Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide

(Bosnia and Herzegovina *v.* Serbia and Montenegro)

INTERNATIONAL COURT OF JUSTICE

General List No. 91 (26 February 2007)
<http://www.icj-cij.org/docket/files/91/13685.pdf>

Author's Note: §3.3.B of the online portion of this textbook contains an earlier decision in this long-running dispute. In 1993, Bosnia and Herzegovina (Bosnia)—after achieving its statehood—filed its case in the International Court of Justice (I.C.J.) against the former Yugoslavia, as the latter was splintering during the 1990s. Bosnia's claim arose under the U.N.-driven 1948 Genocide Convention. Bosnia therein asserted "Yugoslavia's" responsibility for prior actions by various Bosnian Serb military and paramilitary groups against Bosnia's non-Serbian population, primarily Bosnian Muslims. The Respondent Serbia filed a counterclaim against Bosnia, alleging, among other things, that the U.N. safe heaven in Srebrenica, Bosnia, was being used by Muslim forces to commit atrocities against the Serbian population. Serbia subsequently dismissed its counterclaim—choosing, instead, to focus on defending the allegations contained in Bosnia's memorial (complaint).

In the 1996 phase of the I.C.J.'s decision-making, the majority of the Court determined that it had jurisdiction over the defendant "Federal Republic of Yugoslavia (F.R.Y.)." Based on its unique status within the U.N. as of 1992—where the Yugoslavia seat would remain unfilled during the next decade—the F.R.Y. filed objections to the court's ability to determine the merits of this case against an entity that no longer existed ("Yugoslavia"). In 1996, the court nevertheless determined that Bosnia and F.R.Y. were each subject to the rights and obligations set forth in the Genocide Convention. That decision allowed Bosnia to continue with this litigation (alleging the involvement of President Slobodan Milosevic and others, at the seat of the F.R.Y.'s government in Belgrade).

This current round of the match resulted in the Court's final judgment on the merits. This essential issue was whether the Respondent (now "Serbia," after Montenegro's departure from their union) was responsible for genocide at various locations within Bosnia—especially the massacre near Srebrenica. This was the site of Europe's largest mass murder since the Holocaust. In April 1993, the United Nations had declared Srebrenica a "UN safe area." It was guarded by a small unit of Dutch soldiers, operating under the mandate of United Nations Protection Force (UNPROFOR).

The author has added textual enhancements, such as the bolding of the Genocide Conventions key articles at the outset of the Court's opinion; removing quotation marks from indented quotes in the text; placing punctuation inside quotation marks; bolding all paragraph numbers; and the deletion of most legal citations. Readability is further improved by not following the foreign English spelling of certain terms with the American English term "[*sic*]."

Of all the cases in this course, this is perhaps the most important. It has been reduced from 180 to 37 pages. Given what occurred during the Bosnian War, and your reasons for taking this course, a perfunctory perusal would shortchange your understanding of perhaps the most significant of crimes arising under International Law:

Court's Opinion: The COURT, composed as above, after deliberation, delivers the following Judgment:

1. On 20 March 1993, the Government of the Republic of Bosnia and Herzegovina … filed in the Registry of the Court an Application instituting proceedings against the Federal Republic of Yugoslavia (… "Serbia and Montenegro" and … from 3 June 2006, the Republic of Serbia … in respect of a dispute concerning alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly of the United Nations on 9 December 1948 (hereinafter "the Genocide Convention" or "the Convention")…. The Application invoked Article IX of the Genocide Convention as the basis of the jurisdiction of the Court.

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IV. THE APPLICABLE LAW: THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

(1) The Convention in brief

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143. Under Article **I** "[t]he Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish." Article **II** defines genocide in these terms:

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

Article **III** provides as follows:

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

144. According to Article **IV**, persons committing any of those acts shall be punished whether they are constitutionally responsible rulers, public officials or private individuals [a provision which would not resurface in any relevant treaty until the 2002 effective date of the Statute of the International Criminal Court [textbook §8.5]. Article **V** requires the parties to enact the necessary legislation to give effect to the Convention, and, in particular, to provide effective penalties for persons guilty of genocide or other acts enumerated in Article III. Article **VI** provides that "[p]ersons charged with genocide

or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction." Article **VII** provides for extradition.

145. Under Article **VIII**

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

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

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

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

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

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(3) The Court's 1996 decision about the territorial scope of the Convention

153. A second issue … concerns the territorial limits, if any, on the obligations of the States parties to prevent and punish genocide. In support of one of its preliminary objections the Respondent argued that it did not exercise jurisdiction over the Applicant's territory at the relevant time. In the final sentence of its reasons for rejecting this argument the Court said this: "[t]he Court notes that the obligation each State thus has *to prevent and to punish* the crime of genocide is *not territorially limited* by the Convention" [italics added].

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(4) The obligations imposed by the Convention on the Contracting Parties

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160. The Court observes that what obligations the Convention imposes upon the parties to it depends on the ordinary meaning of the terms of the Convention read in their context and in the light of its object and purpose. To confirm the meaning resulting from

that process or to remove ambiguity or obscurity or a manifestly absurd or unreasonable result, the supplementary means of interpretation to which recourse may be had include the preparatory work of the Convention and the circumstances of its conclusion. Those propositions, reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, are well recognized as part of customary international law: see *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion* [textbook §6.2.]; case concerning *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment* [textbook §2.7.C.2]; *LaGrand (Germany* v. *United States of America), Judgment* [textbook §2.7.C.2], and *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002,* p. 645, para. 37, and the other cases referred to in those decisions.

161. To determine what are the obligations of the Contracting Parties under the Genocide Convention, the Court will begin with the terms of its Article I. It contains two propositions. The first is the affirmation that genocide is a crime under international law. That affirmation is to be read in conjunction with the declaration that genocide is a crime under international law, unanimously adopted by the General Assembly two years earlier in its resolution 96 (I), and referred to in the Preamble to the Convention (paragraph 142, above). The affirmation recognizes the existing requirements of customary international law, a matter emphasized by the Court in 1951:

> The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (I) of the General Assembly, December 11th 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required 'in order to liberate mankind from such an odious scourge' (Preamble to the Convention)....
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> The objects of such a convention must also be considered. The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion* [principal case in textbook §7.2.A.4].

Later in that Opinion, the Court referred to "the moral and humanitarian principles which are its basis." . . .

162. Those characterizations of the prohibition on genocide and the purpose of the

Convention are significant for the interpretation of the second proposition stated in Article I: the undertaking by the Contracting Parties to prevent and punish the crime of genocide, and particularly in this context the undertaking to prevent. Several features of that undertaking are significant. The ordinary meaning of the word "undertake" is to give a formal promise, to bind or engage oneself, to give a pledge or promise, to agree, to accept an obligation. It is a word regularly used in treaties setting out the obligations of the Contracting Parties. It is not merely hortatory or purposive. The undertaking is *unqualified* (a matter considered later in relation to the scope of the obligation of prevention) [italics added]; and it is not to be read merely as an introduction to later express references to legislation, prosecution and extradition. Those features support the conclusion that Article I, in particular its undertaking to prevent, creates obligations distinct from those which appear in the subsequent Articles. That conclusion is also supported by the purely humanitarian and civilizing purpose of the Convention.

163. The conclusion is confirmed by … the preparatory work of the Convention and the circumstances of its conclusion as referred to in Article 32 of the Vienna Convention. In 1947 the United Nations General Assembly, in requesting the Economic and Social Council to submit a report and a draft convention on genocide to the Third Session of the Assembly, declared "that genocide is an international crime entailing national and international responsibility on the part of *individuals* and *States*" (A/RES/180(II)) [italics added]. That duality of responsibilities is also to be seen in two other associated resolutions adopted on the same day, both directed to the newly established International Law Commission (hereinafter "the ILC") [textbook §2.5.B]—the first on the formulation of the Nuremberg principles [textbook §9.6], concerned with the rights (Principle V) and duties of individuals, and the second on the draft declaration on the rights and duties of States (A/RES/177 and A/RES/178 (II)) [textbook §2.5]. The duality of responsibilities is further considered later in this Judgment.

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166. The Court next considers whether the Parties are also under an obligation, by virtue of the Convention, not to commit genocide themselves [in addition to the duty "to prevent" it]. It must be observed at the outset that such an obligation is not expressly imposed by the actual terms of the Convention. … However, in the view of the Court, taking into account the established purpose of the Convention, the effect of Article I is to prohibit States from themselves committing genocide. Such a prohibition follows, first, from the fact that the Article categorizes genocide as "a crime under international law": by agreeing to such a categorization, the States parties must logically be undertaking not to commit the act so described. Secondly, it follows from the expressly stated obligation to prevent the commission of acts of genocide. That obligation requires the States parties, *inter alia*, to employ the means at their disposal … to prevent persons or groups not directly under their authority from committing an act of genocide or any of the other acts mentioned in Article III. It would be paradoxical if States were thus under an obligation to prevent, so far as within their power, commission of genocide by persons over whom they have a certain influence, but were not forbidden to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law. In short, the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide.

167. The Court accordingly concludes that Contracting Parties to the Convention

are bound not to commit genocide, through the actions of their organs or persons or groups whose acts are attributable to them. That conclusion must also apply to the other acts enumerated in Article III. Those acts are forbidden along with genocide itself in the list included in Article III. They are referred to equally with genocide in Article IX and without being characterized as "punishable;" and the "purely humanitarian and civilizing purpose" of the Convention may be seen as being promoted by the fact that States are subject to that full set of obligations, supporting their undertaking to prevent genocide. It is true that the concepts used in paragraphs *(b)* to *(e)* of Article III, and particularly that of "complicity," refer to well known categories of criminal law and, as such, appear particularly well adapted to the exercise of penal sanctions against individuals. It would however not be in keeping with the object and purpose of the Convention to deny that the international responsibility of a State—even though quite different in nature from [individual] criminal responsibility—can be engaged through one of the acts, other than genocide itself, enumerated in Article III.

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179. Accordingly, having considered the various arguments, the Court affirms that the Contracting Parties are bound by the obligation under the Convention not to commit, through their organs or persons or groups whose conduct is attributable to them, genocide and the other acts enumerated in Article III. Thus if an organ of the State, or a person or group whose acts are legally attributable to the State, commits any of the acts proscribed by Article III of the Convention, the international responsibility of that State is incurred.

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

180. The Court observes that if a State is to be responsible because it has breached its obligation not to commit genocide, it must be shown that genocide as defined in the Convention has been committed. … The Respondent has raised the question whether it is necessary, as a matter of law, for the Court to be able to uphold a claim of the responsibility of a State for an act of genocide, or any other act enumerated in Article III, that there should have been a finding of genocide by a court or tribunal exercising criminal jurisdiction. According to the Respondent, the condition *sine qua non* for establishing State responsibility is the prior establishment, according to the rules of criminal law, of the individual responsibility of a perpetrator engaging the State's responsibility.

181. The different procedures followed by, and powers available to, this Court and to the courts and tribunals trying persons for criminal offences, do not themselves indicate that there is a legal bar to the Court itself finding that genocide or the other acts enumerated in Article III have been committed. Under its [I.C.J. procedural] Statute the Court has the capacity to undertake that task, while applying the standard of proof appropriate to charges of exceptional gravity (paragraphs 209-210 below). Turning to the terms of the [Genocide] Convention itself, the Court has already held that it has jurisdiction under Article IX to find a State responsible if genocide or other acts enumerated in Article III are committed by its organs, or persons or groups whose acts are attributable to it.

182. Any other interpretation could entail that there would be no legal recourse available under the Convention in some readily conceivable circumstances: genocide has allegedly been committed within a State by its leaders but they have not been brought to trial because, for instance, they are still very much in control of the powers of the State including the police, prosecution services and the courts and there is no international penal tribunal able to exercise jurisdiction over the alleged crimes; or the responsible State may have acknowledged the breach. The Court accordingly concludes that State responsibility can arise under the Convention for genocide and complicity, without an individual being convicted of the crime or an associated one.

(6) The possible territorial limits of the obligations

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

184. The obligation to prosecute imposed by Article VI is by contrast subject to an express territorial limit. The trial of [individual] persons charged with genocide is to be in a competent tribunal of the State in the territory of which the act was committed, or by an international penal tribunal with jurisdiction. [Note that the Genocide Convention does *not* provide for universal jurisdiction (textbook §5.2.E), as a basis for resolving genocide claims against States (or individuals).]

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(8) The question of intent to commit genocide

186. The Court notes that genocide as defined in Article II of the Convention comprises "acts" and an "intent." It is well established that the acts … themselves include mental elements. "Killing" must be intentional, as must "causing serious bodily or mental harm." Mental elements are made explicit in paragraphs *(c)* and *(d)* of Article II by the words "deliberately" and "intended," quite apart from the implications of the words "inflicting" and "imposing;" and forcible transfer too requires deliberate intentional acts. The acts … are by their very nature conscious, intentional or volitional acts.

187. In addition to those mental elements, Article II requires a further mental element. It requires the establishment of the "*intent to destroy, in whole or in part*, . . . [the protected] *group, as such*" [italics added]. It is not enough to establish, for instance in terms of paragraph *(a)*, that deliberate unlawful killings of members of the group have occurred. The additional intent must also be established, and is defined very precisely. It is often referred to as a special or specific intent…; in the present Judgment it will usually be referred to as the "specific intent…. " It is not enough that the members of the group are targeted because they belong to that group, that is because the perpetrator has a discriminatory intent. Something more is required. The acts listed in Article II must be done with intent to destroy the group as such in whole or in part. The words "as such" emphasize that intent to destroy the protected group.

188. The specificity of the intent and its particular requirements are highlighted when genocide is placed in the context of other related criminal acts, notably crimes against humanity and persecution…. In this context … persecution as a crime against humanity is an offence belonging to the same *genus* as genocide. Both persecution and

genocide are crimes perpetrated against persons that belong to a particular group and who are targeted because of such belonging. In both categories what matters is the intent to discriminate: to attack persons on account of their ethnic, racial, or religious characteristics (as well as, in the case of persecution, on account of their political affiliation). While in the case of persecution the discriminatory intent can take multifarious inhumane forms and manifest itself in a plurality of actions including murder, in the case of genocide that intent must be accompanied by the intention to destroy, in whole or in part, the group to which the victims of the genocide belong. Thus, it can be said that, from the viewpoint of *mens rea* [guilty mind], genocide is an extreme and most inhuman form of persecution. To put it differently, when persecution escalates to the extreme form of wilful and deliberate acts designed to destroy a group or part of a group, it can be held that such persecution amounts to genocide."

189. The specific intent is also to be distinguished from other reasons or motives the perpetrator may have. Great care must be taken in finding in the facts a sufficiently clear manifestation of that intent.

190. The term "ethnic cleansing" has frequently been employed to refer to the events in Bosnia and Herzegovina which are the subject of this case; see, for example, Security Council resolution 787 (1992), para. 2; resolution 827 (1993), Preamble; and the Report with that title attached as Annex IV to the Final Report of the United Nations Commission of Experts (S/1994/674/Add.2) (hereinafter "Report of the Commission of Experts"). General Assembly resolution 47/121 referred in its Preamble to "the abhorrent policy of 'ethnic cleansing', which is a form of genocide," as being carried on in Bosnia and Herzegovina. It will be convenient at this point to consider what legal significance the expression may have. It is in practice used, by reference to a specific region or area, to mean "rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area" (S/35374 (1993), para. 55, Interim Report by the Commission of Experts). It does not appear in the Genocide Convention; indeed, a proposal during the drafting of the Convention to include in the definition "measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment" was not accepted (A/C.6/234). It can only be a *form of genocide* within the meaning of the Convention, if it corresponds to or *falls within one of the categories of acts prohibited by Article II* of the Convention [italics added]. Neither the intent, as a matter of policy, to render an area "ethnically homogeneous," nor the operations that may be carried out to implement such policy, can *as such* be designated as genocide: the intent that characterizes genocide is "to destroy, in whole or in part" a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement. This is not to say that acts described as "ethnic cleansing" may never constitute genocide, if they are such as to be characterized as, for example, "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part," contrary to Article II, paragraph *(c)*, of the Convention, provided such action is carried out with the necessary specific intent…, that is to say with a view to the destruction of the group, as distinct from its removal from the region. As the ICTY has observed, while "there are obvious similarities between a genocidal policy and the policy commonly known as 'ethnic cleansing,'" yet "[a] clear distinction must be drawn between physical destruction

and mere dissolution of a group. The expulsion of a group or part of a group does not in itself suffice for genocide." In other words, whether a particular operation described as "ethnic cleansing" amounts to genocide depends on the presence or absence of acts listed in Article II of the Genocide Convention, and of the intent to destroy the group as such. In fact, in the context of the Convention, the term "ethnic cleansing" has no legal significance of its own. That said, it is clear that acts of "ethnic cleansing" may occur in parallel to acts prohibited by Article II of the Convention, and may be significant as indicative of the presence of a specific intent … inspiring those acts.

(10) Definition of the protected group

191. When examining the facts brought before the Court in support of the accusations of the commission of acts of genocide, it is necessary to have in mind the identity of the group against which genocide may be considered to have been committed. The Court will therefore next consider the application in this case of the requirement of Article II of the Genocide Convention, as an element of genocide, that the proscribed acts be "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."

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193. The Court recalls first that the essence of the intent is to destroy the protected group, in whole or in part, as such. It is a group which must have particular positive characteristics—national, ethnical, racial or religious—and not the lack of them. The intent must also relate to the group "as such." That means that the crime requires an intent to destroy a collection of people who have a particular group identity [not just all non-Serbs]. It is a matter of who those people are, not who they are not. The etymology of the word—killing a group—also indicates a positive definition; and Raphael Lemkin has explained that he created the word from the Greek *genos*, meaning race or tribe, and the termination "-cide," from the Latin *caedere*, to kill (*Axis Rule in Occupied Europe*(1944), p. 79). In 1945 the word was used in the Nuremberg indictment which stated that the defendants "conducted deliberate and systematic genocide, viz., the extermination of racial and national groups ... in order to destroy particular races and classes of people and national, racial or religious groups...." (Indictment, Trial of the Major War Criminals before the International Military Tribunal, *Official Documents*, Vol. 1, pp. 43 and 44). As the Court explains below (paragraph 198), when part of the group is targeted, that part must be significant enough for its destruction to have an impact on the group as a whole. Further, each of the acts listed in Article II require that the proscribed action be against members of the "group."

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

197. The Parties also addressed a specific question relating to the impact of

geographic criteria on the group as identified positively. The question concerns in particular the atrocities committed in and around Srebrenica in July 1995, and the question whether in the circumstances of that situation the definition of genocide in Article II was satisfied so far as the intent of destruction of the "group" "in whole or in part" requirement is concerned. … "[M]urders and infliction of serious bodily or mental harm were committed with the intent to kill all the Bosnian Muslim men of military age at Srebrenica."

198. In terms of that question of law, the Court refers to three matters relevant to the determination of "part" of the "group" for the purposes of Article II. In the first place, the intent must be to destroy at least a *substantial* part of the particular group [italics added]. That is demanded by the very nature of the crime of genocide: since the object and purpose of the Convention as a whole is to prevent the intentional destruction of groups, the part targeted must be significant enough to have an impact on the group as a whole. …

199. Second, the Court observes that it is widely accepted that genocide may be found to have been committed where the intent is to destroy the group within a geographically limited area. … This criterion of opportunity must however be weighed against the first and essential factor of substantiality. It may be that the opportunity available to the alleged perpetrator is so limited that the substantiality criterion is not met. … The Respondent, while not challenging this criterion, does contend that the limit militates against the existence of the specific intent … at the national or State level as opposed to the local level—a submission which, in the view of the Court, relates to attribution [of responsibility to the defendant State] rather than to the "group" requirement.

200. A third suggested criterion is qualitative rather than quantitative. The Appeals Chamber in the *Krstić* case [I.C.T.Y. Judgment IT-98-33-A, 19 April 2004] put the matter in these carefully measured terms:

> The number of individuals targeted should be evaluated not only in absolute terms, but also in relation to the overall size of the entire group. In addition to the numeric size of the targeted portion, its prominence within the group can be a useful consideration. If a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial within the meaning of Article 4 [of the Statute which exactly reproduces Article II of the Convention].

Establishing the "group" requirement will not always depend on the substantiality requirement alone although it is an essential starting point. It follows in the Court's opinion that the qualitative approach cannot stand alone.

201. The above list of criteria is not exhaustive, but, as just indicated, the substantiality criterion is critical. … Much will depend on the Court's assessment of those and all other relevant factors in any particular case.

V. Questions of proof: burden of proof, the standard of proof, methods of proof

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202. When turning to the facts of the dispute, the Court must note that many allegations of fact made by the Applicant are disputed by the Respondent. … The disputes relate to issues about the facts, for instance the number of rapes committed by Serbs against Bosnian Muslims, and the day-to-day relationships between the authorities in Belgrade and the authorities in Pale [de facto capital of Bosnia's Serbian entity, the Republika Srpska, during the Bosnian war Bosnia], and the inferences to be drawn from, or the evaluations to be made of, facts, for instance about the existence or otherwise of the necessary specific intent … and about the attributability of the acts of the organs of Republika Srpska and various paramilitary groups to the Respondent [now Serbia]. …

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205. The particular issue concerns the "redacted" sections of documents of the Supreme Defence Council of the Respondent, i.e. sections in which parts of the text had been blacked out so as to be illegible. The documents had been classified, according to the Co-Agent of the Respondent, by decision of the Council as a military secret, and by a confidential decision of the Council of Ministers of Serbia and Montenegro [now Serbia] as a matter of national security interest. The Applicant contends that the Court should draw its own conclusions from the failure of the Respondent to produce complete copies of the documents.

206. On this matter, the Court observes that the Applicant [Bosnia] has extensive documentation and other evidence available to it, especially from the readily accessible ICTY records. It has made very ample use of it. In the month before the hearings it submitted what must be taken to have been a careful selection of documents from the very many available from the ICTY. The Applicant called General Sir Richard Dannatt, who, drawing on a number of those documents, gave evidence on the relationship between the authorities in the Federal Republic of Yugoslavia and those in the Republika Srpska and on the matter of control and instruction.

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208. The Parties also differ on … the standard of proof. The Applicant, emphasizing that the matter is not one of criminal law, says that the standard is the balance of evidence or the balance of probabilities, inasmuch as what is alleged is breach of treaty obligations. According to the Respondent, [however,] the proceedings "concern the most serious issues of State responsibility and ... a charge of such exceptional gravity against a State requires a proper degree of certainty. The proofs should be such as to leave no room for reasonable doubt."

209. The Court has long recognized that claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive (cf. *Corfu Channel (United Kingdom* v. *Albania), Judgment, I.C.J. Reports 1949*, p. 17 [see textbook §8.4]). The Court requires that it be fully convinced that allegations made in the proceedings, that the crime of genocide or the other acts enumerated in Article III have been committed, have been clearly established. The same standard applies to the proof of attribution for such acts [which in common law terms would be "beyond a reasonable doubt" as applied to criminal cases—as opposed to the civil case standard "preponderance of the evidence."

210. In respect of the Applicant's claim that the Respondent has breached its undertakings to prevent genocide and to punish and extradite persons charged with

genocide, the Court requires proof at a high level of certainty appropriate to the seriousness of the allegation.

211. The Court now turns to the third matter—the method of proof. The Parties submitted a vast array of material, from different sources, to the Court. It included reports, resolutions and findings by various United Nations organs, including the Secretary-General, the General Assembly, the Security Council and its Commission of Experts, and the Commission on Human Rights, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities and the Special Rapporteur on Human Rights in the former Yugoslavia; documents from other intergovernmental organizations such as the Conference for Security and Co-operation in Europe; documents, evidence and decisions from the ICTY; publications from governments; documents from non-governmental organizations; media reports, articles and books. They also called witnesses, experts and witness-experts.

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223. In view of the above, the Court concludes that it should in principle accept as highly persuasive relevant findings of fact made by the [I.C.T.Y.] Tribunal at trial, unless of course they have been upset on appeal. For the same reasons, any evaluation by the Tribunal based on the facts as so found for instance about the existence of the required intent, is also entitled to due weight.

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VI. THE FACTS INVOKED BY THE APPLICANT, IN RELATION TO ARTICLE II [punishable acts]

(1) The background

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231. In this case the Court is seised of a dispute between two sovereign States, each of which is established in part of the territory of the former State known as the Socialist Federal Republic of Yugoslavia, concerning the application and fulfillment of an international convention to which they are parties, the Convention on the Prevention and Punishment of the Crime of Genocide. The task of the Court is to deal with the legal claims and factual allegations advanced by Bosnia and Herzegovina against Serbia and Montenegro.

. . .

233. By a "sovereignty" resolution adopted on 14 October 1991, the Parliament of Bosnia and Herzegovina declared the independence of the Republic. … On 28 February 1992, the Constitution of the Republic of the Serb People of Bosnia and Herzegovina was adopted. The Republic of the Serb People of Bosnia and Herzegovina (and subsequently the Republika Srpska) was not and has not been recognized internationally as a State; it has however enjoyed some *de facto* independence [and autonomous status under Bosnia and Herzegovina's constitution].

(2) The entities involved in the events complained of [Bosnia and Serbia]

. . .

236. The Parties both recognize that there were a number of entities at a lower level the activities of which have formed part of the factual issues in the case [making *attribution* to the nation of Serbia more challenging], though they disagree as to the

significance of those activities. Of the military and paramilitary units active in the hostilities, there were in April 1992 five types of armed formations involved in Bosnia: first, the Yugoslav People's Army (JNA), subsequently the Yugoslav Army (VJ); second, volunteer units supported by the JNA and later by the VJ, and the Ministry of the Interior (MUP) of the FRY; third, municipal Bosnian Serb Territorial Defence (TO) detachments; and, fourth, police forces of the Bosnian Serb Ministry of the Interior. The MUP of the Republika Srpska controlled the police and the security services, and operated, according to the Applicant, in close co-operation and co-ordination with the MUP of the FRY. On 15 April 1992, the Bosnian Government established a military force, based on the former Territorial Defence of the Republic, the Army of the Republic of Bosnia and Herzegovina …, merging several non-official forces, including a number of paramilitary defence groups, such as the Green Berets, and the Patriotic League, being the military wing of the Muslim Party of Democratic Action. The Court does not overlook the evidence suggesting the existence of Muslim organizations involved in the conflict, such as foreign Mujahideen, although as a result of the withdrawal of the Respondent's counter-claims, the activities of these bodies are not the subject of specific claims before the Court.

237. The Applicant has asserted the existence of close ties between the Government of the Respondent and the authorities of the Republika Srpska, of a political and financial nature, and also as regards administration and control of the army of the Republika Srpska (VRS). The Court observes that insofar as the political sympathies of the Respondent lay with the Bosnian Serbs, this is not contrary to any legal rule. It is however argued by the Applicant that the Respondent, under the guise of protecting the Serb population of Bosnia and Herzegovina, in fact conceived and shared with them the vision of a "Greater Serbia," in pursuit of which it gave its support to those persons and groups responsible for the activities which allegedly constitute the genocidal acts complained of. The Applicant bases this contention first on the "Strategic Goals" articulated by [Republika Srpska] President Karadžić [see textbook §8.7 for U.S. human rights case pending against Karadžić] … on 12 May 1992, and subsequently published in the *Official Gazette* of the Republika Srpska, and secondly on the consistent conduct of the Serb military and paramilitary forces vis-à-vis the non-Serb Bosnians showing, it is suggested, an overall specific intent…. These activities will be examined below.

238. As regards the relationship between the armies of the FRY [Federal Republic of Yugoslavia—earlier interim country name] and the Republika Srpska [the Serb entity then and now in Bosnia], the Yugoslav Peoples' Army (JNA) of the SFRY [Socialist Federal Republic of Yugoslavia—subsequent interim country name] had, during the greater part of the period of existence of the SFRY, been effectively a federal army, composed of soldiers from all the constituent republics of the Federation, with no distinction between different ethnic and religious groups. … Insofar as the Respondent does not deny the fact of these developments, it insists that they were normal reactions to the threat of civil war, and there was no premeditated [genocidal] plan behind them.

239. The Court further notes the submission of the Applicant that the VRS was armed and equipped by the Respondent. The Applicant contends that when the JNA formally withdrew on 19 May 1992, it left behind all its military equipment which was subsequently taken over by the VRS. This claim is supported by the Secretary-General's report of 3 December 1992 in which he concluded that "[t]hough the JNA has completely withdrawn from Bosnia and Herzegovina, former members of Bosnian Serb origin have

been left behind with their equipment and constitute the Army of the 'Serb Republic.'" Moreover, the Applicant submits that Belgrade actively supplied the VRS with arms and equipment throughout the war in Bosnia and Herzegovina. … For its part, the Respondent generally denies that it supplied and equipped the VRS but maintains that, even if that were the case, such assistance "is very familiar and is an aspect of numerous treaties of mutual security, both bilateral and regional." The Respondent adds that moreover it is a matter of public knowledge that the armed forces of Bosnia and Herzegovina received external assistance from friendly sources.

240. As regards effective links between the two governments in the financial sphere, the Applicant maintains that the economies of the FRY, the Republika Srpska, and the Republika Srpska Krajina [Croatia] were integrated through the creation of a single economic entity, thus enabling the FRY Government to finance the armies of the two other bodies in addition to its own. … The Respondent has denied that the budget deficit of the Republika Srpska was financed by the FRY but has not presented evidence to show how it was financed. Furthermore, the Respondent emphasizes that any financing supplied was simply on the basis of credits, to be repaid, and was therefore quite normal, particularly in view of the economic isolation of the FRY, the Republika Srpska and the Republika Srpska Krajina….

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

242. The Court will therefore now examine the facts alleged by the Applicant, in order to satisfy itself, first, whether the alleged atrocities occurred; secondly, whether such atrocities, if established, fall within the scope of Article II of the Genocide Convention, that is to say whether the facts establish the existence of an intent, on the part of the perpetrators of those atrocities, to destroy, in whole or in part, a defined group. The group taken into account for this purpose will, for the reasons explained above (paragraphs 191-196), be that of the Bosnian Muslims…. The Court will also consider the facts alleged in the light of the question whether there is persuasive and consistent evidence for a pattern of atrocities, as alleged by the Applicant, which would constitute evidence of *dolus specialis* [specific genocidal intent] on the part of the Respondent. …

…

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

245. Article II *(a)* of the Convention deals with acts of killing members of the protected group. The Court will first examine the evidence of killings of members of the protected group in the principal areas of Bosnia and in the various detention camps, and ascertain whether there is evidence of a specific intent *(dolus specialis)* in one or more of them. The Court will then consider under this heading the evidence of the massacres reported to have occurred in July 1995 at Srebrenica.

Sarajevo

246. The Court notes that the Applicant refers repeatedly to killings, by shelling and sniping, perpetrated in Sarajevo. The Fifth Periodic Report of the United Nations Special Rapporteur is presented by the Applicant in support of the allegation that between

1992 and 1993 killings of Muslim civilians were perpetrated in Sarajevo, partly as a result of continuous shelling by Bosnian Serb forces. … In his periodic Report …, the Special Rapporteur observed that as from late February 1995 numerous civilians were killed by sniping activities of Bosnian Serb forces and that "one local source reported that total of 41 civilians were killed ... in Sarajevo during the month of May 1995." The Report also noted that, in … July 1995, there was further indiscriminate shelling and rocket attacks on Sarajevo by Bosnian Serb forces as a result of which many civilian deaths were reported.

247. The Report of the Commission of Experts gives a detailed account of the battle and siege of Sarajevo. The Commission estimated that over the course of the siege nearly 10,000 persons had been killed or were missing in the city of Sarajevo. …

Drina River Valley

(a) Zvornik

250. The Applicant made a number of allegations with regard to killings that occurred in the area of Drina River Valley. …

251. The Respondent contests those allegations and contends that all three sources used by the Applicant are based solely on the account of one witness. … The Court notes that the Office of the Prosecutor of the ICTY had never indicted any of the accused for the alleged massacres in the hospital.

(b) Camps

(i) Sušica camp

252. The Applicant further presents claims with regard to killings perpetrated in detention camps in the area of Drina River Valley. The Report of the Commission of Experts includes the statement of an ex-guard at the Sušica camp who personally witnessed 3,000 Muslims being killed. In proceedings before the ICTY, the commander of that camp, Dragan Nikolić, pleaded guilty to murdering nine non-Serb detainees and, according to the Sentencing Judgment of 18 December 2003, "the Accused persecuted Muslim and other non-Serb detainees by subjecting them to murders, rapes and torture as charged specifically in the Indictment."

. . .

[Here, the Court recites numerous other allegations and similar findings of atrocities in Bosnia.]

276. On the basis of the facts set out above, the Court finds that it is established by overwhelming evidence that massive killings in specific areas and detention camps throughout the territory of Bosnia and Herzegovina were perpetrated during the conflict. Furthermore, the evidence presented shows that the victims were in large majority members of the protected group, which suggests that they may have been systematically targeted by the killings. The Court notes in fact that, while the Respondent contested the veracity of certain allegations, and the number of victims, or the motives of the perpetrators, as well as the circumstances of the killings and their legal qualification, it never contested, as a matter of fact, that members of the protected group were indeed killed in Bosnia and Herzegovina. The Court thus finds that it has been established by conclusive evidence that massive killings of members of the protected group occurred and that therefore the requirements of the material element, as defined by Article II *(a)* of

the Convention, are fulfilled. At this stage of its reasoning, the Court is not called upon to list the specific killings, nor even to make a conclusive finding on the total number of victims.

277. The Court is however not convinced, on the basis of the evidence before it, that it has been conclusively established that the massive killings of members of the protected group were committed with the specific intent … on the part of the perpetrators to destroy, in whole or in part, the group as such. The Court has carefully examined the criminal proceedings of the ICTY and the findings of its Chambers, cited above, and observes that none of those convicted were found to have acted with specific intent…. The killings outlined above may amount to war crimes and crimes against humanity, but the Court has no jurisdiction to determine whether this is so [as does the International Criminal Tribunal addressed in textbook §8.5]. In the exercise of its jurisdiction under the Genocide Convention, the Court finds that it has not been established by the Applicant that the killings amounted to acts of genocide prohibited by the Convention. As to the Applicant's contention that the specific intent … can be inferred from the overall pattern of acts perpetrated throughout the conflict, examination of this must be reserved until the Court has considered all the other alleged acts of genocide (violations of Article II, paragraphs *(b)* to *(e)*) (see paragraph 370 below).

(5) The massacre at Srebrenica

278. The atrocities committed in and around Srebrenica are nowhere better summarized than in the first paragraph of the Judgment of the Trial Chamber in the *Krstić* case:

> The events surrounding the Bosnian Serb take-over of the United Nations ('UN') 'safe area' of Srebrenica in Bosnia and Herzegovina, in July 1995, have become well known to the world. Despite a UN Security Council resolution declaring that the enclave was to be 'free from armed attack or any other hostile act,' units of the Bosnian Serb Army ('VRS') launched an attack and captured the town. Within a few days, approximately 25,000 Bosnian Muslims, most of them women, children and elderly people who were living in the area, were uprooted and, in an atmosphere of terror, loaded onto overcrowded buses by the Bosnian Serb forces and transported across the confrontation lines into Bosnian Muslim-held territory. The military-aged Bosnian Muslim men of Srebrenica, however, were consigned to a separate fate. As thousands of them attempted to flee the area, they were taken prisoner, detained in brutal conditions and then executed. More than 7,000 people were never seen again.

While the Respondent raises a question about the number of deaths, it does not essentially question that account. What it does question is whether specific intent … existed and whether the acts complained of can be attributed to it. It also calls attention to the attacks carried out by the Bosnian army from within Srebrenica and the fact that the

enclave was never demilitarized. In the Respondent's view the military action taken by the Bosnian Serbs was in revenge and part of a war for territory.

279. The Applicant contends that the planning for the final attack on Srebrenica must have been prepared quite some time before July 1995. It refers to a report of 4 July 1994 by the commandant of the Bratunac Brigade. He outlined the "final goal" of the VRS: "an entirely Serbian Podrinje. The enclaves of Srebrenica, Žepa and Goražde must be militarily defeated." The report continued:

> We must continue to arm, train, discipline, and prepare the RS Army for the execution of this crucial task—the expulsion of Muslims from the Srebrenica enclave. There will be no retreat when it comes to the Srebrenica enclave, we must advance. The enemy's life has to be made unbearable and their temporary stay in the enclave impossible so that they leave *en masse* as soon as possible, realising that they cannot survive there.

… The Court observes that the object stated in the report … does not envisage the destruction of the Muslims in Srebrenica, but rather their departure [ethnic cleansing]. The [I.C.T.Y.] Chamber did not give the report any particular significance.

280. The Applicant, like the Chamber, refers to a meeting on 17 March 1995 between the Commander of the United Nations Protection Force (UNPROFOR) and [Bosnian Serb commander] General Mladić, at which the latter expressed dissatisfaction with the safe area régime and indicated that he might take military action against the eastern enclaves. He gave assurances however for the safety of the Bosnian Muslim population of those enclaves. On the following day, 8 March 1995, President Karadžić issued the Directive for Further Operations 7, also quoted by the Chamber and the Applicant: "'Planned and well-thought-out combat operations' were to create 'an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants of both enclaves'." [Mladić and Karadžić are the two men allegedly most responsible for this massacre, and are still at large, allegedly in Serbia or Bosnia's Republika Srpska. See *Karadžić* case in textbook §8.7.] …

281. Counsel for the Applicant asked in respect of the first of those directives "[w]hat could be a more clear-cut definition of the genocidal intent to destroy on the part of the authorities in Pale [de facto capitol of Bosnian Republika Srpska]?" As with the July 1994 report [considered by the I.C.T.Y.], the Court observes that the expulsion of the inhabitants would achieve the purpose of the operation. That observation is supported by the ruling of the Appeals Chamber in the *Krstić* case that the directives were "insufficiently clear" to establish specific intent *(dolus specialis)* on the part of the members of the Main Staff who issued them. "Indeed, the Trial Chamber did not even find that those who issued Directives 7 and 7.1 had genocidal intent, concluding instead that the genocidal plan crystallized at a later stage."

282. A Netherlands Battalion (Dutchbat) was deployed in the Srebrenica safe area. Within that area in January 1995 it had about 600 personnel. By February and through the spring the VRS was refusing to allow the return of Dutch soldiers who had gone on leave, causing their numbers to drop by at least 150, and were restricting the movement of international convoys of aid and supplies to Srebrenica and to other

enclaves. It was estimated that without new supplies about half of the population of Srebrenica would be without food after mid-June.

283. On 2 July the Commander of the Drina Corps issued an order for active combat operations; its stated objective on the Srebrenica enclave was to reduce "the enclave to its urban area." The attack began on 6 July with rockets exploding near the Dutchbat headquarters in Potočari; 7 and 8 July were relatively quiet because of poor weather, but the shelling intensified around 9 July. Srebrenica remained under fire until 11 July when it fell, with the Dutchbat observation posts having been taken by the VRS. Contrary to the expectations of the VRS, the Bosnia and Herzegovina army showed very little resistance. The United Nations Secretary-General's report quotes an assessment made by United Nations military observers on the afternoon of 9 July which concluded as follows:

> 'the … offensive will continue until they achieve their aims. These aims may even be widening since the United Nations response has been almost non-existent and the[y] … are now in a position to overrun the enclave if they wish.' Documents later obtained from Serb sources appear to suggest that this assessment was correct. Those documents indicate that the Serb attack on Srebrenica initially had limited objectives. Only after having advanced with unexpected ease did the Serbs decide to overrun the entire enclave. Serb civilian and military officials from the Srebrenica area have stated the same thing, adding, in the course of discussions with a United Nations official, that they decided to advance all the way to Srebrenica town when they assessed that UNPROFOR was *not willing* or able to stop them [italics added—a decision associated with the ensuing fall of the Dutch government].

. . .

285. On 10 July at 10.45 p.m., according to the Secretary-General's 1999 Report, the delegate in Belgrade of the Secretary-General's Special Representative telephoned … to say that he had seen President Milošević who had responded that not much should be expected of him because "the Bosnian Serbs did not listen to him." At 3 p.m. the next day, the President rang the Special Representative and, according to the same report, "stated that the Dutchbat soldiers in Serb-held areas had retained their weapons and equipment, and were free to move about. This was not true." About 20 minutes earlier two NATO aircraft had dropped two bombs on what were thought to be Serb vehicles advancing towards the town from the south. The Secretary-General's report gives the VRS reaction:

> Immediately following this first deployment of NATO close air support, the … [Bosnian army] radioed a message to Dutchbat. They threatened to shell the town and the [nearby] compound where thousands of inhabitants had begun to gather, and to kill the Dutchbat soldiers being held hostage, if NATO continued with its use of air power. The Special Representative of the Secretary-General recalled having received a telephone call from the Netherlands Minister of Defence at this time, requesting that the close air support action be discontinued, because Serb

soldiers on the scene were too close to Netherlands troops, and their safety would be jeopardized. The Special Representative considered that he had no choice but to comply with this request.

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288. The VRS and MUP of the Republika Srpska from 12 July separated men aged 16 to approximately 60 or 70 from their families. The Bosnian Muslim men were directed to various locations but most were sent to a particular house ("The White House") near the UNPROFOR headquarters in Potočari, where they were interrogated. During the afternoon of 12 July a large number of buses and other vehicles arrived in Potočari including some from Serbia. Only women, children and the elderly were allowed to board the buses bound for territory held by the Bosnia and Herzegovina military. Dutchbat vehicles escorted convoys to begin with, but the VRS stopped that and soon after stole 16-18 Dutchbat jeeps, as well as around 100 small arms, making further escorts impossible. Many of the Bosnian Muslim men from Srebrenica and its surroundings including those who had attempted to flee through the woods were detained and killed.

289. Mention should also be made of the activities of certain paramilitary units, the "Red Berets" and the "Scorpions," who are alleged by the Applicant to have participated in the events in and around Srebrenica. The Court was presented with certain documents by the Applicant, which were said to show that the "Scorpions" were indeed sent to the Trnovo area near Srebrenica and remained there through the relevant time period. The Respondent cast some doubt on the authenticity of these documents (which were copies of intercepts, but not originals) without ever formally denying their authenticity. There was no denial of the fact of the relocation of the "Scorpions" to Trnovo. The Applicant during the oral proceedings presented video material showing the execution by paramilitaries of six Bosnian Muslims, in Trnovo, in July 1995.

290. The [I.C.T.Y.] Trial Chambers … found that Bosnian Serb forces killed over 7,000 Bosnian Muslim men following the takeover of Srebrenica in July 1995 [ultimate estimate is 7,800]. Accordingly they found that the *actus reus* [guilty act] of killings in Article II *(a)* of the Convention was satisfied. Both also found that actions of Bosnian Serb forces also satisfied the *actus reus* of causing serious bodily or mental harm, as defined in Article II *(b)* of the Convention—both to those who where about to be executed, and to the others who were separated from them in respect of their forced displacement and the loss suffered by survivors among them.

291. The Court is fully persuaded that both killings within the terms of Article II *(a)* of the Convention, and acts causing serious bodily or mental harm within the terms of Article II *(b)* thereof occurred during the Srebrenica massacre. Three further aspects of the ICTY decisions [prosecuting *individual* defendants] relating to Srebrenica require closer examination—the specific intent *(dolus specialis)*, the date by which the intent was formed, and the definition of the "group" in terms of Article II. A fourth issue which was not directly before the ICTY but which this Court must address is the involvement, if any, of the Respondent in the actions [now pending before the International Court of Justice proceedings alleging *State* responsibility for those acts].

292. The issue of intent has been illuminated by the *Krstić* [I.C.T.Y.] Trial Chamber. In its findings, it was convinced of the existence of intent by the evidence

placed before it. Under the heading "A Plan to Execute the Bosnian Muslim Men of Srebrenica," the Chamber "finds that, following the takeover of Srebrenica in July 1995, the Bosnian Serbs devised and implemented a plan to execute as many as possible of the military aged Bosnian Muslim men present in the enclave." All the executions, the Chamber decided, "systematically targeted Bosnian Muslim men of military age, regardless of whether they were civilians or soldiers." While "[t]he VRS may have initially considered only targeting military men for execution, ... [the] evidence shows, however, that a decision was taken, at some point, to capture and kill all the Bosnian Muslim men indiscriminately. No effort was made to distinguish the soldiers from the civilians." Under the heading "Intent to Destroy," the Chamber reviewed the Parties' submissions and the documents, concluding that it would "adhere to the characterization of genocide which encompass[es] only acts committed with the *goal* of destroying all or part of a group." The acts of genocide need not be premeditated and the intent may become the goal later in an operation. [As determined by the I.C.T.Y.]

> Evidence presented in this case has shown that the killings were planned: the number and nature of the forces involved, the standardized coded language used by the units in communicating information about the killings, the scale of the executions, the invariability of the killing methods applied, indicate that a decision was made to kill all the Bosnian Muslim military aged men.
>
> The Trial Chamber is unable to determine the precise date on which the decision to kill all the military aged men was taken. Hence, it cannot find that the killings committed in Potočari on 12 and 13 July 1995 formed part of the plan to kill all the military aged men. Nevertheless, the Trial Chamber is confident that the mass executions and other killings committed from 13 July onwards were part of this plan.

293. … The Appeals Chamber also rejected the appeal by [individual defendant] General Krstić against the finding that genocide occurred in Srebrenica. It held that the Trial Chamber was entitled to conclude that the destruction of such a sizeable number of men, *one fifth of the overall Srebrenica community*, "'would inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica [italics added].'"

. . .

296. The Court now turns to the requirement of Article II that there must be the intent to destroy a protected "group" in whole or in part. It recalls its earlier statement of the law and in particular the three elements there discussed: substantiality (the primary requirement), relevant geographic factors and the associated opportunity available to the perpetrators, and emblematic or qualitative factors (paragraphs 197-201). … Next, the Court recalls … the ICTY's findings of facts and its evaluation of them … in the following terms:

> In this case, having identified the protected group as the national group of Bosnian Muslims, the Trial Chamber concluded that the part the VRS Main Staff and Radislav Krstić targeted was the Bosnian Muslims of Srebrenica, or the Bosnian Muslims of Eastern Bosnia. This conclusion

> comports with the guidelines outlined above. The size of the Bosnian Muslim population in Srebrenica prior to its capture by the VRS forces in 1995 amounted to approximately forty thousand people. This represented not only the Muslim inhabitants of the Srebrenica municipality but also many Muslim refugees from the surrounding region. Although this population constituted *only a small percentage of the overall Muslim population* of Bosnia and Herzegovina at the time, the *importance* of the Muslim community of Srebrenica is *not captured solely by its size* [italics added].

. . .

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

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

298. The Applicant contends that besides the massive killings, systematic serious harm was caused to the non-Serb population of Bosnia and Herzegovina. The Applicant includes the practice of terrorizing the non-Serb population, the infliction of pain and the administration of torture as well as the practice of systematic humiliation into this category of acts of genocide. Further, the Applicant puts a particular emphasis on the issue of systematic rapes of Muslim women, perpetrated as part of genocide against the Muslims in Bosnia during the conflict.

299. The Respondent does not dispute that, as a matter of legal qualification, the crime of rape may constitute an act of genocide, causing serious bodily or mental harm. It disputes, however, that the rapes in the territory of Bosnia and Herzegovina were part of a genocide perpetrated therein [by Serbia]. The Respondent, relying on the Report of the Commission of Experts, maintains that the rapes and acts of sexual violence committed during the conflict, were not part of genocide, but were committed on all sides of the conflict, without any specific intent *(dolus specialis)*.

. . .

302. Several Security Council resolutions expressed alarm at the "massive, organised and systematic detention and rape of women," in particular Muslim women in Bosnia and Herzegovina. In terms of other kinds of serious harm, Security Council resolution 1034 (1995) condemned

> in the strongest possible terms the violations of international humanitarian law and of human rights by Bosnian Serb and paramilitary forces in the areas of Srebrenica, Žepa, Banja Luka and Sanski Most as described in the report of the Secretary-General of 27 November 1995 and showing a consistent pattern of summary executions, rape, mass expulsions, arbitrary detentions, forced labour and large-scale disappearances.

The Security Council further referred to a "persistent and systematic campaign of terror" in Banja Luka, Bijeljina and other areas under the control of Bosnian Serb forces. It also expressed concern at reports of mass murder, unlawful detention and forced labour, rape, and deportation of civilians in Banja Luka and Sanski Most.

. . .

304. The Court will now examine the specific allegations of the Applicant under this heading, in relation to the various areas and camps identified as having been the scene of acts causing "bodily or mental harm" within the meaning of the Convention. As regards the events of Srebrenica, the Court has already found it to be established that such acts were committed (paragraph 291 above) [omitted].

. . .

319. Having carefully examined the evidence presented before it, and taken note of that presented to the ICTY, the Court considers that it has been established by fully conclusive evidence that members of the protected group were systematically victims of massive mistreatment, beatings, rape and torture causing serious bodily and mental harm, during the conflict and, in particular, in the detention camps. The requirements of the material element, as defined by Article II *(b)* of the Convention are thus fulfilled. The Court finds, however, on the basis of the evidence before it, that it has not been conclusively established that those atrocities, although they too may amount to war crimes and crimes against humanity, were committed with the specific intent *(dolus specialis)* to destroy the protected group, in whole or in part, required for a finding that genocide has been perpetrated.

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

320. Article II *(c)* of the Genocide Convention concerns the deliberate infliction on the group of conditions of life calculated to bring about its physical destruction in whole or in part. Under this heading, the Applicant first points to an alleged policy by the Bosnian Serb forces to encircle civilians of the protected group in villages, towns or entire regions and to subsequently shell those areas and cut off all supplies in order to starve the population. Secondly, the Applicant claims that Bosnian Serb forces attempted to deport and expel the protected group from the areas which those forces occupied. Finally, the Applicant alleges that Bosnian Serb forces attempted to eradicate all traces of the culture of the protected group through the destruction of historical, religious and cultural property.

321. The Respondent argues that the events referred to by the Applicant took place in a context of war which affected the entire population, whatever its origin. In its view, "it is obvious that in any armed conflict the conditions of life of the civilian population deteriorate." The Respondent considers that, taking into account the civil war in Bosnia and Herzegovina which generated inhuman conditions of life for the entire population in the territory of that State, "it is impossible to speak of the deliberate infliction on the *Muslim group alone* or the *non-Serb group alone* of conditions of life calculated to bring about its destruction" [italics added].

. . .

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

355. The Applicant invoked several arguments to show that measures were imposed to prevent births, contrary to the provision of Article II, paragraph *(d)* of the Genocide Convention. First, the Applicant claimed that the

> forced separation of male and female Muslims in Bosnia and Herzegovina, as systematically practised when various municipalities were occupied by the Serb forces . . . in all probability entailed a decline in the birth rate of the group, given the lack of physical contact over many months.

The Court notes that no evidence was provided in support of this statement.

356. Secondly, the Applicant submitted that rape and sexual violence against women led to physical trauma which interfered with victims' reproductive functions and in some cases resulted in infertility. However, the only evidence adduced by the Applicant was the indictment in the *Gagović* case before the ICTY … In the Court's view, an indictment by the Prosecutor does not constitute persuasive evidence…. Moreover, it notes that the *Gagović* case did not proceed to trial due to the death of the accused.

357. Thirdly, the Applicant referred to sexual violence against men which prevented them from procreating subsequently. In support of this assertion, the Applicant noted that, in the *Tadić* case, the Trial Chamber found that, in Omarska camp, the prison guards forced one Bosnian Muslim man to bite off the testicles of another Bosnian Muslim man [principal case in textbook §8.5]. The Applicant also cited a report in the newspaper, *Le Monde*, on a study by the World Health Organization and the European Union on sexual assaults on men during the conflict in Bosnia and Herzegovina, which alleged that sexual violence against men was practically always accompanied by threats to the effect that the victim would no longer produce Muslim children. The article in *Le Monde* also referred to a statement by the President of a non-governmental organization called the Medical Centre for Human Rights to the effect that approximately 5,000 non-Serb men were the victims of sexual violence. However, the Court notes that the article in *Le Monde* is only a secondary source. Moreover, the results of the World Health Organization and European Union study were only preliminary, and there is no indication as to how the Medical Centre for Human Rights arrived at the figure of 5,000 male victims of sexual violence.

358. Fourthly, the Applicant argued that rape and sexual violence against men and women led to psychological trauma which prevented victims from forming relationships and founding a family. In this regard, the Applicant noted that in the *Akayesu* case, the ICTR considered that "rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate." However, the Court notes that the Applicant presented no evidence that this was the case for women in Bosnia and Herzegovina.

359. Fifthly, the Applicant considered that Bosnian Muslim women who suffered sexual violence might be rejected by their husbands or not be able to find a husband. Again, the Court notes that no evidence was presented in support of this statement.

360. The Respondent considers that the Applicant "alleges no fact, puts forward no serious argument, and submits no evidence" for its allegations that rapes were committed in order to prevent births within a group and notes that the Applicant's contention that there was a decline in births within the protected group is not supported by any evidence concerning the birth rate in Bosnia and Herzegovina either before or after the war.

. . .

361. Having carefully examined the arguments of the Parties, the Court finds that the evidence placed before it by the Applicant does not enable it to conclude that Bosnian Serb forces committed acts which could be qualified as imposing measures to prevent births in the protected group within the meaning of Article II *(d)* of the Convention.

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

362. The Applicant claims that rape was used "as a way of affecting the demographic balance by impregnating Muslim women with the sperm of Serb males" or, in other words, as "procreative rape." The Applicant argues that children born as a result of these "forced pregnancies" would not be considered to be part of the protected group and considers that the intent of the perpetrators was to transfer the unborn children to the group of Bosnian Serbs.

. . .

366. The Respondent points out that Muslim women who had been raped gave birth to their babies in Muslim territory and consequently the babies would have been brought up not by Serbs but, on the contrary, by Muslims. Therefore, in its view, it cannot be claimed that the children were transferred from one group to the other.

367. The Court, on the basis of the foregoing elements, finds that the evidence placed before it by the Applicant does not establish that there was any form of policy of forced pregnancy, nor that there was any aim to transfer children of the protected group to another group within the meaning of Article II *(e)* of the Convention.

. . .

(11) The question of pattern of acts said to evidence an intent to commit genocide

370. In the light of its review of the factual evidence before it of the atrocities committed in Bosnia and Herzegovina in 1991-1995, the Court has concluded that, save for the events of July 1995 at Srebrenica, the necessary intent required to constitute genocide has not been conclusively shown in relation to each specific incident.

. . .

371. The Court notes that this argument of the Applicant moves from the intent of the individual perpetrators of the alleged acts of genocide complained of, to the intent of higher authority, whether within the VRS [Republika Srpska army] or the Republika Srpska, or at the level of the Government of the Respondent itself. In the absence of an official statement of aims reflecting such an intent, the Applicant contends that the specific intent … of those directing the course of events is clear from the consistency of practices, particularly in the camps, showing that the pattern was of acts committed "within an organized institutional framework." … [S]omething approaching an official

statement of an overall plan is … to be found in the Decision on Strategic Goals issued on 12 May 1992 by … the President of the National Assembly of Republika Srpska, published in the *Official Gazette* of the Republika Srpska… reads as follows:

DECISION ON THE STRATEGIC GOALS OF THE SERBIAN PEOPLE
IN BOSNIA AND HERZEGOVINA

The Strategic Goals, i.e., the priorities, of the Serbian people in Bosnia and Herzegovina are:

1. Separation as a state from the other two ethnic communities.
2. A corridor between Semberija and Krajina.
3. The establishment of a corridor in the Drina River valley, i.e., the elimination of the border between Serbian states.
4. The establishment of a border on the Una and Neretva rivers.
5. The division of the city of Sarajevo into a Serbian part and a Muslim part, and the establishment of effective state authorities within each part.
6. An outlet to the sea for the Republika Srpska.

While the Court notes that this document did not emanate from the Government of the Respondent [Serbia], evidence before the Court of intercepted exchanges between President Milošević of Serbia and President Karadžić of the Republika Srpska is sufficient to show that the objectives defined represented their joint view.

372. . . .

The 1992 objectives do not include the elimination of the Bosnian Muslim population. ... The Applicant's argument does not come to terms with the fact that an essential motive of much of the Bosnian Serb leadership—to create a larger Serb State, by a war of conquest if necessary—did not necessarily require the destruction of the Bosnian Muslims and other communities, but their expulsion. The 1992 objectives, particularly the first one, were capable of being achieved by the displacement of the population and by territory being acquired, actions which the Respondent accepted (in the latter case at least) as being unlawful since they would be at variance with the inviolability of borders and the territorial integrity of a State which had just been recognized internationally. It is significant that in cases in which the Prosecutor has put the Strategic Goals in issue the ICTY has not characterized them as genocidal. The Court does not see the 1992 Strategic Goals as establishing the specific intent.

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

374. Furthermore, and again significantly, the proposition is not consistent with the findings of the ICTY relating to genocide or with the actions of the Prosecutor,

including decisions not to charge genocide offences in possibly relevant indictments, and to enter into plea agreements …, by which the genocide-related charges were withdrawn.

375. In the cases of a number of accused, relating to events in July 1995 in Srebrenica, charges of genocide or its related acts have not been brought [against those individual defendants].

376. The Court has already concluded above that—save in the case of Srebrenica—the Applicant has not established that any of the widespread and serious atrocities, complained of as constituting violations of Article II, paragraphs *(a)* to *(e)*, of the Genocide Convention, were accompanied by the necessary specific intent … on the part of the perpetrators. It also finds that the Applicant has not established the existence of that intent on the part of the Respondent, either on the basis of a concerted plan, or on the basis that the events reviewed above reveal a consistent pattern of conduct which could only point to the existence of such intent. Having however concluded (paragraph 297 above), in the specific case of the massacres at Srebrenica in July 1995, that acts of genocide were committed in operations led by members of the VRS, the Court now turns to the question whether those acts are attributable to the Respondent.

VII. THE QUESTION OF RESPONSIBILITY FOR EVENTS AT SREBRENICA UNDER ARTICLE III, PARAGRAPH *(A)*, OF THE GENOCIDE CONVENTION

. . .

(2) The test of responsibility

379. In view of the foregoing conclusions, the Court now must ascertain whether the international responsibility of the Respondent can have been incurred, on whatever basis, in connection with the massacres committed in the Srebrenica area during the period in question. For the reasons set out above, those massacres constituted the crime of genocide within the meaning of the Convention. For this purpose, the Court may be required to consider the following three issues in turn. First, it needs to be determined whether the acts of genocide could be attributed to the Respondent under the rules of customary international law of State responsibility; this means ascertaining whether the acts were committed by persons or organs whose conduct is attributable, specifically in the case of the events at Srebrenica, to the Respondent. Second, the Court will need to ascertain whether acts of the kind referred to in Article III of the Convention, other than genocide itself, were committed by persons or organs whose conduct is attributable to the Respondent under those same rules of State responsibility: that is to say, the acts referred to in Article III, paragraphs *(b)* to *(e)*, one of these being complicity in genocide. Finally, it will be for the Court to rule on the issue as to whether the Respondent complied with its twofold obligation deriving from Article I of the Convention to prevent and punish genocide.

. . .

384. Having thus explained the interrelationship among the three issues set out above (paragraph 379), the Court will now proceed to consider the first of them. This is the question *whether* the massacres committed at Srebrenica during the period in question, which constitute the crime of genocide within the meaning of Articles II and III,

paragraph *(a)*, of the Convention, are *attributable*, in whole or in part, *to the Respondent* [italics added]. …

(3) The question of attribution of the Srebrenica genocide to the Respondent on the basis of the conduct of its organs

385. The first of these … questions relates to the well-established rule, one of the cornerstones of the law of State responsibility, that the conduct of any State organ is to be considered an act of the State under international law, and therefore gives rise to the responsibility of the State if it constitutes a breach of an international obligation of the State [textbook §2.5.B]. This rule, which is one of customary international law, is reflected in Article 4 of the ILC Articles on State Responsibility as follows:

> *Article 4*
> *Conduct of organs of a State*
>
> 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
>
> 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

386. When applied to the present case, this rule first calls for a determination whether the acts of genocide committed in Srebrenica were perpetrated by "persons or entities" having the status of organs of the Federal Republic of Yugoslavia (as the Respondent was known at the time) under its internal law, as then in force. It must be said that there is nothing which could justify an affirmative response to this question. It has not been shown that the FRY army took part in the massacres, nor that the political leaders of the FRY had a hand in preparing, planning or in any way carrying out the massacres. It is true that there is much evidence of direct or indirect participation by the official army of the FRY, along with the Bosnian Serb armed forces, in military operations in Bosnia and Herzegovina in the years prior to the events at Srebrenica. That participation was repeatedly condemned by the political organs of the United Nations, which demanded that the FRY put an end to it (see, for example, Security Council resolutions 752 (1992), 757 (1992), 762 (1992), 819 (1993), 838 (1993)). It has however not been shown that there was any such participation in relation to the massacres committed at Srebrenica (see also paragraphs 278 to 297 above). Further, neither the Republika Srpska, nor the VRS were *de jure* organs of the FRY, since none of them had the status of organ of that State under its internal law.

. . .

388. The Court notes first that no evidence has been presented that either General Mladić or any of the other officers whose affairs were handled by the 30th Personnel Centre were, according to the internal law of the Respondent, officers of the army of the Respondent—a *de jure* organ of the Respondent. … There is no doubt that the FRY was

providing substantial support, *inter alia*, financial support, to the Republika Srpska (cf. paragraph 241 above), and that one of the forms that support took was payment of salaries and other benefits to some officers of the VRS, but this did not automatically make them organs of the FRY. Those officers were appointed to their commands by the President of the Republika Srpska, and were subordinated to the political leadership of the Republika Srpska. In the absence of evidence to the contrary, those officers must be taken to have received their orders from the Republika Srpska or the VRS, not from the FRY. The expression "State organ," as used in customary international law and in Article 4 of the ILC Articles, applies to one or other of the individual or collective entities which make up the organization of the State and act on its behalf. The functions of the VRS officers, including General Mladić, were however to act on behalf of the Bosnian Serb authorities, in particular the Republika Srpska, not on behalf of the FRY; they exercised elements of the public authority of the Republika Srpska. …

389. The issue also arises as to whether the Respondent might bear responsibility for the acts of the "Scorpions" in the Srebrenica area. In this connection, the Court will consider whether it has been proved that the Scorpions were a *de jure* organ of the Respondent. It is in dispute between the Parties as to when the "Scorpions" became incorporated into the forces of the Respondent. The Applicant has claimed that incorporation occurred by a decree of 1991 (which has not been produced as an Annex). The Respondent states that "these regulations [were] relevant exclusively for the war in Croatia in 1991" and that there is no evidence that they remained in force in 1992 in Bosnia and Herzegovina. The Court observes that, while the single State of Yugoslavia was disintegrating at that time, it is the status of the "Scorpions" in mid-1995 that is of relevance to the present case. In two of the intercepted documents presented by the Applicant (the authenticity of which was queried—see paragraph 289 above), there is reference to the "Scorpions" as "MUP of Serbia" and "a unit of Ministry of Interiors of Serbia." The Respondent identified the senders of these communications … as being "officials of the police forces of Republika Srpska." The Court observes that *neither* of these communications was *addressed to Belgrade* [italics added]. Judging on the basis of these materials, the Court is unable to find that the "Scorpions" were, in mid-1995, *de jure* organs of the Respondent. Furthermore, the Court notes that in any event the act of an organ placed by a State at the disposal of another public authority shall not be considered an act of that State if the organ was acting on behalf of the public authority at whose disposal it had been placed.

390. The argument of the Applicant however goes beyond mere contemplation of the status, under the Respondent's internal law, of the persons who committed the acts of genocide; it argues that Republika Srpska and the VRS, as well as the paramilitary militias known as the "Scorpions," the "Red Berets," the "Tigers" and the "White Eagles" must be deemed, notwithstanding their apparent status, to have been "*de facto* organs" of the FRY, in particular at the time in question, so that all of their acts, and specifically the massacres at Srebrenica, must be considered attributable to the FRY, just as if they had been organs of that State under its internal law; reality must prevail over appearances. The Respondent rejects this contention, and maintains that these were not *de facto* organs of the FRY.

391. The first issue raised by this argument … has in fact already [been] addressed … in its Judgment of 27 June 1986 in the case concerning *Military and*

Paramilitary Activities in and against Nicaragua (Nicaragua v. *United States of America)* [principal case in textbook §9.2.C]. In paragraph 109 of that Judgment the Court stated that it had to

> determine ... whether or not the relationship of the *contras* to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the *contras*, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government.

Then, examining the facts in the light of the information in its possession, the Court observed that "there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the *contras* as acting on its behalf," and went on to conclude that "the evidence available to the Court . . . is insufficient to demonstrate [the *contras*'] complete dependence on United States aid," so that the Court was "unable to determine that the *contra* force may be equated for legal purposes with the forces of the United States."

392. The passages quoted show that, according to the Court's jurisprudence, persons, groups of persons or entities may, for purposes of international responsibility, be *equated with State organs* even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in "*complete dependence*" on the State, of which they are ultimately merely the instrument [italics added]. In such a case, it is appropriate to look beyond legal status alone, in order to grasp the reality of the relationship between the person taking action, and the State to which he is so closely attached as to appear to be nothing more than its agent: any other solution would allow States to escape their international responsibility by choosing to act through persons or entities whose supposed independence would be purely fictitious.

393. However, so to equate persons or entities with State organs when they do not have that status under internal law must be exceptional, for it requires proof of a particularly great degree of State control over them, a relationship which the Court's Judgment quoted above expressly described as "complete dependence." It remains to be determined in the present case whether, at the time in question, the persons or entities that committed the acts of genocide at Srebrenica had such ties with the FRY that they can be deemed to have been completely dependent on it; it is only if this condition is met that they can be equated with organs of the Respondent for the purposes of its international responsibility.

394. The Court can only answer this question in the negative. At the relevant time, July 1995, neither the Republika Srpska nor the VRS [Republika Srpska army] could be regarded as mere instruments through which the FRY was acting, and as lacking any real autonomy. While the political, military and logistical relations between the federal authorities in Belgrade and the authorities in Pale, between the Yugoslav army and the VRS, had been strong and close in previous years (see paragraph 238 above), and these ties undoubtedly remained powerful, they were, at least at the relevant time, not such that the Bosnian Serbs' political and military organizations should be equated with organs of the FRY. It is even true that differences over strategic options emerged at the time between Yugoslav authorities and Bosnian Serb leaders; at the very least, these are

evidence that the latter had some qualified, but real, margin of independence. Nor, notwithstanding the very important support given by the Respondent to the Republika Srpska, without which it could not have "conduct[ed] its crucial or most significant military and paramilitary activities" ([Nicaragua] *I.C.J. Reports 1986*, p. 63, para. 111), did this signify a total dependence of the Republika Srpska upon the Respondent.

395. The Court now turns to the question whether the "Scorpions" were in fact acting in complete dependence on the Respondent. The Court has not been presented with materials to indicate this. The Court also notes that, in giving his [I.C.T.Y.] evidence, General Dannatt, when asked under whose control or whose authority the paramilitary groups coming from Serbia were operating, replied, "they would have been under the command of [Bosnian Serb] Mladić and part of the chain of the command of the VRS." … However, the Court cannot draw further conclusions as this case remains at the indictment stage. …

(4) The question of attribution of the Srebrenica genocide to the Respondent on the basis of direction or control

396. As noted above (paragraph 384), the Court must now determine whether the massacres at Srebrenica were committed by persons who, though not having the status of organs of the Respondent, nevertheless acted on its instructions or under its direction or control, as the Applicant argues in the alternative; the Respondent denies that such was the case.

397. … The answer to the latter question depends, as previously explained, on whether those persons were in a relationship of such complete dependence on the [Serbian] State that they cannot be considered otherwise than as organs of the State, so that all their actions performed in such capacity would be attributable to the State for purposes of international responsibility. … What must be determined is whether FRY organs … originated the genocide by issuing instructions to the perpetrators or exercising direction or control, and whether, as a result, the conduct of organs of the Respondent, having been the cause of the commission of acts in breach of its international obligations, constituted a violation of those obligations.

. . .

399. … In that [Nicaragua] Judgment the Court, as noted above, after having rejected the argument that the *contras* were … equated with organs of the United States because they were "completely dependent" on it, added that the responsibility of the Respondent could still arise if it were proved that it had itself "directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State;" this led to the following significant conclusion:

> For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.

400. The test thus formulated differs in two respects from the test—described above—to determine whether a person or entity may be equated with a State organ even

if not having that status under internal law. First, in this context it is not necessary to show that the persons who performed the acts alleged to have violated international law were in general in a relationship of "complete dependence" on the respondent State; it has to be proved that they acted in accordance with that State's instructions or under its "effective control." It must however be shown that this "effective control" was exercised, or that the State's instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.

401. … The rules for attributing alleged internationally wrongful conduct to a State do not vary with the nature of the wrongful act in question in the absence of a clearly expressed *lex specialis*. Genocide will be considered asattributable to a State if and to the extent that the physical acts constitutive of genocide that have been committed by organs or persons other than the State's own agents were carried out, wholly or in part, on the instructions or directions of the State, or under its effective control. This is the state of customary international law.

. . .

408. … The Court notes the fact that the report of the United Nations Secretary-General does not establish any direct involvement by President Milošević with the massacre.

. . .

412. The … report is *Balkan Battlegrounds*, prepared by the United States Central Intelligence Agency … in 2002. The first volume under the heading "The Possibility of Yugoslav involvement" arrives at the following conclusion:

> No basis has been established to implicate Belgrade's military or security forces in the post-Srebrenica atrocities. While there are indications that the VJ or RDB [the Serbian State Security Department] may have contributed elements to the Srebrenica battle, there is no similar evidence that Belgrade-directed forces were involved in any of the subsequent massacres. Eyewitness accounts by survivors may be imperfect recollections of events, and details may have been overlooked. Narrations and other available evidence suggest that only Bosnian Serb troops were employed in the atrocities and executions that followed the military conquest of Srebrenica.

… Counsel for the Respondent also quoted from the evidence of the Deputy Commander of Dutchbat, given in the *Milošević* trial, in which the accused put to the officer the point quoted earlier from the Epilogue to the Netherlands report. The officer responded:

> At least for me, I did not have any evidence that it was launched in co-operation with Belgrade. And again, I read all kinds of reports and opinions and papers where all kinds of scenarios were analysed, and so forth. Again, I do not have any proof that the action, being the attack on the enclave, was launched in co-operation with Belgrade.

The other evidence on which the Applicant relied relates to the influence, rather than the control, that President Milošević had or did not have over the authorities in Pale. It mainly consists of the evidence given at the *Milošević* trial by Lord Owen and General Wesley Clark and also Lord Owen's publications. It does not establish a factual basis for finding the Respondent responsible on a basis of direction or control.

(5) Conclusion as to responsibility for events at Srebrenica under Article III, paragraph *(a)*, of the Genocide Convention

413. In the light of the information available to it, the Court finds, as indicated above, that it has not been established that the massacres at Srebrenica were committed by persons or entities ranking as organs of the Respondent (see paragraph 395 above). It finds also that it has not been established that those massacres were committed on the instructions, or under the direction of organs of the Respondent State, nor that the Respondent exercised effective control over the operations in the course of which those massacres, which, as indicated in paragraph 297 above, constituted the crime of genocide, were perpetrated.

The Applicant has not proved that instructions were issued by the federal authorities in Belgrade, or by any other organ of the FRY, to commit the massacres, still less that any such instructions were given with the specific intent *(dolus specialis)* characterizing the crime of genocide, which would have had to be present in order for the Respondent to be held responsible on this basis. All indications are to the contrary: that the decision to kill the adult male population of the Muslim community in Srebrenica was taken by some members of the VRS Main Staff, but without instructions from or effective control by the FRY.

As for the killings committed by the "Scorpions" [Republika Srpska] paramilitary militias, notably at Trnovo (paragraph 289 above), even if it were accepted that they were an element of the genocide committed in the Srebrenica area, which is not clearly established by the decisions thus far rendered by the ICTY…, it has not been proved that they took place either on the instructions or under the control of organs of the FRY.

414. Finally, the … acts constituting genocide were not committed by persons or entities which, while not being organs of the FRY, were empowered by it to exercise elements of the governmental authority, nor by organs placed at the Respondent's disposal by another State, nor by persons in fact exercising elements of the governmental authority in the absence or default of the official authorities of the Respondent; finally, the Respondent has not acknowledged and adopted the conduct of the perpetrators of the acts of genocide as its own.

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

[The Court's analysis of related acts, addressed by the Genocide Convention Article II on the crime of "genocide," is omitted.]

VIII. The Question of Responsibility, in Respect of Srebrenica, for Acts Enumerated in Article III, Paragraphs *(b)* to *(e)*, of the Genocide Convention

416. The Court now comes to the second of the questions set out in paragraph 379 above, namely, that relating to the Respondent's possible responsibility on the ground of one of the acts related to genocide enumerated in Article III of the Convention. These are: conspiracy to commit genocide (Art. III, para. *(b)*), direct and public incitement to commit genocide (Art. III, para. *(c)*), attempt to commit genocide (Art. III, para. *(d)*)—though no claim is made under this head in the Applicant's final submissions in the present case—and complicity in genocide (Art. III, para. *(e)*). …

417. It is clear from an examination of the facts of the case that subparagraphs *(b)* and *(c)* of Article III are irrelevant in the present case. It has not been proved that organs of the FRY, or persons acting on the instructions or under the effective control of that State, committed acts that could be characterized as "[c]onspiracy to commit genocide" (Art. III, para. *(b)*), or as "[d]irect and public incitement to commit genocide" (Art. III, para. *(c)*), if one considers, as is appropriate, only the events in Srebrenica. As regards paragraph *(b)*, what was said above regarding the attribution to the Respondent of acts of genocide, namely that the massacres were perpetrated by persons and groups of persons (the VRS in particular) who did not have the character of organs of the Respondent, and did not act on the instructions or under the effective control of the Respondent, is sufficient to exclude the latter's responsibility in this regard. As regards subparagraph *(c)*, none of the information brought to the attention of the Court is sufficient to establish that organs of the Respondent, or persons acting on its instructions or under its effective control, directly and publicly incited the commission of the genocide in Srebrenica; nor is it proven, for that matter, that such organs or persons incited the commission of acts of genocide anywhere else on the territory of Bosnia and Herzegovina. In this respect, the Court must only accept precise and incontrovertible evidence, of which there is clearly none.

[The remainder of this section is omitted, as Serbia was likewise found to have no State responsibility.]

IX. The Question Of Responsibility For Breach Of The Obligations To Prevent And Punish Genocide

425. The Court now turns to the third and last of the questions set out in paragraph 379 above: has the respondent State complied with its obligations to prevent and punish genocide under Article I of the Convention?

. . .

(1) The obligation to prevent genocide

. . .

434. The Court would first note that, during the period under consideration, the FRY was in a position of influence, over the Bosnian Serbs who devised and implemented the genocide in Srebrenica, unlike that of any of the other States parties to the Genocide Convention owing to the strength of the political, military and financial links between the FRY on the one hand and the Republika Srpska and the VRS on the

other, which, though somewhat weaker than in the preceding period, nonetheless remained very close.

. . .

437. The Applicant has drawn attention to certain evidence given by General Wesley Clark before the ICTY in the *Milošević* case. General Clark referred to a conversation that he had had with Milošević during the negotiation of the Dayton Agreement. He stated that

> I went to Milošević and I asked him. I said, 'If you have so much influence over these [Bosnian] Serbs, how could you have allowed General Mladić to have killed all those people at Srebrenica?' And he looked to me—at me. His expression was very grave. He paused before he answered, and he said, 'Well, General Clark, *I warned him not to do this, but he didn't listen to me*.' And it was in the context of all the publicity at the time about the Srebrenica massacre" [italics added].

General Clark gave it as his opinion, in his evidence before the ICTY, that the circumstances indicated that Milošević had foreknowledge of what was to be "a military operation combined with a massacre." The ICTY record shows that Milošević denied ever making the statement to which General Clark referred, but the Trial Chamber nevertheless relied on General Clark's testimony in its Decision of 16 June 2004 when rejecting the Motion for Judgment of Acquittal.

438. In view of their undeniable influence and of the information, voicing serious concern, in their possession, the Yugoslav federal authorities should, in the view of the Court, have made the best efforts within their power to try and prevent the tragic events then taking shape, whose scale, though it could not have been foreseen with certainty, might at least have been surmised. The FRY leadership, and President Milošević above all, were fully aware of the climate of deep-seated hatred which reigned between the Bosnian Serbs and the Muslims in the Srebrenica region. As the Court has noted …, it has not been shown that the decision to eliminate physically the whole of the adult male population of the Muslim community of Srebrenica was brought to the attention of the Belgrade authorities. Nevertheless, given all the international concern about what looked likely to happen at Srebrenica, given Milošević's own observations to Mladić, which made it clear that the dangers were known and that these dangers seemed to be of an order that could suggest intent to commit genocide, unless brought under control, it must have been clear that there was a serious risk of genocide in Srebrenica. Yet the Respondent has not shown that it took any initiative to prevent what happened, or any action on its part to avert the atrocities which were committed. It must therefore be concluded that the organs of the Respondent did nothing to prevent the Srebrenica massacres, claiming that they were powerless to do so, which hardly tallies with their known influence over the VRS. As indicated above, for a State to be held responsible for breaching its obligation of prevention, it does not need to be proven that the State concerned definitely had the power to prevent the genocide; it is sufficient that it had the means to do so and that it manifestly refrained from using them. Such is the case here. In view of the foregoing, the Court concludes that the Respondent violated its obligation to

prevent the Srebrenica genocide in such a manner as to engage its international responsibility.

(2) The obligation to punish genocide

439. The Court now turns to the question of the Respondent's compliance with its obligation to punish the crime of genocide stemming from Article I and the other relevant provisions of the Convention.

440. In its fifth final submission, Bosnia and Herzegovina requests the Court to adjudge and declare:

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

441. This submission implicitly refers to Article VI of the Convention, according to which:

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

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

443. It is thus to the obligation for States parties to co-operate with the "international penal tribunal" mentioned in the above provision that the Court must now turn its attention. For it is certain that once such a court has been established, Article VI obliges the Contracting Parties "which shall have accepted its jurisdiction" to co-operate with it, which implies that they will arrest persons accused of genocide who are in their territory—even if the crime of which they are accused was committed outside it—and, failing prosecution of them in the parties' own courts, that they will hand them over for trial by the competent international tribunal.

. . .

447. For the purposes of the present case, the Court only has to determine whether the FRY was under an obligation to co-operate with the ICTY, and if so, on what basis, from when the Srebrenica genocide was committed in July 1995. To that end, suffice it to note that the FRY was under an obligation to co-operate with the ICTY from 14 December 1995 at the latest, the date of the signing and entry into force of the Dayton Agreement between Bosnia and Herzegovina, Croatia and the FRY. Annex 1A of that treaty, made binding on the parties by virtue of its Article II, provides that they must fully co-operate, notably with the ICTY. …

448. Turning now to the facts of the case, the question the Court must answer is whether the Respondent has fully co-operated with the ICTY, in particular by arresting and handing over to the Tribunal any persons accused of genocide as a result of the Srebrenica genocide and finding themselves on its territory. In this connection, the Court would first observe that, during the oral proceedings, the Respondent asserted that the duty to co-operate had been complied with following the régime change in Belgrade in the year 2000, thus implicitly admitting that such had not been the case during the preceding period. The conduct of the organs of the FRY before the régime change however engages the Respondent's international responsibility just as much as it does that of its State authorities from that date. Further, the Court cannot but attach a certain weight to the plentiful, and mutually corroborative, information suggesting that General Mladić, indicted by the ICTY for genocide, as one of those principally responsible for the Srebrenica massacres, was on the territory of the Respondent at least on several occasions and for substantial periods during the last few years and is still there now, without the Serb authorities doing what they could and can reasonably do to ascertain exactly where he is living and arrest him. In particular, counsel for the Applicant referred during the hearings to recent statements made by the Respondent's Minister for Foreign Affairs, reproduced in the national press in April 2006, and according to which the intelligence services of that State knew where Mladić was living in Serbia, but refrained from informing the authorities competent to order his arrest because certain members of those services had allegedly remained loyal to the fugitive. The authenticity and accuracy of those statements has not been disputed by the Respondent at any time.

449. It therefore appears to the Court sufficiently established that the Respondent failed in its duty to co-operate fully with the ICTY. This failure constitutes a violation by the Respondent of its duties as a party to the Dayton Agreement, and as a Member of the United Nations, and accordingly a violation of its obligations under Article VI of the Genocide Convention. …

450. It follows from the foregoing considerations that the Respondent failed to comply both with its obligation to prevent and its obligation to punish genocide deriving from the Convention, and that its international responsibility is thereby engaged.

. . .

XI. THE QUESTION OF REPARATION

459. Having thus found that the Respondent has failed to comply with its obligations under the Genocide Convention in respect of the prevention and punishment of genocide, the Court turns to the question of reparation. The Applicant, in its final submissions, has asked the Court to decide that the Respondent "must redress the

consequences of its international wrongful acts and, as a result of the international responsibility incurred for ... violations of the Convention on the Prevention and Punishment of the Crime of Genocide, must pay, and Bosnia and Herzegovina is entitled to receive, in its own right and as *parens patriae* for its citizens, full compensation for the damages and losses caused" (submission 6 *(b)*).

. . .

464. The Court now turns to the question of the appropriate reparation for the breach by the Respondent of its obligation under the Convention to punish acts of genocide….

465. It will be clear from the Court's findings above on the question of the obligation to punish under the Convention that it is satisfied that the Respondent has outstanding obligations as regards the transfer to the ICTY of persons accused of genocide, in order to comply with its obligations under Articles I and VI of the Genocide Convention, in particular in respect of General Ratko Mladić (paragraph 448). The Court will therefore make a declaration in these terms in the operative clause of the present Judgment, which will in its view constitute appropriate satisfaction.

XII. OPERATIVE CLAUSE

471. For these reasons, THE COURT

. . .

by thirteen votes to two,

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

. . .

by thirteen votes to two,

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

. . .

by eleven votes to four,

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

. . .

by twelve votes to three,

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

by fourteen votes to one,

Finds that Serbia has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by having failed to transfer Ratko Mladić, indicted for genocide and complicity in genocide, for trial by the International

Criminal Tribunal for the former Yugoslavia, and thus having failed fully to co-operate with that Tribunal;

. . .

by fourteen votes to one,

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

. . .

(Signed) Rosalyn HIGGINS,
President.