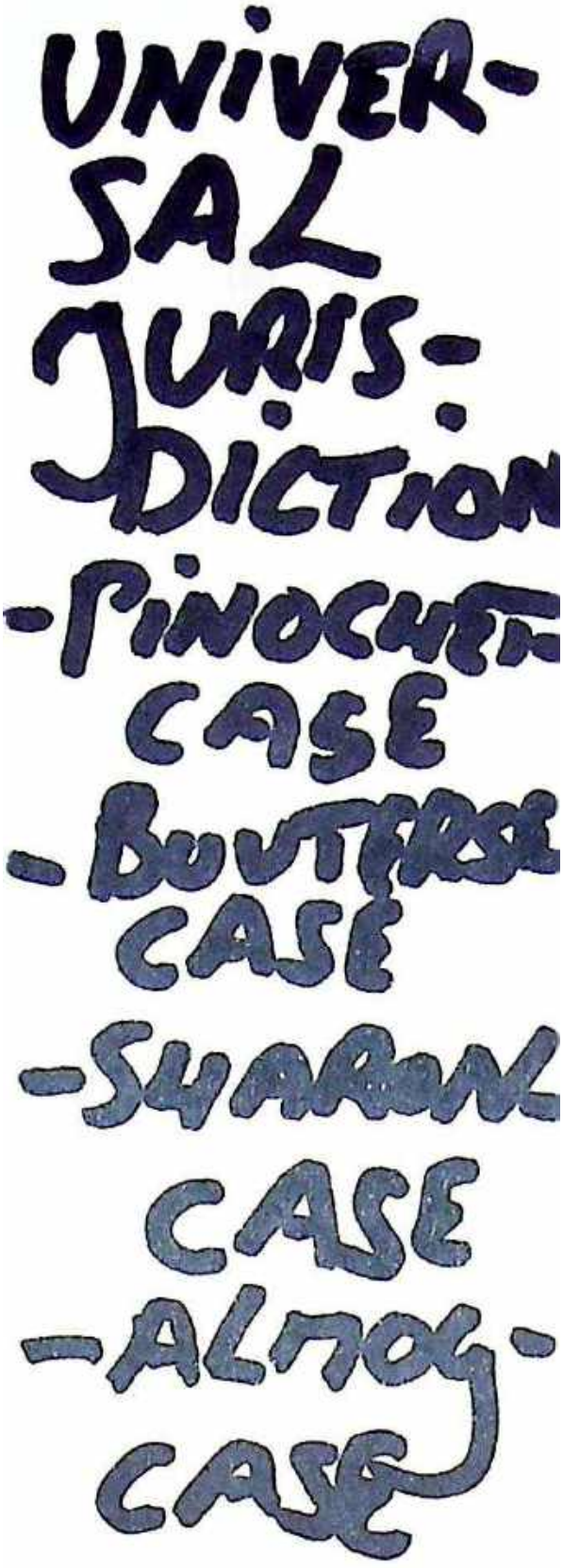
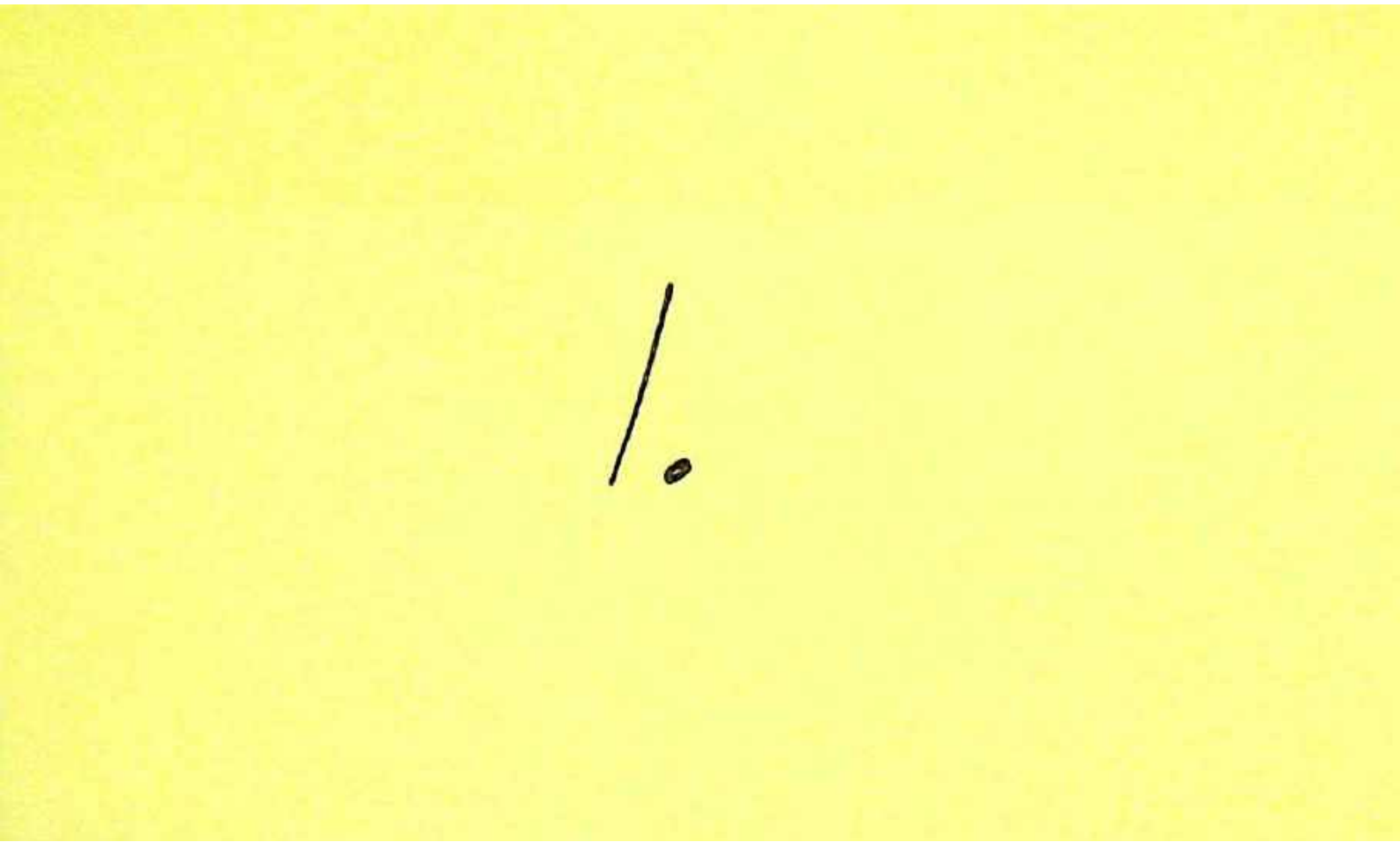

UNIVER-
SAL
JURIS-
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-PINOCHET-
CASE
-BOUTTIRSE
CASE
-SHARON
CASE
-ALTOG-
CASE





Amsterdam Center for International Law

SEMINAR

The application of customary international law by national courts

Seminar at the Amsterdam Center for International Law
Friday 8 June 2001, 11.00 h. – 17.00 h.

COLLECTION OF DOCUMENTS

UNIVERSITEIT VAN AMSTERDAM

Research project The Symbiosis between Public International Law and National Law

The seminar is organized as a part of the research project *The Symbiosis between Public International Law and National Law – Studies in the Enforcement of public international law in the national legal order*, funded as a Pionier project by the the Netherlands Organisation for Scientific Research.

The 5-year project will explore various dimensions of the evolving entanglement between public international law and national law.

For more information on the project, contact prof. André Nollkaemper, tel.: (0)20 – 525 2632, fax: (0)20 – 525 2684, e-mail: nollkaemperl@jur.uva.nl or visit our web-site at http://www.jur.uva.nl/acil/pionier/index.htm

The Pionier project is carried out at the Amsterdam Center for International Law, the research institute for international law of the Faculty of Law of the University of Amsterdam.

For more information contact Mary Footer, deputy director of ACIL, tel.: (0)20 – 525 4943, fax: (0)20 – 525 2684, e-mail: acil@jur.uva.nl

Visiting Address: Turfdraagsterpad 9, 1012 XT Amsterdam

Mailing Address: P.O. Box 19120, 1000 GC Amsterdam

Website: http//www.jur.uva.nl/acil

Introduction

In a number of recent cases, national courts have been asked to address complex and controversial questions of customary international law. In the United Kingdom, the House of Lords, in the *Pinochet Case*, had to consider the existence and content of customary international law in relation to the crime of torture. In March 2001, the Scottish High Court of Justiciary was asked to consider the rules of customary international law pertaining to the possession of trident missiles (*Lord Advocate's Reference No. 1 of 2000*). In the Netherlands last year the Appeals Court of Amsterdam considered the customary international law on crimes against humanity and torture in the *Boutserse* case and the customary law pertaining to humanitarian intervention in the *Dedovic* case.

The application of customary international law by national courts is not a new phenomenon. National courts are regularly confronted with arguments based on customary international law and apply customary international law rules routinely in such matters as jurisdiction and immunities. However, the aforementioned cases are distinguishable because of the controversial substance of the claims in relation to the invocation of customary international norms.

These national court decisions are reason enough to revisit the question of how national courts apply customary international law. The questions the cases raise are in part of a technical nature. How do courts 'find' custom? What is the role of attorneys in 'proving' the existence of customary law? Do 'experts' have a role to play in assisting national courts with determining the content of customary international law?

However, the cases also raise also more conceptual and fundamental questions. What is the proper role of national courts in the application of customary international law. How assertive should national courts be in defining customary international law, particularly given a potential lack of expertise in public international law and the substantial work involved in determining relevant state practice and *opinio iuris*? Are these matters not better handled by international courts? And how is the approach of courts to the identification of customary international law related to the hierarchical position of customary law in the national legal order?

The seminar seeks to bring together attorneys, judges and academics from different countries to discuss how customary international law is applied by national courts and what the proper role of national courts is in the application of customary international law.

This Collection of documents contains materials that are relevant to the questions dicussion at the seminar. It includes materials from the International Law Association on the role of customary law in national courts, a background article by David P. Fidler and the cases that will be discussed: the *Pinochet I and III cases*, the *Boutserse case* and the *Trident Missile case.*

INTERNATIONAL LAW ASSOCIATION

HELSINKI CONFERENCE (1996)

COMMITTEE ON INTERNATIONAL LAW IN NATIONAL COURTS

Members of the Committee:

Judge Gilbert Guillaume (France) *Chairman*
Professor Ivan Shearer (Australia) *Co-Rapporteur*
Professor Torsten Stein (Germany) *Co-Rapporteur*

Mr. Aziz Amunshi (Pakistan)
Dr. Ranhilio C. Aquino (Philippines)
Prof. George N. Barrie (South Africa)
Prof. Anne Bayefsky (Canada)
Dr. Eyal Benvenisti (Israel)
Mr. Jan Heftye Blehr (Norway)
Prof. Hyo-Sang Chang (Korea)
Mr. John G. Collier (UK)
Mr. John Cooke (Ireland)
Prof. Vladimir Djuro Degan (Croatia)
Maître Omar El-Hadidi (Egypt)
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Dr. Gavan Griffith QC (Australia)
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Prof. G. van Hecke (Belgium)
Prof. Eckart Klein (Germany)
Alternate: Prof. Georg Ress
Dr. Gerhard Loibl (Austria)
Prof. I. I. Lukashuk (Russia)
Prof. José C. Magalhães (Brazil)
Prof. Nicolas Michel (Switzerland)
Prof. David Ruzié (France)
Judge Stephen Schwebel (USA)
Alternate: Prof. Edward Gordon
Prof. Helmuth Steinberger (Germany)
Prof. Soji Yamamoto (Japan)
Alternate: Prof. Shinya Murase

SECOND REPORT OF THE COMMITTEE

INTRODUCTION

The Committee on International Law in Municipal Courts presented its first report to the 66th Conference of the International Law Association, held at Buenos Aires, 14-20 August 1994. At that Conference it was decided to substitute the reference in the title of the Committee to "municipal" with "national", since in some languages the former designation refers to the laws relating to local authorities subordinate to national authorities.

The broad aim of the Committee's study is to ascertain the methods by which courts in different states find and apply principles and rules of international law that call for application as part of national law in proceedings brought under national law. The motivation of the study was twofold:

* There has been very little attention given in the literature of international law to actual difficulties encountered by national courts, at various levels, in perceiving the occasions on which international law becomes relevant as the rule, or one of the rules, applicable to the case before them, and then in endeavouring to inform themselves of the content of a relevant principle or rule of international law. An empirical study was thought to be timely and useful.

* Because particular rules of international law may be disputed or uncertain, or may be evolving, there might be merit in proposing the possibility of reference by a national court of such questions to the International Court of Justice for an advisory opinion.

In pursuance of the study's aim, a number of specific questions were addressed to National Branches of the ILA for the purpose of gathering information on the actual practice of courts within their jurisdictions. Replies to the questionnaire have so far been received from the following branches:

Australia, Austria, Belgium, Brazil, Canada, Chile, China (Taiwan), Croatia, France, Germany, Ireland, Israel, Japan, the Philippines, Poland, Russia, Switzerland, the United Kingdom of Great Britain and Northern Ireland, and the United States of America.

It is thought that the texts of these national responses to the questionnaire will constitute in themselves a valuable collection of information on the topics of the Committee's study, in whatever form they may be disseminated. In fact, some national studies have already been published by their authors in other media, with the Committee's encouragement and approval. In the meantime, during 1995 and 1996 further work has been done by members of the Committee representing branches that have submitted reports, and other branches, in identifying patterns of national approaches towards the ascertainment of international law, pointing out (in general terms only) differences of methodology, strengths, and weaknesses evident in the practice of national courts, and making practical suggestions for improving access to the sources of international law by national courts at all levels.

The more general background to the Committee's study, and the factor that most justifies its importance - indeed urgency - is the greatly increased extent to which national legal systems are confronted by issues of international law. The subjects of international cooperation, especially through the means of multilateral law-making conventions, now reach into nearly every aspect of national life. To an extent that could hardly have been imagined even 25 years ago, national courts are finding that some aspect of the law to be applied to a case before them is international law or has a source or point of relevance based on international law. The fields of human rights, protection and preservation of the natural environment, criminal law and jurisdiction over crime, commercial transactions, maritime law, and transport are just some of the important areas of national law that have increasingly come in recent years to be greatly influenced - in some cases dominated - by principles and rules of international law.

In this Second Report of the Committee's work attention will not be focused

on particular national responses to the questionnaire distributed by the Committee. It is not possible, in any event, to do justice to these reports, many of which constitute major studies in their own right.

A preliminary version of the present report was presented as "work in progress" to the First Asian-Pacific Regional Conference of the ILA, held in Tapei, 27-30 May 1995. The report benefited from discussion there, as well as from the meeting of the Committee, hosted by the French Branch of the Association, held in Paris 26-27 February 1996.

PART A. OF THE COMMITTEE'S STUDY: THE NATIONAL CONSTITUTIONAL FRAMEWORK

The Committee's questionnaire invited answers, first of all, to the role and rank of international law in the national legal order. This is a familiar question to all constitutional and international lawyers, and a number of comparative studies have been published in the past. However, this essentially constitutional question is not the focus of the Committee's study. It was included only in order that the responses to the later questions, which were directed to the actual methods used by the courts in ascertaining the content of international law, properly arising for application in the case before them, could be understood in the context of any constitutional considerations that might be particular to that country.

No national response reported that international law was, in general, prevented from being applied within the national legal order, or that international law could be applied only by way of specific direction in national statute law. However, in the case of certain sources of international law it is evident that a degree of incorporation into national law must first have taken place.

Distinctions arise between customary international law and conventional international law in regard to their role and rank in national legal orders. This is natural, because customary international law is formed through the consensus and consistent practice of states and is regarded as binding on that basis alone. The conclusion of treaties and adherence to conventions, by contrast, is a matter of choice of the particular government of the day (with or without legislative approval) and may not always automatically form part of the national legal order. It should be noted, however, that some treaties, or parts of treaties, especially multilateral law-making conventions, may reflect or codify customary international law, which may then call for application as such, and not as conventional international law.

Customary international law becomes automatically part of national law by reason of the provisions of some constitutions. For example, the Constitution of Austria (1920) provides that "the generally recognized rules of international law are regarded as integral parts of federal law." The preamble to the French Constitution provides that "la république française se conforme aux règles du droit public international", and courts have consequently applied customary international law in a number of cases. The Constitution of the Philippines (1946) contains a similar provision. What happens in the case of a conflict between customary international law and national law is not always stated in constitutions. The South African Constitution of 1993 gives in that event priority to national law: "The rules of customary international law binding on the Republic shall, unless inconsistent with this Constitution or an Act of Parliament, form part of the law of the Republic. By contrast, the Constitution of the Federal Republic of Germany (1949) provides in art.25 that "the general rules of international law are an integral part of federal law. They have priority over statutes and give rise directly to rights and obligations for inhabitants of the federal territory." This provision thus renders a statute inoperative to the extent that it conflicts with a general rule of international law.

Most states do not have a provision in their constitutions or laws relating to the application of customary international law. Such application takes place by way of judicial recognition and enforcement, which, as for example in the case of China (Taiwan), "is taken for granted". Specific judicial statements of high authority may also confirm automatic incorporation of a relevant rule of customary international, as for example in the practice of the High Court and Supreme Court of Ireland, which have affirmed on several occasions that principles of international law are part of the law of Ireland and are to be applied as they change and develop from time to time in accordance with modifications in the practice of states.

Where there arises a clear conflict between a prescription of national law and a relevant rule of international law, some national courts are obliged to follow national law. This is so in those countries for general constitutional reasons: the courts are obliged to give effect to the will of the national legislative authority, whether it accords with international law or not. By contrast, the newly accepted doctrine in Swiss law is that the peremptory norms of customary international law (*jus cogens*) prevail over the Constitution and all other laws; constitutional initiatives approved by a vote of the people and of the Cantons resulting in a violation of *jus cogens* will be declared void by the National Assembly, and other such laws will set aside by the Tribunal fédéral.

In courts of the Common Law tradition (except the United States) there is a continuing debate as to whether customary international law is automatically incorporated into national law, or whether that law requires some positive act of incorporation by way of "adoption" or "transformation", either by the legislature or by the judiciary. The former view has been taken in the United Kingdom, but clearly stated only in the Court of Appeal (by Lord Denning in the *Trendtex* case, 1977), not by the House of Lords, the supreme appellate body. The High Court of Australia leans to the view that customary international law is a source, but not automatically part, of Australian law; however, it has stated that clearly established rules of international law would always be accepted by the courts, subject to the superior force of statute law.

A common problem for courts of all legal traditions is: when, or how, is a

principle or rule of customary international law clearly established? Their methodology is examined in the second - and principal - part of the Committee's study. In constitutional terms, it is a vital question, because most courts prefer to decide cases without entering upon doubtful or disputed questions of international law. An example of this reluctance is the unwillingness of the House of Lords in the United Kingdom to determine the international law applicable to the case of the collapse of the International Tin Council; international law in relation to the effects of the inability of an international organisation to meet its financial obligations, in the view of Lord Oliver, was unclear and would require development by the International Court of Justice.

Another common problem is where a doubt arises as to whether a conflict exists between the prescriptions of international law and national law. There is a tendency of courts, where national law is capable of more than one interpretation, to resolve such questions in favour of an interpretation of national law so as to be consistent with international law. Another consideration may be said to underlie this "harmonisation" approach: that the judicial arm of government should endeavour not to embarrass the executive arm in its conduct of international relations, especially those aspects of international relations involving rights and duties under international law. A striking example of this approach, taken in a case of apparent conflict between a treaty and a statute, was the decision of a federal court in the United States holding that the Terrorism Act, forbidding the establishment or maintenance of offices of the Palestine Liberation Organization in the territory of the United States, did not apply to those offices established as an Observer Mission to the United Nations which were governed by the Headquarters Agreement between the United Nations and the United States.

International conventions as a source of international law applicable in national proceedings raise two kinds of question. The first is whether the executive government is free to conclude any international agreements it wishes, or whether constitutional or other limitations are imposed on this power. The second is whether validly concluded international agreements operate automatically as part of national law, or do so only after legislative approval.

For states of the Common Law tradition there is in principle no limitation of general application on the power of the executive to conclude international agreements. The power of making treaties is seen as an aspect of executive power, and legislative involvement in the process is only by way of tabling such instruments in Parliament for information. Where, however, the treaty requires something to be done by or in relation to individuals, or to be prohibited, not warranted by existing law, or the expenditure of funds not already appropriated under existing law, legislative action is required to give effect to the treaty as part of national law. If the executive government does not have a sufficient number of supporters in the legislature it could, unless it had taken the precaution of delaying ratification of the treaty, find itself in the position of being bound by the treaty but lacking the means to give effect to it. An exception to the Common

Law position is the United States where, in accordance with the Constitution, treaties require the advice and consent of the United States Senate before definitive signature or ratification. The designation "treaty", however, receives a much narrower application for the purposes of this rule and does not apply to the much more numerous international agreements concluded by the United States under the President's power to conclude "executive agreements", which are nevertheless treaties by the standards of international law, and which do not require the advice and consent of the Senate. Treaties are declared by the Constitution to be, together with the Constitution and Acts of Congress, "the supreme law of the land". Treaties, provided they are self-executing, override contrary prior law. Executive agreements are said to have "a similar dignity", but it is not clear whether these would override prior federal law. In view of the enormous increase in treaty-making by the executive in recent years, especially multilateral conventions on such subjects as human rights, there are current political moves in Australia to attempt to secure greater "transparency" in the treaty-negotiation and -conclusion processes, and for greater involvement by the federal Parliament. The decision of the High Court of Australia in *Teoh v. Minister for Immigration* (1995) to the effect that a ratified but unincorporated treaty (the International Convention on the Rights of the Child), although not made part of Australian law, nonetheless raised legitimate expectations on the part of citizens and residents that it would be taken into account by decision-makers in deportation cases, has led to indications by the executive that it might seek legislation to reverse any such "legitimate expectation".

Countries of the Civil Law tradition recognise the right of the executive to conclude treaties, which enter into force after appropriate procedures. They recognise the automatic applicability of those treaties in national law on the same level as, or even at a higher level than, statute law, provided that the operative provisions of the treaty are apt for direct application. Automatic applicability of treaties, duly concluded, on the same level as statute law gives the treaty a force superior to prior conflicting law, as is made express. e.g., in Article 134 of the Constitution of Croatia. In countries where treaties have a higher rank than statute law, they take precedence also over subsequent conflicting law. Article 55 of the French Constitution, for example, stipulates that "treaties or agreements properly ratified or approved have, as from their publication (in the Journal officiel de la République française) an authority superior to that of statutes, subject to its application by the other party in the case of each agreement or treaty." It is, however, doubtful whether this "reciprocity condition" was ever imposed in practice. After considerable discussion, it is now clear in French law that, under this constitutional provision, a treaty prevails over a subsequent statute. The same is true of for the Constitution of the Netherlands, which provides in Article 93 that "Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with the provisions of treaties that are binding on all persons or of resolutions by international institutions."

A related problem is the relation between treaties and the national constitution. As a rule, treaties do not rank above the constitution, although in some cases they may have equal rank, as, for example, the European Convention on Human Rights in Austria. Advisory opinions from Supreme or Constitutional Courts, where available (see Part B, question 3), may conclude that a treaty could only be ratified or approved after an amendment of the Constitution (cf. Article 54 of the French Constitution). A unique clause, which effectively gives superiority of certain treaties (peace settlements or treaties serving the defence of the country) over the Constitution, is contained in Article 79 sect.1 of the German Constitution, which provides that "it shall be sufficient, in order to make clear that the provisions of this Constitution do not preclude the conclusion and entry into force of such treaties, to supplement the text of this Constitution and to confine the supplement to such clarification."

The are a number of other kinds of qualification to be noted. The Constitutions of Austria and Germany, for example, require the consent of the national legislature for political treaties and treaties that would have the effect of changing or extending existing statutes or relate to matters of federal legislation. In Switzerland certain treaties have to be submitted to a referendum of the people.

The practice of China (Taiwan) and of Japan should also be noted, as falling into traditions of their own, albeit influenced to an extent by the Civil Law. For China (Taiwan), although the President has power to conclude treaties the Constitution assigns to both the Executive Yüan Council and to the Legislative Yüan roles in the approval of treaties. In practice these bodies exercise those roles, and thus it can be concluded that treaties are in general not effective without the sanction of the legislature, and rank together with legislation. For Japan, not all treaties require approval by the Diet (the Parliament), but treaties containing as their substance an engagement touching upon the legislative power of the Diet, relating to budgetary matters not already sanctioned, or relating to basic relations between Japan and other States, require legislative approved before entry into force.

Against this background, the various national approaches towards the task of ascertaining and applying international law as part of national law are revealed in the answers to a number of specific questions put by the Committee.

PART B. OF THE COMMITTEE'S STUDY: THE PRACTICE OF NATIONAL COURTS IN ASCERTAINING AND APPLYING INTERNATIONAL LAW.

Question 1. Are all courts competent to decide questions of international law arising in the course of proceedings before them, or only certain courts? If the latter, which courts?

The assumption underlying this question was that, in view of the general importance of such questions, courts at the lower levels of the judicial structure might feel unqualified, or at least inhibited, in pronouncing upon such questions. This does not appear to be generally so. Such questions, however, are intrinsically more likely to arise before the higher courts. There would seem to be no case to be made for restricting the consideration of questions of international law to the superior or highest national courts. Indeed, to do so might well be thought to perpetuate the older idea that international law is in some sense alien, or esoteric, which would tend to go against the manifest increase in the impact of international law upon ever widening areas of national law and upon the day-to-day work of the ordinary courts.

Question 2. Where lower courts, being in principle competent to decide questions of international law, are in doubt about that law, may they/must they refer such questions to a higher court?

The underlying hypothesis here was similar to that motivating the first question. In all jurisdictions the normal appellate process was seen as generally effective to ensure that mistakes were not made or perpetuated. But practice divided on the obligation to refer doubtful questions to a higher court, and on the availability of a path of voluntary reference to a higher court. So far as an obligation is concerned, practice does not support a general compulsory reference. An exception is within the European Union: those courts of Member States, against whose decisions there is no appeal in national law, are obliged, by Article 177 of the EC Treaty, to request a (binding) preliminary ruling of the European Court of Justice on any doubtful question of interpretation of that Treaty or on the validity and interpretation of acts of the institutions of the Community. All other courts and tribunals of Member States may voluntarily request the European Court to give such a ruling. Additional exceptions are Germany, where courts must refer doubtful questions of international law to the Federal Constitutional Court for decision, and Austria, whose Constitutional Court must consider any special federal statute, the provisions of which appear to be in contravention of international law.

Question 3. May the courts (or a specific court) be asked to give an advisory opinion on a question of international law, not relating to an actual litigious cause? If yes, which entities or persons may request such an opinion?

Practice appears to vary considerably, but even where available the procedure is not widely used for the purpose of obtaining advice on the applicable rules of international law. In the Civil Law countries the device is not generally available, although compulsory reference to the European Court of the matters referred in 2 above should be remembered. In France, the President, the Prime Minister, the Presidents of the two Chambers of the National Parliament, or a group of 60 or more parliamentarians, may request advice on questions of

"engagements internationaux" from the *Conseil constitutionnel*. Ministers may also request such an advice from the *Conseil d'Etat*. In the Common Law countries also the device is not generally available. An exception is Canada, where the Cabinets of the Federal and Provincial governments may seek advisory opinions on legal questions, including questions of international law, from the Supreme Court of Canada and the Provincial Courts of Appeal, respectively. Well-known examples are the references *Re Offshore Mineral Rights of British Columbia* (1968) and *Re Newfoundland Continental Shelf* (1984). In Ireland, the President may refer, before signing any legislative Bill into law, any question of its constitutionality to the Supreme Court; since Article 29(3) of the Irish Constitution incorporates the principles of international law into Irish law, such a reference could conceivably raise a question of international law.

Question 4. Is there a mechanism whereby an otherwise final and binding court decision may be corrected or invalidated if that decision is perceived to be wrong, or if international law has changed in the meantime, in order to prevent the State from incurring international responsibility for a breach of international law?

Owing to the principle of judicial independence and to the doctrine of the separation of legislative, executive, and judicial powers, it is possible that a court might decide a case contrary to international law and thus leave the state exposed to the international consequences of a breach of international law. The question was thus posed whether any corrective mechanisms were available. In all jurisdictions surveyed, an appeal against the decision in the instant case to the highest national courts was viewed as the obvious means of seeking correction. In certain Civil Law countries, it seems, is there a specific solution available in the event that an appeal is not available: for example, in Belgium under Articles 1088 and 1089 of the Judicial Code the State Attorney at the Cour de Cassation may request that Court to annul a decision in order to prevent the State from incurring international responsibility. Such action was taken in a case concerning the incorrect application of the Hague Convention on Guardianship of 1902. In Switzerland article 139a of the loi fédérale sur l'organisation judiciaire, in force since 1992, permits review of a decision of the Federal Tribunal or of an inferior court where the European Court of Human Rights or the Committee of Ministers of the Council of Europe has found a request to be well founded. This provision has already found application.

While it would not affect the instant case, in the Common Law countries judicial overruling of the bad precedent in later cases, or even legislation, could be resorted to in order to correct any continuing posture of breach of international law. In the Civil Law countries, where individual precedents do not assume such an important place in the shaping of the law, a bad precedent would tend simply to be ignored or avoided in future cases.

Question 5. In what kinds of cases - civil, criminal, administrative, constitutional, etc. - have courts had occasion to consider issues of international law? Give examples in each category, where possible. Where especially good examples exist, kindly furnish a copy of the text of the court's judgement (unless published in internationally accessible reports).

The range of subject matter of cases in national courts involving questions of international law was revealed in the general question asked as to the kinds of cases in which national courts have had to consider issues of international law. Most frequently mentioned were extradition of fugitive criminals, human rights, refugees, state immunity, consular and diplomatic immunity, the interpretation and application of treaties, criminal procedure, maritime law, international business transactions, and compensation for state acquisition of foreign-owned property. With the subjects of international conventions ever widening, it may be expected that the range of subject matter, and the occasions for the application of international law by national courts, will increase. This may especially be so in the case of matters affecting human rights, and the natural environment.

Question 6. Do any constitutional or statutory provisions require courts to apply international law in particular cases or circumstances? Please provide corresponding texts and examples.

The occasions for the application of international law to a particular case arising before a national court may be self-evident from the nature of the case, or may be perceived in written or oral proceedings by counsel, or may be raised by the court itself. Question 6 asked whether, in the first place, any constitutional or statutory provisions pre-empted the question of applicability by requiring the courts to apply international law in particular cases or circumstances. (This issue is distinct from that of the general applicability of international law as part of national law, contained in some constitutions, as mentioned in Part A. above).

It appears that constitutional instruments do not prescribe the application of international law in these particular respects. It seems, however, that in all legal traditions one of the techniques of securing application of international law in particular circumstances is the use of statutes which incorporate international law by reference. For example, a statute relating to the status and immunities of diplomatic agents may declare that the provisions of the Vienna Convention on Diplomatic Relations, 1961, shall have the force of national law and be applied accordingly. Statutes may also purport to incorporate codified customary law (such as elements of the international law of the sea) or uncodified customary international law, such as the many national statutes governing the immunities of foreign states and foreign state entities before authorities of the national state, and concerning the crime of piracy. Some well known United States legislation incorporates international law in this way, including the Alien Tort

Statute (28 U.S.C. 1350), which provides jurisdiction over an alien's actions for torts committed in violation of the law of nations, and 22 U.S.C. 1972(1) which allows for protection of U.S.-owned vessels seized in violation of "international law as recognized by the United States". Legislation governing extradition to and from the national state may give the force of law, in addition, to bilateral or multilateral extradition treaties to which the national state is a party and which may have the effect of conditioning or qualifying the procedure of extradition in relation to individual countries.

Question 7. Do any constitutional or statutory provisions regulate the means by which courts are to ascertain and apply rules of international law relevant to cases before them? Please provide details, where applicable.

Once a rule of international law is seen by a national court to be applicable, do constitutional or statutory provisions in any state direct the manner in which that rule is to be ascertained and applied? This does not appear to be generally the case in any jurisdiction surveyed. The Civil Law countries appear to regard as applicable the maxim "jura novit curia" ("the law is known to the court"); thus national courts are not authorised to seek external help in finding it. The Common Law courts similarly regard a knowledge of international law as within their unaided grasp, unlike the law of foreign states (which may be applicable under private international law rules), which requires proof by expert evidence as though it were a fact. Of course national courts will be aided in coming to a correct identification and interpretation of international law, as in the case of any law to be applied by them, by the researches and arguments of counsel. Exceptionally, statutes may direct that a particular interpretation be placed upon international law by the courts. In the case of the United States statute mentioned in the previous paragraph relating to the protection of U.S. vessels seized in violation of international law, the rider is added "as recognized by the United States". Thus, for its application executive certification would be required by a court as to what rules of international law in that respect were recognized. The United States Congress has periodically attempted to legislate with respect to particular interpretations of specific treaties or to limit treaty-based rights, but these efforts cannot fairly be considered as promulgating neutral rules of treaty interpretation or of divining customary international law norms.

Question 8. Have the higher courts issued directions to other courts as to how international law is to be ascertained and applied by them?

This question asked whether the higher courts in any state had issued directions to other courts as to how international law is to be ascertained and applied by them. This did not appear anywhere to be the case. However, the obvious point was made that lower courts will tend to take notice of the methods applied by the higher courts in ascertaining and applying rules of international law. It was noted in some reports that the higher courts showed familiarity with such concepts as state practice and opinio juris.

Question 9. When a relevant rule of international law is contained in a treaty or other international agreement binding on the State, do the courts -

(a) apply the canons and approaches of interpretation of national law in ascertaining and applying its meaning?

(b) have regard to the rules of interpretation of treaties contained in the Vienna Convention on the Law of Treaties, 1969?

(c) have regard to the decisions of international courts and tribunals relating to the treaty?

(d) have regard to the decisions of courts of other States relating to the treaty?

(e) have regard to the published opinions of jurists, textbooks, commentaries, etc. on the meaning of the treaty?

(f) have regard to certificates, directions, or opinions of the executive branch of government on the meaning or the manner of application of the treaty?

When a relevant rule of international law is contained in a treaty or other international agreement binding on the state, and a national court recognises its obligation to apply it, questions of interpretation of the treaty may sometimes arise. In that event issues arise as to the appropriate juristic methods to be employed in ascertaining the true meaning of the treaty in question. Where the treaty is incorporated into national law by statute, there may be an understandable inclination by the national court to interpret the terms of the treaty according to the same methods of interpretation as are applied by it in relation to statutes. Yet if the treaty is regarded as belonging primarily to the international legal order, there is an obvious case to be made for applying the international law approaches and rules of interpretation, as codified in the Vienna Convention on the Law of Treaties. There is a further argument to be made, in the interests of promoting a uniform interpretation and application of the treaty among all states adhering to it, that a purely local or parochial approach should be avoided by taking into account decisions of international and other national courts and tribunals relating to the same treaty, and to the published opinions of jurists, and commentators on the treaty.

It appears from the practice reflected in the replies to this question that all of the above methods of interpretation are employed, to some extent, by national courts. Most common of all is the use of the methods of interpretation directed

by the Vienna Convention, which allow reference to the travaux préparatoires of the treaty. Reference to travaux préparatoires is especially significant in courts of the Common Law tradition, since that tradition has been generally resistant to going beyond the words of the statute itself in order to ascertain its meaning.

Increasingly recognised as appropriate and permissible is reference to the decisions of other national courts applying international law. However, it is not yet firmly established as a principle. In the first place, it may well be thought by a national court that its own interpretation of a treaty is more plausible or more conducive to the objects of the treaty than a different view of a foreign court. Yet if the decisions of a number of national courts all tend to favour a particular interpretation of a treaty, such as to constitute a significant tendency in the jurisprudence, then a national court should hesitate to adopt a conflicting interpretation. In the second place, it may not always be appreciated by courts and counsel that access to national court decisions on questions of international law, including treaty interpretation, is available from a number of sources, especially the International Law Reports. No National Report gave any example, however, of a national court falling into manifest error by adopting an idiosyncratic interpretation of a treaty, clearly out of line with that adopted elswehere.

The above may be a question of "idiom", as the United States report suggests; national courts may tend to follow their own familiar approaches, and depart from these only where a compelling reason is shown. Should this "idiom" be changed? Should national courts be encouraged to adopt a more openly "internationalist" approach towards the interpretation of treaties?

An additional consideration is whether the executive branch of government should have a role to play in the interpretation and application of treaties by national courts. In most national legal systems formal guidance is not sought by the courts from the executive, nor is it regarded as decisive where offered (such as in cases to which the government is itself a party). Exceptions are France, before 1990, and the United States. In France, before 1990, the Conseil d'Etat referred questions of interpretation of treaties to the Foreign Minister and considered itself bound by the result. In that year the practice was changed; the Minister may now be consulted by the Conseil and invited to submit views, but "en toute hypothèse, le dernier mot doit rester au juge." A similar procedure is allowed in Switzerland. In the United States there has been a lengthy tradition of the executive and the judiciary attempting to speak with one voice in international affairs. Out of this has grown the practice of the "executive suggestion" made to the courts in cases involving questions of international law. The courts are not bound, but tend to follow the suggestion. The United States report states that of the 23 cases involving questions of treaty interpretation decided between 1957 and 1991, the court has significantly disagreed with the executive position in only 4 cases.

Question 10. When the relevant rule of international law is a rule deriving from custom, or otherwise from general international law, do the courts ascertain the

validity, content, scope, and manner of application of that rule -

(a) from the court's own knowledge of international law?

(b) from the writings of jurists, textbooks, encyclopaedias, digests, or other writings?

(c) from the jurisprudence of other courts within the forum State?

(d) from the jurisprudence of courts of other States?

(e) from the jurisprudence of international courts and tribunals?

(f) from cerificates, directions, or opinions of the executive branch of government?

National courts are all in principle competent to decide questions of customary international law, which may take the form of "taking judicial notice" of that law. The latter may well be the approach when it is a question of a well settled and recognised rule of international law. For the reasons given earlier, national courts often demonstrate a degree of reluctance to decide disputed or unclear rules of international law.

While in the case of all states surveyed there was no officially stated direction, such as by constitution, statute, or binding statement by the highest court, as to how customary international law should be proved, in the United States there is such a statement contained in an unofficial text carrying a high degree of persuasive force. The American Law Institute's *Restatement Third) of the Foreign Relations Law of the United States* (1986) is a work compiled by leading international law scholars in the United States in the form of summary texts and commentaries thereon. It is widely available in libraries and accessible to all courts. Section 103 of the Restatement deals with "Evidence of International Law" and provides as follows:

"(1) Whether a rule has become international law is determined by evidence appropriate to the particular source from which that rule is alleged to derive (Sec.102).

(2) In determining whether a rule has become international law, substantial weight is accorded to

(a) judgments and opinions of international judicial and arbitral tribunals;

(b) judgments and opinions of national judicial tribunals;

(c) the writings of scholars;

(d) pronouncements by states that undertake to state a rule of international law, when such pronouncements are not seriously challenged by other states."

This formulation reflects the evidence of international law, not the sources of international law such as those contained in Article 38 of the Statute of the

International Court of Justice. It might well be considered by the Committee as a proposal for a contemporary and more practical restatement of the evidence of international law for dissemination - perhaps, as in the United States in an authoritative but non-binding form - in national legal orders.

It can be said, as a general conclusion to be drawn from all the reports of the ILA Branches, that courts in their countries do have regard, in addition to their inherent knowledge of international law (jura novit curia), to the jurisprudence of international courts and tribunals, of national courts in other states, and to the writings of scholars, as contained in textbooks, commentaries, digests, and articles in learned journals. A further general conclusion is that such sources are used sparingly, often only by way of incidental confirmation of the existence of a clearly established rule. Where the rule is unclear, courts tend to be reluctant to enter into a detailed weighing up of evidence, preferring to decide the case on the basis of national law or national policy. An example of the latter may be the decision of the United States Supreme Court in Alvarez-Machain (1992) where the court preferred to apply an interpretation of a treaty as part of national extradition law rather than to apply that law in the wider context of a customary law rule relating to abduction. By contrast, an Australian court divided in opinion on the question whether the dignity of a foreign embassy was "impaired" by reason of peaceful demonstrations outside its gates: this division of opinion on the relationship between the duties of the host state to protect a foreign mission from insult and the freedom of speech was mirrored in the division of opinions of learned writers.

A specific sub-question concerns the role, if any, of the executive branch of government in giving directions or opinions to the courts in specific cases on the content or manner of application of relevant rules of international law. This was

Section 102 - "Sources of International Law" - referred to in the text of Section 103(1) reads:

"(1) A rule of international law is one that has been accepted as such by the international community of states

(a) in the form of customary law;
(b) by international agreement; or
(c) by derivation from general principles common to the major legal systems of the world.

"(2) Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.

"(3) International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted.

"(4) General principles common to the major legal systems, even if not incorporated or reflected in customary law or international agreement, may be invoked as supplementary rules of international law where appropriate."

not generally found to be the case, although the executive has a limited role in providing to national courts certificates as to "facts of state", e.g. the date of entry into force of a treaty or the number of parties thereto. A notable exception is the United States where the executive traditionally furnishes "executive suggestions" as to the content of a relevant rule of international law and of American policy in regard to that rule. These suggestions appear to be followed and in this sense are said to be "dispositive" so far as the national court is concerned, and irrespective of what an international court or tribunal might decide.

The general issue prompted by the last point is whether courts of other states would be assisted by the certificates or suggestions of their governments as to the existence and content of rules of customary international law, bearing in mind the greater practical extent of knowledge of, or access to, that law that governments tend to posssess. Or whether, on the other hand, such a formalised procedure might tend to entrench parochial or self-interested views of international law, or compromise the principle of judicial independence.

Question 11. Are the courts permitted to hear expert evidence as to the content, meaning, scope, or application, of a treaty or rule of customary or general international law? Do the courts on occasion allow such experts to be called, or call them ex proprio motu?

Courts of the Common Law tradition, for the most part, reject recourse to such sources, consistently with their view that international law is law within their own competence ("*jura novit curia*") and is not a fact to be proved through evidence, as would be the case with foreign national law. An exception is the United States, whose courts have allowed such recourse, as recognised by the Restatement (Third), Section 113, which states that "courts may in their discretion consider any relevant material or source, including expert testimony, in resolving questions of international law." This is also reported to be the position in Canada.

The general attitude of the Civil Law countries appears not to allow the submission of opinions, but use of expert opinions is allowed in Chile and Japan. In the special case of reference by lower courts of disputed questions of international law to the Federal Constitutional Court of Germany, that Court may solicit expert opinions by way of an amicus curiae procedure.

The arguments for and against the use by national courts of expert opinions may be thought to be fairly evenly balanced. It has been suggested, however, that there should be less objection to a court seeking such opinions ex proprio motu than allowing the parties to solicit and submit such opinions. Further study is required of the occasions of their use and of possible limitations on the discretion to be exercised in their reception. One suggested (but seemingly untested) general exception to the general approach disfavouring seeking opinions from experts is the use of evidence on the facts of state practice in considering the existence or content of a rule of customary international law.

Question 12. Give, if possible, some good examples of decisions where it is generally accepted that the courts correctly interpreted and applied -

(a) the provisions of a treaty;
(b) a rule of customary or general international law.

The replies indicated that national courts are generally successful in interpreting and applying correctly rules of international law, whether these are based on tretaies or derive from cusstomary international law, although a number of comments were made which indicate that the education of national courts could be improved. It seems that in some states, especially developing states and states that have been relatively isolated in the recent past from the impact of international law on the affairs and transactions of their citizens, the occasions for the testing of the capabilities of their courts have been few. In other states the occasions have been more frequent and the courts as a consequence more practised and adept. In the case of Japan, despite some difficulties encountered, the courts are said to have made significant progress in recent years in clarifying the method and criteria for interpretation and application of international law rules. The comment made for the United States was that, although on the whole international law has been correctly identified and applied, "U.S courts have not been consistent in determining when to refer to customary international law, and how to apply it."

Question 13. Give, if possible, some good examples of decisions where it is generally accepted that the courts failed correctly to interpret or apply -

(a) the provisions of a treaty;

(b) a rule of customary or general international law.

The replies indicated that this does not appear to be generally so, or frequently so, in relation to any of the countries surveyed.

The reasons why national courts are regarded as having occasionally misdirected themselves include the following: failure by counsel to argue the case comprehensively or thoroughly, failure by the court to advert to available sources or evidence of the rule in question, reliance by the court on outdated textbooks on international law, and undue deference to perceived national legal or policy considerations.

Question 14. Give, if possible, examples of cases where the courts failed to acknowledge the existence or relevance of a treaty or rule of international law in a case which, in the opinion of jurists, arguably required the application of the treaty provision or other rule of international law.

In addition to the reasons why this has occasionally been so, stated in answer to Question 13 above, there may be a tendency to see greater legitimacy in national law and a preference to state the issues in terms of that law.

There is a further reason in the case of states where treaties are not regarded as automatically incorporated into national law. Because at first sight the treaty is not applicable, a national court may ignore it and fail to consider that some of its provisions, such as those in multilateral instruments relating to human rights, may have attained a parallel status as customary international law.

Question 15. Give, if possible, examples of cases where a court was bound to decide a case in accordance with national law (which made no reference to international law in its relevant provisions) but which nevertheless sought to justify its decision additionally by reference to international law.

The courts of all states are bound to apply the national law of that state. If that law provides a sufficient set of rules to be applied to the case, and none of those rules already incorporate, or require reference to, international law, there is no need for the courts to seek any further sources of law. Nevertheless, it appears that on occasion national courts do justify their decisions by additional reference to international law. This may be by way of confirming that national law already reflects, or is in accordance with, international law. See for example the United States case of *Yunis* (1988). Or it may be by way of pointing out that the national rule being applied has a parallel in international law. An exceptional reason may be where national law is comprehensive and sufficient, as where the law of Israel justified the trial of Adolf Eichmann for crimes against humanity, yet where, in view of the intense international interest in the case, the court felt it desirable to justify its assumption of jurisdiction on international law grounds also.

The first type of occasion is where national law contains an ambiguity or a "gap" which can be resolved or filled by the courts in the exercise of their interstitial power to shape and develop the law. Courts in several Common Law countries have used human rights instruments in this way as justifying a development or extension of national law in a similar direction. Recent decisions of the High Court of Australia (*Dietrich*, 1992) and the House of Lords (*Derbyshire County Council*, 1993) can be cited as examples. This is less common a case in countries of the Civil Law tradition where there is a keener sense of the automatic application of international law by national courts.

The second type of occasion can also be linked especially to human rights, where a comprehensive code of rights, such as the Canadian Charter of Rights and Freedoms, can be supplemented or further developed through reference to the similar International Covenant on Civil and Political Rights, or to decisions of the European Court of Human Rights on the European Convention. Another illustration is where the High Court of Australia decided a question of the river

boundary between two of the States of the Australian federation partly by reference to an analogy with international law (which was not in principle applicable at all).

The broad issue for further discussion by the Committee on this point is whether, and if so how, national courts should be encouraged to take greater account of the international law dimensions, or analogies, arising in their application of national law.

Question 16. Give, if possible, examples of cases where a court was free to decide a case on the basis of international law but preferred to arrive at the same solution under national law.

Arriving at the same result by way of national law may, of course, not always be a matter of doctrinal preference so much as a matter of practical convenience, especially where the prescriptions of national and international law are the same. This would appear to explain the few instances cited from Civil Law countries, where a more monistic conception of law prevails.

In the Common Law countries there are a few examples. In the United States a court declined to rule that international law required that children of undocumented aliens be granted the right to public education, instead ruling that the United States Constitution required that result (*Player v. Doe*, 1982). In both Australia and the United Kingdom, fearing that the provisions of the International Covenant on Civil and Political Rights and the European Convention on Human Rights, respectively, might become incorporated "through the back door" if the courts applied those instruments without legislative authority, the highest courts have refused to apply particular provisions of those instruments but have have been willing to develop the common law in the same direction. (*Dietrich*, 1992, developing a right to free counsel in serious criminal cases; and *Derbyshire County Council*, 1993, denying the right of public authorities to sue for defamation in derogation of the rights of free speech and public criticism).

Question 17. Give, if possible, examples of cases where a court considered whether to apply a principle or rule of international law and -

(a) did so in order to fill a gap in national law;
(b) decided that it was precluded from doing so by reason of the contrary provisions or silence of national law;
(c) decided to disregard or overrule any contrary provision of national law.

It has already been noted in response to earlier questions that on some occasions national courts will resort to international law in order to fill a gap in national law. In the Civil Law countries this is not regarded as anything unusual. In the Common Law countries the question more often arises with respect to unincorporated treaties. The Australian and British decisions in *Dietrich* and in Derbyshire County Council, *respectively, have already been cited as showing* that the courts are reluctant to fill gaps in this way but may incline to develop the common law along parallel lines.

An interesting instance of a particular approach in one of the Common Law countries is the decision of the High Court of Australia in Teoh (1995) holding that a ratified but unincorporated treaty raised a "legitimate expectation" in Australian citizens and residents that its provisions would be taken into account by decision-makers in exercising their powers under existing laws. In other words, the court decided that the act of ratification of a treaty had consequences which were not merely external to Australia on the international law plane but had effects on the domestic plane also, albeit not as a matter of law. "Procedural fairness" required that a decision-maker proposing not to give effect to the treaty should give notice of that intention to the individual whose expectations would be disappointed and allow that individual to submit arguments against a departure from the terms of the treaty. It might be commented that this decision (which has aroused political and legal controversy in Australia, and which is inconsistent with the approach of the House of Lords in the United Kingdom in the Brind case) may be seen more in terms of a development of doctrines of administrative law than of international law.

Gaps are one thing; contrary provisions of national law another. Here there is a fairly sharp division between the approaches of the Civil Law and most Common Law countries. In the Civil Law countries it is not at all unusual for the courts to disregard or overrule a provision of national law found to be in conflict with a rule of international law. This is said to be a matter of "everyday occurrence" in France. In other Civil Law countries the answer to the question may depend upon the respective hierarchical positions of the conflicting prescriptions. In most Common Law countries clear conflict between international law and national law must be resolved in favour of the latter, since an essentially dualist approach is taken towards the relationship between the two legal orders. However, the higher courts, which have the power of overruling past judicial decisions (but not statutes) in developing the common law, would regard a conflicting rule of international law as constituting good reason for at least reconsidering the existing law. There is also always the possibility that the legislature would make the necessary changes to the law in order to bring it into line with international law (e.g. the statutes of various Common Law countries on the subject of state immunity).

Question 18. Has the issue arisen of reciprocity of application of treaties or of other rules of international law, under constitutional or statutory provisions, or in the practice of the courts, as a condition of applying such treaties or rules in the national forum? (Cf. the exceptio non adimpleti contractus in Roman Law).

This question was prompted in part by Article 55 of the French Constitution which provides for the incorporation of duly ratified and published treaties, with

force superior to that of the laws, subject, in the case of each agreement or treaty, to its application by the other party ("les traités ou accords régulièrement ratifiés ou approuvés ont, dès leur publication, une autorité supérieure à celle des lois, *sous réserve, pour chaque accord ou traité, de son application par l'autre partie*".) It appears, however, that this general condition has only once been invoked in a French court, which did not find it necessary to rule on the point. However, in the practice of the French and other courts the provisions of particular treaties or statutory regimes may call for reciprocity of application. These include extradition, legal assistance, public procurement (especially under the World Trade Organization), and recognition and enforcement of foreign civil and criminal judgements. Attention was also drawn to the provisions of Article 47(2) of the Vienna Convention on Diplomatic Relations, which allows for a restrictive application of the Convention by a party in relation to another state which applies the same restriction to that party. In Germany and Brazil reciprocity in the application of measures of extradition and legal assistance is seen more as a political maxim than as a legal condition.

In most Common Law countries reciprocity is not required for the application by national courts of conventional or customary international law, except in the particular cases mentioned above for the Civil Law countries. In the United States, however, there is uncertainty in the practice of the courts whether reciprocity should be required as a condition for the recognition and enforcement of foreign judgments. Certification by the Executive that a treaty has been supended or terminated by reason of breach by the other party may be ground for the non-application of that treaty by the courts.

Question 19. Do the higher courts have among their members judges who have previously engaged in higher studies, or practice, in the field of international law? If so, are they usually assigned to sit in cases involving international law?

The issue implied by this question is whether there is a need to promote a greater awareness of international law in the curricula of law schools and in courses of practical legal training. A further issue is whether, in cases calling for a special depth of knowledge of international law, judges having such knowledge should be selected for those cases.

Generally speaking, the judges of the Civil Law countries are more likely to have studied international law as a compulsory part of their legal studies than their Common Law colleagues. This is in part a reflection of the more monistic conceptions of the relationship between international law and national law prevailing in countries of the Civil Law tradition. Awareness is, however, growing in the Common Law world, and international law is a popular elective subject in law schools. Judges in all countries tend to be chosen more for their general legal knowledge and personal qualities, than for their specialised competence in any particular field of law.

There is no general practice of assigning international law cases to judges

specially knowledgeable in that field. However, in some countries, for example Poland, it is possible in the highest courts to make judicial dispositions with that special need in mind. In Japan there is a policy to appoint to the Supreme Court some experts in international law from among the past Directors-General of the Treaties Bureau, Ministry of Foreign Affairs. In France, the rapporteur before the *Conseil d'Etat* in international law cases is usually chosen from members of the *Conseil d'Etat* who are international law specialists.

Conclusion

The above survey is necessarily brief. It is by no means a comprehensive statement of the position of the states surveyed through the submission of reports by National Branches of the ILA. Rather it is indicative of the range of state practice and of the issues calling for further study.

May 1996

PART C: PROPOSED FUTURE WORK OF THE COMMITTEE

1. The present report attempts a summary of the main issues arising out of the national reports presented to the Committee. It is not the Committee's task to propose a harmonisation of methods by which national courts find and apply international law, still less to criticise the records of particular courts. Rather, it is hoped that variations in national approaches to those tasks, disclosed in the report, may be found useful by way of comparison, and perhaps also by way of encouragement to reviewing national practices.

2. In order to strengthen the role of national courts in perceiving the occasions for, and the manner of, the application of international law the Committee would propose the following topics for further and more detailed study:

a. Role and rank of international law in the national legal order.

Although surveyed as a background question, since it relates to constitutional considerations which are not susceptible to easy change, the responses to it revealed that there is nevertheless a re-evaluation of the role and rank of international law in the national legal order presently taking place in certain common law countries. A study of these trends, especially as they pertain to the identification and application of fundamental norms of international law (including human rights), and a comparison with the Civil Law countries, would appear timely.

b. Ways and means to ensure that questions of international law reach superior courts.

Under some national codes of procedure it may be that inexperienced courts may have to deal with difficult questions involving international law. They may, in certain cases, render judgments satisfactory to the parties, but not from the point of view of international law. It may be desirable to make proposals in this respect for reform in order to ensure that national laws allow (extraordinary) appeal for non-application or mis-application of international law.

c. Ways and means to ensure that courts receive all necessary assistance in enabling them to identify and apply rules of international law correctly.

The Committee should investigate further whether the maxim jura novit curia is in fact justified or sufficient in practice. Are there circumstances in which national courts should be encouraged to seek expert opinions on international law ex proprio motu, to request amicus curiae briefs, or to ask for (binding or non-binding) advisory opinions from international bodies? This topic could also include the issue, raised some years ago by the Netherlands Branch of the ILA, of possibly expanding the jurisdiction of the International Court of Justice to allow requests for advisory opinions to be submitted by national courts.

d. The independence of the judiciary from the executive in dealing with questions of international law.

Are there dangers in judges deciding difficult or disputable questions of international law according to their own conceptions of what international law or policy require? On the other hand, are there dangers in the courts deferring always to the executive view on such questions? Should courts be encouraged to follow clear rules of international law even if they should appear to be contrary to a temporary national interest (cf. the Resolution of the Institut de Droit International, adopted at Milan on 7 September 1993)?

e. Standing of individuals to raise questions of international law before national courts.

Numerous rules of international law exist for the benefit of the individual. Should national rules of procedure or the doctrine of standing allow individuals to invoke these rules, even if they fail to show any infringed personal right, or if the self-executing character or direct applicability of the rule is not clearly established?

f. Education of future judges and continuing education of present judges.

In view of the manifest increase in the degree of interaction between international law and national law, the Committee might draft proposals for the place of international law as a mandatory element in legal education, and for expanded opportunities for judges to acquaint themselves with recent developments in international law.

3. The Committee's survey was based on the reports of 19 National Branches of the ILA. Each Branch has been encouraged to publish its own report in its own preferred format. Some have already been published in national yearbooks of interntional law (e.g. the Australian and the Japanese). If the Committee's work is to be continued, it would be possible to receive reports from other National Branches, in order to widen the basis of knowledge of state practice.

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Le Professeur Stern a souligné que l'exemple n'était pas identique aux autres, parce que Hong Kong n'était pas un Etat. Les spécialistes de droit international ont ici besoin de nouvelles catégories juridiques .

Le Président a suggéré que l'ancien statut d'un territoire colonial capable de conduire des relations extérieures peut s'appliquer. Il a aussi remarqué que la Cour internationale de Justice a considéré la question de la succession d'Etats dans l'arrêt concernant l'ancienne Yougoslavie et la convention sur le génocide. La Cour a été très prudente et n'a pris aucune position. Il a été possible à la Cour de le faire parce que la RFY a déclaré son adhésion au traité sur le génocide: elle a alors accepté la déclaration sans questionner sa signification précise de continuité ou succession.

Le Professeur Stern est d'opinion que la Cour a été trop prudente! Néanmoins, le rapport du Comité reconnait qu'il y a deux possibilités, et que la question reste donc ouverte.

Le Président a eu l'impression que, en réalité, le choix de l'une ou l'autre option est plus une question politique que juridique. Quand on cherche à faire une analyse juridique, il apparaît difficile de trouver des critères objectifs. La Russie est regardée comme Etat continuateur de l'Union soviétique pour conserver sa place au Conseil de sécurité. Les conditions dans lesquelles la Yougoslavie s'est désintégrée étaient plus des conditions politiques que juridiques. L'Allemagne a toujours insisté sur le fait qu'elle était un Etat continuateur. Mais pourquoi a-t-elle été capable de succéder aux traités avec les Etats de l'Est? Pourquoi des principes s'appliquent-ils dans quelques cas, et des exceptions dans les autres? Le réponse est plus claire dans le cas des organisations financières, où le fait que l'argent soit en question rend nécessaire de prendre des décisions claires.

Le Professeur Stern a répondu que c'était là un des grands problèmes du droit de la succession d'Etats, et que l'aspect politique est souligné à plusieurs reprises dans le rapport. Mais une fois la question politique réglée, on constate une certaine consistance globale dans les solutions juridiques adoptées.

Le Président a remercié le Professeur Stern pour l'ensemble de son travail et pour l'information très précieuse du rapport. Il a également remercié tous les participants pour leurs commentaires, qui seront pris en considération par le Comité dans son rapport final.

Le Président a lu la résolution, qui a été acceptée à l'unanimité.

REPORTER: MICHAEL BYERS

INTERNATIONAL LAW ASSOCIATION

TAIPEI CONFERENCE (1998)

COMMITTEE ON INTERNATIONAL LAW IN NATIONAL COURTS

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THIRD REPORT OF THE COMMITTEE

Introduction

The 67th Conference of the International Law Association, held in Helsinki, Finland, 12-17 August 1996, received the Second Report of the Committee. That Report, building on the First Report, which had outlined the responses to the Committee's questionnaire to Branches, identified the principal issues emerging from the survey.

The Helsinki Conference urged ILA Branches that had not already submitted reports to the Committee on the practice in their jurisdictions to do so by March 1997.

The following Branches have responded to that appeal: India, Malta, Mexico, the Netherlands (with a comprehensive report covering the original questionaire and the Helsinki Resolution), and South Africa. Additional reports and comments on the present phase of the Committee's work were received from the Australian, British, French, Irish, Israel, and Philippines Branches. The number of ILA Branches that have submitted reports to the Committee now totals 24.

The Helsinki Conference invited the Committee to continue its work, in particular on the subjects of:

(a) the role and rank of international law in national legal orders, including the application of instruments adopted within the framework of international organisations;

(b) ways and means of ensuring that questions of international law are, where appropriate, considered by the higher national courts;

(c) ways and means of ensuring that national courts receive all necessary assistance in enabling them to identify and apply correctly rules of international law;

(d) the relations between the judiciary and the executive in dealing with questions of international law arising in national courts;

(e) the education of judges in international law.

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(A) The role and rank of international law in national legal orders, including the application of instruments adopted within the framework of international organisations.

1. The First and Second Reports of the Committee have dealt as extensively as is possible with the first part of this issue, taking into account the necessary limitations of space, and having regard to the nature of this question as preliminary to the main focus of the Committee's work. Nevertheless, reports received since the Helsinki Meeting have drawn attention to some interesting new facets of the operation of international law within national legal orders.

(i) The South African Branch Report sets out the provisions of the new Constitution of 1996 (entered into force in February 1997) which refer to international law in a number of instances, including limitations deriving from international law on governmental powers concerning derogations from the Bill of Rights, national security, the defence forces, and the self-determination of communities. Of particular interest to the subject of the Committee's study are section 39(1), which stipulates that, when interpreting the Bill of Rights, "a court, tribunal or forum ...(b) must consider international law; and (c) may consider foreign law"; and section 233, which provides that "when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law." (Section 233 may be compared with United States law, as stated in the Restatement of the Law Third, § 115, according to which federal legislation is interpreted as overriding international law or an international agreement only if the intention to do so is clear. Cf. US District Court for the Southern District of New York v. Palestine Liberation Organization, 27 ILM 1055 (1988)).

(ii) The supplementary Australian Branch Report describes the continuation of the debate in Australia concerning the effect of unincorporated treaties on the exercise of executive powers under legislation, and judicial review of such exercise. Since the change of government in Australia in March 1996 the hostility towards the High Court's decision in the case of Minister of State for Immigration and Ethnic Affairs v. Ah Hin Teoh (1995) 183 CLR 273 has been reaffirmed, and a new executive statement issued purporting to set aside any 'legitimate expectations' arising out of the executive's ratification of a treaty. Legislation to this effect has been projected but has not, as yet, been passed by Parliament. The Report refers to several other cases of interest, where the courts have had regard to international law, including the case of 'Applicant A' v. Minister for Immigration and Ethnic Affairs (1997) 71 ALJR 381 where the High Court had to consider whether China's 'one-child policy' constituted persecution within the meaning of the Refugees Convention, 1951. The judges in that case referred to decisions of other national courts interpreting the meaning of 'persecution' and 'social group' in the Convention.

(iii) The supplementary Israeli Branch Report mentions a case very similar to the Australian case of Teoh. In the case of Tibi v. The Government of Israel (1995) the Supreme Court held that an agreement between Israel and the Palestinian Liberation Organisation regarding amnesty to Palestinian prisoners was a relevant consideration to be weighed by the relevant Israeli authority; by implication, failure to do so, or failure to give it proper weight, might render the administrative decision void. Other cases have evidenced the view of the Supreme Court that international norms are among the factors that must enlighten the judges in interpreting statutes.

That Report also cites an article which in turn refers to the Bangalore Principles adopted in 1988 by a high-level judicial colloquium on the domestic application of international human rights norms, convened by the former Chief Justice of India under the auspices of the Commonwealth Secretariat. This statement reflects a growing body of national jurisprudence that guides itself, in the interpretation and application of international law, by international instruments and decisions in matters relating to human rights and fundamental freedoms. This trend is to be applauded because it respects the universality of human

rights and the standards set in international instruments and decisions.

(iv) A subsequent comment from a member of the Swedish Branch draws attention to the fact that, although the Swedish Constitution of 1974 is silent on the relationship between international and national law, and notwithstanding the previous "dualist" practice, the incorporation en bloc into Swedish law of the Lugano Convention on Foreign Judgments and of the European Convention on Human Rights in 1994 seems to show a trend towards monism in Sweden and other Scandivanian countries.

2. The more particular aspect of the question referred to the Committee at Helsinki is the application in national law of instruments adopted within the framework of international organisations. A number of examples may be cited.

3. The supplementary British Branch Report points out that English law has not as yet adopted any general doctrine regarding the the treatment of international organisations by the courts. That question tends to be governed by legislation passed to give effect to the legal personality and acts of international organisations in national law. In the absence of such legislation the courts are reluctant to find a basis for decision in international law alone. Part of the reason for this attitude of judicial abstention is the doctrine of non-justiciability: the English courts will not decide matters in dispute between foreign states which properly arise on the plane of public international law. See especially the litigation concerning the International Tin Council: Maclaine Watson & Co. Ltd. v. Department of Trade and Industry [1990] 2 AC 418 (House of Lords). However, where the question is merely whether an international organisation has locus standi to present or defend a claim in the English courts, in the absence of legislation the courts have recognised the legal personality of the organisation where that organisation has been incorporated under the law of a recognised sovereign state: Arab Monetary Fund v. Hashim (No.3) [1991] 2 AC 114 (House of Lords). In other words, the approach taken is based more on private international law principles than public international law. See, however, Westland Helicopters v. Arab Organisation for Industrialisation [1995] 2 All ER 387 where the issue of the authority of the officers to represent the organisation was decided by the court by reference to public international law and not the law of Egypt, which was the country of incorporation of the organisation.

These statements appear to be generally true of all legal systems of the common law tradition.

In the Civil Law systems the primary source from which the applicability of acts of international organisations may be judged is the constitutive act of the organisation in question and the mode by which the existence of the organisation has been recognised in the national legal system. In most systems the domestic legislative act that approves the constitutive act (Constitution, Charter, etc.) of the international organisation confers the force and rank of domestic law on that instrument. A different question is whether an international organisation can have locus standi before the courts, if the forum state is not a member of the organisation. Some in the Civil Law doctrine maintain that the creation of an international organisation is a sovereign act of foreign states, so that "foreign" organisations enjoy the same status as foreign states. However, in France the Cour d'Appel de Paris, in West African Economic Community (CEDAO) v. Bank of Credit and Commerce (BCCI), denied the existence of an "objective legal personality" of international organisations due to the lack of any relevant international custom (Clunet, 1993, p.353).

4. In the United Kingdom acts of the institutions of the European Communities are given direct effect in UK law by reason of the European Communities Act, 1972. In Ireland a constitutional amendment, combined with the provisions of the European Communities Act, 1992, enabled the existing corpus of legislation and jurisprudence of the Communities, as well as future acts, to have force in domestic law, and exempted "laws enacted, acts done, or measures adopted by the State necessitated by the obligations of membership" of the Communities from judicial review by the national courts. These appear to be unique examples of the recognition and application of the acts of an international organisation within the legal system of a state, in derogation of its juridical autonomy. As for other member states of the European Union, such an approach is an inherent consequence of being part of that Union. These examples are not apposite to other states in their relations with international organisations which have no such organic connexion.

The application of the acts of the various organs of the EU in the national legal orders of member states will therefore not be a major subject of study by the Committee.

5. The status of United Nations resolutions in the national legal order is obviously a question of major importance for all states.

United Nations resolutions may be recommendatory or mandatory. All resolutions of the General Assembly are in principle recommendatory only (except in certain cases provided for in the UN Charter, such as the UN budget) and therefore do not give rise directly to any obligations for states. Resolutions may, however, be couched in terms that purport to be declaratory of customary law; or a pattern of resolutions may in time be held to crystallise a new rule of international law. The attitude of the courts, both of the civil law and common law traditions, towards such resolutions will therefore be similar to their attitudes towards customary international law in general.

Decisions of the UN Security Council, whose resolutions may - according to their content - be binding on member states pursuant to article 25 of the UN Charter (and have dispositive effects for non-member states also: Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (ICJ, 1971)) are of particular importance. Since decisions to impose sanctions on recalcitrant states are often taken with little warning and require prompt implementation in order to be made effective, the executive and judicial authorities of states require a clear understanding of their powers and duties within the national legal order. These sanctions may include the freezing of financial accounts and other assets, the prohibition of trade in all

or some types of goods, and the prohibition of financial transactions, including the granting of credit. Recent examples are the sanctions imposed on Iraq and Kuwait, Libya, Yugoslavia, Haiti, the Serb-held territory of Bosnia-Herzegovina, and the UNITA movement in Angola, and the arms embargoes against South Africa, Liberia, Yugoslavia, Somalia, and Rwanda.

Australia, New Zealand, and the United Kingdom have all enacted legislation which allows for the executive, by published orders consistent with the powers granted by the Act, to suspend or prohibit acts within their states in accordance with the relevant UN Security Council resolution. See for example the United Nations Act, 1946 (UK). This is called 'delegated' or 'subordinate' legislation in common law countries. Such delegated legislation is subject to disallowance by Parliament if it is considered to be inappropriate, and is also subject to judicial invalidation, under the principle of ultra vires, if it is held to go beyond the scope of the authority conferred on the executive by Parliament.

In most civil law countries the relevant law on foreign trade and payments, or similar legislation, contains provisions that allow implementation of UN Security Council decisions. For the member states of the EU Security Council decisions have in many cases been implemented through EC Regulations, which have binding effect and primacy over national law. In Ireland this gave rise to the Supreme Court being obliged to request the European Court of Justice, under Article 177 of the EC Treaty, to interpret Security Council Resolution 820 (1993) on sanctions against the Federal Republic of Yugoslavia (Serbia and Montenegro) as implemented by EC Regulation No.990/93/EEC. (See Bosphorus v. Minister for Transport, Energy and Communications, Ireland, and the Attorney-General, (1996) ECR I-3953).

Specific legislation has been passed by more than 20 states to allow for the implementation of the provisions of the resolutions establishing the International Tribunals for the Former Yugoslavia and/or for Rwanda in such matters of cooperation as arrest, surrender, and the furnishing of evidence: see e.g. Australia, International War Crimes Tribunal Act, 1995.

6. Where an international tribunal established under the provisions of an international convention, or within the framework of an international organisation, makes a ruling which requires application by the parties within a national legal order, the question of the source of the authority to take such steps directly arises.

The Human Rights Committee of the United Nations has made two adverse findings against Australia in respect of the compatibility of its laws with the International Covenant on Civil and Political Rights, 1966: The Toonen Case (HR Committee No. 488/1992, Views dated 31 March 1994) and the A. (Name Deleted)(Cambodian Refugees) Case (HR Committee No. 560/1993, Views dated 30 April 1997). The finding in the first case was accepted and implemented through legislation: the Human Rights (Sexual Conduct) Act, 1994. No action has yet been taken in respect of the finding in the second case, which held certain sections of Australia's migration laws to be contrary to the Covenant.

Cases will undoubtedly arise in increasing numbers from decisions of dispute resolution panels under the provisions of the GATT/WTO. These might hold that legislative, executive, or judicial acts by member states infringe instruments adopted under the GATT/WTO. Those instruments do not themselves dictate the manner in which decisions are to be carried into effect by national authorities.

It is probably the case in all legal systems that where an authoritative international body has found that national legislation is incompatible with that nation's obligations under the relevant convention or instrument, or arising from membership of the organisation, the only appropriate remedial step is the repeal or amendment of the deficient law by legislation. The same might also be true for the correction of non-conforming acts by executive and judicial bodies, at least for countries of the common law tradition.

The situation is broadly the same in civil law countries. In some countries legislation provides for review of an otherwise final court decision, if the European Court of Human Rights has found that decision to be in violation of the Convention (Austria, Luxemburg, Switzerland). In others, Supreme or Constitutional courts have ordered an extraordinary rehearing in such cases (Belgium, Spain).

Since the adoption of the Maastricht Treaty on European Union in 1992, a potentially interesting, but certainly exceptional, provision is contained in Article 171 of the EC Treaty, according to which the European Court of Justice, upon a proposal by the European Commission, may impose a lump sum or penalty payments if a Member State fails to take the necessary measures to comply with the Court's judgment.

The only other known, but so far theoretical, sanction for non-compliance with the judgment of an international court is Article 94, para.2, of the UN Charter relating to the International Court of Justice.

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(B) Ways and means of ensuring that questions of international law are, where appropriate, considered by the higher national courts.

7. This question implicitly accepts that cases may come before courts at any level of the national court system raising issues of international law. It is not necessarily implicit in the question that courts at lower levels are unlikely to recognise those issues or are incompetent to deal with them. The question rather proposes that where, through oversight or inadequacy of consideration, a case is decided without proper advertence to applicable rules of international law, means be suggested for bringing the case before the higher national courts so that the omission or error may be corrected.

This way of putting the question assumes that the decision of the lower court is not challenged by the unsuccessful party and does not reach the higher courts

by way of the normal avenues of appeal. Where an appeal is brought, the issues dealt with under (C) below arise. The valid point is made in the supplementary Israeli Branch Report that the court system may be overburdened with cases, and that where it is possible to decide a case on the basis of national law alone, an excursus into international law is often avoided. A similar point is made in the Mexican Branch Report which notes that the writ of amparo, which might in principle claim a breach of international law or of a treaty, tends to be based on claims of violation of a parallel provision of constitutional law. The question also differs from Question 4 of the Committee's questionnaire, discussed in the Second Report, at page 9, where the question was confined to instances where the inadvertence to international law might result in the state incurring international responsibility for a breach of international law.

Where a judgment has been rendered by a lower court, satisfactory to the parties - or at least not appealed against by one of the parties - but omitting consideration of relevant rules of international law or misapplying them, it is difficult to see in most legal systems an established procedure by which a third party (e.g. the Government) can impose judicial review on those parties. In addition to any other consideration, the cost and inconvenience to the parties must be taken into account.

In Germany, courts are obliged, under Article 100, para.2 of the Constitution, to refer doubtful questions of international law to the Federal Constitutional Court for preliminary decision.

It is also possible to imagine a procedure under these circumstances where the state authorities responsible for the international legal relations of the state might seek a ruling from the higher courts on the question left undecided, or wrongly decided, by a lower court. In some countries such procedures exist, more generally, for advisory opinions or for an Attorney-General's Reference. The suggested procedure would not result in any change to the decision of the lower court in the particular case: the decision of the lower court would be treated as res judicata. The purpose of the procedure would be to seek a declaratory statement of the law that would be binding on lower courts in the future. Such a procedure exists in the Netherlands under Articles 95 and 98 of the Judicial Organisation Act, when no other possibilities for appeal are present: appeal in cassation to the Supreme Court "in the interest of law", including international law. The decision in this kind of proceeding will not affect the rights of the parties in the particular case. A similar procedure exists in France and in a number of other countries, but is rarely used.

The suggested procedure would have the distinct advantage of clarifying the relevant principles and rules of international law and their relationship to the national legal order. It would also serve to heighten the awareness of legislative, executive and judicial authorities of the increasing impact and importance of international law.

A possible disadvantage of the suggested procedure is that it might tend to be one-sided. If the state authorities present to the higher court a particular interpretation of international law, who will be there to contradict them? Where no party interest is directly affected, it is unlikely that counsel other than state counsel will appear to assist the court, unless in the capacity of amici curiae.

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(C) Ways and means of ensuring that national courts receive all necessary assistance in enabling them to identify and apply correctly rules of international law.

8. This question assumes that the fundamental principle, recognised by all the major legal systems, that the courts know and understand international law (jura novit curia), may not in practice be a guarantee that courts will always identify applicable rules of international law and apply them correctly.

A particular area of potential confusion is the distinction between "hard" and "soft" international law. As the British Branch Supplementary Report points out, past adherence in English law to the rule that international law requires legislative recognition or judicial adoption before it can be applied as part of national law allowed the courts to avoid this problem. Today, in the United Kingdom as elsewhere in the common law world, when customary international law is more pervasive and is seen as automatically part of national law, or at least as a source of that law, the problem cannot be avoided; the distinction needs to be identified with care and taken fully into account when applying international law in national courts.

Previously received Branch Reports, reflected in the Committee's Second Report, stress the importance of the role of counsel in bringing to the attention of the court all relevant material and argument concerning issues of international law. As the Australian Supplementary Report notes, where the government is itself a party to a case its resources and interests enable it to put material before the court that may not be so readily found by private parties. The Mexican Branch Report notes the wide powers of the Federal Attorney-General to intervene in private proceedings where questions of unconstitutionality or broad public interest are involved, which questions would include international law.

The court may, of course, carry out its own researches, aided - as judges of the higher courts of developed countries tend to be - by bright young law graduates who act as their law clerks (associates) or research assistants. But the court may still be in doubt, and feel itself to be in unfamiliar territory. Various suggestions have been made whereby the court might be assisted:

(i) The simplest suggestion is that courts might be assisted through a greater use of written arguments from the parties, which include supporting references to the "subsidiary means for the determination of rules of law" set forth in article 38 of the Statute of the International Court of Justice, viz. "judicial decisions [of international and national courts and tribunals], and the teachings of the

most highly qualified publicists of the various nations." To these sources should now be added resolutions of international organisations, especially of the United Nations. This method has the potential to descend into a "paper war", and also to invite invidious comparisons of the qualifications of various writers to speak authoritatively. But if counsel behave with restraint and the procedure is managed appropriately by the court, the method may suffice in most cases.

(ii) The use of expert witnesses on international law is allowed in the courts of some countries, but not others. The problem with expert witnesses is that they tend to be called by the parties in dispute and their views of the law may be tempered by the interest in which they appear. Their evidence may thus become part of the dialectical process of litigation, leaving the court with the task of preferring one view to the other. Moreover, those opposed views may not provide a comprehensive perspective. In most common law countries such a procedure is not allowed: evidence is allowed of the content of foreign law, which is treated as a fact, but not of international law, which is not treated as foreign law but as one of the sources of national law.

The same is true for most civil law countries where, in some, courts may ask for expert opinions on foreign law ex officio, especially in cases where the parties do not have sufficient means to do so; but they may not use this procedure in relation to international law. One exception is the German Federal Constitutional Court, which may, and does from time to time, request ex officio expert opinions of questions of international law.

(iii) The supplementary Australian Branch Report notes the possibility of intervention in cases by bodies charged with statutory powers to intervene, such the Australian Human Rights and Equal Opportunity Commission. Consideration might be given by courts to allowing intervention, or briefs by amici curiae, on behalf of consumer, environmental, human rights and other groups which are in a position to put material relevant to an international law perspective before the court. The Philippines Branch Supplementary Report mentions, in this connexion, the provisions of its Rules of Court that enable the courts (particularly the Supreme Court) to invite amici curiae to appear in order to present argument on particular points of law, including international law. However, the Mexican Branch Report notes that the notion of amici curiae is foreign to its legal tradition. This may be true of other countries also. In those countries where such intervention is allowed care would need to be taken that the right to intervene is not abused.

(iv) The Israeli Supplementary Report proposes consideration of the establishment of a panel of experts in international law. National courts could, in appropriate cases, refer difficult questions of international law to the panel for advice or expert opinion. The suggestion does not consider whether such a reference should be accompanied by oral arguments and hearings, or whether it should be carried out "on the papers" only. Nor does it advert to the question of how the costs of the procedure should be met. Clearly, in order to be of real assistance, such a reference procedure would need to be carried out expeditiously and at modest cost.

(v) The present Committee is the outcome of a proposal by the Netherlands Branch of the ILA for a study of the possible use of the International Court of Justice as an advisory body to national courts in the elucidation of rules of international law relevant to a particular case. The Committee's mandate was, however, framed with its present broader terms of reference. Nevertheless the Netherlands proposal naturally falls for consideration under paragraph (C) of the Helsinki mandate. The advantages of the suggested procedure are obvious: the Court's stature is undoubted, its impartiality is assured, and any ruling by it would carry the greatest authority. However, the caseload of the Court is presently such that it would be difficult to respond to requests for assistance in a time span consistent with a pending national case, unless the Court were prepared to organise for that purpose accelerated procedures of the kind used for Interim Measures. Moreover, this would require that additional financial resources be given to the Court, and that its Statute be amended (which would be a difficult process). Taking into account all these elements, it appears more realistic to encourage national courts to improve their own procedures along the lines suggested in (i) to (iii) above, rather than to try to establish advisorory opinion procedures as discussed in (iv) and (v).

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(D) The relations between the judiciary and the executive in dealing with questions of international law arising in national courts.

9. The doctrine of the separation of powers is acknowledged by all major legal traditions, although its application in particular circumstances may differ. In relation to questions of international law, governments have a central role to play: they are the actors who create international law through state practice and through the conclusion of treaties and conventions; they are the repositories of direct information regarding the proceedings of international conferences or proceedings within international institutions which have resulted in rules; and states bear legal responsibility towards other states for the discharge of their responsibilities under international law. These considerations underline the crucial interest the executive has in the outcome of judicial application of international law in the national sphere, as well as the exclusive power the executive has, in some countries, to certify certain "facts of state" to the judiciary. Courts might refer to the executive under these circumstances, but they must be aware of their ultimate and exclusive responsibility for the legal characterisation of the facts received from or ascertained by the executive. (Cf. the Resolution of the Institut de Droit International on "The activities of national judges and the international relations of their State", Article 7, Annuaire Vol. 65(II), 319 (1993)). In the Beaumartin case (24 November 1994, Series A, No. 296-B) the European Court of Human Rights held that the Conseil d'Etat had not acted as an inde-

pendent tribunal, because under the then prevailing legal situation in France the power to interpret an international treaty lay exclusively with the Minister of Foreign Affairs, and administrative courts were bound by that interpretation.

It should be noted that, in some other countries, executive certificates, in this sense, are unknown. However, courts in those countries do have the possibility of requesting observations from the Foreign Office. These observations have no binding effect whatsoever. This is the case in France where, since 1988, courts no longer feel obliged to consult the executive or to endorse its position. Nevertheless, courts should feel themselves to be under an obligation to apply international law carefully and thus to shield the State against possible responsibility for a breach of international law by one of its organs.

10. An important question arising in countries where the practice of obtaining executive certificates prevails is the proper scope for their use in judicial proceedings. By "executive certificate" is meant a statement made by or under the authority of the minister of state responsible for foreign affairs which asserts the government's position in relation to certain matters of fact in the field of international affairs. When addressed to a court (which may be at the request of one of the parties, or of the court itself) the certificate is usually concerned with such questions as whether a particular state or government is recognised as such by the executive, whether certain territory is under the sovereignty or jurisdiction of a state, whether a state of war exists, the status of parties to an international convention, and whether a particular person is entitled to diplomatic or consular status. These are called "facts of state" and are to be distinguished from mere opinions or indications of preferred executive policy. It is not the role of the executive, in countries of the British inheritance, to dictate the "correct" interpretation of a statute to a court through the use of a certificate. While executive assertions of facts of state are treated by the courts as conclusive, the court must be free to determine the legal consequences of those facts in national law.

Judicial practice in the United States, by contrast, does admit the propriety of an "executive suggestion" to the courts, designed to promote the consistency of executive and judicial acts affecting international relations. Although not in terms binding, executive suggestions, when made, tend to be followed by the courts.

11. The British Branch Supplementary Report notes that the view that "the courts should speak with the same voice as the executive" in matters of foreign affairs has been criticised by the late Dr. F.A. Mann in his book Foreign Affairs in English Courts (1986). Indeed that view has been rejected by the English courts if by it is meant that the executive's view of the content of international law is to be regarded by the courts as binding. Dr. Mann states, at page 51-52: "It is, however, not for the Executive to pronounce upon any question of either English or international law. The legal effect of the certified facts of state is a matter that falls solely within the province of the judiciary even if, for instance, the interpretation of a treaty certified to have been concluded or to be still in force is concerned." Dr Mann ends this section (at page 54) by recalling the

warning against too great a reliance on the executive view given by Lord Cross of Chelsea, in the case of The Philippine Admiral (1977): "what may begin by guidance as to the principles to be applied may end in cases being decided irrespective of principle in accordance with the view of the Executive as to what is politically expedient."

12. In matters not directly connected with government policy, should the courts seek or accept a statement of the executive's view of the current state of international law in a particular aspect of concern to the court? The British Branch Supplementary Report holds that such an approach, if treated as conclusive, "may well be detrimental to a proper reception of international law by national courts." This may especially be so where the executive furnishes such a view in its own interest as a party to the litigation. Even where this is not the case, to treat the executive's view as conclusive would be to treat international law differently from other parts of national law and thus to perpetuate outmoded attitudes towards the proper place of international law in national legal orders.

It is a somewhat different question whether it may be appropriate, in view of the executive's closer involvement with matters of international law at the working level, for courts to seek and accept the executive's view on the current state of international law, without treating that view as conclusive. As the Australian Branch Supplementary Report notes, this already tends to be the case where the government is itself involved in the litigation in question, and government counsel puts such material before the court in the course of argument.

A different question again is that courts may and do ask the Foreign Office about factual situations in other countries relevant to the application of international law or treaties and thus for the court's decision. For example, German administrative courts in asylum cases often rely on information requested and received from a German embassy in the country concerned about the situation of human rights there, in order to decide whether the Refugees Convention, 1951, applies to the applicant.

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(E) Standing to raise questions of international law before national courts.

13. Numerous rules of international law exist for the benefit of the individual. Should national rules of procedure, including the doctrine of standing (locus standi) allow individuals to invoke these rules before national courts, even if they fail to demonstrate any infringed personal right, or if the self-exe-

cuting character or direct applicability of the rule is not clearly established?

14. The countries of the common law tradition tend to insist on a demonstration of a particular personal right or interest before allowing an individual or corporate entity to bring an action before the courts. This means a right or interest of the claimant beyond that of the generality of citizens. Thus, actions may not be brought to restrain the government from acting in a manner claimed to be contrary to international law. See for example the Australian High Court cases of Ramos Horta v. Commonwealth (1994) 181 CLR 183 where a declaration was sought against the validity of national legislation implementing the Timor Gap agreement with Indonesia, and Lindon v. Commonwealth [No.2] (1996) 70 ALJR 541 where a declaration was sought that the presence of American bases on Australian soil was contrary to Australia's obligation not to cooperate in the threat or use of nuclear arms. However, there are some signs of relaxation of formal rules of standing, at least where the action has not been instigated for overtly political or propagandistic reasons. See for example the case cited in the British Branch Supplementary Report R. v. Pollution Inspectorate, ex parte Greenpeace [1994] 4 All ER 329.

15. In civil law countries the actio popularis is also excluded, virtually without exception. In some, class actions are admissible in some areas, e.g. environmental law. Those judged to have standing may raise any legal arguments, including those based on international law.

The more difficult question is whether courts may disregard an alleged rule of international law (custom or treaty), applicable to the case and most probably violated, simply because the rule is not self-executing and binding only on the State and thus does not directly protect the claimant. There is evidence that some courts do not deny standing to individuals who invoke international law only because that law - being a treaty or customary law - applies only between states. The Israeli Branch Supplementary Report mentions examples where the High Court of Israel examined petitions of Palestinians who invoked alleged breaches of international law by the Israeli authorities in the West Bank and Gaza, although these obligations were inter-state obligations and not directed towards individuals.

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(F) The education of judges in international law.

16. In view of the manifest expansion of the areas of interaction between international law and national law, it has been suggested that the Committee might draft proposals for the place of international law as a mandatory element in the education of all lawyers, and for expanded opportunities for judges to acquaint themselves with recent developments in international law.

It is an observable fact that international law is now a core subject in the curricula of most law schools. In the civil law countries this has long been so, although sometimes only on an optional basis. In the common law countries, international law has moved from the periphery of the curriculum to the centre, although it is not always required as a compulsory unit of study.

The present Report endorses, in this respect, the Resolution of the Institut de Droit International of 4 September 1997 (Strasbourg Session) on The Teaching of Public and Private International Law, in which it recommended, inter alia, that every law school and faculty of law offer a foundation course and a range of optional courses on international law, both public and private, that examinations should include international law among the subjects regularly examined, and that no law school graduate should enter the practice of law and the judicial or diplomatic service without having had a foundation course in international law.

17. With regard to the present generation of judges, who have not necessarily studied international law as part of their earlier education, a number of suggestions have been made:

(i) The promotion of seminars and other forms of judicial training, sponsored by the courts themselves, by such bodies as national institutes of judicial administration, by universities, and by private bodies, such as the ILA. It may be that, in many countries, "there is much to be desired in this area", as stated by the Philippines Branch Supplementary Report. One could also consider, in those countries where the judiciary is a separate career, making promotion of judges to higher instances of the judiciary dependent upon some proven knowledge of international law.

(ii) The International Court of Justice might be encouraged to establish a programme, on a modest budget, under which it invites a small number of national judges for a short visit to the Court each year. A similar programme has been established by the European Court of Justice for national judges of Member States.

(ii) Seminars and training courses might also be conducted at the regional level. The Mexican Branch Report mentions the organs of the Organization of American States and the commitment to the enhancement of the administration of justice taken at the First Summit of the Americas in 1994.

(iii) The encouragement of the attendance of judges at international conferences on international law. Judges could also be included in the delegations sent by states to participate in the drafting of international conventions concerning legal matters, such as the forthcoming diplomatic conference on the Statute of the Permanent International Criminal Court.

(iv) The wider availability to judges of decisions of national courts of other countries in international law. There is already, of course, the International Law Reports series, prepared and published from Cambridge (England), which has provided an invaluable service since the 1920s. But it is suggested that this, or a similar service, should also be available on line through the Internet, in order to allow faster access. A promising example is the newly established Internet site of the International Court of Justice: >http://www.icj-cij.org<.

(G) Conclusions

1. Unless otherwise directed by the 68th Conference in Taipei, this will be the final report of the Committee. It is hoped that the issues raised in all three of the Committee's reports will stimulate further reflection by judges, legal practitioners, and scholars in the various countries, especially in the developing countries. It is hoped that the reports will add significantly to other studies recently published, such as Thomas M. Franck & Gregory H. Fox (eds), International Law Decisions in National Courts (Transnational Publishers, New York, 1996), and Pierre Michel Eisemann, L'Intégration du droit international et communitaire dans l'ordre juridique national: Etude de la pratique en Europe / The Integration of International and European Law into the National Legal Order: A Study of the Practice in Europe (Kluwer, The Hague, 1996).

2. The amount of material collected by the Committee, provided by some 25 national branches of the ILA, is impressive. The Committee is greatly indebted to those ILA members who prepared reports for their national branches and submitted to the Committee. It is considered that, although considerable editorial work would be needed, those reports are worthy of publication.

COMMITTEE ON INTERNATIONAL LAW IN NATIONAL COURTS

WORKING SESSION

FRIDAY, 29 MAY 1998, 2:30 PM

Chair: Professor Maureen Williams (HQ/Argentina)

The Chair declared the working session open.

Judge Gilbert Guillaume (Chair of the Committee, French Branch) introduced the report of the Committee, which had been prepared by Professors Ivan Shearer and Torsten Stein. He noted that information had been received from 25 national branches and that it was hoped to publish the results of the survey. In particular, it was hoped that some progress could be made in assisting judges to understand the application and potential of international law in their courts.

Professor Torsten Stein (Co-Rapporteur, German Branch) spoke to the report. He commented that the report was based on information, of varying depth, from 25 national reports as well as from the participation of about 12 members of the Committee. There was a lack of information on Eastern Europe, and to some extent the report was limited by that factor. Professor Stein gave a brief history of the Committee and noted that in the first report an attempt had been made to identify the different national practices in respect of the observance of international law, and in that context a distinction had been drawn between continental and common law systems. At Helsinki the Committee had been given the mandate to look more precisely at the role of international law in national legal orders and this task had been undertaken through specific questions in a survey.

Professor Stein explained that it was the view of the Committee members that the Committee should be terminated following the Taipei conference. Its work was substantially complete. In particular, he noted that it was ultimately the national legal systems that decide how to, and if to, enforce decisions of international courts. The preparedness of States to change their traditional practice, which may involve constitutional amendment, is limited, and it would have been unrealistic to propose revolutionary changes to the way international law was treated by national law. Instead, the Committee concentrated its proposals on ensuring that national courts and judges are aware of international law.

Professor Ivan Shearer (Co-Rapporteur, Australian Branch) then made some comments in relation to the final point of the draft resolution. He noted that the 25 national reports were an extremely valuable collection of source

INTERNATIONAL LAW ASSOCIATION

LONDON CONFERENCE (2000)

COMMITTEE ON FORMATION OF CUSTOMARY (GENERAL) INTERNATIONAL LAW

Members of the Committee:

Professor M H Mendelson QC (UK): *Chairman*
Professor Rein Mullerson (Estonia): *Rapporteur*

Professor Kadar Asmal (South Africa)
Professor Smilja Avramov (Yugoslavia)
Dr Kaare Bangert (Denmark)
Professor Borut Bohte (Slovenia)
Professor Maarten Bos (Netherlands)
Professor Genevieve Burdeau (France)
Professor Francesco Capotorti (Italy)
Alternate: Professor Luigi Ferrari Bravo
Professor Hilary Charlesworth (Australia)
Professor B Cheng (UK)
Dr G M Danilenko (Russia)
Professor Ingrid Detter (Sweden)
Professor Dencho Georgiev (Bulgaria)
Dr Kamal Hossain (Bangladesh)
Ms Basanti Mitra (India)
Mr Davis R Robinson (USA)
Professor Davorin Rudolf (Croatia)
Professor Meinhard Schroder (Germany)
Alternate: Professor Rudolf Geiger
Professor Guido F S Soares (Brazil)
Professor Yuichi Takano (Japan)
Alternate: Professor Shinya Murase
Dr Mark E Villiger (Switzerland)
Professor Maureen Williams (HQ/Argentina)
Professor Karol Wolfke (Poland)

FINAL REPORT OF THE COMMITTEE

STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW*

[...]

9. The practice of the executive, legislative and judicial organs of the State is to be considered, according to the circumstances, as State practice.

Commentary.

(a) According to some earlier writers[37] State practice consists only of the practice of those organs capable of entering into binding agreements on behalf of the State - in other words, the head of State, head of government and foreign minister. However, this approach is closely linked to one which regards customary law as merely tacit treaty law. If one has no *a priori* attachment to such a theory, there is no reason why the criteria should be so restrictive.[38] As a matter of comparative constitutional law and of legal theory, the State comprises the constituent, legislative, and judicial branches as well as the executive. It is certainly the case that the activities of organs of the State other than the executive can also engage its international responsibility;[39] and although this is not a conclusive argument, in the present context the analogy seems persuasive. See further, paragraphs (c) to (e) below.

(b) Certainly, the actions of the whole of the executive, and not just the foreign ministry, should count. In modern practice, it is not always the foreign ministry which has the "lead" in international negotiations and transactions: it can be the ministry of finance, transport, and so on. Unless an organ of the executive is acting outside the scope of its authority and its conduct is disavowed by higher authorities, there seems to be no good reason why the ability to create State practice should be confined to the foreign ministry.

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[37] E.g. Strupp, "Les règles générales du droit de la paix", 47 *RCADI* (1934-I), pp. 313-315; cf. Anzilotti, *Cours de droit international* (tr. Gidel, 1929), 74-75.

[38] *Accord* e.g. Ferrari-Bravo, "Méthodes de recherche de la coutume internationale dans la pratique des Etats", 192 *Collected Courses* (1985), 237, 259-61; Daillier & Pellet, *Droit international public* (6th ed. 1999), 321.

[39] See Arts. 5 & 6 of the International Law Commission's draft on State Responsibility, *Yearbook of the ILC* 1980-II, Part 2, 30-34.

(c) The practice of States and international tribunals shows that a State's legislation (including its constitution, which may, for instance, include claims to zones of maritime jurisdiction) can also be regarded as a manifestation of its practice.[40] In addition to the reasons given in paragraph (a) above, it is by no means everywhere the case that only the executive has a role in international transactions: for instance, in many countries the legislature (or a section of it) has a part to play in the making of war and peace, the negotiation of treaties, and so forth. Again, a country's legislation will normally apply to aliens within its territory (and so affect their national State); and it may also be extraterritorial in its range, thus affecting the interests of other States.

(d) Domestic courts, too, are organs of the State, and their decisions should also be treated as part of the practice of the State.[41] For example, a determination that international law does or does not require State immunity to be accorded in a particular case, or the extraterritorial application of a domestic law. This observation is unaffected by the fact that decisions of national courts can also be regarded as (more or less persuasive) "subsidiary means for the determination of rules of law" within the meaning of Article 38(1)(d) of the Statute of the ICJ.

(e) It can happen, particularly in countries where there is a separation of powers, that the position of the judiciary (or of the legislature) conflicts with that of the executive. This is a matter of what *weight* is to be attached to the various instances of the State's practice (see Section 3 above). In the ultimate analysis, since it is the executive which has primary responsibility for the conduct of foreign relations, that organ's formal position ought usually to be accorded more weight than conflicting positions of the legislature or the national courts. But it should also be noted that, in such a case, the internal uniformity or consistency which is needed for a State's practice to count towards the formation of a customary rule may anyway be prejudiced (see Section 13 below).

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[40] See e.g. *Nottebohm case (2nd Phase), ICJ Rep.* 1955, p. 4 at p. 22.
[41] See e.g. *"Lotus" case, PCIJ Ser. A.*, no. 10, pp. 23, 26, & 28-9.

§ 103

Evidence of International Law

(1) Whether a rule has become international law is determined by evidence appropriate to the particular source from which that rule is alleged to derive (§ 102).

(2) In determining whether a rule has become international law, substantial weight is accorded to

(a) judgments and opinions of international judicial and arbitral tribunals;

(b) judgments and opinions of national judicial tribunals;

(c) the writings of scholars;

(d) pronouncements by states that undertake to state a rule of international law, when such pronouncements are not seriously challenged by other states.

COMMENTS & ILLUSTRATIONS:

Comment:

a. Primary and secondary evidence of international law. Section 102 sets forth the "sources" of international law, i.e., the ways in which a rule or principle becomes international law. This section indicates the means of proving, for example, in a court or other tribunal, that a rule has become international law by way of one or more of the sources indicated in § 102.

Under Subsection (1), the process of determining whether a rule has been accepted as international law depends on the particular source of international law indicated in § 102 from which the rule is alleged to derive. Thus, for customary law the "best evidence" is proof of state practice, ordinarily by reference to official documents and other indications of governmental action. (Similar forms of proof would be adduced as evidence that a state is not bound by a principle of law because it had dissented, § 102, Comment d). Law made by international agreement is proved by reference to the text of the agreement, but appropriate supplementary means to its interpretation are not excluded. See § 325. Subsection (2) refers to secondary evidence indicating what the law has been found to be by authoritative reporters and interpreters; the order of the clauses is not meant to indicate their relative importance. Such evidence may be negated by primary evidence, for example, as to customary law, by proof as to what state practice is in fact.

A determination as to whether a customary rule has developed is likely to be influenced by assessment as to whether the rule will contribute to international order.

For the practice of United States courts in determining international law, see § 113.

b. Judicial and arbitral decisions. Article 59 of the Statute of the International Court of Justice provides: "The decision of the Court has no binding force except between the parties and in respect of that particular case." That provision reflects the traditional view that there is no stare decisis in international law. In fact, in the few permanent courts, such as the International Court of Justice, the Court of Justice of the European Communities, and the European Court of Human Rights, there is considerable attention to past decisions. See § 903, Reporters' Note 8. That may be

expected, too, of the Inter-American Court of Human Rights established in 1979. In any event, to the extent that decisions of international tribunals adjudicate questions of international law, they are persuasive evidence of what the law is. The judgments and opinions of the International Court of Justice are accorded great weight. Judgments and opinions of international tribunals generally are accorded more weight than those of domestic courts, since the former are less likely to reflect a particular national interest or bias, but the views of national courts, too, generally have the weight due to bodies of presumed independence, competence, impartiality, and authority.

Under the foreign relations law of the United States, determinations of international law by courts in the United States are respected to the same extent as other determinations of law; lower courts must of course accept decisions of higher courts, and the determinations of the Supreme Court of the United States are conclusive on all courts in the United States. See § 112(2).

c. Declaratory resolutions of international organizations. States often pronounce their views on points of international law, sometimes jointly through resolutions of international organizations that undertake to declare what the law is on a particular question, usually as a matter of general customary law. International organizations generally have no authority to make law, and their determinations of law ordinarily have no special weight, but their declaratory pronouncements provide some evidence of what the states voting for it regard the law to be. The evidentiary value of such resolutions is variable. Resolutions of universal international organizations, if not controversial and if adopted by consensus or virtual unanimity, are given substantial weight. Such declaratory resolutions of international organizations are to be distinguished from those special "law-making resolutions" that, under the constitution of an organization, are legally binding on its members. See § 102, Comment g.

REPORTERS NOTES:

1. Writings of international law scholars. The "teachings of the most highly qualified publicists of the various nations" are treated in Article 38(1)(d) of the Statute of International Court of Justice as subsidiary means for the determination of international law. See § 102, Reporters' Note 1. Such writings include treatises and other writings of authors of standing; resolutions of scholarly bodies such as the Institute of International Law (Institut de droit international) and the International Law Association; draft texts and reports of the International Law Commission, and systematic scholarly presentations of international law such as this Restatement. Which publicists are "the most highly qualified" is, of course, not susceptible of conclusive proof, and the authority of writings as evidence of international law differs greatly. The views of the International Law Commission have sometimes been considered especially authoritative. See, e g., North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark & Netherlands), [1969] I.C.J. Rep. 3, 33 et seq.

2. Declaratory resolutions of international organizations. Article 38(1)(d) of the Statute of the International Court of Justice, § 102, Reporters' Note 1, does not include resolutions of international organizations among the "subsidiary means for the determination of rules of law." However, the Statute was drafted before the growth and proliferation of international organizations following the Second World War. Given the universal character of many of those organizations and the forum they provide for the expression by states of their views regarding legal principles, such resolutions sometimes provide important evidence of law. A resolution purporting to state the law on a subject is some evidence of what the states voting for the resolution regard the law to be, although what states do is more weighty evidence than their declarations or the resolutions they vote for. The evidentiary value of such a resolution is high if it is adopted by consensus or by virtually unanimous vote of an organization of universal membership such as the United Nations or its Specialized Agencies. On the other hand, majorities may be tempted to declare as existing law what they would like the law to be, and less weight must be given to such a resolution when it declares law in the interest of the majority and against the interest of a strongly dissenting minority. See, e.g., the General Assembly resolution declaring that the use of nuclear weapons is a violation of international law (G.A. Res. 1653, U.N. GAOR, Supp. No. 17 at 4), and the "Moratorium Resolution" declaring that no one may mine for resources in the deep-sea bed until there is an agreed international regime and only in accordance with its terms (G.A. Res. 2574(D), 24 U.N. GAOR, Supp. No. 30, at 11), both of which were challenged by the United States, a principal power immediately affected by those resolutions. See § 523, Reporters' Note 2. Even a unanimous resolution may be questioned when the record shows that those voting for it considered it merely a recommendation or a political expression, or that serious consideration was not given to its legal basis. A resolution is entitled to little weight if it is contradicted by state practice, Comment a, or is rejected by international courts or tribunals. On the other hand, a declaratory resolution that was less than unanimous may be evidence of customary law if it is supported by thorough study by the International Law Commission or other serious

expected, too, of the Inter-American Court of Human Rights established in 1979. In any event, to the extent that decisions of international tribunals adjudicate questions of international law, they are persuasive evidence of what the law is. The judgments and opinions of the International Court of Justice are accorded great weight. Judgments and opinions of international tribunals generally are accorded more weight than those of domestic courts, since the former are less likely to reflect a particular national interest or bias, but the views of national courts, too, generally have the weight due to bodies of presumed independence, competence, impartiality, and authority.

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legal examination. See, for example, the reliance on one United Nations General Assembly resolution but deprecation of another resolution by the arbitrator in Texas Overseas Petroleum Co. v. Libyan Arab Republic (1977), 17 Int'l Leg.Mat. 1 (1978).

Resolutions by a principal organ of an organization interpreting the charter of the organization may be entitled to greater weight. In some instances, such an interpretation may, by the terms of the charter, be binding on the parties, for example, those of the Council of the International Coffee Organization. See Charter of the International Coffee Organization, 469 U.N.T.S. 169. Declarations interpreting a charter are entitled to considerable weight if they are unanimous or nearly unanimous and have the support of all the principal members.

See generally Schachter, "The Crisis of Legitimation in the United Nations," 50 Nordisk Tidsskrift for International Ret 3 (1981).

CROSS REFERENCES: Digest System Key Numbers:

International Law 2

ARTICLES

Challenging the Classical Concept of Custom: Perspectives on the Future of Customary International Law

By David P. Fidler*

Introduction

Of all the sources of international law, customary international law (CIL) is perhaps the most controversial. International lawyers, tribunals and scholars consider treaties and CIL to be the two most important sources of international law, but treaties do not generate the controversy CIL creates. CIL causes problems wherever it is referenced: in the public international law course in law school, scholarly debate or the legal arguments before international or national courts. Every student, scholar and practitioner of international law faces a paradox with CIL: CIL stands at the heart of modern international law while generating frustration and frictions in its identification and application. CIL appears indispensable and incomprehensible. In the contemporary international system, is CIL, to steal to a phrase from *Winston Churchill*, a riddle inside a mystery wrapped in an enigma?

In this Article, I explore CIL to discover whether any sense can be made out of the different attitudes towards it in scholarly literature. My exploration proceeds in four parts. In Part I, I outline what I call the 'pedagogical perspective', which is the traditional perspective on CIL taught in law school. Analyzing the pedagogical perspective illustrates the difficulty students, scholars and lawyers have with CIL in its classical form. The pedagogical perspective indicates that CIL is not easy to teach because it is not easy to understand. The troubles that arise in trying to figure out classical CIL suggest that the pedagogical perspective is inadequate to guide future thought about CIL. This inadequacy encourages the search for alternative perspectives about CIL and its place in international law.

* I would like to thank *Jill M. Sears* and *Jack A. Bobo*, my research assistants, for their help in preparing this Article. I would also like to thank *Jost Delbrück* and *Curtis A. Bradley* for their generous comments and ideas on an earlier draft.

The difficulties rife with CIL found in the pedagogical perspective serve as an introduction to three alternative perspectives on CIL analyzed in Part II, which I call the dinosaur, dynamo and dangerous perspectives. These three perspectives disagree on the role of CIL in international law. Analyzing these perspectives adds further confusion to the attempt to understand CIL because the perspectives differ dramatically on the potential of CIL. While the confusion in the pedagogical perspective mainly stems from its failure to make sense of the fundamental elements of CIL, the confusion created by analyzing the dinosaur, dynamo and dangerous perspectives flows from differing attitudes about the potential CIL holds for international relations. These differing attitudes invite us to widen our examination even more to include international relations theory.

In Part III, I attempt to explain the differences between the three perspectives through placement of the dinosaur, dynamo and dangerous perspectives within basic traditions of international relations theory. These traditions suggest that the differences between the three contemporary perspectives run deeper than disagreements on how traditional elements of CIL are used and reveal diverse images of international relations at work in analysis of CIL. This part of the analysis demonstrates that the problems associated with CIL ultimately stem from competing perspectives on international relations. Such a demonstration argues for seeking a more coherent understanding of CIL not in further refinements of the pedagogical perspective but in theories of international relations that might provide common ground for the dinosaur, dynamo and dangerous perspectives.

In Part IV, I explore whether liberal international relations theory offers any potential to synthesize the three competing perspectives. In the post-Cold War era, liberal thought is ascendent, perhaps providing a coherent way to reconcile the confusion surrounding CIL. I conclude that liberal international relations theory does not provide synthesis but instead presents its own very radical perspective on CIL that differs from the pedagogical, dinosaur, dynamo and dangerous perspectives. Having pursued a desire for a more coherent understanding of CIL from the pedagogical perspective into the realm of international relations theory, I conclude that the future of CIL in international law and relations will remain controversial because the riddle of CIL turns out to be a choice driven not by legal analysis but by assumptions about the nature and potential of international relations.

I. The Pedagogical Perspective

As indicated above, the 'pedagogical perspective' refers to how CIL is traditionally taught in law school.[1] Although such generalizations are always suspect, every

[1] Another writer refers to this perspective as the 'orthodox account' of CIL. *See Daniel M. Bodansky*, Customary (and not so Customary) International Environmental Law, Indiana

student of international law learns the basic elements of CIL. The pedagogical perspective presents CIL as an established, well-understood process of international law formation; but, as each element of CIL is analyzed, CIL begins to be incoherent. It becomes apparent that the pedagogical perspective attempts to explain a process that has troubling weaknesses. These weaknesses have been the source for many attempts to lay a more coherent foundation for CIL.[2] Also disturbing about the pedagogical perspective is its failure to place CIL into context within international relations. It remains in that sense legalistic in its primary focus on the legal elements of CIL.

1. The Basics of Customary International Law

a) Definition of Customary International Law

As defined in Article 38(1)(b) of the Statute of the International Court of Justice (ICJ), CIL is defined as "international custom, as evidence of a general practice accepted as law."[3] The pedagogical perspective presents this definition as authoritative because it appears in Article 38(1) of the ICJ Statute, which "is generally regarded as a complete statement of the sources of international law."[4] Even though Article 38 (1)(b) is the starting place for the pedagogical perspective, this definition has been criticized by many international legal scholars. *Karol Wolfke* observes that international legal scholars find the definition in Article 38(1)(b) defective because general practice accepted as law is evidence of custom not the other way around as stated in Article 38(1)(b).[5] A deeper problem raised by the faulty drafting in Article 38(1)(b) is that, according to *Wolfke*, "the drafters of the Statute themselves had no clear idea as to what custom was."[6] *Wolfke* bases this assertion on his analysis of the drafting of the Statute for the Permanent Court of International Justice.[7] The authoritative starting point for the pedagogical perspective turns out to be a badly drafted definition that the drafters of the Statute did not seem to understand.

Journal of Global Legal Studies, vol. 3, 1995, 105, 108.

[2] *Michael Byers*, Custom, Power, and the Power of Rules: Customary International Law from an Interdisciplinary Perspective, Michigan Journal of International Law, vol. 17, 1995, 109, 136 (noting the problems with the traditional presentation of CIL and the "many attempts to explain the process of customary international law in a theoretically coherent way"). *See also G. M. Danilenko*, Law-Making in the International Community, 1993, 128 (noting the continuing controversial nature of CIL and arguing for "an authoritative clarification of how customary law is created, changed, or abrogated").

[3] Statute of the International Court of Justice, Article 38(1)(b).

[4] *Ian Brownlie*, Principles of Public International Law, 4th ed., 1990, 3.

[5] *Karol Wolfke*, Custom in Present International Law, 2nd rev. ed., 1993, 5 - 6.

[6] *Id.*, 8.

[7] *Id.*, 2 - 5.

Other definitions have been offered as better attempts to define CIL, but "[n]o definition of customary law has received universal agreement."[8] The Restatement (Third) of the Foreign Relations Law of the United States states that CIL "results from a general and consistent practice of states followed by them from a sense of legal obligation"[9] and that the essence of this definition "has wide acceptance."[10] The Restatement definition puts into clearer language the elements of CIL and emphasizes that CIL flows from State practice and a sense of legal obligation. The pedagogical perspective tends not to dwell on Article 38(1)(b)'s problems but moves quickly into an examination of the traditional elements of CIL, which appear in Article 38 (1)(b) as well as other definitions like the Restatement's.

b) Elements of Customary International Law

The traditionally recognized elements of CIL are: (1) general State practice, (2) uniform State practice and that (3) such State practice is accompanied by a sense of legal obligation, often referred to as *opinio juris sive necessitatis*.[11] The British international lawyer *Brierly* tried to capture the essence of CIL by observing that "what is sought for is a general recognition among states of a certain practice as obligatory."[12] The elements of CIL boil down to an 'objective' element — State practice — and a 'subjective' element — *opinio juris*.

aa) State Practice

State practice is an objective concept because international lawyers can discern it by observing what States do. International lawyers look for two things in State practice when searching for CIL: generality and uniformity of practice.[13] General State practice refers to a practice that is widespread in the international system but does not require that every State in the system adopts the practice.[14] Uniform State practice means that one can identify in a general State practice behavior following a coherent, identifiable rule or principle. State practice does not have to be identical but only has to demonstrate that States are acting more or less upon the same prin-

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[8] Restatement (Third) of the Foreign Relations Law of the United States, § 102, Reporters' Note 2.

[9] *Id.*, § 102(2).

[10] *Id.*, § 102, Reporters' Note 2.

[11] *Brownlie* (note 4), 5 - 7; *Byers* (note 2), 136.

[12] *J. L. Brierly*, The Law of Nations, 6th ed., 1963, 61.

[13] *Brownlie* (note 4), 5 - 6.

[14] *Id.*, 6.

ciple.[15] Although the pedagogical perspective presents generality and uniformity as distinct elements of CIL, in practice the two meld together in a unitary analytical process. International lawyers cannot, for example, analyze whether State practice is general without having identified a practice that is uniform.

In engaging in the empirical task of identifying whether a State practice is general and uniform, international lawyers consider all types of evidence: treaties, policy statements, diplomatic correspondence, national legislation, resolutions of multilateral fora and much more.[16] In relation to State practice, the pedagogical perspective presents the image of the international lawyer dispassionately engaging in an empirical task through the analysis of available evidence. This image is misleading because the State practice element of CIL contains serious problems that call into question whether analysis of State practice is really objective.

The vast array of sources of State practice that an international lawyer should analyze are so numerous as to call into question the feasibility of the analysis of State practice. It stretches credibility to tell students that international lawyers thoroughly examine for any given State each category of possible evidence of State practice. Credibility disappears completely if students are told that this exercise is repeated faithfully for a large number of the approximately 185 States in the current international system to determine whether a practice is general and uniform. International lawyers have to be selective about what types of evidence of State practice are analyzed and which States have their practice analyzed.

Picking and choosing from among the long list of possible sources of evidence of State practice usually brings up the 'words versus action' problem. This problem crops up when international lawyers have to decide whether to give more weight to the actions of States or to their written or spoken justifications, declarations or policies. A well-known 'words versus action' example is found in the controversy surrounding the importance of votes for or against UN resolutions as evidence of State practice. One of the best known scholars of CIL — *Wolfke* — argues that verbal acts, such as voting on UN resolutions, "do not constitute acts of conduct, nor, even multiplied, any conclusive evidence of any state practice."[17] Other authoritative scholars such as *Ian Brownlie* include verbal acts as material sources of custom.[18] The practice of the ICJ supports the position taken by *Brownlie* as the ICJ refers, for example, to resolutions of the UN in its decisions.[19] *Michael Byers* believes that a "compromise position" is emerging between the two extremes "to the effect that

[15] *Id.*, 5.

[16] *Id.*

[17] *Wolfke* (note 5), 84.

[18] *See Brownlie* (note 4), 5.

[19] *See, e.g., Military and Paramilitary Activities in and against Nicaragua* (Merits) (Nicaragua v. United States), 1986 ICJ 14, para. 188.

resolutions and declarations are instances of state practice which do not carry as much weight as those instances of state practice that involve more traditional forms of state practice."[20] Although such a compromise position would serve the pedagogical perspective well, I submit that no such compromise position has in fact been reached. Not only does ICJ practice clearly give UN resolutions great weight in analyzing CIL but also the three perspectives to be analyzed later in this Article take different positions on the value of resolutions and declarations from multilateral fora. Thus, the pedagogical perspective gives equal or greater weight to the 'words' of States as to their 'actions'.

Students often find the equality of 'words' and 'actions' in analyzing State practice questionable because the history of international relations proves that verbal acts by States are less than revealing about a State's intentions or ultimate course of behavior. Virtually every State has in one form or another condemned torture as a violation of international human rights law; but, if Amnesty International is to be believed, torture has been widely practiced in the international system.[21] The willingness to give 'words' equal weight with 'actions' typically found in the pedagogical perspective is the first indication that it avoids placing the CIL process directly into context with the real world of international politics.

A related problem comes up in connection with selecting evidence of State practice from among approximately 185 States. Under the pedagogical perspective, State practice has to be general and uniform throughout the international system and not just among a few States. Further, the doctrine of the equality of sovereign States, enshrined in the United Nations Charter,[22] means that all State practice should be equal under the CIL process. The combination of the principles of generality and uniformity of State practice and of the equality of sovereign States poses significant problems for the pedagogical perspective. To execute faithfully the dictates of the above-mentioned combination of principles would require thorough examination of the vast array of types of evidence of State practice for most if not all of 185 sovereign States. Even if adequate digests of State practice for every country in the world were available, such an examination would be prohibitively time-consuming and inefficient. Practically speaking, international lawyers typically analyze the State practice of a small number of prominent and powerful States.[23] Although the peda-

[20] *Byers* (note 2), 118.

[21] *See* Amnesty International, Report on Torture, 1973, and Amnesty International, Torture in the Eighties, 1984.

[22] UN Charter, Article 2(1) (stating that the UN "is based on the principle of the sovereign equality of all its Members").

[23] *Jonathan Charney*, Universal International Law, American Journal of International Law (AJIL), vol. 87, 1993, 529, 537 (stating that "when authorities examine the evidence necessary to establish customary law, they consider actions of a limited number of states, often only the largest, most prominent, or most interested among them"). *See also Hiram Chodosh*, Neither

gogical perspective insists on *general* State practice, this requirement is ignored in the actual analysis of CIL. This problem goes deeper. The pedagogical perspective fails to acknowledge that in reality some States are more equal than others. As *Byers* observes, the "concept of formal state equality is considerably less useful with respect to the process of customary international law" than with respect to treaties because "it is generally easier for more powerful states to engage in behavior which will significantly affect the maintenance, development, or change of customary rules than it is for less powerful states to do so."[24] The pedagogical perspective again shows its legalistic approach by failing to place the doctrines of general and uniform State practice and of sovereign equality into political context.

Rather than presenting the image of the international lawyer as an objective analyst of State practice, we find instead the pedagogical perspective presenting an inaccurate caricature of the operation of the analysis of State practice in the CIL process. There is nothing sinister about this situation because international law professors often discuss the traditional requirements for CIL quickly and incompletely for lack of time to devote to the problems of the pedagogical perspective. Directly confronting the problems with State practice produces, moreover, questions about the entire concept of CIL itself. If, in fact, the requirement for general and uniform State practice is not really observed, then the accumulated wisdom of the international legal profession on CIL crystalized in the pedagogical perspective seems like less than wisdom.

bb) *Opinio Juris*

The subjective element of CIL — *opinio juris* — refers to the motives behind State behavior.[25] For a general, uniform State practice to become CIL, the practice must be accompanied by a sense of legal obligation.[26] In other words, a State must behave a certain way out of a sense of legal obligation. Students of international law often join their professors in struggling to handle this 'psychological' element of CIL.[27]

Treaty nor Custom: The Emergence of Declarative International Law, Texas International Law Journal, vol. 26, 1991, 87, 102 (observing that "[t]he number of states required to meet the generality requirement is often no more than a mere handful").

[24] *Byers* (note 2), 115. *See also* discussion of the role of the great powers in CIL formation in *Wolfke* (note 5), 78 - 79.

[25] For a general analysis of *opinio juris* see *Jo Lynn Slama*, Note: *Opinio Juris* in Customary International Law, Oklahoma City University Law Review, vol. 15, 1990, 603.

[26] *Brownlie* (note 4), 7.

[27] *Wolfke* writes that "[a]s regards the subjective element of international custom, the confusion in the theory and . . . also in the practice of the [ICJ], is still deeper and much more complex." *Wolfke* (note 5), 44.

A well-known problem with the pedagogical perspective's use of *opinio juris* is its circularity. *Anthony D'Amato* poses the circularity problem this way: "How can custom create law if its psychological component requires action in conscious accordance with law preexisting the action?"[28] The pedagogical perspective cannot explain how general and uniform State practice creates new CIL or modifies existing CIL because *opinio juris* requires that State practice already conform to existing law. Even though the *opinio juris* element makes it impossible to explain how new CIL is created or existing CIL is modified, the pedagogical perspective maintains that *opinio juris* remains a critical element of CIL.[29]

Another problem with *opinio juris* is determining how to locate this sense of legal obligation in State practice. International lawyers must apparently find *opinio juris* expressed generally and uniformly in State practice for such practice to be accompanied by the requisite sense of legal obligation. All the problems confronting the analysis of generality and uniformity in State practice raise their heads as well in connection with the identification of *opinio juris*. With *opinio juris*, however, even more difficulties abound. If a State behaves in a certain way that is consistent with other State practice, but such a State says nothing about why it behaves the way it does, then how does an international lawyer find *opinio juris*? In other words, *opinio juris* constitutes a special kind of State practice that requires a certain kind of evidence. Such special evidence may not, however, be readily available. As *Hedley Bull* observed, States often behave in accordance with rules of international law not because they respect the law but because such behavior serves raw self-interest.[30] If a State declares that it is behaving a certain way out of a sense of legal obligation, then we confront the 'words versus action' problem again. Can international lawyers take a State's words at face value, or does *opinio juris* require an independent analysis of a State's motivation? If statements reflecting a sense of legal obligation are to be taken at face value, then is not *opinio juris* really just a matter of 'objective' evidence of State practice?

These questions indicate that the concept of *opinio juris* as presented by the pedagogical perspective is problematical. If we look to the practice of the ICJ on identifying *opinio juris*, the picture does not get clearer. According to *Brownlie*, the ICJ has adopted two approaches to *opinio juris*.[31] First, *Brownlie* argues that in the

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[28] *Anthony A. D'Amato*, The Concept of Custom in International Law, 1971, 66. The Restatement (Third) of the Foreign Relations Law of the United States also mentions the circularity problem. *See* § 102, Reporters' Note 2.

[29] *See, e.g., Brownlie* (note 4), 7.

[30] *Hedley Bull*, The Anarchical Society, 1977, 140. *See also A. Mark Weisburd*, Customary International Law: The Problem of Treaties, Vanderbilt Journal of Transnational Law, vol. 21, 1988, 1, 9 ("adherence to a rule provides no guidance because such usage does not necessarily prove that actors see themselves as subject to a legal obligation").

[31] *Brownlie* (note 4), 7.

majority of cases, the ICJ has assumed that *opinio juris* exists because general and uniform State practice exists.[32] This 'no scrutiny' approach essentially writes *opinio juris* off as an independent element of CIL formation.

Second, the ICJ has in a few cases required positive evidence that *opinio juris* be present in State practice.[33] *Brownlie* cites the *Lotus* case, the *North Sea Continental Shelf* cases and *Nicaragua v. United States* as examples of the Permanent Court of International Justice's (PCIJ) and ICJ's application of a 'strict scrutiny' approach to *opinio juris*.[34] In the *Lotus* Case[35] and the *North Sea Continental Shelf* Cases[36], the PCIJ and ICJ respectively found no positive evidence of *opinio juris* to support the alleged rules of CIL. In *Nicaragua v. United States*, the ICJ found positive evidence of *opinio juris* for the rule prohibiting the use or threat of force in the "attitude of the Parties and the attitude of states towards certain General Assembly resolutions[.]"[37] Reliance upon such 'verbal acts' as UN resolutions raises the 'words versus action' problem in connection with determining whether *opinio juris* exists. Technically, resolutions of the UN General Assembly have no legal status or force but constitute political or aspirational statements.[38] If a State supports a UN General Assembly resolution that asserts, for example, that all States have a legal duty to act in a certain way or refrain from acting in a certain way, does the non-legal character of the resolution taint it as evidence of *opinio juris*? *Wolfke* argues that "votes cast by the members do not necessarily represent the actual acceptance as law of the conduct only verbally postulated in the context of the recommendation since the motive for such votes may be various."[39] In *Nicaragua v. United States*, even the ICJ observed that "[t]he mere fact that states declare their recognition of certain rules is not sufficient for the Court to consider these as being part of customary international law, and as applicable as such to those states."[40] But the ICJ in *Nicaragua v. United States* relied heavily on UN resolutions for evidence of State practice and even more heavily for evidence of *opinio juris*. Clearly the ICJ perceives no problem with discovering *opinio juris* in documents without legal status or force. The same concern could be raised about finding *opinio juris* in other sorts of evidence of State practice that are primarily political: policy statements, press releases, diplomatic correspondence etc. The pedagogical perspective does not address the anomaly of finding a sense of legal obligation in evidence that is quintessentially political in origin and intent.

[32] *Id. Byers* also asserts that the ICJ "while supporting the concept of *opinio juris* in principle, has repeatedly ignored it in practice." *Byers* (note 2), 140.

[33] *Brownlie* (note 4), 7.

[34] *Id.*, 7 - 9. The ICJ also required positive proof of *opinio juris* in two cases involving the formation of regional custom. *See* the *Asylum* case (Colombia v. Peru), 1950 ICJ 266, 277 and *Right of Passage over Indian Territories* (Portugal v. India), 1960 ICJ 6, 40.

[35] *Lotus* case (France v. Turkey), 1927 PCIJ (ser. A), No. 9, 23 - 26.

[36] *North Sea Continental Shelf* cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), 1969 ICJ 4.

[37] *Nicaragua v. United States* (note 19), para. 188.

[38] *Brownlie* (note 4), 14.

[39] *Wolfke* (note 5), 84.

[40] *Nicaragua v. United States* (note 19), para. 184.

Another 'words versus action' problem in connection with finding *opinio juris* comes in the following form: if 'verbal acts' are evidence of general and uniform State practice, is the location of *opinio juris* in the same verbal acts merely to collapse *opinio juris* into general and uniform State practice? In other words, is the 'strict scrutiny' approach of the ICJ in *Nicaragua v. United States* the same as the 'no scrutiny' approach in that *opinio juris* is presumed to exist in a general and uniform State practice? These questions echo the controversy about whether *opinio juris* is declarative of the existence of a rule of CIL or is constitutive of a rule of CIL.[41] The declarative position is that *opinio juris* merely serves to declare that a rule of CIL has formed.[42] Under the declarative position, finding *opinio juris* in evidence of State practice that also demonstrates uniformity and generality is not problematical. Under the declarative position, however, *opinio juris* is not apparently critical to the formation of a rule of CIL because it exists merely to recognize the rule of law developed independently of *opinio juris*. Such a position parallels the 'no scrutiny' approach of the ICJ but flies in the face of the pedagogical perspective's teaching that *opinio juris* is necessary to the formation of a rule of CIL. The pedagogical perspective, thus, contains the constitutive position, which holds that *opinio juris* is critical to the formation of a rule of CIL.[43] The constitutive position supports the 'strict scrutiny' approach of the ICJ. The use of UN resolutions and declarations to constitute evidence of both general and uniform State practice and *opinio juris* seems, however, suspect under the constitutive position because *opinio juris* is independent of generality and uniformity as a precondition for CIL rule formation. Students should be forgiven for seeing analytical cacophony in *opinio juris* as presented by the pedagogical perspective.

A final 'words versus action' problem is more substantive. How do we analyze State practice and *opinio juris* when the words and actions of States obviously differ? *Nicaragua v. United States* serves as a good illustration of this problem. Both Nicaragua and the United States verbally recognized in many contexts the prohibition on the use or threat of force, as pointed out by the ICJ. But it was also clear that both the United States and Nicaragua believed that using force directly or indirectly

[41] For a discussion of this controversy see *Olufemi Elias*, The Nature of the Subjective Element in Customary International Law, International and Comparative Law Quarterly, vol. 44, 1995, 501.

[42] *Id.*, 502.

[43] *Id.*

against another State was an effective instrument of national policy, which is exactly the type of belief the prohibition on the use or threat of force was designed to outlaw. Did the United States and Nicaragua *really* demonstrate a general and uniform practice supporting the non-use of force or a sense of legal obligation not to use or threaten to use force in arming insurgencies in other States?[44] Heavy reliance on verbal acts in ascertaining *opinio juris* can threaten to create a gap between international law and international politics. Again, the pedagogical perspective suffers from a lack of political context, much as it does in connection with the requirements of generality and uniformity of State practice.

c) Universally Binding Nature of CIL

If a general, uniform State practice accompanied by *opinio juris* is identified, then the pedagogical perspective informs students that the rule formed by the practice and accepted as law binds all States except persistent objectors (*see* discussion of persistent objector rule below). The universally binding nature of CIL raises some difficult questions for the pedagogical perspective. As noted earlier, CIL analysis typically examines the practice of a small number of States and then asserts the existence of rules that bind all States whether the rest of the States had their practice examined or even knew about the practice allegedly supporting the rule. This situation calls into question the legitimacy of binding all States under rules based on selective analyses of State practice. Under the pedagogical perspective, the theory used to explain the binding nature of CIL is the theory of State consent. This theoretical explanation contrasts, however, with the reality that many States never 'consent' to rules of CIL. As *Jonathan Charney* has argued, many international lawyers have abandoned the idea that CIL is binding under the theory of State consent because the theory does not explain what really happens in CIL formation.[45] Again, the pedagogical perspective seems out of touch with how CIL works in the real world. Here the gap between the pedagogical perspective and the actual operation of CIL erodes the legitimacy of CIL's binding nature, undermining the place CIL occupies in international law.

[44] One might find in the justifications States give to explain actions that violate international law evidence of *opinio juris* in that justifications often seek to affirm the legal principles the States violate. Leaving aside the possibility that many justifications are merely hypocritical rhetoric by States, a deeper problem with seeing such justifications as evidence of *opinio juris* is that the justifications actually evidence that a State believes that the legal principle in question is only binding under those conditions States find convenient and/or in the national interest. The traditional theory of *opinio juris* does not recognize a conditional sense of legal obligation on the part of States.

[45] *Jonathan Charney*, The Persistent Objector Rule and the Development of Customary International Law, British Yearbook of International Law, vol. 56, 1985, 1, 16.

d) Persistent Objector Rule

As mentioned earlier, under the pedagogical perspective the only exception to the universally binding nature of CIL is the persistent objector rule.[46] If a State consistently and without interruption opposes the formation of a rule of CIL, then that rule does not bind such a persistent objector.[47] The pedagogical perspective claims that the persistent objector rule recognizes the importance of State consent in the formation of CIL.[48]

The pedagogical perspective's presentation of the persistent objector rule has come in for significant criticism. Some international lawyers reject State consent as a theoretical foundation for the persistent objector rule because State consent cannot be the basis for the binding nature of CIL.[49] Without State consent as a theoretical foundation, the persistent objector rule loses coherency. The remaining line of defense is that State practice recognizes the persistent objector rule.[50] *Charney* questions whether State practice really supports the persistent objector rule and asserts that the rule can only appeal to a small amount of supporting State practice.[51] Further, the way CIL actually forms severely limits the potential of the persistent objector rule because, as *Charney* argues, "many states do not know that the law is being made and thus have not formed an opinion."[52] The solid place the persistent objector rule occupies in the pedagogical perspective confuses students given the lack of a credible theoretical explanation and limited support for the rule found in State practice.

[46] For general analysis of the persistent objector rule see *Ted Stein*, The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law, Harvard International Law Journal, vol. 26, 1985, 457; *Charney* (note 45); *David A. Colson*, How Persistent Must the Persistent Objector Be?, Washington Law Review, vol. 61, 1986, 957.

[47] *Brownlie* (note 4), 10. The ICJ has recognized the importance of the persistent objector rule in the following cases: *Asylum* case (note 34), 277 - 278; *Fisheries* case (United Kingdom v. Norway), 1951 ICJ 116, 131, 139; and *North Sea Continental Shelf* cases (note 36), 18 - 19, 27.

[48] *Wolfke* (note 5), 66.

[49] *See, e.g., Charney* (note 45), 16 - 18.

[50] *See, e.g., Brownlie* (note 4), 10 (arguing that "[w]hatever the theoretical underpinnings of the [persistent objector] principle, it is well recognized by international tribunals, and in the practice of states").

[51] *Charney* (note 45), 16.

[52] *Charney* (note 23), 537.

The Central Appeals Court infers from this that the Dutch position with regard to the content and scope of the relevant provisions of the ILO Conventions in relation to the point at issue here is the same as that taken by the Committee of Experts and accordingly considers that there is no further role for the courts to play in interpreting the Convention in so far as the aim of such interpretation can only be a more limited interpretation of the relevant provisions than that envisaged by the party to the Conventions, in accordance with the view of an authoritative body of the relevant international organisation.

The Central Appeals Court therefore holds that Article 3a of the Health Insurance Fund (Hospital Care) Decree is incompatible with treaty provisions binding on all persons and must for this reason not be applied.

It follows from the findings thus far that the challenged judgments and the disputed decisions of the defendant must be quashed ...'

1.204 SELF EXECUTING TREATY PROVISIONS
See: 1.203

2.01 CONFLICTS BETWEEN SOURCES
See: 1.203 (pp. 238-240)

2.2 CUSTOMARY LAW

Federatie Werknemers in de Zeevaart [FWZ, Federation of Employees in the Shipping Industry], Koninklijke Vereniging van Nederlandse Reders [Royal Association of Dutch Shipowners] and the Minister of Transport, Public Works and Water Management, Equal Treatment Commission [Commissie Gelijke Behandeling], 4 February 1997, RV (1997) No. 96,[21] Oordelenbundel (1997) No. 13, NIPR (1997) No. 235.

— As a result of the distinction between seamen according to their country of residence made in Article 3 of the collective agreement for merchant vessels with a gross tonnage of up to 9,000 tonnes,[22] the persons adversely affected are mainly of Philippine or

21. Note by C.A. Groenendijk. Discussed by A.A.H. van Hoek in *Sociaal Recht* (1997) pp. 353-359 and by K. Wentholdt in *NJCM-Bulletin* (1998) pp. 449-450.

22. Art. 3(1) of the collective agreement reads: 'The pay and terms of employment agreed between the bona fide trade union organisations established in the country of residence and the employer shall apply to employees resident in the Philippines, Indonesia and any other countries specified by collective agreement. In the absence of a bona fide trade union organisation the pay and terms of employment shall be agreed direct between the Vereniging van Werkgevers in de Handelsvaart (Association of Employers in the Merchant Marine, VWH) and the Federation of Employees in the Shipping Industry (FWZ). The pay and terms of employment must at least fulfil the international conventions, recommendations and agreements. The other pay and conditions of employment mentioned in this collective agreement are not applicable to this category of employee.'

Indonesian nationality. Article 3 of the collective agreement therefore discriminates indirectly on the basis of nationality within the meaning of Article 1 of the Equal Treatment Act.[23]

— For an exception to the prohibition of discrimination on the basis of nationality under Article 2, paragraph 5(a), of the Equal Treatment Act[24] *through the application of unwritten rules of international law there should be established State practice and* opinio juris. *The custom of using seamen from low-wage countries can be said to constitute established State practice.* Opinio juris *means that the conviction must have been formed that it is a proper way to act. As regards a custom which permits a particular act – a so-called permissive rule – the proof of state practice and the absence of protest by other States is sufficient to conclude that a rule of customary law exists. There is no evidence that other countries or the countries of origin of the seamen protested against this. The said custom can therefore be regarded as an unwritten rule of international law.*

— In order to determine whether there is an exception to the prohibition of discrimination on the basis of nationality owing to the existence of an objective ground of justification under Article 2, paragraph 1, of the Equal Treatment Act,[25] *the following criteria are applied: the objective of the act must have nothing whatever to do with discrimination, the means chosen to achieve the objective must be in keeping with the real needs of the organisation and must be appropriate and necessary in order to achieve the stated objective. The provisions of Article 3 of the collective agreement satisfy these criteria.*

— In order to promote legal certainty, a recommendation will be made to the Minister of Transport, Public Works and Water Management that a statutory provision allowing the present discrimination be introduced.

23. Art. 1 of the Equal Treatment Act provides that discrimination should be deemed to include discrimination between persons on the grounds of nationality in a political sense. Discrimination is taken to mean both direct and indirect discrimination. Indirect discrimination on the basis (in this case) of nationality is discrimination on the basis of a criterion other than nationality which results in direct discrimination on the basis of nationality. Art. 5, para. 1(d), of the Equal Treatment Act, in conjunction with Art. 1 of the same Act, prohibits discrimination on the basis of nationality in, *inter alia*, conditions of employment. See 28 *NYIL* (1997) p. 308.

24. Art. 2, para. 5(a), of the Equal Treatment Act provides that the prohibition of discrimination on the basis of nationality as contained in the Equal Treatment Act does not apply if the discrimination is based on generally binding regulations or written or unwritten rules of international law.

25. Art. 2, para. 1, of the Equal Treatment Act provides that the prohibition of discrimination contained in the Equal Treatment Act does not apply to indirect discrimination that is objectively justified.

The Facts: The Federation of Employees in the Shipping Industry requested the Equal Treatment Commission to rule on the question whether Article 3, paragraph 1, of the collective agreement for merchant vessels with a gross tonnage of up to 9,000 tonnes is in breach of the Equal Treatment Act. Article 3 of the collective agreement is included in order to be able to employ seafarers resident in these countries at the rates of pay customary in their countries of residence on ships sailing under the Dutch flag. The Federation of Employees in the Shipping Industry was a party to the collective agreement on behalf of the employees. Both the Royal Association of Dutch Shipowners, also acting on behalf of the Association of Employers in the Merchant Marine (the party to the collective agreement on behalf of the employers) (interested party I) and the Minister of Transport, Public Works and Water Management (interested party II) were given the opportunity to make known their views on the present request to the Commission.

Held: '... *As regards competence*

4.3 Interested party I is of the opinion that the Commission is not competent to rule on this matter. The Equal Treatment Act is, after all, an elaboration of Article 1 of the Constitution. This Article is limited in the scope of its territorial application to the territory of the Netherlands and the relevant provision of the collective agreement relates to employees who are outside the Netherlands.

The Commission notes that the relevant provision of the collective agreement has been included in a collective provision declared generally binding in the Netherlands and to which Dutch law is applicable. In view of the above, the Commission is of the opinion that it has jurisdiction to review the actions of the applicant as a party to the collective agreement by reference to the Equal Treatment Act. The above is not altered by the fact that the relevant provision extends beyond the territory of the Netherlands. In the opinion of the Committee, the operation of the Equal Treatment Act is not restricted in the manner alleged by interested party I.

...

In answering the question at issue the Commission holds as follows:

4.5 The Commission notes that Article 3 of the collective agreement permits a distinction in remuneration between seamen resident in the Philippines or Indonesia and seamen resident elsewhere. In brief, remuneration according to national criteria is permitted for the former group. The Commission is of the opinion that this distinction does not constitute direct discrimination on the basis of nationality. Persons resident in one of the two above-mentioned countries do not, after all, necessarily possess the nationality of one of these countries.

4.6 The next question at issue is whether the provisions of Article 3 of the relevant collective agreement constitute indirect discrimination between seamen resident in the Philippines or Indonesia and other seamen covered by the collective agreement.

The Commission notes that the applicant and the interested parties have recognised – or have not sufficiently disputed – that the place of residence of the persons concerned is generally in their country of origin. It follows that discrimination on the basis of

country of residence generally coincides with discrimination on the basis of nationality. The Commission concludes that the discrimination on the basis of country of residence in Article 3 of the collective agreement means that the persons adversely affected are mainly of Philippine or Indonesian nationality. The disputed decision therefore gives rise to indirect discrimination on the basis of nationality.

4.7 The interested parties at I and II have also submitted that the indirect discrimination is not contrary to the following provisions of the Equal Treatment Act: (a) [...]; (b) Article 2, paragraph 5 (a); (c) Article 2, paragraph 1. The Commission holds as follows on this point.

...

4.9 *As regards Article 2, paragraph 5(a), of the Equal Treatment Act*

...

4.10 With respect to the question of whether the present discrimination is based on unwritten rules of international law in connection with the provisions of Article 2, paragraph 5 (a) (second part), of the Equal Treatment Act, the Commission holds as follows.

Legal scholars are virtually unanimous in the view that two conditions must be fulfilled if customary international law is to be formed [K. Ipsen, *Völkerrecht* (1990) p. 191].[26] First of all, there must State practice and, second, the custom must have been converted into a rule of customary law: the so-called *opinio juris*.

As regards the State practice, legal scholars take the view that such practice must involve active action by States [K. Brownlie, *Principles of International Law* (1990) p. 5]. Such action may also consist of an omission. The custom must be formed by recurring action. The practice must be similar, sufficiently clear and consistent. Acts of private individuals can also contribute to the formation of a customary rule, but only in so far as these acts are encouraged or at least tolerated by the State [R. Bernhardt, 'Customary International Law', in the *Encyclopaedia of Public International Law*, Vol. 2 (1995) p. 900].

The Commission notes that the State of the Netherlands has incorporated the practice of using seamen from low-wage countries in its policy for the shipping industry and tolerates the actions of the parties to the collective agreement in this respect. In addition, this action has been repeated over time and the practice in this regard is similar to that of neighbouring States and is sufficiently clear and consistent. The Commission would observe in this connection that uniformity or absolute consistency is not required. For the reasons given above, the Commission holds that the custom of manning ships with seamen from low-wage countries can be said to constitute a State practice.

There is less agreement among legal scholars about *opinio juris*. The majority view is that the conviction must have been formed that this is a proper way to act [P.H. Kooijmans, *Internationaal publiekrecht in vogelvlucht* (1996) pp. 20-21]. A minority

26. It should be noted that the text in square brackets is the text of footnotes included by the Commission in its ruling.

view is that a will must have been formed to convert the customary rule into a rule of customary law and that this will must have been manifested [H. Meijers, *Mededelingen NIVR*, No. 91 (1985) p. 62].

The Commission takes the majority view of legal scholars and holds that as regards a custom which permits a particular act – a so-called permissive rule – the proof of State practice and the absence of protest by other States is sufficient to conclude that a rule of customary law exists. As regards the practice of employing seamen from low-wage countries at a lower wage on ships, there is no evidence that other countries or the countries of origin of these seamen have protested about this.

The Commission is of the opinion on the basis of the above that this custom can be regarded as an unwritten rule of international law. It follows that no prohibited indirect discrimination on the basis of nationality is made in article 3 of the collective agreement.

4.11 The Commission would point out, *ex abundantia*, that on the basis of the minority view it could be doubted whether the State of the Netherlands has expressed its will to a sufficient extent in this matter and made known that it wishes to convert the custom into a legal rule. If it had done so, there would not necessarily be an unwritten rule of international law. This is why the Commission will investigate whether the indirect discrimination made on the basis of nationality is objectively justified.

4.12 *As regards Article 2, paragraph 1, Equal Treatment Act*

Under Article 2, paragraph 1, of the Equal Treatment Act, the prohibition of indirect discrimination does not apply in cases where the indirect discrimination is objectively justified. In deciding whether there is an objective ground of justification, the Commission applies the following criteria [Lower House of Parliament, 1990-1991, 22 014, No. 3, p. 14, and Court of Justice of the European Communities, *Bilka-Kaufhaus v. Weber von Hartz*, 13 May 1986, case 170/84]:

— the objective of the act must have nothing whatever to do with discrimination;

— the means chosen to achieve the objective must be in keeping with the real needs of the organisation;

— the means must be appropriate and necessary in order to achieve the stated objective.

The objective in this case is to maintain the continuity and profitability of the Dutch shipping companies and to defend the competitive position of Dutch shipping internationally. The Commission is of the opinion that this objective has nothing whatever to do with discrimination.

The means chosen to achieve this objective is the recruitment of seamen resident in the Philippines or Indonesia at local wages and in jobs for which no qualifications are needed.

4.13 As regards the question whether the means meets a real need of the organisation and is appropriate and necessary in order to achieve the stated objective, the Commission holds as follows.

In the explanatory notes for parliament on Article 2, paragraph 1, of the Equal Treatment Act it is observed that the question whether there is an objective justification must be assessed by reference to general criteria and on the basis of general points of

view [Lower House 1991-1992, 22 014, No. 5, p. 72]. In this respect the Commissio considers the following to be important.

It has been established that the seamen in question have their ordinary place o residence or sojourn outside the Netherlands. The seamen live in countries where th living standards are substantially lower than in the Netherlands. They are not in practic subject to the Dutch legal order. In addition, it has been established that the terms an conditions of employment of the seamen comply with the minimum requirements lai down by the International Labour Organisation. The pay of the persons concerned i substantially higher than the pay for comparable jobs in their countries of residence, an payment of wages at Dutch rates is considered undesirable by the authorities in th countries of residence owing to the unacceptable social consequences.

Furthermore, it has been established that this practice of remuneration has evolve over time and is still sanctioned by all parties concerned in the context of maintainin Dutch shipping companies. It is important to note in this connection that the appointmen of seamen from low-wage countries is part of a coherent package of government measure to protect and maintain the maritime sector. The present measure is customary not onl in the Netherlands but also internationally in order to compete effectively.

Taking account of all of this, the Commission considers that in the preser circumstances it has been shown that the means meets an real need of the organisatio and, in combination with the other government measures, is appropriate and necessar in order to achieve the stated objective in this case.

If it were therefore necessary to determine whether there is indirect discrimination a prohibited in Article 3 of the relevant collective agreement, the Commission would b of the opinion on the above grounds that this would be objectively justified and th the disputed provision would not therefore be contrary to the Equal Treatment Act.

...

4.15 *Recommendation to interested party II*

The Commission is of the opinion that the exceptions in the Equal Treatment Act t the prohibition of discrimination should be interpreted restrictively in order to ensur that the equal treatment rule is not unduly undermined [see, *inter alia*, Equal Treatmer Commission, 30 September 1996, ruling 96-77].

Assessment of whether one of the exceptions to the prohibition of discrimination o the basis of nationality is applicable reveals that there is a complex issue in the preser case. This concerns both the question of unwritten rules of international law and th question of the objective justification of indirect discrimination. It follows that in th event of a change in the relevant circumstances the outcome of this assessment ma also change.

To promote legal certainty the Commission recommends to interested party II th as regards merchant shipping a statutory provision allowing the present distinction b introduced.

5. *The ruling of the Commission*

APPEAL COURT, HIGH COURT OF JUSTICIARY

Lord Prosser

Lord Kirkwood

Lord Penrose

Trident Missiles Case

Misc 11/00

OPINION OF THE COURT

in

LORD ADVOCATE'S REFERENCE
NO. 1 OF 2000

by

HER MAJESTY'S ADVOCATE

in terms of

Section 123 of the Criminal Procedure
(Scotland) Act 1995

Referring for

THE OPINION OF THE HIGH COURT

Points of law arising in relation to
charges upon which, on trial on
indictment in the Sheriff Court at
Greenock there were acquitted

(FIRST) ANGELA ZELTER, (SECOND)
BODIL ULLA RODER and (THIRD)
ELLEN MOXLEY

Appellant: Menzies, Q.C., Di Rollo, A.D. for the Lord Advocate; Crown Agent:

L. Murphy, Q.C. for the Advocate General

Respondents: Party: Moynihan, Q.C., *amicus curiae* for Ms A. Zelter: I. Anderson, Mayer; Livingstone Brown: A.M. O'Neill, Q.C.; J McLaughlin, McCourts

30 March 2001

Introductory

[1] Angela Zelter, Bodil Roder and Ellen Moxley stood trial on indictment at Greenock Sheriff Court on 27 September 1999 and subsequent dates. The indictment contained four charges, all of which were directed against all three accused, and all of which related to events alleged to have occurred on 8 June 1999, on board the vessel "Maytime", then moored in the waters of Loch Goil. "Maytime" had a role in relation to submarines carrying Trident missiles. Charge 2 (a charge of attempted theft) was not insisted in by the Crown, and need not be referred to further. Charges 1 and 3, and the first alternative under charge 4, were all charges of malicious damage. Charge 1 related to some minor damage to the vessel

itself. Charge 3 related to damage to equipment, fixtures and fittings on board the vessel. And charge 4 related to damage to a quantity of computer equipment and other moveables said to have been deposited in the waters of Loch Goil and thereby to have become waterlogged, useless and inoperable. The alternative to this fourth charge was that the accused removed these items from the vessel, deposited them in Loch Goil and thus stole them.

[2] At the conclusion of the trial, on 21 October 1999, the sheriff directed the jury to return a verdict of not guilty in respect of each of the accused, on charges 1 and 3 and on both of the alternatives contained in charge 4. In accordance with this direction, the jury unanimously found all three accused not guilty on these three remaining charges.

Lord Advocate's Reference

[3] Section 123(1) of the Criminal Procedure (Scotland) Act 1995 provides *inter alia* as follows:

> "Where a person tried on indictment is acquitted or convicted of a charge, the Lord Advocate may refer a point of law which has arisen in relation to that charge to the High Court for their opinion..."

[4] This petition is presented by the Lord Advocate in terms of section 123(1) of the 1995 Act. He refers four Questions of law to the court for our opinion. In accordance with procedures set out in section 123, the first respondent, Angela Zelter, elected to appear personally (as she had done at the trial) and each of the second and third respondents elected to be represented by counsel (as they had been at the trial). On 4 April 2000, the court appointed a hearing to be fixed in respect of the Reference: and also *inter alia*, in respect that Ms. Zelter had not elected to be represented by counsel, appointed G.J.B. Moynihan, Q.C. to act as *amicus curiae*. The court did not require formal Answers, but appointed all parties to lodge skeletal arguments. Written statements of argument were subsequently lodged by all parties, although not all could be described as skeletal.

Subsidiary Issues

[5] Various matters have been raised by the parties by motions made at various stages in the proceedings. In addition, however, certain other applications require to be mentioned.

[6] On behalf of the second respondent, a petition was presented to the *nobile officium* of the court as a means of raising certain preliminary points in connection with the Lord Advocate's Reference. That petition proceeded upon certain fundamental misconceptions as to the history and nature of the proceedings. So far as insisted in, the points in question could be and were raised in the course of the proceedings. That having become evident, no further argument was advanced on behalf of the second respondent to show that the petition to the *nobile officium* was necessary or indeed competent. It was not however abandoned. At the end of the proceedings, the advocate depute moved us *inter alia* to dismiss that petition. That is plainly appropriate.

[7] At various dates prior to the hearing fixed in relation to the Lord Advocate's Reference, Minutes were lodged on behalf of each of the three respondents, giving notice of an intention to raise devolution issues in connection with the Reference. In addition to the issues raised in these Minutes, their presentation naturally gave rise to questions of procedure, and in particular the question of whether the issues raised in these Minutes, or any of them, required to be considered and disposed of before any hearing on the Lord Advocate's Reference and the Questions upon which he sought the court's opinion. Hearings to resolve the matters contained in these Minutes were fixed to coincide with the hearing in relation to the Reference itself. We considered it more appropriate to hear the submissions of parties in relation to the Questions set out in the Reference before hearing the submissions of parties on the matters raised by these Minutes. In the event, many of these latter issues were thus rendered academic, and were not insisted in. The lodging of these Minutes resulted in the Advocate General being represented at the hearing, but in the event nothing remained upon which counsel for the Advocate

General wished to make any submissions. We consider such issues as did remain, briefly, at the end of this Opinion.

Competency

[8] In various ways and at various stages, points have been raised on behalf of each of the respondents, and by the *amicus curiae*, as to whether one or more of the Questions set out in the Lord Advocate's petition might be incompetent, in terms of section 123(1) of the 1995 Act. It did not appear to us that the issues regarding the competency of any of these Questions could be resolved satisfactorily before we had heard the submissions of parties on the substantive issues. In particular, we did not see it as possible to decide *a priori* in relation to any Question whether it could be said to express a point of law which had "arisen" in relation to any of the charges, or to determine in advance the nature, scope or indeed number of any points of law which we might consider to be raised by any particular Question. In these circumstances, we reserved the issue of competency, indicating to the parties that in their submissions they would be permitted, and indeed expected, to cover issues which they considered had arisen in relation to the charges but which they saw the questions as framed as failing to identify, or indeed evading. In the event, this procedure did not appear to us to produce any difficulty, and we touch upon questions of competency along with the substantive issues.

The Questions

[9] The Questions set out in the petition are these:

1. In a trial under Scottish criminal procedure, is it competent to lead

   evidence as to the content of customary international law as it applies to the United Kingdom?

2. Does any rule of customary international law justify a private

   individual in Scotland in damaging or destroying property in pursuit of his or her objection to the United Kingdom's possession of nuclear weapons, its action in placing such weapons at locations within Scotland or its policies in relation to such weapons?

3. Does the belief of an accused person that his or her actions are justified

   in law constitute a defence to a charge of malicious mischief or theft?

4. Is it a general defence to a criminal charge that the offence was

   committed in order to prevent or bring to an end the commission of an offence by another person?

Procedure at the Trial

[10] Before coming to other matters, we think it useful to mention certain matters in relation to procedural aspects of the trial. The Crown led a number of witnesses, and the sheriff tells us that none of the Crown evidence was really in dispute. In addition, six joint minutes were lodged, relating to such matters as the recovery of property from the Loch, the cost of replacement or repair, and evidence linking the accused with presence on the vessel. All three accused gave evidence, and it is worth noting that in relation to the events of 8 June 1999, and indeed the background to these events, they admitted much of what the Crown wished to establish in support of the charges. However, the evidence which the accused sought to put before the jury, either personally in their evidence or by evidence from other witnesses, included evidence as to a wide range of matters relating to the U.K's Trident missiles, and

also evidence as to customary international law. This gave rise to numerous objections, and argument upon matters of competency, admissibility and relevancy. Apart from the three accused, four defence witnesses were called - Professor Paul Rogers, Professor Francis Boyle, Rebecca Johnston and Judge Ulf Panzer. At this stage we merely note that the sheriff allowed evidence from these witnesses, although with certain restrictions.

[11] At the conclusion of the defence evidence, on 19 October 1999, the sheriff allowed the first accused and counsel for the other accused to make submissions outwith the presence of the jury. These submissions were concluded the next day, when the procurator fiscal responded. Further submissions were then advanced by counsel for both the second and third accused. The submissions had covered quite a range of matters. After an adjournment, the sheriff stated certain conclusions which she had reached, and the reasons for reaching them. Overall, she concluded that it fell to her formally to instruct the jury that they should acquit all three accused of the charges relating to wilful and malicious damage. Thereafter, and on the following day, further submissions were heard outwith the presence of the jury in relation to the alternative charge under charge 4, of theft. The sheriff concluded that the jury should be instructed to acquit in respect of that matter also. The jury returned, and as we have indicated, they acquitted on all the remaining charges, on the sheriff's direction.

Issues and Non-Issues

[12] It is worth emphasising that the issues for this court are those raised by the four Questions in the Reference. Answering these questions naturally makes it necessary to consider and resolve certain more specific or subsidiary issues. But before coming to the issues which we think we have to resolve, we think it is worth identifying certain matters which it is not for us to consider, or which we need not consider because the parties are at one.

[13] As was emphasised on behalf of the respondents, this is not an appeal; and quite apart from the provision in section 123(5) of the 1995 Act, that our opinion "shall not affect the acquittal", it is not for us to consider the rightness of the acquittal, as such. On the other hand, the very fact that points of law referred to this court for its opinion must have arisen in relation to charges upon which a person has been acquitted or convicted makes it plain that the answers which are given by the court may show or suggest that in the court's opinion the acquittal or conviction was, or was not, sound. The extent to which that will happen will depend in any particular case upon the questions posed, but also upon the nature of the submissions made by any of the parties to the court, which the court will have to consider. On behalf of the respondents, it was suggested that, having regard to section 123(5) in particular, we should avoid saying anything that would cast doubt on the rightness of their acquittal. We think that is quite wrong. The acquittal will stand, whatever we say. And what we should say depends on what we consider has to be said in relation to the points of law referred to us for our opinion and the submissions made by the parties - including the respondents. The nature of the submissions made by the respondents was such that they relate closely to the soundness of the acquittal. But this is not of the essence of these proceedings. The questions are general, and not particular.

[14] In these circumstances, consideration of the sheriff's reasoning is likewise not of the essence. The arguments with which she was faced in the course of the trial, and the submissions made to her, were in our opinion both confusing and often confused. And they appear at times to have differed substantially from any argument advanced in this court. In the circumstances, we do not find it necessary to consider these arguments and submissions, or the sheriff's reasoning, in any detail.

[15] In factual terms, there was no real dispute at the trial as to what the accused had done. Moreover, at least in this court there was no dispute that what they did was criminal if one ignored certain exculpatory issues raised in their defence. As a foundation for that defence, the respondents sought to show, and in this court contend, that the deployment of Trident missiles by the United Kingdom Government is a breach of customary international law, and as such, illegal and indeed criminal in Scots law. Having regard to what happened at the trial, and to the submissions made in this court, certain questions arise as to the factual basis, or the appropriate hypothesis, upon which we should

proceed in considering the characteristics and implications of the deployment of Trident. But the respondents' basic contention is that the actions of the U.K. Government are criminal in Scots law. Subject to one qualification which we shall mention in due course, it is upon that hypothesis alone that they approach the particular question which arose at trial (whether the otherwise criminal acts of the accused were in some way justified and thus non-criminal) and the more general questions which arise in this court, as to whether there is a justification or defence in relation to otherwise criminal acts of malicious damage or theft, in the ways described in Questions 2, 3 and 4.

[16] It is to be noted that the respondents do not contend that mere *bona fide* belief that the Government's actions were criminal would provide any basis for the further contention that their actions were justified: they proceed upon the basis that the Government must actually be acting contrary to Scots law, for such a further contention to be open to the respondents. It is also to be emphasised that we are not asked, by either the Crown or the respondents, to consider or resolve any questions as to demonstration or protest, or the lawful boundaries of positive action as an expression of opinion. The respondents' position is that their otherwise criminal intervention was of a character and purpose quite different from protest or the like. It was action designed to prevent or obstruct a crime, in circumstances where that intervention was justified and non-criminal - either in terms of customary international law, or in terms of the law of Scotland in relation to the defence of necessity. That was as they submitted, and indeed is, a wholly different matter from the expression of opinion through demonstrative action, or merely symbolic obstruction or civil disobedience in an attempt to bring influence to bear upon Government.

[17] This brings us to a matter which we think we should mention before coming to deal with the Questions upon which our opinion is sought. Demonstration and protest and civil disobedience have a long and indeed proud history. Those who involve themselves in action of that kind will often be willing, or indeed intend, to step over the limits of legality, in order to make their point as forcibly as they can. And correspondingly, they may be willing, or intend, to undergo punishment for any breach of the law - such minor martyrdom perhaps helping to reinforce and publicise the point which they are making. In distinguishing their own position from that world of action, and insisting that their own otherwise criminal conduct was non-criminal because it was justified, the respondents could be seen as moving into a relatively familiar area of legal and jurisprudential discussion: what are the circumstances which our law recognises as entitling a person to do things which would otherwise be criminal? And that is indeed a substantial part of what was put in issue at the trial, and what was the subject of submissions to us.

[18] But three points are to be noted. First, it would be unrealistic to think that the issue arose at trial merely as a legal point which should result in acquittal: it is clear that in doing what they did, the respondents were effectively inviting prosecution, with a view *inter alia* to raising the issue of justification in court, and perhaps inducing some members of the public to see the trial as some kind of "test" case in relation to positive intervention and interference in defence matters. It has thus not only been the Crown who, by their Questions, have raised general issues: the respondents themselves appear to us to have wished to do so, ever since they first planned what they eventually did on 8 June 1999.

[19] Secondly, while issues of justification and necessity may turn upon the prior question of whether an accused was faced with, and in some way trying to prevent, acts by another which were themselves criminal, the criminality of the events which the accused thus tries to avert is not always of the essence. And in taking the alleged criminality of the Government's actions in relation to Trident as a cornerstone of their argument, the respondents appeared to us, particularly in much that was said by Ms. Zelter, to be treating the Government's alleged criminality in this respect not merely as something which had to be established in order to succeed in the defence of necessity and justification, but as itself the primary issue, with the respondents' actions at Loch Goil, and their subsequent trial, amounting to no more than a slightly complicated mechanism for bringing the Crown's conduct in relation to Trident indirectly before a court, for scrutiny and, if possible, condemnation as criminal. As we mention later, Ms. Zelter emphasised that her inability to induce others to take action, in relation to what she perceived as criminal action on the part of the Government, was one of the foundations for arguing that she and the

other respondents had no choice but to do what they did. But we think that it is worth noting, before coming to that particular question, that in addition to their claimed aim of physical prevention of what was being done by the Government in relation to Trident, the respondents appear also to have had, and still to have, the quite different aim of obtaining from a British court a finding that the Government's conduct was criminal.

[20] Thirdly, we should record that some emphasis was placed upon the respondents' membership of an organisation which apparently takes an interest in questions of nuclear weapons and disarmament. That organisation apparently has a number of principles or rules, by which members such as the respondents abide when taking action in furtherance of the organisation's aims. (One such principle is apparently non-violence - familiar enough in the context of protest and civil disobedience, but harder to understand when one is responding to necessity). This is one of a number of background facts which help to explain how these three respondents came together for their Loch Goil exploit, with a significant degree of planning and a substantial body of information or belief as to defence matters and indeed international law. In many ways their action appears to have been a carefully chosen element in a widely-based political campaign. The sheriff, having referred to the various sources of the respondents' knowledge and understanding of such matters, says that the respondents had formed "an unchallenged, sincere, unshakeable view" upon various matters, and contrasts them with "ordinary" peace protesters. We are not sure what is meant by "unchallenged" in this context. And one might suggest that holding "unshakeable" views is not always helpful when their soundness is in issue. The point which we think requires comment relates to the respondents' sincerity. Sincerity is significant, in as much as any kind of bad faith could be destructive of the types of defence which the respondents relied upon, and which underlie Questions 2, 3 and 4. Sincerity is, however, quite common. And at least in the proceedings before this court (apart from a point discussed at paragraphs 49-55 below) we did not understand it to be suggested on behalf of any of the respondents that either in relation to themselves, or upon the more general questions before us, the sincerity of a person's beliefs was in any way relevant except as negating any suggestion of *mala fides* which might be made.

[21] Against this background of matters which are not really in issue, we come to the Questions referred for our opinion.

Question 1: In a trial under Scottish criminal procedure, is it competent to lead evidence as to the content of customary international law as it applies to the United Kingdom?

[22] At the respondents' trial, evidence was led as to the content of customary international law as it applies to the United Kingdom. The sheriff says that it seemed to her that in addition to the "non-legal" experts, "It was absolutely necessary for expert evidence to be led from an expert in international law, and whether or not it has ever been done in Scotland before seemed not to matter if I considered it essential." She goes on to say that "It did not seem appropriate that counsel, not necessarily skilled in international law should address me on such a vital part of the defence". Thereafter she observes that it would not have been difficult for the Crown Office to bring in "counter-experts". It is to be noted that the evidence in question was led before the jury, and not merely before the sheriff (outwith the presence of the jury) as some kind of alternative or substitute for legal submissions. (It is also to be noted that at the trial, the respondents' understanding of what the law was - as distinct from the fundamental question of what the law actually was - was apparently seen as having potential significance. And the reasonableness of their understanding seems to have been regarded by the sheriff as also having a potential significance. But these peculiarities do not appear to us to have any bearing upon this Question).

[23] We are in no doubt that in relation to evidence in the trial itself this Question must be answered in the negative. A rule of customary international law is a rule of Scots law. As such, in solemn proceedings it is a matter for the judge and not for the jury. The jury must be directed by the judge upon such a matter, and must accept any such direction. There can thus be no question of the jury requiring to hear or consider the evidence of a witness, however expert, as to what the law is.

[24] It was pointed out to us that evidence as to foreign law may competently be led in Scottish proceedings. That is because the law in question is foreign, and in Scottish proceedings is a question of fact and not of law. Any analogy between such foreign law and customary international law is false. It was also pointed out that it may be necessary, in some circumstances, to lead evidence as to what a particular person believed the law to be. But that is an entirely different question from the question of what the law is. In such a situation, it would still be the responsibility of the court to direct the jury as to the actual law, which would not be a matter for evidence.

[25] The sheriff's comments afford no reason for leading evidence before the jury upon questions of law. If anything, what they suggest is that it might be desirable for a judge in solemn proceedings to be helped in coming to a correct understanding of the law (which could then be incorporated in directions to the jury) by hearing the evidence of experts or specialists in a particular field of law.

[26] Just as it is for the judge to direct the jury upon a point of law, it is important to remember that it is for the solicitor or counsel appearing on behalf of any party to present to the court any submission which is thought appropriate upon any issue of law. If there is an authoritative basis for any such submission, it may of course be referred to. And we of course acknowledge that a court may find it convenient to be referred to textbooks, articles or other written material which a party's legal representative may put forward in his submissions as providing a succinct or illuminating formulation of some proposition which he wishes to put forward as part of his submissions. A court would not nowadays, in our opinion, reject such a procedure merely because the material was not technically authoritative.

[27] We can see some initial attraction in the suggestion that if a court is willing to read what a particular expert has written in a general context, it might on occasion be sensible to hear what he has to say, in the particular context of the case in hand. We do not feel it appropriate to rule out that possibility, as a matter of law. Such argument as was addressed to us in relation to Question 1 was of course directed primarily to the question of evidence *in causa*, before the jury; and while the possible usefulness of such material to a judge was touched upon, having regard to what the sheriff had said, the point was not fully argued. At that level, we are inclined to think that the matter would be one for the judge's discretion, although we would wish to reserve our opinion on that point. We would, however, add that if in any particular situation it were thought necessary by those representing a party to have recourse to some specialist source of advice, the appropriate course would of course normally be to seek that advice, whether in writing or by consultation or both, so that the appropriate submissions could be made, by that party's representative, at the appropriate time. In matters of customary international law, we can appreciate that the question of whether an *opinio juris* has emerged, and won the general acceptance which is necessary to constitute a rule of customary international law, might well make recourse to expertise appropriate. But having regard to the different skills and expertise of an advocate on the one hand, and some other kind of specialist on the other hand, we find it very hard to imagine any situation in which the appropriate material should be presented to the court in the form of evidence with examination and cross-examination, and perhaps counter-evidence for the other party. We note the sheriff's views. In the present case, the matter was regrettably complicated by the evidence being led in front of the jury, by its becoming entangled in questions as to the respondents' beliefs as to the law, and by the fact that the Crown (quite rightly in our opinion) did not seek to have the issue of law determined by evidence and counter-evidence. But on any analysis, the history of the matter at trial serves as a dire reminder and warning of how issues of law, however recondite or complex, must be carefully identified and formulated both for and by the presiding judge.

Fundamental Principles

[28] Questions 2, 3 and 4 depend on a consideration of a number of fundamental principles of Scots law, as well as questions of customary international law. It is convenient to consider these issues generally, in order to provide a context in which these three Questions can be answered.

Malicious Damage

[29] It is not disputed that what the respondents did amounted in law to malicious damage, if (a) they had the relevant *mens rea* and (b) there was no exculpatory defence whereby the law would see what they did as justified. The second, third and fourth Questions relate not to the general nature of malicious damage or the *mens rea* which it requires, but to issues of justification. But some of the propositions which were advanced, in particular on behalf of the second respondent, make it appropriate for us to say something about malicious damage and the *mens rea* which it requires, before turning to issues of justification.

[30] The context for a discussion of the scope of possible defences to a charge of malicious damage is a proper understanding of the components of the crime itself. The modern crime of malicious damage has been defined as the intentional or reckless destruction or damage of the property of another whether by destroying crops, killing or injuring animals, knocking down walls or fences, or in any other way. The *mens rea* of the crime in the case of intentional damage, which is the only relevant head in the present case, consists in the knowledge that the destructive conduct complained of was carried out with complete disregard for, or indifference to, the property or possessory rights of another. The case of *Ward* v. *Robertson* 1938 J.C. 32 illustrates the boundary between innocent and guilty destructive conduct for present purposes. There was nothing in the facts found in that case to show that the appellant knew or must have known that walking across permanent pasture would render the grass useless or unsuitable for grazing purposes. Had the field been sown with an ordinary commercial crop, the inference of the necessary knowledge would have been drawn. The immediate destructive purpose of the conduct would have been inferred, without regard to underlying motive, from facts and circumstances showing that the appellant knew or must have known that trampling down the crop would have destroyed or damaged it.

[31] The traditional formulation of the *nomen juris* may be potentially misleading. But there is no room for doubt as to the formal requirements of proof of the offence. "Malice" does not require proof of spite or any other form of motive. The constituent parts of the crime are few. The property in question must have belonged to or have been in the possession of another. That property must have been damaged intentionally or recklessly. There must have been knowledge, or facts from which knowledge can be inferred, that the conduct complained of would cause damage to a third party's patrimonial rights in the property in question. In our opinion the admitted facts in the present case show that the respondents set out deliberately to cause damage, including the damage which they did inflict, and there is no substance whatsoever in the argument that they lacked the *mens rea* required for proof of malicious damage. The only substantial issue relates to the contention that they were justified in inflicting that damage.

Basis for claiming Justification

[32] Apart from certain rather confusing submissions as to the nature of malicious damage, and the *mens rea* which it would normally require, the respondents' submissions at trial, and in this court, may be expressed broadly as a contention that what they did should not merely be regarded as a course of action, in isolation, but must be assessed as a reaction or response to what the Government were doing with Trident. And the submission that their reaction or response was justified (in the legal sense of providing a full defence to the charges which they faced) took two distinct forms. First it was contended that what the Government were doing with Trident was itself illegal or criminal, and that that fact made it lawful to take action which would otherwise be criminal to prevent or inhibit the Government's illegal or criminal acts. And as a separate argument, it was contended that what the respondents did was done out of necessity, which in Scots law provides a complete defence. The first of these arguments depended upon customary international law in two different ways. First, it was not suggested that what the Government were doing with Trident would be illegal or criminal apart from customary international law; but it was contended that these actions were illegal or criminal as a matter of customary international law, and thus became so as a matter of Scots law. Secondly, and quite separately, it was argued that again as a matter of customary international law the illegality or criminality of what the Government were doing with Trident constituted a justification (not otherwise to be found in Scots law, and quite apart from any justification by necessity) for what the respondents

had done. This aspect of the submissions advanced on behalf of the respondents can thus be seen as entirely separate from their submissions in relation to necessity. But in some cases where a defence of necessity is advanced, as a justification for acts intended to avert or inhibit danger, it will be necessary to consider whether the alleged danger flows from an act which in some way breaches the civil or criminal law, or from what is an entirely lawful act, notwithstanding any danger that it may create for others. We think that the respondents see the first argument, depending not on necessity but upon customary international law, as the more "important" (perhaps because of a somewhat extraneous wish to have the Government's actions condemned as illegal or criminal, rather than for reasons directly connected with the issue of their own possible guilt). But we find it appropriate to consider the law relating to necessity first, before coming to questions of customary international law and the lawfulness of the Government's conduct in relation to Trident.

Necessity

[33] We do not propose to attempt any definition of the defence of necessity. And we would add that in our opinion any clarification or refinement of the concept of necessity is far more likely to emerge from a particular set of facts in a given case than from consideration of a general question. However, we would agree with what is said in Glanville Williams, *Criminal Law*, page 728:

> "The peculiarity of necessity as a doctrine of law is the difficulty or impossibility of formulating it with any approach to precision...It is in reality a dispensing power exercised by the judges where they are brought to feel that obedience to the law would have endangered some higher value. Sir William Scott said in *The Gratitudine*: 'The law of cases of necessity is not likely to be well furnished with precise rules; necessity creates the law; it supersedes rules; and whatever is reasonable and just in such cases, is likewise legal. It is not to be considered a matter of surprise, therefore, if much instituted rule is not to be found on such subjects.'"

There are nonetheless certain factors which have been authoritatively recognised as contributing to the type of necessity which constitutes a defence, and others which in principle can be seen as having to be taken into account. In any particular case it will be necessary to consider whether the defence is established having regard to such factors.

[34] It was common ground that necessity may be a relevant defence in the case of malicious damage as in other crimes. In appropriate circumstances the property of another might present the kind of immediate danger to the life or health of an individual or that individual's companion described by Lord Justice-General Rodger in *Moss* v. *Howdle* 1997 S.C.C.R. 215 that would justify destruction or material damage. In that case the court held that it made no difference whether the danger relied on arose from a contingency such as a natural disaster or illness rather than from deliberate threats. In the context of damage to property the danger may arise from accident or carelessness which may cause some physical thing to become dangerous. A vehicle rolling out of control towards a crowd might be intercepted by someone other than the owner or driver as the only way of preventing death or injury, even if the actions carried out caused damage to the vehicle. The contingency giving rise to the danger again appears to be immaterial.

[35] If a danger arises from natural causes, as opposed to some kind of human action, the justification for destroying or damaging the property of another obviously does not depend upon any claim to be preventing something unlawful or criminal. But where the danger arises from some human act or omission, which might be in breach of the criminal law or of some civil duty or obligation, the question arises as to what bearing, if any, such considerations might have in judging whether the defence of necessity is established. In the present case, there is no question of the alleged danger arising from contingencies such as natural disaster. The alleged danger is said to be created by the Government's actions. Moreover, there is no question of the danger arising from actions which are delictual or in breach of contract or otherwise in breach of known civil obligations. What is said is simply that the Government's actions are in breach of customary international law, and consequently in breach of

domestic law. In these circumstances, it is unnecessary and inappropriate for us to consider whether any other type of breach of the law could ever be a factor having a bearing upon whether the defence of necessity was established. Furthermore, in the absence of any such other breaches, it is apparent that the Government's actions in relation to Trident must be regarded as entirely lawful unless the breach of customary international law is established. If the Government's actions were thus entirely lawful, notwithstanding any danger that they might create, it is difficult to see how the defence of necessity could be invoked in relation to the otherwise criminal acts of a third party, done in order to prevent such entirely lawful actions. At all events, in the present case it was not submitted that if the Government's acts were lawful the defence of necessity would be available. It is thus an essential element of the respondents' argument in relation to necessity that they must show that the Government is in breach of customary international law. Such a breach is thus essential to the contention founded upon necessity, just as it is essential to the separate contention which is based not upon necessity but upon customary international law alone.

[36] It must, of course, be remembered that while such a breach of law is thus a necessary part of the defence of necessity in the circumstances of this case, that fact in no way diminishes the need to establish necessity according to Scots law, taking all appropriate factors into account. Subject to what we say later in relation to the respondents' argument based upon customary international law, it is not a defence to a charge of malicious damage to contend that the damage was done to prevent the commission of another offence: *Palazzo* v. *Copeland* 1976 J.C. 52, the Lord Justice-General at page 54. The principles of our domestic law are general and clear. A person may not take the law into his or her own hands. A person may not commit an offence in an attempt to stop another. In relation to the defence of necessity, it may of course be the case that criminal conduct is the source of the danger, perhaps in the direct sense of criminal acts which are embarked upon or threatened and are themselves dangerous, or more indirectly as having created or contributed to some circumstances in which an accused claims that it was necessary for him to intervene. But even if such criminality were relevant, as showing that the creation of the danger was not itself lawful, the factors demonstrating necessity are circumstantial factors, concerning the danger itself, and require to be established regardless of whether what gave rise to the danger was a criminal act or, for example, a natural disaster. We turn to consider these factors.

[37] It is clear that timing is a crucial consideration. Immediacy of danger is an essential element in the defence of necessity. Unless the danger is immediate, in the ordinary sense of that word, there will at least be time to take a non-criminal course, as an alternative to destructive action. A danger which is threatened at a future time, as opposed to immediately impending, might be avoided by informing the owner of the property and so allowing that person to take action to avert the danger, or informing some responsible authority of the perceived need for intervention. That authority could then consider whether intervention was in its view necessary, and whether and how it could be carried out legally. If there is scope for legitimate intervention in the time scale set by the circumstances, it is difficult to see why the law should allow a third party to intervene by actions that would ordinarily be characterised as involving criminal conduct. One might not weigh the conduct of the rescuer or intervener in too fine a balance, and there may be marginal cases of difficulty. But making allowance for human judgment in the heat of the moment, the danger to which the individual claims to respond must have the character of immediacy.

[38] A related factor is the range of choice presented by the circumstances. In *Perka* v. *The Queen* [1984] 2 S.C.R. 232 Dickson J analysed the defence of necessity in considerable detail. At page 248, he commented on the concept of necessity as an excuse for conduct which would otherwise be criminal. On his analysis the defence arose where, realistically, the individual had no choice, where the action was "remorselessly compelled by normal human instincts". He adopted the views expressed in George Fletcher: *Rethinking Criminal Law* that involuntary conduct should be excused in the context of criminal law, and observed:

> "I agree with this formulation of the rationale for excuses in the criminal law. In my view this rationale extends beyond specific codified excuses and embraces the residual excuse

known as the defence of necessity. At the heart of this defence is the perceived injustice of punishing violations of the law in circumstances in which the person had no other viable or reasonable choice available; the act was wrong but it is excused because it was realistically unavoidable."

[39] In *Moss* v. *Howdle* the Lord Justice-General, at page 223, referred to the discussion of the juridical basis of the defence of necessity, and declined to add to it. He referred to Dickson J.'s opinion among other authorities, and said:

> "It follows that the defence cannot apply where the circumstances did not in fact constrain the accused to act in breach of the law...Miss Scott did not dispute that the availability of the defence had to be tested in this way, nor that, if Mr. Moss had had an alternative course of action which was lawful, the defence could not apply."

So far then, one can say that the defence is available only where there is so pressing a need for action that the actor has no alternative but to do what would otherwise be a criminal act under the compulsion of the circumstances in which he finds himself.

[40] The next issue, which arises directly from the above, relates to the circumstances justifying action, and is whether it is enough that the actor is driven by considerations personal to him. It appears plain that for action to meet the test there must be reasonable grounds for the view that it is necessary. The test has been expressed in different ways. On one view, the circumstances compelling action must be so extreme that no ordinary human being confronted by them would think that there was an alternative to the criminal conduct if the emergency were to be averted. For the Crown it was contended that the threat leading to action must be so compelling that any normal person would carry out the action in the circumstances confronting the accused. There is a risk that each of these propositions fails to have regard to the reality that there are normal people who may not react to an emergency. Not all normal people are equally brave or of equal resolve. Nor do all normal people perceive emergency or urgency, or danger itself, in the same way. (It is worth emphasising that questions as to "personal" response are very different from questions as to prior personal beliefs or preconceptions).

[41] We were referred to the English law of duress as discussed in *Reg.* v. *Howe* [1987] 1 A.C. 417. The appellants in that case had contended that they had killed their victim under duress. The third question referred to the House of Lords in that case was: "Does the defence of duress fail if the prosecution prove that a person of reasonable firmness sharing the characteristics of the defendant would not have given way to the threats as did the defendant?". At page 426, the Lord Chancellor, Lord Hailsham, said:

> "the definition of duress...was correctly stated by both trial judges to contain an objective element...and this must involve a threat of such a degree of violence that 'a person of reasonable firmness' with the characteristics and in the situation of the defendant could not have been expected to resist. No doubt there are subjective elements as well, but, unless the test is purely subjective to the defendant which, in my view, it is not, the answer to the third certified question,..., must be 'yes'."

In *Reg.* v. *Martin* (1989) 88 G. App. R. 343 Simon Brown J restated the English rule as follows:

> "First, English law does, in extreme circumstances, recognise a defence of necessity. Most commonly this defence arises as duress, that is pressure upon the accused's will from the wrongful threats or violence of another. Equally, however, it can arise from other objective dangers threatening the accused or others. Arising thus it is conveniently called "duress of circumstances". Secondly, the defence is available only if, from an objective standpoint, the accused can be said to be acting reasonably and proportionately in order to avoid a threat of death or serious injury. Thirdly, assuming the defence to be open to the accused on his account of the facts, the issue should be left to the jury, who should be directed to

> determine these two questions: first, was the accused, or may he have been, impelled to act as he did because as a result of what he reasonably believed to be the situation he had good cause to fear that otherwise death or serious physical injury would result? Second, if so, may a sober person of reasonable firmness, sharing the characteristics of the accused, have responded to that situation by acting as the accused acted? If the answer to both these questions was yes, then the ... defence of necessity would have been established."

[42] The Lord Chancellor in *Reg.* v. *Howe* emphasised that duress of circumstances was an aspect of necessity. In *Moss* v. *Howdle* that approach was adopted by the Lord Justice-General. Leaving aside the English terminology, these observations provide considerable assistance in understanding some of the requirements of the general defence of necessity. The actor must have good cause to fear that death or serious injury *would* result unless he acted; that cause for fear must have resulted from a reasonable belief as to the circumstances; the actor must have been impelled to act as he did by those considerations; and the defence will only be available if a sober person of reasonable firmness, sharing the characteristics of the actor, would have responded as he did.

[43] These tests acknowledge that different people respond to danger in different ways. The test applies to what a "sober person of reasonable firmness, sharing the characteristics of the accused" would do. It would not be enough to exclude a defence of necessity, which in all other respects was appropriate, to show that a person with different characteristics from the actor would have lacked the resolve to take effective action. Taking the simple example of a run-away vehicle, one can readily imagine circumstances in which an attempt to interfere with a moving vehicle would expose the actor to personal danger. Some individuals might find that risk unacceptable. In *Perka*, Dickson J included in his preliminary conclusions that the involuntariness of the actor's conduct "is measured on the basis of society's expectation of appropriate and normal resistance to pressure". Society would, in normal course, recognise that there must be a range of acceptable responses to any given danger or other form of pressure. There may be certain dangers that only the most resolute would respond to by intervention.

[44] For the Crown it was contended that for a response to danger to be justified by the defence of necessity the person or persons exposed to risk must be positively identified and have some relation to the actor. On that approach the person who intercepted the run-away vehicle mentioned above would have a defence of necessity if he had a "companion" in the vulnerable crowd, but not if they were all strangers. In our opinion there is no acceptable basis for restricting rescue to the protection of persons already known to and having a relationship with the rescuer at the moment of response to the other's danger. No doubt a close relationship may enter into the issue of necessity in some respects. Proportionality of response may be a function of relationship, for example. A parent's reaction to apprehended danger to a child might reasonably be more extreme than that of an unrelated bystander. But the existence of a prior relationship as a pre-condition of necessity has nothing to commend it, in our view. In this respect we consider that the submissions of the *amicus curiae* were sound. If one had to define "companion" it would be anyone who could reasonably be foreseen to be in danger of harm if action were not taken to prevent the harmful event.

[45] There was considerable discussion whether the defence of necessity could be available where the place and person or persons under threat from the apprehended danger were remote from the locus of the allegedly malicious damage. We can see no reason in principle why the defence should not be so available. In the modern world many industrial processes have inherent in them the potential for mass destruction over a wide area surrounding a given plant. If a person damaged industrial plant to prevent a disaster which he reasonably believed to be imminent but which he could avoid by the actions taken, there is no compelling reason for excluding the defence of necessity solely on the grounds that persons at risk were remote from the plant provided that they were within the reasonably foreseeable area of risk.

[46] It was also contended by the Crown that the actor must, at the material time, have reason to think that the acts carried out had some prospect of removing the perceived danger. In our view that proposition is sound. What the defence is concerned with is conduct directly related to the avoidance of

a particular danger which would cause harm if the acts of intervention were not carried out. If there were no prospect that the conduct complained of would affect the danger anticipated the relationship between the danger and the conduct would not be established. In the context of the destruction of or damage to another person's property to avert danger, having regard to its condition or what was being done to it or with it or the threat presented by it, the connection might ordinarily be easy to establish, as in the case of the run-away vehicle. In other circumstances, if the action could achieve no more than, say, a postponement or interruption of danger (so that it is only averted for a time) or some lessening of its likelihood (without removing the danger even temporarily) the assessment of any necessity would be less simple. In particular, issues of proportionality would arise; and merely making a danger less likely might not be regarded as justified by necessity at all.

[47] As a matter of general principle it appears clear that the conduct carried out must be broadly proportional to the risk. That will always be a question of fact to be determined in the circumstances of the particular case.

[48] There was of course a major dispute between the parties as to whether and how the defence of necessity might be said to be available in the present case. But leaving aside for the moment questions as to the application of the appropriate principles, it appears to us that there was little or no dispute among the parties as to what those principles were - with one exception. It is convenient to consider that exception at this stage.

[49] In the final stages of the hearing, in the second speech for the second respondent, Mr. Anderson introduced an argument which had not been advanced either in the first speech for the second respondent, or on behalf of either of the other respondents. It was not adopted on behalf of either of the other respondents.

[50] Put shortly, the argument was to the effect that the criteria for necessity identified in *Moss* v. *Howdle*, or indeed anywhere else in Scottish authority, did not represent the law of necessity in relation to a particular category of what would otherwise be malicious damage. This was said to be damage done by what were called "citizen interveners". The argument was based on certain American decisions, and as we understood it, was to the effect that these decisions revealed principles which we could and should incorporate into Scots law despite the absence of previous Scottish authority for doing so, presumably as a way of applying old principles to a new kind of situation.

[51] Before considering the American decisions, we would observe that we were not provided with any definition of "citizen interveners". In objective terms, it appears that they are simply citizens who intervene to damage public property. As such, they are apparently defined by their own decision to intervene, and are thus self-selecting and, it seems to us, self-indulgent. As such, it is not clear to us why they require any special description such as "citizen interveners". What one is apparently talking about are people who have come to the view that their own opinions should prevail over those of others, for reasons which are not identified. They might of course be persons of otherwise blameless character and of indubitable intelligence. But they might not. It is not only the good or the bright or the balanced who for one reason or another may feel unable to accept the ordinary role of a citizen in a democracy. It is one curiosity of the expression "citizen intervener" (as indeed it is of the words "global citizen" used by the respondents) that citizenship is invoked by persons who apparently claim to be representing some unidentified category or number of fellow "citizens" - but can point to nothing in any generally understood concept of citizenship which would give them any right to act in furtherance of these particular citizens' wishes, and against the wishes of other citizens.

[52] As Edmund Davies L.J. said in *Southwark London Borough Council* v. *Williams* [1971] 1 Ch. 734 at page 745H, the law regards with the deepest suspicion any remedies of self-help, and permits those remedies to be resorted to only in very special circumstances. "The reason for such circumspection is clear - necessity can very easily become simply a mask for anarchy." (One may note in passing that he went on to observe that it appeared that all the cases where a plea of necessity had succeeded were cases which deal with "an urgent situation of imminent peril"). These observations were quoted with

approval in *Hutchison* v. *Newbury Magistrates Court* 9 October 2000; [2000] E.W.H.C. 24. It is hard to see how such a variety of possible saints and sinners as "citizen interveners" could be regarded as acting out of some special kind of necessity as a matter of law, without introducing anarchy in a particularly shapeless and indeed dangerous form. The phrase is evidently intended to suggest legitimacy of conduct in the public interest. But it seems to have no objective basis justifying any such implication.

[53] Mr. Anderson contended that the general defence of justification was much wider than the Scottish cases and writings suggested, and that American cases, especially *Commonwealth of Pennsylvania* v. *Berrigan* 472 Atlantic Reporter, 2nd Series 1099; 501 Atlantic Reporter, 2nd Series 226; *People* v. *Gray* 571 New York Supplement, 2nd Series 850; and *Commonwealth of Pennsylvania* v. *Capitolo* 471 Atlantic Reporter, 2nd Series 462 contained valuable observations that the court might rely on. Three propositions were said to be established by these authorities. (1) The question of immediacy should not be restricted to reacting immediately; there could be situations in which a delay between the perception of harm and action in response was acceptable. (2) The question whether there were other available legal means of acting should not be confined to ascertaining whether there were in fact such means but should include a consideration of whether the accused reasonably believed that there were other effective means of responding to the situation. (3) In considering the effectiveness of the action taken the court should have regard to the accused's reasonable belief that the action taken would lessen the harm rather than to the true likelihood that the action would avert danger. It seemed to be acknowledged that in terms of Scots law these propositions are novel.

[54] The American cases are not persuasive. *Berrigan* was concerned with two provisions of the Pennsylvania criminal code. In the Superior Court Judge Brosky at paragraph [4] quoted observations of Justice Rehnquist in *United States* v. *Bailey* 444 U.S. 394 on the American common law of necessity, and distinguished them on the basis that: "In Pennsylvania, however, the justification defence enacted by our General Assembly...is an expanded, modern variant on the common law defence of necessity". Justice Rehnquist's comments on the defences of duress and necessity, as a measure of the American common law, are totally destructive of Mr. Anderson's first and second propositions. He said: "Under any definition of these defences one principle remains constant: if there was a reasonable, legal alternative to violating the law, 'a chance both to refuse to do the criminal act and also to avoid the threatened harm', the defences will fail." The adoption by Pennsylvania of a statutory defence which is inconsistent with American common law is an unlikely basis for an amendment to Scots common law. *Capitolo* was decided on the basis of the same code and similar comments apply. *People* v. *Gray* was a decision of a first instance criminal court in New York. Mr. Anderson accepted that many of the propositions found in Justice Safer-Espinoza's opinion were not vouched by other authority. However, he informed us that similar views were held in other first instance criminal courts in America. In citing American authority he reminded us that in *Moss* v. *Howdle* the Lord Justice-General had cited the views of Cardozo J. for the proposition that "Danger invites rescue". There may perhaps be a developing or changing jurisprudence in the criminal courts of the United States. Safer-Espinoza J may in time achieve the eminence of Cardozo J. But it would be premature to accept her judgment as having as yet achieved the status of an authoritative statement of the modern law of necessity in America, much less as having persuasive authority on what the components of that defence should be in other countries.

[55] Mr. Anderson's submissions were wholly lacking in substance. The *amicus curiae* in his submissions suggested that the formulation of the law of necessity in the American Law Institute's Model Penal Code might assist. That code suggests that the defence is available where the actor believes the conduct to be necessary to avoid an evil, to himself or to another, where, *inter alia*, the evil sought to be avoided by his conduct is greater than that sought to be prevented by the law defining the offence charged. That formulation may require more precise scrutiny. But it appears to suffer from a number of defects for present purposes. It introduces an element of personal belief rather than objective reasonableness. It defines the test in terms of comparative evil without apparent regard to the quality of the conduct threatened. It appears to justify a crime carried out to prevent another crime whenever the threatened crime involved a greater harm. It does not seem to require immediacy in any way. In our view American codifications of the criminal law are unlikely to provide a reliable basis for ascertaining

Scots law. The law of Scotland is as declared in *Moss* v. *Howdle*. Reform is not for us, but for Parliament. It is against the background of the factors identified in *Moss* that the defences available to people in the position of the respondents have to be considered.

Legality of Government action: Justiciability

[56] Turning from the principles governing necessity to the issue of the legality of the Government's actings, we consider first the justiciability of such an issue. The advocate depute did not argue that the legality of the deployment of Trident II was not justiciable in this court. Having initiated the present proceedings the Crown was not best placed to do so. But it has to be observed that there may be an important issue which is not disposed of as a result. The position in 1964 is illustrated by *Chandler* v. *Director of Public Prosecutions* [1964] A.C. 763, which involved the activities of the Committee of 100. At page 791, Lord Reid said:

> "It is in my opinion clear that the disposition and armament of the armed forces are and for centuries have been within the exclusive discretion of the Crown and that no one can seek a legal remedy on the ground that such discretion has been wrongly exercised...Anyone is entitled, in or out of Parliament, to urge that policy regarding the armed forces should be changed; but until it is changed, on a change of Government or otherwise, no one is entitled to challenge it in court."

The best interests of the state in matters of defence were a matter for the prerogative.

[57] For the third respondent, Ms Moxley, Mr. O'Neill argued that the law had developed since 1964. There was a growing acceptance that exercise of prerogative powers was open to judicial review. But even upon that basis, the first case he relied on scarcely assisted his position in the present context. In *C. C. S. U.* v. *Minister for the Civil Service* [1985] 1 A.C. 374, the House of Lords discussed the progressive relaxation of the rule that exercise of the prerogative was not justiciable. But there were important qualifications. At page 398, Lord Fraser of Tullybelton said:

> "As *De Keyser's* case shows, the courts will inquire into whether a particular prerogative power exists or not, and, if it does exist, into its extent. But once the existence and the extent of a power are established to the satisfaction of the court, the court cannot inquire into the propriety of its exercise. That is undoubtedly the position as laid down in the authorities...and it is plainly reasonable in relation to many of the most important prerogative powers which are concerned with control of the armed forces and with foreign policy and with other matters which are unsuitable for discussion or review in the law courts."

Lord Diplock at page 412 said that national security, the defence of the realm against enemies, is the responsibility of the executive, and not the courts of justice: "It is par excellence a non-justiciable question". Lord Roskill at page 418 included the disposal of the armed forces among the prerogative powers which were not subject to judicial review.

[58] Mr. O'Neill next discussed the Canadian case of *Operation Dismantle* v. *The Queen* (1985) 18 D.L.T. (4th) 481. The plaintiffs sought an injunction to prevent the testing of the cruise missile on the ground that it conflicted with the right to life assured by section 7 of the Canadian Charter of Rights and Freedoms. The Federal Court of Appeal held that the issues were non-justiciable. The Supreme Court rejected that proposition. Wilson J discussed *Chandler* at some length, putting a gloss on Lord Radcliffe's observations at several points. However she does not appear to have been referred to the *C.C.S.U.* case. Her observations on *Chandler* are in our opinion incompatible with the consistent view in the United Kingdom that the disposition of the armed forces is non-justiciable. The case cannot assist the respondents in this court.

[59] We were next referred to *Reg.* v. *Ministry of Defence ex p. Smith* [1994] Q.B. 517. The case related

to the legality of a rule prohibiting homosexuals from the armed forces. It was held that the prerogative did not preclude the court's jurisdiction. But the terms of the decision are important. The relevant question was discussed only by the Divisional Court. At page 539 Simon Brown L.J. said:

> "I have no hesitation in holding this challenge justiciable. To my mind only the rarest cases will today be ruled strictly beyond the court's purview - only cases involving national security properly so called and where in addition the courts really do lack the expertise or material to form a judgment on the point at issue."

In that case no operational considerations were involved. Finally in this chapter we were referred to *Reg.* v. *Secretary of State for the Home Department ex p. Fire Brigades Union* [1995] 2 A.C. 513. Along with the case of *Smith* this shows a broadening of the circumstances in which the courts will hold questions relating to the exercise of the prerogative justiciable. But they have no direct bearing on the present case.

[60] In our view it is not at all clear that if this issue had been fully debated before us the incorporation of Trident II in the United Kingdom's defence strategy, in pursuance of a strategic policy of global deterrence, would have been regarded as giving rise to issues which were properly justiciable. *Chandler* remains binding authority in this court. Such developments as have taken place seem to have left untouched the status of the prerogative in matters relating to the defence of the realm. However, we have not been asked to dispose of the case on this basis, and we see no alternative but to reserve the issue for another occasion.

Trident and Danger

[61] Question 2 refers to "the United Kingdom's possession of nuclear weapons, its action in placing such weapons at locations within Scotland or its policies in relation to such weapons". We shall return to the terms of the question. We were not asked by the respondents or the Crown to consider the characteristics of any nuclear weapon other than Trident II, although contrasts were drawn between the characteristics of that weapon and others. It is convenient at this stage to note certain undisputed facts about Trident, and to indicate briefly the established facts or suggested hypotheses which it might be necessary to take into account in answering Question 2.

[62] It is not disputed that the United Kingdom possesses Trident II. And while Question 2 takes such mere possession as the starting point in the phrase which we have quoted, no issue arises in relation to such mere possession: an hypothesis of mere possession without any kind of placement or deployment is perhaps somewhat unreal in any event but it is undisputed that Trident II is not thus merely possessed, or in some sense merely held, in Scotland. It is in fact deployed. The respondents are content to proceed upon the basis that mere possession would not entail any illegality on the part of the Government. The decision in *John* v. *Donnelly* 2000 S.L.T. 11 was not questioned. It is not for this court to make factual findings. In particular, it is not for us to make findings as to the characteristics or destructive potential of Trident. Nor is it for us to make findings as to the manner in which Trident is deployed, or any implications derived from its deployment as to the purpose of the deployment, the circumstances, if any, in which it might be used, or the form which the damage which it would cause would take. Nor is it for us to make factual findings as to Government policies or intentions in relation to Trident. It is also to be emphasised that while the sheriff clearly took account of factual evidence in reaching her decision, the trial does not provide us, and the questions do not deal, with any set of facts specific to or established in this case. But having regard to the nature of the questions we do not think that it is necessary, or indeed desirable, to proceed upon any single or established view of the facts. The generality of Question 2, in particular, seems to us inevitably to require a broader approach, considering hypothetical rather than actual situations. And in particular, we regard it as appropriate to consider, as a hypothesis, the situation as the respondents see and describe it. We do not have material upon which we could accept or reject the factual picture which they present to us. But within the ambit of Question 2, we think it necessary to consider what the legal position would be, upon this as well as other hypotheses.

[63] It is said that the Trident nuclear warheads are 100 to 120 kilotons each, approximately eight or ten times larger than the weapons used at Hiroshima and Nagasaki. Emphasis was placed upon the blast, heat and radioactive effects of the detonation of such a warhead, and what were described as the inevitably uncontainable radioactive effects, in terms of both space and time. All these asserted characteristics were relied upon as showing that the damage done, and the suffering caused, could not be other than indiscriminate. Suggestions that the weapons deployed by the United Kingdom could be used in restricted ways, defensively or tactically or being directed only against specific types of target, were said not to be possible, or if possible not to remove this element of being indiscriminate in the suffering and damage which they would cause. In particular, it was said that they would be inevitably indiscriminate as between military personnel and civilians who could not be excluded from the uncontainable effects which we have mentioned. Even if much smaller warheads were used (and the possibility of this was not accepted in the context of the United Kingdom's deployment of Trident) one was still dealing with weapons of mass destruction, with uncontainable consequences.

[64] In addition to relying upon the characteristics of the weapons deployed by the United Kingdom, and the inevitable and indiscriminate consequences which they attributed to them, the respondents relied also upon material which they saw as demonstrating Government intentions and policy, and thus the circumstances in which there was a risk that the weapons would actually be used. In its most general form, the proposition is said to be based upon logic. A deterrent will not deter unless it is credible. It will be credible only if those sought to be deterred are convinced that the weapons would be used (or, one might think, fear that they might). There must therefore, it is said, be an actual willingness and intention to use the weapons, at least in some circumstances. One may doubt the logical perfection of such arguments; but in contending that there was a real risk of actual use, at least in some circumstances, the respondents were able to rely both upon the familiar facts of deterrence (round-the-clock deployment, permanent preparedness to fire at a few minutes notice, long-term targeting and deployments related to particular trouble spots and the like) and also statements in various forms from high Government sources indicating a willingness and intention to use these weapons in response not only to nuclear attack but in certain other circumstances. The respondents of course went into greater detail. We do not find it necessary to do so. But the argument moves from a claim that if certain circumstances were to emerge there would be a risk of threat and actual use, to a portrayal of the risk as already present: there is said to be, inherent in deployment, a continuing and continuous risk of actual use of Trident, and the continuing and continuous "threat" to use it, with its inevitably indiscriminate consequences. The respondents contend both that the United Kingdom's deployment of these weapons is illegal in terms of customary international law, and that recourse to what would otherwise constitute the offence of malicious damage is justified, as a matter of necessity and in order to prevent an illegal act, where the continuity of this risk and threat can be interrupted or reduced by inflicting damage on equipment of the kind found on board "Maytime". The respondents' picture of the deployment of Trident and the policies of Government was not accepted by the advocate depute on behalf of the Crown; but we are satisfied that as an hypothesis, it makes it possible to consider Question 2 in a reasonably specific context, and to regard it as arising from the charges upon which the respondents were acquitted. We shall have to return to the concept of deterrence, and to the particular word "threat" in our consideration of customary international law, to which we now turn.

The legality of the deployment of Trident

[65] The foundation of the respondents' contention that the United Kingdom's deployment of Trident is illegal as a matter of customary international law is the Advisory Opinion given by the International Court of Justice, as requested by the General Assembly of the United Nations by Resolution 49/75K adopted on 15 December 1994, on the question: "Is the threat or use of nuclear weapons in any circumstance permitted under international law?" We were informed by the *amicus curiae* that one of the issues which led to this reference arose from the distinction drawn in debate, by the nuclear States, between deterrence on the one hand and threat of use or use of nuclear weapons on the other hand. The General Assembly clearly hoped that the advisory opinion would provide authoritative guidance on that and other issues. It is of course to be noted that the question related to nuclear weapons in general, and

not to Trident; and that the court was thus not concerned with or considering the particular characteristics of Trident, as distinct from other nuclear weapons which might be less inevitably or uncontainably indiscriminate than Trident is seen as being by the respondents.

[66] Before turning to consider the international court's advisory opinion, we think it worth emphasising that that is what it is: it is an advisory opinion, not a judicial determination of customary international law. For the purposes of giving an advisory opinion, upon the question before them, the court had to consider what was or was not permitted under international law in relation to the threat or use of nuclear weapons. Similarly, this court, in relation to the questions before us and having regard to the contentions of the respondents, must in our opinion consider what is and is not permitted by customary international law in relation to the United Kingdom's deployment and policies in relation to Trident, upon the hypothesis which the respondents say is appropriate. But it is worth emphasising that although the advisory opinion may be regarded as confirmatory of the then rules of customary international law, it is not in itself to be regarded as having changed them. We do not understand the court itself to have taken any other view of its function. And correspondingly, it is this court's function to reach its own conclusions as to the rules of customary international law, taking full account of, but not being bound by, the conclusions reached by the International Court of Justice.

The Advisory Opinion

[67] The court delivered its opinion on 8 July 1996. The court stated at paragraph 20 of its opinion that the real objective of the question was clear: "to determine the legality or illegality of the threat or use of nuclear weapons". That view reflected an approach identifiable in the submissions of certain states appearing before the court that the question posed offered an opportunity to express an unqualified view of the legality of the threat or use of nuclear weapons whatever the circumstances. For example, one finds in the submissions made on behalf of Australia an invitation to set aside the past and to accept the submission that: "the use or threat of nuclear weapons would now be contrary to fundamental principles of humanity, and hence, contrary to customary international law". It is clear that the court was asked by certain states to consider the question in the widest context.

[68] The court resolved, after discussion, that it had jurisdiction to answer such a general question, but noted, at paragraph 19, that there was an entirely different question which arose, namely, whether the court, under the constraints placed on it as a judicial organ, would be able to give a complete answer to the question asked. At paragraph 18 the majority opinion notes that the court's function is to state existing law. It does not legislate. As a matter of language, the advocate depute was correct in argument before us in saying that the question might have been answered in the positive or negative without qualification, as indeed the court was invited to do by Australia among other states. However one reads the opinion, and the *dispositif* in particular, the court was clearly unable to dispose of the question in a universal and unqualified way. In order to understand the limits within which the court did consider that it could express an opinion, the starting point has to be an examination of the sources of international law considered by the court which might bear upon the question of the legality of Trident.

[69] In paragraphs 24 to 32 of its advisory opinion, the court rejected a number of submissions by several states. The inherent right to life, and the prohibition on arbitrary deprivation of life, under Article 6 of the International Covenant on Civil and Political Rights, were distinguished in paragraph 25. The law against genocide was distinguished in paragraph 26. The possible relevance of laws for the protection of the environment was considered in paragraphs 27 - 33. Those laws indicated important environmental factors to be taken into account, but did not specifically prohibit the use of nuclear weapons. Against that background, in paragraph 34, the court identified the most directly relevant applicable law governing the question as (a) that relating to the use of force enshrined in the United Nations Charter; and (b) the law applicable in armed conflict which regulates the conduct of hostilities; together with (c) relevant specific treaties on nuclear weapons.

[70] The observations in paragraph 25 on Article 6 of the International Covenant on Civil and Political Rights, taken along with the identification of the relevant sources in paragraph 34, are of some possible

relevance in the present case in the context of an argument that the court's opinion has a bearing on the policy of deterrence in time of peace.

[71] Before turning to the sources identified and the rules of international law that can be deduced from them, it is relevant to note what the court understood it was dealing with in considering "nuclear weapons". Paragraphs 35 and 36 make it clear that what the court had in mind were weapons of mass destruction, potentially catastrophic in their destructive potential, with the capacity to cause untold human suffering and the ability to cause damage, including genetic defects and illness, to generations to come. It was the legality of the threat or use of weapons of this kind that the court proceeded to consider. If the court had considered that there was an identifiable and distinct class of small scale or tactical nuclear weapons which could be regarded as different, and could be set aside in their advice, it would no doubt have made that clear. The question of whether weapons capable of mass destruction can be used on a small scale, or tactically, or in some other limited way, is another matter, and is recognised by the court.

[72] At paragraph 37 of its Opinion, the court states that it will now address the question of the legality or illegality of recourse to nuclear weapons in the light of the provisions of the United Nations Charter relating to the threat or use of force, and in the succeeding paragraphs gives consideration to a number of provisions of that kind. The general provision of Article 2, paragraph 4 is noted:

> "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations."

Reference is also made to Articles 51 and 42. At paragraph 39, it is observed that these provisions do not refer to specific weapons, but apply to any use of "force", regardless of the weapons employed. "The Charter neither expressly prohibits, nor permits, the use of any specific weapon, including nuclear weapons. A weapon that is already unlawful *per se*, whether by treaty or custom, does not become lawful by reason of its being used for a legitimate purpose under the Charter". At paragraph 42, it is acknowledged that the use of nuclear weapons in self-defence cannot be excluded in all circumstances, and after reference to certain other matters the court, at paragraph 47, comes to questions which are more directly relevant for present purposes. The court observes that whether a "signalled intention to use force if certain events occur" is or is not a "threat" within Article 2, paragraph 4 of the Charter depends upon various factors. It is not suggested that the general Purposes of the Charter throw any particular light upon the legality of nuclear as opposed to other weapons. In relation to the concepts of "threat" and "use", for the purposes of Article 2, paragraph 4, the court records that no State (whether or not it defended the policy of deterrence) suggested to the court that it would be lawful to threaten to use force if the use of force contemplated would be illegal. But in paragraph 48, the court comes to the question of whether a policy of deterrence (with a credible intention to use nuclear weapons) is a "threat" contrary to Article 2, paragraph 4. What it says is that this depends upon whether the particular use of force envisaged would be directed against the territorial integrity or political independence of a State, or upon certain other considerations whereby the use or threat of force would be unlawful. In the absence of these other considerations, therefore, it is directing a particular use of force against a particular "target" State's integrity or independence which is seen as possibly amounting to a "threat" in the sense of Article 2, paragraph 4. If that is inherent in the concept of "threat", it is apparent that the court sees deployment as a deterrent as not necessarily involving this crucial element of "threat".

[73] Turning from the Charter, the court considered the law applicable in situations of armed conflict. Noting at paragraph 57 that the pattern until now has been for weapons of mass destruction to be declared illegal by specific instruments, the court does not find any specific prohibition of recourse to nuclear weapons. At paragraph 58, it goes on to say that in the last two decades a great many negotiations have been conducted regarding nuclear weapons, but notes that they have not resulted in a treaty of general prohibition of the same kind as for bacteriological and chemical weapons. It refers to a number of specific treaties which limit such matters as acquisition, manufacture and possession of nuclear weapons, or their deployment in particular areas, or their testing. And at paragraph 60 it notes

the view of certain States that these treaties "bear witness, in their own way, to the emergence of a rule of complete legal prohibition of all use of nuclear weapons". On the other hand, at paragraph 61, they note that other States see a logical contradiction in reaching such a conclusion. At paragraph 62 the court itself notes that such treaties, which do not specifically address threat or use, "certainly point to an increasing concern in the international community with these weapons". The court concludes from this that these treaties could therefore be seen "as foreshadowing a future general prohibition of the use of such weapons, but they do not constitute such a prohibition by themselves". At paragraph 63, referring specifically to the Tlatelolco and Rarotonga Treaties, the court says that they "testify to a growing awareness of the need to liberate the community of States and the international public from the dangers resulting from the existence of nuclear weapons", and it refers to certain more recent treaties. But it concludes by saying "it does not, however, view these elements as amounting to a comprehensive and universal conventional prohibition on the use, or the threat of use, of those weapons as such." That is, as we have indicated, accepted in the present case: the contention is not that there is a conventional prohibition, but that these weapons are illegal as a matter of customary international law. Nonetheless, in judging whether there is a settled *opinio juris* as a matter of customary law, it appears to us that the history and nature of conventional provisions may be of substantial significance.

[74] At paragraph 64, the court turned to an examination of customary international law, noting that the substance of that law must be "looked for primarily in the actual practice and *opinio juris* of States". After noting opposing arguments, it says this at paragraph 67:

> "The court does not intend to pronounce here upon the practice known as the 'policy of deterrence'. It notes that it is a fact that a number of States adhered to that practice during the greater part of the Cold War and continue to adhere to it. Furthermore, the members of the international community are profoundly divided on the matter of whether non-recourse to nuclear weapons over the past 50 years constitutes the expression of an *opinio juris*. Under these circumstances the court does not consider itself able to find that there is such an *opinio juris*."

We find that passage unequivocal.

[75] Going on to consider certain General Assembly resolutions, the court notes *inter alia* that they can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. And it acknowledges that a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule. However, it observes that several of the resolutions under consideration were adopted with substantial numbers of negative votes and abstentions and says that "thus, although those resolutions are a clear sign of deep concern regarding the problem of nuclear weapons, they still fall short of establishing the existence of an *opinio juris* on the illegality of the use of such weapons." At paragraph 73, noting the adoption each year by the General Assembly of resolutions requesting the Member States to conclude a convention prohibiting the use of nuclear weapons in any circumstance, the court says that this reveals the desire of a very large section of the international community to take, by a specific and express prohibition of the use of nuclear weapons, "a significant step forward along the road to complete nuclear disarmament." And it concludes by saying that the emergence, as *lex lata*, of a customary rule specifically prohibiting the use of nuclear weapons as such "is hampered by the continuing tensions between the nascent *opinio juris* on the one hand, and the still strong adherence to the practice of deterrence on the other." Again, we find that unequivocal.

[76] At paragraph 74 of the Opinion, the court turned to the question whether recourse to nuclear weapons must be considered as illegal in the light of the principles and rules of what is now known as "international humanitarian law", applicable in armed conflict. After noting the varied sources of international humanitarian law, and some of its history, the court comments at paragraph 77 that the conduct of military operations is governed by a body of legal prescriptions, because "the right of belligerents to adopt means of injuring the enemy is not unlimited". In particular, reference is made to the prohibition of the use of "arms, projectiles, or material calculated to cause unnecessary suffering"

contained in Article 23 of the 1907 Hague Regulations. At paragraph 78, the court identified the cardinal principles constituting the fabric of humanitarian law:

> "The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. According to the second principle, it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use."

After referring to the Martens Clause, the court notes that humanitarian law, at a very early stage, prohibited certain types of weapons, either because of their indiscriminate effect on combatants and civilians, or because of the unnecessary suffering caused to combatants, that is to say, a harm greater than that unavoidable to achieve legitimate military objectives. And they add that if an envisaged use of weapons would not meet the requirements of humanitarian law, a "threat" to engage in such use would also be contrary to that law. At paragraph 79, they say that these fundamental rules are to be observed by all States, whether or not they have ratified the conventions that contain them, "because they constitute intransgressible principles of international customary law." Proceeding upon its view that there could be no doubt as to the applicability of humanitarian law to nuclear weapons, and recording *inter alia* the United Kingdom's explicit statement that "So far as the customary law of war is concerned, the United Kingdom has always accepted that the use of nuclear weapons is subject to the general principles of the *jus in bello*" the court goes on at paragraph 89 to say that it finds that, as in the case of the principles of humanitarian law applicable in armed conflict, international law leaves no doubt that the principle of neutrality is also applicable to all international armed conflict, whatever type of weapons might be used.

[77] At paragraph 90, the court observes that the conclusions to be drawn from the applicability of these principles to nuclear weapons are "controversial". Passages from the United Kingdom's Written Statement are quoted, referring to the requirements of self-defence and the "wide variety of circumstances with very different results in terms of likely civilian casualties 'in which nuclear weapons might be used'". It also records at paragraph 92 the different view, that recourse to nuclear weapons could never be compatible with the principles and rules of humanitarian law on the basis that they would in all the circumstances be unable to draw any distinction between the civilian population and combatants, and that their effects, largely uncontrollable, could not be restricted, either in time or in space, to lawful military targets. They would kill and destroy in a necessarily indiscriminate manner, and the number of casualties would be enormous. On that view, the use of nuclear weapons would be prohibited in any circumstance, notwithstanding the absence of any explicit conventional prohibition. Faced with this conflict of views, the court says that it did not consider that it had a sufficient basis for a determination on the validity of either view: "the court considers that it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance." At paragraph 96, the court mentions the fundamental right of every State to survival, and thus its right to resort to self-defence when its survival is at stake. And it refers again to the "policy of deterrence" in terms similar to those already mentioned at paragraph 67 of its Opinion. This section of the Opinion concludes by the court observing that it "cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake."

[78] In the concluding section of its Opinion, paragraphs 98 to 103, the court refers to "the continuing difference of views with regard to the legal status of weapons as deadly as nuclear weapons" and to Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons:

> "Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on

effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control."

It points out that this goes beyond a mere obligation of conduct: the obligation is an obligation to achieve a precise result (nuclear disarmament in all its aspects) by adopting a particular course of conduct (the pursuit of negotiations in good faith). The fulfilment of these obligations is described as "without any doubt an objective of vital importance to the whole of the international community today."

[79] We have thought it appropriate to set out the relevant views and conclusions expressed in the course of the court's Opinion at some length, before turning to the court's replies to the question, as set out in paragraph 2 of the *dispositif*. It is necessary to set out the material parts of the *dispositif* in full. The Court replied to the question as follows:

"A. Unanimously,

There is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons;

B. By eleven votes to three,

There is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such;

C. Unanimously,

A threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, of the United Nations Charter and that fails to meet all the requirements of Article 51, is unlawful;

D. Unanimously,

A threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons;

E. By seven votes to seven, by the President's casting vote,

It follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law;

However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake;..."

[80] The expression "threat or use of nuclear weapons", which is used in the question upon which the advisory opinion was sought, is also used at heads A, B, D, and E of paragraph 2 of the *dispositif*. It seems clear that it must have the same meaning in all four heads. What that meaning is, in our opinion, is clarified by the terms of head C, which refers to a threat or use "of force" by means of nuclear weapons "that is contrary to Article 2, paragraph 4, of the United Nations Charter." That provision of the Charter, along with Article 51, is discussed as we have indicated at paragraphs 38 to 50 of the

court's Opinion. And while those provisions are concerned with a threat or use "of force", it appears to us to be clear that wherever reference is made to a threat or use of nuclear weapons, the expression "threat or use" must have the same meaning as it has in connection with the general concept of force in Article 2, paragraph 4. Apart from making that particular observation, we find it more convenient to discuss the terms and apparent meaning of the various heads of paragraph 2 of the *dispositif* after a consideration of the minority Opinions.

Minority Opinions

[81] Our attention was drawn to some of the minority opinions. These do not, of course, express the Opinion of the court as to the requirements of customary international law. In some respects they appear to be expressions of views as to what the law ought to be, rather than what it is. But they cast some light on the advisory opinion itself and the scope of the material considered by the court.

[82] Judge Ranjeva delivered a separate opinion from the majority explaining the basis on which he supported the decision. He put a gloss on the first clause of paragraph 2E, and proceeded to analyse the second part in a highly destructive way. His ultimate conclusion is difficult to reconcile with his support of the whole clause except on a basis which we cannot reconcile with the reasoning underlying the decision. It is illuminating of his difficulties that he concluded his opinion with the hope that no court would ever have to rule on the basis of the second clause of paragraph 2E of the *dispositif*. We find no help in his individual views in relation to the issues before this court.

[83] Some of the dissenting opinions reflect clearly the divergence of views on matters which are relevant in the present case. Vice-President Schwebel's analysis of the law followed the same lines as the majority opinion. His conclusion on conventional and customary sources was consistent with the majority: the threat or use of nuclear weapons was not, certainly not yet, prohibited in all circumstances. He dismissed the resolutions of the General Assembly as lacking legal authority. His discussion of the principles of international humanitarian law followed. He identified the extremes which in his view allowed of easy answer. It could not be accepted that the use of nuclear weapons on a scale which would, or could, result in millions of deaths in indiscriminate inferno and by far-reaching fallout, which would have profoundly pernicious effects in space and time, and would render uninhabitable much or all of the earth could be lawful. At the other extreme tactical nuclear weapons used in submarine warfare easily could. He figured intermediate cases. He interpreted paragraph 2E as acknowledging that while the use of nuclear weapons might "generally" be in conflict with international law, in specific cases they might not. He proceeded to strong criticism of the second part of paragraph 2E, and developed an argument based on contemporary events in support of the legality of the threat or use of nuclear weapons in certain circumstances.

[84] Judge Weeramantry reflected the opposite opinion. He thought that the court should have declared that the use or threat of use of nuclear weapons was unlawful in all circumstances without exception. Ms Zelter relied strongly on passages in his opinion. It is clear, however, that his dissenting opinion does not reflect either the opinion of the court or the existing law. The terms in which he expresses his own views are recognised by him to be at odds with the majority. He says that in certain respects the majority view is "clearly wrong". In section VII part 2 of his opinion, Judge Woolamantry dealt with his views on deterrence. One can entertain no doubt that he considered that even at the level of minimum deterrence a policy of holding nuclear weapons for deterrence was contrary to law.

[85] These two extremes of opinion illustrate the kind of discussion which took place, not only as to threat and use, but also as to deterrence. They show the degree of divergence of opinion on the legality of deterrence among the members of the court. Perhaps because of this divergence of opinion, paragraph E of the *dispositif* is not persuasive of the proposition that in the present state of international law deployment of nuclear weapons in pursuance of a policy of deterrence is *per se* illegal. The observations of Judge Shahbuddeen in his dissenting opinion are of some importance. He considered that the court could have answered the question put to it in the only context which he thought relevant, the use of nuclear weapons in self defence where the use envisaged threatened the survival of the

species. He dissented because the court did not answer the question one way or the other.

Interpretation of the dispositif

[86] We shall come back to the meaning of "threat" when dealing with the submissions of parties. We have no comment otherwise in relation to heads A, B or C of paragraph 2 of the *dispositif* at this stage. Some comment is, however, appropriate in relation to heads D and E. In relation to head D, we find the use of the words "should" and "particularly" somewhat surprising and confusing. But we think this head must be read broadly as confirming the applicability to nuclear weapons of the general requirements of international law applicable in armed conflict and indicating (consistently with heads A and B) that apart from specific obligations under treaties and other undertakings, the threat or use of nuclear weapons may be compatible with these requirements, but will not be so if the circumstances are such that the particular threat or use breaches any of the principles and rules of international humanitarian law. Head D is not in our opinion capable of being read as suggesting that deployment of nuclear weapons in pursuance of a general policy of deterrence is *per se* a "threat". Nor does head D suggest that whatever does amount to a threat of nuclear weapons, or actual use of such weapons, will necessarily be in breach of the principles and rules of international humanitarian law. Indeed, it envisages that they may not be. Head E was plainly regarded as problematic by certain members of the court. Since head D leaves entirely open the question of when and in what circumstances the threat or use of nuclear weapons might be in breach of customary international law, it is perhaps understandable that the court might be reluctant to conclude the replies without reflecting in any way the observations which they had made at paragraph 95 of their Opinion to the effect that the use of such weapons seems "scarcely reconcilable" with respect for the requirements of international humanitarian law, and at paragraph 97, which suggests an unwillingness to leave the circumstantial questions unanswered, and expresses the idea that their use by a State might always be illegal, except "in an extreme circumstance of self-defence, in which its very survival would be at stake." Head E, with its use of the word "generally" and its repetition of what has been said in paragraph 97, is perhaps intended as an indication of where the boundaries of legality and illegality are likely to be found. Even if Trident is to be seen as inevitably indiscriminate, head E does not in our opinion show that the court saw use or threat of such a weapon (as distinct from some small or tactical nuclear weapon) as always illegal. Indeed, the references to extreme circumstances and survival do not suggest that small or tactical weapons are envisaged. Despite the divided views on head E and indeed the trenchant criticism expressed by Judge Higgins, we would not wish to comment on the propriety of including this type of non-determinative material in what was, after all, an advisory rather than determinative opinion. For us the point is that head E identifies no rule, expressly or by implication.

Intervention to prevent crime

[87] As we have indicated at paragraph 32 above, the respondents rely upon customary international law not merely as showing that what the Government were doing was illegal, but as providing a justification (not otherwise to be found in Scots law, and quite apart from any justification by necessity) for what they did. We come now to that question.

[88] The respondents claim to have "acted in the knowledge that the only effective remedy open to us to prevent a nuclear holocaust was to join with other 'global citizens' in an effort to enforce the law ourselves as the Government, judiciary, police and other institutions of the State were not willing to do it themselves, despite high level delegations asking them to do so." Leaving aside the question of whether what they did could seriously be seen as helping to prevent a nuclear holocaust, and stripping this claim of some of its vaguer and more tendentious implications, the underlying proposition appears to be that if the law is being broken, and is not being enforced by public institutions empowered to enforce it, individuals have the legal right to enforce it, or to take steps contributing to its enforcement, notwithstanding that what they do would otherwise itself be criminal. As we have indicated, the law in relation to necessity confers no such general right. What is contended is that customary international law confers such a right. Indeed it is that contention which appears, even more than alleged necessity, to underlie the respondents' claim to be justified in what they did. Its basis is much less clear.

[89] The argument advanced in support of this proposition, in particular on behalf of the second respondent, was at one stage founded upon the Nuremberg Principles. But these clearly have nothing to do with this matter, and the argument based on them was not insisted in. Counsel for the second respondent, and Ms. Zelter, submitted however that the proposition had a basis in principles revealed at the Nuremberg trials themselves. It was not explained how or why any rule or principle applied in the conduct of those trials, but not incorporated in the Nuremberg Principles, should be regarded as established customary international law. The cases relied upon, both by Ms. Zelter and by counsel for the second respondent, were cases where an accused person pled justification by extreme necessity, arising from the plight of Germany at certain stages in the war, or by superior orders at times of grave emergency. Those defences were rejected, and the argument here appeared to be on the lines that as some kind of corollary or implication, deriving from the fact that neither orders nor necessity excused an individual's participation in actions alleged to be criminal at international law, the individual in question should be seen as having had a right to take action (itself otherwise criminal) designed to prevent the military or civilian authorities from committing the crimes in which the accused had in fact implicated himself.

[90] That does not appear to us to have been an issue at the Nuremberg trials in question. And while interesting questions of law might no doubt arise, in relation, say, to a German citizen during the war who in breach of German law chose to kill his officer rather than obey him in committing a crime against humanity, the cases to which we were referred do not appear to us to have determined any such issue.

[91] Particular emphasis was laid upon the case of a Swiss national, Paul Grueninger, who had been dismissed from office and convicted in a local court on the ground of disregard of Swiss federal directives and laws in allowing refugees from Nazi persecution to enter Switzerland. We were told by Ms. Zelter that his trial was re-opened in 1995 and that he was acquitted posthumously. The facts of the case appeared clearly from Ms. Zelter's narrative, but the grounds of judgment did not. On the material available his actions appear to have had the character of rescue. There is nothing to support the notion that the case demonstrates some right, as a matter of customary international law, to prevent crime by committing what would otherwise be a criminal act. We see no real analogy between any of these cases and the situation in which the respondents find themselves. What we have referred to as a "notion" is in our opinion no more than that. It has no foundation in law. Unless the respondents' actions are justified by the law of necessity, they cannot be seen as justified.

Submissions as to the illegality of deploying Trident

[92] The arguments advanced to us were essentially those considered by the International Court of Justice for the purposes of giving their advisory opinion, but with one crucial difference. That court was considering nuclear weapons in general. We were considering Trident in particular. The possibilities which the International Court considered included some in which they had not felt able to say that the inevitable consequences would be so indiscriminate as always to entail breach of international humanitarian law. It was submitted that these possibilities related only to small tactical weapons. The court was unable to hold that the threat or use of nuclear weapons would always and inevitably entail such a breach. It was submitted that for such small weapons, the court's reluctance to reach an absolute conclusion might be understandable, but that for a weapon such as Trident, the possibility of use compatible with the requirements of international humanitarian law simply did not exist, and the international court had not suggested that it did. In relation to Trident, therefore, this court should hold that any threat or use would inevitably entail breach of those requirements, and would be illegal as a matter of customary international law. And while that conclusion was said to flow from the rules of international humanitarian law, which had been considered by the International Court of Justice, rather than from the advisory opinion itself, it was submitted that head E of paragraph 2 of the *dispositif* demonstrated the court's reasons for stopping short of a declaration of universal illegality in threatening or using nuclear weapons, and identified the limited category of situations in which such threat or use might be legal - situations in which Trident could not be used.

[93] In our opinion, this submission misconstrues the position adopted by the International Court of Justice. On a correct reading of the *dispositif*, and in particular head E, we understand the court as stopping short not merely of a declaration that the threat or use of nuclear weapons will always and inevitably be illegal. They also, as we understand, stop short of drawing any line between those threats or uses which will or may be legal, and those which will or may be illegal. They appear to us to consider, as we do, that any breach of international humanitarian law will depend upon circumstances. In any particular case of threat or use, the facts will have to be compared with rules which are not expressed in black and white objective terms, but involve a range of qualitative considerations, covering such matters as the purposes, nature and consequences of the threat or use in question. We are not persuaded that even upon the respondents' description of, or hypothesis as to, the characteristics of Trident it would be possible to say *a priori* that a threat to use it, or its use, could never be seen as compatible with the requirements of international humanitarian law.

[94] In our opinion there are two fundamental flaws in the respondents' contention that the United Kingdom's deployment of Trident is in breach of customary international law. These two flaws can perhaps be seen as one; but they merge from different considerations, and it is convenient to approach them separately.

[95] First, the submissions advanced on behalf of the respondents appear to us to ignore the fact that the relevant rules of conventional and customary international law, and in particular the rules of international humanitarian law, are not concerned with regulating the conduct of States in time of peace. They specifically relate to warfare and times of armed conflict, and are designed to regulate the conduct of belligerents, against one another or against some neutral State. The International Court of Justice appears to us to have made this plain. In particular, at head E of paragraph 2 of the *dispositif*, the court was in our opinion expressly concerned with the application of international humanitarian law where a state of belligerence exists. That is what the court says in the first part of paragraph E. It refers to the rules of international law "applicable in armed conflict", and the principles and rules of humanitarian law are mentioned only in that context, without reference to any rules of humanitarian law in situations where there is no armed conflict. Attempts were made in argument to apply paragraph E, and the rules generally applicable to armed conflict, to times of peace. We are not persuaded that that can be done. In an alternative approach, it appeared to be suggested that the deployment of Trident was of its nature of such a kind as to create "armed conflict". We can see that that expression may be used to describe situations in which, despite actual use of lethal weaponry, a State or States may deny that there is a state of "war". We are not concerned with such nice distinctions or definitions, when arms are used by one State against another. But it is quite another matter to try to extend the meaning of "armed conflict" to deployment of forces or weaponry in time of peace. The respondents' enthusiasm for their cause may lead them to think along those lines. But enthusiasm is an untrustworthy dictionary. If one considers a case of actual use of nuclear weapons, the situation can no doubt be seen as one in which there is either an invasion of neutrality or *ipso facto* a state of war. At all events, it is hard to see how such an event would fall outside the expression "armed conflict". Moreover, where there is already armed conflict, with identifiable belligerents, one can readily envisage threats of illegal use of nuclear weapons which, as a matter of international humanitarian law, are to be equiparated with that illegal use, and are thus themselves illegal. In the context of armed conflict between such known belligerents or opponents, such an equiparation is understandable. But in time of peace, it does not appear to us that these rules are either applicable or capable of application. That remains true even where a particular State has a policy of deterrence, and deploys nuclear weaponry in execution of that policy. Application of the rules, and the resultant possibility of illegality, will arise only if and when some specific change turns the situation into one of armed conflict. But that aspect of the matter lies at the heart of the second flaw in the respondents' argument, and is more conveniently dealt with in that context.

[96] Quite apart from the fact that the relevant rules of international humanitarian law appear to be restricted to situations of armed conflict, a question arises in relation to any rule which is concerned with the "threat or use" of force or of nuclear weapons, as to whether there is indeed a "threat" of the kind which the rule equiparates with actual use. On behalf of the respondents, the argument appeared to

be that deterrence quite simply is a threat. We have no difficulty in acknowledging that in certain contexts the words may be virtually interchangeable. But to adopt another word, the minatory element in one action or set of actions may be very different from the minatory element in another act or set of actions. And we are entirely satisfied that the general minatory element in the deployment of nuclear weapons in time of peace, even upon the respondents' hypothesis as to the United Kingdom Government's policies and intentions, is utterly different from the kind of specific "threat" which is equated with actual use in those rules of customary international law which make both use and threat illegal.

[97] No one familiar with either the streets or the courts of this country could fail to see that a distinction can be drawn between a youngster brandishing a knife at another a foot away from him, and perhaps indicating by word and action that he intends to stab him there and then, and all the multifarious situations in which a person may say or show, perhaps very convincingly, that in some circumstances, specified or not, he would have recourse to violence against another or others. One can play with language: the latter may be said to constitute a threat, or perhaps to issue a threat, or to be guilty of threatening behaviour. *Nemo me impune lacessit*. But broadly deterrent conduct, with no specific target and no immediate demands, is familiarly seen as something quite different from a particular threat of practicable violence, made to a specific "target", perhaps coupled with some specific demand or perhaps simply as the precursor of actual attack. The deployment of Trident II, however far one goes in adding hypotheses as to the immediacy with which it could be used against some potential and arguably identifiable target State, in our opinion in general lacks the links between threat and use, and an immediate target, which are essential to a "threat" of the kind dealt with by customary international law or in particular international humanitarian law. A State which has a deployed deterrent plainly could and might take some step which turned the situation into one of armed conflict, and involved a sufficiently specific threat to constitute a breach of customary international law. But that is another matter.

[98] The respondents relied in various ways upon a paper entitled "Nuclear Weapons and the Law" by Lord Murray, based upon a speech given by him in Oxford in October 1998, and published in "Medicine, Conflict and Survival", volume 15 (1999) at pages 126 to 137. Considerable emphasis was laid upon Lord Murray's observations; and while we do not feel the need to refer to his very thoughtful discussion of the International Court of Justice's advisory opinion, it is right to draw attention to one particular passage, which counsel for the respondents did not rely upon but which appears to us to be in point. At page 132, Lord Murray says this:

> "The court, I think rightly, proceeded on the basis that threat is equivalent to use. In this context threat means a practical warning directed against a specific opponent. So a general display of military might, such as a Red Square parade in Soviet days or a routine Trident submarine patrol, would not alone constitute a threat at law."

In relation to ordinary deployment, and routine patrols, that appears to us to be plainly right. In so far as they have a minatory element, it is so general and conditional that it is quite simply not a threat of the kind which is "equivalent to use". Whether that general position would be transformed into such a "threat" in some particular circumstances depends entirely upon those circumstances. According to the respondents, there have been occasions when specific circumstances would alter the general position, and give rise to a specific argument that what the United Kingdom was doing had on that occasion moved beyond general deterrence to specific "threat". These would be questions of fact; but one can have regard to this as an hypothesis. Even so, we see no basis for a contention that the general deployment of Trident in pursuit of a policy of deterrence constitutes a continuous or continuing "threat" of the kind that might be illegal as equivalent to use. In both of these respects, it appears to us that the respondents' contention is baseless, and that the conduct of the United Kingdom Government, with which they sought to interfere, was in no sense illegal.

Necessity in the present case

[99] The contention that the respondents' conduct was justified as a matter of customary international law is thus without foundation. The general deployment of Trident was not illegal as a matter of customary international law. In any event, and even on the hypothesis of armed conflict and actual threat, customary international law does not entitle persons such as the respondents to intervene as self-appointed substitute law-enforcers with a right to commit what would otherwise be criminal offences in order to stop, or inhibit, the criminal acts of others. Any justification for what would otherwise be criminal malicious damage must therefore be found in the ordinary domestic law of necessity. Leaving aside the point that the actions of the United Kingdom Government in deploying Trident cannot be said to be illegal, and that any risk or danger which they create is correspondingly not apparently illegal, it is appropriate to consider whether such risk or danger as it may create could be seen as presenting the respondents with circumstances in which, according to the ordinary requirements for a defence of necessity, they would be justified in doing what they did on board "Maytime".

[100] We have already observed that clarification or refinement of the concept of necessity is more likely to come from a particular set of facts in a given case than from consideration of a general question. But the facts of the present case are in our opinion of no value as a foundation for any analysis of the defence of necessity. Our conclusion upon that matter cannot sensibly be elaborated. We cannot see any substance at all in the suggestion that what the respondents did was justified by necessity. The actions of the respondents were planned over months. What they did on board "Maytime" was not a natural or instinctive or indeed any kind of reaction to some immediate perception of danger, or perception of immediate danger. Deployment of Trident shows that the United Kingdom had the capacity to threaten use of the weapon, or to use it. One might say that there is a chance or possibility that this might be done, in some situation that might emerge. But there is no apparent basis for saying that such a situation seemed likely to emerge. Even if such a situation had seemed imminent, the risk of its emerging must still be distinguished from the risk that in that situation there would be an actual threat or use. And even if the respondents were well-founded in regarding the deployment of Trident as some kind of standing or abiding threat, that possibility must be distinguished from any likelihood that Trident was about to be used. The circumstances are not in our opinion even remotely analogous to those which provide a justification for intervention to prevent imminent danger. Moreover, there is not the slightest indication that the damage which the respondents did, and which they apparently claim was necessary as a means of averting or perhaps reducing danger or harm, had or could have had any conceivable impact upon the supposedly immediate risk. If the respondents said that they were acting as political protesters, willing to carry their protest beyond demonstration into crime, for the sake of publicity for their cause, their reasoning would be comprehensible. But they repudiate any such explanation for what they did. They insist that they were engaged in altering the course of events. If that is how they sincerely see their actions, so be it. But whatever drove them or compelled them to do as they did bears no resemblance to necessity in Scots law.

Questions 2, 3 and 4

[101] Before answering these questions we would refer to paragraphs 3 and 8 above. Section 123(1) of the 1995 Act is in very broad terms. We are satisfied that the expression "a point of law which has arisen in relation to that charge" must be read as referring not merely to points of law which are in some general way inherent in the charge itself, but also to points of law which have actually arisen in the proceedings which led to acquittal or conviction on the charge in question, including points of law which arise from any defence which is advanced against the charge. In the present case, where it appears that conviction would have been appropriate unless the defence of justification, in one form or another, was established or gave rise to reasonable doubt, we are satisfied that the respondents are well-founded in contending that the points of law relied upon by them at trial, in support of their defence of justification, would be points of law within the scope of section 123(1). Questions 2, 3 and 4 clearly do not, as stated, express those particular points of law. And it can be said, most obviously in relation to Question 2, that the points of law which they raise were not points which were put in issue by the respondents, in that form. But we are not persuaded that that means that the questions are incompetent; or that we should restrict ourselves to answering the precise questions posed. As stated, the questions put matters broadly. But on any sensible reading of the section, it appears to us that the

charges laid against the respondents, together with the nature of the defence, were such that these broad questions raise points of law which are to be seen as having arisen in relation to the charges. In our opinion the questions as stated provide a useful broad starting point, within the scope of the section, although within the broad boundaries of these questions there arise the more specific issues raised by the respondents, which must be dealt with if any useful or meaningful answer is to be given to the broad questions stated. It was upon that view, in principle, that we acceded to the respondents' wish that we should hear argument upon the points of law which they saw as the "real" issues in the case. And in answering the questions, correspondingly, we do not think that it would be appropriate to restrict ourselves to simple answers to the broad questions stated. These questions provide boundaries beyond which we should not go. But within those boundaries, we think it appropriate to deal with the more specific points of law which arose from the defence advanced at trial, and upon which the respondents made submissions to us.

Question 2

[102] Ms. Zelter urged the court to refuse to answer Question 2. Alternatively she proposed that it should be re-formulated as follows:

> "Does international law and/or Scots law justify an individual in Scotland in damaging or destroying property which is being used for criminal purposes, in order to prevent those criminal actions being carried out by the United Kingdom - namely the United Kingdom's deployment, within and without Scotland, of Trident nuclear warheads and its threat to use such warheads in accordance with H.M. Government's current defence policy?"

[103] Both formulations might be criticised as tendentious. But it is clear that this question can be addressed within the general scope of the question referred to the court. There is no substance in the contention that the court should decline to answer the Lord Advocate's question.

[104] We answer the question as stated in the negative: as we have indicated, customary international law contains no rule justifying damage or destruction of property. That is the case not only when the damage or destruction is in pursuit of a personal objection of the kind suggested in the question. It is the case even if the United Kingdom's possession of nuclear weapons, or its deployment of these weapons, or its policies in relations to such weapons, are illegal as a matter of customary international law, or in particular international humanitarian law.

[105] We also answer this question as reformulated by Ms. Zelter in the negative. The United Kingdom's deployment, within and outwith Scotland, of Trident nuclear warheads, and the Government's current defence policy, do not in our opinion include any "threat" to use such warheads in the sense in which a threat is equiparated to use, so as to be illegal as a matter of customary international law or international humanitarian law. In any event, even if the deployment of these warheads, and current defence policy, were at present, or were to become, not merely a general deterrent but a "threat" in that sense, international law provides no justification for an individual damaging or destroying property used for those purposes, in order to prevent the actions of the United Kingdom in that respect. As regards Scots law, it likewise provides no justification for such damage or destruction unless such damage or destruction is justified by the Scots law of necessity.

[106] In relation to any justification based upon the Scots law of necessity, the question as reformulated by Ms. Zelter must again be answered unequivocally in the negative. If particular circumstances arose, so that it could be said that the United Kingdom was not merely deploying Trident in execution of a general policy of deterrence, but was making a specific "threat" to use Trident against a target State, then questions as to the legality of its actions could arise as a matter of customary international law. But even leaving aside questions as to justiciability, which we do not feel it appropriate to deal with, any issue of justification would depend not upon the mere fact of any such illegality, but upon the Scots law of necessity, with the requirements *inter alia* of immediacy of danger and prospects of prevention which we have discussed. In the context of what was done by the respondents, and said to be justified

by necessity, the damage or destruction of property has no foundation at all in anything analogous to necessity in Scots law. More generally, the circumstances described in this formulation of Question 2 do not in our opinion involve the crucial requirements for a defence of necessity, either in terms of immediacy and response to danger, or in terms of the prospects of prevention of the supposed danger.

Question 3

[107] We answer this question in the negative.

[108] Ms. Zelter objected to the formulation of Question 3 on a number of grounds. She contended that reference to "belief" that the actions complained of were justified in law missed the point. The three accused "knew objectively" that Trident was unlawful on the basis of factual analysis and legal argument. The argument became somewhat circular. At certain stages, it relied on the beliefs of the accused being well-founded beliefs, and thus not merely beliefs but facts. But obviously they could not conclusively determine the issues of fact and law involved, and then act on the basis of their own views. No matter how firmly convinced a person might be of his or her conclusions on an issue of fact and law, the validity of those views would be a matter for a properly constituted court to determine so far as the issue was justiciable. At other stages it was simply argued that the respondents had never suggested that mere belief could constitute a defence.

[109] The unequivocal answer to the question posed by the Lord Advocate is provided in the opinion of Lord Justice-General Clyde in *Clark* v *Syme* 1957 J.C. 1 at page 5. The mere fact that a person carried out acts which constituted a crime under a misconception of his legal rights is not a defence. The Crown accepted that there were some offences where honest belief was a factor, for example in cases of bigamy or rape, where the honest belief of the man that the woman consented to intercourse was relevant. But these related to the requisites for proof of the criminal conduct, and had no bearing on the present case.

Question 4

[110] We answer this question in the negative.

[111] For the respondents it was argued that the question did not properly focus the issues which arose at the trial, and which ought properly to be addressed at this stage if the court were to deal with them rather than simply refuse to answer the questions posed. However, the answer is straightforward. Apart from the defence of necessity it is not a defence to a criminal charge that the actions complained of were carried out to prevent another person committing a crime.

Devolution Minutes

[112] In the event the devolution minutes do not seem to us to require any specific comment beyond what we have said in other contexts.

Summary

[113] In answering the questions, we have tried to deal with the broad issues which they raise, as well as the specific issues which have been seen by the respondents as "real". But in concluding, we would reiterate that we have grave misgivings as to the justiciability of the issues which we have been asked to deal with, in relation to defence policy and the deployment of Trident. And we feel obliged to add that even ignoring the issue of justiciability, we are not persuaded that the facts of what the respondents did, or anything in the nature or purposes of the deployment of Trident, indicate any foundation at all, in Scots or in international law, for a defence of justification.

INTERNATIONAL COURT OF JUSTICE

YEAR 2007

2007
26 February
General List
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26 February 2007

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

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

JUDGMENT

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

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

between

Bosnia and Herzegovina,

represented by

Mr. Sakib Softić,

as Agent;

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

as Deputy Agent;

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

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

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

Mr. Luigi Condorelli, Professor at the Faculty of Law of the University of Florence,

Ms Magda Karagiannakis, B.Ec., LL.B., LL.M., Barrister at Law, Melbourne, Australia,

Ms Joanna Korner Q.C., Barrister at Law, London,

Ms Laura Dauban, LL.B. (Hons),

Mr. Antoine Ollivier, Temporary Lecturer and Research Assistant, University of Paris X-Nanterre,

as Counsel and Advocates;

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

as Expert Counsel and Advocate;

H.E. Mr. Fuad Šabeta, Ambassador of Bosnia and Herzegovina to the Kingdom of the Netherlands,

Mr. Wim Muller, LL.M., M.A.,

Mr. Mauro Barelli, LL.M. (University of Bristol),

Mr. Ermin Sarajlija, LL.M.,

Mr. Amir Bajrić, LL.M.,

Ms Amra Mehmedić, LL.M.,

Ms Isabelle Moulier, Research Student in International Law, University of Paris I,

Mr. Paolo Palchetti, Associate Professor at the University of Macerata, Italy,

as Counsel,

and

Serbia and Montenegro,

represented by

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

as Agent;

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

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

as Co-Agents;

Mr. Tibor Varady, S.J.D. (Harvard), Professor of Law at the Central European University, Budapest, and Emory University, Atlanta,

Mr. Ian Brownlie, C.B.E., Q.C., F.B.A., Member of the International Law Commission, member of the English Bar, Distinguished Fellow of All Souls College, Oxford,

Mr. Xavier de Roux, Maîtrise de droit, avocat à la cour, Paris,

Ms Nataša Fauveau-Ivanović, avocat à la cour, Paris, member of the Council of the International Criminal Bar,

Mr. Andreas Zimmerman, LL.M. (Harvard), Professor of Law at the University of Kiel, Director of the Walther-Schücking Institute,

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

Mr. Igor Olujić, Attorney at Law, Belgrade,

as Counsel and Advocates;

Ms Sanja Djajić, S.J.D, Associate Professor at the Novi Sad University School of Law,

Ms Ivana Mroz, LL.M. (Minneapolis),

Mr. Svetislav Rabrenović, Expert-associate at the Office of the Prosecutor for War Crimes of the Republic of Serbia,

Mr. Aleksandar Djurdjić, LL.M., First Secretary at the Ministry of Foreign Affairs of Serbia and Montenegro,

Mr. Miloš Jastrebić, Second Secretary at the Ministry of Foreign Affairs of Serbia and Montenegro,

Mr. Christian J. Tams, LL.M., Ph.D. (Cambridge), Walther-Schücking Institute, University of Kiel,

Ms Dina Dobrkovic, LL.B.,

as Assistants,

The COURT,

composed as above,

after deliberation,

delivers the following Judgment:

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

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

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

4. On 20 March 1993, immediately after the filing of its Application, Bosnia and Herzegovina submitted a request for the indication of provisional measures pursuant to Article 73 of the Rules of Court. On 31 March 1993, Bosnia and Herzegovina filed in the Registry, and invoked as an additional basis of jurisdiction, the text of a letter dated 8 June 1992, addressed jointly by the President of the then Republic of Montenegro and the President of the then Republic of Serbia to the President of the Arbitration Commission of the International Conference for Peace in Yugoslavia. On 1 April 1993, the FRY submitted written observations on Bosnia and Herzegovina's request for provisional measures, in which it, in turn, recommended that the Court indicate provisional measures to be applied to Bosnia and Herzegovina. By an Order dated 8 April 1993, the Court, after hearing the Parties, indicated certain provisional measures with a view to the protection of rights under the Genocide Convention.

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

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

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

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

9. By an Order dated 7 October 1993, the Vice-President of the Court, at the request of Bosnia and Herzegovina, extended the time-limit for the filing of the Memorial to 15 April 1994 and accordingly extended the time-limit for the filing of the Counter-Memorial to 15 April 1995. Bosnia and Herzegovina filed its Memorial within the time-limit thus extended. By a letter dated 9 May 1994, the Agent of the FRY submitted that the Memorial filed by Bosnia and Herzegovina failed to meet the requirements of Article 43 of the Statute and Articles 50 and 51 of the Rules of Court. By letter of 30 June 1994, the Registrar, acting on the instructions of the Court, requested Bosnia and Herzegovina, pursuant to Article 50, paragraph 2, of the Rules of Court, to file as annexes to its Memorial the extracts of the documents to which it referred therein. Bosnia and Herzegovina accordingly filed Additional Annexes to its Memorial on 4 January 1995.

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

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

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

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

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

15. On 15 April 1998, the Co-Agent of the FRY filed "Additional Annexes to the Counter-Memorial of the Federal Republic of Yugoslavia". By a letter dated 14 May 1998, the Deputy Agent of Bosnia and Herzegovina, referring to Articles 50 and 52 of the Rules of Court, objected to the admissibility of these documents in view of their late filing. On 22 September 1998, the Parties were informed that the Court had decided that the documents in question "[were] admissible as Annexes to the Counter-Memorial to the extent that they were established, in the original language, on or before the date fixed by the Order of 23 July 1996 for the filing of the Counter-Memorial" and that "[a]ny such document established after that date [would] have to be submitted as an Annex to the Rejoinder, if Yugoslavia so wishe[d]".

16. On 23 April 1998, within the time-limit thus extended, Bosnia and Herzegovina filed its Reply. By a letter dated 27 November 1998, the FRY requested the Court to extend the time-limit for the filing of its Rejoinder to 22 April 1999. By a letter dated 9 December 1998, Bosnia and

Herzegovina objected to any extension of the time-limit fixed for the filing of the Rejoinder. By an Order of 11 December 1998, the Court, having regard to the fact that Bosnia and Herzegovina had been granted an extension of the time-limit for the filing of its Reply, extended the time-limit for the filing of the Rejoinder of the FRY to 22 February 1999. The FRY filed its Rejoinder within the time-limit thus extended.

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

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

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

20. By a letter of 20 September 1999, the President of the Court informed the Parties that the Court intended to schedule hearings in the case beginning in the latter part of February 2000 and requested the Chairman of the Presidency of Bosnia and Herzegovina to confirm that Bosnia and Herzegovina's position was that the case should so proceed. By a letter of 4 October 1999, the Agent of Bosnia and Herzegovina confirmed that the position of his Government was that the case should proceed and he requested the Court to set a date for the beginning of the oral proceedings as soon as possible. By a letter dated 10 October 1999, the member of the Presidency of Bosnia and Herzegovina from the Republika Srpska informed the Court that the letter of 15 September 1999 from the Chairman of the Presidency was "without legal effects" *inter alia* because the National Assembly of the Republika Srpska, acting pursuant to the Constitution of Bosnia and Herzegovina, had declared the decision of 15 September "destructive of a vital interest" of the Republika Srpska. On 22 October 1999, the President informed the Parties that, having regard to the correspondence received on this matter, the Court had decided not to hold hearings in the case in February 2000.

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

22. By a letter dated 13 April 2000, the Agent of the FRY transmitted to the Court a document entitled "Application for the Interpretation of the Decision of the Court on the Pendency of the case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia)", requesting an interpretation of the decision of the Court to which the President of the Court had referred in his letter dated 22 October 1999. By a letter dated 18 April 2000, the Registrar informed the Agent of the FRY that, according to Article 60 of the Statute, a request for interpretation could relate only to a judgment of the Court and therefore the document transmitted to the Court on 13 April 2000 could not constitute a request for interpretation and had not been entered on the Court's General List. The Registrar further explained that the sole decision to which reference was made in the letter of 22 October 1999 was that no hearings would be held in February 2000. The Registrar requested the Agent to transmit as soon as possible any comments he might have on the letter dated 23 March 2000 from the Agent of Bosnia and Herzegovina and the letter from the Chairman of the Presidency enclosed therewith. By a letter dated 25 April 2000, the Agent of the FRY submitted such comments to the Court and requested that the Court record and implement the agreement for the discontinuance of the case evidenced by the exchange of the letter of the Co-Agent of the Applicant dated 10 June 1999 and the letter of the Agent of the FRY dated 15 June 1999. By a letter dated 8 May 2000, the Agent of Bosnia and Herzegovina submitted certain observations regarding the letter dated 25 April 2000 from the Agent of the FRY and reiterated the wish of his Government to continue with the proceedings in the case. By letters dated 8 June, 26 June and 4 October 2000 from the FRY and letters dated 9 June and 21 September 2000 from Bosnia and Herzegovina, the Agents of the Parties restated their positions.

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

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

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

26. By a letter dated 20 April 2001, the Agent of the FRY informed the Court that his Government wished to withdraw the counter-claims submitted by the FRY in its Counter-Memorial. The Agent also informed the Court that his Government was of the opinion that the Court did not have jurisdiction *ratione personae* over the FRY and further that the FRY intended to submit an application for revision of the Judgment of 11 July 1996. On 24 April 2001, the FRY filed in the Registry of the Court an Application instituting proceedings whereby, referring to Article 61 of the Statute, it requested the Court to revise the Judgment delivered on Preliminary Objections on 11 July 1996 (*Application for Revision of the Judgment of 11 July 1996 in the Case concerning* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia), Preliminary Objections *(Yugoslavia* v. *Bosnia and Herzegovina)*, hereinafter referred to as "the *Application for Revision* case"). In the present case the Agent of the FRY submitted, under cover of a letter dated 4 May 2001, a document entitled "Initiative to the Court to Reconsider *ex officio* Jurisdiction over Yugoslavia", accompanied by one volume of annexes (hereinafter "the Initiative"). The Agent informed the Court that the Initiative was based on facts and arguments which were essentially identical to those submitted in the FRY's Application for revision of the Judgment of 11 July 1996 since his Government believed that these were both appropriate procedural avenues. In the Initiative, the FRY requested the Court to adjudge and declare that it had no jurisdiction *ratione personae* over the FRY, contending that it had not been a party to the Statute of the Court until its admission to the United Nations on 1 November 2000, that it had not been and still was not a party to the Genocide Convention; it added moreover that its notification of accession to that Convention dated 8 March 2001 contained a reservation to Article IX thereof. The FRY asked the Court to suspend the proceedings on the merits until a decision was rendered on the Initiative.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

42. By letters of 15 November 2005, the Registrar informed the Parties, *inter alia*, that the Court had decided that it would hear the three experts and ten witnesses and witness-experts that Bosnia and Herzegovina and Serbia and Montenegro respectively wished to call and, moreover, that it had decided not to arrange for the attendance, pursuant to Article 62, paragraph 2, of the Rules of Court, of the five witnesses proposed by Serbia and Montenegro. However, the Court reserved the right to exercise subsequently, if necessary, its powers under that provision to call persons of its choosing on its own initiative. The Registrar also requested the Parties to provide certain information related to the hearing of the witnesses, experts and witness-experts including, *inter alia*, the language in which each witness, expert or witness-expert would speak and, in respect of those speaking in a language other than English or French, the arrangements which the Party intended to make, pursuant to Article 70, paragraph 2, of the Rules of Court, for interpretation into one of the official languages of the Court. Finally the Registrar transmitted to the Parties the calendar for the oral proceedings as adopted by the Court.

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

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

45. By a letter dated 16 January 2006, the Deputy Agent of Bosnia and Herzegovina transmitted to the Registry copies of new documents that Bosnia and Herzegovina wished to produce pursuant to Article 56 of the Rules of Court. Under cover of the same letter and of a letter dated 23 January 2006, the Deputy Agent of Bosnia and Herzegovina also transmitted to the Registry copies of video material, extracts of which Bosnia and Herzegovina intended to present at the oral proceedings. By a letter dated 31 January 2006, the Co-Agent of Serbia and Montenegro informed the Court that his Government did not object to the production of the new documents by Bosnia and Herzegovina. Nor did it object to the video material being shown at the oral proceedings. By letters of 2 February 2006, the Registrar informed the Parties that, in view of the fact that no objections had been raised by Serbia and Montenegro, the Court had decided to authorize the production of the new documents by Bosnia and Herzegovina pursuant to Article 56 of the Rules of Court and that it had further decided that Bosnia and Herzegovina could show extracts of the video material at the hearings.

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

the Co-Agent of Serbia and Montenegro transmitted to the Court certain missing elements of the new documents submitted on 20 January 2006 and made a number of observations concerning the new documents produced by Bosnia and Herzegovina. By a letter dated 20 February 2006, the Deputy Agent of Bosnia and Herzegovina informed the Court that Bosnia and Herzegovina did not intend to make any observations regarding the new documents produced by Serbia and Montenegro.

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

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

49. By a letter dated 13 February 2006, the Agent of Serbia and Montenegro informed the Court that his Government had decided not to call two of the witnesses and witness-experts included in the list transmitted to the Court on 8 September 2005 and that the order in which the remaining witnesses and witness-expert would be heard had been modified. By a letter dated 21 February 2006, the Agent of Serbia and Montenegro requested the Court's permission for the examination of three of the witnesses called by his Government to be conducted in Serbian (namely, Mr. Dušan Mihajlović, Mr. Vladimir Milićević, Mr. Dragoljub Mićunović). By a letter dated 22 February 2006, the Registrar informed the Agent of Serbia and Montenegro that there was no objection to such a procedure being followed, pursuant to the provisions of Article 39, paragraph 3, of the Statute and Article 70 of the Rules of Court.

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

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

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

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

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

53. By a letter dated 5 March 2006, the Agent of Bosnia and Herzegovina informed the Court that it wished to withdraw one of the experts it had intended to call. In that letter, the Agent of Bosnia and Herzegovina also asked the Court to request each of the Parties to provide a one-page outline per witness, expert or witness-expert detailing the topics which would be covered in his evidence or statement. By letters dated 7 March 2006, the Parties were informed that the Court requested them to provide, at least three days before the hearing of each witness, expert or witness-expert, a one-page summary of the latter's evidence or statement.

54. On 7 March 2006, Bosnia and Herzegovina provided the Court and the Respondent with a CD-ROM containing "ICTY Public Exhibits and other Documents cited by Bosnia and Herzegovina during its Oral Pleadings (07/03/2006)". By a letter dated 10 March 2006, Serbia and Montenegro informed the Court that it objected to the production of the CD-ROM on the grounds that the submission at such a late stage of so many documents "raise[d] serious concerns related to

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

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

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

57. The following experts were called by Bosnia and Herzegovina and made their statements at public sittings on 17 and 20 March 2006: Mr. András J. Riedlmayer and General Sir Richard Dannatt. The experts were examined by counsel for Bosnia and Herzegovina and cross-examined by counsel for Serbia and Montenegro. The experts were subsequently re-examined by counsel for Bosnia and Herzegovina. Questions were put to Mr. Riedlmayer by Judges Kreća, Tomka, Simma and the Vice-President and replies were given orally. Questions were put to General Dannatt by the President, Judge Koroma and Judge Tomka and replies were given orally.

58. The following witnesses and witness-expert were called by Serbia and Montenegro and gave evidence at public sittings on 23, 24, 27 and 28 March 2006: Mr. Vladimir Lukić; Mr. Vitomir Popović; General Sir Michael Rose; Mr. Jean-Paul Sardon (witness-expert); Mr. Dušan Mihajlović; Mr. Vladimir Milićević; Mr. Dragoljub Mićunović. The witnesses and witness-expert were examined by counsel for Serbia and Montenegro and cross-examined by

counsel for Bosnia and Herzegovina. General Rose, Mr. Mihajlović and Mr. Milićević were subsequently re-examined by counsel for Serbia and Montenegro. Questions were put to Mr. Lukić by Judges Ranjeva, Simma, Tomka and Bennouna and replies were given orally. Questions were put to General Rose by the Vice-President and Judges Owada and Simma and replies were given orally.

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

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

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

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

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

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

"Accordingly, while reserving the right to revise, supplement or amend this Application, and subject to the presentation to the Court of the relevant evidence and legal arguments, Bosnia and Herzegovina requests the Court to adjudge and declare as follows:

(a) that Yugoslavia (Serbia and Montenegro) has breached, and is continuing to breach, its legal obligations toward the People and State of Bosnia and Herzegovina under Articles I, II *(a)*, II *(b)*, II *(c)*, II *(d)*, III *(a)*, III *(b)*, III *(c)*, III *(d)*, III *(e)*, IV and V of the Genocide Convention;

(b) that Yugoslavia (Serbia and Montenegro) has violated and is continuing to violate its legal obligations toward the People and State of Bosnia and Herzegovina under the four Geneva Conventions of 1949, their Additional Protocol I of 1977, the customary international laws of war including the Hague Regulations on Land Warfare of 1907, and other fundamental principles of international humanitarian law;

(c) that Yugoslavia (Serbia and Montenegro) has violated and continues to violate Articles 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26 and 28 of the Universal Declaration of Human Rights with respect to the citizens of Bosnia and Herzegovina;

(d) that Yugoslavia (Serbia and Montenegro), in breach of its obligations under general and customary international law, has killed, murdered, wounded, raped, robbed, tortured, kidnapped, illegally detained, and exterminated the citizens of Bosnia and Herzegovina, and is continuing to do so;

(e) that in its treatment of the citizens of Bosnia and Herzegovina, Yugoslavia (Serbia and Montenegro) has violated, and is continuing to violate, its solemn obligations under Articles 1 (3), 55 and 56 of the United Nations Charter;

(f) that Yugoslavia (Serbia and Montenegro) has used and is continuing to use force and the threat of force against Bosnia and Herzegovina in violation of Articles 2 (1), 2 (2), 2 (3), 2 (4) and 33 (1), of the United Nations Charter;

(g) that Yugoslavia (Serbia and Montenegro), in breach of its obligations under general and customary international law, has used and is using force and the threat of force against Bosnia and Herzegovina;

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

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

— aerial trespass into Bosnian airspace;

— efforts by direct and indirect means to coerce and intimidate the Government of Bosnia and Herzegovina;

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

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

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

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

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

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

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

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

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

— from its systematic practice of so-called 'ethnic cleansing' of the citizens and sovereign territory of Bosnia and Herzegovina;

— from the murder, summary execution, torture, rape, kidnapping, mayhem, wounding, physical and mental abuse, and detention of the citizens of Bosnia and Herzegovina;

— from the wanton devastation of villages, towns, districts, cities, and religious institutions in Bosnia and Herzegovina;

— from the bombardment of civilian population centres in Bosnia and Herzegovina, and especially its capital, Sarajevo;

— from continuing the siege of any civilian population centres in Bosnia and Herzegovina, and especially its capital, Sarajevo;

— from the starvation of the civilian population in Bosnia and Herzegovina;

— from the interruption of, interference with, or harassment of humanitarian relief supplies to the citizens of Bosnia and Herzegovina by the international community;

— from all use of force — whether direct or indirect, overt or covert — against Bosnia and Herzegovina, and from all threats of force against Bosnia and Herzegovina;

— from all violations of the sovereignty, territorial integrity or political independence of Bosnia and Herzegovina, including all intervention, direct or indirect, in the internal affairs of Bosnia and Herzegovina;

— from all support of any kind — including the provision of training, arms, ammunition, finances, supplies, assistance, direction or any other form of support — to any nation, group, organization, movement or individual engaged or planning to engage in military or paramilitary actions in or against Bosnia and Herzegovina;

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

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

On behalf of the Government of Bosnia and Herzegovina,

in the Memorial:

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

Requests the International Court of Justice to adjudge and declare,

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

— killing members of the group;

— causing deliberate bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

— imposing measures intended to prevent births within the group;

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

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

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

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

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

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

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

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

On behalf of the Government of Serbia and Montenegro,

in the Counter-Memorial[1]:

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

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

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

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

— they have not been directed specifically against the members of one ethnic or religious group, i.e. they have not been committed against individuals just because they belong to some ethnic or religious group,

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

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

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

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

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

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

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

therefore the Court rejects all claims of the Applicant; and

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

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

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

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

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

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

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

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

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

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

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

On behalf of the Government of Bosnia and Herzegovina,

in the Reply:

"Therefore the Applicant persists in its claims as presented to this Court on 14 April 1994, and recapitulates its Submissions in their entirety. Bosnia and Herzegovina requests the International Court of Justice to adjudge and declare,

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

— killing members of the group;

— causing deliberate bodily or mental harm to members of the group;

— deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

— imposing measures intended to prevent births within the group;

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

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

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

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

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

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

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

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

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

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

On behalf of the Government of Serbia and Montenegro,

in the Rejoinder[1]:

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

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

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

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

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

— they have not been directed specifically against the members of one ethnic or religious group, i.e. they have not been committed against individuals just because they belong to some ethnic or religious group,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

On behalf of the Government of Bosnia and Herzegovina,

at the hearing of 24 April 2006:

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

1. That Serbia and Montenegro, through its organs or entities under its control, has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by intentionally destroying in part the non-Serb national, ethnical or religious group within, but not limited to, the territory of Bosnia and Herzegovina, including in particular the Muslim population, by

— killing members of the group;

— causing serious bodily or mental harm to members of the group;

— deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

— imposing measures intended to prevent births within the group;

— forcibly transferring children of the group to another group;

2. Subsidiarily:

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

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

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

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

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

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

(a) that Serbia and Montenegro shall immediately take effective steps to ensure full compliance with its obligation to punish acts of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide or any other act prohibited by the Convention and to transfer individuals accused of genocide or any other act prohibited by the Convention to the International Criminal Tribunal for the former Yugoslavia and to fully co-operate with this Tribunal;

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

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

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

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

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

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

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

On behalf of the Government of Serbia and Montenegro,

at the hearing of 9 May 2006:

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

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

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

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

— That the requests in paragraphs 1 to 6 of the Submissions of Bosnia and Herzegovina relating to alleged violations of the obligations under the Convention on the Prevention and Punishment of the Crime of Genocide be rejected as lacking a basis either in law or in fact.

— In any event, that the acts and/or omissions for which the respondent State is alleged to be responsible are not attributable to the respondent State. Such attribution would necessarily involve breaches of the law applicable in these proceedings.

— Without prejudice to the foregoing, that the relief available to the applicant State in these proceedings, in accordance with the appropriate interpretation of the Convention on the Prevention and Punishment of the Crime of Genocide, is limited to the rendering of a declaratory judgment.

— Further, without prejudice to the foregoing, that any question of legal responsibility for alleged breaches of the Orders for the indication of provisional measures, rendered by the Court on 8 April 1993 and 13 September 1993, does not fall within the competence of the Court to provide appropriate remedies to an applicant State in the context of contentious proceedings, and, accordingly, the request in paragraph 7 of the Submissions of Bosnia and Herzegovina should be rejected."

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II. Identification of the respondent party

67. The Court has first to consider a question concerning the identification of the Respondent party before it in these proceedings. After the close of the oral proceedings, by a letter dated 3 June 2006, the President of the Republic of Serbia informed the Secretary-General of the United Nations that, following the Declaration of Independence adopted by the National Assembly of Montenegro on 3 June 2006, "the membership of the state union Serbia and Montenegro in the United Nations, including all organs and organisations of the United Nations system, [would be] continued by the Republic of Serbia on the basis of Article 60 of the Constitutional Charter of Serbia and Montenegro". He further stated that "in the United Nations the name 'Republic of Serbia' [was] to be henceforth used instead of the name 'Serbia and Montenegro'" and added that the Republic of Serbia "remain[ed] responsible in full for all the rights and obligations of the state union of Serbia and Montenegro under the UN Charter".

68. By a letter of 16 June 2006, the Minister for Foreign Affairs of the Republic of Serbia informed the Secretary-General, *inter alia*, that "[t]he Republic of Serbia continue[d] to exercise its rights and honour its commitments deriving from international treaties concluded by Serbia and Montenegro" and requested that "the Republic of Serbia be considered a party to all international agreements in force, instead of Serbia and Montenegro". By a letter addressed to the Secretary-General dated 30 June 2006, the Minister for Foreign Affairs confirmed the intention of the Republic of Serbia to continue to exercise its rights and honour its commitments deriving from international treaties concluded by Serbia and Montenegro. He specified that "all treaty actions undertaken by Serbia and Montenegro w[ould] continue in force with respect to the Republic of Serbia with effect from 3 June 2006", and that, "all declarations, reservations and notifications made by Serbia and Montenegro w[ould] be maintained by the Republic of Serbia until the Secretary-General, as depositary, [were] duly notified otherwise".

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

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

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

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

72. By a letter dated 29 November 2006, the Chief State Prosecutor of Montenegro, after indicating her capacity to act as legal representative of the Republic of Montenegro, referred to the letter from the Agent of Bosnia and Herzegovina dated 16 October 2006, quoted in the previous paragraph, expressing the view that "both Serbia and Montenegro, jointly and severally, are responsible for the unlawful conduct that constitute[s] the cause of action in this case". The Chief State Prosecutor stated that the allegation concerned the liability in international law of the sovereign State of Montenegro, and that Montenegro regarded it as an attempt to have it become a participant in this way, without its consent, "i.e. to become a respondent in this procedure". The Chief State Prosecutor drew attention to the fact that, following the referendum held in Montenegro on 21 May 2006, the National Assembly of Montenegro had adopted a decision pronouncing the independence of the Republic of Montenegro. In the view of the Chief State Prosecutor, the Republic of Montenegro had become "an independent state with full international legal personality within its existing administrative borders", and she continued:

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

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

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

74. The Court observes that the facts and events on which the final submissions of Bosnia and Herzegovina are based occurred at a period of time when Serbia and Montenegro constituted a single State.

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

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

77. The Court thus notes that the Republic of Serbia remains a respondent in the case, and at the date of the present Judgment is indeed the only Respondent. Accordingly, any findings that the Court may make in the operative part of the present Judgment are to be addressed to Serbia.

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

79. The Court observes that the Republic of Montenegro is a party to the Genocide Convention. Parties to that Convention have undertaken the obligations flowing from it, in particular the obligation to co-operate in order to punish the perpetrators of genocide.

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* *

III. The Court's jurisdiction

(1) Introduction: the jurisdictional objection of Serbia and Montenegro

80. Notwithstanding the fact that in this case the stage of oral proceedings on the merits has been reached, and the fact that in 1996 the Court gave a judgment on preliminary objections to its jurisdiction (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 595, hereinafter "the 1996 Judgment"), an important issue of a jurisdictional character has since been raised by the Initiative, and the Court has been asked to rule upon it (see paragraphs 26-28 above). The basis of jurisdiction asserted by the Applicant, and found applicable by the Court by the 1996 Judgment, is Article IX of the Genocide Convention. The Socialist Federal Republic of Yugoslavia (hereinafter "the SFRY") became a party to that Convention on 29 August 1950. In substance, the central question now raised by the Respondent is whether at the time of the filing of the Application instituting the present proceedings the Respondent was or was not the continuator of the SFRY. The Respondent now contends that it was not a continuator State, and that therefore not only was it not a party to the Genocide Convention when the present proceedings were instituted, but it was not then a party to the Statute of the Court by virtue of membership in the United Nations; and that, not being such a party, it did not have access to the Court, with the consequence that the Court had no jurisdiction *ratione personae* over it.

81. This contention was first raised, in the context of the present case, by the "Initiative to the Court to Reconsider *ex officio* Jurisdiction over Yugoslavia" filed by the Respondent on 4 May 2001 (paragraph 26 above). The circumstances underlying that Initiative will be examined in more detail below (paragraphs 88-99). Briefly stated, the situation was that the Respondent, after claiming that since the break-up of the SFRY in 1992 it was the continuator of that State, and

as such maintained the membership of the SFRY in the United Nations, had on 27 October 2000 applied, "in light of the implementation of the Security Council resolution 777 (1992)", to be admitted to the Organization as a new Member, thereby in effect relinquishing its previous claim. The Respondent contended that it had in 2000 become apparent that it had not been a Member of the United Nations in the period 1992-2000, and was thus not a party to the Statute at the date of the filing of the Application in this case; and that it was not a party to the Genocide Convention on that date. The Respondent concluded that "the Court has no jurisdiction over [the Respondent] *ratione personae*". It requested the Court "to suspend proceedings regarding the merits of the Case until a decision on this Initiative is rendered".

82. By a letter of 12 June 2003, the Registrar, acting on the instructions of the Court, informed the Respondent that the Court could not accede to the request made in that document, that the proceedings be suspended until a decision was rendered on the jurisdictional issues raised therein. The Respondent was informed, nevertheless, that the Court "w[ould] not give judgment on the merits in the present case unless it [was] satisfied that it ha[d] jurisdiction" and that, "[s]hould Serbia and Montenegro wish to present further argument to the Court on jurisdictional questions during the oral proceedings on the merits, it w[ould] be free to do so". The Respondent accordingly raised, as an "issue of procedure", the question whether the Respondent had access to the Court at the date of the Application, and each of the parties has now addressed argument to the Court on that question. It has however at the same time been argued by the Applicant that the Court may not deal with the question, or that the Respondent is debarred from raising it at this stage of the proceedings. These contentions will be examined below.

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

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

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

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

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

* *

(2) History of the status of the FRY with regard to the United Nations

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

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

> "....
>
> 1. The Federal Republic of Yugoslavia, continuing the state, international legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all the commitments that the SFR of Yugoslavia assumed internationally,
>
> ....
>
> Remaining bound by all obligations to international organizations and institutions whose member it is . . ." (United Nations doc. A/46/915, Ann. II).

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

> "The Assembly of the Socialist Federal Republic of Yugoslavia, at its session held on 27 April 1992, promulgated the Constitution of the Federal Republic of Yugoslavia. Under the Constitution, on the basis of the continuing personality of Yugoslavia and the legitimate decisions by Serbia and Montenegro to continue to live together in Yugoslavia, the Socialist Federal Republic of Yugoslavia is transformed into the Federal Republic of Yugoslavia, consisting of the Republic of Serbia and the Republic of Montenegro.
>
> Strictly respecting the continuity of the international personality of Yugoslavia, the Federal Republic of Yugoslavia shall continue to fulfil all the rights conferred to, and obligations assumed by, the Socialist Federal Republic of Yugoslavia in international relations, including its membership in all international organizations and participation in international treaties ratified or acceded to by Yugoslavia." (United Nations doc. A/46/915, Ann. I.)

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

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

"*The Security Council,*

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

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

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

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

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

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

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

"*The General Assembly,*

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

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

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

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

94. On 25 September 1992, the Permanent Representatives of Bosnia and Herzegovina and Croatia addressed a letter to the Secretary-General, in which, with reference to Security Council resolution 777 (1992) and General Assembly resolution 47/1, they stated their understanding as follows: "At this moment, there is no doubt that the Socialist Federal Republic of Yugoslavia is not a member of the United Nations any more. At the same time, the Federal Republic of Yugoslavia is clearly not yet a member." They concluded that "[t]he flag flying in front of the United Nations and the name-plaque bearing the name 'Yugoslavia' do not represent anything or anybody any more" and "kindly request[ed] that [the Secretary-General] provide a legal explanatory statement concerning the questions raised" (United Nations doc. A/47/474).

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

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

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

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

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

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

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

* *

(3) The response of Bosnia and Herzegovina

100. The Court will now consider the Applicant's response to the jurisdictional objection raised by the Respondent, that is to say the contention of Bosnia and Herzegovina that the Court should not examine the question, raised by the Respondent in its Initiative (paragraph 81 above), of the status of the Respondent at the date of the filing of the Application instituting proceedings. It is first submitted by Bosnia and Herzegovina that the Respondent was under a duty to raise the issue of whether the FRY (Serbia and Montenegro) was a Member of the United Nations at the time of the proceedings on the preliminary objections, in 1996, and that since it did not do so, the principle of *res judicata*, attaching to the Court's 1996 Judgment on those objections, prevents it from reopening the issue. Secondly, the Applicant argues that the Court itself, having decided in 1996 that it had jurisdiction in the case, would be in breach of the principle of *res judicata* if it were now to decide otherwise, and that the Court cannot call in question the authority of its decisions as *res judicata*.

101. The first contention, as to the alleged consequences of the fact that Serbia did not raise the question of access to the Court under Article 35 at the preliminary objection stage, can be dealt with succinctly. Bosnia and Herzegovina has argued that to uphold the Respondent's objection "would mean that a respondent, after having asserted one or more preliminary objections, could still raise others, to the detriment of the effective administration of justice, the smooth conduct of proceedings, and, in the present case, the doctrine of *res judicata*". It should however be noted that if a party to proceedings before the Court chooses not to raise an issue of jurisdiction by way of the preliminary objection procedure under Article 79 of the Rules, that party is not necessarily thereby debarred from raising such issue during the proceedings on the merits of the case. As the Court stated in the case of *Avena and Other Mexican Nationals (Mexico* v. *United States of America)*,

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

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

102. The Court does not however find it necessary to consider here whether the conduct of the Respondent could be held to constitute an acquiescence in the jurisdiction of the Court. Such acquiescence, if established, might be relevant to questions of consensual jurisdiction, and in particular jurisdiction *ratione materiae* under Article IX of the Genocide Convention, but not to the question whether a State has the capacity under the Statute to be a party to proceedings before the Court.

The latter question may be regarded as an issue prior to that of jurisdiction *ratione personae*, or as one constitutive element within the concept of jurisdiction *ratione personae*. Either way, unlike the majority of questions of jurisdiction, it is not a matter of the consent of the parties. As the Court observed in the cases concerning the *Legality of Use of Force*,

> "a distinction has to be made between a question of jurisdiction that relates to the consent of a party and the question of the right of a party to appear before the Court under the requirements of the Statute, which is not a matter of consent. The question is whether *as a matter of law* Serbia and Montenegro was entitled to seise the Court as a party to the Statute at the time when it instituted proceedings in these cases. Since that question is independent of the views or wishes of the Parties, even if they were

now to have arrived at a shared view on the point, the Court would not have to accept that view as necessarily the correct one. The function of the Court to enquire into the matter and reach its own conclusion is thus mandatory upon the Court irrespective of the consent of the parties and is in no way incompatible with the principle that the jurisdiction of the Court depends on consent." (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 295, para. 36; emphasis in the original.)

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

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

* *

(4) Relevant past decisions of the Court

105. On 8 April 1993, the Court made an Order in this case indicating certain provisional measures. In that Order the Court briefly examined the circumstances of the break-up of the SFRY, and the claim of the Respondent (then known as "Yugoslavia (Serbia and Montenegro)") to continuity with that State, and consequent entitlement to continued membership in the United Nations. It noted that "the solution adopted" within the United Nations was "not free from legal difficulties", but concluded that "the question whether or not Yugoslavia is a Member of the United Nations and as such a party to the Statute of the Court is one which the Court does not need to determine definitively at the present stage of the proceedings" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 14 para. 18). This conclusion was based in part on a provisional view taken by the Court as to the effect of the proviso to Article 35, paragraph 2, of the Statute (*ibid.*, para. 19). The Order contained the reservation, normally included in orders on requests for provisional measures, that "the decision

given in the present proceedings in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case . . . and leaves unaffected the right of the Governments of Bosnia-Herzegovina and Yugoslavia to submit arguments in respect of [that question]" (*ibid.*, p. 23, para. 51). It is therefore evident that no question of *res judicata* arises in connection with the Order of 8 April 1993. A further Order on provisional measures was made on 13 September 1993, but contained nothing material to the question now being considered.

106. In 1995 the Respondent raised seven preliminary objections (one of which was later withdrawn), three of which invited the Court to find that it had no jurisdiction in the case. None of these objections were however founded on a contention that the FRY was not a party to the Statute at the relevant time; that was not a contention specifically advanced in the proceedings on the preliminary objections. At the time of those proceedings, the FRY was persisting in the claim, that it was continuing the membership of the former SFRY in the United Nations; and while that claim was opposed by a number of States, the position taken by the various organs gave rise to a "confused and complex state of affairs . . . within the United Nations" (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 308, para. 73). Neither party raised the matter before the Court: Bosnia and Herzegovina as Applicant, while denying that the FRY was a Member of the United Nations as a continuator of the SFRY, was asserting before this Court that the FRY was nevertheless a party to the Statute, either under Article 35, paragraph 2, thereof, or on the basis of the declaration of 27 April 1992 (see paragraphs 89 to 90 above); and for the FRY to raise the issue would have involved undermining or abandoning its claim to be the continuator of the SFRY as the basis for continuing membership of the United Nations.

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

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

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

Essentially the contention of the FRY was that its admission to membership in 2000 necessarily implied that it was not a Member of the United Nations and thus not a party to the Statute in 1993, when the proceedings in the present case were instituted, so that the Court would have had no jurisdiction in the case.

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

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

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

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

111. The Court therefore found the Application for revision inadmissible. However, as the Court has observed in the cases concerning *Legality of Use of Force*, it did not, in its Judgment on the Application for revision,

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

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

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

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

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

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

* *

(5) The principle of *res judicata*

114. The Court will now consider the principle of *res judicata*, and its application to the 1996 Judgment in this case. The Applicant asserts that the 1996 Judgment, whereby the Court found that it had jurisdiction under the Genocide Convention, "enjoys the authority of *res judicata* and is not susceptible of appeal" and that "any ruling whereby the Court reversed the 1996 Judgment . . . would be incompatible both with the *res judicata* principle and with Articles 59, 60 and 61 of the Statute". The Applicant submits that, like its judgments on the merits, "the Court's decisions on jurisdiction are *res judicata*". It further observes that, pursuant to Article 60 of the Statute, the Court's 1996 Judgment is "final and without appeal" subject only to

the possibility of a request for interpretation and revision; and the FRY's request for revision was rejected by the Court in its Judgment of 3 February 2003. The Respondent contends that jurisdiction once upheld may be challenged by new objections; and considers that this does not contravene the principle of *res judicata* or the wording of Article 79 of the Rules of Court. It emphasizes "the right and duty of the Court to act *proprio motu*" to examine its jurisdiction, mentioned in the case of the *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan)* (see paragraph 118 below), and contends that the Court cannot "forfeit" that right by not having itself raised the issue in the preliminary objections phase.

115. There is no dispute between the Parties as to the existence of the principle of *res judicata* even if they interpret it differently as regards judgments deciding questions of jurisdiction. The fundamental character of that principle appears from the terms of the Statute of the Court and the Charter of the United Nations. The underlying character and purposes of the principle are reflected in the judicial practice of the Court. That principle signifies that the decisions of the Court are not only binding on the parties, but are final, in the sense that they cannot be reopened by the parties as regards the issues that have been determined, save by procedures, of an exceptional nature, specially laid down for that purpose. Article 59 of the Statute, notwithstanding its negative wording, has at its core the positive statement that the parties are bound by the decision of the Court in respect of the particular case. Article 60 of the Statute provides that the judgment is final and without appeal; Article 61 places close limits of time and substance on the ability of the parties to seek the revision of the judgment. The Court stressed those limits in 2003 when it found inadmissible the application made by Serbia and Montenegro for revision of the 1996 Judgment in the *Application for Revision* case (*I.C.J. Reports 2003*, p. 12, para. 17).

116. Two purposes, one general, the other specific, underlie the principle of *res judicata*, internationally as nationally. First, the stability of legal relations requires that litigation come to an end. The Court's function, according to Article 38 of its Statute, is to "decide", that is, to bring to an end, "such disputes as are submitted to it". Secondly, it is in the interest of each party that an issue which has already been adjudicated in favour of that party be not argued again. Article 60 of the Statute articulates this finality of judgments. Depriving a litigant of the benefit of a judgment it has already obtained must in general be seen as a breach of the principles governing the legal settlement of disputes.

117. It has however been suggested by the Respondent that a distinction may be drawn between the application of the principle of *res judicata* to judgments given on the merits of a case, and judgments determining the Court's jurisdiction, in response to preliminary objections; specifically, the Respondent contends that "decisions on preliminary objections do not and cannot have the same consequences as decisions on the merits". The Court will however observe that the decision on questions of jurisdiction, pursuant to Article 36, paragraph 6, of the Statute, is given by a judgment, and Article 60 of the Statute provides that "[t]he judgment is final and without appeal", without distinguishing between judgments on jurisdiction and admissibility, and judgments on the merits. In its Judgment of 25 March 1999 on the request for interpretation of the Judgment of 11 June 1998 in the case of the *Land and Maritime Boundary between Cameroon and Nigeria*, the Court expressly recognized that the 1998 Judgment, given on a number of preliminary objections to

jurisdiction and admissibility, constituted *res judicata*, so that the Court could not consider a submission inconsistent with that judgment (*Judgment, I.C.J. Reports 1999 (I)*, p. 39, para. 16). Similarly, in its Judgment of 3 February 2003 in the *Application for Revision* case, the Court, when it began by examining whether the conditions for the opening of the revision procedure, laid down by Article 61 of the Statute, were satisfied, undoubtedly recognized that an application could be made for revision of a judgment on preliminary objections; this could in turn only derive from a recognition that such a judgment is "final and without appeal". Furthermore, the contention put forward by the Respondent would signify that the principle of *res judicata* would not prevent a judgment dismissing a preliminary objection from remaining open to further challenge indefinitely, while a judgment upholding such an objection, and putting an end to the case, would in the nature of things be final and determinative as regards that specific case.

118. The Court recalls that, as it has stated in the case of the *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan)*, it "must however always be satisfied that it has jurisdiction, and must if necessary go into that matter *proprio motu*" (*Judgment, I.C.J. Reports 1972*, p. 52, para. 13). That decision in its context (in a case in which there was no question of reopening a previous decision of the Court) does not support the Respondent's contention. It does not signify that jurisdictional decisions remain reviewable indefinitely, nor that the Court may, *proprio motu* or otherwise, reopen matters already decided with the force of *res judicata*. The Respondent has argued that there is a principle that "an international court may consider or reconsider the issue of jurisdiction at any stage of the proceedings". It has referred in this connection both to the dictum just cited from the *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan)*, and to the *Corfu Channel (United Kingdom* v. *Albania)* case. It is correct that the Court, having in the first phase of that case rejected Albania's preliminary objection to jurisdiction, and having decided that proceedings on the merits were to continue (*Preliminary Objection, Judgment, I.C.J. Reports 1947-1948*, p. 15), did at the merits stage consider and rule on a challenge to its jurisdiction, in particular whether it had jurisdiction to assess compensation (*I.C.J. Reports 1949*, pp. 23-26; 171). But no reconsideration at all by the Court of its earlier Judgment was entailed in this because, following that earlier Judgment, the Parties had concluded a special agreement submitting to the Court, *inter alia*, the question of compensation. The later challenge to jurisdiction concerned only the scope of the jurisdiction conferred by that subsequent agreement.

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

120. This does not however mean that, should a party to a case believe that elements have come to light subsequent to the decision of the Court which tend to show that the Court's conclusions may have been based on incorrect or insufficient facts, the decision must remain final, even if it is in apparent contradiction to reality. The Statute provides for only one procedure in such an event: the procedure under Article 61, which offers the possibility for the revision of judgments, subject to the restrictions stated in that Article. In the interests of the stability of legal relations, those restrictions must be rigorously applied. As noted above (paragraph 110) the FRY's Application for revision of the 1996 Judgment in this case was dismissed, as not meeting the conditions of Article 61. Subject only to this possibility of revision, the applicable principle is *res judicata pro veritate habetur*, that is to say that the findings of a judgment are, for the purposes of the case and between the parties, to be taken as correct, and may not be reopened on the basis of claims that doubt has been thrown on them by subsequent events.

* *

(6) Application of the principle of *res judicata* to the 1996 Judgment

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

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

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

123. The operative part of a judgment of the Court possesses the force of *res judicata*. The operative part of the 1996 Judgment stated, in paragraph 47 (2) *(a)*, that the Court found "that, on the basis of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, it has jurisdiction to decide upon the dispute". That jurisdiction is thus established with the full weight of the Court's judicial authority. For a party to assert today that, at the date the 1996 Judgment was given, the Court had no power to give it, because one of the parties can now be seen to have been unable to come before the Court is, for the reason given in the preceding paragraph, to call in question the force as *res judicata* of the operative clause of the Judgment. At first sight, therefore, the Court need not examine the Respondent's objection to jurisdiction based on its contention as to its lack of status in 1993.

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

125. The Court does not however consider that it was the purpose of Article 79 of the Rules of Court to limit the extent of the force of *res judicata* attaching to a judgment on preliminary objections, nor that, in the case of such judgment, such force is necessarily limited to the clauses of

the *dispositif* specifically rejecting particular objections. There are many examples in the Court's jurisprudence of decisions on preliminary objections which contain a general finding that the Court has jurisdiction, or that the application is admissible, as the case may be; and it would be going too far to suppose that all of these are necessarily superfluous conclusions. In the view of the Court, if any question arises as to the scope of *res judicata* attaching to a judgment, it must be determined in each case having regard to the context in which the judgment was given (cf. *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the* Continental Shelf (Tunisia/Libyan Arab Jamahiriya) *(Tunisia* v. *Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1985*, pp. 218-219, para. 48).

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

127. In particular, the fact that a judgment may, in addition to rejecting specific preliminary objections, contain a finding that "the Court has jurisdiction" in the case does not necessarily prevent subsequent examination of any jurisdictional issues later arising that have not been resolved, with the force of *res judicata*, by such judgment. The Parties have each referred in this connection to the successive decisions in the *Corfu Channel* case, which the Court has already considered above (paragraph 118). Mention may also be made of the judgments on the merits in the two cases concerning *Fisheries Jurisdiction (United Kingdom* v. *Iceland; Federal Republic of Germany* v. *Iceland) (I.C.J. Reports 1974*, p. 20, para. 42; pp. 203-204, para. 74), which dealt with minor issues of jurisdiction despite an express finding of jurisdiction in previous judgments (*I.C.J. Reports 1973*, p. 22, para. 46; p. 66, para. 46). Even where the Court has, in a preliminary judgment, specifically reserved certain matters of jurisdiction for later decision, the judgment may nevertheless contain a finding that "the Court has jurisdiction" in the case, this being understood as being subject to the matters reserved (see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 442, para. 113 (1) *(c)*, and pp. 425-426, para. 76; cf. also, in connection with an objection to admissibility, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom) (Libyan Arab Jamahiriya* v. *United States of America), I.C.J. Reports 1998*, p. 29, para. 51 and pp. 30-31, paras. 53 (2) *(b)* and 53 (3); p. 134, para. 50 and p. 156, paras. 53 (2) *(b)* and 53 (3)).

128. On the other hand, the fact that the Court has in these past cases dealt with jurisdictional issues after having delivered a judgment on jurisdiction does not support the contention that such a judgment can be reopened at any time, so as to permit reconsideration of issues already settled with the force of *res judicata*. The essential difference between the cases mentioned in the previous

paragraph and the present case is this: the jurisdictional issues examined at a late stage in those cases were such that the decision on them would not contradict the finding of jurisdiction made in the earlier judgment. In the *Fisheries Jurisdiction* cases, the issues raised related to the extent of the jurisdiction already established in principle with the force of *res judicata*; in the *Military and Paramilitary Activities* case, the Court had clearly indicated in the 1984 Judgment that its finding in favour of jurisdiction did not extend to a definitive ruling on the interpretation of the United States reservation to its optional clause declaration. By contrast, the contentions of the Respondent in the present case would, if upheld, effectively reverse the 1996 Judgment; that indeed is their purpose.

129. The Respondent has contended that the issue whether the FRY had access to the Court under Article 35 of the Statute has in fact never been decided in the present case, so that no barrier of *res judicata* would prevent the Court from examining that issue at the present stage of the proceedings. It has drawn attention to the fact that when commenting on the 1996 Judgment, in its 2004 Judgments in the cases concerning the *Legality of Use of Force*, the Court observed that "[t]he question of the status of the Federal Republic of Yugoslavia in relation to Article 35 of the Statute was not raised and the Court saw no reason to examine it" (see, for example, *Legality of Use of Force (Serbia and Montenegro* v. *Belgium), I.C.J. Reports 2004*, p. 311, para. 82), and that "in its pronouncements in incidental proceedings" in the present case, the Court "did not commit itself to a definitive position on the issue of the legal status of the Federal Republic of Yugoslavia in relation to the Charter and the Statute" (*ibid.*, pp. 308-309, para. 74).

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

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

The question whether the FRY was a continuator or a successor State of the SFRY was mentioned in the Memorial of Bosnia and Herzegovina. The view of Bosnia and Herzegovina was that, while the FRY was not a Member of the United Nations, as a successor State of the SFRY which had

expressly declared that it would abide by the international commitments of the SFRY, it was nevertheless a party to the Statute. It is also essential, when examining the text of the 1996 Judgment, to take note of the context in which it was delivered, in particular as regards the contemporary state of relations between the Respondent and the United Nations, as recounted in paragraphs 88 to 99 above.

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

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

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

132. As already noted, the legal complications of the position of the Respondent in relation to the United Nations were not specifically mentioned in the 1996 Judgment. The Court stated, as mentioned in paragraph 121 above, that "Yugoslavia was bound by the provisions of the [Genocide] Convention on the date of the filing of the Application in the present case" (*I.C.J. Reports 1996 (II)*, p. 610, para. 17), and found that "on the basis of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, it has jurisdiction to adjudicate upon the dispute" (*ibid.*, p. 623, para. 47 (2) *(a)*). Since, as observed above, the question of a State's capacity to be a party to proceedings is a matter which precedes that of jurisdiction *ratione materiae*, and one which the Court must, if necessary, raise ex officio (see paragraph 122 above), this finding must as a matter of construction be understood, by necessary implication, to mean that the Court at that time perceived the Respondent as being in a position to participate in cases before the Court. On that basis, it proceeded to make a finding on jurisdiction which would

have the force of *res judicata*. The Court does not need, for the purpose of the present proceedings, to go behind that finding and consider on what basis the Court was able to satisfy itself on the point. Whether the Parties classify the matter as one of "access to the Court" or of "jurisdiction *ratione personae*", the fact remains that the Court could not have proceeded to determine the merits unless the Respondent had had the capacity under the Statute to be a party to proceedings before the Court.

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

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

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

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

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

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

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

> "Today it is known that in 1996 when the decision on preliminary objections was rendered, the Respondent was not a party to the Statute. Thus, there was no foothold, Articles 36 (6), 59, and 60 did not represent a binding treaty provision providing a possible basis for deciding on jurisdiction with *res judicata* effects."

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

139. Counsel for the Respondent contended further that, in the circumstances of the present case, reliance on the *res judicata* principle "would justify the Court's *ultra vires* exercise of its judicial functions contrary to the mandatory requirements of the Statute". However, the operation

of the "mandatory requirements of the Statute" falls to be determined by the Court in each case before it; and once the Court has determined, with the force of *res judicata*, that it has jurisdiction, then for the purposes of that case no question of *ultra vires* action can arise, the Court having sole competence to determine such matters under the Statute. For the Court *res judicata pro veritate habetur*, and the judicial truth within the context of a case is as the Court has determined it, subject only to the provision in the Statute for revision of judgments. This result is required by the nature of the judicial function, and the universally recognized need for stability of legal relations.

* *

(7) Conclusion: jurisdiction affirmed

140. The Court accordingly concludes that, in respect of the contention that the Respondent was not, on the date of filing of the Application instituting proceedings, a State having the capacity to come before the Court under the Statute, the principle of *res judicata* precludes any reopening of the decision embodied in the 1996 Judgment. The Respondent has however also argued that the 1996 Judgment is not *res judicata* as to the further question whether the FRY was, at the time of institution of proceedings, a party to the Genocide Convention, and has sought to show that at that time it was not, and could not have been, such a party. The Court however considers that the reasons given above for holding that the 1996 Judgment settles the question of jurisdiction in this case with the force of *res judicata* are applicable *a fortiori* as regards this contention, since on this point the 1996 Judgment was quite specific, as it was not on the question of capacity to come before the Court. The Court does not therefore find it necessary to examine the argument of the Applicant that the failure of the Respondent to advance at the time the reasons why it now contends that it was not a party to the Genocide Convention might raise considerations of estoppel, or *forum prorogatum* (cf. paragraphs 85 and 101 above). The Court thus concludes that, as stated in the 1996 Judgment, it has jurisdiction, under Article IX of the Genocide Convention, to adjudicate upon the dispute brought before it by the Application filed on 20 March 1993. It follows from the above that the Court does not find it necessary to consider the questions, extensively addressed by the Parties, of the status of the Respondent under the Charter of the United Nations and the Statute of the Court, and its position in relation to the Genocide Convention at the time of the filing of the Application.

*

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

*

* *

IV. The applicable law: the Convention on the Prevention and Punishment of the Crime of Genocide

(1) The Convention in brief

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

> "The Contracting Parties,
>
> Having considered the declaration made by the General Assembly of the United Nations in its resolution 96 (I) dated 11 December 1946 that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world,
>
> Recognizing that at all periods of history genocide has inflicted great losses on humanity, and
>
> Being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required,
>
> Hereby agree as hereinafter provided . . ."

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

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

Article III provides as follows:

> "The following acts shall be punishable:
>
> *(a)* Genocide;
>
> *(b)* Conspiracy to commit genocide;

(c) Direct and public incitement to commit genocide;

(d) Attempt to commit genocide;

(e) Complicity in genocide."

144. According to Article IV, persons committing any of those acts shall be punished whether they are constitutionally responsible rulers, public officials or private individuals. Article V requires the parties to enact the necessary legislation to give effect to the Convention, and, in particular, to provide effective penalties for persons guilty of genocide or other acts enumerated in Article III. Article VI provides that "[p]ersons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction". Article VII provides for extradition.

145. Under Article VIII

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

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

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

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

147. The jurisdiction of the Court in this case is based solely on Article IX of the Convention. All the other grounds of jurisdiction invoked by the Applicant were rejected in the 1996 Judgment on jurisdiction (*I.C.J. Reports 1996 (II)*, pp. 617-621, paras. 35-41). It follows that the Court may rule only on the disputes between the Parties to which that provision refers. The Parties disagree on whether the Court finally decided the scope and meaning of that provision in its 1996 Judgment and, if it did not, on the matters over which the Court has jurisdiction under that provision. The Court rules on those two matters in following sections of this Judgment. It has no power to rule on alleged breaches of other obligations under international law, not amounting to genocide, particularly those protecting human rights in armed conflict. That is so even if the alleged breaches are of obligations under peremptory norms, or of obligations which protect essential humanitarian values, and which may be owed *erga omnes*.

148. As it has in other cases, the Court recalls the fundamental distinction between the existence and binding force of obligations arising under international law and the existence of a court or tribunal with jurisdiction to resolve disputes about compliance with those obligations. The fact that there is not such a court or tribunal does not mean that the obligations do not exist. They retain their validity and legal force. States are required to fulfil their obligations under international law, including international humanitarian law, and they remain responsible for acts contrary to international law which are attributable to them (e.g. case concerning *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction of the Court and Admissibility of the Application, Judgment, I.C.J. Reports 2006*, pp. 52-53, para. 127).

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

* *

(2) The Court's 1996 decision about the scope and meaning of Article IX

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

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

> "The Court now comes to the second proposition advanced by Yugoslavia [in support of one of its preliminary objections], regarding the type of State responsibility envisaged in Article IX of the Convention. According to Yugoslavia, that Article would only cover the responsibility flowing from the failure of a State to fulfil its obligations of prevention and punishment as contemplated by Articles V, VI and VII; on the other hand, the responsibility of a State for an act of genocide perpetrated by the State itself would be excluded from the scope of the Convention.

The Court would observe that the reference to Article IX to 'the responsibility of a State for genocide or for any of the other acts enumerated in Article III', does not exclude any form of State responsibility.

Nor is the responsibility of a State for acts of its organs excluded by Article IV of the Convention, which contemplates the commission of an act of genocide by 'rulers' or 'public officials'.

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

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

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

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

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

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

152. The Court has already examined above the question of the authority of *res judicata* attaching to the 1996 Judgment, and indicated that it cannot reopen issues decided with that authority. Whether or not the issue now raised by the Respondent falls in that category, the Court observes that the final part of paragraph 33 of that Judgment, quoted above, must be taken as indicating that "the meaning and legal scope" of Article IX and of other provisions of the

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

* *

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

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

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

* *

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

155. The Applicant, in the words of its Agent, contends that "[t]his case is about State responsibility and seeks to establish the responsibilities of a State which, through its leadership, through its organs, committed the most brutal violations of one of the most sacred instruments of

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

156. The Respondent contends to the contrary that

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

It argues that the Court therefore does not have jurisdiction *ratione materiae* under Article IX; and continues:

> "[t]hese provisions [Articles I, V, VI and IX] do not extend to the responsibility of a Contracting Party as such for acts of genocide but [only] to responsibility for failure to prevent or to punish acts of genocide committed by individuals within its territory or . . . its control".

The sole remedy in respect of that failure would, in the Respondent's view, be a declaratory judgment.

157. As a subsidiary argument, the Respondent also contended that

> "for a State to be responsible under the Genocide Convention, the facts must first be established. As genocide is a crime, it can only be established in accordance with the rules of criminal law, under which the first requirement to be met is that of individual responsibility. The State can incur responsibility only when the existence of genocide has been established beyond all reasonable doubt. In addition, it must then be shown that the person who committed the genocide can engage the responsibility of the State . . ."

(This contention went on to mention responsibility based on breach of the obligation to prevent and punish, matters considered later in this Judgment.)

158. The Respondent has in addition presented what it refers to as "alternative arguments concerning solely State responsibility for breaches of Articles II and III". Those arguments addressed the necessary conditions, especially of intent, as well as of attribution. When presenting those alternative arguments, counsel for the Respondent repeated the principal submission set out above that "the Convention does not suggest in any way that States themselves can commit genocide".

159. The Court notes that there is no disagreement between the Parties that the reference in Article IX to disputes about "the responsibility of a State" as being among the disputes relating to the interpretation, application or fulfilment of the Convention which come within the Court's jurisdiction, indicates that provisions of the Convention do impose obligations on States in respect of which they may, in the event of breach, incur responsibility. Articles V, VI and VII requiring legislation, in particular providing effective penalties for persons guilty of genocide and the other acts enumerated in Article III, and for the prosecution and extradition of alleged offenders are plainly among them. Because those provisions regulating punishment also have a deterrent and therefore a preventive effect or purpose, they could be regarded as meeting and indeed exhausting the undertaking to prevent the crime of genocide stated in Article I and mentioned in the title. On that basis, in support of the Respondent's principal position, that Article would rank as merely hortatory, introductory or purposive and as preambular to those specific obligations. The remaining specific provision, Article VIII about competent organs of the United Nations taking action, may be seen as completing the system by supporting both prevention and suppression, in this case at the political level rather than as a matter of legal responsibility.

160. The Court observes that what obligations the Convention imposes upon the parties to it depends on the ordinary meaning of the terms of the Convention read in their context and in the light of its object and purpose. To confirm the meaning resulting from that process or to remove ambiguity or obscurity or a manifestly absurd or unreasonable result, the supplementary means of interpretation to which recourse may be had include the preparatory work of the Convention and the circumstances of its conclusion. Those propositions, reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, are well recognized as part of customary international law: see *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 174, para. 94; case concerning *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004*, p. 48, para. 83; *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 501, para. 99; and *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 645, para. 37, and the other cases referred to in those decisions.

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

"The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (I) of the General Assembly, December 11th 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required 'in order to liberate mankind from such an odious scourge' (Preamble to the Convention) . . .

The objects of such a convention must also be considered. The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality." (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23.)

Later in that Opinion, the Court referred to "the moral and humanitarian principles which are its basis" (*ibid.*, p. 24). In earlier phases of the present case the Court has also recalled resolution 96 (I) (*I.C.J. Reports 1993*, p. 23; see also pp. 348 and 440) and has quoted the 1951 statement (*I.C.J. Reports 1996 (II)*, p. 616). The Court reaffirmed the 1951 and 1996 statements in its Judgment of 3 February 2006 in the case concerning *Armed Activities on the Territory of the Congo (New Application 2002) (Democratic Republic of the Congo* v. *Rwanda)*, paragraph 64, when it added that the norm prohibiting genocide was assuredly a peremptory norm of international law *(jus cogens)*.

162. Those characterizations of the prohibition on genocide and the purpose of the Convention are significant for the interpretation of the second proposition stated in Article I — the undertaking by the Contracting Parties to prevent and punish the crime of genocide, and particularly in this context the undertaking to prevent. Several features of that undertaking are significant. The ordinary meaning of the word "undertake" is to give a formal promise, to bind or engage oneself, to give a pledge or promise, to agree, to accept an obligation. It is a word regularly used in treaties setting out the obligations of the Contracting Parties (cf., for example, International Convention on the Elimination of All Forms of Racial Discrimination (7 March 1966), Article 2, para. 1; International Covenant on Civil and Political Rights (16 December 1966), Articles 2, para. 1, and 3, for example). It is not merely hortatory or purposive. The undertaking is unqualified (a matter considered later in relation to the scope of the obligation of prevention); and it is not to be read merely as an introduction to later express references to legislation, prosecution and extradition. Those features support the conclusion that Article I, in particular its undertaking to prevent, creates obligations distinct from those which appear in the subsequent Articles. That conclusion is also supported by the purely humanitarian and civilizing purpose of the Convention.

163. The conclusion is confirmed by two aspects of the preparatory work of the Convention and the circumstances of its conclusion as referred to in Article 32 of the Vienna Convention. In 1947 the United Nations General Assembly, in requesting the Economic and Social Council to

submit a report and a draft convention on genocide to the Third Session of the Assembly, declared "that genocide is an international crime entailing national and international responsibility on the part of individuals and States" (A/RES/180 (II)). That duality of responsibilities is also to be seen in two other associated resolutions adopted on the same day, both directed to the newly established International Law Commission (hereinafter "the ILC"): the first on the formulation of the Nuremberg principles, concerned with the rights (Principle V) and duties of individuals, and the second on the draft declaration on the rights and duties of States (A/RES/177 and A/RES/178 (II)). The duality of responsibilities is further considered later in this Judgment (paragraphs 173-174).

164. The second feature of the drafting history emphasizes the operative and non-preambular character of Article I. The Preamble to the draft Convention, prepared by the *Ad Hoc* Committee on Genocide for the Third Session of the General Assembly and considered by its Sixth Committee, read in part as follows:

> "The High Contracting Parties
>
> . . . . . .
>
> Being convinced that the prevention and punishment of genocide requires international co-operation,
>
> *Hereby agree to prevent and punish the crime as hereinafter provided.*"

The first Article would have provided "[g]enocide is a crime under international law whether committed in time of peace or in time of war" (report of the *Ad Hoc* Committee on Genocide, 5 April to 10 May 1948, United Nations, *Official Records of the Economic and Social Council, Seventh Session, Supplement No. 6*, doc. E/794, pp. 2, 18).

Belgium was of the view that the undertaking to prevent and punish should be made more effective by being contained in the operative part of the Convention rather than in the Preamble and proposed the following Article I to the Sixth Committee of the General Assembly: "The High Contracting Parties undertake to prevent and punish the crime of genocide." (United Nations doc. A/C.6/217.) The Netherlands then proposed a new text of Article I combining the *Ad Hoc* Committee draft and the Belgian proposal with some changes: "The High Contracting Parties reaffirm that genocide is a crime under international law, which they undertake to prevent and to punish, in accordance with the following articles." (United Nations docs. A/C.6/220; United Nations, *Official Records of the General Assembly, Third Session, Part I, Sixth Committee*, Summary Records of the 68th meeting, p. 45.) The Danish representative thought that Article I should be worded more effectively and proposed the deletion of the final phrase — "in accordance with the following articles" (*ibid.*, p. 47). The Netherlands representative agreed with that suggestion (*ibid.*, pp. 49-50). After the USSR's proposal to delete Article I was rejected by 36 votes to 8 with 5 abstentions and its proposal to transfer its various points to the Preamble was rejected by 40 votes to 8, and the phrase "whether committed in time of peace or of war" was inserted by 30 votes to 7 with 6 abstentions, the amended text of Article I was adopted by 37 votes to 3 with 2 abstentions (*ibid.*, pp. 51 and 53).

165. For the Court both changes — the movement of the undertaking from the Preamble to the first operative Article and the removal of the linking clause ("in accordance with the following articles") — confirm that Article I does impose distinct obligations over and above those imposed by other Articles of the Convention. In particular, the Contracting Parties have a direct obligation to prevent genocide.

166. The Court next considers whether the Parties are also under an obligation, by virtue of the Convention, not to commit genocide themselves. It must be observed at the outset that such an obligation is not expressly imposed by the actual terms of the Convention. The Applicant has however advanced as its main argument that such an obligation is imposed by Article IX, which confers on the Court jurisdiction over disputes "including those relating to the responsibility of a State for genocide or any of the other acts enumerated in Article III". Since Article IX is essentially a jurisdictional provision, the Court considers that it should first ascertain whether the substantive obligation on States not to commit genocide may flow from the other provisions of the Convention. Under Article I the States parties are bound to prevent such an act, which it describes as "a crime under international law", being committed. The Article does not *expressis verbis* require States to refrain from themselves committing genocide. However, in the view of the Court, taking into account the established purpose of the Convention, the effect of Article I is to prohibit States from themselves committing genocide. Such a prohibition follows, first, from the fact that the Article categorizes genocide as "a crime under international law": by agreeing to such a categorization, the States parties must logically be undertaking not to commit the act so described. Secondly, it follows from the expressly stated obligation to prevent the commission of acts of genocide. That obligation requires the States parties, *inter alia*, to employ the means at their disposal, in circumstances to be described more specifically later in this Judgment, to prevent persons or groups not directly under their authority from committing an act of genocide or any of the other acts mentioned in Article III. It would be paradoxical if States were thus under an obligation to prevent, so far as within their power, commission of genocide by persons over whom they have a certain influence, but were not forbidden to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law. In short, the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide.

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

168. The conclusion that the Contracting Parties are bound in this way by the Convention not to commit genocide and the other acts enumerated in Article III is confirmed by one unusual feature of the wording of Article IX. But for that unusual feature and the addition of the word "fulfilment" to the provision conferring on the Court jurisdiction over disputes as to the "interpretation and application" of the Convention (an addition which does not appear to be significant in this case), Article IX would be a standard dispute settlement provision.

169. The unusual feature of Article IX is the phrase "including those [disputes] relating to the responsibility of a State for genocide or any of the other acts enumerated in Article III". The word "including" tends to confirm that disputes relating to the responsibility of Contracting Parties for genocide, and the other acts enumerated in Article III to which it refers, are comprised within a broader group of disputes relating to the interpretation, application or fulfilment of the Convention. The responsibility of a party for genocide and the other acts enumerated in Article III arises from its failure to comply with the obligations imposed by the other provisions of the Convention, and in particular, in the present context, with Article III read with Articles I and II. According to the English text of the Convention, the responsibility contemplated is responsibility "for genocide" (in French, "responsabilité . . . en matière de génocide"), not merely responsibility "for failing to prevent or punish genocide". The particular terms of the phrase as a whole confirm that Contracting Parties may be responsible for genocide and the other acts enumerated in Article III of the Convention.

*

170. The Court now considers three arguments, advanced by the Respondent which may be seen as contradicting the proposition that the Convention imposes a duty on the Contracting Parties not to commit genocide and the other acts enumerated in Article III. The first is that, as a matter of general principle, international law does not recognize the criminal responsibility of the State, and the Genocide Convention does not provide a vehicle for the imposition of such criminal responsibility. On the matter of principle the Respondent calls attention to the rejection by the ILC of the concept of international crimes when it prepared the final draft of its Articles on State Responsibility, a decision reflecting the strongly negative reactions of a number of States to any such concept. The Applicant accepts that general international law does not recognize the criminal responsibility of States. It contends, on the specific issue, that the obligation for which the Respondent may be held responsible, in the event of breach, in proceedings under Article IX, is simply an obligation arising under international law, in this case the provisions of the Convention. The Court observes that the obligations in question in this case, arising from the terms of the Convention, and the responsibilities of States that would arise from breach of such obligations, are obligations and responsibilities under international law. They are not of a criminal nature. This argument accordingly cannot be accepted.

171. The second argument of the Respondent is that the nature of the Convention is such as to exclude from its scope State responsibility for genocide and the other enumerated acts. The Convention, it is said, is a standard international criminal law convention focussed essentially on

the criminal prosecution and punishment of individuals and not on the responsibility of States. The emphasis of the Convention on the obligations and responsibility of individuals excludes any possibility of States being liable and responsible in the event of breach of the obligations reflected in Article III. In particular, it is said, that possibility cannot stand in the face of the references, in Article III to punishment (of individuals), and in Article IV to individuals being punished, and the requirement, in Article V for legislation in particular for effective penalties for persons guilty of genocide, the provision in Article VI for the prosecution of persons charged with genocide, and requirement in Article VII for extradition.

172. The Court is mindful of the fact that the famous sentence in the Nuremberg Judgment that "[c]rimes against international law are committed by men, not by abstract entities . . ." (Judgment of the International Military Tribunal, Trial of the Major War Criminals, 1947, *Official Documents*, Vol. 1, p. 223) might be invoked in support of the proposition that only individuals can breach the obligations set out in Article III. But the Court notes that that Tribunal was answering the argument that "international law is concerned with the actions of sovereign States, and provides no punishment for individuals" (*ibid.*, p. 222), and that thus States alone were responsible under international law. The Tribunal rejected that argument in the following terms: "[t]hat international law imposes duties and liabilities upon individuals as well as upon States has long been recognized" (*ibid.*, p. 223; the phrase "as well as upon States" is missing in the French text of the Judgment).

173. The Court observes that that duality of responsibility continues to be a constant feature of international law. This feature is reflected in Article 25, paragraph 4, of the Rome Statute for the International Criminal Court, now accepted by 104 States: "No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law." The Court notes also that the ILC's Articles on the Responsibility of States for Internationally Wrongful Acts (Annex to General Assembly resolution 56/83, 12 December 2001), to be referred to hereinafter as "the ILC Articles on State Responsibility", affirm in Article 58 the other side of the coin: "These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State." In its Commentary on this provision, the Commission said:

> "Where crimes against international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them. In certain cases, in particular aggression, the State will by definition be involved. Even so, the question of individual responsibility is in principle distinct from the question of State responsibility. The State is not exempted from its own responsibility for internationally wrongful conduct by the prosecution and punishment of the State officials who carried it out." (ILC Commentary on the Draft Articles on Responsibility of States for Internationally Wrongful Acts, ILC Report A/56/10, 2001, Commentary on Article 58, para. 3.)

The Commission quoted Article 25, paragraph 4, of the Rome Statute, and concluded as follows:

"Article 58 . . . [makes] it clear that the Articles do not address the question of the individual responsibility under international law of any person acting on behalf of a State. The term 'individual responsibility' has acquired an accepted meaning in light of the Rome Statute and other instruments; it refers to the responsibility of individual persons, including State officials, under certain rules of international law for conduct such as genocide, war crimes and crimes against humanity."

174. The Court sees nothing in the wording or the structure of the provisions of the Convention relating to individual criminal liability which would displace the meaning of Article I, read with paragraphs *(a)* to *(e)* of Article III, so far as these provisions impose obligations on States distinct from the obligations which the Convention requires them to place on individuals. Furthermore, the fact that Articles V, VI and VII focus on individuals cannot itself establish that the Contracting Parties may not be subject to obligations not to commit genocide and the other acts enumerated in Article III.

175. The third and final argument of the Respondent against the proposition that the Contracting Parties are bound by the Convention not to commit genocide is based on the preparatory work of the Convention and particularly of Article IX. The Court has already used part of that work to confirm the operative significance of the undertaking in Article I (see paragraphs 164 and 165 above), an interpretation already determined from the terms of the Convention, its context and purpose.

176. The Respondent, claiming that the Convention and in particular Article IX is ambiguous, submits that the drafting history of the Convention, in the Sixth Committee of the General Assembly, shows that "there was no question of direct responsibility of the State for acts of genocide". It claims that the responsibility of the State was related to the "key provisions" of Articles IV-VI: the Convention is about the criminal responsibility of individuals supported by the civil responsibility of States to prevent and punish. This argument against any wider responsibility for the Contracting Parties is based on the records of the discussion in the Sixth Committee, and is, it is contended, supported by the rejection of United Kingdom amendments to what became Articles IV and VI. Had the first amendment been adopted, Article IV, concerning the punishment of individuals committing genocide or any of the acts enumerated in Article III, would have been extended by the following additional sentence: "[Acts of genocide] committed by or on behalf of States or governments constitute a breach of the present Convention"(A/C.6/236 and Corr. 1). That amendment was defeated (United Nations, *Official Records of the General Assembly, Third Session, Part I, Sixth Committee, Summary Records of the 96th meeting*, p. 355). What became Article VI would have been replaced by a provision conferring jurisdiction on the Court if an act of genocide is or is alleged to be the act of a State or government or its organs. The United Kingdom in response to objections that the proposal was out of order (because it meant going back on a decision already taken) withdrew the amendment in favour of the joint amendment to what became Article IX, submitted by the United Kingdom and Belgium (*ibid., 100th meeting*, p. 394). In speaking to that joint amendment the United Kingdom delegate acknowledged that the debate had clearly shown the Committee's decision to confine what is now Article VI to the responsibility of individuals (*ibid., 100th meeting*, p. 430). The United Kingdom/Belgium amendment would have added the words "including disputes relating to the responsibility of a State for any of the acts

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enumerated in Articles II and IV [as the Convention was then drafted]". The United Kingdom delegate explained that what was involved was civil responsibility, not criminal responsibility (*ibid., 103rd meeting*, p. 440). A proposal to delete those words failed and the provision was adopted (*ibid., 104th meeting*, p. 447), with style changes being made by the Drafting Committee.

177. At a later stage a Belgium/United Kingdom/United States proposal which would have replaced the disputed phrase by including "disputes arising from a charge by a Contracting Party that the crime of genocide or any other of the acts enumerated in article III has been committed within the jurisdiction of another Contracting Party" was ruled by the Chairman of the Sixth Committee as a change of substance and the Committee did not adopt the motion (which required a two-thirds majority) for reconsideration (A/C.6/305). The Chairman gave the following reason for his ruling which was not challenged:

> "it was provided in article IX that those disputes, among others, which concerned the responsibility of a State for genocide or for any of the acts enumerated in article III, should be submitted to the International Court of Justice. According to the joint amendment, on the other hand, the disputes would not be those which concerned the responsibility of the State but those which resulted from an accusation to the effect that the crime had been committed in the territory of one of the contracting parties." (United Nations, *Official Records of the General Assembly, Third Session, Part I, Sixth Committee, Summary Records of the 131st meeting*, p. 690.)

By that time in the deliberations of the Sixth Committee it was clear that only individuals could be held criminally responsible under the draft Convention for genocide. The Chairman was plainly of the view that the Article IX, as it had been modified, provided for State responsibility for genocide.

178. In the view of the Court, two points may be drawn from the drafting history just reviewed. The first is that much of it was concerned with proposals supporting the criminal responsibility of States; but those proposals were *not* adopted. The second is that the amendment which was adopted — to Article IX — is about jurisdiction in respect of the responsibility of States *simpliciter*. Consequently, the drafting history may be seen as supporting the conclusion reached by the Court in paragraph 167 above.

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

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

180. The Court observes that if a State is to be responsible because it has breached its obligation not to commit genocide, it must be shown that genocide as defined in the Convention has been committed. That will also be the case with conspiracy under Article III, paragraph *(b)*, and complicity under Article III, paragraph *(e)*; and, as explained below (paragraph 431) for purposes of the obligation to prevent genocide. The Respondent has raised the question whether it is necessary, as a matter of law, for the Court to be able to uphold a claim of the responsibility of a State for an act of genocide, or any other act enumerated in Article III, that there should have been a finding of genocide by a court or tribunal exercising criminal jurisdiction. According to the Respondent, the condition *sine qua non* for establishing State responsibility is the prior establishment, according to the rules of criminal law, of the individual responsibility of a perpetrator engaging the State's responsibility.

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

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

* *

(6) The possible territorial limits of the obligations

183. The substantive obligations arising from Articles I and III are not on their face limited by territory. They apply to a State wherever it may be acting or may be able to act in ways appropriate to meeting the obligations in question. The extent of that ability in law and fact is considered, so far as the obligation to prevent the crime of genocide is concerned, in the section of the Judgment concerned with that obligation (cf. paragraph 430 below). The significant relevant condition concerning the obligation not to commit genocide and the other acts enumerated in Article III is provided by the rules on attribution (paragraphs 379 ff. below).

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

* *

(7) The Applicant's claims in respect of alleged genocide committed outside its territory against non-nationals

185. In its final submissions the Applicant requests the Court to make rulings about acts of genocide and other unlawful acts allegedly committed against "non-Serbs" outside its own territory (as well as within it) by the Respondent. Insofar as that request might relate to non-Bosnian victims, it could raise questions about the legal interest or standing of the Applicant in respect of such matters and the significance of the *jus cogens* character of the relevant norms, and the *erga omnes* character of the relevant obligations. For the reasons explained in paragraphs 368 and 369 below, the Court will not however need to address those questions of law.

* *

(8) The question of intent to commit genocide

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

"*(a)* Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

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

(d) Imposing measures intended to prevent births within the group; [and]

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

themselves include mental elements. "Killing" must be intentional, as must "causing serious bodily or mental harm". Mental elements are made explicit in paragraphs *(c)* and *(d)* of Article II by the words "deliberately" and "intended", quite apart from the implications of the words "inflicting" and "imposing"; and forcible transfer too requires deliberate intentional acts. The acts, in the words of the ILC, are by their very nature conscious, intentional or volitional acts (Commentary on Article 17 of the 1996 Draft Code of Crimes against the Peace and Security of Mankind, ILC Report 1996, *Yearbook of the International Law Commission, 1996*, Vol. II, Part Two, p. 44, para. 5).

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

188. The specificity of the intent and its particular requirements are highlighted when genocide is placed in the context of other related criminal acts, notably crimes against humanity and persecution, as the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (hereinafter "ICTY" or "the Tribunal") did in the *Kupreškić et al.* case:

> "the *mens rea* requirement for persecution is higher than for ordinary crimes against humanity, although lower than for genocide. In this context the Trial Chamber wishes to stress that persecution as a crime against humanity is an offence belonging to the same *genus* as genocide. Both persecution and genocide are crimes perpetrated against persons that belong to a particular group and who are targeted because of such belonging. In both categories what matters is the intent to discriminate: to attack persons on account of their ethnic, racial, or religious characteristics (as well as, in the case of persecution, on account of their political affiliation). While in the case of persecution the discriminatory intent can take multifarious inhumane forms and manifest itself in a plurality of actions including murder, in the case of genocide that intent must be accompanied by the intention to destroy, in whole or in part, the group to which the victims of the genocide belong. Thus, it can be said that, from the viewpoint of *mens rea*, genocide is an extreme and most inhuman form of persecution. To put it differently, when persecution escalates to the extreme form of wilful and deliberate acts designed to destroy a group or part of a group, it can be held that such persecution amounts to genocide." (IT-95-16-T, Judgment, 14 January 2000, para. 636.)

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

* *

(9) Intent and "ethnic cleansing"

190. The term "ethnic cleansing" has frequently been employed to refer to the events in Bosnia and Herzegovina which are the subject of this case; see, for example, Security Council resolution 787 (1992), para. 2; resolution 827 (1993), Preamble; and the Report with that title

attached as Annex IV to the Final Report of the United Nations Commission of Experts (S/1994/674/Add.2) (hereinafter "Report of the Commission of Experts"). General Assembly resolution 47/121 referred in its Preamble to "the abhorrent policy of 'ethnic cleansing', which is a form of genocide", as being carried on in Bosnia and Herzegovina. It will be convenient at this point to consider what legal significance the expression may have. It is in practice used, by reference to a specific region or area, to mean "rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area" (S/35374 (1993), para. 55, Interim Report by the Commission of Experts). It does not appear in the Genocide Convention; indeed, a proposal during the drafting of the Convention to include in the definition "measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment" was not accepted (A/C.6/234). It can only be a form of genocide within the meaning of the Convention, if it corresponds to or falls within one of the categories of acts prohibited by Article II of the Convention. Neither the intent, as a matter of policy, to render an area "ethnically homogeneous", nor the operations that may be carried out to implement such policy, can *as such* be designated as genocide: the intent that characterizes genocide is "to destroy, in whole or in part" a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement. This is not to say that acts described as "ethnic cleansing" may never constitute genocide, if they are such as to be characterized as, for example, "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part", contrary to Article II, paragraph *(c)*, of the Convention, provided such action is carried out with the necessary specific intent *(dolus specialis)*, that is to say with a view to the destruction of the group, as distinct from its removal from the region. As the ICTY has observed, while "there are obvious similarities between a genocidal policy and the policy commonly known as 'ethnic cleansing'" (*Krstić*, IT-98-33-T, Trial Chamber Judgment, 2 August 2001, para. 562), yet "[a] clear distinction must be drawn between physical destruction and mere dissolution of a group. The expulsion of a group or part of a group does not in itself suffice for genocide." (*Stakić*, IT-97-24-T, Trial Chamber Judgment, 31 July 2003, para. 519.) In other words, whether a particular operation described as "ethnic cleansing" amounts to genocide depends on the presence or absence of acts listed in Article II of the Genocide Convention, and of the intent to destroy the group as such. In fact, in the context of the Convention, the term "ethnic cleansing" has no legal significance of its own. That said, it is clear that acts of "ethnic cleansing" may occur in parallel to acts prohibited by Article II of the Convention, and may be significant as indicative of the presence of a specific intent *(dolus specialis)* inspiring those acts.

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(10) Definition of the protected group

191. When examining the facts brought before the Court in support of the accusations of the commission of acts of genocide, it is necessary to have in mind the identity of the group against which genocide may be considered to have been committed. The Court will therefore next

consider the application in this case of the requirement of Article II of the Genocide Convention, as an element of genocide, that the proscribed acts be "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". The Parties disagreed on aspects of the definition of the "group". The Applicant in its final submission refers to "the non-Serb national, ethnical or religious group within, but not limited to, the territory of Bosnia and Herzegovina, including in particular the Muslim population" (paragraph 66 above). It thus follows what is termed the negative approach to the definition of the group in question. The Respondent sees two legal problems with that formulation:

> "First, the group targeted is not sufficiently well defined as such, since, according to the Applicant's allegation, that group consists of the non-Serbs, thus an admixture of all the individuals living in Bosnia and Herzegovina except the Serbs, but more particularly the Muslim population, which accounts for only a part of the non-Serb population. Second, the intent to destroy concerned only a part of the non-Serb population, but the Applicant failed to specify which part of the group was targeted."

In addition to those issues of the negative definition of the group and its geographic limits (or their lack), the Parties also discussed the choice between subjective and objective approaches to the definition. The Parties essentially agree that international jurisprudence accepts a combined subjective-objective approach. The issue is not in any event significant on the facts of this case and the Court takes it no further.

192. While the Applicant has employed the negative approach to the definition of a protected group, it places major, for the most part exclusive, emphasis on the Bosnian Muslims as the group being targeted. The Respondent, for instance, makes the point that the Applicant did not mention the Croats in its oral arguments relating to sexual violence, Srebrenica and Sarajevo, and that other groups including "the Jews, Roma and Yugoslavs" were not mentioned. The Applicant does however maintain the negative approach to the definition of the group in its final submissions and the Court accordingly needs to consider it.

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

(paragraph 198), when part of the group is targeted, that part must be significant enough for its destruction to have an impact on the group as a whole. Further, each of the acts listed in Article II require that the proscribed action be against members of the "group".

194. The drafting history of the Convention confirms that a positive definition must be used. Genocide as "the denial of the existence of entire human groups" was contrasted with homicide, "the denial of the right to live of individual human beings" by the General Assembly in its 1946 resolution 96 (I) cited in the Preamble to the Convention. The drafters of the Convention also gave close attention to the positive identification of groups with specific distinguishing characteristics in deciding which groups they would include and which (such as political groups) they would exclude. The Court spoke to the same effect in 1951 in declaring as an object of the Convention the safeguarding of "the very existence of certain human groups" (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23). Such an understanding of genocide requires a positive identification of the group. The rejection of proposals to include within the Convention political groups and cultural genocide also demonstrates that the drafters were giving close attention to the positive identification of groups with specific distinguishing well-established, some said immutable, characteristics. A negatively defined group cannot be seen in that way.

195. The Court observes that the ICTY Appeals Chamber in the *Stakić* case (IT-97-24-A, Judgment, 22 March 2006, paras. 20-28) also came to the conclusion that the group must be defined positively, essentially for the same reasons as the Court has given.

196. Accordingly, the Court concludes that it should deal with the matter on the basis that the targeted group must in law be defined 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. This question arises because of a critical finding in the *Krstić* case. In that case the Trial Chamber was "ultimately satisfied that murders and infliction of serious bodily or mental harm were committed with the intent to kill all the Bosnian Muslim men of military age at Srebrenica" (IT-98-33, Judgment, 2 August 2001, para. 546). Those men were systematically targeted whether they were civilians or soldiers *(ibid.)*. The Court addresses the facts of that particular situation later (paragraphs 278-297). For the moment, it considers how as a matter of law the "group" is to be defined, in territorial and other respects.

198. In terms of that question of law, the Court refers to three matters relevant to the determination of "part" of the "group" for the purposes of Article II. In the first place, the intent must be to destroy at least a substantial part of the particular group. That is demanded by the very nature of the crime of genocide: since the object and purpose of the Convention as a whole is to prevent the intentional destruction of groups, the part targeted must be significant enough to have an impact on the group as a whole. That requirement of substantiality is supported by consistent rulings of the ICTY and the International Criminal Tribunal for Rwanda (ICTR) and by the Commentary of the ILC to its Articles in the draft Code of Crimes against the Peace and Security of Mankind (e.g. *Krstić*, IT-98-33-A, Appeals Chamber Judgment, 19 April 2004, paras. 8-11 and the cases of *Kayishema*, *Byilishema*, and *Semanza* there referred to; and *Yearbook of the International Law Commission, 1996*, Vol. II, Part Two, p. 45, para. 8 of the Commentary to Article 17).

199. Second, the Court observes that it is widely accepted that genocide may be found to have been committed where the intent is to destroy the group within a geographically limited area. In the words of the ILC, "it is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe" *(ibid.)*. The area of the perpetrator's activity and control are to be considered. As the ICTY Appeals Chamber has said, and indeed as the Respondent accepts, the opportunity available to the perpetrators is significant (*Krstić*, IT-98-33-A, Judgment, 19 April 2004, para. 13). This criterion of opportunity must however be weighed against the first and essential factor of substantiality. It may be that the opportunity available to the alleged perpetrator is so limited that the substantiality criterion is not met. The Court observes that the ICTY Trial Chamber has indeed indicated the need for caution, lest this approach might distort the definition of genocide (*Stakić*, IT-97-24-T, Judgment, 31 July 2003, para. 523). The Respondent, while not challenging this criterion, does contend that the limit militates against the existence of the specific intent *(dolus specialis)* at the national or State level as opposed to the local level — a submission which, in the view of the Court, relates to attribution rather than to the "group" requirement.

200. A third suggested criterion is qualitative rather than quantitative. The Appeals Chamber in the *Krstić* case put the matter in these carefully measured terms:

> "The number of individuals targeted should be evaluated not only in absolute terms, but also in relation to the overall size of the entire group. In addition to the numeric size of the targeted portion, its prominence within the group can be a useful consideration. If a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial within the meaning of Article 4 [of the Statute which exactly reproduces Article II of the Convention]." (IT-98-33-A, Judgment, 19 April 2004, para. 12; footnote omitted.)

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

201. The above list of criteria is not exhaustive, but, as just indicated, the substantiality criterion is critical. They are essentially those stated by the Appeals Chamber in the *Krstić* case, although the Court does give this first criterion priority. Much will depend on the Court's assessment of those and all other relevant factors in any particular case.

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

202. When turning to the facts of the dispute, the Court must note that many allegations of fact made by the Applicant are disputed by the Respondent. That is so notwithstanding increasing agreement between the Parties on certain matters through the course of the proceedings. The disputes relate to issues about the facts, for instance the number of rapes committed by Serbs against Bosnian Muslims, and the day-to-day relationships between the authorities in Belgrade and the authorities in Pale, and the inferences to be drawn from, or the evaluations to be made of, facts, for instance about the existence or otherwise of the necessary specific intent *(dolus specialis)* and about the attributability of the acts of the organs of Republika Srpska and various paramilitary groups to the Respondent. The allegations also cover a very wide range of activity affecting many communities and individuals over an extensive area and over a long period. They have already been the subject of many accounts, official and non-official, by many individuals and bodies. The Parties drew on many of those accounts in their pleadings and oral argument.

203. Accordingly, before proceeding to an examination of the alleged facts underlying the claim in this case, the Court first considers, in this section of the Judgment, in turn the burden or onus of proof, the standard of proof, and the methods of proof.

204. On the burden or onus of proof, it is well established in general that the applicant must establish its case and that a party asserting a fact must establish it; as the Court observed in the case of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, "it is the litigant seeking to establish a fact who bears the burden of proving it" (*Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 437, para. 101). While the Applicant accepts that approach as a general proposition, it contends that in certain respects the onus should be reversed, especially in respect of the attributability of alleged acts of genocide to the Respondent, given the refusal of the Respondent to produce the full text of certain documents.

205. The particular issue concerns the "redacted" sections of documents of the Supreme Defence Council of the Respondent, i.e. sections in which parts of the text had been blacked out so as to be illegible. The documents had been classified, according to the Co-Agent of the Respondent, by decision of the Council as a military secret, and by a confidential decision of the

Council of Ministers of Serbia and Montenegro as a matter of national security interest. The Applicant contends that the Court should draw its own conclusions from the failure of the Respondent to produce complete copies of the documents. It refers to the power of the Court, which it had invoked earlier (paragraph 44 above), to call for documents under Article 49 of the Statute, which provides that "[f]ormal note shall be taken of any refusal". In the second round of oral argument the Applicant's Deputy Agent submitted that

> "Serbia and Montenegro should not be allowed to respond to our quoting the redacted SDC reports if it does not provide at the very same time the Applicant and the Court with copies of entirely unredacted versions of *all* the SDC shorthand records and of *all* of the minutes of the same. Otherwise, Serbia and Montenegro would have an overriding advantage over Bosnia and Herzegovina with respect to documents, which are apparently, and not in the last place in the Respondent's eyes, of direct relevance to winning or losing the present case. We explicitly, Madam President, request the Court to instruct the Respondent accordingly." (Emphasis in the original.)

206. On this matter, the Court observes that the Applicant has extensive documentation and other evidence available to it, especially from the readily accessible ICTY records. It has made very ample use of it. In the month before the hearings it submitted what must be taken to have been a careful selection of documents from the very many available from the ICTY. The Applicant called General Sir Richard Dannatt, who, drawing on a number of those documents, gave evidence on the relationship between the authorities in the Federal Republic of Yugoslavia and those in the Republika Srpska and on the matter of control and instruction. Although the Court has not agreed to either of the Applicant's requests to be provided with unedited copies of the documents, it has not failed to note the Applicant's suggestion that the Court may be free to draw its own conclusions.

207. On a final matter relating to the burden of proof, the Applicant contends that the Court should draw inferences, notably about specific intent *(dolus specialis)*, from established facts, i.e., from what the Applicant refers to as a "pattern of acts" that "speaks for itself". The Court considers that matter later in the Judgment (paragraphs 370-376 below).

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

209. The Court has long recognized that claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive (cf. *Corfu Channel (United Kingdom* v. *Albania), Judgment, I.C.J. Reports 1949*, p. 17). The Court requires that it be fully

convinced that allegations made in the proceedings, that the crime of genocide or the other acts enumerated in Article III have been committed, have been clearly established. The same standard applies to the proof of attribution for such acts.

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

211. The Court now turns to the third matter — the method of proof. The Parties submitted a vast array of material, from different sources, to the Court. It included reports, resolutions and findings by various United Nations organs, including the Secretary-General, the General Assembly, the Security Council and its Commission of Experts, and the Commission on Human Rights, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities and the Special Rapporteur on Human Rights in the former Yugoslavia; documents from other intergovernmental organizations such as the Conference for Security and 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 (paragraphs 57-58 above).

212. The Court must itself make its own determination of the facts which are relevant to the law which the Applicant claims the Respondent has breached. This case does however have an unusual feature. Many of the allegations before this Court have already been the subject of the processes and decisions of the ICTY. The Court considers their significance later in this section of the Judgment.

213. The assessment made by the Court of the weight to be given to a particular item of evidence may lead to the Court rejecting the item as unreliable, or finding it probative, as appears from the practice followed for instance in the case concerning *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, pp. 9-10, paras. 11-13; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, pp. 39-41, paras. 59-73; and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, pp. 200-201, paras. 57-61. In the most recent case the Court said this:

> "The Court will treat with caution evidentiary materials specially prepared for this case and also materials emanating from a single source. It will prefer contemporaneous evidence from persons with direct knowledge. It will give particular attention to reliable evidence acknowledging facts or conduct unfavourable to the State represented by the person making them (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 41, para. 64). The Court will also give weight to evidence that has not, even before this litigation, been challenged by impartial persons for the

> correctness of what it contains. The Court moreover notes that evidence obtained by examination of persons directly involved, and who were subsequently cross-examined by judges skilled in examination and experienced in assessing large amounts of factual information, some of it of a technical nature, merits special attention. The Court thus will give appropriate consideration to the Report of the Porter Commission, which gathered evidence in this manner. The Court further notes that, since its publication, there has been no challenge to the credibility of this Report, which has been accepted by both Parties." (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 35, para. 61. See also paras. 78-79, 114 and 237-242.)

214. The fact-finding process of the ICTY falls within this formulation, as "evidence obtained by examination of persons directly involved", tested by cross-examination, the credibility of which has not been challenged subsequently. The Court has been referred to extensive documentation arising from the Tribunal's processes, including indictments by the Prosecutor, various interlocutory decisions by judges and Trial Chambers, oral and written evidence, decisions of the Trial Chambers on guilt or innocence, sentencing judgments following a plea agreement and decisions of the Appeals Chamber.

215. By the end of the oral proceedings the Parties were in a broad measure of agreement on the significance of the ICTY material. The Applicant throughout has given and gives major weight to that material. At the written stage the Respondent had challenged the reliability of the Tribunal's findings, the adequacy of the legal framework under which it operates, the adequacy of its procedures and its neutrality. At the stage of the oral proceedings, its position had changed in a major way. In its Agent's words, the Respondent now based itself on the jurisprudence of the Tribunal and had "in effect" distanced itself from the opinions about the Tribunal expressed in its Rejoinder. The Agent was however careful to distinguish between different categories of material:

> "[W]e do not regard all the material of the Tribunal for the former Yugoslavia as having the same relevance or probative value. We have primarily based ourselves upon the judgments of the Tribunal's Trial and Appeals Chambers, given that only the judgments can be regarded as establishing the facts about the crimes in a credible way."

And he went on to point out that the Tribunal has not so far, with the exception of Srebrenica, held that genocide was committed in any of the situations cited by the Applicant. He also called attention to the criticisms already made by Respondent's counsel of the relevant judgment concerning General Krstić who was found guilty of aiding and abetting genocide at Srebrenica.

216. The Court was referred to actions and decisions taken at various stages of the ICTY processes:

(1) The Prosecutor's decision to include or not certain changes in an indictment;

(2) The decision of a judge on reviewing the indictment to confirm it and issue an arrest warrant or not;

(3) If such warrant is not executed, a decision of a Trial Chamber (of three judges) to issue an international arrest warrant, provided the Chamber is satisfied that there are reasonable grounds for believing that the accused has committed all or any of the crimes charged;

(4) The decision of a Trial Chamber on the accused's motion for acquittal at the end of the prosecution case;

(5) The judgment of a Trial Chamber following the full hearings;

(6) The sentencing judgment of a Trial Chamber following a guilty plea.

The Court was also referred to certain decisions of the Appeals Chamber.

217. The Court will consider these stages in turn. The Applicant placed some weight on indictments filed by the Prosecutor. But the claims made by the Prosecutor in the indictments are just that — allegations made by one party. They have still to proceed through the various phases outlined earlier. The Prosecutor may, instead, decide to withdraw charges of genocide or they may be dismissed at trial. Accordingly, as a general proposition the inclusion of charges in an indictment cannot be given weight. What may however be significant is the decision of the Prosecutor, either initially or in an amendment to an indictment, not to include or to exclude a charge of genocide.

218. The second and third stages, relating to the confirmation of the indictment, issues of arrest warrants and charges, are the responsibility of the judges (one in the second stage and three in the third) rather than the Prosecutor, and witnesses may also be called in the third, but the accused is generally not involved. Moreover, the grounds for a judge to act are, at the second stage, that a prima facie case has been established, and at the third, that reasonable grounds exist for belief that the accused has committed crimes charged.

219. The accused does have a role at the fourth stage — motions for acquittal made by the defence at the end of the prosecution's case and after the defence has had the opportunity to cross-examine the prosecution's witnesses, on the basis that "there is no evidence capable of supporting a conviction". This stage is understood to require a decision, not that the Chamber trying the facts *would* be satisfied beyond reasonable doubt by the prosecution's evidence (if accepted), but rather that it *could* be so satisfied (*Jelisić*, IT-95-10-A, Appeals Chamber Judgment, 5 July 2001, para. 37). The significance of that lesser standard for present purposes appears from one case on which the Applicant relied. The Trial Chamber in August 2005 in *Krajišnik* dismissed the defence motion that the accused who was charged with genocide and other crimes had no case to answer (IT-00-39-T, transcript of 19 August 2005, pp. 17112-17132). But following the full hearing the accused was found not guilty of genocide nor of complicity in genocide. While the *actus reus* of genocide was established, the specific intent *(dolus specialis)* was not (Trial Chamber

Judgment, 27 September 2006, paras. 867-869). Because the judge or the Chamber does not make definitive findings at any of the four stages described, the Court does not consider that it can give weight to those rulings. The standard of proof which the Court requires in this case would not be met.

220. The processes of the Tribunal at the fifth stage, leading to a judgment of the Trial Chamber following the full hearing are to be contrasted with those earlier stages. The processes of the Tribunal leading to final findings are rigorous. Accused are presumed innocent until proved guilty beyond reasonable doubt. They are entitled to listed minimum guarantees (taken from the International Covenant on Civil and Political Rights), including the right to counsel, to examine witness against them, to obtain the examination of witness on their behalf, and not to be compelled to testify against themselves or to confess guilt. The Tribunal has powers to require Member States of the United Nations to co-operate with it, among other things, in the taking of testimony and the production of evidence. Accused are provided with extensive pre-trial disclosure including materials gathered by the prosecution and supporting the indictment, relevant witness statements and the pre-trial brief summarizing the evidence against them. The prosecutor is also to disclose exculpatory material to the accused and to make available in electronic form the collections of relevant material which the prosecution holds.

221. In practice, now extending over ten years, the trials, many of important military or political figures for alleged crimes committed over long periods and involving complex allegations, usually last for months, even years, and can involve thousands of documents and numerous witnesses. The Trial Chamber may admit any relevant evidence which has probative value. The Chamber is to give its reasons in writing and separate and dissenting opinions may be appended.

222. Each party has a right of appeal from the judgment of the Trial Chamber to the Appeals Chamber on the grounds of error of law invalidating the decision or error of fact occasioning a miscarriage of justice. The Appeals Chamber of five judges does not rehear the evidence, but it does have power to hear additional evidence if it finds that it was not available at trial, is relevant and credible and could have been a decisive factor in the trial. It too is to give a reasoned opinion in writing to which separate or dissenting opinions may be appended.

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

224. There remains for consideration the sixth stage, that of sentencing judgments given following a guilty plea. The process involves a statement of agreed facts and a sentencing judgment. Notwithstanding the guilty plea the Trial Chamber must be satisfied that there is

sufficient factual basis for the crime and the accused's participation in it. It must also be satisfied that the guilty plea has been made voluntarily, is informed and is not equivocal. Accordingly the agreed statement and the sentencing judgment may when relevant be given a certain weight.

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225. The Court will now comment in a general way on some of the other evidence submitted to it. Some of that evidence has been produced to prove that a particular statement was made so that the Party may make use of its content. In many of these cases the accuracy of the document as a record is not in doubt; rather its significance is. That is often the case for instance with official documents, such as the record of parliamentary bodies and budget and financial statements. Another instance is when the statement was recorded contemporaneously on audio or videotape. Yet another is the evidence recorded by the ICTY.

226. In some cases the account represents the speaker's own knowledge of the fact to be determined or evaluated. In other cases the account may set out the speaker's opinion or understanding of events after they have occurred and in some cases the account will not be based on direct observation but may be hearsay. In fact the Parties rarely disagreed about the authenticity of such material but rather about whether it was being accurately presented (for instance with contention that passages were being taken out of context) and what weight or significance should be given to it.

227. The Court was also referred to a number of reports from official or independent bodies, giving accounts of relevant events. Their value depends, among other things, on (1) the source of the item of evidence (for instance partisan, or neutral), (2) the process by which it has been generated (for instance an anonymous press report or the product of a careful court or court-like process), and (3) the quality or character of the item (such as statements against interest, and agreed or uncontested facts).

228. One particular instance is the comprehensive report, "The Fall of Srebrenica", which the United Nations Secretary-General submitted in November 1999 to the General Assembly (United Nations doc. A/54/549). It was prepared at the request of the General Assembly, and covered the events from the establishing by the Security Council of the "safe area" on 16 April 1993 (Security Council resolution 819 (1993)) until the endorsement by the Security Council on 15 December 1995 of the Dayton Agreement. Member States and others concerned had been encouraged to provide relevant information. The Secretary-General was in a very good position to prepare a comprehensive report, some years after the events, as appears in part from this description of the method of preparation:

> "This report has been prepared on the basis of archival research within the United Nations system, as well as on the basis of interviews with individuals who, in one capacity or another, participated in or had knowledge of the events in question. In the interest of gaining a clearer understanding of these events, I have taken the

exceptional step of entering into the public record information from the classified files of the United Nations. In addition, I would like to record my thanks to those Member States, organizations and individuals who provided information for this report. A list of persons interviewed in this connection is attached as annex I. While that list is fairly extensive, time, as well as budgetary and other constraints, precluded interviewing many other individuals who would be in a position to offer important perspectives on the subject at hand. In most cases, the interviews were conducted on a non-attribution basis to encourage as candid a disclosure as possible. I have also honoured the request of those individuals who provided information for this report on the condition that they not be identified." (A/54/549, para. 8.)

229. The chapter, "Fall of Srebrenica: 6-11 July 1995", is preceded by this note:

"The United Nations has hitherto not publicly disclosed the full details of the attack carried out on Srebrenica from 6 to 11 July 1995. The account which follows has now been reconstructed mainly from reports filed at that time by Dutchbat and the United Nations military observers. The accounts provided have also been supplemented with information contained in the Netherlands report on the debriefing of Dutchbat, completed in October 1995, and by information provided by Bosniac, Bosnian Serb and international sources. In order to independently examine the information contained in various secondary sources published over the past four years, as well to corroborate key information contained in the Netherlands debriefing report, interviews were conducted during the preparation of this report with a number of key personnel who were either in Srebrenica at the time, or who were involved in decision-making at higher levels in the United Nations chain of command." (A/54/549, Chap. VII, p. 57.)

The introductory note to the next chapter, "The Aftermath of the fall of Srebrenica: 12-20 July 1995", contains this description of the sources:

"The following section attempts to describe in a coherent narrative how thousands of men and boys were summarily executed and buried in mass graves within a matter of days while the international community attempted to negotiate access to them. It details how evidence of atrocities taking place gradually came to light, but too late to prevent the tragedy which was unfolding. In 1995, the details of the tragedy were told in piecemeal fashion, as survivors of the mass executions began to provide accounts of the horrors they had witnessed; satellite photos later gave credence to their accounts.

The first official United Nations report which signalled the possibility of mass executions having taken place was the report of the Special Rapporteur of the Commission on Human Rights, dated 22 August 1995 (E/CN.4/1996/9). It was followed by the Secretary-General's reports to the Security Council, pursuant to resolution 1010 (1995), of 30 August (S/1995/755) and 27 November 1995 (S/1995/988). Those reports included information obtained from governmental and

non-governmental organizations, as well as information that had appeared in the international and local press. By the end of 1995, however, the International Tribunal for the Former Yugoslavia had still not been granted access to the area to corroborate the allegations of mass executions with forensic evidence.

The Tribunal first gained access to the crime scenes in January 1996. The details of many of their findings were made public in July 1996, during testimony under rule 60 of the Tribunal's rules of procedure, in the case against Ratio [*sic:* Ratko] Mladić and Radovan Karadžić. Between that time and the present, the Tribunal has been able to conduct further investigations in the areas where the executions were reported to have taken place and where the primary and secondary mass graves were reported to have been located. On the basis of the forensic evidence obtained during those investigations, the Tribunal has now been able to further corroborate much of the testimony of the survivors of the massacres. On 30 October 1998, the Tribunal indicted Radislav Krstić, Commander of the BSA's Drina Corps, for his alleged involvement in those massacres. The text of the indictment provides a succinct summary of the information obtained to date on where and when the mass executions took place.

The aforementioned sources of information, coupled with certain additional confidential information that was obtained during the preparation of this report, form the basis of the account which follows. Sources are purposely not cited in those instances where such disclosure could potentially compromise the Tribunal's ongoing work." (*Ibid.*, Chap. VIII, p. 77.)

230. The care taken in preparing the report, its comprehensive sources and the independence of those responsible for its preparation all lend considerable authority to it. As will appear later in this Judgment, the Court has gained substantial assistance from this report.

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VI. The facts invoked by the Applicant, in relation to Article II

(1) The background

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

232. Following the death on 4 May 1980 of President Tito, a rotating presidency was implemented in accordance with the 1974 Constitution of the SFRY. After almost ten years of economic crisis and the rise of nationalism within the republics and growing tension between different ethnic and national groups, the SFRY began to break up. On 25 June 1991, Slovenia and Croatia declared independence, followed by Macedonia on 17 September 1991. (Slovenia and Macedonia are not concerned in the present proceedings; Croatia has brought a separate case against Serbia and Montenegro, which is still pending on the General List.) On the eve of the war in Bosnia and Herzegovina which then broke out, according to the last census (31 March 1991), some 44 per cent of the population of the country described themselves as Muslims, some 31 per cent as Serbs and some 17 per cent as Croats (*Krajišnik*, IT-00-39-T and 40-T, Trial Chamber Judgment, 27 September 2006, para. 15).

233. By a "sovereignty" resolution adopted on 14 October 1991, the Parliament of Bosnia and Herzegovina declared the independence of the Republic. The validity of this resolution was contested at the time by the Serbian community of Bosnia and Herzegovina (Opinion No. 1 of the Arbitration Commission of the Conference on Yugoslavia (the Badinter Commission), p. 3). On 24 October 1991, the Serb Members of the Bosnian Parliament proclaimed a separate Assembly of the Serb Nation/Assembly of the Serb People of Bosnia and Herzegovina. On 9 January 1992, the Republic of the Serb People of Bosnia and Herzegovina (subsequently renamed the Republika Srpska on 12 August 1992) was declared with the proviso that the declaration would come into force upon international recognition of the Republic of Bosnia and Herzegovina. On 28 February 1992, the Constitution of the Republic of the Serb People of Bosnia and Herzegovina was adopted The Republic of the Serb People of Bosnia and Herzegovina (and subsequently the Republika Srpska) was not and has not been recognized internationally as a State; it has however enjoyed some *de facto* independence.

234. On 29 February and 1 March 1992, a referendum was held on the question of independence in Bosnia and Herzegovina. On 6 March 1992, Bosnia and Herzegovina officially declared its independence. With effect from 7 April 1992, Bosnia and Herzegovina was recognized by the European Community. On 7 April 1992, Bosnia and Herzegovina was recognized by the United States. On 27 April 1992, the Constitution of the Federal Republic of Yugoslavia was adopted consisting of the Republic of Serbia and the Republic of Montenegro. As explained above (paragraph 67), Montenegro declared its independence on 3 June 2006. All three States have been admitted to membership of the United Nations: Bosnia and Herzegovina on 22 May 1992; Serbia and Montenegro, under the name of the Federal Republic of Yugoslavia on 1 November 2000; and the Republic of Montenegro on 28 June 2006.

* *

(2) The entities involved in the events complained of

235. It will be convenient next to define the institutions, organizations or groups that were the actors in the tragic events that were to unfold in Bosnia and Herzegovina. Of the independent sovereign States that had emerged from the break-up of the SFRY, two are concerned in the present proceedings: on the one side, the FRY (later to be called Serbia and Montenegro), which was

composed of the two constituent republics of Serbia and Montenegro; on the other, the Republic of Bosnia and Herzegovina. At the time when the latter State declared its independence (15 October 1991), the independence of two other entities had already been declared: in Croatia, the Republika Srpska Krajina, on 26 April 1991, and the Republic of the Serb People of Bosnia and Herzegovina, later to be called the Republika Srpska, on 9 January 1992 (paragraph 233 above). The Republika Srpska never attained international recognition as a sovereign State, but it had *de facto* control of substantial territory, and the loyalty of large numbers of Bosnian Serbs.

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

237. The Applicant has asserted the existence of close ties between the Government of the Respondent and the authorities of the Republika Srpska, of a political and financial nature, and also as regards 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 President Karadžić at the 16th Session of the FRY Assembly on 12 May 1992, and subsequently published in the *Official Gazette* of the Republika Srpska (paragraph 371), and secondly on the consistent conduct of the Serb military and paramilitary forces vis-à-vis the non-Serb Bosnians showing, it is suggested, an overall specific intent *(dolus specialis)*. These activities will be examined below.

238. As regards the relationship between the armies of the FRY and the Republika Srpska, the Yugoslav Peoples' Army (JNA) of the SFRY had, during the greater part of the period of existence of the SFRY, been effectively a federal army, composed of soldiers from all the

constituent republics of the Federation, with no distinction between different ethnic and religious groups. It is however contended by the Applicant that even before the break-up of the SFRY arrangements were being made to transform the JNA into an effectively Serb army. The Court notes that on 8 May 1992, all JNA troops who were not of Bosnian origin were withdrawn from Bosnia-Herzegovina. However, JNA troops of Bosnian Serb origin who were serving in Bosnia and Herzegovina were transformed into, or joined, the army of the Republika Srpska (the VRS) which was established on 12 May 1992, or the VRS Territorial Defence. Moreover, Bosnian Serb soldiers serving in JNA units elsewhere were transferred to Bosnia and Herzegovina and subsequently joined the VRS. The remainder of the JNA was transformed into the Yugoslav army (VJ) and became the army of the Federal Republic of Yugoslavia. On 15 May 1992 the Security Council, by resolution 752, demanded that units of the JNA in Bosnia and Herzegovina "be withdrawn, or be subject to the authority of the Government of Bosnia and Herzegovina, or be disbanded and disarmed". On 19 May 1992, the Yugoslav army was officially withdrawn from Bosnia and Herzegovina. The Applicant contended that from 1993 onwards, around 1,800 VRS officers were "administered" by the 30th Personnel Centre of the VJ in Belgrade; this meant that matters like their payment, promotions, pensions, etc., were handled, not by the Republika Srpska, but by the army of the Respondent. According to the Respondent, the importance of this fact was greatly exaggerated by the Applicant: the VRS had around 14,000 officers and thus only a small number of them was dealt with by the 30th Personnel Centre; this Centre only gave a certain degree of assistance to the VRS. The Applicant maintains that all VRS officers remained members of the FRY army — only the label changed; according to the Respondent, there is no evidence for this last allegation. The Court takes note however of the comprehensive description of the processes involved set out in paragraphs 113 to 117 of the Judgment of 7 May 1997 of the ICTY Trial Chamber in the *Tadić* case (IT-94-1-T) quoted by the Applicant which mainly corroborate the account given by the latter. Insofar as the Respondent does not deny the fact of these developments, it insists that they were normal reactions to the threat of civil war, and there was no premeditated plan behind them.

239. The Court further notes the submission of the Applicant that the VRS was armed and equipped by the Respondent. The Applicant contends that when the JNA formally withdrew on 19 May 1992, it left behind all its military equipment which was subsequently taken over by the VRS. This claim is supported by the Secretary-General's report of 3 December 1992 in which he concluded that "[t]hough the JNA has completely withdrawn from Bosnia and Herzegovina, former members of Bosnian Serb origin have been left behind with their equipment and constitute the Army of the 'Serb Republic'" (A/47/747, para. 11). Moreover, the Applicant submits that Belgrade actively supplied the VRS with arms and equipment throughout the war in Bosnia and Herzegovina. On the basis of evidence produced before the ICTY, the Applicant contended that up to 90 per cent of the material needs of the VRS were supplied by Belgrade. General Dannatt, one of the experts called by the Applicant (paragraph 57 above), testified that, according to a "consumption review" given by General Mladić at the Bosnian Serb Assembly on 16 April 1995, 42.2 per cent of VRS supplies of infantry ammunition were inherited from the former JNA and 47 per cent of VRS requirements were supplied by the VJ. For its part, the Respondent generally denies that it supplied and equipped the VRS but maintains that, even if that were the case, such assistance "is very familiar and is an aspect of numerous treaties of mutual security, both bilateral and regional". The Respondent adds that moreover it is a matter of public knowledge that the armed forces of Bosnia and Herzegovina received external assistance from friendly sources.

However, one of the witnesses called by the Respondent, Mr. Vladimir Lukić, who was the Prime Minister of the Republika Srpska from 20 January 1993 to 18 August 1994 testified that the army of the Republika Srpska was supplied from different sources "including but not limited to the Federal Republic of Yugoslavia" but asserted that the Republika Srpska "mainly paid for the military materiel which it obtained" from the States that supplied it.

240. As regards effective links between the two governments in the financial sphere, the Applicant maintains that the economies of the FRY, the Republika Srpska, and the Republika Srpska Krajina were integrated through the creation of a single economic entity, thus enabling the FRY Government to finance the armies of the two other bodies in addition to its own. The Applicant argued that the National Banks of the Republika Srpska and of the Republika Srpska Krajina were set up as under the control of, and directly subordinate to, the National Bank of Yugoslavia in Belgrade. The national budget of the FRY was to a large extent financed through primary issues from the National Bank of Yugoslavia, which was said to be entirely under governmental control, i.e. in effect through creating money by providing credit to the FRY budget for the use of the JNA. The same was the case for the budgets of the Republika Srpska and the Republika Srpska Krajina, which according to the Applicant had virtually no independent sources of income; the Respondent asserts that income was forthcoming from various sources, but has not specified the extent of this. The National Bank of Yugoslavia was making available funds (80 per cent of those available from primary issues) for "special purposes", that is to say "to avoid the adverse effects of war on the economy of the Serbian Republic of Bosnia and Herzegovina". The Respondent has denied that the budget deficit of the Republika Srpska was financed by the FRY but has not presented evidence to show how it was financed. Furthermore, the Respondent emphasizes that any financing supplied was simply on the basis of credits, to be repaid, and was therefore quite normal, particularly in view of the economic isolation of the FRY, the Republika Srpska and the Republika Srpska Krajina; it also suggested that any funds received would have been under the sole control of the recipient, the Republika Srpska or the Republika Srpska Krajina.

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

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(3) Examination of factual evidence: introduction

242. The Court will therefore now examine the facts alleged by the Applicant, in order to satisfy itself, first, whether the alleged atrocities occurred; secondly, whether such atrocities, if established, fall within the scope of Article II of the Genocide Convention, that is to say whether the facts establish the existence of an intent, on the part of the perpetrators of those atrocities, to destroy, in whole or in part, a defined group *(dolus specialis)*. The group taken into account for this purpose will, for the reasons explained above (paragraphs 191-196), be that of the Bosnian Muslims; while the Applicant has presented evidence said to relate to the wider group of non-Serb

Bosnians, the Bosnian Muslims formed such a substantial part of this wider group that that evidence appears to have equal probative value as regards the facts, in relation to the more restricted group. The Court will also consider the facts alleged in the light of the question whether there is persuasive and consistent evidence for a pattern of atrocities, as alleged by the Applicant, which would constitute evidence of *dolus specialis* on the part of the Respondent. For this purpose it is not necessary to examine every single incident reported by the Applicant, nor is it necessary to make an exhaustive list of the allegations; the Court finds it sufficient to examine those facts that would illuminate the question of intent, or illustrate the claim by the Applicant of a pattern of acts committed against members of the group, such as to lead to an inference from such pattern of the existence of a specific intent *(dolus specialis)*.

243. The Court will examine the evidence following the categories of prohibited acts to be found in Article II of the Genocide Convention. The nature of the events to be described is however such that there is considerable overlap between these categories: thus, for example, the conditions of life in the camps to which members of the protected group were confined have been presented by the Applicant as violations of Article II, paragraph *(c)*, of the Convention (the deliberate infliction of destructive conditions of life), but since numerous inmates of the camps died, allegedly as a result of those conditions, or were killed there, the camps fall to be mentioned also under paragraph *(a)*, killing of members of the protected group.

244. In the evidentiary material submitted to the Court, and that referred to by the ICTY, frequent reference is made to the actions of "Serbs" or "Serb forces", and it is not always clear what relationship, if any, the participants are alleged to have had with the Respondent. In some cases it is contended, for example, that the JNA, as an organ *de jure* of the Respondent, was involved; in other cases it seems clear that the participants were Bosnian Serbs, with no *de jure* link with the Respondent, but persons whose actions are, it is argued, attributable to the Respondent on other grounds. Furthermore, as noted in paragraph 238 above, it appears that JNA troops of Bosnian Serb origin were transformed into, or joined the VRS. At this stage of the present Judgment, the Court is not yet concerned with the question of the attributability to the Respondent of the atrocities described; it will therefore use the terms "Serb" and "Serb forces" purely descriptively, without prejudice to the status they may later, in relation to each incident, be shown to have had. When referring to documents of the ICTY, or to the Applicant's pleadings or oral argument, the Court will use the terminology of the original.

* *

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

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

Sarajevo

246. The Court notes that the Applicant refers repeatedly to killings, by shelling and sniping, perpetrated in Sarajevo. The Fifth Periodic Report of the United Nations Special Rapporteur is presented by the Applicant in support of the allegation that between 1992 and 1993 killings of Muslim civilians were perpetrated in Sarajevo, partly as a result of continuous shelling by Bosnian Serb forces. The Special Rapporteur stated that on 9 and 10 November 1993 mortar attacks killed 12 people (E/CN.4/1994/47, 17 November 1992, p. 4, para. 14). In his periodic Report of 5 July 1995, the Special Rapporteur observed that as from late February 1995 numerous civilians were killed by sniping activities of Bosnian Serb forces and that "one local source reported that a total of 41 civilians were killed . . . in Sarajevo during the month of May 1995" (Report of 5 July 1995, para. 69). The Report also noted that, in late June and early July 1995, there was further indiscriminate shelling and rocket attacks on Sarajevo by Bosnian Serb forces as a result of which many civilian deaths were reported (Report of 5 July 1995, para. 70).

247. The Report of the Commission of Experts gives a detailed account of the battle and siege of Sarajevo. The Commission estimated that over the course of the siege nearly 10,000 persons had been killed or were missing in the city of Sarajevo (Report of the Commission of Experts, Vol. II, Ann. VI, p. 8). According to the estimates made in a report presented by the Prosecution before the ICTY in the *Galić* case (IT-98-29-T, Trial Chamber Judgment, 5 December 2003, paras. 578 and 579), the monthly average of civilians killed fell from 105 in September to December 1992, to around 64 in 1993 and to around 28 in the first six months of 1994.

248. The Trial Chamber of the ICTY, in its Judgment of 5 December 2003 in the *Galić* case examined specific incidents in the area of Sarajevo, for instance the shelling of the Markale market on 5 February 1994 which resulted in the killing of 60 persons. The majority of the Trial Chamber found that "civilians in ABiH-held areas of Sarajevo were directly or indiscriminately attacked from SRK-controlled territory during the Indictment Period, and that as a result and as a minimum, hundreds of civilians were killed and thousands others were injured" *(Galić*, IT-98-29-T, Judgment, 5 December 2003, para. 591), the Trial Chamber further concluded that "[i]n sum, the Majority of the Trial Chamber finds that each of the crimes alleged in the Indictment — crime of terror, attacks on civilians, murder and inhumane acts — were committed by SRK forces during the Indictment Period" (*ibid.*, para. 600).

249. In this connection, the Respondent makes the general point that in a civil war it is not always possible to differentiate between military personnel and civilians. It does not deny that crimes were committed during the siege of Sarajevo, crimes that "could certainly be characterized as war crimes and certain even as crimes against humanity", but it does not accept that there was a strategy of targeting civilians.

Drina River Valley

(a) *Zvornik*

250. The Applicant made a number of allegations with regard to killings that occurred in the area of Drina River Valley. The Applicant, relying on the Report of the Commission of Experts, claims that at least 2,500 Muslims died in Zvornik from April to May 1992. The Court notes that the findings of the Report of the Commission of Experts are based on individual witness statements and one declassified United States State Department document No. 94-11 (Vol. V, Ann. X, para. 387; Vol. IV, Ann. VIII, p. 342 and para. 2884; Vol. I, Ann. III.A, para. 578). Further, a video reporting on massacres in Zvornik was shown during the oral proceedings (excerpts from "The Death of Yugoslavia", BBC documentary). With regard to specific incidents, the Applicant alleges that Serb soldiers shot 36 Muslims and mistreated 27 Muslim children in the local hospital of Zvornik in the second half of May 1992.

251. The Respondent contests those allegations and contends that all three sources used by the Applicant are based solely on the account of one witness. It considers that the three reports cited by the Applicant cannot be used as evidence before the Court. The Respondent produced the statement of a witness made before an investigating judge in Zvornik which claimed that the alleged massacre in the local hospital of Zvornik had never taken place. The Court notes that the Office of the Prosecutor of the ICTY had never indicted any of the accused for the alleged massacres in the hospital.

(b) *Camps*

(i) **Sušica camp**

252. The Applicant further presents claims with regard to killings perpetrated in detention camps in the area of Drina River Valley. The Report of the Commission of Experts includes the statement of an ex-guard at the Sušica camp who personally witnessed 3,000 Muslims being killed (Vol. IV, Ann. VIII, p. 334) and the execution of the last 200 surviving detainees (Vol. I, Ann. IV, pp. 31-32). In proceedings before the ICTY, the commander of that camp, Dragan Nikolić, pleaded guilty to murdering nine non-Serb detainees and, according to the Sentencing Judgment of 18 December 2003, "the Accused persecuted Muslim and other non-Serb detainees by subjecting them to murders, rapes and torture as charged specifically in the Indictment" (*Nikolić*, IT-94-2-S, para. 67).

(ii) **Foča Kazneno-Popravní Dom camp**

253. The Report of the Commission of Experts further mentions numerous killings at the camp of Foča Kazneno-Popravní Dom (Foča KP Dom). The Experts estimated that the number of prisoners at the camp fell from 570 to 130 over two months (Vol. IV, Ann. VIII, p. 129). The United States State Department reported one eye-witness statement of regular executions in July 1992 and mass graves at the camp.

254. The Trial Chamber of the ICTY made the following findings on several killings at this camp in its Judgment in the *Krnojelac* case:

"The Trial Chamber is satisfied beyond reasonable doubt that all but three of the persons listed in Schedule C to the Indictment were killed at the KP Dom. The Trial Chamber is satisfied that these persons fell within the pattern of events that occurred at the KP Dom during the months of June and July 1992, and that the only reasonable explanation for the disappearance of these persons since that time is that they died as a result of acts or omissions, with the relevant state of mind [sc. that required to establish murder], at the KP Dom." (IT-97-25-T, Judgment, 15 March 2002, para. 330.)

(iii) Batković camp

255. As regards the detention camp of Batković, the Applicant claims that many prisoners died at this camp as a result of mistreatment by the Serb guards. The Report of the Commission of Experts reports one witness statement according to which there was a mass grave located next to the Batković prison camp. At least 15 bodies were buried next to a cow stable, and the prisoners neither knew the identity of those buried at the stable nor the circumstances of their deaths (Report of the Commission of Experts, Vol. V, Ann. X, p. 9). The Report furthermore stresses that

"[b]ecause of the level of mistreatment, many prisoners died. One man stated that during his stay, mid-July to mid-August, 13 prisoners were beaten to death. Another prisoner died because he had gangrene which went untreated. Five more may have died from hunger. Allegedly, 20 prisoners died prior to September." (Vol. IV, Ann. VIII, p. 63.)

Killings at the Batković camp are also mentioned in the Dispatch of the United States State Department of 19 April 1993. According to a witness, several men died as a result of bad conditions and beatings at the camp (United States Dispatch, 19 April 1993, Vol. 4, No. 30, p. 538).

256. On the other hand, the Respondent stressed that, when the United Nations Special Rapporteur visited the Batković prison camp, he found that: "The prisoners did not complain of ill-treatment and, in general appeared to be in good health." (Report of 17 November 1992, para. 29) However, the Applicant contends that "it is without any doubt that Mazowiecki was shown a 'model' camp".

Prijedor

(a) *Kozarac and Hambarine*

257. With regard to the area of the municipality of Prijedor, the Applicant has placed particular emphasis on the shelling and attacks on Kozarac, 20 km east of Prijedor, and on Hambarine in May 1992. The Applicant contends that after the shelling, Serb forces shot people in their homes and that those who surrendered were taken to a soccer stadium of Kozarac where some men were randomly shot. The Report of the Commission of Experts (Vol. I, Ann. III, pp. 154-155) states that:

"The attack on Kozarac lasted three days and caused many villagers to flee to the forest while the soldiers were shooting at 'every moving thing'. Survivors calculated that at least 2,000 villagers were killed in that period. The villagers' defence fell on 26 May . . .

Serbs then reportedly announced that the villagers had 10 minutes to reach the town's soccer stadium. However, many people were shot in their homes before given a chance to leave. One witness reported that several thousand people tried to surrender by carrying white flags, but three Serb tanks opened fire on them, killing many."

The Respondent submits that the number of killings is exaggerated and that "there was severe fighting in Kozarac, which took place on 25 and 26 May, and naturally, it should be concluded that a certain number of the victims were Muslim combatants".

258. As regards Hambarine, the Report of the Commission of Experts (Vol. I, p. 39) states that:

"Following an incident in which less than a handful of Serb[ian] soldiers were shot dead under unclear circumstances, the village of Hambarine was given an ultimatum to hand over a policeman who lived where the shooting had occurred. As it was not met, Hambarine was subjected to several hours of artillery bombardment on 23 May 1992. The shells were fired from the aerodrome Urije just outside Prijedor town. When the bombardment stopped, the village was stormed by infantry, including paramilitary units, which sought out the inhabitants in every home. Hambarine had a population of 2,499 in 1991."

The Report of the Special Rapporteur of 17 November 1992, states that:

"Between 23 and 25 May, the Muslim village of Hambarine, 5 km south of Prijedor, received an ultimatum: all weapons must be surrendered by 11 a.m. Then, alleging that a shot was fired at a Serbian patrol, heavy artillery began to shell the village and tanks appeared, firing at homes. The villagers fled to Prijedor. Witnesses reported many deaths, probably as many as 1,000." (Periodic Report of 17 November 1992, p. 8, para. 17 *(c)*.)

The Respondent says, citing the indictment in the *Stakić* case, that "merely 11 names of the victims are known" and that it is therefore impossible that the total number of victims in Hambarine was "as many as 1,000".

259. The Report of the Commission of Experts found that on 26, 27 or 28 May, the Muslim village of Kozarac, came under attack of heavy Serb artillery. It furthermore notes that: "The population, estimated at 15,000, suffered a great many summary executions, possibly as many as 5,000 persons according to some witnesses." (Report of the Commission of Experts, Vol. IV, pt. 4.)

260. The Applicant also claimed that killings of members of the protected group were perpetrated in Prijedor itself. The Report of the Commission of Experts, as well as the United Nations Special Rapporteur collected individual witness statements on several incidents of killing in the town of Prijedor (Report of the Commission of Experts, Vol. I, Ann. V, pp. 54 *et seq.*). In particular, the Special Rapporteur received testimony "from a number of reliable sources" that 200 people were killed in Prijedor on 29 May 1992 (Report of 17 November 1992, para. 17).

261. In the *Stakić* case, the ICTY Trial Chamber found that "many people were killed during the attacks by the Bosnian Serb army on predominantly Bosnian Muslim villages and towns throughout the Prijedor municipality and several massacres of Muslims took place", and that "a comprehensive pattern of atrocities against Muslims in Prijedor municipality in 1992 ha[d] been proved beyond reasonable doubt" (IT-97-24-T, Judgment, 31 July 2003, paras. 544 and 546). Further, in the *Brdanin* case, the Trial Chamber was satisfied that "at least 80 Bosnian Muslim civilians were killed when Bosnian Serb soldiers and police entered the villages of the Kozarac area" (IT-99-36, Judgment, 1 September 2004, para. 403).

(b) *Camps*

(i) Omarska camp

262. With respect to the detention camps in the area of Prijedor, the Applicant has stressed that the camp of Omarska was "arguably the cruellest camp in Bosnia and Herzegovina". The Report of the Commission of Experts gives an account of seven witness statements reporting between 1,000 to 3,000 killings (Vol. IV, Ann. VIII, p. 222). The Report noted that

> "[s]ome prisoners estimate that on an average there may have been 10 to 15 bodies displayed on the grass each morning, when the first prisoners went to receive their daily food rations. But there were also other dead bodies observed in other places at other times. Some prisoners died from their wounds or other causes in the rooms where they were detained. Constantly being exposed to the death and suffering of fellow prisoners made it impossible for anyone over any period of time to forget in what setting he or she was. Given the length of time Logor Omarska was used, the numbers of prisoners detained in the open, and the allegations that dead bodies were exhibited there almost every morning."

The Report of the Commission of Experts concludes that "all information available . . . seems to indicate that [Omarska] was more than anything else a death camp" (Vol. I, Ann. V, p. 80). The United Nations Secretary-General also received submissions from Canada, Austria and the United States, containing witness statements about the killings at Omarska.

263. In the Opinion and Judgment of the Trial Chamber in the *Tadić* case, the ICTY made the following findings on Omarska: "Perhaps the most notorious of the camps, where the most horrific conditions existed, was the Omarska camp." (IT-94-1-T, Judgment, 7 May 1997,

para. 155.) "The Trial Chamber heard from 30 witnesses who survived the brutality to which they were systematically subjected at Omarska. By all accounts, the conditions at the camp were horrendous; killings and torture were frequent." (*Ibid.*, para. 157.) The Trial Chamber in the *Stakić* Judgment found that "over a hundred people were killed in late July 1992 in the Omarska camp" and that

> "[a]round late July 1992, 44 people were taken out of Omarska and put in a bus. They were told that they would be exchanged in the direction of Bosanska Krupa; they were never seen again. During the exhumation in Jama Lisac, 56 bodies were found: most of them had died from gunshot injuries." (IT-97-24-T, Judgment, 31 July 2003, paras. 208 and 210).

At least 120 people detained at Omarska were killed after having been taken away by bus.

> "The corpses of some of those taken away on the buses were later found in Hrastova Glavica and identified. A large number of bodies, 126, were found in this area, which is about 30 kilometres away from Prijedor. In 121 of the cases, the forensic experts determined that the cause of death was gunshot wounds." (*Ibid.*, para. 212.)

264. In the *Brdanin* case, the Trial Chamber, in its Judgment of 1 September 2004 held that between 28 May and 6 August, a massive number of people were killed at Omarska camp. The Trial Chamber went on to say specifically that "[a]s of late May 1992, a camp was set up at Omarska, where evidence shows that several hundred Bosnian Muslim and Bosnian Croat civilians from the Prijedor area were detained, and where killings occurred on a massive scale" (IT-99-36-T, Trial Chamber Judgment, 1 September 2004, para. 441). "The Trial Chamber is unable to precisely identify all detainees that were killed at Omarska camp. It is satisfied beyond reasonable doubt however that, at a minimum, 94 persons were killed, including those who disappeared." (*Ibid.*, para. 448.)

(ii) Keraterm camp

265. A second detention camp in the area of Prijedor was the Keraterm camp where, according to the Applicant, killings of members of the protected group were also perpetrated. Several corroborating accounts of a mass execution on the morning of 25 July 1992 in Room 3 at Keraterm camp were presented to the Court. This included the United States Dispatch of the State Department and a letter from the Permanent Representative of Austria to the United Nations dated 5 March 1993, addressed to the Secretary-General. The Report of the Commission of Experts cites three separate witness statements to the effect that ten prisoners were killed per day at Keraterm over three months (Vol. IV, para. 1932; see also Vol. I, Ann. V, para. 445).

266. The Trial Chamber of the ICTY, in the *Sikirica et al.* case, concerning the commander of Keraterm camp, found that 160 to 200 men were killed or wounded in the so-called Room 3 massacre (IT-95-8-S, Sentencing Judgment, 13 November 2001, para. 103). According to the

Judgment, Sikirica himself admitted that there was considerable evidence "concerning the murder and killing of other named individuals at Keraterm during the period of his duties". There was also evidence that "others were killed because of their rank and position in society and their membership of a particular ethnic group or nationality" (*ibid.*, para. 122). In the *Stakić* case, the Trial Chamber found that "from 30 April 1992 to 30 September 1992 . . . killings occurred frequently in the Omarska, Keraterm and Trnopolje camps" (IT-97-24-T, Judgment, 31 July 2003, para. 544).

(iii) Trnopolje camp

267. The Applicant further contends that there is persuasive evidence of killing at Trnopolje camp, with individual eye-witnesses corroborating each other. The Report of the Commission of Experts found that "[i]n Trnopolje, the regime was far better than in Omarska and Keraterm. Nonetheless, harassment and malnutrition was a problem for all the inmates. Rapes, beatings and other kinds of torture, and even killings, were not rare." (Report of the Commission of Experts, Vol. IV, Ann. V, p. 10.)

> "The first period was allegedly the worst in Trnopolje, with the highest numbers of inmates killed, raped, and otherwise mistreated and tortured . . .
>
> The people killed in the camp were usually removed soon after by some camp inmates who were ordered by the Serbs to take them away and bury them . . .
>
> Albeit *Logor* Trnopolje was not a death camp like *Logor* Omarska or *Logor* Keraterm, the label 'concentration camp' is none the less justified for *Logor* Trnopolje due to the regime prevailing in the camp." (Report of the Commission of Experts, Vol. I, Ann. V, pp. 88-90.)

268. With regard to the number of killings at Trnopolje, the ICTY considered the period between 25 May and 30 September 1992, the relevant period in the *Stakić* case (IT-97-24-T, Trial Chamber Judgment, 31 July 2003, paras. 226-227). The Trial Chamber came to the conclusion that "killings occurred frequently in the Omarska, Keraterm and Trnopolje camps and other detention centres" (*ibid.*, para. 544). In the Judgment in the *Brđanin* case, the Trial Chamber found that in the period from 28 May to October 1992,

> "numerous killings occurred in Trnopolje camp. A number of detainees died as a result of the beatings received by the guards. Others were killed by camp guards with rifles. The Trial Chamber also [found] that at least 20 inmates were taken outside the camp and killed there." (IT-99-36-T, Judgment, 1 September 2004, para. 450.)

269. In response to the allegations of killings at the detention camps in the area of Prijedor, the Respondent questions the number of victims, but not the fact that killings occurred. It contends that killings in Prijedor "were committed sporadically and against individuals who were not a significant part of the group". It further observed that the ICTY had not characterized the acts committed in the Prijedor region as genocide.

Banja Luka

(i) Manjača camp

270. The Applicant further contends that killings were also frequent at Manjača camp in Banja Luka. The Court notes that multiple witness accounts of killings are contained in the Report of the Commission of Experts (Vol. IV, paras. 370-376) and a mass grave of 540 bodies, "presumably" from prisoners at Manjača, is mentioned in a report on missing persons submitted by Manfred Nowak, the United Nations Expert on Missing Persons:

> "In September 1995, mass graves were discovered near Krasulje in northwest Bosnia and Herzegovina. The Government has exhumed 540 bodies of persons who were presumably detained at Manjaca concentration camp in 1992. In January 1996, a mass grave containing 27 bodies of Bosnian Muslims was discovered near Sanski Most; the victims were reportedly killed in July 1992 during their transfer from Sanski Most to Manjaca concentration camp (near Banja Luka)." (E/CN.4/1996/36 of 4 March 1996, para. 52.)

Brčko

(i) Luka camp

271. The Applicant claims that killings of members of the protected group were also perpetrated at Luka camp and Brčko. The Report of the Commission of Experts confirms these allegations. One witness reported that "[s]hootings often occurred at 4.00 a.m. The witness estimates that during his first week at Luka more than 2,000 men were killed and thrown into the Sava River." (Report of the Commission of Experts Vol. IV, Ann. VIII, p. 93.) The Report further affirms that "[a]pparently, murder and torture were a daily occurrence" (*ibid.*, p. 96), and that it was reported that

> "[t]he bodies of the dead or dying internees, were often taken to the camp dump or moved behind the prisoner hangars. Other internees were required to move the bodies. Sometimes the prisoners who carried the dead were killed while carrying such bodies to the dump. The dead were also taken and dumped outside the Serbian Police Station located on Majevička Brigada Road in Brčko." (*Ibid.*)

These findings are corroborated by evidence of a mass grave being found near the site (Report of the Commission of Experts, Vol. IV, Ann. VIII, p. 101 and United States State Department Dispatch).

272. In the *Jelisić* case, eight of the 13 murders to which the accused pleaded guilty were perpetrated at Luka camp and five were perpetrated at the Brčko police station (IT-95-10-T, Trial Chamber Judgment, 14 December 1999, paras. 37-38). The Trial Chamber further held that "[a]lthough the Trial Chamber is not in a position to establish the precise number of victims ascribable to Goran Jelisić for the period in the indictment, it notes that, in this instance, the material element of the crime of genocide has been satisfied" (*ibid.*, para. 65).

273. In the *Milošević* Decision on Motion for Judgment of Acquittal, the Trial Chamber found that many Muslims were detained in Luka camp in May and June 1992 and that many killings were observed by witnesses (IT-02-54-T, Decision on Motion for Judgment of Acquittal, 16 June 2004, paras. 159, 160-168), it held that "[t]he conditions and treatment to which the detainees at Luka Camp were subjected were terrible and included regular beatings, rapes, and killings" (*ibid.*, para. 159). "At Luka Camp . . . The witness personally moved about 12 to 15 bodies and saw approximately 100 bodies stacked up like firewood at Luka Camp; each day a refrigerated meat truck from the local Bimeks Company in Brčko would come to take away the dead bodies." (*Ibid.*, para. 161.)

274. The Court notes that the *Brdanin* Trial Chamber Judgment of 1 September 2004 made a general finding as to killings of civilians in camps and municipalities at Banja Luka, Prijedor, Šanski Most, Ključ, Kotor Varoš, Bosanski Novi. It held that:

> "In sum, the Trial Chamber is satisfied beyond reasonable doubt that, considering all the incidents described in this section of the judgment, at least 1669 Bosnian Muslims and Bosnian Croats were killed by Bosnian Serb forces, all of whom were non-combatants." (IT-99-36-T, Judgment, 1 September 2004, para. 465.)

There are contemporaneous Security Council and General Assembly resolutions condemning the killing of civilians in connection with ethnic cleansing, or expressing alarm at reports of mass killings (Security Council resolution 819 (1993), Preamble, paras. 6 and 7; General Assembly resolution 48/153 (1993), paras. 5 and 6; General Assembly resolution 49/196 (1994), para. 6).

275. The Court further notes that several resolutions condemn specific incidents. These resolutions, *inter alia*, condemn "the Bosnian Serb forces for their continued offensive against the safe area of Goražde, which has resulted in the death of numerous civilians" (Security Council resolution 913 (1994), Preamble, para. 5); condemn ethnic cleansing "perpetrated in Banja Luka, Bijeljina and other areas of the Republic of Bosnia and Herzegovina under the control of Bosnian Serb forces" (Security Council resolution 941 (1994), para. 2); express concern at "grave violations of international humanitarian law and of human rights in and around Srebrenica, and in the areas of Banja Luka and Sanski Most, including reports of mass murder" (Security Council resolution 1019 (1995), Preamble, para. 2); and condemn "the indiscriminate shelling of civilians in the safe areas of Sarajevo, Tuzla, Bihać and Goražde and the use of cluster bombs on civilian targets by Bosnian Serb and Croatian Serb forces" (General Assembly resolution 50/193 (1995) para. 5).

*

276. On the basis of the facts set out above, the Court finds that it is established by overwhelming evidence that massive killings in specific areas and detention camps throughout the territory of Bosnia and Herzegovina were perpetrated during the conflict. Furthermore, the

evidence presented shows that the victims were in large majority members of the protected group, which suggests that they may have been systematically targeted by the killings. The Court notes in fact that, while the Respondent contested the veracity of certain allegations, and the number of victims, or the motives of the perpetrators, as well as the circumstances of the killings and their legal qualification, it never contested, as a matter of fact, that members of the protected group were indeed killed in Bosnia and Herzegovina. The Court thus finds that it has been established by conclusive evidence that massive killings of members of the protected group occurred and that therefore the requirements of the material element, as defined by Article II *(a)* of the Convention, are fulfilled. At this stage of its reasoning, the Court is not called upon to list the specific killings, nor even to make a conclusive finding on the total number of victims.

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

* *

(5) The massacre at Srebrenica

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

> "The events surrounding the Bosnian Serb take-over of the United Nations ('UN') 'safe area' of Srebrenica in Bosnia and Herzegovina, in July 1995, have become well known to the world. Despite a UN Security Council resolution declaring that the enclave was to be 'free from armed attack or any other hostile act', units of the Bosnian Serb Army ('VRS') launched an attack and captured the town. Within a few days, approximately 25,000 Bosnian Muslims, most of them women, children and elderly people who were living in the area, were uprooted and, in an atmosphere of terror, loaded onto overcrowded buses by the Bosnian Serb forces and transported across the confrontation lines into Bosnian Muslim-held territory. The military-aged

> Bosnian Muslim men of Srebrenica, however, were consigned to a separate fate. As thousands of them attempted to flee the area, they were taken prisoner, detained in brutal conditions and then executed. More than 7,000 people were never seen again." (IT-98-33-T, Judgment, 2 August 2001, para. 1; footnotes omitted.)

While the Respondent raises a question about the number of deaths, it does not essentially question that account. What it does question is whether specific intent *(dolus specialis)* existed and whether the acts complained of can be attributed to it. It also calls attention to the attacks carried out by the Bosnian army from within Srebrenica and the fact that the enclave was never demilitarized. In the Respondent's view the military action taken by the Bosnian Serbs was in revenge and part of a war for territory.

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

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

The Chamber in the *Blagojević* case mentioned testimony showing that some "members of the Bratunac Brigade . . . did not consider this report to be an order. Testimony of other witnesses and documentary evidence show that the strategy was in fact implemented." (IT-02-60-T, Trial Chamber Judgment, 17 January 2005, para. 104; footnotes omitted.) The Applicant sees the "final goal" described here as "an entirely Serbian Podrinje", in conformity with the objective of a Serbian region 50 km to the west of the Drina river identified in an April or a May 1991 meeting of the political and State leadership of Yugoslavia. The Court observes that the object stated in the report, like the 1992 Strategic Objectives, does not envisage the destruction of the Muslims in Srebrenica, but rather their departure. The Chamber did not give the report any particular significance.

280. The Applicant, like the Chamber, refers to a meeting on 17 March 1995 between the Commander of the United Nations Protection Force (UNPROFOR) and General Mladić, at which the latter expressed dissatisfaction with the safe area régime and indicated that he might take military action against the eastern enclaves. He gave assurances however for the safety of the Bosnian Muslim population of those enclaves. On the following day, 8 March 1995, President Karadžić issued the Directive for Further Operations 7, also quoted by the Chamber and the Applicant: "'Planned and well-thought-out combat operations' were to create 'an unbearable situation of total insecurity with no hope of further survival or life for the inhabitants of both enclaves'." The *Blagojević* Chamber continues as follows:

"The separation of the Srebrenica and Žepa enclaves became the task of the Drina Corps. As a result of this directive, General Ratko Mladić on 31 March 1995 issued Directive for Further Operations, Operative No. 7/1, which further directive specified the Drina Corps' tasks." (*Ibid.*, pp. 38-39, para. 106.)

281. Counsel for the Applicant asked in respect of the first of those directives "[w]hat could be a more clear-cut definition of the genocidal intent to destroy on the part of the authorities in Pale?". As with the July 1994 report, the Court observes that the expulsion of the inhabitants would achieve the purpose of the operation. That observation is supported by the ruling of the Appeals Chamber in the *Krstić* case that the directives were "insufficiently clear" to establish specific intent *(dolus specialis)* on the part of the members of the Main Staff who issued them. "Indeed, the Trial Chamber did not even find that those who issued Directives 7 and 7.1 had genocidal intent, concluding instead that the genocidal plan crystallized at a later stage." (IT-98-33-A, Judgment, 19 April 2004, para. 90.)

282. A Netherlands Battalion (Dutchbat) was deployed in the Srebrenica safe area. Within that area in January 1995 it had about 600 personnel. By February and through the spring the VRS was refusing to allow the return of Dutch soldiers who had gone on leave, causing their numbers to drop by at least 150, and were restricting the movement of international convoys of aid and supplies to Srebrenica and to other enclaves. It was estimated that without new supplies about half of the population of Srebrenica would be without food after mid-June.

283. On 2 July the Commander of the Drina Corps issued an order for active combat operations; its stated objective on the Srebrenica enclave was to reduce "the enclave to its urban area". The attack began on 6 July with rockets exploding near the Dutchbat headquarters in Potočari; 7 and 8 July were relatively quiet because of poor weather, but the shelling intensified around 9 July. Srebrenica remained under fire until 11 July when it fell, with the Dutchbat observation posts having been taken by the VRS. Contrary to the expectations of the VRS, the Bosnia and Herzegovina army showed very little resistance (*Blagojević*, IT-02-60-T, Trial Chamber Judgment, 17 January 2005, para. 125). The United Nations Secretary-General's report quotes an assessment made by United Nations military observers on the afternoon of 9 July which concluded as follows:

"'the BSA offensive will continue until they achieve their aims. These aims may even be widening since the United Nations response has been almost non-existent and the BSA are now in a position to overrun the enclave if they wish.' Documents later obtained from Serb sources appear to suggest that this assessment was correct. Those documents indicate that the Serb attack on Srebrenica initially had limited objectives. Only after having advanced with unexpected ease did the Serbs decide to overrun the entire enclave. Serb civilian and military officials from the Srebrenica area have stated the same thing, adding, in the course of discussions with a United Nations official, that they decided to advance all the way to Srebrenica town when they assessed that UNPROFOR was not willing or able to stop them." (A/54/549, para. 264.)

Consistently with that conclusion, the Chamber in the *Blagojević* case says this:

> "As the operation progressed its military object changed from 'reducing the enclave to the urban area' [the objective stated in a Drina Corps order of 2 July] to the taking-over of Srebrenica town and the enclave as a whole. The Trial Chamber has heard no direct evidence as to the exact moment the military objective changed. The evidence does show that President Karadžić was 'informed of successful combat operations around Srebrenica . . . which enable them to occupy the very town of Srebrenica' on 9 July. According to Miroslav Deronjić, the President of the Executive Board of the Bratunac Municipality, President Karadžić told him on 9 July that there were two options in relation to the operation, one of which was the complete take-over of Srebrenica. Later on 9 July, President Karadžić 'agreed with continuation of operations for the takeover of Srebrenica'. By the morning of 11 July the change of objective of the 'Krivaja 95' operation had reached the units in the field; and by the middle of the afternoon, the order to enter Srebrenica had reached the Bratunac Brigades's IKM in Pribićevac and Colonel Blagojević. Miroslav Deronjić visited the Bratunac Brigade IKM in Pribićevac on 11 July. He briefly spoke with Colonel Blagojević about the Srebrenica operation. According to Miroslav Deronjić, the VRS had just received the order to enter Srebrenica town." (IT-02-60-T, Trial Chamber Judgment, 17 January 2005, para. 130.)

284. The Chamber then begins an account of the dreadful aftermath of the fall of Srebrenica. A Dutchbat Company on 11 July started directing the refugees to the UNPROFOR headquarters in Potočari which was considered to be the only safe place for them. Not all the refugees went towards Potočari; many of the Bosnian Muslim men took to the woods. Refugees were soon shelled and shot at by the VRS despite attempts to find a safe route to Potočari where, to quote the ICTY, chaos reigned:

> "The crowd outside the UNPROFOR compound grew by the thousands during the course of 11 July. By the end of the day, an estimated 20,000 to 30,000 Bosnian Muslims were in the surrounding area and some 4,000 to 5,000 refugees were in the UNPROFOR compound.
>
> *(b)* Conditions in Potočari
>
> The standards of hygiene within Potočari had completely deteriorated. Many of the refugees seeking shelter in the UNPROFOR headquarters were injured. Medical assistance was given to the extent possible; however, there was a dramatic shortage of medical supplies. As a result of the VRS having prevented aid convoys from getting through during the previous months, there was hardly any fresh food in the DutchBat headquarters. There was some running water available outside the compound. From 11 to 13 July 1995 the temperature was very high, reaching 35 degrees centigrade and this small water supply was insufficient for the 20,000 to 30,000 refugees who were outside the UNPROFOR compound." (*Ibid.*, paras. 146-147.)

The Tribunal elaborates on those matters and some efforts made by Bosnian Serb and Serbian authorities, i.e., the local Municipal Assembly, the Bratunac Brigade and the Drina Corps, as well as UNHCR, to assist the Bosnian Muslim refugees (*ibid.*, para. 148).

285. On 10 July at 10.45 p.m., according to the Secretary-General's 1999 Report, the delegate in Belgrade of the Secretary-General's Special Representative telephoned the Representative to say that he had seen President Milošević who had responded that not much should be expected of him because "the Bosnian Serbs did not listen to him" (A/54/549, para. 292). At 3 p.m. the next day, the President rang the Special Representative and, according to the same report, "stated that the Dutchbat soldiers in Serb-held areas had retained their weapons and equipment, and were free to move about. This was not true." (*Ibid.*, para. 307.) About 20 minutes earlier two NATO aircraft had dropped two bombs on what were thought to be Serb vehicles advancing towards the town from the south. The Secretary-General's report gives the VRS reaction:

> "Immediately following this first deployment of NATO close air support, the BSA radioed a message to Dutchbat. They threatened to shell the town and the compound where thousands of inhabitants had begun to gather, and to kill the Dutchbat soldiers being held hostage, if NATO continued with its use of air power. The Special Representative of the Secretary-General recalled having received a telephone call from the Netherlands Minister of Defence at this time, requesting that the close air support action be discontinued, because Serb soldiers on the scene were too close to Netherlands troops, and their safety would be jeopardized. The Special Representative considered that he had no choice but to comply with this request." (*Ibid.*, para. 306.)

286. The Trial Chamber in the *Blagojević* case recorded that on 11 July at 8 p.m. there was a meeting between a Dutch colonel and General Mladić and others. The former said that he had come to negotiate the withdrawal of the refugees and to ask for food and medicine for them. He sought assurances that the Bosnian Muslim population and Dutchbat would be allowed to withdraw from the area. General Mladić said that the civilian population was not the target of his actions and the goal of the meeting was to work out an arrangement. He then said "'you can all leave, all stay, or all die here' . . . 'we can work out an agreement for all this to stop and for the issues of the civilian population, your soldiers and the Muslim military to be resolved in a peaceful way'" (*Blagojević*, IT-02-60-T, Trial Chamber Judgment, 17 January 2005, paras. 150-152). Later that night at a meeting beginning at 11 p.m., attended by a representative of the Bosnian Muslim community, General Mladić said:

> "'Number one, you need to lay down your weapons and I guarantee that all those who lay down their weapon will live. I give you my word, as a man and a General, that I will use my influence to help the innocent Muslim population which is not the target of the combat operations carried out by the VRS . . . In order to make a decision as a man and a Commander, I need to have a clear position of the representatives of your people on whether you want to survive . . . stay or vanish. I am prepared to receive here tomorrow at 10 a.m. hrs. a

> delegation of officials from the Muslim side with whom I can discuss the salvation of your people from . . . the former enclave of Srebrenica . . . Nesib [a Muslim representative], the future of your people is in your hands, not only in this territory . . . Bring the people who can secure the surrender of weapons and save your people from destruction.'

The Trial Chamber finds, based on General Mladić's comments, that he was unaware that the Bosnian Muslim men had left the Srebrenica enclave in the column.

General Mladić also stated that he would provide the vehicles to transport the Bosnian Muslims out of Potočari. The Bosnian Muslim and Bosnian Serb sides were not on equal terms and Nesib Mandžić felt his presence was only required to put up a front for the international public. Nesib Mandžić felt intimidated by General Mladić. There was no indication that anything would happen the next day." (*Ibid.*, paras. 156-158.)

287. A third meeting was held the next morning, 12 July. The Tribunal in the *Blagojević* case gives this account:

> "After the Bosnian Muslim representatives had introduced themselves, General Mladić stated:
>
> > 'I want to help you, but I want absolute co-operation from the civilian population because your army has been defeated. There is no need for your people to get killed, your husband, your brothers or your neighbours . . . As I told this gentleman last night, you can either survive or disappear. For your survival, I demand that all your armed men, even those who committed crimes, and many did, against our people, surrender their weapons to the VRS . . . You can choose to stay or you can choose to leave. If you wish to leave, you can go anywhere you like. When the weapons have been surrendered every individual will go where they say they want to go. The only thing is to provide the needed gasoline. You can pay for it if you have the means. If you can't pay for it, UNPROFOR should bring four or five tanker trucks to fill up trucks . . .'
>
> Čamila Omanović [one of the Muslim representatives] interpreted this to mean that if the Bosnian Muslim population left they would be saved, but that if they stayed they would die. General Mladić did not give a clear answer in relation to whether a safe transport of the civilian population out of the enclave would be carried out. General Mladić stated that the male Bosnian Muslim population from the age of 16 to 65 would be screened for the presence of war criminals. He indicated that after this screening, the men would be returned to the enclave. This was the first time that the separation of men from the rest of the population was mentioned. The Bosnian Muslim representatives had the impression that 'everything had been prepared in advance, that there was a team of people working together in an organized manner' and that 'Mladić was the chief organizer.'

> The third Hotel Fontana meeting ended with an agreement that the VRS would transport the Bosnian Muslim civilian population out of the enclave to ABiH-held territory, with the assistance of UNPROFOR to ensure that the transportation was carried out in a humane manner." (*Ibid.*, paras. 160-161.)

The Court notes that the accounts of the statements made at the meetings come from transcripts of contemporary video recordings.

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

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

290. The Trial Chambers in the *Krstić* and *Blagojević* cases both found that Bosnian Serb forces killed over 7,000 Bosnian Muslim men following the takeover of Srebrenica in July 1995 (*Krstić*, IT-98-33-T, Judgment, 2 August 2001, paras. 426-427 and *Blagojević*, IT-02-60-T, Judgment, 17 January 2005, para. 643). Accordingly they found that the *actus reus* of killings in Article II *(a)* of the Convention was satisfied. Both also found that actions of Bosnian Serb forces also satisfied the *actus reus* of causing serious bodily or mental harm, as defined in Article II *(b)* of the Convention — both to those who where about to be executed, and to the others who were separated from them in respect of their forced displacement and the loss suffered by survivors among them (*Krstić*, *ibid.*, para. 543, and *Blagojević*, *ibid.*, paras. 644-654).

291. The Court is fully persuaded that both killings within the terms of Article II *(a)* of the Convention, and acts causing serious bodily or mental harm within the terms of Article II *(b)* thereof occurred during the Srebrenica massacre. Three further aspects of the ICTY decisions relating to Srebrenica require closer examination — the specific intent *(dolus specialis)*, the date by

which the intent was formed, and the definition of the "group" in terms of Article II. A fourth issue which was not directly before the ICTY but which this Court must address is the involvement, if any, of the Respondent in the actions.

292. The issue of intent has been illuminated by the *Krstić* Trial Chamber. In its findings, it was convinced of the existence of intent by the evidence placed before it. Under the heading "A Plan to Execute the Bosnian Muslim Men of Srebrenica", the Chamber "finds that, following the takeover of Srebrenica in July 1995, the Bosnian Serbs devised and implemented a plan to execute as many as possible of the military aged Bosnian Muslim men present in the enclave" (IT-98-33-T, Judgment, 2 August 2001, para. 87). All the executions, the Chamber decided, "systematically targeted Bosnian Muslim men of military age, regardless of whether they were civilians or soldiers" (*ibid.*, para. 546). While "[t]he VRS may have initially considered only targeting military men for execution, . . . [the] evidence shows, however, that a decision was taken, at some point, to capture and kill all the Bosnian Muslim men indiscriminately. No effort was made to distinguish the soldiers from the civilians." (*Ibid.*, para. 547.) Under the heading "Intent to Destroy", the Chamber reviewed the Parties' submissions and the documents, concluding that it would "adhere to the characterization of genocide which encompass[es] only acts committed with the *goal* of destroying all or part of a group" (*ibid.*, para. 571; original emphasis). The acts of genocide need not be premeditated and the intent may become the goal later in an operation (*ibid.*, para. 572).

> "Evidence presented in this case has shown that the killings were planned: the number and nature of the forces involved, the standardized coded language used by the units in communicating information about the killings, the scale of the executions, the invariability of the killing methods applied, indicate that a decision was made to kill all the Bosnian Muslim military aged men.
>
> The Trial Chamber is unable to determine the precise date on which the decision to kill all the military aged men was taken. Hence, it cannot find that the killings committed in Potočari on 12 and 13 July 1995 formed part of the plan to kill all the military aged men. Nevertheless, the Trial Chamber is confident that the mass executions and other killings committed from 13 July onwards were part of this plan." (*Ibid.*, paras. 572-573; see also paras. 591-598.)

293. The Court has already quoted (paragraph 281) the passage from the Judgment of the Appeals Chamber in the *Krstić* case rejecting the Prosecutor's attempted reliance on the Directives given earlier in July, and it would recall the evidence about the VRS's change of plan in the course of the operation in relation to the complete takeover of the enclave. The Appeals Chamber also rejected the appeal by General Krstić against the finding that genocide occurred in Srebrenica. It held that the Trial Chamber was entitled to conclude that the destruction of such a sizeable number of men, one fifth of the overall Srebrenica community, "'would inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica'" (IT-98-33-A, Appeals Chamber

Judgment, 19 April 2004, paras. 28-33); and the Trial Chamber, as the best assessor of the evidence presented at trial, was entitled to conclude that the evidence of the transfer of the women and children supported its finding that some members of the VRS Main Staff intended to destroy the Bosnian Muslims in Srebrenica. The Appeals Chamber concluded this part of its Judgment as follows:

> "The gravity of genocide is reflected in the stringent requirements which must be satisfied before this conviction is imposed. These requirements — the demanding proof of specific intent and the showing that the group was targeted for destruction in its entirety or in substantial part — guard against a danger that convictions for this crime will be imposed lightly. Where these requirements are satisfied, however, the law must not shy away from referring to the crime committed by its proper name. By seeking to eliminate a part of the Bosnian Muslims, the Bosnian Serb forces committed genocide. They targeted for extinction the forty thousand Bosnian Muslims living in Srebrenica, a group which was emblematic of the Bosnian Muslims in general. They stripped all the male Muslim prisoners, military and civilian, elderly and young, of their personal belongings and identification, and deliberately and methodically killed them solely on the basis of their identity. The Bosnian Serb forces were aware, when they embarked on this genocidal venture, that the harm they caused would continue to plague the Bosnian Muslims. The Appeals Chamber states unequivocally that the law condemns, in appropriate terms, the deep and lasting injury inflicted, and calls the massacre at Srebrenica by its proper name: genocide. Those responsible will bear this stigma, and it will serve as a warning to those who may in future contemplate the commission of such a heinous act.
>
> In concluding that some members of the VRS Main Staff intended to destroy the Bosnian Muslims of Srebrenica, the Trial Chamber did not depart from the legal requirements for genocide. The Defence appeal on this issue is dismissed." (*Ibid.*, paras. 37-38.)

294. On one view, taken by the Applicant, the *Blagojević* Trial Chamber decided that the specific intent *(dolus specialis)* was formed earlier than 12 or 13 July, the time chosen by the *Krstić* Chamber. The Court has already called attention to that Chamber's statement that at some point (it could not determine "the exact moment") the military objective in Srebrenica changed, from "reducing the enclave to the urban area" (stated in a Drina Corps order of 2 July 1995 referred to at times as the "Krivaja 95 operation") to taking over Srebrenica town and the enclave as a whole. Later in the Judgment, under the heading "Findings: was genocide committed?", the Chamber refers to the 2 July document:

> "The Trial Chamber is convinced that the criminal acts committed by the Bosnian Serb forces were all parts of one single scheme to commit genocide of the Bosnian Muslims of Srebrenica, as reflected in the 'Krivaja 95 operation', the ultimate objective of which was to eliminate the enclave and, therefore, the Bosnian Muslim community living there." (*Blagojević*, IT-02-60-T, Judgment, 17 January 2005, para. 674.)

The Chamber immediately goes on to refer only to the events — the massacres and the forcible transfer of the women and children — after the fall of Srebrenica, that is sometime after the change of military objective on 9 or 10 July. The conclusion on intent is similarly focussed:

> "The Trial Chamber has no doubt that all these acts constituted a single operation executed with the intent to destroy the Bosnian Muslim population of Srebrenica. The Trial Chamber finds that the Bosnian Serb forces not only knew that the combination of the killings of the men with the forcible transfer of the women, children and elderly, would inevitably result in the physical disappearance of the Bosnian Muslim population of Srebrenica, but clearly intended through these acts to physically destroy this group." (*Ibid.*, para. 677.) (See similarly all but the first item in the list in paragraph 786.)

295. The Court's conclusion, fortified by the Judgments of the Trial Chambers in the *Krstić* and *Blagojević* cases, is that the necessary intent was not established until after the change in the military objective and after the takeover of Srebrenica, on about 12 or 13 July. This may be significant for the application of the obligations of the Respondent under the Convention (paragraph 423 below). The Court has no reason to depart from the Tribunal's determination that the necessary specific intent *(dolus specialis)* was established and that it was not established until that time.

296. The Court now turns to the requirement of Article II that there must be the intent to destroy a protected "group" in whole or in part. It recalls its earlier statement of the law and in particular the three elements there discussed: substantiality (the primary requirement), relevant geographic factors and the associated opportunity available to the perpetrators, and emblematic or qualitative factors (paragraphs 197-201). Next, the Court recalls the assessment it made earlier in the Judgment of the persuasiveness of the ICTY's findings of facts and its evaluation of them (paragraph 223). Against that background it turns to the findings in the *Krstić* case (IT-98-33-T, Trial Chamber Judgment, 2 August 2001, paras. 551-599 and IT-98-33-A, Appeals Chamber Judgment, 19 April 2004, paras. 6-22), in which the Appeals Chamber endorsed the findings of the Trial Chamber in the following terms.

> "In this case, having identified the protected group as the national group of Bosnian Muslims, the Trial Chamber concluded that the part the VRS Main Staff and Radislav Krstić targeted was the Bosnian Muslims of Srebrenica, or the Bosnian Muslims of Eastern Bosnia. This conclusion comports with the guidelines outlined above. The size of the Bosnian Muslim population in Srebrenica prior to its capture by the VRS forces in 1995 amounted to approximately forty thousand people. This represented not only the Muslim inhabitants of the Srebrenica municipality but also many Muslim refugees from the surrounding region. Although this population constituted only a small percentage of the overall Muslim population of Bosnia and Herzegovina at the time, the importance of the Muslim community of Srebrenica is not captured solely by its size." (IT-98-33-A, Judgment, 19 April 2004, para. 15; footnotes omitted.)

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

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

* *

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

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

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

300. The Court notes that there is no dispute between the Parties that rapes and sexual violence could constitute acts of genocide, if accompanied by a specific intent to destroy the protected group. It notes also that the ICTR, in its Judgment of 2 September 1998 in the *Akayesu* case , addressed the issue of acts of rape and sexual violence as acts of genocide in the following terms:

> "Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of inflicting harm on the victim as he or she suffers both bodily and mental harm" (ICTR-96-4-T, Trial Chamber Judgment, 2 September 1998, para. 731).

The ICTY, in its Judgment of 31 July 2003 in the *Stakić* case, recognized that:

> "'Causing serious bodily and mental harm' in subparagraph *(b)* [of Article 4 (2) of the Statute of the ICTY] is understood to mean, *inter alia*, acts of torture, inhumane or degrading treatment, sexual violence including rape, interrogations combined with beatings, threats of death, and harm that damages health or causes disfigurement or injury. The harm inflicted need not be permanent and irremediable." (IT-97-24-T, Trial Chamber Judgment, 31 July 2003, para. 516.)

301. The Court notes furthermore that Security Council and General Assembly resolutions contemporary with the facts are explicit in referring to sexual violence. These resolutions were in turn based on reports before the General Assembly and the Security Council, such as the Reports of the Secretary-General, the Commission of Experts, the Special Rapporteur for Human Rights, Tadeusz Mazowiecki, and various United Nations agencies in the field. The General Assembly stressed the "extraordinary suffering of the victims of rape and sexual violence" (General Assembly resolution 48/143 (1993), Preamble; General Assembly resolution 50/192 (1995), para. 8). In resolution 48/143 (1993), the General Assembly declared it was:

> "*Appalled* at the recurring and substantiated reports of widespread rape and abuse of women and children in the areas of armed conflict in the former Yugoslavia, in particular its systematic use against the Muslim women and children in Bosnia and Herzegovina by Serbian forces" (Preamble, para. 4).

302. Several Security Council resolutions expressed alarm at the "massive, organised and systematic detention and rape of women", in particular Muslim women in Bosnia and Herzegovina (Security Council resolutions 798 (1992), Preamble, para. 2; resolution 820 (1993), para. 6; 827 (1993), Preamble, para. 3). In terms of other kinds of serious harm, Security Council resolution 1034 (1995) condemned

> "in the strongest possible terms the violations of international humanitarian law and of human rights by Bosnian Serb and paramilitary forces in the areas of Srebrenica, Žepa, Banja Luka and Sanski Most as described in the report of the Secretary-General of 27 November 1995 and showing a consistent pattern of summary executions, rape, mass expulsions, arbitrary detentions, forced labour and large-scale disappearances" (para. 2).

The Security Council further referred to a "persistent and systematic campaign of terror" in Banja Luka, Bijeljina and other areas under the control of Bosnian Serb forces (Security Council resolution 941 (1994), Preamble, para. 4). It also expressed concern at reports of mass murder, unlawful detention and forced labour, rape, and deportation of civilians in Banja Luka and Sanski Most (Security Council resolution 1019 (1995), Preamble, para. 2).

303. The General Assembly also condemned specific violations including torture, beatings, rape, disappearances, destruction of houses, and other acts or threats of violence aimed at forcing individuals to leave their homes (General Assembly resolution 47/147 (1992), para. 4; see also General Assembly resolution 49/10 (1994), Preamble, para. 14 and General Assembly resolution 50/193 (1995), para. 2).

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

Drina River Valley

(a) ***Zvornik***

305. As regards the area of the Drina River Valley, the Applicant has stressed the perpetration of acts and abuses causing serious bodily or mental harm in the events at Zvornik. In particular, the Court has been presented with a report on events at Zvornik which is based on eye-witness accounts and extensive research (Hannes Tretter *et al.*, "'Ethnic cleansing' Operations in the Northeast Bosnian-City of Zvornik from April through June 1992", Ludwig Boltzmann Institute of Human Rights (1994), p. 48). The report of the Ludwig Boltzmann Institute gives account of a policy of terrorization, forced relocation, torture, rape during the takeover of Zvornik in April-June 1992. The Report of the Commission of Experts received 35 reports of rape in the area of Zvornik in May 1992 (Vol. V, Ann. IX, p. 54).

(b) ***Foča***

306. Further acts causing serious bodily and mental harm were perpetrated in the municipality of Foča. The Applicant, relying on the Judgment in the *Kunarac et al.* case (IT-96-23-T and IT-96-23/1-T, Trial Chamber Judgment, 22 February 2001, paras. 574 and 592), claims, in particular that many women were raped repeatedly by Bosnian Serb soldiers or policemen in the city of Foča.

(c) ***Camps***

(i) Batković camp

307. The Applicant further claims that in Batković camp, prisoners were frequently beaten and mistreated. The Report of the Commission of Experts gives an account of a witness statement according to which "prisoners were forced to perform sexual acts with each other, and sometimes with guards". The Report continues: "Reports of the frequency of beatings vary from daily beatings to beatings 10 times each day." (Report of the Commission of Experts, Vol. IV, Ann. VIII, p. 62, para. 469.) Individual witness accounts reported by the Commission of Experts

(Report of the Commission of Experts, Vol. IV, Ann. VIII, pp. 62-63 and Ann. X, p. 9) provide second-hand testimony that beatings occurred and prisoners lived in terrible conditions. As already noted above (paragraph 256), however, the periodic Report of Special Rapporteur Mazowiecki of 17 November 1992 stated that "[t]he prisoners . . . appeared to be in good health" (p. 13); but according to the Applicant, Mazowiecki was shown a "model" camp and therefore his impression was inaccurate. The United States Department of State Dispatch of 19 April 1993 (Vol. 4, No. 16), alleges that in Batković camp, prisoners were frequently beaten and mistreated. In particular, the Dispatch records two witness statements according to which "[o]n several occasions, they and other prisoners were forced to remove their clothes and perform sex acts on each other and on some guards".

(ii) Sušica camp

308. According to the Applicant, rapes and physical assaults were also perpetrated at Sušica camp; it pointed out that in the proceedings before the ICTY, in the "Rule 61 Review of the Indictment" and the Sentencing Judgment, in the *Nikolić* case, the accused admitted that many Muslim women were raped and subjected to degrading physical and verbal abuse in the camp and at locations outside of it (*Nikolić*, IT-94-2-T, Sentencing Judgment, 18 December 2003, paras. 87-90), and that several men were tortured in that same camp.

(iii) Foča Kazneno-Popravní Dom camp

309. With regard to the Foča Kazneno-Popravní Dom camp, the Applicant asserts that beatings, rapes of women and torture were perpetrated. The Applicant bases these allegations mainly on the Report of the Commission of Experts and the United States State Department Dispatch. The Commission of Experts based its findings on information provided by a Helsinki Watch Report. A witness claimed that some prisoners were beaten in Foča KP Dom (Report of the Commission of Experts, Vol. IV, pp. 128-132); similar accounts are contained in the United States State Department Dispatch. One witness stated that

> "Those running the center instilled fear in the Muslim prisoners by selecting certain prisoners for beatings. From his window in Room 13, the witness saw prisoners regularly being taken to a building where beatings were conducted. This building was close enough for him to hear the screams of those who were being beaten." (Dispatch of the United States Department of State, 19 April 1993, No. 16, p. 262.)

310. The ICTY Trial Chamber in its *Kunarac* Judgment of 22 February 2001, described the statements of several witnesses as to the poor and brutal living conditions in Foča KP Dom. These seem to confirm that the Muslim men and women from Foča, Gacko and Kalinovik municipalities were arrested, rounded up, separated from each other, and imprisoned or detained at several detention centres like the Foča KP Dom where some of them were killed, raped or severely beaten (*Kunarac et al*, IT-96-23-T and IT-96-23/1-T, Trial Chamber Judgment, 22 February 2001).

Prijedor

(a) *Municipality*

311. Most of the allegations of abuses said by the Applicant to have occurred in Prijedor have been examined in the section of the present Judgment concerning the camps situated in Prijedor. However, the Report of the Commission of Experts refers to a family of nine found dead in Stara Rijeka in Prijedor, who had obviously been tortured (Vol. V, Ann. X, p. 41). The Trial Chamber of the ICTY, in its Judgment in the *Tadić* case made the following factual finding as to an attack on two villages in the Kozarac area, Jaskići and Šivci:

> "On 14 June 1992 both villages were attacked. In the morning the approaching sound of shots was heard by the inhabitants of Sivci and soon after Serb tanks and Serb soldiers entered the village . . . There they were made to run along that road, hands clasped behind their heads, to a collecting point in the yard of one of the houses. On the way there they were repeatedly made to stop, lie down on the road and be beaten and kicked by soldiers as they lay there, before being made to get up again and run some distance further, where the whole performance would be repeated . . . In all some 350 men, mainly Muslims but including a few Croats, were treated in this way in Sivci.
>
> On arrival at the collecting point, beaten and in many cases covered with blood, some men were called out and questioned about others, and were threatened and beaten again. Soon buses arrived, five in all, and the men were made to run to them, hands again behind the head, and to crowd on to them. They were then taken to the Keraterm camp.
>
> The experience of the inhabitants of the smaller village of Jaskići, which contained only 11 houses, on 14 June 1992 was somewhat similar but accompanied by the killing of villagers. Like Sivci, Jaskići had received refugees after the attack on Kozarac but by 14 June 1992 many of those refugees had left for other villages. In the afternoon of 14 June 1992 gunfire was heard and Serb soldiers arrived in Jaskići and ordered men out of their homes and onto the village street, their hands clasped behind their heads; there they were made to lie down and were severely beaten." (IT-94-1-T, Judgment, 7 May 1997, paras. 346-348.)

(b) *Camps*

(i) Omarska camp

312. As noted above in connection with the killings (paragraph 262), the Applicant has been able to present abundant and persuasive evidence of physical abuses causing serious bodily harm in Omarska camp. The Report of the Commission of Experts contains witness accounts regarding the "white house" used for physical abuses, rapes, torture and, occasionally, killings, and the "red house" used for killings (Vol. IV, Ann. VIII, pp. 207-222). Those accounts of the sadistic methods of killing are corroborated by United States submissions to the Secretary-General. The most persuasive and reliable source of evidence may be taken to be the factual part of the Opinion and

Judgment of the ICTY in the *Tadić* case (IT-94-1-T, Trial Chamber Judgment, 7 May 1997). Relying on the statements of 30 witnesses, the *Tadić* Trial Judgment made findings as to interrogations, beatings, rapes, as well as the torture and humiliation of Muslim prisoners in Omarska camp (in particular: *ibid.*, paras. 155-158, 163-167). The Trial Chamber was satisfied beyond reasonable doubt of the fact that several victims were mistreated and beaten by Tadić and suffered permanent harm, and that he had compelled one prisoner to sexually mutilate another (*ibid.*, paras. 194-206). Findings of mistreatment, torture, rape and sexual violence at Omarska camp were also made by the ICTY in other cases; in particular, the Trial Judgment of 2 November 2001 in the *Kvočka et al.* case (IT-98-30/1-T, Trial Chamber Judgment, paras. 21-50, and 98-108) — upheld on appeal, the Trial Judgment of 1 September 2004 in the *Brdanin* case (IT-99-36-T, Trial Chamber Judgment, paras. 515-517) and the Trial Judgment of 31 July 2003 in the *Stakić* case (IT-97-24-T, Trial Chamber Judgment, paras. 229-336).

(ii) Keraterm camp

313. The Applicant also pointed to evidence of beatings and rapes at Keraterm camp. Several witness accounts are reported in the Report of the Commission of Experts (Vol. IV, Ann. VIII, pp. 225, 231, 233, 238) and corroborated by witness accounts reported by the Permanent Mission of Austria to the United Nations and Helsinki Watch. The attention of the Court has been drawn to several judgments of the ICTY which also document the severe physical abuses, rapes and sexual violence that occurred at this camp. The Trial Judgment of 1 September 2004 in the *Brdanin* case found that:

> "At Keraterm camp, detainees were beaten on arrival . . . Beatings were carried out with wooden clubs, baseball bats, electric cables and police batons . . .
>
> In some cases the beatings were so severe as to result in serious injury and death. Beatings and humiliation were often administered in front of other detainees. Female detainees were raped in Keraterm camp." (IT-99-36-T, Trial Chamber Judgment, paras. 851-852.)

The Trial Chamber in its Judgment of 31 July 2003 in the *Stakić* case found that

> "the detainees at the Keraterm camp were subjected to terrible abuse. The evidence demonstrates that many of the detainees at the Keraterm camp were beaten on a daily basis. Up until the middle of July, most of the beatings happened at night. After the detainees from Brdo arrived, around 20 July 1992, there were 'no rules', with beatings committed both day and night. Guards and others who entered the camp, including some in military uniforms carried out the beatings. There were no beatings in the rooms since the guards did not enter the rooms — people were generally called out day and night for beatings." (IT-97-24-T, Trial Chamber Judgment, para. 237.)

The Chamber also found that there was convincing evidence of further beatings and rape perpetrated in Keraterm camp (*ibid.*, paras. 238-241).

In the Trial Judgment in the *Kvočka et al.* case, the Chamber held that, in addition to the "dreadful" general conditions of life, detainees at Keraterm camp were "mercilessly beaten" and "women were raped" (IT-98-30/1-T, Trial Chamber Judgment, 2 November 2001, para. 114).

(iii) Trnopolje camp

314. The Court has furthermore been presented with evidence that beatings and rapes occurred at Trnopolje camp. The rape of 30-40 prisoners on 6 June 1992 is reported by both the Report of the Commission of Experts (Vol. IV, Ann. VIII, pp. 251-253) and a publication of the United States State Department. In the *Tadić* case the Trial Chamber of the ICTY concluded that at Trnopolje camp beatings occurred and that "[b]ecause this camp housed the largest number of women and girls, there were more rapes at this camp than at any other" (IT-94-1-T, Judgment, 7 May 1997, paras. 172-177, (para. 175)). These findings concerning beatings and rapes are corroborated by other Judgments of the ICTY, such as the Trial Judgment in the *Stakić* case where it found that,

> "although the scale of the abuse at the Trnopolje camp was less than that in the Omarska camp, mistreatment was commonplace. The Serb soldiers used baseball bats, iron bars, rifle butts and their hands and feet or whatever they had at their disposal to beat the detainees. Individuals were who taken out for questioning would often return bruised or injured" (IT-97-24-T, Trial Chamber Judgment, 31 July 2003, para. 242);

and that, having heard the witness statement of a victim, it was satisfied beyond reasonable doubt "that rapes did occur in the Trnopolje camp" (*ibid.*, para. 244). Similar conclusions were drawn in the Judgment of the Trial Chamber in the *Brdanin* case (IT-99-36-T, 1 September 2004, paras. 513-514 and 854-857).

Banja Luka

(i) Manjača camp

315. With regard to the Manjača camp in Banja Luka, the Applicant alleges that beatings, torture and rapes were occurring at this camp. The Applicant relies mainly on the witnesses cited in the Report of the Commission of Experts (Vol. IV, Ann. VIII, pp. 50-54). This evidence is corroborated by the testimony of a former prisoner at the Joint Hearing before the Select Committee on Intelligence in the United States Senate on 9 August 1995, and a witness account reported in the Memorial of the Applicant (United States State Department Dispatch, 2 November 1992, p. 806). The Trial Chamber, in its Decision on Motion for Judgment of Acquittal of 16 June 2004, in the *Milošević* case reproduced the statement of a witness who testified that,

> "at the Manjaca camp, they were beaten with clubs, cables, bats, or other similar items by the military police. The men were placed in small, bare stables, which were overcrowded and contained no toilet facilities. While at the camp, the detainees received inadequate food and water. Their heads were shaved, and they were severely beaten during interrogations." (IT-02-54-T, Decision on Motion for Judgment of Acquittal, 16 June 2004, para. 178.)

316. The Applicant refers to the Report of the Commission of Experts, which contains reports that the Manjača camp held a limited number of women and that during their stay they were "raped repeatedly". Muslim male prisoners were also forced to rape female prisoners (Report of the Commission of Experts, Vol. IV, Annex VIII, pp. 53-54). The Respondent points out that the *Brđanin* Trial Judgment found no evidence had been presented that detainees were subjected to "acts of sexual degradation" in Manjača.

Brčko

(i) Luka camp

317. The Applicant alleges that torture, rape and beatings occurred at Luka camp (Brčko). The Report of the Commission of Experts contains multiple witness accounts, including the evidence of a local guard forced into committing rape (Vol. IV, Ann. VIII, pp. 93-97). The account of the rapes is corroborated by multiple sources (United States State Department Dispatch, 19 April 1993). The Court notes in particular the findings of the ICTY Trial Chamber in the *Češić* case, with regard to acts perpetrated in the Luka camp. In his plea agreement the accused admitted several grave incidents, such as beatings and compelling two Muslim brothers to perform sexual acts with each other (IT-95-10/1-S, Sentencing Judgment, 11 March 2004, paras. 8-17). These findings are corroborated by witness statements and the guilty plea in the *Jelisić* case.

318. The Respondent does not deny that the camps in Bosnia and Herzegovina were "in breach of humanitarian law and, in most cases, in breach of the law of war", but argues that the conditions in all the camps were not of the kind described by the Applicant. It stated that all that had been demonstrated was "the existence of serious crimes, committed in a particularly complex situation, in a civil and fratricidal war", but not the requisite specific intent *(dolus specialis)*.

*

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

* *

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

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

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

322. The Court will examine in turn the evidence concerning the three sets of claims made by the Applicant: encirclement, shelling and starvation; deportation and expulsion; destruction of historical, religious and cultural property. It will also go on to consider the evidence presented regarding the conditions of life in the detention camps already extensively referred to above (paragraphs 252-256, 262-273, 307-310 and 312-318).

Alleged encirclement, shelling and starvation

323. The principal incident referred to by the Applicant in this regard is the siege of Sarajevo by Bosnian Serb forces. Armed conflict broke out in Sarajevo at the beginning of April 1992 following the recognition by the European Community of Bosnia and Herzegovina as an independent State. The Commission of Experts estimated that, between the beginning of April 1992 and 28 February 1994, in addition to those killed or missing in the city (paragraph 247 above), 56,000 persons had been wounded (Report of the Commission of Experts, Vol. II, Ann. VI, p. 8). It was further estimated that, "over the course of the siege, the city [was] hit by an average of approximately 329 shell impacts per day, with a high of 3,777 shell impacts on 22 July 1993" *(ibid.)*. In his report of 28 August 1992, the Special Rapporteur observed that:

> "The city is shelled on a regular basis . . . Snipers shoot innocent civilians . . .
>
> The civilian population lives in a constant state of anxiety, leaving their homes or shelters only when necessary . . . The public systems for distribution of electrical power and water no longer function. Food and other basic necessities are scarce, and depend on the airlift organized by UNHCR and protected by UNPROFOR." (Report of 28 August 1992, paras. 17-18.)

324. The Court notes that, in resolutions adopted on 16 April and 6 May 1993, the Security Council declared Sarajevo, together with Tuzla, Žepa, Goražde, Bihać and Srebrenica, to be "safe areas" which should be free from any armed attack or any other hostile act and fully accessible to UNPROFOR and international humanitarian agencies (resolutions 819 of 16 April 1993 and 824 of 6 May 1993). However, these resolutions were not adhered to by the parties to the conflict. In his report of 26 August 1993, the Special Rapporteur noted that

> "Since May 1993 supplies of electricity, water and gas to Sarajevo have all but stopped . . . a significant proportion of the damage caused to the supply lines has been deliberate, according to United Nations Protection Force engineers who have attempted to repair them. Repair crews have been shot at by both Bosnian Serb and government forces . . ." (Report of 26 August 1993, para. 6).

He further found that UNHCR food and fuel convoys had been "obstructed or attacked by Bosnian Serb and Bosnian Croat forces and sometimes also by governmental forces" (Report of 26 August 1993, para. 15). The Commission of Experts also found that the "blockade of humanitarian aid ha[d] been used as an important tool in the siege" (Report of the Commission of Experts, Ann. VI, p. 17). According to the Special Rapporteur, the targeting of the civilian population by shelling and sniping continued and even intensified throughout 1994 and 1995 (Report of 4 November 1994, paras. 27-28; Report of 16 January 1995, para. 13; Report of 5 July 1995, paras. 67-70). The Special Rapporteur noted that

> "[a]ll sides are guilty of the use of military force against civilian populations and relief operations in Sarajevo. However, one cannot lose sight of the fact that the main responsibility lies with the [Bosnian Serb] forces, since it is they who have adopted the tactic of laying siege to the city." (Report of 17 November 1992, para. 42.)

325. The Court notes that in the *Galić* case, the Trial Chamber of the ICTY found that the Serb forces (the SRK) conducted a campaign of sniping and shelling against the civilian population of Sarajevo (*Galić*, IT-98-29-T, Judgment, 5 December 2003, para. 583). It was

> "convinced by the evidence in the Trial Record that civilians in ABiH-held areas of Sarajevo were directly or indiscriminately attacked from SRK-controlled territory . . ., and that as a result and as a minimum, hundreds of civilians were killed and thousands others were injured" (*ibid.*, para. 591).

These findings were subsequently confirmed by the Appeals Chamber (*Galić*, IT-98-29-A, Judgment, 30 November 2006, paras. 107-109). The ICTY also found that the shelling which hit the Markale market on 5 February 1994, resulting in 60 persons killed and over 140 injured, came from behind Bosnian Serb lines, and was deliberately aimed at civilians (*ibid.*, paras. 333 and 335 and *Galić*, IT-98-29-T, Trial Chamber Judgment, 5 December 2003, para. 496).

326. The Respondent argues that the safe areas proclaimed by the Security Council had not been completely disarmed by the Bosnian army. For instance, according to testimony given in the *Galić* case by the deputy commander of the Bosnian army corps covering the Sarajevo area, the

Bosnian army had deployed 45,000 troops within Sarajevo. The Respondent also pointed to further testimony in that case to the effect that certain troops in the Bosnian army were wearing civilian clothes and that the Bosnian army was using civilian buildings for its bases and positioning its tanks and artillery in public places. Moreover, the Respondent observes that, in his book, *Fighting for Peace*, General Rose was of the view that military equipment was installed in the vicinity of civilians, for instance, in the grounds of the hospital in Sarajevo and that "[t]he Bosnians had evidently chosen this location with the intention of attracting Serb fire, in the hope that the resulting carnage would further tilt international support in their favour" (Michael Rose, *Fighting for Peace*, London, 1998, p. 254).

327. The Applicant also points to evidence of sieges of other towns in Bosnia and Herzegovina. For instance, with regard to Goražde, the Special Rapporteur found that the enclave was being shelled and had been denied convoys of humanitarian aid for two months. Although food was being air-dropped, it was insufficient (Report of 5 May 1992, para. 42). In a later report, the Special Rapporteur noted that, as of spring 1994, the town had been subject to a military offensive by Bosnian Serb forces, during which civilian objects including the hospital had been targeted and the water supply had been cut off (Report of 10 June 1994, paras. 7-12). Humanitarian convoys were harassed including by the detention of UNPROFOR personnel and the theft of equipment (Report of 19 May 1994, paras. 17 *et seq.*). Similar patterns occurred in Bihać, Tuzla, Cerska and Maglaj (Bihać: Special Rapporteur's Report of 28 August 1992, para. 20; Report of the Secretary-General pursuant to resolution 959 (1994), para. 17; Special Rapporteur's Report of 16 January 1995, para. 12; Tuzla: Report of the Secretary-General pursuant to resolutions 844 (1993), 836 (1993) and 776 (1992), paras. 2-4; Special Rapporteur's Report of 5 July 1995; Cerska: Special Rapporteur's Report of 5 May 1993, paras. 8-17; Maglaj: Special Rapporteur's Report of 17 November 1993, para. 93).

328. The Court finds that virtually all the incidents recounted by the Applicant have been established by the available evidence. It takes account of the assertion that the Bosnian army may have provoked attacks on civilian areas by Bosnian Serb forces, but does not consider that this, even if true, can provide any justification for attacks on civilian areas. On the basis of a careful examination of the evidence presented by the Parties, the Court concludes that civilian members of the protected group were deliberately targeted by Serb forces in Sarajevo and other cities. However, reserving the question whether such acts are in principle capable of falling within the scope of Article II, paragraph *(c)*, of the Convention, the Court does not find sufficient evidence that the alleged acts were committed with the specific intent to destroy the protected group in whole or in part. For instance, in the *Galić* case, the ICTY found that

> "the attacks on civilians were numerous, but were not consistently so intense as to suggest an attempt by the SRK to wipe out or even deplete the civilian population through attrition . . . the only reasonable conclusion in light of the evidence in the Trial Record is that the primary purpose of the campaign was to instil in the civilian population a state of extreme fear" (*Galić*, IT-98-29-T, Trial Chamber Judgment, 5 December 2003, para. 593).

These findings were not overruled by the judgment of the Appeals Chamber of 30 November 2006 (*Galić*, IT-98-29-A, Judgment: see e.g., paras. 107-109, 335 and 386-390). The Special Rapporteur of the United Nations Commission on Human Rights was of the view that "[t]he siege, including the shelling of population centres and the cutting off of supplies of food and other essential goods, is another tactic used to force Muslims and ethnic Croatians to flee" (Report of 28 August 1992, para. 17). The Court thus finds that it has not been conclusively established that the acts were committed with the specific intent *(dolus specialis)* to destroy the protected group in whole or in part.

Deportation and expulsion

329. The Applicant claims that deportations and expulsions occurred systematically all over Bosnia and Herzegovina. With regard to Banja Luka, the Special Rapporteur noted that since late November 1993, there had been a "sharp rise in repossessions of apartments, whereby Muslim and Croat tenants [were] summarily evicted" and that "a form of housing agency ha[d] been established . . . which chooses accommodation for incoming Serb displaced persons, evicts Muslim or Croat residents and reputedly receives payment for its services in the form of possessions left behind by those who have been evicted" (Report of 21 February 1994, para. 8). In a report dated 21 April 1995 dedicated to the situation in Banja Luka, the Special Rapporteur observed that since the beginning of the war, there had been a 90 per cent reduction in the local Muslim population (Report of 21 April 1995, para. 4). He noted that a forced labour obligation imposed by the *de facto* authorities in Banja Luka, as well as "the virulence of the ongoing campaign of violence" had resulted in "practically all non-Serbs fervently wishing to leave the Banja Luka area" (Report of 21 April 1995, para. 24). Those leaving Banja Luka were required to pay fees and to relinquish in writing their claim to their homes, without reimbursement (Report of 21 April 1995, para. 26). The displacements were "often very well organized, involving the bussing of people to the Croatian border, and involve[d] large numbers of people" (Report of 4 November 1994, para. 23). According to the Special Rapporteur, "[o]n one day alone in mid-June 1994, some 460 Muslims and Croats were displaced" *(ibid.)*.

330. As regards Bijeljina, the Special Rapporteur observed that, between mid-June and 17 September 1994, some 4,700 non-Serbs were displaced from the Bijeljina and Janja regions. He noted that many of the displaced, "whether forced or choosing to depart, were subject to harassment and theft by the Bosnian Serb forces orchestrating the displacement" (Report of 4 November 1994, para. 21). These reports were confirmed by those of non-governmental organizations based on witness statements taken on the ground (Amnesty International, "Bosnia and Herzegovina: Living for the Day — Forced expulsions from Bijeljina and Janja", December 1994, p. 2).

331. As for Zvornik, the Commission of Experts, relying on a study carried out by the Ludwig Boltzmann Institute of Human Rights based on an evaluation of 500 interviews of individuals who had fled the area, found that a systematic campaign of forced deportation had occurred (Report of the Commission of Experts, Vol. I, Ann. IV, pp. 55 *et seq*). The study observed that Bosnian Muslims obtained an official stamp on their identity card indicating a change of domicile in exchange for transferring their property to an "agency for the exchange of houses" which was subsequently a prerequisite for being able to leave the town (Ludwig Boltzmann Institute of Human Rights, "'Ethnic Cleansing Operations' in the northeast Bosnian city of Zvornik

from April through June 1992", pp. 28-29). According to the study, forced deportations of Bosnian Muslims began in May/June 1992 by bus to Mali Zvornik and from there to the Bosnian town of Tuzla or to Subotica on the Serbian-Hungarian border (*ibid.*, pp. 28 and 35-36). The Special Rapporteur's report of 10 February 1993 supports this account, stating that deportees from Zvornik had been "ordered, some at gunpoint, to board buses and trucks and later trains", provided with Yugoslav passports and subsequently taken to the Hungarian border to be admitted as refugees (Report of 10 February 1993, para. 99).

332. According to the Trial Chamber of the ICTY in its review of the indictment in the cases against *Karadžić and Mladić*, "[t]housands of civilians were unlawfully expelled or deported to other places inside and outside the Republic of Bosnia and Herzegovina" and "[t]he result of these expulsions was the partial or total elimination of Muslims and Bosnian Croats in some of [the] Bosnian Serb-held regions of Bosnia and Herzegovina". The Chamber further stated that "[i]n the municipalities of Prijedor, Foča, Vlasenica, Brčko and Bosanski Šamac, to name but a few, the once non-Serbian majority was systematically exterminated or expelled by force or intimidation" (*Karadžić and Mladić*, IT-95-5-R61 and IT-95-18-R61, Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, para. 16).

333. The Respondent argues that displacements of populations may be necessary according to the obligations set down in Articles 17 and 49, paragraph 2, of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, for instance if the security of the population or imperative military reasons so demand. It adds that the displacement of populations has always been a way of settling certain conflicts between opposing parties and points to a number of examples of forced population displacements in history following an armed conflict. The Respondent also argues that the mere expulsion of a group cannot be characterized as genocide, but that, according to the ICTY Judgment in the *Stakić* case, "[a] clear distinction must be drawn between physical destruction and mere dissolution of a group" and "[t]he expulsion of a group or part of a group does not in itself suffice for genocide" (*Stakić*, IT-97-24-T, Trial Chamber Judgment, 31 July 2003, para. 519).

334. The Court considers that there is persuasive and conclusive evidence that deportations and expulsions of members of the protected group occurred in Bosnia and Herzegovina. With regard to the Respondent's argument that in time of war such deportations or expulsions may be justified under the Geneva Convention, or may be a normal way of settling a conflict, the Court would observe that no such justification could be accepted in the face of proof of specific intent *(dolus specialis)*. However, even assuming that deportations and expulsions may be categorized as falling within Article II, paragraph *(c)*, of the Genocide Convention, the Court cannot find, on the basis of the evidence presented to it, that it is conclusively established that such deportations and expulsions were accompanied by the intent to destroy the protected group in whole or in part (see paragraph 190 above).

Destruction of historical, religious and cultural property

335. The Applicant claims that throughout the conflict in Bosnia and Herzegovina, Serb forces engaged in the deliberate destruction of historical, religious and cultural property of the protected group in "an attempt to wipe out the traces of their very existence".

336. In the *Tadić* case, the ICTY found that "[n]on-Serb cultural and religious symbols throughout the region were targeted for destruction" in the Banja Luka area (*Tadić*, IT-94-1-T, Trial Chamber Judgment, 7 May 1997, para. 149). Further, in reviewing the indictments of Karadžić and Mladić, the Trial Chamber stated that:

> "Throughout the territory of Bosnia and Herzegovina under their control, Bosnian Serb forces . . . destroyed, quasi-systematically, the Muslim and Catholic cultural heritage, in particular, sacred sites. According to estimates provided at the hearing by an expert witness, Dr. Kaiser, a total of 1.123 mosques, 504 Catholic churches and five synagogues were destroyed or damaged, for the most part, in the absence of military activity or after the cessation thereof.
>
> This was the case in the destruction of the entire Islamic and Catholic heritage in the Banja Luka area, which had a Serbian majority and the nearest area of combat to which was several dozen kilometres away. All of the mosques and Catholic churches were destroyed. Some mosques were destroyed with explosives and the ruins were then levelled and the rubble thrown in the public dumps in order to eliminate any vestige of Muslim presence.
>
> Aside from churches and mosques, other religious and cultural symbols like cemeteries and monasteries were targets of the attacks." (*Karadžić and Mladić*, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, para. 15.)

In the *Brdanin* case, the Trial Chamber was "satisfied beyond reasonable doubt that there was wilful damage done to both Muslim and Roman Catholic religious buildings and institutions in the relevant municipalities by Bosnian Serb forces" (*Brdanin*, IT-99-36-T, Judgment, 1 September 2004, paras. 640 and 658). On the basis of the findings regarding a number of incidents in various regions of Bosnia and Herzegovina, the Trial Chamber concluded that a "campaign of devastation of institutions dedicated to religion took place throughout the conflict" but "intensified in the summer of 1992" and that this concentrated period of significant damage was "indicative that the devastation was targeted, controlled and deliberate" (*ibid.*, paras. 642-657). For instance, the Trial Chamber found that the Bosanska Krupa town mosque was mined by Bosnian Serb forces in April 1992, that two mosques in Bosanski Petrovac were destroyed by Bosnian Serb forces in July 1992 and that the mosques in Staro Šipovo, Bešnjevo and Pljeva were destroyed on 7 August 1992 (*ibid.*, paras. 644, 647 and 656).

337. The Commission of Experts also found that religious monuments especially mosques and churches had been destroyed by Bosnian Serb forces (Report of the Commission of Experts, Vol. I, Ann. IV, pp. 5, 9, 21 ff.). In its report on the Prijedor region, the Commission found that at

least five mosques and associated buildings in Prijedor town had been destroyed and noted that it was claimed that all 16 mosques in the Kozarac area had been destroyed and that not a single mosque, or other Muslim religious building remained intact in the Prijedor region (Report of the Commission of Experts, Vol. I, Ann. V, p. 106). The report noted that those buildings were "allegedly not desecrated, damaged and destroyed for any military purpose nor as a side-effect of the military operations as such" but rather that the destruction "was due to later separate operations of dynamiting" *(ibid.)*.

338. The Special Rapporteur found that, during the conflict, "many mosques, churches and other religious sites, including cemeteries and monasteries, have been destroyed or profaned" (Report of 17 November 1992, para. 26). He singled out the "systematic destruction and profanation of mosques and Catholic churches in areas currently or previously under [Bosnian Serb] control" (Report of 17 November 1992, para. 26).

339. Bosnia and Herzegovina called as an expert Mr. András Riedlmayer, who had carried out a field survey on the destruction of cultural heritage in 19 municipalities in Bosnia and Herzegovina for the Prosecutor of the ICTY in the *Milošević* case and had subsequently studied seven further municipalities in two other cases before the ICTY ("Destruction of Cultural Heritage in Bosnia and Herzegovina, 1992-1996: A Post-war Survey of Selected Municipalities", *Milošević*, IT-02-54-T, Exhibit Number P486). In his report prepared for the *Milošević* case, Mr. Riedlmayer documented 392 sites, 60 per cent of which were inspected first hand while for the other 40 per cent, his assessment was based on photographs and information obtained from other sources judged to be reliable and where there was corroborating documentation (Riedlmayer Report, p. 5).

340. The report compiled by Mr. Riedlmayer found that of the 277 mosques surveyed, none were undamaged and 136 were almost or entirely destroyed (Riedlmayer Report, pp. 9-10). The report found that:

> "The damage to these monuments was clearly the result of attacks directed against them, rather than incidental to the fighting. Evidence of this includes signs of blast damage indicating explosives placed inside the mosques or inside the stairwells of minarets; many mosques [were] burnt out. In a number of towns, including Bijeljina, Janja (Bijeljina municipality), Foča, Banja Luka, Sanski Most, Zvornik and others, the destruction of mosques took place while the area was under the control of Serb forces, at times when there was no military action in the immediate vicinity." (*Ibid.*, p. 11.)

The report also found that, following the destruction of mosques:

> "the ruins [of the mosques] were razed and the sites levelled with heavy equipment, and all building materials were removed from the site... Particularly well-documented instances of this practice include the destruction and razing of

> 5 mosques in the town of Bijeljina; of 2 mosques in the town of Janja (in Bijeljina municipality); of 12 mosques and 4 turbes in Banja Luka; and of 3 mosques in the city of Brčko." (*Ibid.*, p. 12.)

Finally, the Report noted that the sites of razed mosques had been "turned into rubbish tips, bus stations, parking lots, automobile repair shops, or flea markets" (*ibid.*, p. 14), for example, a block of flats and shops had been erected on the site of the Zamlaz Mosque in Zvornik and a new Serbian Orthodox church was built on the site of the destroyed Divic Mosque (*ibid.*, p. 14).

341. Mr. Riedlmayer's report together with his testimony before the Court and other corroborative sources detail the destruction of the cultural and religious heritage of the protected group in numerous locations in Bosnia and Herzegovina. For instance, according to the evidence before the Court, 12 of the 14 mosques in Mostar were destroyed or damaged and there are indications from the targeting of the minaret that the destruction or damage was deliberate (Council of Europe, *Information Report: The Destruction by War of the Cultural Heritage in Croatia and Bosnia and Herzegovina-Herzegovina*, Parliamentary Assembly doc. 6756, 2 February 1993, paras. 129 and 155). In Foča, the town's 14 historic mosques were allegedly destroyed by Serb forces. In Banja Luka, all 16 mosques were destroyed by Serb forces including the city's two largest mosques, the Ferhadija Mosque (built in 1578) and the Arnaudija Mosque (built in 1587) (United States Department of State, Bureau of Public Affairs, *Dispatch*, 26 July 1993, Vol. 4, No. 30, pp. 547-548; "War Crimes in Bosnia-Herzegovina: UN Cease-Fire Won't Help Banja Luka", Human Rights Watch/Helsinki Watch, June 1994, Vol. 6, No. 8, pp. 15-16; The Humanitarian Law Centre, Spotlight Report, No. 14, August 1994, pp. 143-144).

342. The Court notes that archives and libraries were also subjected to attacks during the war in Bosnia and Herzegovina. On 17 May 1992, the Institute for Oriental Studies in Sarajevo was bombarded with incendiary munitions and burnt, resulting in the loss of 200,000 documents including a collection of over 5,000 Islamic manuscripts (Riedlmayer Report, p. 18; Council of Europe, Parliamentary Assembly; Second Information Report on War Damage to the Cultural Heritage in Croatia and Bosnia-Herzegovina, doc. 6869, 17 June 1993, p. 11, Ann. 38). On 25 August 1992, Bosnia's National Library was bombarded and an estimated 1.5 million volumes were destroyed (Riedlmayer Report, p. 19). The Court observes that, although the Respondent considers that there is no certainty as to who shelled these institutions, there is evidence that both the Institute for Oriental Studies in Sarajevo and the National Library were bombarded from Serb positions.

343. The Court notes that, in cross-examination of Mr. Riedlmayer, counsel for the Respondent pointed out that the municipalities included in Mr. Riedlmayer's report only amounted to 25 per cent of the territory of Bosnia and Herzegovina. Counsel for the Respondent also called into question the methodology used by Mr. Riedlmayer in compiling his report. However, having closely examined Mr. Riedlmayer's report and having listened to his testimony, the Court considers that Mr. Riedlmayer's findings do constitute persuasive evidence as to the destruction of historical, cultural and religious heritage in Bosnia and Herzegovina albeit in a limited geographical area.

344. In light of the foregoing, the Court considers that there is conclusive evidence of the deliberate destruction of the historical, cultural and religious heritage of the protected group during the period in question. The Court takes note of the submission of the Applicant that the destruction of such heritage was "an essential part of the policy of ethnic purification" and was "an attempt to wipe out the traces of [the] very existence" of the Bosnian Muslims. However, in the Court's view, the destruction of historical, cultural and religious heritage cannot be considered to constitute the deliberate infliction of conditions of life calculated to bring about the physical destruction of the group. Although such destruction may be highly significant inasmuch as it is directed to the elimination of all traces of the cultural or religious presence of a group, and contrary to other legal norms, it does not fall within the categories of acts of genocide set out in Article II of the Convention. In this regard, the Court observes that, during its consideration of the draft text of the Convention, the Sixth Committee of the General Assembly decided not to include cultural genocide in the list of punishable acts. Moreover, the ILC subsequently confirmed this approach, stating that:

> "As clearly shown by the preparatory work for the Convention . . ., the destruction in question is the material destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group." (Report of the International Law Commission on the work of its Forty-eighth Session, *Yearbook of the International Law Commission 1996*, Vol. II, Part Two, pp. 45-46, para. 12.)

Furthermore, the ICTY took a similar view in the *Krstić* case, finding that even in customary law, "despite recent developments", the definition of acts of genocide is limited to those seeking the physical or biological destruction of a group (*Krstić*, IT-98-33-T, Trial Chamber Judgment, 2 August 2001, para. 580). The Court concludes that the destruction of historical, religious and cultural heritage cannot be considered to be a genocidal act within the meaning of Article II of the Genocide Convention. At the same time, it also endorses the observation made in the *Krstić* case that "where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group" *(ibid.)*.

Camps

345. The Court notes that the Applicant has presented substantial evidence as to the conditions of life in the detention camps and much of this evidence has already been discussed in the sections regarding Articles II *(a)* and *(b)*. The Court will briefly examine the evidence presented by the Applicant which relates specifically to the conditions of life in the principal camps.

(a) ***Drina River Valley***

(i) Sušica camp

346. In the Sentencing Judgment in the case of Dragan Nikolić, the commander of Sušica camp, the ICTY found that he subjected detainees to inhumane living conditions by depriving them of adequate food, water, medical care, sleeping and toilet facilities (*Nikolić*, IT-94-2-S, Sentencing Judgment, 18 December 2003, para. 69).

(ii) Foča Kazneno-Popravní Dom camp

347. In the *Krnojelac* case, the ICTY Trial Chamber made the following findings regarding the conditions at the camp:

> "the non-Serb detainees were forced to endure brutal and inadequate living conditions while being detained at the KP Dom, as a result of which numerous individuals have suffered lasting physical and psychological problems. Non-Serbs were locked in their rooms or in solitary confinement at all times except for meals and work duty, and kept in overcrowded rooms even though the prison had not reached its capacity. Because of the overcrowding, not everyone had a bed or even a mattress, and there were insufficient blankets. Hygienic conditions were poor. Access to baths or showers, with no hot water, was irregular at best. There were insufficient hygienic products and toiletries. The rooms in which the non-Serbs were held did not have sufficient heating during the harsh winter of 1992. Heaters were deliberately not placed in the rooms, windowpanes were left broken and clothes made from blankets to combat the cold were confiscated. Non-Serb detainees were fed starvation rations leading to severe weight loss and other health problems. They were not allowed to receive visits after April 1992 and therefore could not supplement their meagre food rations and hygienic supplies". (*Krnojelac*, IT-97-25-T, Judgment, 15 March 2002, para. 440.)

(b) *Prijedor*

(i) Omarska camp

348. In the Trial Judgment in the *Kvočka et al.* case, the ICTY Trial Chamber provided the following description of the poor conditions in the Omarska camp based on the accounts of detainees:

> "Detainees were kept in inhuman conditions and an atmosphere of extreme mental and physical violence pervaded the camp. Intimidation, extortion, beatings, and torture were customary practices. The arrival of new detainees, interrogations, mealtimes, and use of the toilet facilities provided recurrent opportunities for abuse. Outsiders entered the camp and were permitted to attack the detainees at random and at will . . .
>
> . . . . . .
>
> The Trial Chamber finds that the detainees received poor quality food that was often rotten or inedible, caused by the high temperatures and sporadic electricity during the summer of 1992. The food was sorely inadequate in quantity. Former detainees testified of the acute hunger they suffered in the camp: most lost 25 to 35 kilograms in body weight during their time at Omarska; some lost considerably more." (*Kvočka et al.*, IT-98-30/1-T, Trial Chamber Judgment, 2 November 2001, paras. 45 and 55.)

(ii) Keraterm camp

349. The *Stakić* Trial Judgment contained the following description of conditions in the Keraterm camp based on multiple witness accounts:

> "The detainees slept on wooden pallets used for the transport of goods or on bare concrete in a big storage room. The conditions were cramped and people often had to sleep on top of each other. In June 1992, Room 1, which according to witness statements was slightly larger than Courtroom 2 of this Tribunal (98.6 m2), held 320 people and the number continued to grow. The detainees were given one meal a day, made up of two small slices of bread and some sort of stew. The rations were insufficient for the detainees. Although families tried to deliver food and clothing every day they rarely succeeded. The detainees could see their families walking to the camp and leaving empty-handed, so in all likelihood someone at the gates of the camp took the food and prevented it from being distributed to the detainees." (*Stakić*, IT-97-24-T, Trial Chamber Judgment, 31 July 2003, para. 163.)

(iii) Trnopolje camp

350. With respect to the Trnopolje camp, the *Stakić* Trial Judgment described the conditions as follows, noting that they were slightly better than at Omarska and Keraterm:

> "The detainees were provided with food at least once a day and, for some time, the families of detainees were allowed to bring food. However the quantity of food available was insufficient and people often went hungry. Moreover, the water supply was insufficient and the toilet facilities inadequate. The majority of the detainees slept in the open air. Some devised makeshift . . . shelters of blankets and plastic bags. While clearly inadequate, the conditions in the Trnopolje camp were not as appalling as those that prevailed in Omarska and Keraterm." (*Ibid.*, para. 190.)

(c) *Banja Luka*

Manjača camp

351. According to ICTY Trial Chamber in the *Plavšić* Sentencing Judgment:

> "the sanitary conditions in Manjača were 'disastrous . . . inhuman and really brutal': the concept of sanitation did not exist. The temperature inside was low, the inmates slept on the concrete floor and they relieved themselves in the compound or in a bucket placed by the door at night. There was not enough water, and any water that became available was contaminated. In the first three months of Adil Draganović's detention, Manjača was a 'camp of hunger' and when there was food available, it was of a very poor quality. The inmates were given two small meals per day, which

usually consisted of half a cup of warm tea, which was more like warm water, and a small piece of thin, 'transparent' bread. Between two and a half thousand men there were only 90 loaves of bread, with each loaf divided into 20 or 40 pieces. Most inmates lost between 20 and 30 kilograms of body weight while they were detained at Manjača. The witness believes that had the ICRC and UNHCR not arrived, the inmates would have died of starvation." (*Plavšić*, IT-00-39-S and 40/1-S, Sentencing Judgment, 27 February 2003, para. 48.)

(d) *Bosanski Šamac*

352. In its Judgment in the *Simić* case, the Trial Chamber made the following findings:

"the detainees who were imprisoned in the detention centres in Bosanski Šamac were confined under inhumane conditions. The prisoners were subjected to humiliation and degradation. The forced singing of 'Chetnik' songs and the verbal abuse of being called 'ustasha' or 'balija' were forms of such abuse and humiliation of the detainees. They did not have sufficient space, food or water. They suffered from unhygienic conditions, and they did not have appropriate access to medical care. These appalling detention conditions, the cruel and inhumane treatment through beatings and the acts of torture caused severe physical suffering, thus attacking the very fundamentals of human dignity . . . This was done because of the non-Serb ethnicity of the detainees." (*Simić*, IT-95-9-T, Judgment, 17 October 2003, para. 773.)

353. The Respondent does not deny that the camps in Bosnia and Herzegovina were in breach of humanitarian law and, in most cases, in breach of the law of war. However, it notes that, although a number of detention camps run by the Serbs in Bosnia and Herzegovina were the subject of investigation and trials at the ICTY, no conviction for genocide was handed down on account of any criminal acts committed in those camps. With specific reference to the Manjača camp, the Respondent points out that the Special Envoy of the United Nations Secretary-General visited the camp in 1992 and found that it was being run correctly and that a Muslim humanitarian organization also visited the camp and found that "material conditions were poor, especially concerning hygiene [b]ut there were no signs of maltreatment or execution of prisoners".

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

* *

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

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

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

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

356. Secondly, the Applicant submitted that rape and sexual violence against women led to physical trauma which interfered with victims' reproductive functions and in some cases resulted in infertility. However, the only evidence adduced by the Applicant was the indictment in the *Gagović* case before the ICTY in which the Prosecutor stated that one witness could no longer give birth to children as a result of the sexual abuse she suffered (*Gagović et al.*, IT-96-23-I, Initial Indictment, 26 June 1996, para. 7.10). In the Court's view, an indictment by the Prosecutor does not constitute persuasive evidence (see paragraph 217 above). Moreover, it notes that the *Gagović* case did not proceed to trial due to the death of the accused.

357. Thirdly, the Applicant referred to sexual violence against men which prevented them from procreating subsequently. In support of this assertion, the Applicant noted that, in the *Tadić* case, the Trial Chamber found that, in Omarska camp, the prison guards forced one Bosnian Muslim man to bite off the testicles of another Bosnian Muslim man (*Tadić*, IT-94-1-T, Judgment, 7 May 1997, para. 198). The Applicant also cited a report in the newspaper, *Le Monde*, on a study by the World Health Organization and the European Union on sexual assaults on men during the conflict in Bosnia and Herzegovina, which alleged that sexual violence against men was practically always accompanied by threats to the effect that the victim would no longer produce Muslim children. The article in *Le Monde* also referred to a statement by the President of a non-governmental organization called the Medical Centre for Human Rights to the effect that approximately 5,000 non-Serb men were the victims of sexual violence. However, the Court notes that the article in *Le Monde* is only a secondary source. Moreover, the results of the World Health Organization and European Union study were only preliminary, and there is no indication as to how the Medical Centre for Human Rights arrived at the figure of 5,000 male victims of sexual violence.

358. Fourthly, the Applicant argued that rape and sexual violence against men and women led to psychological trauma which prevented victims from forming relationships and founding a family. In this regard, the Applicant noted that in the *Akayesu* case, the ICTR considered that "rape can be a measure intended to prevent births when the person raped refuses subsequently to

procreate" (*Akayesu*, ICTR-96-4-T, Trial Chamber Judgment, 2 September 1998, para. 508). However, the Court notes that the Applicant presented no evidence that this was the case for women in Bosnia and Herzegovina.

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

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

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

* *

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

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

363. As evidence for this claim, the Applicant referred to a number of sources including the following. In the indictment in the *Gagović et al.* case, the Prosecutor alleged that one of the witnesses was raped by two Bosnian Serb soldiers and that "[b]oth perpetrators told her that she would now give birth to Serb babies" (*Gagović et al.*, IT-96-23-I, Initial Indictment, 26 June 1996, para. 9.3). However, as in paragraph 356 above, the Court notes that an indictment cannot constitute persuasive evidence for the purposes of the case now before it and that the *Gagović* case did not proceed to trial. The Applicant further referred to the Report of the Commission of Experts which stated that one woman had been detained and raped daily by three or four soldiers and that "[s]he was told that she would give birth to a chetnik boy" (Report of the Commission of Experts, Vol. I, p. 59, para. 248).

364. The Applicant also cited the Review of the Indictment in the *Karadžić and Mladić* cases in which the Trial Chamber stated that "[s]ome camps were specially devoted to rape, with the aim of forcing the birth of Serbian offspring, the women often being interned until it was too late to undergo an abortion" and that "[i]t would seem that the aim of many rapes was enforced impregnation" (*Karadžić and Mladić*, IT-95-5-R61 and IT-95-18-R61, Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, para. 64). However, the Court notes that this finding of the Trial Chamber was based only on the testimony of one *amicus curiae* and on the above-mentioned incident reported by the Commission of Experts (*ibid.*, para. 64, footnote 154).

365. Finally, the Applicant noted that in the *Kunarac* case, the ICTY Trial Chamber found that, after raping one of the witnesses, the accused had told her that "she would now carry a Serb baby and would not know who the father would be" (*Kunarac et al* cases, Nos. IT-96-23-T and IT-96-23/1-T, Judgment, 22 February 2001, para. 583).

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

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

* *

(10) Alleged genocide outside Bosnia and Herzegovina

368. In the submissions in its Reply, the Applicant has claimed that the Respondent has violated its obligations under the Genocide Convention "by destroying in part, and attempting to destroy in whole, national, ethnical or religious groups within the, *but not limited to* the, territory of Bosnia and Herzegovina, including in particular the Muslim population . . ." (emphasis added). The Applicant devoted a section in its Reply to the contention that acts of genocide, for which the Respondent was allegedly responsible, also took place on the territory of the FRY; these acts were similar to those perpetrated on Bosnian territory, and the constituent elements of "ethnic cleansing as a policy" were also found in the territory of the FRY. This question of genocide committed within the FRY was not actively pursued by the Applicant in the course of the oral argument before the Court; however, the submission quoted above was maintained in the final submissions presented at the hearings, and the Court must therefore address it. It was claimed by the Applicant

that the genocidal policy was aimed not only at citizens of Bosnia and Herzegovina, but also at Albanians, Sandžak Muslims, Croats, Hungarians and other minorities; however, the Applicant has not established to the satisfaction of the Court any facts in support of that allegation. The Court has already found (paragraph 196 above) that, for purposes of establishing genocide, the targeted group must be defined positively, and not as a "non-Serb" group.

369. The Applicant has not in its arguments dealt separately with the question of the nature of the specific intent *(dolus specialis)* alleged to accompany the acts in the FRY complained of. It does not appear to be contending that actions attributable to the Respondent, and committed on the territory of the FRY, were accompanied by a specific intent *(dolus specialis)*, peculiar to or limited to that territory, in the sense that the objective was to eliminate the presence of non-Serbs in the FRY itself. The Court finds in any event that the evidence offered does not in any way support such a contention. What the Applicant has sought to do is to convince the Court of a pattern of acts said to evidence specific intent *(dolus specialis)* inspiring the actions of Serb forces in Bosnia and Herzegovina, involving the destruction of the Bosnian Muslims in that territory; and that same pattern lay, it is contended, behind the treatment of Bosnian Muslims in the camps established in the FRY, so that that treatment supports the pattern thesis. The Applicant has emphasized that the same treatment was meted out to those Bosnian Muslims as was inflicted on their compatriots in Bosnia and Herzegovina. The Court will thus now turn to the question whether the specific intent *(dolus specialis)* can be deduced, as contended by the Applicant, from the pattern of actions against the Bosnian Muslims taken as a whole.

* *

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

370. In the light of its review of the factual evidence before it of the atrocities committed in Bosnia and Herzegovina in 1991-1995, the Court has concluded that, save for the events of July 1995 at Srebrenica, the necessary intent required to constitute genocide has not been conclusively shown in relation to each specific incident. The Applicant however relies on the alleged existence of an overall plan to commit genocide, indicated by the pattern of genocidal or potentially acts of genocide committed throughout the territory, against persons identified everywhere and in each case on the basis of their belonging to a specified group. In the case, for example, of the conduct of Serbs in the various camps (described in paragraphs 252-256, 262-273, 307-310 and 312-318 above), it suggests that "[t]he genocidal intent of the Serbs becomes particularly clear in the description of camp practices, due to their striking similarity all over the territory of Bosnia and Herzegovina". Drawing attention to the similarities between actions attributed to the Serbs in Croatia, and the later events at, for example, Kosovo, the Applicant observed that

> "it is not surprising that the picture of the takeovers and the following human and cultural destruction looks indeed similar from 1991 through 1999. These acts were perpetrated as the expression of one single project, which basically and effectively

included the destruction in whole or in part of the non-Serb group, wherever this ethnically and religiously defined group could be conceived as obstructing the all-Serbs-in-one-State group concept."

371. The Court notes that this argument of the Applicant moves from the intent of the individual perpetrators of the alleged acts of genocide complained of, to the intent of higher authority, whether within the VRS or the Republika Srpska, or at the level of the Government of the Respondent itself. In the absence of an official statement of aims reflecting such an intent, the Applicant contends that the specific intent *(dolus specialis)* of those directing the course of events is clear from the consistency of practices, particularly in the camps, showing that the pattern was of acts committed "within an organized institutional framework". However, something approaching an official statement of an overall plan is, the Applicant contends, to be found in the Decision on Strategic Goals issued on 12 May 1992 by Momčilo Krajišnik as the President of the National Assembly of Republika Srpska, published in the *Official Gazette* of the Republika Srpska, and the Court will first consider what significance that Decision may have in this context. The English translation of the Strategic Goals presented by the Parties during the hearings, taken from the Report of Expert Witness Donia in the *Milošević* case before the ICTY, Exhibit No. 537, reads as follows:

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

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

1. Separation as a state from the other two ethnic communities.

2. A corridor between Semberija and Krajina.

3. The establishment of a corridor in the Drina River valley, i.e., the elimination of the border between Serbian states.

4. The establishment of a border on the Una and Neretva rivers.

5. The division of the city of Sarajevo into a Serbian part and a Muslim part, and the establishment of effective state authorities within each part.

6. An outlet to the sea for the Republika Srpska."

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

372. The Parties have drawn the Court's attention to statements in the Assembly by President Karadžić which appear to give conflicting interpretations of the first and major goal of these objectives, the first on the day they were adopted, the second two years later. On that first

occasion, the Applicant contended, he said: "It would be much better to solve this situation by political means. It would be best if a truce could be established right away and the borders set up, even if we lose something". Two years later he said (according to the translation of his speech supplied by the Applicant):

> "We certainly know that we must give up something — that is beyond doubt in so far as we want to achieve our first strategic goal: to drive our enemies by the force of war from their homes, that is the Croats and Muslims, so that we will no longer be together [with them] in a State."

The Respondent disputes the accuracy of the translation, claiming that the stated goal was not "to drive our enemies by the force of war from their homes" but "to free the homes from the enemy". The 1992 objectives do not include the elimination of the Bosnian Muslim population. The 1994 statement even on the basis of the Applicant's translation, however shocking a statement, does not necessarily involve the intent to destroy in whole or in part the Muslim population in the enclaves. The Applicant's argument does not come to terms with the fact that an essential motive of much of the Bosnian Serb leadership — to create a larger Serb State, by a war of conquest if necessary — did not necessarily require the destruction of the Bosnian Muslims and other communities, but their expulsion. The 1992 objectives, particularly the first one, were capable of being achieved by the displacement of the population and by territory being acquired, actions which the Respondent accepted (in the latter case at least) as being unlawful since they would be at variance with the inviolability of borders and the territorial integrity of a State which had just been recognized internationally. It is significant that in cases in which the Prosecutor has put the Strategic Goals in issue the ICTY has not characterized them as genocidal (see *Brđanin*, IT-99-36-T, Trial Chamber Judgment, 1 September 2004, para. 303 and *Stakić*, IT-97-24-T, Trial Chamber Judgment, 31 July 2003, paras. 546-561 (in particular para. 548)). The Court does not see the 1992 Strategic Goals as establishing the specific intent.

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

374. Furthermore, and again significantly, the proposition is not consistent with the findings of the ICTY relating to genocide or with the actions of the Prosecutor, including decisions not to charge genocide offences in possibly relevant indictments, and to enter into plea agreements, as in the *Plavšić* and *Sikirica et al.* cases (IT-00-40 and IT-95-8), by which the genocide-related charges were withdrawn. Those actions of the Prosecution and the Tribunal can be conveniently enumerated here. Prosecutions for genocide and related crimes before the ICTY can be grouped in the following way:

(a) convictions in respect of charges involving genocide relating to Srebrenica in July 1995: *Krstić* (IT-98-33) (conviction of genocide at trial was reduced to aiding and abetting genocide on appeal) and *Blagojević* (IT-02-60) (conviction of complicity in genocide "through aiding and abetting" at trial is currently on appeal);

(b) plea agreements in which such charges were withdrawn, with the accused pleading guilty to crimes against humanity: *Obrenović* (IT-02-60/2) and *Momir Nikolić* (IT-02-60/1);

(c) acquittals on genocide-related charges in respect of events occurring elsewhere: *Krajišnik*, (paragraph 219 above) (on appeal), *Jelisić* (IT-95-10) (completed), *Stakić* (IT-97-24) (completed), *Brdanin* (IT-99-36) (on appeal) and *Sikirica* (IT-95-8) (completed);

(d) cases in which genocide-related charges in respect of events occurring elsewhere were withdrawn: *Plavšić* (IT-00-39 and 40/1) (plea agreement), *Župljanin* (IT-99-36) (genocide-related charges withdrawn) and *Mejakić* (IT-95-4) (genocide-related charges withdrawn);

(e) case in which the indictment charged genocide and related crimes in Srebrenica and elsewhere in which the accused died during the proceedings: *Milošević* (IT-02-54);

(f) cases in which indictments charge genocide or related crimes in respect of events occurring elsewhere, in which accused have died before or during proceedings: *Kovačević and Drljača* (IT-97-24) and *Talić* (IT-99-36/1);

(g) pending cases in which the indictments charge genocide and related crimes in Srebrenica and elsewhere: *Karadžić and Mladić* (IT-95-5/18); and

(h) pending cases in which the indictments charge genocide and related crimes in Srebrenica: *Popović, Beara, Drago Nikolić, Borovčanin and Pandurević, Trbić* (IT-05-88/1) and *Tolimir* (IT-05-88/2).

375. In the cases of a number of accused, relating to events in July 1995 in Srebrenica, charges of genocide or its related acts have not been brought: *Erdemović* (IT-96-22) (completed), *Jokić* (IT-02-60) (on appeal), *Miletić and Gvero* (IT-05-88, part of the *Popović et al.* proceeding referred to in paragraph 374 *(h)* above), *Perišić* (IT-04-81) (pending) and *Stanišić and Simatović* (IT-03-69) (pending).

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

*

* *

VII. The question of responsibility for events at Srebrenica under Article III, paragraph *(a)*, of the Genocide Convention

(1) The alleged admission

377. The Court first notes that the Applicant contends that the Respondent has in fact recognized that genocide was committed at Srebrenica, and has accepted legal responsibility for it. The Applicant called attention to the following official declaration made by the Council of Ministers of the Respondent on 15 June 2005, following the showing on a Belgrade television channel on 2 June 2005 of a video-recording of the murder by a paramilitary unit of six Bosnian Muslim prisoners near Srebrenica (paragraph 289 above). The statement reads as follows:

> "Those who committed the killings in Srebrenica, as well as those who ordered and organized that massacre represented neither Serbia nor Montenegro, but an undemocratic regime of terror and death, against whom the majority of citizens of Serbia and Montenegro put up the strongest resistance.
>
> Our condemnation of crimes in Srebrenica does not end with the direct perpetrators. We demand the criminal responsibility of all who committed war crimes, organized them or ordered them, and not only in Srebrenica.
>
> Criminals must not be heroes. Any protection of the war criminals, for whatever reason, is also a crime."

The Applicant requests the Court to declare that this declaration "be regarded as a form of admission and as having decisive probative force regarding the attributability to the Yugoslav State of the Srebrenica massacre".

378. It is for the Court to determine whether the Respondent is responsible for any acts of genocide which may be established. For purposes of a finding of this kind the Court may take into account any statements made by either party that appear to bear upon the matters in issue, and have been brought to its attention (cf. *Nuclear Tests (Australia* v. *France), Judgments, I.C.J. Reports 1974*, pp. 263 ff., paras. 32 ff.; *(New Zealand* v. *France), ibid.*, pp. 465 ff., paras. 27 ff.; *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, pp. 573-574, paras. 38-39), and may accord to them such legal effect as may be appropriate. However, in the present case, it appears to the Court that the declaration of 15 June 2005 was of a political nature; it was clearly not intended as an admission, which would have had a legal effect in complete contradiction to the submissions made by the Respondent before this Court, both at the time of the declaration and subsequently. The Court therefore does not find the statement of 15 June 2005 of assistance to it in determining the issues before it in the case.

* *

(2) The test of responsibility

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

380. These three issues must be addressed in the order set out above, because they are so interrelated that the answer on one point may affect the relevance or significance of the others. Thus, if and to the extent that consideration of the first issue were to lead to the conclusion that some acts of genocide are attributable to the Respondent, it would be unnecessary to determine whether it may also have incurred responsibility under Article III, paragraphs *(b)* to *(e)*, of the Convention for the same acts. Even though it is theoretically possible for the same acts to result in the attribution to a State of acts of genocide (contemplated by Art. III, para. *(a)*), conspiracy to commit genocide (Art. III, para. *(b)*), and direct and public incitement to commit genocide (Art. III, para. *(c)*), there would be little point, where the requirements for attribution are fulfilled under *(a)*, in making a judicial finding that they are also satisfied under *(b)* and *(c)*, since responsibility under *(a)* absorbs that under the other two. The idea of holding the same State responsible by attributing to it acts of "genocide" (Art. III, para. *(a)*), "attempt to commit genocide" (Art. III, para. *(d)*), and "complicity in genocide" (Art. III, para. *(e)*), in relation to the same actions, must be rejected as untenable both logically and legally.

381. On the other hand, there is no doubt that a finding by the Court that no acts that constitute genocide, within the meaning of Article II and Article III, paragraph *(a)*, of the Convention, can be attributed to the Respondent will not free the Court from the obligation to determine whether the Respondent's responsibility may nevertheless have been incurred through the attribution to it of the acts, or some of the acts, referred to in Article III, paragraphs *(b)* to *(e)*. In particular, it is clear that acts of complicity in genocide can be attributed to a State to which no act of genocide could be attributed under the rules of State responsibility, the content of which will be considered below.

382. Furthermore, the question whether the Respondent has complied with its obligations to prevent and punish genocide arises in different terms, depending on the replies to the two preceding questions. It is only if the Court answers the first two questions in the negative that it will have to consider whether the Respondent fulfilled its obligation of prevention, in relation to the whole accumulation of facts constituting genocide. If a State is held responsible for an act of genocide (because it was committed by a person or organ whose conduct is attributable to the State), or for one of the other acts referred to in Article III of the Convention (for the same reason), then there is no point in asking whether it complied with its obligation of prevention in respect of the same acts, because logic dictates that a State cannot have satisfied an obligation to prevent genocide in which it actively participated. On the other hand, it is self-evident, as the Parties recognize, that if a State is not responsible for any of the acts referred to in Article III, paragraphs *(a)* to *(e)*, of the Convention, this does not mean that its responsibility cannot be sought for a violation of the obligation to prevent genocide and the other acts referred to in Article III.

383. Finally, it should be made clear that, while, as noted above, a State's responsibility deriving from any of those acts renders moot the question whether it satisfied its obligation of prevention in respect of the same conduct, it does not necessarily render superfluous the question whether the State complied with its obligation to punish the perpetrators of the acts in question. It is perfectly possible for a State to incur responsibility at once for an act of genocide (or complicity in genocide, incitement to commit genocide, or any of the other acts enumerated in Article III) committed by a person or organ whose conduct is attributable to it, and for the breach by the State of its obligation to punish the perpetrator of the act: these are two distinct internationally wrongful acts attributable to the State, and both can be asserted against it as bases for its international responsibility.

384. Having thus explained the interrelationship among the three issues set out above (paragraph 379), the Court will now proceed to consider the first of them. This is the question whether the massacres committed at Srebrenica during the period in question, which constitute the crime of genocide within the meaning of Articles II and III, paragraph *(a)*, of the Convention, are attributable, in whole or in part, to the Respondent. This question has in fact two aspects, which the Court must consider separately. First, it should be ascertained whether the acts committed at Srebrenica were perpetrated by organs of the Respondent, i.e., by persons or entities whose conduct is necessarily attributable to it, because they are in fact the instruments of its action. Next, if the preceding question is answered in the negative, it should be ascertained whether the acts in question were committed by persons who, while not organs of the Respondent, did nevertheless act on the instructions of, or under the direction or control of, the Respondent.

* *

ZIE ONDER 483:
NAAST "DIRECTION"
OOK "CONTROL"
OOK
"INFLUENCE"
ZIE OOK 396:
ALLEEN "DIRECTION"
EN "CONTROL"

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

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

VJOK PROCES TEŠK HR. L

"*Article 4*

Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State."

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

387. The Applicant has however claimed that all officers in the VRS, including General Mladić, remained under FRY military administration, and that their salaries were paid from Belgrade right up to 2002, and accordingly contends that these officers "were *de jure* organs of [the FRY], intended by their superiors to serve in Bosnia and Herzegovina with the VRS". On this basis it has been alleged by the Applicant that those officers, in addition to being officers of the VRS, remained officers of the VJ, and were thus *de jure* organs of the Respondent (paragraph 238 above). The Respondent however asserts that only some of the VRS officers were being

"administered" by the 30th Personnel Centre in Belgrade, so that matters like their payment, promotion, pension, etc., were being handled from the FRY (paragraph 238 above); and that it has not been clearly established whether General Mladić was one of them. The Applicant has shown that the promotion of Mladić to the rank of Colonel General on 24 June 1994 was handled in Belgrade, but the Respondent emphasizes that this was merely a verification for administrative purposes of a promotion decided by the authorities of the Republika Srpska.

388. The Court notes first that no evidence has been presented that either General Mladić or any of the other officers whose affairs were handled by the 30th Personnel Centre were, according to the internal law of the Respondent, officers of the army of the Respondent — a *de jure* organ of the Respondent. Nor has it been conclusively established that General Mladić was one of those officers; and even on the basis that he might have been, the Court does not consider that he would, for that reason alone, have to be treated as an organ of the FRY for the purposes of the application of the rules of State responsibility. There is no doubt that the FRY was providing substantial support, *inter alia*, financial support, to the Republika Srpska (cf. paragraph 241 above), and that one of the forms that support took was payment of salaries and other benefits to some officers of the VRS, but this did not automatically make them organs of the FRY. Those officers were appointed to their commands by the President of the Republika Srpska, and were subordinated to the political leadership of the Republika Srpska. In the absence of evidence to the contrary, those officers must be taken to have received their orders from the Republika Srpska or the VRS, not from the FRY. The expression "State organ", as used in customary international law and in Article 4 of the ILC Articles, applies to one or other of the individual or collective entities which make up the organization of the State and act on its behalf (cf. ILC Commentary to Art. 4, para. (1)). The functions of the VRS officers, including General Mladić, were however to act on behalf of the Bosnian Serb authorities, in particular the Republika Srpska, not on behalf of the FRY; they exercised elements of the public authority of the Republika Srpska. The particular situation of General Mladić, or of any other VRS officer present at Srebrenica who may have been being "administered" from Belgrade, is not therefore such as to lead the Court to modify the conclusion reached in the previous paragraph.

389. The issue also arises as to whether the Respondent might bear responsibility for the acts of the "Scorpions" in the Srebrenica area. In this connection, the Court will consider whether it has been proved that the Scorpions were a *de jure* organ of the Respondent. It is in dispute between the Parties as to when the "Scorpions" became incorporated into the forces of the Respondent. The Applicant has claimed that incorporation occurred by a decree of 1991 (which has not been produced as an Annex). The Respondent states that "these regulations [were] relevant exclusively for the war in Croatia in 1991" and that there is no evidence that they remained in force in 1992 in Bosnia and Herzegovina. The Court observes that, while the single State of Yugoslavia was disintegrating at that time, it is the status of the "Scorpions" in mid-1995 that is of relevance to the present case. In two of the intercepted documents presented by the Applicant (the authenticity of which was queried — see paragraph 289 above), there is reference to the "Scorpions" as "MUP of Serbia" and "a unit of Ministry of Interiors of Serbia". The Respondent identified the senders of these communications, Ljubiša Borovčanin and Savo Cvjetinović, as being "officials of the police

forces of Republika Srpska". The Court observes that neither of these communications was addressed to Belgrade. Judging on the basis of these materials, the Court is unable to find that the "Scorpions" were, in mid-1995, *de jure* organs of the Respondent. Furthermore, the Court notes that in any event the act of an organ placed by a State at the disposal of another public authority shall not be considered an act of that State if the organ was acting on behalf of the public authority at whose disposal it had been placed.

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

391. The first issue raised by this argument is whether it is possible in principle to attribute to a State conduct of persons — or groups of persons — who, while they do not have the legal status of State organs, in fact act under such strict control by the State that they must be treated as its organs for purposes of the necessary attribution leading to the State's responsibility for an internationally wrongful act. The Court has in fact already addressed this question, and given an answer to it in principle, in its Judgment of 27 June 1986 in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* (*Merits, Judgment, I.C.J. Reports 1986*, pp. 62-64). In paragraph 109 of that Judgment the Court stated that it had to

> "determine . . . whether or not the relationship of the *contras* to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the *contras*, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government" (p. 62).

Then, examining the facts in the light of the information in its possession, the Court observed that "there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the *contras* as acting on its behalf" (para. 109), and went on to conclude that "the evidence available to the Court . . . is insufficient to demonstrate [the *contras*'] complete dependence on United States aid", so that the Court was "unable to determine that the *contra* force may be equated for legal purposes with the forces of the United States" (pp. 62-63, para. 110).

392. The passages quoted show that, according to the Court's jurisprudence, persons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in "complete dependence" on the State, of which they are ultimately merely the instrument. In such a case, it is appropriate to look beyond legal status alone, in order to grasp the reality of the relationship between the person taking action, and the State to which he is so closely

attached as to appear to be nothing more than its agent: any other solution would allow States to escape their international responsibility by choosing to act through persons or entities whose supposed independence would be purely fictitious.

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

394. The Court can only answer this question in the negative. At the relevant time, July 1995, neither the Republika Srpska nor the VRS could be regarded as mere instruments through which the FRY was acting, and as lacking any real autonomy. While the political, military and logistical relations between the federal authorities in Belgrade and the authorities in Pale, between the Yugoslav army and the VRS, had been strong and close in previous years (see paragraph 238 above), and these ties undoubtedly remained powerful, they were, at least at the relevant time, not such that the Bosnian Serbs' political and military organizations should be equated with organs of the FRY. It is even true that differences over strategic options emerged at the time between Yugoslav authorities and Bosnian Serb leaders; at the very least, these are evidence that the latter had some qualified, but real, margin of independence. Nor, notwithstanding the very important support given by the Respondent to the Republika Srpska, without which it could not have "conduct[ed] its crucial or most significant military and paramilitary activities" (*I.C.J. Reports 1986*, p. 63, para. 111), did this signify a total dependence of the Republika Srpska upon the Respondent.

395. The Court now turns to the question whether the "Scorpions" were in fact acting in complete dependence on the Respondent. The Court has not been presented with materials to indicate this. The Court also notes that, in giving his evidence, General Dannatt, when asked under whose control or whose authority the paramilitary groups coming from Serbia were operating, replied, "they would have been under the command of Mladić and part of the chain of the command of the VRS". The Parties referred the Court to the *Stanišić and Simatović* case (IT-03-69, pending); notwithstanding that the defendants are not charged with genocide in that case, it could have its relevance for illuminating the status of the "Scorpions" as Serbian MUP or otherwise. However, the Court cannot draw further conclusions as this case remains at the indictment stage. In this respect, the Court recalls that it can only form its opinion on the basis of the information which has been brought to its notice at the time when it gives its decision, and which emerges from the pleadings and documents in the case file, and the arguments of the Parties made during the oral exchanges.

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

* *

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

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

397. The Court must emphasize, at this stage in its reasoning, that the question just stated is not the same as those dealt with thus far. It is obvious that it is different from the question whether the persons who committed the acts of genocide had the status of organs of the Respondent under its internal law; nor however, and despite some appearance to the contrary, is it the same as the question whether those persons should be equated with State organs *de facto*, even though not enjoying that status under internal law. The answer to the latter question depends, as previously explained, on whether those persons were in a relationship of such complete dependence on the State that they cannot be considered otherwise than as organs of the State, so that all their actions performed in such capacity would be attributable to the State for purposes of international responsibility. Having answered that question in the negative, the Court now addresses a completely separate issue: whether, in the specific circumstances surrounding the events at Srebrenica the perpetrators of genocide were acting on the Respondent's instructions, or under its direction or control. An affirmative answer to this question would in no way imply that the perpetrators should be characterized as organs of the FRY, or equated with such organs. It would merely mean that the FRY's international responsibility would be incurred owing to the conduct of those of its own organs which gave the instructions or exercised the control resulting in the commission of acts in breach of its international obligations. In other words, it is no longer a question of ascertaining whether the persons who directly committed the genocide were acting as organs of the FRY, or could be equated with those organs — this question having already been answered in the negative. What must be determined is whether FRY organs — incontestably having that status under the FRY's internal law — originated the genocide by issuing instructions to the perpetrators or exercising direction or control, and whether, as a result, the conduct of organs of the Respondent, having been the cause of the commission of acts in breach of its international obligations, constituted a violation of those obligations.

398. On this subject the applicable rule, which is one of customary law of international responsibility, is laid down in Article 8 of the ILC Articles on State Responsibility as follows:

> "*Article 8*
>
> *Conduct directed or controlled by a State*
>
> The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."

399. This provision must be understood in the light of the Court's jurisprudence on the subject, particularly that of the 1986 Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* referred to above (paragraph 391). In that Judgment the Court, as noted above, after having rejected the argument that the *contras* were to be equated with organs of the United States because they were "completely dependent" on it, added that the responsibility of the Respondent could still arise if it were proved that it had itself "directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State" (*I.C.J. Reports 1986*, p. 64, para. 115); this led to the following significant conclusion:

> "For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed." (*Ibid.*, p. 65.)

400. The test thus formulated differs in two respects from the test — described above — to determine whether a person or entity may be equated with a State organ even if not having that status under internal law. First, in this context it is not necessary to show that the persons who performed the acts alleged to have violated international law were in general in a relationship of "complete dependence" on the respondent State; it has to be proved that they acted in accordance with that State's instructions or under its "effective control". It must however be shown that this "effective control" was exercised, or that the State's instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.

401. The Applicant has, it is true, contended that the crime of genocide has a particular nature, in that it may be composed of a considerable number of specific acts separate, to a greater or lesser extent, in time and space. According to the Applicant, this particular nature would justify, among other consequences, assessing the "effective control" of the State allegedly responsible, not in relation to each of these specific acts, but in relation to the whole body of operations carried out by the direct perpetrators of the genocide. The Court is however of the view that the particular characteristics of genocide do not justify the Court in departing from the criterion elaborated in the Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* (see paragraph 399 above). The rules for attributing alleged internationally wrongful conduct to a State do not vary with the nature of the wrongful act in question in the absence of a clearly expressed *lex specialis*. Genocide will be considered as attributable to a State if and to the extent that the physical acts constitutive of genocide that have been committed by organs or persons other than the State's own agents were carried out, wholly or in part, on the instructions or directions of the State, or under its effective control. This is the state of customary international law, as reflected in the ILC Articles on State Responsibility.

402. The Court notes however that the Applicant has further questioned the validity of applying, in the present case, the criterion adopted in the *Military and Paramilitary Activities* Judgment. It has drawn attention to the Judgment of the ICTY Appeals Chamber in the *Tadić* case (IT-94-1-A, Judgment, 15 July 1999). In that case the Chamber did not follow the jurisprudence of the Court in the *Military and Paramilitary Activities* case: it held that the appropriate criterion,

applicable in its view both to the characterization of the armed conflict in Bosnia and Herzegovina as international, and to imputing the acts committed by Bosnian Serbs to the FRY under the law of State responsibility, was that of the "overall control" exercised over the Bosnian Serbs by the FRY; and further that that criterion was satisfied in the case (on this point, *ibid.*, para. 145). In other words, the Appeals Chamber took the view that acts committed by Bosnian Serbs could give rise to international responsibility of the FRY on the basis of the overall control exercised by the FRY over the Republika Srpska and the VRS, without there being any need to prove that each operation during which acts were committed in breach of international law was carried out on the FRY's instructions, or under its effective control.

403. The Court has given careful consideration to the Appeals Chamber's reasoning in support of the foregoing conclusion, but finds itself unable to subscribe to the Chamber's view. First, the Court observes that the ICTY was not called upon in the *Tadić* case, nor is it in general called upon, to rule on questions of State responsibility, since its jurisdiction is criminal and extends over persons only. Thus, in that Judgment the Tribunal addressed an issue which was not indispensable for the exercise of its jurisdiction. As stated above, the Court attaches the utmost importance to the factual and legal findings made by the ICTY in ruling on the criminal liability of the accused before it and, in the present case, the Court takes fullest account of the ICTY's trial and appellate judgments dealing with the events underlying the dispute. The situation is not the same for positions adopted by the ICTY on issues of general international law which do not lie within the specific purview of its jurisdiction and, moreover, the resolution of which is not always necessary for deciding the criminal cases before it.

404. This is the case of the doctrine laid down in the *Tadić* Judgment. Insofar as the "overall control" test is employed to determine whether or not an armed conflict is international, which was the sole question which the Appeals Chamber was called upon to decide, it may well be that the test is applicable and suitable; the Court does not however think it appropriate to take a position on the point in the present case, as there is no need to resolve it for purposes of the present Judgment. On the other hand, the ICTY presented the "overall control" test as equally applicable under the law of State responsibility for the purpose of determining — as the Court is required to do in the present case — when a State is responsible for acts committed by paramilitary units, armed forces which are not among its official organs. In this context, the argument in favour of that test is unpersuasive.

405. It should first be observed that logic does not require the same test to be adopted in resolving the two issues, which are very different in nature: the degree and nature of a State's involvement in an armed conflict on another State's territory which is required for the conflict to be characterized as international, can very well, and without logical inconsistency, differ from the degree and nature of involvement required to give rise to that State's responsibility for a specific act committed in the course of the conflict.

406. It must next be noted that the "overall control" test has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf. That is true of acts carried out by its official organs, and also by persons or entities which are not formally recognized as official organs

under internal law but which must nevertheless be equated with State organs because they are in a relationship of complete dependence on the State. Apart from these cases, a State's responsibility can be incurred for acts committed by persons or groups of persons — neither State organs nor to be equated with such organs — only if, assuming those acts to be internationally wrongful, they are attributable to it under the rule of customary international law reflected in Article 8 cited above (paragraph 398). This is so where an organ of the State gave the instructions or provided the direction pursuant to which the perpetrators of the wrongful act acted or where it exercised effective control over the action during which the wrong was committed. In this regard the "overall control" test is unsuitable, for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a State's organs and its international responsibility.

407. Thus it is on the basis of its settled jurisprudence that the Court will determine whether the Respondent has incurred responsibility under the rule of customary international law set out in Article 8 of the ILC Articles on State Responsibility.

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408. The Respondent has emphasized that in the final judgments of the Chambers of the ICTY relating to genocide in Srebrenica, none of its leaders have been found to have been implicated. The Applicant does not challenge that reading, but makes the point that that issue has not been before the ICTY for decision. The Court observes that the ICTY has indeed not up to the present been directly concerned in final judgments with the question whether those leaders might bear responsibility in that respect. The Court notes the fact that the report of the United Nations Secretary-General does not establish any direct involvement by President Milošević with the massacre. The Court has already recorded the contacts between Milošević and the United Nations on 10 and 11 July (paragraph 285). On 14 July, as recorded in the Secretary-General's Report,

> "the European Union negotiator, Mr. Bildt, travelled to Belgrade to meet with President Milošević. The meeting took place at Dobanovci, the hunting lodge outside Belgrade, where Mr. Bildt had met President and General Mladić one week earlier. According to Mr. Bildt's public account of that second meeting, he pressed the President to arrange immediate access for UNHCR to assist the people of Srebrenica, and for ICRC to start to register those who were being treated by the BSA as prisoners of war. He also insisted that the Netherlands soldiers be allowed to leave at will. Mr. Bildt added that the international community would not tolerate an attack on Goražde, and that a 'green light' would have to be secured for free and unimpeded access to the enclaves. He also demanded that the road between Kiseljak and Sarajevo ('Route Swan') be opened to all non-military transport. President Milošević apparently acceded to the various demands, but also claimed that he did not have control over the matter. Milošević had also apparently explained, earlier in the meeting, that the whole incident had been provoked by escalating Muslim attacks from the enclave, in violation of the 1993 demilitarization agreement.

A few hours into the meeting, General Mladić arrived at Dobanovci. Mr. Bildt noted that General Mladić readily agreed to most of the demands on Srebrenica, but remained opposed to some of the arrangements pertaining to the other enclaves, Sarajevo in particular. Eventually, with President Milošević's intervention, it appeared that an agreement in principle had been reached. It was decided that another meeting would be held the next day in order to confirm the arrangements. Mr. Bildt had already arranged with Mr. Stoltenberg and Mr. Akashi [the Special Representative of the Secretary-General] that they would join him in Belgrade. He also requested that the UNPROFOR Commander also come to Belgrade in order to finalize some of the military details with Mladić." (A/54/549, paras. 372-373.)

409. By 19 July, on the basis of the Belgrade meeting, Mr. Akashi was hopeful that both President Milošević and General Mladić might show some flexibility. The UNPROFOR Commander met with Mladić on 19 July and throughout the meeting kept in touch with Mr. Bildt who was holding parallel negotiations with President Milošević in Belgrade. Mladić gave his version of the events of the preceding days (his troops had "'finished [it] in a correct way'"; some "'unfortunate small incidents' had occurred"). The UNPROFOR Commander and Mladić then signed an agreement which provided for

"ICRC access to all 'reception centres' where the men and boys of Srebrenica were being held, by the next day;

UNHCR and humanitarian aid convoys to be given access to Srebrenica;

The evacuation of wounded from Potočari, as well as the hospital in Bratunac;

The return of Dutchbat weapons and equipment taken by the BSA;

The transfer of Dutchbat out of the enclave commencing on the afternoon of 21 July, following the evacuation of the remaining women, children and elderly who wished to leave.

Subsequent to the signing of this agreement, the Special Representative wrote to President Milošević, reminding him of the agreement, that had not yet been honoured, to allow ICRC access to Srebrenica. The Special Representative later also telephoned President Milošević to reiterate the same point." (*Ibid.*, para. 392.)

410. The Court was referred to other evidence supporting or denying the Respondent's effective control over, participation in, involvement in, or influence over the events in and around Srebrenica in July 1995. The Respondent quotes two substantial reports prepared seven years after the events, both of which are in the public domain, and readily accessible. The first, *Srebrenica — a "safe" area*, published in 2002 by the Netherlands Institute for War Documentation was prepared

over a lengthy period by an expert team. The Respondent has drawn attention to the fact that this report contains no suggestion that the FRY leadership was involved in planning the attack or inciting the killing of non-Serbs; nor any hard evidence of assistance by the Yugoslav army to the armed forces of the Republika Srpska before the attack; nor any suggestion that the Belgrade Government had advance knowledge of the attack. The Respondent also quotes this passage from point 10 of the Epilogue to the Report relating to the "mass slaughter" and "the executions" following the fall of Srebrenica: "There is no evidence to suggest any political or military liaison with Belgrade, and in the case of this mass murder such a liaison is highly improbable." The Respondent further observes that the Applicant's only response to this submission is to point out that "the report, by its own admission, is not exhaustive", and that this Court has been referred to evidence not used by the authors.

411. The Court observes, in respect of the Respondent's submissions, that the authors of the Report do conclude that Belgrade was aware of the intended attack on Srebrenica. They record that the Dutch Military Intelligence Service and another Western intelligence service concluded that the July 1995 operations were co-ordinated with Belgrade (Part III, Chap. 7, Sect. 7). More significantly for present purposes, however, the authors state that "there is no evidence to suggest participation in the preparations for executions on the part of Yugoslav military personnel or the security agency (RDB). In fact there is some evidence to support the opposite view . . ." (Part IV, Chap. 2, Sect. 20). That supports the passage from point 10 of the Epilogue quoted by the Respondent, which was preceded by the following sentence: "Everything points to a central decision by the General Staff of the VRS."

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

> "No basis has been established to implicate Belgrade's military or security forces in the post-Srebrenica atrocities. While there are indications that the VJ or RDB [the Serbian State Security Department] may have contributed elements to the Srebrenica battle, there is no similar evidence that Belgrade-directed forces were involved in any of the subsequent massacres. Eyewitness accounts by survivors may be imperfect recollections of events, and details may have been overlooked. Narrations and other available evidence suggest that only Bosnian Serb troops were employed in the atrocities and executions that followed the military conquest of Srebrenica." (*Balkan Battlegrounds*, p. 353.)

The response of the Applicant was to quote an earlier passage which refers to reports which "suggest" that VJ troops and possibly elements of the Serbian State Security Department may have been engaged in the battle in Srebrenica — as indeed the second sentence of the passage quoted by the Respondent indicates. It is a cautious passage, and significantly gives no indication of any involvement by the Respondent in the post-conflict atrocities which are the subject of

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

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

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

* *

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

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

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

As for the killings committed by the "Scorpions" paramilitary militias, notably at Trnovo (paragraph 289 above), even if it were accepted that they were an element of the genocide committed in the Srebrenica area, which is not clearly established by the decisions thus far rendered by the ICTY (see, in particular, the Trial Chamber's decision of 12 April 2006 in the *Stanišić and Simatović* case, IT-03-69), it has not been proved that they took place either on the instructions or under the control of organs of the FRY.

414. Finally, the Court observes that none of the situations, other than those referred to in Articles 4 and 8 of the ILC's Articles on State Responsibility, in which specific conduct may be attributed to a State, matches the circumstances of the present case in regard to the possibility of attributing the genocide at Srebrenica to the Respondent. The Court does not see itself required to decide at this stage whether the ILC's Articles dealing with attribution, apart from Articles 4 and 8, express present customary international law, it being clear that none of them apply in this case. The acts constituting genocide were not committed by persons or entities which, while not being organs of the FRY, were empowered by it to exercise elements of the governmental authority (Art. 5), nor by organs placed at the Respondent's disposal by another State (Art. 6), nor by persons in fact exercising elements of the governmental authority in the absence or default of the official authorities of the Respondent (Art. 9); finally, the Respondent has not acknowledged and adopted the conduct of the perpetrators of the acts of genocide as its own (Art. 11).

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

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VIII. The question of responsibility, in respect of Srebrenica, for acts enumerated in Article III, paragraphs *(b)* to *(e)*, of the Genocide Convention

416. The Court now comes to the second of the questions set out in paragraph 379 above, namely, that relating to the Respondent's possible responsibility on the ground of one of the acts related to genocide enumerated in Article III of the Convention. These are: conspiracy to commit genocide (Art. III, para. *(b)*), direct and public incitement to commit genocide (Art. III, para. *(c)*), attempt to commit genocide (Art. III, para. *(d)*) — though no claim is made under this head in the Applicant's final submissions in the present case — and complicity in genocide (Art. III, para. *(e)*). For the reasons already stated (paragraph 380 above), the Court must make a finding on this matter inasmuch as it has replied in the negative to the previous question, that of the Respondent's responsibility in the commission of the genocide itself.

417. It is clear from an examination of the facts of the case that subparagraphs *(b)* and *(c)* of Article III are irrelevant in the present case. It has not been proved that organs of the FRY, or persons acting on the instructions or under the effective control of that State, committed acts that could be characterized as "[c]onspiracy to commit genocide"(Art. III, para. *(b)*), or as "[d]irect and public incitement to commit genocide" (Art. III, para. *(c)*), if one considers, as is appropriate, only the events in Srebrenica. As regards paragraph *(b)*, what was said above regarding the attribution to the Respondent of acts of genocide, namely that the massacres were perpetrated by persons and

groups of persons (the VRS in particular) who did not have the character of organs of the Respondent, and did not act on the instructions or under the effective control of the Respondent, is sufficient to exclude the latter's responsibility in this regard. As regards subparagraph *(c)*, none of the information brought to the attention of the Court is sufficient to establish that organs of the Respondent, or persons acting on its instructions or under its effective control, directly and publicly incited the commission of the genocide in Srebrenica; nor is it proven, for that matter, that such organs or persons incited the commission of acts of genocide anywhere else on the territory of Bosnia and Herzegovina. In this respect, the Court must only accept precise and incontrovertible evidence, of which there is clearly none.

418. A more delicate question is whether it can be accepted that acts which could be characterized as "complicity in genocide", within the meaning of Article III, paragraph *(e)*, can be attributed to organs of the Respondent or to persons acting under its instructions or under its effective control.

This question calls for some preliminary comment.

419. First, the question of "complicity" is to be distinguished from the question, already considered and answered in the negative, whether the perpetrators of the acts of genocide committed in Srebrenica acted on the instructions of or under the direction or effective control of the organs of the FRY. It is true that in certain national systems of criminal law, giving instructions or orders to persons to commit a criminal act is considered as the mark of complicity in the commission of that act. However, in the particular context of the application of the law of international responsibility in the domain of genocide, if it were established that a genocidal act had been committed on the instructions or under the direction of a State, the necessary conclusion would be that the genocide was attributable to the State, which would be directly responsible for it, pursuant to the rule referred to above (paragraph 398), and no question of complicity would arise. But, as already stated, that is not the situation in the present case.

However there is no doubt that "complicity", in the sense of Article III, paragraph *(e)*, of the Convention, includes the provision of means to enable or facilitate the commission of the crime; it is thus on this aspect that the Court must focus. In this respect, it is noteworthy that, although "complicity", as such, is not a notion which exists in the current terminology of the law of international responsibility, it is similar to a category found among the customary rules constituting the law of State responsibility, that of the "aid or assistance" furnished by one State for the commission of a wrongful act by another State.

420. In this connection, reference should be made to Article 16 of the ILC's Articles on State Responsibility, reflecting a customary rule, which reads as follows:

"*Article 16*

Aid or assistance in the commission of an internationally wrongful act

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(a) That State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) The act would be internationally wrongful if committed by that State."

Although this provision, because it concerns a situation characterized by a relationship between two States, is not directly relevant to the present case, it nevertheless merits consideration. The Court sees no reason to make any distinction of substance between "complicity in genocide", within the meaning of Article III, paragraph *(e)*, of the Convention, and the "aid or assistance" of a State in the commission of a wrongful act by another State within the meaning of the aforementioned Article 16 — setting aside the hypothesis of the issue of instructions or directions or the exercise of effective control, the effects of which, in the law of international responsibility, extend beyond complicity. In other words, to ascertain whether the Respondent is responsible for "complicity in genocide" within the meaning of Article III, paragraph *(e)*, which is what the Court now has to do, it must examine whether organs of the respondent State, or persons acting on its instructions or under its direction or effective control, furnished "aid or assistance" in the commission of the genocide in Srebrenica, in a sense not significantly different from that of those concepts in the general law of international responsibility.

421. Before the Court turns to an examination of the facts, one further comment is required. It concerns the link between the specific intent *(dolus specialis)* which characterizes the crime of genocide and the motives which inspire the actions of an accomplice (meaning a person providing aid or assistance to the direct perpetrators of the crime): the question arises whether complicity presupposes that the accomplice shares the specific intent *(dolus specialis)* of the principal perpetrator. But whatever the reply to this question, there is no doubt that the conduct of an organ or a person furnishing aid or assistance to a perpetrator of the crime of genocide cannot be treated as complicity in genocide unless at the least that organ or person acted knowingly, that is to say, in particular, was aware of the specific intent *(dolus specialis)* of the principal perpetrator. If that condition is not fulfilled, that is sufficient to exclude categorization as complicity. The Court will thus first consider whether this latter condition is met in the present case. It is only if it replies to that question of fact in the affirmative that it will need to determine the legal point referred to above.

422. The Court is not convinced by the evidence furnished by the Applicant that the above conditions were met. Undoubtedly, the quite substantial aid of a political, military and financial nature provided by the FRY to the Republika Srpska and the VRS, beginning long before the tragic events of Srebrenica, continued during those events. There is thus little doubt that the atrocities in Srebrenica were committed, at least in part, with the resources which the perpetrators of those acts possessed as a result of the general policy of aid and assistance pursued towards them by the FRY. However, the sole task of the Court is to establish the legal responsibility of the Respondent, a responsibility which is subject to very specific conditions. One of those conditions is not fulfilled, because it is not established beyond any doubt in the argument between the Parties whether the authorities of the FRY supplied — and continued to supply — the VRS leaders who decided upon and carried out those acts of genocide with their aid and assistance, at a time when those authorities

were clearly aware that genocide was about to take place or was under way; in other words that not only were massacres about to be carried out or already under way, but that their perpetrators had the specific intent characterizing genocide, namely, the intent to destroy, in whole or in part, a human group, as such.

423. A point which is clearly decisive in this connection is that it was not conclusively shown that the decision to eliminate physically the adult male population of the Muslim community from Srebrenica was brought to the attention of the Belgrade authorities when it was taken; the Court has found (paragraph 295 above) that that decision was taken shortly before it was actually carried out, a process which took a very short time (essentially between 13 and 16 July 1995), despite the exceptionally high number of victims. It has therefore not been conclusively established that, at the crucial time, the FRY supplied aid to the perpetrators of the genocide in full awareness that the aid supplied would be used to commit genocide.

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

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IX. The question of responsibility for breach of the obligations to prevent and punish genocide

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

Despite the clear links between the duty to prevent genocide and the duty to punish its perpetrators, these are, in the view of the Court, two distinct yet connected obligations, each of which must be considered in turn.

426. It is true that, simply by its wording, Article I of the Convention brings out the close link between prevention and punishment: "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish." It is also true that one of the most effective ways of preventing criminal acts, in general, is to provide penalties for persons committing such acts, and to impose those penalties effectively on those who commit the acts one is trying to prevent. Lastly, it

is true that, although in the subsequent Articles, the Convention includes fairly detailed provisions concerning the duty to punish (Articles III to VII), it reverts to the obligation of prevention, stated as a principle in Article I, only in Article VIII:

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

427. However, it is not the case that the obligation to prevent has no separate legal existence of its own; that it is, as it were, absorbed by the obligation to punish, which is therefore the only duty the performance of which may be subject to review by the Court. The obligation on each contracting State to prevent genocide is both normative and compelling. It is not merged in the duty to punish, nor can it be regarded as simply a component of that duty. It has its own scope, which extends beyond the particular case envisaged in Article VIII, namely reference to the competent organs of the United Nations, for them to take such action as they deem appropriate. Even if and when these organs have been called upon, this does not mean that the States parties to the Convention are relieved of the obligation to take such action as they can to prevent genocide from occurring, while respecting the United Nations Charter and any decisions that may have been taken by its competent organs.

This is the reason why the Court will first consider the manner in which the Respondent has performed its obligation to prevent before examining the situation as regards the obligation to punish.

(1) The obligation to prevent genocide

428. As regards the obligation to prevent genocide, the Court thinks it necessary to begin with the following introductory remarks and clarifications, amplifying the observations already made above.

429. First, the Genocide Convention is not the only international instrument providing for an obligation on the States parties to it to take certain steps to prevent the acts it seeks to prohibit. Many other instruments include a similar obligation, in various forms: see, for example, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (Article 2); the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, of 14 December 1973 (Art. 4); the Convention on the Safety of United Nations and Associated Personnel of 9 December 1994 (Art. 11); the International Convention on the Suppression of Terrorist Bombings of 15 December 1997 (Art. 15). The content of the duty to prevent varies from one instrument to another, according to the wording of the relevant provisions, and depending on the nature of the acts to be prevented.

The decision of the Court does not, in this case, purport to establish a general jurisprudence applicable to all cases where a treaty instrument, or other binding legal norm, includes an obligation for States to prevent certain acts. Still less does the decision of the Court purport to find whether, apart from the texts applicable to specific fields, there is a general obligation on States to prevent the commission by other persons or entities of acts contrary to certain norms of general international law. The Court will therefore confine itself to determining the specific scope of the duty to prevent in the Genocide Convention, and to the extent that such a determination is necessary to the decision to be given on the dispute before it. This will, of course, not absolve it of the need to refer, if need be, to the rules of law whose scope extends beyond the specific field covered by the Convention.

430. Secondly, it is clear that the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible. A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide. In this area the notion of "due diligence", which calls for an assessment *in concreto*, is of critical importance. Various parameters operate when assessing whether a State has duly discharged the obligation concerned. The first, which varies greatly from one State to another, is clearly the capacity to influence effectively the action of persons likely to commit, or already committing, genocide. This capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events. The State's capacity to influence must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law; seen thus, a State's capacity to influence may vary depending on its particular legal position vis-à-vis the situations and persons facing the danger, or the reality, of genocide. On the other hand, it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question, the more so since the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result — averting the commission of genocide — which the efforts of only one State were insufficient to produce.

431. Thirdly, a State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed. It is at the time when commission of the prohibited act (genocide or any of the other acts listed in Article III of the Convention) begins that the breach of an obligation of prevention occurs. In this respect, the Court refers to a general rule of the law of State responsibility, stated by the ILC in Article 14, paragraph 3, of its Articles on State Responsibility:

"....

3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation."

This obviously does not mean that the obligation to prevent genocide only comes into being when perpetration of genocide commences; that would be absurd, since the whole point of the obligation is to prevent, or attempt to prevent, the occurrence of the act. In fact, a State's obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed. From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent *(dolus specialis)*, it is under a duty to make such use of these means as the circumstances permit. However, if neither genocide nor any of the other acts listed in Article III of the Convention are ultimately carried out, then a State that omitted to act when it could have done so cannot be held responsible *a posteriori*, since the event did not happen which, under the rule set out above, must occur for there to be a violation of the obligation to prevent.

In consequence, in the present case the Court will have to consider the Respondent's conduct, in the light of its duty to prevent, solely in connection with the massacres at Srebrenica, because these are the only acts in respect of which the Court has concluded in this case that genocide was committed.

432. Fourth and finally, the Court believes it especially important to lay stress on the differences between the requirements to be met before a State can be held to have violated the obligation to prevent genocide — within the meaning of Article I of the Convention — and those to be satisfied in order for a State to be held responsible for "complicity in genocide" — within the meaning of Article III, paragraph *(e)* — as previously discussed. There are two main differences; they are so significant as to make it impossible to treat the two types of violation in the same way.

In the first place, as noted above, complicity always requires that some positive action has been taken to furnish aid or assistance to the perpetrators of the genocide, while a violation of the obligation to prevent results from mere failure to adopt and implement suitable measures to prevent genocide from being committed. In other words, while complicity results from commission, violation of the obligation to prevent results from omission; this is merely the reflection of the notion that the ban on genocide and the other acts listed in Article III, including complicity, places States under a negative obligation, the obligation not to commit the prohibited acts, while the duty to prevent places States under positive obligations, to do their best to ensure that such acts do not occur.

In the second place, as also noted above, there cannot be a finding of complicity against a State unless at the least its organs were aware that genocide was about to be committed or was under way, and if the aid and assistance supplied, from the moment they became so aware onwards, to the perpetrators of the criminal acts or to those who were on the point of committing them, enabled or facilitated the commission of the acts. In other words, an accomplice must have given support in perpetrating the genocide with full knowledge of the facts. By contrast, a State may be

found to have violated its obligation to prevent even though it had no certainty, at the time when it should have acted, but failed to do so, that genocide was about to be committed or was under way; for it to incur responsibility on this basis it is enough that the State was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed. As will be seen below, this latter difference could prove decisive in the present case in determining the responsibility incurred by the Respondent.

433. In light of the foregoing, the Court will now consider the facts of the case. For the reasons stated above (paragraph 431), it will confine itself to the FRY's conduct vis-à-vis the Srebrenica massacres.

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

435. Secondly, the Court cannot but note that, on the relevant date, the FRY was bound by very specific obligations by virtue of the two Orders indicating provisional measures delivered by the Court in 1993. In particular, in its Order of 8 April 1993, the Court stated, *inter alia*, that although not able, at that early stage in the proceedings, to make "definitive findings of fact or of imputability" (*I.C.J. Reports 1993*, p. 22, para. 44) the FRY was required to ensure:

> "that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity in genocide . . ." (*ibid.*, p. 24, para. 52 A.(2)).

The Court's use, in the above passage, of the term "influence" is particularly revealing of the fact that the Order concerned not only the persons or entities whose conduct was attributable to the FRY, but also all those with whom the Respondent maintained close links and on which it could exert a certain influence. Although in principle the two issues are separate, and the second will be examined below, it is not possible, when considering the way the Respondent discharged its obligation of prevention under the Convention, to fail to take account of the obligation incumbent upon it, albeit on a different basis, to implement the provisional measures indicated by the Court.

436. Thirdly, the Court recalls that although it has not found that the information available to the Belgrade authorities indicated, as a matter of certainty, that genocide was imminent (which is why complicity in genocide was not upheld above: paragraph 424), they could hardly have been unaware of the serious risk of it once the VRS forces had decided to occupy the Srebrenica enclave.

Among the documents containing information clearly suggesting that such an awareness existed, mention should be made of the above-mentioned report (see paragraphs 283 and 285 above) of the United Nations Secretary-General prepared pursuant to General Assembly resolution 53/35 on the "fall of Srebrenica" (United Nations doc. A/54/549), which recounts the visit to Belgrade on 14 July 1995 of the European Union negotiator Mr. Bildt to meet Mr. Milošević. Mr. Bildt, in substance, informed Mr. Milošević of his serious concern and

> "pressed the President to arrange immediate access for the UNHCR to assist the people of Srebrenica, and for the ICRC to start to register those who were being treated by the BSA [Bosnian Serb Army] as prisoners of war".

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

> "I went to Milošević and I asked him. I said, 'If you have so much influence over these [Bosnian] Serbs, how could you have allowed General Mladić to have killed all those people at Srebrenica?' And he looked to me — at me. His expression was very grave. He paused before he answered, and he said, 'Well, General Clark, I warned him not to do this, but he didn't listen to me.' And it was in the context of all the publicity at the time about the Srebrenica massacre." (*Milošević*, IT-02-54-T, Transcript, 16 December 2003, pp. 30494-30495).

General Clark gave it as his opinion, in his evidence before the ICTY, that the circumstances indicated that Milošević had foreknowledge of what was to be "a military operation combined with a massacre" (*ibid.*, p. 30497). The ICTY record shows that Milošević denied ever making the statement to which General Clark referred, but the Trial Chamber nevertheless relied on General Clark's testimony in its Decision of 16 June 2004 when rejecting the Motion for Judgment of Acquittal (*Milošević*, IT-02-54-T, Decision on Motion for Judgment of Acquittal, 16 June 2004, para. 280).

438. In view of their undeniable influence and of the information, voicing serious concern, in their possession, the Yugoslav federal authorities should, in the view of the Court, have made the best efforts within their power to try and prevent the tragic events then taking shape, whose scale, though it could not have been foreseen with certainty, might at least have been surmised. The FRY leadership, and President Milošević above all, were fully aware of the climate of deep-seated hatred which reigned between the Bosnian Serbs and the Muslims in the Srebrenica region. As the Court has noted in paragraph 423 above, it has not been shown that the decision to eliminate physically the whole of the adult male population of the Muslim community of Srebrenica was brought to the attention of the Belgrade authorities. Nevertheless, given all the international concern about what looked likely to happen at Srebrenica, given Milošević's own observations to Mladić, which made it clear that the dangers were known and that these dangers seemed to be of an order that could suggest intent to commit genocide, unless brought under control, it must have been clear that there

was a serious risk of genocide in Srebrenica. Yet the Respondent has not shown that it took any initiative to prevent what happened, or any action on its part to avert the atrocities which were committed. It must therefore be concluded that the organs of the Respondent did nothing to prevent the Srebrenica massacres, claiming that they were powerless to do so, which hardly tallies with their known influence over the VRS. As indicated above, for a State to be held responsible for breaching its obligation of prevention, it does not need to be proven that the State concerned definitely had the power to prevent the genocide; it is sufficient that it had the means to do so and that it manifestly refrained from using them.

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

(2) The obligation to punish genocide

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

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

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

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

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

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

or of having committed one of the other acts mentioned in Article III of the Convention in connection with the Srebrenica genocide. Even if Serbian domestic law granted jurisdiction to its criminal courts to try those accused, and even supposing such proceedings were compatible with Serbia's other international obligations, *inter alia* its obligation to co-operate with the ICTY, to which the Court will revert below, an obligation to try the perpetrators of the Srebrenica massacre in Serbia's domestic courts cannot be deduced from Article VI. Article VI only obliges the Contracting Parties to institute and exercise territorial criminal jurisdiction; while it certainly does not prohibit States, with respect to genocide, from conferring jurisdiction on their criminal courts based on criteria other than where the crime was committed which are compatible with international law, in particular the nationality of the accused, it does not oblige them to do so.

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

444. In order to determine whether the Respondent has fulfilled its obligations in this respect, the Court must first answer two preliminary questions: does the ICTY constitute an "international penal tribunal" within the meaning of Article VI? And must the Respondent be regarded as having "accepted the jurisdiction" of the tribunal within the meaning of that provision?

445. As regards the first question, the Court considers that the reply must definitely be in the affirmative. The notion of an "international penal tribunal" within the meaning of Article VI must at least cover all international criminal courts created after the adoption of the Convention (at which date no such court existed) of potentially universal scope, and competent to try the perpetrators of genocide or any of the other acts enumerated in Article III. The nature of the legal instrument by which such a court is established is without importance in this respect. When drafting the Genocide Convention, its authors probably thought that such a court would be created by treaty: a clear pointer to this lies in the reference to "those Contracting Parties which shall have accepted [the] jurisdiction" of the international penal tribunal. Yet, it would be contrary to the object of the provision to interpret the notion of "international penal tribunal" restrictively in order to exclude from it a court which, as in the case of the ICTY, was created pursuant to a United Nations Security Council resolution adopted under Chapter VII of the Charter. The Court has found nothing to suggest that such a possibility was considered by the authors of the Convention, but no intention of seeking to exclude it can be imputed to them.

446. The question whether the Respondent must be regarded as having "accepted the jurisdiction" of the ICTY within the meaning of Article VI must consequently be formulated as follows: is the Respondent obliged to accept the jurisdiction of the ICTY, and to co-operate with the Tribunal by virtue of the Security Council resolution which established it, or of some other rule

of international law? If so, it would have to be concluded that, for the Respondent, co-operation with the ICTY constitutes both an obligation stemming from the resolution concerned and from the United Nations Charter, or from another norm of international law obliging the Respondent to co-operate, and an obligation arising from its status as a party to the Genocide Convention, this last clearly being the only one of direct relevance in the present case.

447. For the purposes of the present case, the Court only has to determine whether the FRY was under an obligation to co-operate with the ICTY, and if so, on what basis, from when the Srebrenica genocide was committed in July 1995. To that end, suffice it to note that the FRY was under an obligation to co-operate with the ICTY from 14 December 1995 at the latest, the date of the signing and entry into force of the Dayton Agreement between Bosnia and Herzegovina, Croatia and the FRY. Annex 1A of that treaty, made binding on the parties by virtue of its Article II, provides that they must fully co-operate, notably with the ICTY. Thus, from 14 December 1995 at the latest, and at least on the basis of the Dayton Agreement, the FRY must be regarded as having "accepted [the] jurisdiction" of the ICTY within the meaning of Article VI of the Convention. This fact is sufficient for the Court in its consideration of the present case, since its task is to rule upon the Respondent's compliance with the obligation resulting from Article VI of the Convention in relation to the Srebrenica genocide, from when it was perpetrated to the present day, and since the Applicant has not invoked any failure to respect the obligation to co-operate alleged to have occurred specifically between July and December 1995. Similarly, the Court is not required to decide whether, between 1995 and 2000, the FRY's obligation to co-operate had any legal basis besides the Dayton Agreement. Needless to say, the admission of the FRY to the United Nations in 2000 provided a further basis for its obligation to co-operate: but while the legal basis concerned was thereby confirmed, that did not change the scope of the obligation. There is therefore no need, for the purposes of assessing how the Respondent has complied with its obligation under Article VI of the Convention, to distinguish between the period before and the period after its admission as a Member of the United Nations, at any event from 14 December 1995 onwards.

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

Applicant referred during the hearings to recent statements made by the Respondent's Minister for Foreign Affairs, reproduced in the national press in April 2006, and according to which the intelligence services of that State knew where Mladić was living in Serbia, but refrained from informing the authorities competent to order his arrest because certain members of those services had allegedly remained loyal to the fugitive. The authenticity and accuracy of those statements has not been disputed by the Respondent at any time.

449. It therefore appears to the Court sufficiently established that the Respondent failed in its duty to co-operate fully with the ICTY. This failure constitutes a violation by the Respondent of its duties as a party to the Dayton Agreement, and as a Member of the United Nations, and accordingly a violation of its obligations under Article VI of the Genocide Convention. The Court is of course without jurisdiction in the present case to declare that the Respondent has breached any obligations other than those under the Convention. But as the Court has jurisdiction to declare a breach of Article VI insofar as it obliges States to co-operate with the "international penal tribunal", the Court may find for that purpose that the requirements for the existence of such a breach have been met. One of those requirements is that the State whose responsibility is in issue must have "accepted [the] jurisdiction" of that "international penal tribunal"; the Court thus finds that the Respondent was under a duty to co-operate with the tribunal concerned pursuant to international instruments other than the Convention, and failed in that duty. On this point, the Applicant's submissions relating to the violation by the Respondent of Articles I and VI of the Convention must therefore be upheld.

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

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X. The question of responsibility for breach of the Court's Orders indicating provisional measures

451. In its seventh submission Bosnia and Herzegovina requests the Court to adjudge and declare:

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

452. The Court observes that its "orders on provisional measures under Article 41 [of the Statute] have binding effect" (*LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 506, para. 109). Although the Court only had occasion to make such a finding in a judgment subsequent to the Orders that it made in the present dispute, this does not affect the binding nature of those Orders, since in the Judgment referred to the Court did no more than give the provisions of the Statute the meaning and scope that they had possessed from the outset. It notes that provisional measures are aimed at preserving the rights of each of the parties pending the final decision of the Court. The Court's Orders of 8 April and 13 September 1993 indicating provisional measures created legal obligations which both Parties were required to satisfy.

453. The Court indicated the following provisional measures in the *dispositif*, paragraph 52, of its Order of 8 April 1993:

"A. (1) . . . . . .

The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should immediately, in pursuance of its undertaking in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, take all measures within its power to prevent commission of the crime of genocide;

(2) . . . . . .

The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should in particular ensure that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity in genocide, whether directed against the Muslim population of Bosnia and Herzegovina or against any other national, ethnical, racial or religious group;

. . . . . .

B. . . . . .

The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) and the Government of the Republic of Bosnia and Herzegovina should not take any action and should ensure that no action is taken which may aggravate or extend the existing dispute over the prevention or punishment of the crime of genocide, or render it more difficult of solution."

454. The Court reaffirmed these measures in the *dispositif* of its Order of 13 September 1993.

455. From the Applicant's written and oral pleadings as a whole, it is clear that the Applicant is not accusing the Respondent of failing to respect measure B above, and that its submissions relate solely to the measures indicated in paragraph A, subparagraphs (1) and (2). It is therefore only to that extent that the Court will consider whether the Respondent has fully complied with its obligation to respect the measures ordered by the Court.

456. The answer to this question may be found in the reasoning in the present Judgment relating to the Applicant's other submissions to the Court. From these it is clear that in respect of the massacres at Srebrenica in July 1995 the Respondent failed to fulfil its obligation indicated in paragraph 52 A (1) of the Order of 8 April 1993 and reaffirmed in the Order of 13 September 1993 to "take all measures within its power to prevent commission of the crime of genocide". Nor did it comply with the measure indicated in paragraph 52 A (2) of the Order of 8 April 1993, reaffirmed in the Order of 13 September 1993, insofar as that measure required it to "ensure that any ... organizations and persons which may be subject to its ... influence ... do not commit any acts of genocide".

457. However, the remainder of the Applicant's seventh submission claiming that the Respondent failed to comply with the provisional measures indicated must be rejected for the reasons set out above in respect of the Applicant's other submissions (paragraphs 415 and 424).

458. As for the request that the Court hold the Respondent to be under an obligation to the Applicant to provide symbolic compensation, in an amount to be determined by the Court, for the breach thus found, the Court observes that the question of compensation for the injury caused to the Applicant by the Respondent's breach of aspects of the Orders indicating provisional measures merges with the question of compensation for the injury suffered from the violation of the corresponding obligations under the Genocide Convention. It will therefore be dealt with below, in connection with consideration of points *(b)* and *(c)* of the Respondent's sixth submission, which concern the financial compensation which the Applicant claims to be owed by the Respondent.

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XI. The question of reparation

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

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

The Applicant also asks the Court to decide that the Respondent

> "shall immediately take effective steps to ensure full compliance with its obligation to punish acts of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide or any other act prohibited by the Convention and to transfer individuals accused of genocide or any other act prohibited by the Convention to the International Criminal Tribunal for the former Yugoslavia and to fully co-operate with this Tribunal" (submission 6 *(a)*),

and that the Respondent "shall provide specific guarantees and assurances that it will not repeat the wrongful acts complained of, the form of which guarantees and assurances is to be determined by the Court" (submission 6 *(d)*). These submissions, and in particular that relating to compensation, were however predicated on the basis that the Court would have upheld, not merely that part of the Applicant's claim as relates to the obligation of prevention and punishment, but also the claim that the Respondent has violated its substantive obligation not to commit genocide, as well as the ancillary obligations under the Convention concerning complicity, conspiracy and incitement, and the claim that the Respondent has aided and abetted genocide. The Court has now to consider what is the appropriate form of reparation for the other forms of violation of the Convention which have been alleged against the Respondent and which the Court has found to have been established, that is to say breaches of the obligations to prevent and punish.

460. The principle governing the determination of reparation for an internationally wrongful act is as stated by the Permanent Court of International Justice in the *Factory at Chorzów* case: that "reparation must, so far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed" (*P.C.I.J. Series A, No. 17*, p. 47: see also Article 31 of the ILC's Articles on State Responsibility). In the circumstances of this case, as the Applicant recognizes, it is inappropriate to ask the Court to find that the Respondent is under an obligation of *restitutio in integrum*. Insofar as restitution is not possible, as the Court stated in the case of the *Gabčikovo-Nagymaros Project (Hungary/Slovakia)*, "[i]t is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it" (*I.C.J. Reports 1997*, p. 81, para. 152.; cf. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 198, paras. 152-153; see also Article 36 of the ILC's Articles on State Responsibility). It is therefore appropriate to consider what were the consequences of the failure of the Respondent to comply with its obligations under the Genocide Convention to prevent and punish the crime of genocide, committed in Bosnia and Herzegovina, and what damage can be said to have been caused thereby.

461. The Court has found that the authorities of the Respondent could not have been unaware of the grave risk of genocide once the VRS forces had decided to take possession of the Srebrenica enclave, and that in view of its influence over the events, the Respondent must be held to have had the means of action by which it could seek to prevent genocide, and to have manifestly refrained from employing them (paragraph 438). To that extent therefore it failed to comply with its obligation of prevention under the Convention. The obligation to prevent the commission of the crime of genocide is imposed by the Genocide Convention on any State party which, in a given situation, has it in its power to contribute to restraining in any degree the commission of genocide. To make this finding, the Court did not have to decide whether the acts of genocide committed at Srebrenica would have occurred anyway even if the Respondent had done as it should have and employed the means available to it. This is because, as explained above, the obligation to prevent genocide places a State under a duty to act which is not dependent on the certainty that the action to be taken will succeed in preventing the commission of acts of genocide, or even on the likelihood of that outcome. It therefore does not follow from the Court's reasoning above in finding a violation by the Respondent of its obligation of prevention that the atrocious suffering caused by the genocide committed at Srebrenica would not have occurred had the violation not taken place.

462. The Court cannot however leave it at that. Since it now has to rule on the claim for reparation, it must ascertain whether, and to what extent, the injury asserted by the Applicant is the consequence of wrongful conduct by the Respondent with the consequence that the Respondent should be required to make reparation for it, in accordance with the principle of customary international law stated above. In this context, the question just mentioned, whether the genocide at Srebrenica would have taken place even if the Respondent had attempted to prevent it by employing all means in its possession, becomes directly relevant, for the definition of the extent of the obligation of reparation borne by the Respondent as a result of its wrongful conduct. The question is whether there is a sufficiently direct and certain causal nexus between the wrongful act, the Respondent's breach of the obligation to prevent genocide, and the injury suffered by the Applicant, consisting of all damage of any type, material or moral, caused by the acts of genocide. Such a nexus could be considered established only if the Court were able to conclude from the case as a whole and with a sufficient degree of certainty that the genocide at Srebrenica would in fact have been averted if the Respondent had acted in compliance with its legal obligations. However, the Court clearly cannot do so. As noted above, the Respondent did have significant means of influencing the Bosnian Serb military and political authorities which it could, and therefore should, have employed in an attempt to prevent the atrocities, but it has not been shown that, in the specific context of these events, those means would have sufficed to achieve the result which the Respondent should have sought. Since the Court cannot therefore regard as proven a causal nexus between the Respondent's violation of its obligation of prevention and the damage resulting from the genocide at Srebrenica, financial compensation is not the appropriate form of reparation for the breach of the obligation to prevent genocide.

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

Convention to prevent the crime of genocide. As in the *Corfu Channel (United Kingdom* v. *Albania)* case, the Court considers that a declaration of this kind is "in itself appropriate satisfaction" (*Merits, Judgment, I.C.J. Reports 1949*, pp. 35, 36), and it will, as in that case, include such a declaration in the operative clause of the present Judgment. The Applicant acknowledges that this failure is no longer continuing, and accordingly has withdrawn the request made in the Reply that the Court declare that the Respondent "has violated *and is violating* the Convention" (emphasis added).

464. The Court now turns to the question of the appropriate reparation for the breach by the Respondent of its obligation under the Convention to punish acts of genocide; in this respect, the Applicant asserts the existence of a continuing breach, and therefore maintains *(inter alia)* its request for a declaration in that sense. As noted above (paragraph 440), the Applicant includes under this heading the failure "to transfer individuals accused of genocide or any other act prohibited by the Convention to the International Criminal Tribunal for the former Yugoslavia and to fully co-operate with this Tribunal"; and the Court has found that in that respect the Respondent is indeed in breach of Article VI of the Convention (paragraph 449 above). A declaration to that effect is therefore one appropriate form of satisfaction, in the same way as in relation to the breach of the obligation to prevent genocide. However, the Applicant asks the Court in this respect to decide more specifically that

> "Serbia and Montenegro shall immediately take effective steps to ensure full compliance with its obligation to punish acts of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide or any other act prohibited by the Convention and to transfer individuals accused of genocide or any other act prohibited by the Convention to the International Criminal Tribunal for the former Yugoslavia and to fully co-operate with this Tribunal."

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

466. In its final submissions, the Applicant also requests the Court to decide "that Serbia and Montenegro shall provide specific guarantees and assurances that it will not repeat the wrongful acts complained of, the form of which guarantees and assurances is to be determined by the Court". As presented, this submission relates to all the wrongful acts, i.e. breaches of the Genocide Convention, attributed by the Applicant to the Respondent, thus including alleged breaches of the Respondent's obligation not itself to commit genocide, as well as the ancillary obligations under the Convention concerning complicity, conspiracy and incitement. Insofar as the Court has not upheld these claims, the submission falls. There remains however the question whether it is appropriate to direct that the Respondent provide guarantees and assurances of non-repetition in relation to the established breaches of the obligations to prevent and punish genocide. The Court

notes the reasons advanced by counsel for the Applicant at the hearings in support of the submission, which relate for the most part to "recent events [which] cannot fail to cause concern as to whether movements in Serbia and Montenegro calling for genocide have disappeared". It considers that these indications do not constitute sufficient grounds for requiring guarantees of non-repetition. The Applicant also referred in this connection to the question of non-compliance with provisional measures, but this matter has already been examined above (paragraphs 451 to 458), and will be mentioned further below. In the circumstances, the Court considers that the declaration referred to in paragraph 465 above is sufficient as regards the Respondent's continuing duty of punishment, and therefore does not consider that this is a case in which a direction for guarantees of non-repetition would be appropriate.

467. Finally, the Applicant has presented the following submission:

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

The provisional measures indicated by the Court's Order of 8 April 1993, and reiterated by the Order of 13 September 1993, were addressed specifically to the Respondent's obligation "to prevent commission of the crime of genocide" and to certain measures which should "in particular" be taken to that end (*I.C.J. Reports 1993*, p. 24, para. 52 (A) (1) and (2)).

468. Provisional measures under Article 41 of the Statute are indicated "pending [the] final decision" in the case, and the measures indicated in 1993 will thus lapse on the delivery of the present Judgment (cf. *Anglo-Iranian Oil Co. (United Kingdom* v. *Iran), Preliminary Objections, Judgment, I.C.J. Reports 1952*, p. 114; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 442, para. 112). However, as already observed (paragraph 452 above), orders made by the Court indicating provisional measures under Article 41 of the Statute have binding effect, and their purpose is to protect the rights of either party, pending the final decision in the case.

469. The Court has found above (paragraph 456) that, in respect of the massacres at Srebrenica in July 1995, the Respondent failed to take measures which would have satisfied the requirements of paragraphs 52 (A) (1) and (2) of the Court's Order of 8 April 1993 (reaffirmed in the Order of 13 September 1993). The Court however considers that, for purposes of reparation, the Respondent's non-compliance with the provisional measures ordered is an aspect of, or merges with, its breaches of the substantive obligations of prevention and punishment laid upon it by the Convention. The Court does not therefore find it appropriate to give effect to the Applicant's request for an order for symbolic compensation in this respect. The Court will however include in the operative clause of the present Judgment, by way of satisfaction, a declaration that the Respondent has failed to comply with the Court's Orders indicating provisional measures.

470. The Court further notes that one of the provisional measures indicated in the Order of 8 April and reaffirmed in that of 13 September 1993 was addressed to both Parties. The Court's findings in paragraphs 456 to 457 and 469 are without prejudice to the question whether the Applicant did not also fail to comply with the Orders indicating provisional measures.

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XII. Operative clause

471. For these reasons,

THE COURT,

(1) by ten votes to five,

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

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

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

(2) by thirteen votes to two,

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

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

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

(3) by thirteen votes to two,

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

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

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

(4) by eleven votes to four,

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

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

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

(5) by twelve votes to three,

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

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

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

(6) by fourteen votes to one,

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

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

AGAINST: *Judge* ad hoc Kreća;

(7) by thirteen votes to two,

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

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

AGAINST: *Judge* Skotnikov; *Judge* ad hoc Kreća;

(8) by fourteen votes to one,

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

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

AGAINST: *Judge* ad hoc Kreća;

(9) by thirteen votes to two,

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

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

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

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-sixth day of February, two thousand and seven, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of Bosnia and Herzegovina and the Government of Serbia, respectively.

(Signed) Rosalyn HIGGINS,
President.

(Signed) Philippe COUVREUR,
Registrar.

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

(Initialled) R.H.

(Initialled) Ph.C.