

THE JUDGMENT OF THE ICJ IN THE GENOCIDE CASE: 'THE STATE AS PERPETRATOR OF GENOCIDE'

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In this historic case between Bosnia and Serbia revolving around the question whether Serbia could be held responsible for the genocide at Srebrenica, the ICJ was requested to settle a dispute that was already subject to the criminal jurisdiction of the ICTY. The ICJ determined that in addition to individuals, the Genocide Convention also contains an obligation for States not to commit genocide, though such an obligation was never expressly formulated by the drafters. Hence the ICJ is competent to make a finding on genocide in order to ascertain a treaty violation by a State-party. This contribution will analyze the manner in which the Court dealt with a case of extreme gravity with regard to jurisdiction, procedural standards and substantive law.

Introduction

In a much anticipated judgment delivered on 26 February 2007, the International Court of Justice finally ruled on the issue of State responsibility of Serbia under the 1948 Genocide Convention for acts committed or omitted between 1991 and 1995 in Bosnia and Herzegovina.¹ The Court found by thirteen votes to two that Serbia had not committed genocide in Bosnia nor could be considered an accomplice in it. It did however find Serbia responsible for failing to prevent and punish the genocide that occurred at Srebrenica in July 1995, when approximately 7000 Muslim males, widely differing in age, were massacred in the aftermath of the capture of this 'safe area'. As the physical perpetrators of these massacres were the Bosnian Serb forces, the responsibility of Serbia would only arise if a relationship of a certain pedigree could be established between Belgrade and the Bosnian Serb army of the Republika Srpska (hereinafter: VRS).

With the specific aim of proving this relationship, Bosnia filed an application at the International Court of Justice on 20 March 1993 to initiate proceedings against Serbia on account of alleged violations of the Genocide Convention, in light of the substantial financial and military support given by Serbia to the Bosnian Serbs.² In quite a macabre sense, the only instance where the Court ultimately found the allegation of genocide proven, Srebrenica, was still to occur at

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¹ On 4 February 2003 the respondent State changed its name from the Federal Republic of Yugoslavia (hereinafter: FRY) to Serbia and Montenegro by way of adoption of a new constitutional Charter. For the sake of brevity, I will refer in this article to the FRY before 04-02-03, and to Serbia after that date. Bosnia and Herzegovina will be referred to as Bosnia.

² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, 20 March 1993.

that time. But as the genocide was found to be committed by the VRS without Belgrade having effective control over or having issued instructions to the VRS, the Court was unable to attribute the genocide to Serbia.

The initial reactions to this finding were quite critical to say the least. Several jurists opined that the restrictive legal standards the Court applied, such as the adherence to the 'old' standard of effective control, or the limited scope of complicity, amounted to nothing less than a 'technical misstep' or an 'unrealistically high standard of proof'.³ However, these comments ignore the areas where the Court has arguably expanded the grounds for international responsibility of the State, also when that meant leaving the safe road of a restrictive interpretation of the Convention. In fact, in applying the Genocide Convention the Court had to operate at a relatively unexplored intersection of public international law and international criminal law, where the drafting history shows considerable ambiguity. It required a re-animation of the legal notion of State perpetrator ship that was only vaguely referred to in the Convention, but never formulated in detail by the drafters. As not uncommon for controversial notions, it was essentially left to the judiciary, in this case the ICJ, to clarify the matter. Though one might be critical about certain findings of the Court, a more nuanced reception is called for.

In this contribution the main legal questions the Court was confronted with will be discussed in the order the Court dealt with them in this Judgment. Part I deals with jurisdiction. One of the main legal challenges in this case was posed by the issue of access to the Court of Serbia at the time of the Judgment on Preliminary Objections.⁴ The role of the issue of access in the preliminary stage of the case will be examined in section I. Section I.1 will briefly focus on the changed strategy of Serbia towards membership of the United Nations and its subsequent complicating impact on the issue of access. In section I.2 the solution of the Court will be analyzed. This entailed a full contradiction of its viewpoint on the issue of access as previously adopted in the *Legality of the Use of Force*⁵ cases of 2004, in order to pass jurisdiction and proceed to the merits.

Part II deals with the applicable law and the way it was interpreted by the Court. As the Genocide Convention leaves considerable room for interpretation, the Court had to clarify the scope of each substantive State obligation that formed part of the dispute. Although all obligations merit

³ See Ruth Wedgwood, 'Slobodan Milosevic's Last Waltz', *The New York Times*, 12 March 2007, and Antonio Cassese, 'A Judicial Massacre', 27 February 2007, at: http://commentisfree.guardian.co.uk/antonio_cassese/2007/02/the_judicial_massacre_of_srebr.html.

⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment*, I. C. J. Reports 1996, p. 595, point 2 of the operative part.

⁵ *Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections; Legality of Use of Force (Serbia and Montenegro v. Canada), Preliminary Objections; Legality of Use of Force (Serbia and Montenegro v. France), Preliminary Objections; Legality of Use of Force (Serbia and Montenegro v. Germany), Preliminary Objections; Legality of Use of Force (Serbia and Montenegro v. Italy), Preliminary Objections; Legality of Use of Force (Serbia and Montenegro v. Netherlands), Preliminary Objections; Legality of Use of Force (Serbia and Montenegro v. Portugal), Preliminary Objections; Legality of Use of Force (Serbia and Montenegro v. United Kingdom), Preliminary Objections*; Judgments of 15 December 2004, available at <http://www.icj-cij.org>.

further discussion, special attention will be given to the obligation not to commit genocide and the obligation to prevent genocide. The first on account of its potential impact on the concept of crime of State and the latter in light of the theme of extra-territoriality of this issue. Finally, the Court's decision on the issue of reparation will be examined.

Part III contains some general reflections on the possible implications this Judgment might have for the two points of interest mentioned above, the concept of crime of State and on the extra-territorial scope of the Conventions.

I. Jurisdiction: Access to the Court

Despite having already ruled upon jurisdiction in the Judgment on Preliminary Objections of 11 July 1996, the question whether Serbia possessed the capacity to have access to the Court remained a serious challenge to the Court's jurisdiction during the entire course of the proceedings. The issue largely revolved around the questionable status of Serbia as a member of the United Nations (hereinafter: UN), a highly political topic which explains the difficulties of the Court having to deal with it.

The first instance where the Court had to address the issue was the Order on Provisional Measures of 8 April 1993.⁶ The Order followed a request of both parties to the dispute, asking for the indication of provisional measures with regard to the atrocities taking place in Bosnia. In a standard consideration the Court asserted that though it is not necessary to fully satisfy itself that it has jurisdiction on the merits of the case, it will only impose such measures if a *prima facie* basis can be ascertained upon which to establish jurisdiction.⁷ As nowadays most states are parties to the Statute of the Court, ascertaining jurisdiction *ratione personae* is mostly reduced to a formality.⁸

The Genocide case is an atypical case on jurisdiction however, as there were serious grounds for doubting whether Serbia had access to the Court in the first place. Article 35 (1) of the Statute, which deals with this issue, provides that access is reserved for parties to the Statute. This provision has to be read in conjunction with article 93 (1) of the UN Charter, which states that all members of the United Nations are automatically parties to the Statute of the International Court of Justice. Though this is the common way to gain access, the disintegration of the Socialist Federal Republic of Yugoslavia (hereinafter: SFRY) in the early 1990s left the legal status of the emerging state entities surrounded by uncertainty, particularly with regard to their UN membership. While the seceded entities were eventually accepted as new members of the

⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 3, paras. 14-19.

⁷ *Idem*, para. 14.

⁸ See Shabtai Rosenne, *The Law and Practise of the International Court 1920-2005, Vol.II Jurisdiction*, Leiden: Martinus Nijhoff 2006, p. 597.

⁹ Croatia and Slovenia seceded on 25 June 1991, Macedonia on 17 September 1991, and Bosnia and Herzegovina on 6 March 1992. Subsequent dates of admission as Members of the United Nations: Croatia 22 May 1992 (A/RES/46/238), Slovenia 22 May 1992 (A/RES/46/236), Macedonia 8 April 1993 (A/RES/47/225) Bosnia and Herzegovina 22 May 1992 (A/RES/46/237).

United Nations, the claim of the FRY to be the continuator of the SFRY met with considerable opposition. This was also noticed by the Security Council which stated in resolution 777 of 19 September 1992:

“[...]

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

Recalling in particular resolution 757 (1992) which notes that ‘the claim by the Federal Republic of Yugoslavia [...] to continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations has not been generally accepted’,

1. *Considers* that the Federal Republic of Yugoslavia [...] cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and therefore *recommends* to the General Assembly that it decide that the Federal Republic of Yugoslavia [...] should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly”;¹⁰

The General Assembly integrally adopted the viewpoint of the Security Council with resolution 47/1, adopted on 22 September 1992.¹¹

While admission of a new member to the United Nations can be viewed as a rather uncomplicated issue of either yes or no through the procedure of article 4(2) of the UN Charter, the question of membership by way of continuation is subject to the constitutive theory of recognition.¹² That means that the Court had to infer an answer based on a highly politicized legal doctrine instead of a codified legal procedure. In other words, whether or not a state is viewed as the continuator of a UN member is so to speak in the eye of the beholder. From the legal point of view this is evidently problematic when membership triggers legal consequences such as access to the Court, which is obviously intended to be interpreted in an objective sense: a state can exercise this capacity towards all other states or towards none.

This posed a significant problem for the Court to resolve under article 35(1). How to identify the legal status when recognition is predominantly motivated by political considerations? As vice president Al-Khasawneh noted in his dissenting opinion to the Judgment on the merits, “This state of affairs is typical for the relativism inherent in the constitutive theory of recognition

¹⁰ UN Doc. S/RES/777 (1992).

¹¹ [...] 1. *Considers* that the Federal Republic of Yugoslavia [...] cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and therefore decides that the Federal Republic of Yugoslavia [...] should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly: UN Doc. A/RES/47/1 (1992).

¹² The author is aware of the controversial status of the constitutive theory, but is in agreement with Vice-President Al-Khasawneh that recognition in this case is best qualified as constitutive. *supra* note 13.

and in itself prevents the drawing of any firm inferences.”¹³ The uncertainty about the status of the FRY led Bosnia to ask for a legal explanatory statement from the Secretary-General on this matter. The Under-Secretary-General and Legal Counsel of the UN replied and took the view that:

“While the General Assembly has stated unequivocally that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot automatically continue the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations and that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations, the only practical consequence that the resolution draws is that the Federal Republic of Yugoslavia [...] shall not participate in the work of the General Assembly. It is clear, therefore, that representatives of the Federal Republic of Yugoslavia [...] can no longer *participate* in the work of the General Assembly, its subsidiary organs, nor conferences and meetings convened by it.

On the other hand, the resolution neither terminates nor suspends Yugoslavia’s *membership* in the Organization. Consequently, the seat and nameplate remain as before, but in Assembly bodies representatives of the Federal Republic of Yugoslavia [...] cannot sit behind the sign ‘Yugoslavia’. Yugoslav missions at United Nations Headquarters and offices may continue to function and may receive and circulate documents. At Headquarters, the Secretariat will continue to fly the flag of the old Yugoslavia as it is the last flag of Yugoslavia used by the Secretariat. The resolution does not take away the right of Yugoslavia to participate in the work of organs other than Assembly bodies. The admission to the United Nations of a new Yugoslavia under Article 4 of the Charter will terminate the situation created by resolution 47/1”;¹⁴

Confronted with these seemingly contradictory views of the Security Council and the General Assembly on the one hand and the Secretary-General on the other hand, the Court noted in the Order of 8 April with a sense of understatement that “...while the solution adopted is not free from legal difficulties, the question whether or not Yugoslavia is a Member of the United Nations and as such a party to the Statute of the Court is one which the Court does not need to determine definitively at the present stage of the proceedings...”¹⁵ It continued by stating that the other way to have access to the Court, namely a special provision contained in a treaty in force, could in this case be found in article IX of the Genocide Convention, which confers jurisdiction on the Court in case of disputes arising under the Convention, and can *in any event*

¹³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment 26 February 2007 (not yet published), Dissenting Opinion of Vice-President Al-Khasawneh, para. 8.

¹⁴ UN Doc. A/47/485 (1992); emphasis in the original.

¹⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, supra* note 6, para. 18.

serve as a *prima facie* basis for the jurisdiction *ratione personae*. So without excluding access to the Court by way of membership to the United Nations, the Court seemed rather reluctant to take a clear stance on the matter and relied mainly on article 35(2) of the Statute.

Not a single reference to the issue of access to the Court can be found in the Judgment on Preliminary Objections of 11 July 1996.¹⁶ One might expect a more firm position of the Court at this later stage of the proceedings, since in principle at this stage the jurisdictional and admissibility issues are decided upon with finality. But as the issue of access was not put forward by either party (at that time the FRY still held on to the claim that it was continuing the membership of the SFRY), the Court apparently saw no need to address it. According to Judge Tomka the attitude of the Court was the result from the objective 'not to pre-empt (or pre-judge) the position that the Security Council and the General Assembly might have taken subsequently',¹⁷ an explanation that reflects vice-presidents Al-Khasawneh's remarks on the political nature of recognition.

Hence, the Court rejected all raised objections and concluded that it had jurisdiction to proceed to the merits of the case.

I.1 The Change of Strategy

In the aftermath of Milosevic's fall from power and the emergency of a new spirit of democracy, the strategy of Serbia before the Court changed significantly.¹⁸ It decided to abandon its claim of continuation and applied for admission as a new member of the UN on 27 October 2000. Through the procedure of article 4 of the UN Charter, the General Assembly admitted the FRY as a member on 1 November 2000.¹⁹ Taking this new membership as the starting point, the FRY argued that it only became a member of the UN with the recent admission and consequently challenged membership before this date. For the present case that meant the withdrawal of the counterclaim that had earlier been launched and a request for revision of the decision rendered in the Judgment on Preliminary Objections.²⁰

In the *Application for Revision* case, the FRY basically argued that the admission had exposed unknown facts at the time of the judgment on preliminary objections, namely that the FRY was

¹⁶ *Supra* note 4.

¹⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment 26 February 2007 (not yet published), Separate Opinion Judge Tomka, para. 16.

¹⁸ This paragraph is largely based on the article of Maria Chiara Vitucci, 'Has Pandora's Box been Closed? The Decisions on the Legality of Use of Force Cases about the Status of the Federal Republic of Yugoslavia (Serbia and Montenegro) within the United Nations', *Leiden Journal of International Law* (19) 2006-1, p. 112.

¹⁹ UN Doc. A/RES/55/12.

²⁰ The counterclaim contained a charge of genocide committed by Bosnia against Serbs: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Counter-claims, Order of 17 December 1997*, I. C. J. Reports 1997, p. 243. In two other proceedings the FRY was involved with, the *Legality of Use of Force cases and the Application of the Genocide Convention (Croatia v. Serbia and Montenegro)*, it claimed not to be a member of the UN before the date of admission.

not a member of the UN and by implication was not bound by the Genocide Convention.²¹ The formal admission revealed this reality. The Court took a different view and considered that the admission in itself was not a new fact within the meaning of article 61 of the Statute, since it only took place after the date of the Judgment on Preliminary Objections.²² The admission also did not uncover a different reality pertaining to Serbia's membership of the UN, as it "cannot have changed retroactively the sui generis position which the FRY found itself in vis-à-vis the United Nations over the period 1992 to 2000, or its position in relation to the Statute of the Court and the Genocide Convention."²³ In the diffuse situation that was created by General Assembly resolution 47/1, the precise effects, such as the consequence of non-participation in the work of the General Assembly, had to be determined on a case by case basis. It did however not "affect the FRY's right to appear before the Court or to be a party to a dispute before the Court under the conditions laid down by the Statute."²⁴

Diffuse as the situation may have been, the Court concludes that the renewed admission was necessary to terminate the unclear situation produced by Resolution 47/1, but can not have altered the legal consequences of that Resolution in the period before the date of admission. As these facts were known to the Court and to the FRY at the time the Judgment was given, the conditions for admissibility had not been satisfied.²⁵ Consequently, the Court did not have to pronounce explicitly upon the membership of the FRY of the UN, thereby leaving the previous Order on Provisional Measures still the only instance where the Court did so.

I.2 Access to the Court Revisited

The rejection of the request for revision did not satisfactorily nor finally decide the question of access to the Court. On the contrary, by virtue of the inadmissibility ruling and the subsequent effect that it had never been exhaustively addressed except on a provisional basis, the uncomfortable impression arises that the Court was reluctant to deal with it perhaps not on account of the unclear politicized status of membership, but because of its destructive potential to the Court's jurisdiction. This suggestion became even more tangible with the delivery of the judgments in the *Legality of the Use of Force* cases. Under explicit protest of the minority by means of a joint declaration of seven out of 15 judges²⁶, the majority ruled that "Serbia and Montenegro, at the time of the institution of the present proceedings, did not have access to the Court under either paragraph 1 or paragraph 2 of article 35 of the Statute".²⁷

²¹ *Application for Revision of the Judgment of 11 July 1996 in the Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Application instituting proceedings*, 24 April 2001.

²² *Application for Revision of the Judgment of 11 July 1996 in the Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, (Yugoslavia v. Bosnia and Herzegovina), Judgment*, I.C.J. Reports 2003, p.7, paras. 68-70.

²³ *Idem*, para. 71.

²⁴ *Idem*, para. 70.

²⁵ *Idem*, paras. 71-74.

²⁶ *Legality of Use of Force, supra* note 5, Joint Declaration, paras. 10-12.

²⁷ *Idem*, paras. 91 and 126.

As commentators have already observed, the Court surprisingly abandoned its demonstrated position of self-restraint towards UN membership and followed the arguments of the parties *including* Serbia, by considering that Serbia was not a Member of the United Nations, and thus not a State party to the Statute of the International Court of Justice, at the time of filing its Application. At this point the Court explicitly departed from the findings in the Order on Provisional Measures of 8 April 1993 and from the view held in the *Revision* case where it said that General Assembly Resolution 47/1 did not affect the right to appear for the Court.

Problematic as these inconsistent and contradictory findings may be to the coherence and legitimacy of the Court's jurisprudence, they do not affect the discretion of the Court in the *Genocide* case to rule otherwise on the same issue. In other words, the findings in the *Legality* and *Revision* cases do not constitute *res judicata* for the purpose of the *Genocide* case: once an issue has been decided, the principle embodied in articles 36 (6) and 60 of the Statute precludes a second ruling upon it. But this naturally has to be understood as confined to the context of a single case. Within this context, according to the Court, the decision in the meaning of article 60 of the Statute can be given either *expressly* or *by necessary implication*.²⁹

Because of a written invitation of the Court itself 'to present further arguments to the Court on jurisdictional issues during the oral proceedings on the merits', the issue regarding the access to the Court,³⁰ which is by nature a preliminary issue, became a contentious issue again in the merits phase. Thus the central question became whether the silence of the 1996 Judgment on Preliminary Objections should be interpreted as an implicit decision on the matter or no decision at all. In the Court's view, the choice not to commit itself to a definite position on the legal status of the FRY does not signify a lack of awareness of the unclear legal situation at the time.³¹ Thus it should not be interpreted as having no opinion on the matter. On the contrary, the Court explicitly distances itself from the inference drawn in the *Legality on the Use of Force* cases that the admission uncovered the legal reality underlying the *sui generis* situation:

"As the Court here recognized, in 1999 - and even more so in 1996 - it was *by no means so clear as the Court found it to be in 2004* that the Respondent was not a Member of the United Nations at the relevant time. The inconsistencies of approach expressed by the various United Nations organs are apparent from the passages quoted in paragraphs 91 to 96 above."³²

²⁸ Vitucci 2006, *supra* note 18, on the position of self-restraint by the Court. See Simon Olleson for an analysis of the *Legality* cases, S. Olleson, "Killing Three Birds with One Stone?", *The Preliminary Objections Judgments of the International Court of Justice in the Legality of Use of Force Cases*, *Leiden Journal of International Law* (18) 2005-2.

²⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment 26 February 2007 (not yet published), para. 48.

³⁰ *Idem*, para. 82.

³¹ *Idem*, para. 130.

³² *Idem*, para. 131.

The Court seems to indicate that the legal obscurity did not allow an unequivocal positive or negative finding on UN membership, but only a *sui generis* qualification, implying 'something in between'. Apparently, it considered this qualification as a position on membership since it concludes that it has already positively decided on the issue of access to the Court. It states that in 1996 it found that Yugoslavia was bound by the Genocide Convention and that it had jurisdiction to adjudicate upon the dispute on the basis of Article IX.³³ The Court continues by stating that:

"Since, as observed above, the question of a State's capacity to be a party to proceedings is a matter which precedes that of jurisdiction *ratione materiae*, and one which the Court must, if necessary, raise *ex officio* (see paragraph 122 above), this finding must as a matter of construction be understood, by necessary implication, to mean that the Court at that time perceived the Respondent as being in a position to participate in cases before the Court. On that basis, it proceeded to make a finding on jurisdiction which would have the force of *res judicata*. The Court does not need, for the purpose of the present proceedings, to go behind that finding and consider on what basis the Court was able to satisfy itself on the point. Whether the Parties classify the matter as one of "access to the Court" or of "jurisdiction *ratione personae*", the fact remains that the Court could not have proceeded to determine the merits unless the Respondent had had the capacity under the Statute to be a party to proceedings before the Court."³⁴

This is a rather puzzling statement by the Court. On the one hand it stresses the importance of the issue of 'access' in that it should be raised *ex officio* if necessary, while on the other hand, it is prepared to accept 'access' as being implied in the affirmation of jurisdiction *ratione materiae*, without any reference to it or form of clarification. There seems to be, at least at a grammatical level, a tension between 'raising' and 'implying' in the sense that they are different standards. A complete silence on the topic does not seem consonant with the first, while under circumstances possible under the latter. With a matter of importance at stake as proclaimed by the Court itself, implication however does not seem an adequate method to decide within the meaning of article 60 of the Statute. This approach reduces the element of access to the Court to a meaningless condition that is already met when jurisdiction *ratione materiae* is passed. Essentially the Court seems to say that if jurisdiction is passed, then it has jurisdiction, a demonstration of circular logic that does not convince. The conclusion of the Court that it could not have proceeded unless the FRY possessed that capacity makes the circle complete. One may argue that the Court *should not* proceed in that eventuality by failing a statutory requirement, but it certainly *can*: once the Court affirms jurisdiction *ratione materiae*, access to the Court has to be assumed and is not challengeable because of *res judicata*. The Court indeed seems to intend this logic:

³³ *Idem*, para. 132.

³⁴ *Ibid*

“The determination by the Court that it had jurisdiction under the Genocide Convention is thus to be interpreted as incorporating a determination that all the conditions relating to the capacity of the Parties to appear before it had been met.”³⁵

In this light the criticism of the judges Ranjeva, Shi and Koroma is understandable. In their dissenting opinion they state that:

“There is nothing in the 1996 Judgment indicating that the Court had definitely ruled on that issue in such a way as to confer upon it the authority of *res judicata*. An issue is not precluded by the doctrine of *res judicata* just because the Court says it is.”³⁶

They rightly link the principle of *res judicata* to article 56 of the Statute of the Court, by which the Court is bound to state the reasons on which it is based. It is essential to the legitimacy of the Court's decisions that they are explained to and understood by the parties to facilitate the acceptance of the ruling. Moreover, it serves as a check on the quality of the reasoning that has been applied. Judge Tomka also expresses serious misgivings about the reasoning of the Court and explains in his separate opinion that he finds the construction of a decision ‘by necessary implication’ strained and not convincing.³⁷ The Court thus might have ‘perceived’ the FRY as being capable of proceeding before the Court, but it did not appear to have given a decision on that issue.

As a result, the only phase in the proceedings where it has been explicitly addressed is the Order of 8 April 1993. The precise legal basis on which the Court establishes its jurisdiction to proceed to the merits thus remains unspecified. For such a problematic issue, although contested only in the later stage of the proceedings, this solution of the Court is not quite satisfactory. The question is however what alternatives the Court had at its disposal. Not passing jurisdiction after proceedings of almost 13 years would have been virtually unacceptable in view of the elapsed time, the extreme gravity of the case and the interests at stake. An explicit pronouncement on access would imply contradicting the findings of the Court in the *Legality on the Use of Force* cases either on article 35 (1) or (2). In view of the seriousness of the case, a ruling on article 35 (1) which would limit the leeway of the UN organs to decide otherwise, would seem to strike a fair balance of interests, particularly because of the lack of unanimity they displayed.

³⁵ *Idem*, para. 133.

³⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 29, Joint Dissenting Opinion of Judges Ranjeva, Shi and Koroma, para. 3.

³⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 17, Separate Opinion Judge Tomka, para. 21.

II. The Law

Having accepted jurisdiction, the Court could finally consider the international responsibility of Serbia under the Genocide Convention. In order to do that it first had to determine the scope and meaning of the relevant provisions. In case of the Genocide Convention that is not an uncomplicated matter. In this part first the particular structure of the Genocide Convention will be analyzed (II.1), followed by a discussion of the Court's interpretation of the substantive obligations for States. The obligation not to commit genocide can be divided into the identification of the legal basis for such an obligation under the Convention (II.2), the corresponding nature of the responsibility for a violation of the obligation (II.3), the identification and application of the elements of a State perpetrated genocide (II.4), the issue of attributing genocide to the State (II.5) and the obligation not to commit through a participatory mode (II.6). After the obligations to prevent (II.7) and to punish (II.8), the issue of reparation shall be addressed (II.9).

II.1 The Dual Structure of the Genocide Convention

As it stands, the Convention reflects the duality of international law in the sense that it imposes obligations on States as well as on individuals.³⁸ A bird's-eye view of the Convention learns that on the one hand, it instructs *States* to prevent the commission of the crime of genocide and to punish genocidal *individuals*, whereas on the other hand it includes provisions that proscribe the prohibited behavior of individuals amounting to the crime of genocide. This dichotomy between acts that can be exclusively committed by States and acts that can be exclusively committed by individuals is based on a fundamental difference in the nature of their responsibility. State responsibility under the Convention does not contain punitive elements and is best comparable with civil responsibility analogous to domestic law.³⁹ For instance the procedure of the ICJ is based on principles such as party-autonomy and equality and in conformity with standard jurisprudence and customary international law only reparatory damages may be awarded. In contrast, individual responsibility as provided for under the Genocide Convention is of a criminal nature. It has to be established in a criminal procedure, which is characterized by coercive powers of the judge and prosecutor and potentially leads to the imposition of punishment.

The different impact of both forms of responsibility on the legal position of the involved participants results in a distinction in norm addressees. The gravity of the criminal charge, the intensity of the investigational competences and procedures and the seriousness of possible penalties necessitate that this type of responsibility is exclusively attributed to individuals who

³⁸ See John Quigley, *The Genocide Convention: an international law analysis*, Aldershot: Ashgate 2006, p. 73.

³⁹ According to Special Rapporteur on State responsibility John Crawford, State responsibility is best characterized as an undifferentiated regime, 'which does not embody such domestic classifications as 'civil' and 'criminal'', see J. Crawford and S. Olleson, 'The Nature and Forms of International Responsibility', in: Malcolm D. Evans (ed.), *International Law*, Oxford: Oxford University Press 2006, pp. 457-458. Yet he also argues that States are unwilling to insert any punitive element in the field of State responsibility, *supra* note 153, p. 36.

are personally involved in the (alleged) criminal act. According to criminal doctrine this kind of responsibility, generally considered the *ultimum remedium* on the ground of its potentially extreme punitive character, cannot be allocated to persons who did not participate in the criminal act themselves.⁴⁰ This basic tenet of criminal law is commonly referred to as the principle of personal guilt.⁴¹ As such it forms a major impediment to the criminalization of collectives as represented by legal persons such as States, since the personal guilt of each individual member of the collective will no longer be required, but 'only' the guilt of the *legal* person as such.

Another obstacle for including the State as legal entity in criminal law is formed by the classical point of departure that criminal responsibility is tailor made for natural persons. It must necessarily be linked to a physical act or its omission by the person himself. In addition to this objective requirement (*actus reus*), it is a prerequisite that the perpetrator acts with a blameworthy mental capacity (*mens rea*). No act is considered to be criminal if the perpetrator did not intend the criminal act to occur. The combination of objective and subjective elements were long held to be the most solid guarantees that criminal responsibility would be limited to the actual perpetrator.

It must be noted though that the validity of both traditional barriers of a dogmatic nature has been subject to serious erosion due to developments under both domestic and international criminal law. Under domestic law formal collectives as legal persons are to an increasing extent recognized as criminal actors and consequently incorporated as norm addressee in criminal codes.⁴² This phenomenon has not yet manifested itself in international criminal law.⁴³

Moreover, the requirement of a physical act is no longer sacrosanct in either domestic or international criminal law.⁴⁴ This can be demonstrated by reference to article 25(3)(a) of the Statute of the International Criminal Court (hereinafter: ICC), where the notion of co-perpetration is provided for. It implies the acceptance of the idea that one person can be held criminally responsible for the physical act of another person. The criminal intention forms the more important part of the legal basis for responsibility. A similar understanding appears from the concept of perpetration by means, where the criminal mastermind is pointed out as

⁴⁰ Particularly within the body of international criminal law concepts have been introduced and developed, which have stretched the meaning of participation. For a critical assessment see: Allison Marston Danner & Jenny S. Martinez, *The Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, California Law Review (93) 2005, pp. 25-27.

⁴¹ For instance A. Cassese, *International Criminal Law*, Oxford: Oxford University Press 2003, pp. 136-139 or Elies van Sliedregt, *The Criminal responsibility of Individuals for Violations of International Humanitarian Law*, The Hague: TMC Asser Press 2003, pp. 5-6.

⁴² Hans de Doelder and Klaus Tiedemann, *La criminalisation du comportement collectif: Criminal liability of corporations*, The Hague: Kluwer Law International 1996.

⁴³ Research indicates that many domestic law systems have expanded the liability of legal persons to international norms, like the crimes under the jurisdiction of the International Criminal Court (ICC), while they are not obligated to do so, since the Rome Statute restricts the ICC's jurisdiction to natural persons only. See: A. Ramasastry & R.C. Thompson, *Commerce, Crime and Conflict, Legal Remedies for Private Sector Liability for Grave Breaches of International Law*, report of the Fafo Institute for Applied International Studies.

⁴⁴ Van Sliedregt 2003, *supra* note 41, p. 345.

(intellectual) perpetrator.⁴⁵ The concept of a *joint criminal enterprise* can be seen as a further development of a participatory mode where responsibility can be incurred without committing the main criminal act oneself in a physical sense.⁴⁶ The fact that the body of international criminal law, as reflected by the ICC Statute, recognizes these notions shows that contemporary international criminal law increasingly accepts that a person can be criminally responsible without fulfilling the objective elements himself: they can be attributed. This development is an essential step with regard to a potential inclusion of legal entities into criminal law, although the issue of *mens rea* in this respect is still seen as an insurmountable barrier by some commentators.⁴⁷ Attribution of the subjective elements to legal entities forms part of domestic concepts, but has not yet reached international criminal law.

The accrued pressure on the conventional barriers for the inclusion of legal persons in criminal law gains significance in light of the construction of the Genocide Convention. The Convention does not categorically exclude the possibility of the crime of genocide in the meaning of the Convention being committed by a State. Though through a grammatical interpretation it would most logically be constructed as prohibiting genocidal behavior of physical perpetrators, other interpretation methods might give different results. This is particularly so in the case of article IX, which confers jurisdiction on the Court for disputes "...including those relating to the *responsibility of a State for genocide or for any of the other acts enumerated in article III...*". This element opens a window for the Court to accept that a State can be a perpetrator of genocide, but without any guidance on how to establish that fact in law or in procedure. As article IX is essentially a jurisdictional provision, it does not in itself establish any substantive obligations.

The vagueness of article IX requires clarification by interpretation of the Court. If State-perpetrated genocide is also prohibited by the Convention, does the convergence of the obligations of the State and the individual at this point, also mean a convergence of the elements required, the nature of the responsibility and the procedural standard? And what authority should be given to the decisions of a criminal tribunal, in this case the International Criminal Tribunal for the Former Yugoslavia (hereinafter: ICTY), particularly when it ruled upon the same factual events? As the Court did not exclude the possibility of genocide committed by a State in the meaning of the Convention in the Judgment on Preliminary Objections,⁴⁸ and in light of the above mentioned developments in criminal law, these questions are no longer of a hypothetical nature.

⁴⁵ *Idem*, pp. 65-76.

⁴⁶ Danner & Martinez 2005, *supra* note 40, and van Sliedregt 2003, *supra* note 41, pp. 100-101.

⁴⁷ Quigley 2006, *supra* note 38, p. 235, who refers to Schabas's contention that the genocidal intent relates to the mind of a natural person. According to Schabas, this physical connotation rules out the possibility of responsibility of a State for genocide under the Convention.

⁴⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 4, para. 32.

II.2 The Obligation Not to Commit Genocide

To answer these fundamental questions, the Court had to interpret the meaning of article IX in conjunction with the other provisions of the Convention, the purpose of the Convention and the intentions of the drafters. In this section the various aspects will be analyzed, that the Court had to address when interpreting the relevant provisions. In section 3.1 the possible consequences for the nature of responsibility will be discussed.

The Court asserts that the “characterizations of the prohibition on genocide and the purpose of the Convention are significant for the interpretation of the second proposition stated in Article I ... particularly in this context the undertaking to prevent”.⁴⁹ Partly because of the purely humanitarian and civilizing purpose of the Convention, it concludes that the obligation to prevent in article I has an autonomous meaning, separate from the specifications in other provisions. Within this meaning, the Court quite boldly concludes, it must be understood to contain an obligation not to commit genocide, although the article does not *expressis verbis* formulate one.⁵⁰ Though the topic was intensely debated at the negotiation stage, an explicit reference to this possibility had been omitted.⁵¹ Besides the logical assumption that upon the categorization of a certain act as a crime, States automatically undertake the obligation not to commit such an act themselves, the idea of *the State as a potential perpetrator of genocide* is also deemed implicit in the obligation to prevent. In the Court’s view, it evidently entails an obligation to refrain from committing it through the State’s own organs.⁵² Support for this liberal interpretation of article I in the Convention itself is found in the formulation of article IX, which states that:

“Disputes between the Contracting Parties relating to the interpretation, application or fulfillment 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.”

In light of the drafting history, the Court concludes that the phrase “including...article III” is inserted into the provision to confer jurisdiction to the Court in case of genocide committed *by a State*. Although support can be found in literature for this interpretation of the Court, it should not be taken for granted.⁵³ As Judges Shi and Vereshchetin point out in their Joint Declaration to the Judgment on Preliminary Objections, any reference to the responsibility of a State for genocide was absent till the final stage of the negotiations.⁵⁴ The drafting history reveals much

⁴⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 29, para. 162.

⁵⁰ *Idem*, para. 166.

⁵¹ See John Quigley on the specific background of the omission, Quigley 2006, *supra* note 38, pp. 222-226.

⁵² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 29, para. 166.

⁵³ See Quigley and the authors he refers to, Quigley 2006, *supra* note 38, pp. 228-229, pp. 238-239.

⁵⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 4, Joint declaration of Judge Shi and Judge Vereshchetin.

uncertainty about the actual meaning of the article and the reference in particular.

The 1948 Genocide Convention should in this regard be situated in the historical context of the Nuremberg trials, which in a revolutionary fashion broke away from the traditional State responsibility by introducing the notion of individual criminal responsibility in international law. The primary motivation for this departure from classical State centered international law was to exclude the use of the State as a shield against the incurrance of international responsibility for the perpetration of international crimes. As explained above, the Convention is partly a penal Statute codifying the notion of individual criminal responsibility with regard to genocide (which did not constitute an autonomous crime in the Nuremberg jurisprudence), and partly a conventional treaty establishing responsibility for States. The State obligations were for the largest part of the negotiations aimed at effectuating the established individual responsibility by activating the cooperation of the State, and not framed as a prohibition to engage in genocidal activities itself.

To a certain extent this attitude towards the crime of genocide seems logical in view of the position that individual criminal responsibility was given: no parallel interstate proceedings were instituted against the States constituting the axis powers. This appeared to suggest an exclusive position of individual responsibility in the field of international crimes, which seems reflected and arguably amplified by the much cited maxim of the International Military Tribunal (hereinafter: IMT), at Nuremberg:

“Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”⁵⁵

Yet this individualistic approach also completely fails to capture the involvement of the State authorities in the perpetration of the crime. As States must have been aware with the relatively recent holocaust in mind, genocide was hardly conceivable without the availability and employment of the State apparatus. The systematic nature of genocide requires either the acquiescence or active participation of the State, so the absence of any reference to this reality would be a serious flaw of the Convention.⁵⁶ This provoked continued efforts of the UK to insert links to State responsibility in the provisions, but the associations with criminal responsibility in concept and language encountered resistance.⁵⁷

⁵⁵ *Judgment of the International Military Tribunal*, trial of the Major War Criminals, 1947, *Official Documents*, Vol. I, p. 223.

⁵⁶ Nehemiah Robinson, *The Genocide Convention*, A Commentary, New York: Institute of Jewish Affairs 1960, p. 101.

⁵⁷ Quigley 2006, *supra* note 38, pp. 223-224.

Although several delegations understood an act of genocide by a State or government to be implicitly covered by the Convention as violating the obligation to prevent and punish, the UK wanted an explicit basis for this.⁵⁸ A joint amendment with Belgium ultimately led to success in that an explicit reference to the responsibility of the State, not just for the failure to prevent or punish, but for genocide itself was included in article IX. Judges Shi and Vereshchetin stressed that the amendment was accepted by a very small majority of 19 against 17 votes, with 9 abstentions.⁵⁹ There was also much confusion about the exact meaning of the provision, as several commentaries on the Convention describe.⁶⁰ A later proposal was submitted to reverse the amendment, but was rebuffed.⁶¹ Apparently, the delegations were prepared to accept the notion of the State as perpetrator, but that willingness was limited to an expression in a vague jurisdictional provision instead of a substantive one.⁶² As one commentator observed, this peculiar outcome leaves the Genocide Convention to confer jurisdiction to the ICJ for an act that has not been described in the Convention itself.⁶³

The lack of specific provisions raises the obvious question what elements a genocide committed by a State might entail. The confusion among the negotiating parties about the meaning of article IX, shows that it was not automatically taken to correspond with the provisions defining genocide for the purpose of individual criminal responsibility. The question whether perpetrator ship of natural persons and States could be equated in law was never resolved.

In response to the argument of Serbia that State responsibility is excluded in case of an international crime and the related unclear issue of the elements of a State perpetrated genocide under the Convention, the Court stresses that the maxim of the IMT should be understood in the proper meaning. It asserts that the IMT was countering the argument that international law did not provide for the punishment of individuals, but merely addressed the obligations of States.⁶⁴ The IMT considered that international law imposed duties upon individuals *as well as* upon States. The Court observes that this duality of responsibilities can be found in several instruments of international law, such as the Statute of the ICC and the articles on State responsibility of the International Law Commission (hereinafter: ILC). It finds that nothing in the wording or structure of the Convention precludes the interpretation of the Court that article I, read in conjunction with article 3, imposes obligations on the State distinct from the obligations which the Convention requires them to place on individuals.⁶⁵ It thus confirms the dual character of the Convention.

⁵⁸ *Idem*, p. 224.

⁵⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 54.

⁶⁰ Quigley 2006, *supra* note 38, pp. 227-233, and Robinson 1960, *supra* note 56, pp. 101-102.

⁶¹ United Nations, *Official Records of the General Assembly, Third Session, Part I, Sixth Committee, Summary Records of the 96th meeting*, p. 355.

⁶² Quigley 2006, *supra* note 38, p. 224.

⁶³ *Idem*, para. 224.

⁶⁴ *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 29, para. 172.

⁶⁵ *Idem*, para. 174.

With regard to the elements of State perpetrated genocide, an issue on which the Convention is completely silent as explained above, the Court very briefly states that it must be shown that genocide *as defined in the Convention* has been committed.⁶⁶ It thus indicates in very few words the far-reaching implication that it will apply the provisions containing criminal prohibitions to review the wrongfulness of State acts.⁶⁷ It asserts that this does not require a prior criminal conviction of individuals by a criminal tribunal: the Court can make an autonomous determination on genocide. It finds that a criminal jurisdiction is not a prerequisite as it considers itself capable to deal with issues of 'exceptional gravity' under its Statute, without explaining which specific provisions enable it to this end. Otherwise the readily conceivable scenario of a State perpetrated genocide would result in a lack of legal redress in case no international penal tribunal is established: rulers are not likely to subject themselves to domestic criminal jurisdiction on charges of genocide.⁶⁸

Though laudable in its objective, this argumentation seems strained. In the recent case of *Armed Activities on the Territory of the Congo*, the Court was confronted with facts of perhaps equal gravity considering the brutality and the shocking amount of casualties that the conflict in the Great Lake region produced, and found itself barred from adjudication by a reservation to article IX.⁶⁹ It painfully demonstrated the discrepancy between the compulsory jurisdiction of criminal tribunals and the consent based jurisdiction of the Court in cases of equal gravity: in case of the latter, the gravity in itself bears no relation to the issue of jurisdiction. It therefore does not seem a consistent justification of the Court to refer to a legal gap in the protection of individuals to claim the competency to make an autonomous determination of genocide.⁷⁰

II.3 The Nature of the Responsibility for State Perpetrated Genocide

Quite obviously, the Court struggles with its position between the criminal law and the public international law domain. On the one hand it does not want to forfeit its competence to adjudicate extreme grave interstate disputes, even when criminal tribunals have been put into place to effectuate the individual criminal responsibility for the exact same configuration of facts. It manifestly considers that there is still a role to play even when the facts amount to criminal acts. However, since it does not possess a criminal jurisdiction, it has to treat the committed acts as treaty violations (and thus as international wrongful acts), and adapt its approach. Under domestic law, a criminal act can in principle establish both criminal and civil liability. They are not mutually exclusive, since they reflect different dimensions of blameworthiness.⁷¹ The

⁶⁶ *Idem*, para. 180.

⁶⁷ *Supra* note 159.

⁶⁸ *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 29, para. 182.

⁶⁹ *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Judgment of 3 February 2006.

⁷⁰ *Idem*, compare para. 64 in which the Court indicates that the *ius cogens* character of the norm of genocide cannot of itself provide a basis for the jurisdiction of the Court.

⁷¹ This concurrence can even yield different outcomes, like in the extensively media-covered O.J. Simpson case where the suspect was acquitted in the criminal trial but held liable in a civil trial for the same facts, though more often a (successful) civil suit will follow upon a criminal conviction.

Court is thus not legally precluded from establishing the 'civil-like' liability of a State, even though the facts have already been adjudicated by a criminal tribunal. The essential difference with concurrent civil and criminal responsibility under domestic law and this case is that the legal basis for civil proceedings is a civil provision containing a definition of a wrongful act. The judge concerned will not make a finding based on a criminal provision; that would practically place him upon the seat of the criminal judge.

In casu, the shift in procedural guarantees is another notable difference with a domestic civil suit, since a civil court will never have to adapt the procedural standard to the gravity of the case: it only deals with wrongs containing a civil blameworthiness. Quite predictably, Bosnia argued that the normal standard of an alleged breach of treaty violations should apply. In a similar vein, Wedgwood argued that the standard of criminal proof 'exceeds the demands of civil liability'.⁷² These positions negate the fact that it is not a civil blame the Court is trying to establish. By choosing the penal provisions as legal basis, it will by implication distil a clearly defined criminal blameworthiness in stead of a 'mere' civil blame. In order to reflect the gravity of the alleged international wrongful act of genocide (counter-intuitive as that qualification may sound) the Court wisely raises the standard of proof to 'a high level of certainty appropriate to the seriousness of the allegation'.⁷³ Referring to earlier case law, the Court holds that claims against a State involving charges of exceptional gravity require fully conclusive evidence.⁷⁴ The need for a higher procedural standard in cases of extreme gravity is indicative of the increased importance the Court attaches to the aim of truth finding. In this respect the procedure obtains a more criminal-like character. As a result, one would expect that the seriousness of the violation will also be reflected in the remedy, if proven. It gives rise to the question of the actual nature of the responsibility for the perpetration of genocide.

On this point there seems to be consensus in literature that the drafting history reveals that criminal responsibility was ultimately *not* accepted by the majority of State parties.⁷⁵ Firstly, the proposals suggesting such a concept were rejected and secondly, the UK representative explained that their proposed (and ultimately accepted) amendment containing the reference to States directly responsible for genocide was meant to be of a civil rather than a criminal nature.⁷⁶

The Court acknowledged that the intended nature of direct State responsibility by the drafters by stating that the international responsibility of a State 'is quite different in nature from

⁷² See Wedgwood 2007, *supra* note 3.

⁷³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 29, para. 172.

⁷⁴ *Idem*, para. 209.

⁷⁵ Quigley 2006, *supra* note 38, 230-233. Also William A. Schabas, *Genocide in International Law*, Cambridge: Cambridge University Press 2000, pp. 418-420.

⁷⁶ United Nations doc. A/C.6/SR.103, p. 440.

criminal responsibility'.⁷⁷ But if the responsibility is not of a criminal nature, then why does the Court deem it necessary to adapt the standard of proof to reflect the extreme gravity of the case? Either the seriousness of the charge is considered so detrimental to the status of a State in the international community that a finding of a violation of genocide needs to be supported by a high procedural standard, or the remedy that can be imposed is of a potentially punitive nature. Since punitive damages have not yet found acceptance in international law, it might be assumed that the stigmatizing effect of an affirmative finding on genocide formed the main reason for the Court to abandon the normal procedural standard. Perhaps this can not be equated to genuine criminal responsibility, but it can be argued that it is apparently perceived of by the Court as containing a punitive element: the label of a genocidal perpetrator bears heavy on the standing of a State as a member of the international community.

II.4 The Elements of State Perpetrated Genocide

As the Court thus held that genocide committed by a State meant genocide as defined under the Convention, it accordingly had to base a finding of genocide on article II, which provides the definition of genocide.⁷⁸ As any typical criminal law provision,⁷⁹ it contains elements describing the physical behavior (objective) and elements describing the intent of the perpetrator (subjective). After reviewing the facts, the Court only finds genocide to be established with regard to Srebrenica. This section will briefly address the Court's findings.

With regard to the significance of the factual findings of the ICTY to the Court's appreciation of the facts, the Court holds that they are considered as 'highly persuasive'.⁸⁰ The Court seemed to have little choice in this respect as the ICTY has substantial investigatory powers, consonant with its compulsory jurisdiction, and is thus much better equipped than the Court to find relevant evidence, in stead of having to rely on what the parties submit. Moreover, as noted before, its procedural guarantees are aimed at protecting the rights of the suspect to a certain minimum level, only allowing a conviction on the basis of proof that is considered 'beyond reasonable doubt'. The possibility of an erroneous verdict simply becomes even less acceptable when criminal responsibility can be incurred. In order to reduce this risk, the standard of proof is such as to attain an optimal degree of certainty on the reliability of the facts. It demonstrates the prominent position that truth finding is given within the context of a criminal procedure.

⁷⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 29, paras. 167 jo 178.

⁷⁸ *Article 2*: In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

⁷⁹ It must be stressed though that since the Court does not possess a criminal jurisdiction, it is forced to treat the crime of genocide as a treaty violation and thus as an international wrongful act.

⁸⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 29, para. 223.

As the Court adapted its standard of proof to a level that does not seem to differ significantly from the criminal law standard, but without the investigational potential of the ICTY to find evidence that actually meets this standard, it quite logically relies heavily on the ICTY's factual findings concerning the atrocities committed in Bosnia between 1991-1995. In examining article 2 of the Convention, it considers that although the objective elements of paragraphs (a), (b) and (c) have been demonstrated to the required standard, the Court has been unable to make a finding of the subjective element of genocidal intent.⁸¹ The Court identifies two levels at which the genocidal intent of a State can be located: the level of the physical perpetrators and the level of the "higher authority".⁸² With regard to the first, it consistently refers to the fact that in none of the instances invoked by Bosnia other than the events in Srebrenica, the ICTY found that the accused acted with the required special intent. Thus since genocide had only been established in case of Srebrenica, the Court has little options but to follow this finding.

With regard to the latter, the Court agreed with Bosnia's argument that intent could also be found in the form of a consistent pattern of conduct which could only point to the existence of genocidal intent, or a general plan to commit genocide.⁸³ Although the acceptance of the fact that genocidal intent can be inferred from other organs than exclusively from the actual physical perpetrators is a significant contribution to the law on State responsibility under the Convention, the effect on this case remains limited as the Court concludes that it has not been convincingly demonstrated.⁸⁴ The Court thus finds that genocide under article 2 of the Convention has only been established with regard to the massacre following the take-over of Srebrenica.⁸⁵

II.5 Attributing the Genocide at Srebrenica: Serbia as Perpetrator?

After the finding of genocide in Srebrenica, the Court subsequently had to answer: whether these genocidal acts could be attributed to Serbia under the rules of customary international law of State responsibility (codified in the Articles on State Responsibility), so that Serbia as a State could be held responsible as a perpetrator of genocide. If answered negatively, the question would arise as: to whether Serbia had participated in the act of genocide in the modes described in article 3 (b) to (e), subject to the same rules of attribution.⁸⁶

⁸¹ *Idem*, paras. 277-319-354. The Court refers to the objective elements as material elements.

⁸² The Court does not explicitly mention the two levels in one paragraph, except for paragraph 376.

⁸³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 29, paras. 370-371-373.

⁸⁴ *Idem*, para. 376. If it would have been proved, the situations referred to in footnote 81 would have resulted in a determination of genocide. This contribution cannot address the complex issue of attribution of intent in depth for the sake of brevity. For a discussion of the matter see A. Nollkaemper, 'Concurrence between individual responsibility and State responsibility in international law', *International and Comparative Law Quarterly* (52) 2003, pp. 633-635.

⁸⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 29, paras. 297-376.

⁸⁶ Article 3 (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide.

The Court first considered whether the physical perpetrators of the genocide were organs of the FRY in the meaning of article 4 of the Articles on State Responsibility (hereinafter: ASR). It states that “there is nothing that could justify an affirmative response to this question”.⁸⁷ The participation of the FRY army in the massacres prior to Srebrenica notwithstanding, there was no evidence of direct participation in relation to the events in Srebrenica in the Court’s view. In response to the claim of Bosnia that the officers in the VRS, including general Mladić, remained under FRY administration, and that among others their salaries were paid from Belgrade right up to 2002, making them *de jure* organs, the Court states that it has not been proven that Mladić was one of the officers that was administrated in Belgrade.⁸⁸ Furthermore:

“[...] and even on the basis that he might have been, the Court does not consider that he would, for that reason alone, have to be treated as an organ of the FRY for the purposes of the application of the rules of State responsibility. There is no doubt that the FRY was providing substantial support, *inter alia*, financial support, to the Republika Srpska (cf. paragraph 241 above), and that one of the forms that support took was payment of salaries and other benefits to some officers of the VRS, but this did not automatically make them organs of the FRY.”⁸⁹ [...]

The Court explains that article 4 is intended to cover situations where the entities making up the State are supposed to act *on its behalf*. This is not to say that *ultra vires* acts are not covered, clearly they are in conjunction with article 7. But the functions of the VRS officers, including Mladić, were to act on *behalf of the Bosnian Serb authorities* and “exercised elements of the public authority of the Republika Srpska”.⁹⁰

This finding does not digest very well. The Court rather easily dismisses the possibility of article 4 based on a purely formal distinction between the interests of Serbia and Republika Srpska, while the whole case revolves around the convergence of the interests.⁹¹ The very unusual situation that officers of an army of an autonomous entity in a neighbouring country are formally administrated by a State, even years after the formal and internationally accepted secession, is more akin to a contrary conclusion. If anything, it suggests that the interests are identical, otherwise Belgrade could and certainly would have stopped the payment of salaries, the decisions on promotion and pensions etc. The continuation essentially constitutes a formal relationship of employment: Serbia is the formal employer of the officers who are administrated in Belgrade. It seems to fall under the scope of article 4 where ‘organ of the State’ should be interpreted in

⁸⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 29, para. 386..

⁸⁸ *Idem*, para. 388. The administration also covered pensions and promotions.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ See the Strategic Goals document, *supra* note 4, para. 371. Vice-President Al-Khasawneh states in his dissenting opinion that the approach of the Court does not adequately take into account situations of a common criminal purpose (para. 39).

a general sense.⁹² The Court considers salaries as a form of financial aid, but a distinction for the sake of identifying the proper grounds for attribution seems warranted between the acts of financial support and salaries. Whereas the first is relevant to the determination of the status of a *de facto* organ, the latter seems much more at place for an assessment of a *de iure* status.

The Court was also unable to find the “Scorpions”, a paramilitary militia composed by mostly Serbs, to be a *de iure* or *de facto* organ of Serbia.⁹³ It did not consider two intercepted documents which referred to the Scorpions as “a unit of the Ministry of Interiors of Serbia” sufficient proof to establish a formal link as neither of these communications was addressed to Belgrade.

In a reference to the *Nicaragua* case, the Court also held that there is no evidence to assume a *de facto* status of the Scorpions under article 4. The applicable standard for establishing this status of “complete dependence” would require their characterization as mere instruments, whereas the Court explains that the Republika Srpska and the VRS were under leadership that ‘had some qualified, but real, margin of independence’.⁹⁴

The Court then addresses the question whether the massacres of Srebrenica were committed under the instructions or direction or control of FRY organs. It asserts that the customary rule as laid down in article 8 of the Articles on State Responsibility should be read in conjunction with the Court’s jurisprudence, particularly the *Nicaragua* case. Accordingly it holds that for the attribution of acts of persons who can not be equated with State organs:

“It must however be shown that this “effective control” was exercised, or that the State’s instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.”⁹⁵

At this point the Court explicitly departs from the standard of control as used by the ICTY in the *Tadic* case. In this case the Appeals Chamber found the *Nicaragua* test of effective control ‘unpersuasive’, and opted for the less strict overall control test. This requires:

⁹² *Official Records of the General Assembly*, Fifty-sixth Session, Supplement No. 10 (A/56/10), *Commentaries* article 4, p. 95 under 6.

⁹³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 29, para. 389.

⁹⁴ *Idem*, para. 394.

⁹⁵ *Idem*, para. 400.

“[...] that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. Only then can the State be held internationally accountable for any misconduct of the group. *However, it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law.*”⁹⁶

The Court in turn discards with the overall control standard with the similar qualification of ‘unpersuasive’ by observing that the overall control test would stretch the connection which must exist between the conduct of a State’s organs and its international responsibility almost to the breaking point.⁹⁷ It holds that a State is only responsible for its own conduct. This is a fundamental principle of criminal law, as explained in section 3. Under civil or tort law however it is not of the same stature. The Court thus applies a strict standard with regard to attribution of State responsibility, one that seems more restrictive than strictly necessary for responsibility of a non-criminal nature. In this regard the Court’s approach is consistent with the adopted standard of proof. The Court is only prepared to accept the perpetrator ship of a State for genocide in relation to acts of non-State organs in case of instructions given, direction provided or effective control over the acts by State organs.

Though criticized by commentators, once the Court opts for approaching the charge of genocide as something transcending the seriousness of a common interstate dispute, the choice for the effective control standard is a logical one. Under both standards a substantial involvement of the State is required, but the basic difference is that under the overall control standard the ‘controlled’ group is not told what to do. It is ‘merely’ assisted (be it to such an extent that the commission of the wrongful act would perhaps not have been possible without it). It seems reasonable to qualify this involvement as complicity rather than perpetrator ship.⁹⁸ Only if it can be proven that the State acted as the mastermind or initiator of the acts, then attribution will be possible under the effective control standard.

In casu, the Court found that it has not been proved that the FRY has issued instructions with regard to the massacres at Srebrenica. Neither the report of the Secretary-General, *The Fall of Srebrenica*,⁹⁹ nor the report of the Netherlands Institute for War Documentation *Srebrenica – a “safe” area*¹⁰⁰ and the CIA report *Balkan Battlegrounds*¹⁰¹ contained evidence of control by the FRY. Hence the Court concludes that “the decision to kill the adult male population of the

⁹⁶ *Prosecutor v. Tadic*, IT-94-1-A, Appeals Judgment, 15 July 1999, para. 131.

⁹⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 29, para. 406.

⁹⁸ This distinction in perpetrators and accomplices is consistent with the predominant practice of the *ad hoc* tribunals. See van Sliedregt, *supra* note 41, p. 62 and 74.

⁹⁹ See: <http://www.un.org/peace/srebrenica.pdf> : Report of the Secretary-General pursuant to General Assembly resolution 53/35.

¹⁰⁰ See: <http://www.srebrenica.nl/en/>.

¹⁰¹ The Central Intelligence Agency, *Page 3, Balkan Battlegrounds: A Military History of the Yugoslav Conflict, 1990-1995*, Washington: CIA Office of Public Affairs 2002.

Muslim community in Srebrenica was taken by some members of the VRS Main Staff, but without instructions from or effective control by the FRY".¹⁰² Thus Serbia can not be considered to be the perpetrator of the genocide at Srebrenica, as the acts of the physical perpetrators can not be attributed to it.

II.6 The State as an Accomplice?

It is important to realize that the Court did not create a gap in legal responsibility with the adherence to the effective control standard. The involvement not meeting the standard of article 8 could still lead to international responsibility under the alternative modes of responsibility provided for in the Genocide Convention. With regard to the conspiracy to commit genocide the Court holds that this option is ruled out since it already established that the physical perpetrators of the genocide at Srebrenica did not qualify as FRY organs or persons acting under its control. With regard to the direct and public incitement to commit genocide, the Court states that there is clearly a lack of precise and incontrovertible evidence.¹⁰³

The Court then turns to the question whether Serbia can be qualified as an accomplice in the massacres. In order to define the scope of the notion of complicity; the Court first determines the objective elements and stresses that the issuing of orders or instructions will under certain national systems be qualified as complicity, but in the context of international responsibility for genocide, such acts will lead to direct responsibility of the State. Complicity, in the Court's view, should be understood as to include the provision of means to enable or facilitate the commission of the crime.¹⁰⁴ It should be interpreted in a sense not significantly differing from those concepts already accepted in the general law of State responsibility, particularly article 16. This article codifies the customary rule that aid or assistance by a State to another State in the commission of an internationally wrongful act generates the international responsibility of the aiding State, if the State does so with knowledge of the wrongfulness. This rule is preferred over the notion of complicity as developed and clarified over the last decade by the ad hoc tribunals in the field of criminal law, despite the fact that the genocide is committed by a non state entity. Strictly, the rule does not apply.

Following the criminal law definition on the other hand would entail the risk of making the obligation to prevent superfluous. Under the criminal law notion of complicity one can be an accomplice to a criminal act by omission.¹⁰⁵ As the Court stipulates, the 'mere failure to adopt and implement suitable measures to prevent genocide from being committed', is already covered

¹⁰² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 29, para. 413.

¹⁰³ *Idem*, para. 417.

¹⁰⁴ *Idem*, para. 419.

¹⁰⁵ Van Sliedregt 2003, *supra* note 41, p. 91.

by the obligation to prevent.¹⁰⁶ It already interpreted this obligation to be an autonomous one, in addition to the other articles which might be seen as specifications. Interpreting complicity as also encompassing acts of omission would subsume to a large extent the substantive meaning of the obligation to prevent under article 1 it had just acquired by the Court's reading. The Court thus interprets the Convention to establish positive and negative obligations, the duty to prevent belonging to the first kind and article 3 as a provision containing prohibited behavior as a reflection of the latter. However, one might ask the question whether there are any compelling arguments for such a rigid division besides a systematic one. It seems to be at odds with the reasoning of the Court in relation to article 1 where the Court argued that the obligation to prevent should be understood as to implicitly contain an obligation not to commit. The choice for this artificial separation between positive and negative obligations seems somewhat arbitrary, but it has a direct effect on the issue of reparation in a later stage of the Judgment.

With regard to the subjective elements, it holds that the accomplice should at least be aware of the genocidal intent of the principal perpetrator.¹⁰⁷ After considering the facts, the Court affirms the fulfillment of the objective elements, but considers the subjective element absent:

“There is thus little doubt that the atrocities in Srebrenica were committed, at least in part, with the resources which the perpetrators of those acts possessed as a result of the general policy of aid and assistance pursued towards them by the FRY. [...] it is not established beyond any doubt in the argument between the Parties whether the authorities of the FRY supplied - and continued to supply - the VRS leaders who decided upon and carried out those acts of genocide with their aid and assistance, at a time when those authorities were *clearly aware* that genocide was about to take place or was under way;”¹⁰⁸

As a result, Serbia can not be considered to be an accomplice to the genocide that was committed in Srebrenica.

II.7 The Obligation to Prevent

With regard to the obligation to prevent the Court is once again confronted with an ear deafening silence in the Convention on how to interpret this principle. Judge Tomka notes in his separate opinion that the debate in the Sixth Committee was “not very illuminating”. He refers in apparent agreement to the observations of William Schabas regarding this silence:

¹⁰⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, supra note 4, para. 432.

¹⁰⁷ *Idem*, para. 421.

¹⁰⁸ *Idem*, para. 422.

“Not surprisingly the leading author on genocide wrote that “[p]erhaps the most intriguing phrase in Article I is the obligation upon States to prevent and punish genocide”. He continued that: “while the final Convention has much to say about punishment of genocide, there is little to suggest what prevention of genocide really means. Certainly, nothing in the debates about Article I provides the slightest clue as to the scope of the obligation to prevent.”¹⁰⁹

Thus the Court is forced to develop the criteria which enable an assessment of the scope of the obligation. First it notes that the nature of the obligation is one of conduct: if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide, it incurs responsibility.¹¹⁰ In this regard the notion of due diligence is of critical importance according to the Court. The assessment needs to be performed on a case by case basis on the basis of the following parameters:

“The first, which varies greatly from one State to another, is clearly the capacity to influence effectively the action of persons likely to commit, or already committing, genocide. This capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events. The State’s capacity to influence must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law; seen thus, a State’s capacity to influence may vary depending on its particular legal position vis-à-vis the situations and persons facing the danger, or the reality, of genocide.”¹¹¹

The first criterion requires a factual link of a certain substance between the ‘preventing’ State and the persons likely to commit the genocide. This criterion seems to express the normative aspect that States in a special position towards the ‘genocidals’ have an increased responsibility and should act on that. The actual meaning of the second criterion is less clear due to its vague description. The Court does seem to apply this criterion in the subsequent consideration of the facts, when it notes that the FRY was bound by very specific obligations by virtue of the two Orders indicating provisional measures. The Court ordered the FRY to take all measures within its power to prevent the commission of the crime of genocide, and in particular to ensure that no acts of genocide as prohibited by the convention, are committed by armed units under its control, direction or influence. With regard to other relevant legal facts, one might perhaps

¹⁰⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 17, Separate Opinion Judge Tomka, para. 66. For a similar view see Peter Quayle, ‘Unimaginable Evil: The Legislative Limitations of the Genocide Convention’, *International Criminal Law Review* (5) 2005, p. 367.

¹¹⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 29, para. 430.

¹¹¹ *Idem*, para. 430.

be inclined to think of specific obligations by virtue of membership of a (regional) collective security organisation, treaties specifying military assistance and other legal obligations that are particular to the legal relationship between the 'preventing' State and the 'genocidals'.

The absence of a position of genuine influence does not absolve a State from responsibility, in so far as it claims that it could not have prevented the commission of genocide, even if it would have applied its full capability within the confines of international law. In the Court's view, the combined efforts of several States, each complying with its obligation to prevent, might succeed in preventing the genocide from occurring, where the State acting in isolation would be unlikely to succeed.¹¹²

The Court also stipulates an important difference with complicity with regard to the required standard of knowledge. The obligation to prevent is violated if '...the State was aware, or should normally have been aware of the serious danger that acts of genocide would be committed'.¹¹³ Thus the State should act from the moment this danger emerges. As the degree of seriousness is not explained, this standard can still be applied restrictively, but it is without doubt fulfilled sooner than the strict requirement of knowledge of the genocidal intentions of another State or entity.

This lowered standard of knowledge proved decisive for the incurrence of responsibility of Serbia under the Convention. The political, military and financial links between the FRY and the Bosnian Serbs were so close that a position of influence, unlike any other State party to the Convention, could be considered to be present. Moreover, as already indicated above, the FRY was under a legal obligation by the Court Orders to ensure that genocide would not be committed by anyone under its control or influence. Since both the factual and legal position of the FRY towards the Bosnian Serbs justify a higher degree of diligence and thus the imposition of specific positive obligations with regard to the prevention of genocide, the question of awareness of the intentions of the Bosnian Serbs seems already partially answered. In the context of such a close relationship at the political and military level, the Court concludes that Serbia must have been aware of a serious risk of genocide in Srebrenica. It relies heavily upon a statement that Milosevic allegedly made to General Wesley Clark during the negotiation of the Dayton Agreement, containing a warning of Milosevic to Mladić about the killing of people in Srebrenica. This allegation was denied by Milosevic, but used by the Trial Chamber of the ICTY in the rejection of a Motion for Judgment of Acquittal.¹¹⁴ The Court further refers to 'all the international concern about what looked likely to happen at Srebrenica', and concludes that since Serbia has not shown that it took any initiative or action to prevent the genocide, Serbia

¹¹² *Idem*, para. 430.

¹¹³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 29, para. 432.

¹¹⁴ *Prosecutor v. Milosevic*, IT-02-54-T, Decision on Motion for Judgment of Acquittal, 16 June 2004, para. 280.

has violated its obligation to prevent under the Convention and hence incurs international responsibility.¹¹⁵

II.8 The Obligation to Punish

Article VI deals with the question who should punish the alleged genocidal perpetrators. It provides two options: either the competent tribunals of the State on whose territory the genocide occurred shall try the suspects, or an international penal tribunal. While at the time of the drafting of the Convention, the establishment of an international penal tribunal was more of an ideal than an imminent development, the Court considers that the ICTY definitely constitutes a penal tribunal in the meaning of article VI.¹¹⁶ Though an obligation to co-operate with such a tribunal seems a logical consequence, it is not expressly stipulated by the article, and the Court derives such an obligation without precisely indicating how. It merely considers that an obligation to co-operate with such a tribunal under article VI 'is certain' once the tribunal has been established.¹¹⁷

It finds that this obligation is violated by the non-compliance of the State authorities before the regime change in 2000, and from 2000 by the irregular residence of Mladić, indicted for genocide, "...without the Serb authorities doing what they could and can reasonably do to ascertain exactly where he is living and arrest him...".¹¹⁸ The Court also points to the Serbian Minister of Foreign Affairs who stated that "...the intelligence services of that State knew where Mladić was living in Serbia, but refrained from informing the authorities competent to order his arrest because certain members of those services had allegedly remained loyal to the fugitive...".¹¹⁹ Consequently, the obligation to punish under the Convention is violated.

II.9 The Issue of Reparation

Finally the Court has to address the question of appropriate reparation for the failure to comply with the obligations to prevent and to punish under the Convention. As restitution is evidently impossible, the Court examines whether compensation is appropriate.¹²⁰ According to the Court a direct and certain causal relation must be established between the wrongful act and the damage sustained.

Such a nexus could be considered established only if the Court were able to conclude from the case as a whole and with a sufficient degree of certainty that the genocide at Srebrenica would in fact have been averted if the Respondent had acted in compliance with its legal obligations.¹²¹

¹¹⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, supra note 29, para. 438.

¹¹⁶ *Idem*, para. 445.

¹¹⁷ *Idem*, para. 443.

¹¹⁸ *Idem*, para. 448.

¹¹⁹ *Idem*, para. 448.

¹²⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, supra note 29, para. 460.

¹²¹ *Idem*, para. 462.

Not surprisingly, the Court comes to a negative answer. It states that it clearly can not do so, as it has not been shown that the genocide would have been prevented if Serbia would have fulfilled its obligation to prevent. In light of the earlier assessment of the Court that the relationship between the Bosnian Serbs who physically perpetrated the genocide at Srebrenica and the FRY, was not characterized by effective control, but 'only' by a position of influence, this does not seem an unreasonable conclusion. However, the absence of causality is directly related to the qualification of the wrongful act as an act of omission. The proper *sine qua non* test in case of omission would indeed be the hypothetical question: would the damage resulting from the acts of genocide not have occurred if Serbia would have fulfilled its obligation to prevent?¹²² Only if the answer is affirmative, then a causal link is established. This is a very strict test, because hypothetically speaking it is hard to exclude other factors which could enable the genocidal acts to happen. Nevertheless support might still be found for an affirmative answer. As the Court found when it analyzed the relationships between the different entities involved:

“The Court finds it established that the Respondent was thus making its considerable military and financial support available to the Republika Srpska, and had it withdrawn that support, *this would have greatly constrained the options that were available to the Republika Srpska authorities.*”¹²³

Also relevant in this respect is the reference of Judge Keith in the context of complicity, to the statement of the Bosnian Serb president Karadzic before the Assembly of the Republika Srpska in May 1994: “[w]ithout Serbia nothing would have happened, we don’t have the resources and would not have been able to make war”.¹²⁴ It should be borne in mind that the former Yugoslavia was under a general and complete embargo on all deliveries of weapons and military equipment from 1991 by resolution of the Security Council.¹²⁵

The problem with the inevitably hypothetical causality in the event of an act of omission is that an absolute certain answer is virtually impossible, thereby making a causal relationship improbable. A more serious point however is that it should be questioned if the Court was right in treating the obligation to prevent as an act of omission. This qualification stems from the division between positive and negative obligations in the Convention as further explained in section 4.3 below, which was not strictly necessary. At this point there is an important contradiction in the Court’s reasoning. As it held with regard to the interrelationship between

¹²² See for causality in law in general with regard to omission H.L.A. Hart & T. Honoré, *Causation in the Law*, Oxford: The Clarendon Press 1985, pp. 127-128, for international criminal law Michael Duttwiler, ‘Liability for Omission in International Criminal Law’, *International Criminal Law Review* (6) 2006, pp. 6-7, for international law Francois Rigaux, ‘International Responsibility and the principle of Causality’, in M. Ragazzi (ed.), *International Responsibility Today, Essays in Memory of Oscar Schachter* 2005, p. 85.

¹²³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, supra note 29, para. 241.

¹²⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, supra note 29, Declaration of Judge Keith, para. 8.

¹²⁵ UN Doc. S/RES/713 (1991).

the obligations not to commit genocide itself (article 3 a), not to engage in the participatory acts (article 3 b-e), and to prevent genocide:

“If a State is held responsible for an act of genocide [...] or for one of the other acts referred to in Article III of the Convention [...] then there is no point in asking whether it complied with its obligation of prevention in respect of the same acts, *because logic dictates that a State cannot have satisfied an obligation to prevent genocide in which it actively participated.*”¹²⁶

The same reasoning led to the identification of an implicit obligation not to commit genocide as contained by article I. And yet there is no reference to the illegal activities of supplying arms to the Bosnian Serbs by the FRY. In the context of complicity, the Court considered that although awareness of the genocidal intent of the Bosnian Serbs by the FRY could not be proved, the aid and assistance was not doubted:

“There is thus little doubt that the atrocities in Srebrenica were committed, at least in part, with the resources which the perpetrators of those acts possessed as a result of the general policy of aid and assistance pursued towards them by the FRY.”¹²⁷

In conjunction with its finding on the significance of the FRY's support to the Bosnian Serbs, it can thus be inferred from the Court's own findings that the genocide was at least partly committed with resources that the FRY supplied in contravention with the legally binding Orders of 1993.¹²⁸ Though the Court never clarified the concrete actions Serbia could and should have taken to comply with the obligation to prevent, it seems an inescapable conclusion that at the minimum it should have stopped supplying the armed forces that were the principal candidates for the commission of a possible genocide. As argued before, there is no compelling logic in persisting in a strict division between acts of omission and commission, particularly in light of the above mentioned reasoning of the Court. In a reference to the Court's own words, it should be concluded that Serbia did not satisfy its obligation to prevent as it actively participated in its facilitation.

This analysis forces to reformulate the *sine qua non* test of causality into the sine qua non test that is applied for establishing causality for acts of commission, so as to take into account the aid and assistance provided by Serbia. Withdrawal of the support of resources does not exclude the possibility that the genocide would have materialized in any event, but such an application of a *sine qua non* relationship seems to present a too heavy burden of proof, and possibly even

¹²⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 29, para. 382.

¹²⁷ *Idem*, para. 422.

¹²⁸ It should be noted that the obligation imposed by the Orders aims to protect the same norm, namely the prohibition of genocide, as the norm where upon the obligation to prevent is based. The damage claimed by Bosnia is directly related to the protected norm.

an incorrect one. As Serbia is not under an obligation of result to prevent genocide or found to be a perpetrator of genocide itself, it should not be asked if the genocide in its entirety could have been averted, but if the damage resulting from the genocidal acts is (partly) caused by the failure of Serbia to comply with its obligation to prevent (by discontinuation of the supplies). The answer to this more appropriate question would have been affirmative.

The current approach of the Court raises the question whether the obligation to prevent, which will only come into play after effective control can not be established, can ever generate financial compensation. Since the Court has ruled that responsibility under this obligation can not be averted by a claim that the genocide could not have been prevented even if all the means at the disposal of the State were employed, this category encompasses candidate offenders where the causal relationship between the failure to act and the alleged damages will be very hard to prove. The only reparation the Court deems appropriate is satisfaction in the form of the 'declaration in the present Judgment that Serbia has failed to comply with the obligation imposed by the Convention to prevent the crime of genocide'.¹²⁹

With regard to the failure to punish, the Court also considers the declaration of the failure in the operative part of the Judgment to be sufficient satisfaction. As the non-compliance with the duty to co-operate is still continuing, the Court includes a declaration in which it demands that Serbia shall immediately take effective steps to ensure the full co-operation with the ICTY, including the transfer of individuals accused of genocide or other acts for trial by the ICTY.¹³⁰

III. Implications of the Judgment

Although article 59 of the Statute states that the decision of the Court has no binding force except between the parties, the significance of this Judgment clearly transcends the particularities of the case. First of all, the Court had to clarify the obligations for States under the Convention, since these proceedings were the first to revolve around allegations of genocide by a State. The Judgment thus states the prevailing interpretation of the obligations of all States-parties. Secondly, various issues of international law played a central role in this case. A few of them might be influenced or further developed by the relevant considerations of the Court. In the next two sections, some general implications with regard to the extraterritorial scope of the Convention and the concept of crime of State will be discussed.¹³¹

¹²⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 29, para. 463.

¹³⁰ *Ibid.*, operative part under 8.

¹³¹ It is also possible that the Judgment will influence certain pending cases at the ICTY, like *Perisic* (IT-04-81) and *Stanisic and Simatovic* (IT-03-69). That aspect is however outside of the scope of this contribution.

III.1 The Extra-Territorial Implications of the Judgment

Extra-territoriality is obviously a central theme in the Genocide case, since it basically revolves around the question of international responsibility under the Genocide Convention of Serbia for genocide committed on the territory of Bosnia. This is not a particularity of this case; the extra-territorial dimensions of genocide have also been subject to extensive debate during the negotiations of the Convention.¹³² The Secretary-General was of the opinion that the purpose of the Genocide Convention required the universality of repression. In his view, and that of experts, General Assembly resolution 96, affirming genocide as a crime under international law and calling for a draft convention by the ECOSOC, should be properly understood as to embrace such a principle. The Ad Hoc Committee though, as one of the many organs involved in the drafting process, removed any reference to universal jurisdiction, mainly because it found the universality principle to be an infringement on the principle of sovereignty. This danger remains of significance, particularly with regard to the obligation to prevent. The issue was also debated in the Sixth Committee and ultimately rejected by a vote of 29 to 6, with 10 abstaining. According to the commentary to the Convention by Nehemiah Robinson, the omission of this principle leads to the interpretation that under the Convention, genocide can only be dealt with by the State on whose territory the genocide is committed and by organs of the UN.¹³³

In the proceedings of the case, the question of the extra-territorial scope of the Convention was first addressed in the preliminary phase. In response to a preliminary objection against the extra-territorial application of the Convention, the Court had stated that:

“It follows that the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*. The Court notes that the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention.”¹³⁴

This already deviates from the assessment of Robinson at the time of the conclusion of the Convention. But the question arises whether the finding is endowed with the authority of *res judicata*. In the Court's view, this finding pertained only to article I. Since it did not rule on each particular obligation arising under the Convention, it says it still has to rule on the territorial scope of the Convention. It does so in the following paragraphs:

The substantive obligations arising from Articles I and III are not on their face limited by territory. They apply to a State wherever it may be acting or may be able to act in ways appropriate to meeting the obligations in question. The extent of that ability in law and fact is considered, so far as the obligation to prevent the crime of genocide is concerned, in the section of the

¹³² See for this discussion Robinson 1960, *supra* note 56, p. 31.

¹³³ *Idem*, p. 32.

¹³⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 4, para. 31.

Judgment concerned with that obligation (cf. paragraph 430 below). The significant relevant condition concerning the obligation not to commit genocide and the other acts enumerated in Article III is provided by the rules on attribution (paragraphs 379 ff. below).¹³⁵

The obligation to prosecute imposed by Article VI is by contrast subject to an express territorial limit. The trial of persons charged with genocide is to be in a competent tribunal of the State in the territory of which the act was committed (cf. paragraph 442 below), or by an international penal tribunal with jurisdiction (paragraphs 443 ff. below).

What is noticeable at first sight is that any reference to the *erga omnes* character of the rights and obligations contained in the Convention as a foundation for extraterritoriality is absent. The extent to which the obligations have extra-territorial effect is now differentiated per obligation.

With respect to the obligation for States not to commit genocide the normal rules of attribution determine whether an act of genocide outside a State's territory can generate international responsibility under the Convention. This issue will thus be decided on the basis of existing customary law. The obligation not to commit genocide also entails the prohibited engagement in the participatory modes enumerated in article 3 (b)-(e). Complicity, conspiracy, incitement and the attempt to commit genocide are however factually and legally hard to conceive of as not raising responsibility under the general law on State responsibility. Such behaviour would at the minimum be considered a violation of the principle of non-intervention or of State sovereignty. Although innovative in the law on State responsibility, they do not seem to extend the extra-territorial application of the Convention any further.

As for the obligation to punish, specifically dealt with in article VI, the Court indicates that it is strictly territorial. Since the genocide was committed outside Serbia's territory, the obligation to punish is not engaged in this respect (of course, the residence of Mladić on Serbia's territory did constitute a violation of the duty to co-operate, an implicit part of the obligation to punish). The Court observes that while the Convention does not oblige States to exercise extra-territorial criminal jurisdiction, it also does not prohibit States to do so either, subject to compatibility with international law, particularly if based upon the principle of active personality.¹³⁶ In this approach the Court follows the conventional reading of the Genocide Convention, such as supported by Robinson.

The system as laid down in article VI of territorial obligations for individual States parties complemented by an enforcement mechanism at the international level of the UN to only deal collectively (via an international penal tribunal) with genocide outside one's territory, is not

¹³⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 29, paras. 183-184.

¹³⁶ *Idem*, para. 442.

¹³⁷ For an assessment see G. Molier, 'Het Internationaal Gerechtshof, Srebrenica en het Genocide-Verdrag: rechtsvinding of rechtsschepping', *Vrede en Veiligheid* (36) 2007- 1, pp. 20-22.

fully copied by the Court in its approach to the obligation to prevent. Though article VIII seems to envisage a similar division, the Court interprets the obligation to prevent as to also oblige individual States to prevent genocidal acts outside the perimeters of their own territories.

The criterion formulated by the Court 'wherever it may be acting or may be able to act' seems to stretch the extra-territorial application of the Convention far beyond the standard of control, as advocated by Serbia in their memorial. However, the seemingly unlimited scope is restricted by the limits implicit in the due diligence test, which has already been explained above. This test yields a differentiated regime of responsibility that varies with the differing relationships between the States parties and the 'genocidals'. This assessment in concreto is a first safeguard against a too extensive scope of the obligation. Within the diligence test further restrictions are built in. For instance, the geographical distance from the scene of events is a factual circumstance which may negatively affect the capacity to influence. It is also less likely that intense political or cultural ties can be sustained with a State on another continent for example, though exceptions are certainly possible.¹³⁸

Another restriction, of a legal nature, is that every State may only act within the limits permitted by international law. Unless the Court is of the opinion that humanitarian interventions are legal under (customary) international law, a question that it always seems to have avoided, this condition excludes military interventions on the basis of article 2 (4) of the UN Charter as lawful measures adopted to meet the positive obligation to prevent genocide. A less clear issue is at what point the obligation to prevent may be considered to impede upon the principle of non-intervention. As this principle prohibits the intervention in a State's internal or external affairs by another State, the options for preventative measures seem very limited. Moreover, measures addressing a situation that can develop into genocide seem most effective at the collective level. The Court seems to modestly hint at such an approach:

"[...] the more so since the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result - averting the commission of genocide - which the efforts of only one State were insufficient to produce."¹³⁹

Such an interpretation would be consistent with the positive obligations that States are under according to the regime of the articles on State responsibility in case of a *ius cogens* violation, to which category genocide clearly belongs. Article 41 (1) ASR codifies this consequence.

States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.¹⁴⁰

¹³⁸ For instance, in many cases former colonies maintain close relations with the former colonial powers.

¹³⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 29, para. 430.

¹⁴⁰ *Official Records of the General Assembly*, Fifty-sixth Session, Supplement No. 10 (A/56/10).

With regard to the kind of measures that States should take, the commentaries note the following:

“What is called for in the face of serious breaches is a joint and coordinated effort by all States to counteract the effects of these breaches. [...] But in fact such cooperation, especially in the framework of international organizations, is carried out already in response to the gravest breaches of international law and it is often the only way of providing an effective remedy. Paragraph 1 seeks to strengthen existing mechanisms of cooperation, on the basis that all States are called upon to make an appropriate response to the serious breaches referred to in article 40.”¹⁴¹

The emerging doctrine of the ‘responsibility to protect’ embodies a similar understanding of a two tier model of enforcement: the primary responsibility of protection of a population against crimes such as genocide lies with the State itself, while a complementary responsibility is located at the (collective) level of the international community.¹⁴² As Secretary-General Annan explains in the report *In Larger Freedom*, “The task is not to find alternatives to the Security Council as a source of authority but to make it work better”.¹⁴³ Although this remark should be situated in the context of the use of force, the General Assembly seems to share this view in its reference to the responsibility to protect by failing to mention obligations for States to act on an individual basis in case of a genocide.¹⁴⁴

The Court seemed to refrain from taking a position on this issue when it stated that its decision should not be understood as to purport a finding ‘of a general obligation on States to prevent the commission by other persons or entities of acts contrary to certain norms of general international law’.¹⁴⁵ Although Judge Tomka also does not explicitly refer to the responsibility to protect, he does address the mechanism behind the emergence of the doctrine.¹⁴⁶ Tomka argues that article VIII embodies the normative notion that genocide should be eliminated through international co-operation, and is primarily directed at the Security Council and alternatively the General Assembly. But in case article VIII can not be understood as to impose a legal obligation on the particular organs to act, should the obligation to prevent be understood as to require a State to act outside its territory to prevent acts of genocide? In response, he carefully phrases a warning against a too broad construction of the obligation, arguing that the status

¹⁴¹ *Ibid.*, see commentary in same document.

¹⁴² See the UN GA resolution A/60/L.1 20 September 2005, paras. 138-139 and the report ‘The Responsibility to Protect’ by the International Commission on Intervention and State Sovereignty, published by the International Development Research Centre, Ottawa, December 2001.

¹⁴³ United Nations doc. A/59/2005, para. 126.

¹⁴⁴ UN GA resolution A/60/L.1 20 September 2005, paras. 138-139.

¹⁴⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 29, para. 429. See also Molier 2007, *supra* note 137, p. 15.

¹⁴⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 17, Separate Opinion Judge Tomka, para. 66.

of unilateral or plurilateral actions undertaken without Security Council authorization still remains controversial. Only authorized actions are 'undoubtedly lawful and legitimate' in his view.¹⁴⁷ Thus, without rejecting the legality of what is best known as humanitarian interventions altogether, Tomka argues for a more conservative interpretation and dissents: only when a State exercises jurisdiction or effective control, it should be obligated under the Convention to act extra-territorially.¹⁴⁸

As the Court in this case does not provide concrete examples of measures that could be adopted under the preventative obligation, but only refers to a total lack of action on the side of Serbia, the actual contents and form of the obligation to prevent will have to be clarified by future practice or proceedings. For now, the most logical interpretation of the Court's ruling on this issue is that the obligation to prevent under the genocide Convention is a special obligation, not comparable with other more general obligations to prevent. The Court emphasizes this view when it states that there are many different obligations to prevent under several international instruments, each of them varying in contents. The Court states that it does not aim to establish a general jurisprudence of a wide applicability to these obligations.¹⁴⁹

III.2 Genocide: A Crime or an International Wrongful Act?

The acceptance of a State as a perpetrator of genocide might not have directly extended the extra-territorial application of the Genocide Convention, but in the author's opinion the Court contributed to the development of the law on State responsibility in a significant way. As explained in section II.2, under current international law only individuals are considered capable of committing crimes. As such, international law fails to accurately express the frequent involvement of the State apparatus in the perpetration of crimes and thus maintains a discrepancy between the accountability of the State and the individual.

Although at a sociological level the involvement of the State in crimes under international law is increasingly recognized,¹⁵⁰ until this judgment this had not found an appropriate reflection in the law on State responsibility. In this respect, challenging the oversimplified reading of the Nuremberg Judgment comes down to challenging a prevailing doctrine rather than interpreting just another consideration of a judicial organ.

¹⁴⁷ *Idem*, para. 66.

¹⁴⁸ *Idem*, para. 67.

¹⁴⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 29, para. 429.

¹⁵⁰ For instance Penny Green & Tony Ward, *State Crime, Governments, Violence and Corruption*, London: Pluto Press 2004, and Ronald C. Kramer & Raymond J. Michalowski, 'War, Aggression and State Crime: A Criminological Analysis of the Invasion and Occupation of Iraq', *British Journal of Criminology* (45) 2005, pp. 446-469, David Kauzlarich and Ronald C. Kramer, *Crimes of the American Nuclear State: At Home and Abroad*. Boston: Northeastern University Press 1998.

After all, the International Law Commission had to delete the notion of a 'crime of state' in the second reading of the Draft Articles on State Responsibility, after it had featured prominently on the agenda since the 1970s in the form of draft article 19 (2).¹⁵¹

"An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime."¹⁵²

Though the concept was not intended to create a criminal responsibility analogous to domestic law, but only to reflect a normative hierarchy in the law on State responsibility, it still generated unwanted associations in that direction and was one of the reasons for abandoning the terminology of crime.¹⁵³ Special Rapporteur on State Responsibility James Crawford notes in the introduction to the commentaries on the articles that no principled considerations exclude the acceptance of a crime of State, but that such a term should only be used in the genuine sense of criminal responsibility or not at all.¹⁵⁴ Since no institutional and procedural frameworks existed under contemporary international law to exercise a criminal jurisdiction over States, the introduction of the notion of a crime of State would have been a hazardous enterprise in light of the considerable division amongst States on the validity of such a concept.

The fact that a distinction between 'ordinary' wrongful acts and crimes proved unsustainable for the time being, is indicative for the challenge the Court faced in this case, when it had to decide whether the reference to State responsibility for genocide could be read as to entail the idea that a State can actually perpetrate genocide itself. In the author's view, there are persuasive arguments to consider this judgment a rehabilitation of the abandoned notion of former draft article 19.

Firstly, the ruling of the Court should be construed as to mean that there is now a basis in positive law that a State can commit the crime of genocide. Though the Court repeatedly stated that the *responsibility* is not of a criminal nature, it can not credibly be denied that the act is. Article I unequivocally characterizes genocide as a crime:

"The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."

¹⁵¹ UN Doc. A/56/10 (2001), 279

¹⁵² *Yearbook ILC* 1976, vol. II (2), pp. 95-122.

¹⁵³ James Crawford, *The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries*, Cambridge: Cambridge University Press 2002, 17 and 37-38, also Weiler, Cassese & Spinedi (eds), *International Crimes of State, A Critical Analysis of the ILC's Draft Article 19 on State Responsibility*, Berlijn: De Gruyter 1989, 52.

¹⁵⁴ Crawford 2002, *supra* note 153, pp. 16-20.

The assertion of the Court that State perpetrated genocide means genocide 'as defined in the Convention' leads to the conclusion that the State can commit a crime.¹⁵⁵ The fact that the Court treats genocide as a treaty violation, resulting in an international wrongful act cannot discard this fact.¹⁵⁶ The wrongful act consists of an international crime. Under the current law of State responsibility this leads to the strained construction that the genocide is a crime when committed by an individual, but an international wrongful act when committed by the State.

Secondly, combined with the reference by the parties and the Court itself in terms of the exceptional gravity of the case, concerning 'the most serious issues of State responsibility'¹⁵⁷, the Court demonstrated by raising the standard of proof that either a finding on genocide or the imposition of appropriate compensation or perhaps the combination of both, is viewed as an additional serious consequence in comparison with less serious inter-State disputes. As such, it gives expression to the existence of an aggravated responsibility, or in a more contentious term a normative hierarchy. In fact, the discussions of the ILC show that particularly genocide was considered a typical crime of State.¹⁵⁸

The decision to use articles 2 and 3 as a legal basis for a determination of genocide by a State is also likely to affect the more general debate on State criminal responsibility. In opposition to this approach by the majority, several Judges opined that the acceptance of a State as a perpetrator of the crime of genocide as defined under the Convention, implicates the criminal responsibility of the State, which they reject as not being part of contemporary international law.¹⁵⁹ One might agree to the extent that by establishing a criminal blame the nature of international State responsibility for the crime of genocide has moved further away from a civil-like responsibility in the direction of a (rudimentary) form of criminal responsibility.¹⁶⁰ The increased prominence of

¹⁵⁵ *Supra* note 66.

¹⁵⁶ See for instance paragraph 401, where the Court discusses the rules of attribution that are applicable in case of genocide. It states that the rules do not vary with the nature of the wrongful acts, referring to genocide in particular.

¹⁵⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 2, para. 208.

¹⁵⁰ It remains to be seen whether or how the articles on State responsibility could be affected by this ruling. Currently the General Assembly did not finally decide to incorporate the articles into a convention, postponing that decision to a later date: General Assembly Resolution 59/35, 2 Dec 2000; UN Doc A/RES/59/35, adopted at the 65th plenary meeting of the General Assembly (see UN Doc A/59/SR.65). As the Secretariat is requested to gather the relevant State practise and jurisprudence to support the General Assembly's decision on how to proceed, it is not ruled out that this case might provide an incentive to re-assess a possible role for the concept of a crime of State.

¹⁵⁹ The considerable opposition with regard to this point is not visible in the Judgment itself as the issue as such does not form part of the decisions in the operative part of the Judgment. Ad-hoc Judge Kreca argued that the acceptance of a State being capable of committing genocide inevitably leads to the criminal responsibility of the State (para. 129). Judge Tomka holds that the interpretation of a State committing genocide implicates 'the criminal responsibility of States in international law' (para. 55). Judges Shi and Koroma jointly hold that an outcome contrary to the plain meaning of the Convention is produced by the expansive interpretation of the majority, namely the criminal responsibility of the State (paras.1 and 4). Judge Skotnikov argues that the Convention exclusively recognizes genocide as a crime, and argues that the Court's approach not to treat it as such is not possible under the Convention. Implicitly, he seems to assert that if it would have done so, it would have accepted State criminal responsibility (first page of the merits). Judge Owada finally, rejects the interpretation of the majority, even though [...] makes the justiciability of this act of genocide by a State [...] somewhat less than criminal responsibility [...] (para. 71).

¹⁶⁰ This conclusion would not be contradictory with the view of many authors that State responsibility is neither civil nor penal, but a *sui generis* responsibility. See Pellet, Alain, 'Can a State Commit a Crime? Definitely, Yes!', *European Journal of International Law* (10) 1999, p. 433.

truth finding, as demonstrated by the higher procedural standard, only supports this position. Although the Court and both parties denied the existence of such a notion in international law, the Court made a significant contribution to the debate by accepting that the State can have a *mens rea*, modelled after a criminal law provision. As explained in section II.1, in criminal doctrine the attribution of the subjective element forms a major impediment to the acceptance of criminal responsibility of legal entities. The acceptance of this notion in the law on State responsibility may facilitate the acceptance of a criminal responsibility of States in future debates.¹⁶¹

Conclusion

In conclusion, the Court took its responsibility to decide on the merits of the case, despite considerable legal difficulties. But in doing so, it refused to take a position on the membership of the UN of Serbia which is deplorable. The Court contributed to the development of the law on State responsibility in a significant way, deciding the issue of State perpetrated genocide where the drafters left the issue undecided. It did so basically 'upstream', considering the prevalent non-acceptance of State crime under international law and doctrine. In addition, it gave a progressive interpretation of the obligation to prevent which extends the extra-territorial scope in a way that makes it difficult to predict the immediate consequences. In this sense, the Court increased the overall accountability of States under international law and it should be applauded for that.

The interrelated interpretation of complicity, the obligation to prevent and the causality of damage should be assessed as unnecessary restrictive. It seems the Court is too reserved with regard to translating the responsibility of Serbia into compensation. The same restrictive attitude was displayed with regard to the explicit request of Bosnia to request Serbia to submit the minutes of the Serbian Supreme Defence Council (SDC), which the Court was competent to do under article 49 of its Statute. These documents were suspected to contain vital evidence on Serbia's involvement in the Bosnian war that could be decisive for the issues of attribution and intent. Since it has been demonstrated that truth finding took a more central place in this procedure by raising the standard of proof on account of the extreme gravity of the allegations,

¹⁶¹ The acceptance of States having a specific intent in the meaning of the Genocide Convention under the law on State responsibility has also been subject to much debate. Opinions vary from authors who insist that specific intent is simply a question of attribution as it is located at the primary rule of genocide, see Marko Milanovic, 'State Responsibility for Genocide', *European Journal of International Law* (17) 2006, pp. 553-604, to authors who point to the problematic issue of identifying a *mens rea* with a legal entity under current international law and exclude that possibility, see Schabas, *supra* note 46. In between various opinions can be found, for example that fault can be identified with the State, but it is separate from the primary rule, see A. Pellet, 'Can a State Commit a Crime? Definitely, Yes!', *European Journal of International Law* (10) 1999, pp. 425-434 and Crawford, *supra* note 140, pp. 12-14, who claims that particularly former draft article 19, which includes genocide, needs an explicit subjective element to be a viable concept. Gattini flags the unclear position of fault in the system of State responsibility, see Andrea Gattini, 'Smoking/No Smoking: Some Remarks on the Current Place of Fault in the ILC Draft Articles on State Responsibility', *European Journal of International Law* (10) 1999, pp. 397-404. For an insightful discussion see A. Nollkaemper, 'Concurrence between individual responsibility and State responsibility in international law', *International and Comparative Law Quarterly* (52) 2003, pp. 633-635.

the Court shows an inconsistent approach by not asking for the documents. The gravity of the case demanded an active and not a passive bench in this case, a point of severe criticism of vice-president Al-Khasawneh in his dissenting opinion.¹⁶²

That being said, one ought to be careful to speculate about the decisive value of the SDC documents. The failure of Bosnia to prove that Serbia fulfilled the role of accomplice to genocide, might be primarily located in the particular nature of genocide and the problems of proving the requirement of specific intent that characterizes it. Since international law does not provide for a convention on crimes against humanity, which are of equal gravity but do not require specific intent, Bosnia was forced to resort to a claim under the Genocide Convention.¹⁶³ This lacuna in international law should not compel judges to establish genocide too easily; something the Court was obviously well aware of. So in order to more accurately express the (future) involvement of States in international crimes, there is also a task for the international community to better equip the Court with jurisdiction over other crimes.

¹⁶² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 13, Dissenting Opinion of Vice-President Al-Khasawneh, paras. 35 and 62.

¹⁶³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 29, para. 277. The Court briefly hints at this difference, when it states that the facts may amount to crimes against humanity and war crimes, but that the Court lacks jurisdiction to do so.