on the *erga omnes* nature of the obligations in the *Genocide Convention*,[180] the way could yet be open for inter-state cases to be brought against such international miscreants as Zimbabwe or Myanmar — although an obvious difference between those cases and that of Bosnia is that, unlike the latter, they do not involve any element of international or internationalised armed conflict. And yet, the crime of genocide does not depend on the existence of an armed conflict; nor could the VRS plausibly be seen as anything other than a non-state actor, given the international non-recognition of the RS. The questions will really boil down to these: which other state(s) will be sufficiently interested — in the legal sense — in what is happening in Zimbabwe or Myanmar to bring a case against them? Or will a state that manifestly has no particular interest in what is happening there seek to bring an inter-state *actio popularis*?[181] On a domestic level, will states feel emboldened enough to attempt prosecutions of officials from Zimbabwe or Myanmar on the basis of universal jurisdiction?

Whatever the identity and status of the perpetrators in any given situation, it is clear that genocide remains fundamentally a crime of individuals; if those

[179] *Factory at Chorzów (Claim for Indemnity) (Germany v Poland) (Merits)* [1928] PCIJ ser A, No 17, 47.

[180] See above n 160 and accompanying text.

[181] 'Right of a member of a community to take legal action in vindication of a public interest': James Fox, *Dictionary of International and Comparative Law* (3rd ed, 2003) 5.

individuals represent or are under the effective control of a state, then that state may have a separate legal responsibility in parallel to the individual liability of the perpetrators. What the present case does demonstrate beyond a shadow of doubt is that the notorious difficulty of proving genocide charges against defendants in criminal cases is equally applicable, if not more so, when seeking to hold a state liable for genocide. Although proceedings against a state are not, and cannot be, criminal in nature, in relation to genocide the lesson of the present case is that they are still dominated by the criminal concept of *dolus specialis*; and if that very high level of specific intent is exceedingly difficult to prove against individual defendants, it is *a fortiori* the case against a collective or, in the famous phrase of the International Military Tribunal at Nuremberg, an 'abstract entity' like a state.[182]

For all that, it is clear that the ICJ was indebted to the ICTY's jurisprudence for its determination and legal qualification of many of the facts alleged by Bosnia; as Judge Tomka put it, '[c]ases involving the "responsibility of a State for genocide" are too serious to be adjudicated simply on the basis of the allegations by the Parties'.[183] Whether the ICJ would have been able to make any of the findings that it did in relation to the existence or otherwise of genocide in Bosnia would surely have been unlikely in the extreme; in this respect, the proceedings in the case might be seen as some kind of 'fluke'. It is not surprising, in this context, that the ICJ found that genocide occurred at Srebrenica in July 1995; what *is* surprising, however, is — as Vice-President Al-Khasawneh stated in his dissenting opinion — the unwillingness of the Court to deduce genocide in Bosnia as a whole. The methodology employed in the judgment appears arguably suspect in this regard: time and again, the majority sets out the facts behind the allegations in awful detail, only to end with a brief, dismissive statement (unsupported by any attempt at sustained argument) to the effect that the Court 'is not persuaded' that the facts disclosed amount to genocide in terms of the intention required. On the other hand, the extreme gravity of the charges militates against easy findings of guilt: a conservative approach may be warranted, and on this basis the Court, with the best will in the world, probably could have done little else.

Another result of the case would seem to be that there is carte blanche for genocide in circumstances where it is carried out by non-state actors with whom a state has manifest sympathy and common goals, but over whom it does not actually have effective control. It was always going to be necessary, sooner or later, that the ICJ confront the tension between its enunciation of the 'effective control' test in *Nicaragua* and the ICTY's inclination to the 'overall control' test in *Tadić*, but it is submitted that the majority were right to prefer the former. The determination of whether the FRY had overall control over the VRS was used by the ICTY in order to determine the applicability to Tadić of charges of grave breaches of the 1949 *Geneva Conventions*, which require that the conflict be international in nature. Thus, the question which this test was formulated to answer was whether the conflict in Bosnia was international or non-international

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[182] International Military Tribunal, *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946* (1947) vol 22, 466.

[183] *Application of the Convention on Genocide (Judgment)* [2007] ICJ [72] <http://www.icj-cij.org> at 18 October 2007 (Separate Opinion of Judge Tomka).

in terms of international humanitarian law, for the purpose of applying war crimes charges. Genocide, on the other hand, is not dependent on a state of armed conflict or the classification of such conflict — like crimes against humanity, genocide can occur in peacetime or in any type of conflict. The ICJ's decision on the appropriate test for state responsibility was therefore surely correct.

The Muslims of Bosnia have undoubtedly been left feeling very short-changed by this decision; a widespread perception of the outcome of the case is that the Serbs have been allowed to commit murder — literally — and 'get away with it'. Even what little remedy has been awarded appears, as one commentator has put it, 'an unsatisfactory form of satisfaction'.[184] And yet, what else could the Court reasonably have said? Had it found that Serbia was indeed responsible to a fuller extent for genocide in Bosnia, its decision would have been derided in certain quarters (and not just in Belgrade, but in Moscow and Athens too) as yet further evidence of the international community's intrinsic bias against Serbia. It remains to be seen whether the judgment in this case will serve as a serious and useful precedent for international law. Or will it merely be regarded as a one-off, confined to its own special set of circumstances, and necessary to provide at least a judicial fig leaf of closure to a very painful and tragic episode of recent European history?

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[184] Tomuschat, above n 178.

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