

DISSENTING OPINION OF VICE-PRESIDENT  
AL-KHASAWNEH

*The Court's jurisdiction is established — Serious doubts that already settled question of jurisdiction should have been re-examined — SFRY's United Nations membership could only have been suspended or terminated pursuant to Articles 5 or 6 of the Charter; Security Council and General Assembly resolutions did not have the effect of terminating the SFRY's United Nations membership — The FRY's admission to the United Nations in 2000 did not retroactively change its position vis-à-vis the United Nations between 1992 and 2000 — Between 1992 and 2000, the FRY was the continuator of the SFRY, and after its admission to the United Nations, the FRY was the SFRY's successor — The Court's Judgment in the Legality of Use of Force cases on the question of access and "treaties in force" is not convincing and regrettably has led to confusion and contradictions within the Court's own jurisprudence — The Court should not have entertained the Respondent's highly irregular 2001 "Initiative" on access to the Court, nor should it have invited the Respondent to renew its jurisdictional arguments at the merits phase.*

*Serbia's involvement, as a principal actor or accomplice, in the genocide that took place in Srebrenica is supported by massive and compelling evidence — Disagreement with the Court's methodology for appreciating the facts and drawing inferences therefrom — The Court should have required the Respondent to provide unedited copies of its Supreme Defence Council documents, failing which, the Court should have allowed a more liberal recourse to inference — The "effective control" test for attribution established in the Nicaragua case is not suitable to questions of State responsibility for international crimes committed with a common purpose — The "overall control" test for attribution established in the Tadić case is more appropriate when the commission of international crimes is the common objective of the controlling State and the non-State actors — The Court's refusal to infer genocidal intent from a consistent pattern of conduct in Bosnia and Herzegovina is inconsistent with the established jurisprudence of the ICTY — The FRY's knowledge of the genocide set to unfold in Srebrenica is clearly established — The Court should have treated the Scorpions as a de jure organ of the FRY — The statement by the Serbian Council of Ministers in response to the massacre of Muslim men by the Scorpions amounted to an admission of responsibility — The Court failed to appreciate the definitional complexity of the crime of genocide and to assess the facts before it accordingly.*

1. I feel that I should explain the nature of my dissent before explaining the reasons for it. I am not in total disagreement with the majority:

regarding jurisdiction, I come to the same conclusion contained in paragraph 1 of the *dispositif* that the Court's jurisdiction is established, although I have serious doubts whether, in terms of the proper administration of justice, the already settled question of jurisdiction should have been re-examined in the Judgment.

2. I, likewise, concur with the findings (paragraphs 5-7 of the *dispositif*) dealing respectively with Serbia's violation of its obligations under the Genocide Convention to prevent genocide in Srebrenica and to cooperate fully with the International Criminal Tribunal for the former Yugoslavia; and its failure to comply with the two Orders on provisional measures issued by the Court in 1993.

3. Where, however, my learned colleagues and I part company is with respect to the central question of Serbia's international responsibility incurred as a consequence of its involvement — as a principal actor or an accomplice — in the genocide that took place in Bosnia and Herzegovina. Such involvement is supported, in my opinion, by massive and compelling evidence. My disagreement with the majority, however, relates not only to their conclusions but also to the very assumptions on which their reasoning is based and to their methodology for appreciating the facts and drawing inferences therefrom, and is hence profound. Therefore, notwithstanding my agreement with some parts of the Judgment, and much to my regret, I am duty and conscience bound to dissent. In explanation of this position I append the present opinion.

#### I. THE COURT'S JURISDICTION

4. The jurisdictional issues in the present case have revolved around the international status of the Respondent and its membership in the United Nations. Those issues, which permeated all phases of this case and other related cases, can be traced to the State succession arising out of the process of disintegration of the Socialist Federal Republic of Yugoslavia (SFRY) which took place in the early 1990s. Briefly described, that process — for it has to be emphasized that there was no agreed point in time when the SFRY could be said to have been extinguished<sup>1</sup> — started when both Slovenia and Croatia seceded from the SFRY on 25 June 1991. Macedonia did the same on 17 September 1991 and Bosnia and Herzegovina, the last to secede, followed on 6 March 1992. Only two constituent republics, Serbia and Montenegro, were left in the old Yugoslavia and on 27 April 1992 they joined to form the Federal Republic of Yugoslavia (FRY) which claimed to be the continuator of the SFRY and declared its intention "to strictly abide by all the international commit-

<sup>1</sup> As was the case, for example, with the Union of Soviet Socialist Republics.

ments” of the SFRY as well as to remain “bound by all obligations to international organizations and institutions whose member it is”<sup>2</sup>.

5. While the four Republics that emerged from the SFRY were admitted to United Nations membership in 1992 and 1993, the FRY’s claim to continuity was *noted* by the Security Council on 30 May 1992 as a claim that “has not been generally accepted”<sup>3</sup>. Again the Security Council, on 19 September 1992, considered that the SFRY had ceased to exist, recalled its earlier resolution, and considered that the FRY

“cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and therefore recommend[ed] 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”<sup>4</sup>.

Two days later the General Assembly adopted a resolution in which *inter alia* it decided that the FRY “*should* apply for membership in the United Nations and that it *shall* not participate in the work of the General Assembly”<sup>5</sup>.

6. Both the language of the resolutions and their negotiating history suggest that they were compromise resolutions that fell short of terminating or suspending SFRY membership in the United Nations<sup>6</sup>. In fact under the United Nations Charter, there is no way in which the SFRY membership could have been terminated given the veto power of the permanent members, some of whom were as opposed to such a termination as others were keen on it. In any case, the requirements for suspension (Charter, Art. 5) or expulsion (Charter, Art. 6) were never invoked by the Security Council nor put into motion. The FRY clung to its membership claim with the result that

“the only practical consequence that [General Assembly resolution 47/1] draws is that the Federal Republic of Yugoslavia (Serbia and Montenegro) shall not participate in the work of the General Assembly” (letter of the Under-Secretary-General and Legal Counsel of the United Nations; incidentally the only legal authority to

<sup>2</sup> United Nations doc. A/46/915 (1992), 7 May 1992, Ann. II.

<sup>3</sup> Security Council resolution 757 (1992), 30 May 1992.

<sup>4</sup> Security Council resolution 777 (1992), 19 September 1992.

<sup>5</sup> General Assembly resolution 47/1 (1992), 22 September 1992.

<sup>6</sup> See Michael Scharf, “Musical Chairs: The Dissolution of States and Membership in the United Nations”, *Cornell International Law Journal*, 1995, Vol. 28, pp. 58-62.

appraise the matter in what was an otherwise blatantly political process).

That letter from the Legal Counsel of the United Nations left no room for doubt. It went on to state “on the other hand, the resolution neither terminates nor suspends Yugoslavia’s membership”.

7. Important as this letter is, we should not be content with it, nor with the language and negotiating history of Security Council resolutions 757 and 777 and General Assembly resolution 47/1, nor with the undisputed fact that no measures were adopted to affect the termination or suspension of SFRY membership — all of which point unmistakably to continued SFRY membership in the United Nations. We should, additionally, ask a basic question: was the SFRY a United Nations Member in the first place? The answer to that question is also clearly in the affirmative, for it would be recalled that the SFRY had been a founding Member of the United Nations and already in 1947 the Sixth Committee of the General Assembly had formulated the principle that:

“As a general rule, it is in accordance with principle to assume that a State which is a Member of the United Nations does not cease to be a Member from the mere fact that its constitution or frontiers have been modified, and to consider the rights and obligations which that State possesses as a Member of the United Nations as ceasing to exist only with its extinction as a legal person internationally recognized as such.”<sup>7</sup>

8. At no time was the SFRY extinguished as a legal person internationally recognized as such. There were always States that continued to recognize the FRY as the continuator of the SFRY though there were others who took the opposite view. This state of affairs is typical of the relativism inherent in the constitutive theory of recognition and in itself prevents the drawing of any firm inferences. The only way to ascertain whether there was continuity or extinction of the SFRY is by reference to the actual or legal elements surrounding the succession of States which can be measured against an objective yardstick. It is indisputable, for example, that the capital of the SFRY was still within the borders of the FRY and that Serbia (an ancient kingdom) and Montenegro formed the historic nucleus of Yugoslavia and continued even after the loss of the four Republics — which happened at different times — to have 40 per cent of the land mass of the former Yugoslavia and 45 per cent of its

<sup>7</sup> United Nations, *Official Records of the General Assembly, Sixth Committee, Second Session*, 43rd meeting, 1947, pp. 38-39.

population<sup>8</sup>. Moreover, it is also factually indisputable that in the Forty-sixth Session of the General Assembly, the SFRY, even after Slovenia, Croatia and Macedonia had broken away, was still considered a United Nations Member and the credentials of its representatives were not challenged. Of equal importance is that even in the Forty-seventh Session of the General Assembly no challenge to the credentials of its representatives was made<sup>9</sup>. In other words, the rump Yugoslavia, later the FRY, was treated as a continuator of the SFRY. There was nothing out of the ordinary in this. It was supported by the classic models of the succession of India and Pakistan from the Commonwealth of India; then later the Pakistan/Bangladesh succession; and the dissolution of the Union of the Soviet Socialist Republics; and it accorded with the principle adopted by the Sixth Committee referred to above. Moreover, the nature of Security Council resolutions 757 and 777 and General Assembly resolution 47/1, appreciated contextually, lends strong credence to the claim that their main aim was in the nature of sanctions. It should not be overlooked in this respect that news of the atrocities committed in Croatia and Bosnia were being carried world-wide to a shocked international public opinion and blame for the most part was being laid on the doorstep of the government of Mr. Milošević and hence sanctions were started even when the SFRY was still in existence<sup>10</sup>.

9. Whatever may have been the case with regard to the intended or unintended effects of those resolutions, the decisive fact is that once SFRY membership in the United Nations had been ascertained and that this membership had survived the breakaway of Croatia, Slovenia and Macedonia which was indisputably the case in the Forty-sixth Session of the General Assembly, and of Bosnia which was similarly the case in the Forty-seventh Session of the General Assembly, the Security Council and General Assembly resolutions adopted did not, and more importantly, could not, have terminated or suspended that existing membership. Only the SFRY, of its own volition, could give up its original membership and it was naturally not inclined to do so, given not only the strength of its claim, but additionally, because, had it abandoned its membership, it would have put itself at the mercy of the “peace-loving formula” (United Nations Charter, Art. 4, para. 1) which, contextually, it had ample reason to believe some, including some in the Security Council, would not easily apply to it. As already stated, the FRY clung to its membership

<sup>8</sup> See Michael Scharf, *op. cit.*, p. 53.

<sup>9</sup> Yehuda Blum, “UN Membership of the ‘New’ Yugoslavia: Continuity or Break”, *American Journal of International Law*, 1992, Vol. 86, p. 830.

<sup>10</sup> Security Council resolution 713 (1991), 25 September 1991, para. 6.

and suffered only the sanction of non-participation in the work of the General Assembly and the Economic and Social Council (ECOSOC) where a similar resolution was adopted<sup>11</sup>.

10. Indeed there is post-Dayton evidence to suggest that had the FRY persisted in its claim as a continuator, it would have triumphed. For we can glean, for example, acceptance of that claim from the treaties that it entered into with Croatia, Bosnia and Macedonia<sup>12</sup>. The acceptance by the successor States of that claim is especially significant given their closeness to the process of succession. This thesis, however, could not be fully tested because the nascent normalcy was shattered by Mr. Milošević's attack on Kosovo in 1999 resulting in disastrous consequences for the FRY and, not least, for Mr. Milošević as evidenced by his fall from power. A new Government replaced him and decided to embark on a new course. It applied to the United Nations as a new Member and was accepted as such in 2000, thereby abandoning of its own will the claim of continuity. From that moment on and only from that moment on it became a successor of the SFRY and not its continuator.

11. Curiously, the fact of FRY admission to the United Nations in 2000 was viewed as retroactively clarifying the Respondent's hitherto amorphous status vis-à-vis the United Nations in favour of the conclusion that in the period 1992 to 2000 it was not a United Nations Member. It was also argued that the FRY's admission "revealed" a lack of United Nations membership and toppled the assumption which was based on the existence of an amorphous situation, making it now impossible to ignore the question of the FRY's access to the Court. Nothing could be more debatable. The logic of the argument seems at first glance to be straightforward: admission as a new Member means that the FRY was not a Member before the date of admission. But here we are not dealing with a State that had never been a United Nations Member. Rather we are faced with a State that assiduously maintained it was the continuator of an original United Nations Member and which had to relinquish a strong claim to continuity and apply as a new Member in the sense of a successor State. The distinction therefore is not between a "new Member" and a "non-Member", but between a "new Member" and an "old Member". Seen from this angle, the act of admission does not lead to the conclusion

<sup>11</sup> Security Council resolution 821 (1993), 28 April 1993, para. 1.

<sup>12</sup> See, e.g., Article IV of the Joint Declaration of the President of the Republic of Serbia and the President of the Presidency of Bosnia and Herzegovina, which stipulates that "Bosnia and Herzegovina accepts the State continuity of the Federal Republic of Yugoslavia", United Nations doc. A/51/461-S/1996/830 (1996), 7 October 1996.

that the FRY was not a United Nations Member. Rather, the act of admission confirms that it had been an old member by way of continuity until it abandoned that claim and took on the status of a successor. Therefore the FRY was a continuator in 1992 to 2000 and a successor after its admission in 2000. Furthermore, to argue that the SFRY was extinguished in 1992 and that the FRY was a successor of the SFRY in 2000 without first being its continuator creates a legal void in the intervening period of eight years, which is absurd.

12. In the post-2000 period, the claim that the FRY was not a United Nations Member and therefore lacked access to the Court became pivotal in jurisdictional rounds and ploys aimed at undoing the Court's clearly-established jurisdiction in its 1996 Judgment on Preliminary Objections (in paragraph 34 of that Judgment, the Court indicated that it had jurisdiction *rationae personae*, *rationae materiae* and *rationae temporis*). Denying that the Respondent had been a United Nations Member in 1992 to 2000 was a necessary first step to the argument that it lacked "access" to the Court via that membership under Article 35, paragraph 1, of the Statute. Furthermore, this access was said to be independent from jurisdiction, even jurisdiction *rationae personae*, and, unlike it, was objective and could not be established simply because there was consent to jurisdiction but should always be ascertained, if need be, by the Court acting *proprio motu*. Thus, the modest idea of access (concerned primarily with granting access to States and denying it to non-States and ensuring equality for Members and non-Members) was elevated to heights that its drafters never imagined. In its latest incarnation, the concept of access could circumvent the principle of *res judicata* by either overturning it or by being outside the scope of the *res judicata* of the Court's jurisdiction in the 1996 Judgment on Preliminary Objections (CR 2006/45, 9 May 2006, pp. 10-18.). I shall revert to these issues of jurisdiction and access to propound the view that differences between them are greatly exaggerated. I shall first, however, give an overall description of the major developments that took place after 2000. In the Respondent's Application for revision of the Judgment of 11 July 1996 and its Initiative, both submitted to the Court in 2001, and the Court's 2004 *Legality of Use of Force* Judgments, the question of the FRY's access to the Court (including access under Article 35, paragraph 2, of the Statute) played a central role in jurisdictional arguments. Already in 2004, acting counsel for Belgium described how the *Legality of Use of Force* cases were being used by Serbia as "effectively . . . the fifth round in the jurisdictional contest of the *Genocide Convention* case which stretches back to 1993" (*Legality of Use of Force (Serbia and Montenegro v. Belgium)*, CR 2004/15, para. 10). When one adds to that two attempts by Serbian members of the Bosnian Presidium to discontinue the *Genocide Convention* case, and the latest round of jurisdictional arguments in 2006, that jurisdictional contest

reached eight rounds — which is unprecedented in the history of this Court or of its Predecessor.

1. *The Application for Revision Judgment (2003) and the Legality of Use of Force Judgments (2004)*

13. In its Application for revision, the Respondent had not based its request strictly on new facts as required by Article 61 of the Statute but on the legal consequences relating to its United Nations membership flowing from facts already known to the parties at the time of the 1996 Judgment. This being the case, the Court dismissed the request because the alleged new facts were not new. There was no need, therefore, for the Court to decide on the question of the Respondent's United Nations membership. The Court stated that the General Assembly resolution on admission:

“cannot have changed retroactively the *sui generis* position which the FRY found itself in vis-à-vis the United Nations over the period 1992-2000 or its position in relation to the Statute of the Court and the Genocide Convention” (*Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections (*Yugoslavia v. Bosnia and Herzegovina*), *Judgment, I.C.J. Reports 2003*, p. 31, para 71).

14. By contrast, in the *Legality of Use of Force* cases, the caution that had for better or worse always characterized the Court's approach to the issue of Yugoslavia's membership was thrown to the wind. Free from the constraints of *res judicata*, the majority found in those closely related cases an escape route which was used notwithstanding the impact that this would have on the present case. As stated in Judge Higgins's separate opinion: “Its relevance can lie, and only lie, in another pending case.” (*Legality of Use of Force (Serbia and Montenegro v. Belgium)*, *Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 487, para. 18, separate opinion of Judge Higgins.)

15. Be that as it may, what interests us more for the present is the

reasoning followed in the *Legality of Use of Force* Judgments. The Court started by noting — correctly — that the aforementioned passage in the *Application for Revision* Judgment did not imply any decision on the status of the FRY within the United Nations before 2000. The Court went on to say that the fact of admission brought to an end the *sui generis* position of FRY membership — which is also correct for the future. But the Court went further and sought to derive new legal consequences — for the past — namely lack of United Nations membership between 1992 and 2000 from the fact of the FRY's admission whereas in the 2003 *Application for Revision* Judgment, the Court had found it impossible to derive, from the same fact, any consequences for the past<sup>13</sup>. The only basis for doing so was the observation that the term *sui generis* is a descriptive and not a prescriptive term. But this is hardly evidence or argument for nothing turns on that observation. As the joint declaration in the *Legality of Use of Force* cases observes, the proposition that the FRY's United Nations membership was retroactively clarified is “far from self-evident and we cannot trace the steps of the reasoning” (*Legality of Use of Force (Serbia and Montenegro v. Belgium)*, *Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 334, para. 12, joint declaration of Vice-President Ranjeva, Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby). This, with great respect, is one of the reasons why the Court's logic in the *Legality of Use of Force* Judgments does not perhaps represent the zenith of legal reasoning. This is so in addition of course to its negative and regrettable impact on the broad consistency of the Court's jurisprudence.

16. Our present Judgment considers the 2003 *Application for Revision* Judgment and the 2004 *Legality of Use of Force* Judgments in paragraphs 105-113 under the heading “Relevant Past Decisions of the Court”, but fails to address the contradiction between its inability to draw findings as to FRY United Nations membership in its 2003 Judgment, and its drawing conclusions from the same facts in its 2004 Judgment.

17. Apart from access via United Nations membership (Statute, Art. 35, para. 1) non-Members may, as is well known, have access to the

<sup>13</sup> See Maria Chiara Vitucci, “Has Pandora's Box Been Closed?: The Decision on the *Legality of Use of Force* Cases in Relation to the Status of the Federal Republic of Yugoslavia (Serbia and Montenegro) within the United Nations”, *Leiden Journal of International Law*, 2006, Vol. 19, p. 114.

Court under Article 35, paragraph 2. The crucial question in the second route is whether the term “treaties in force” is to be interpreted to mean those treaties in force at the time of the institution of proceedings (the liberal interpretation) or those that were already in force when the ICJ Statute itself had come into force (the narrow interpretation).

18. It will be recalled that, in its Order of 8 April 1993, the Court opted for the liberal interpretation. It did so expressly in paragraph 19 of that Order. Indeed, given that it did not find the need to pronounce definitively on FRY membership in the United Nations, the liberal interpretation of Article 35, paragraph 2, of the Statute, was the sole or main ground for its provisional jurisdiction. Though not definitive, this finding carries considerable weight and should not have been lightly reversed. Moreover, this assumption was, by necessary logic, at the heart of the Court’s finding in the 1996 Judgment on Preliminary Objections that it had jurisdiction. Yet the 2004 *Legality of Use of Force* Judgments did not hesitate to unnecessarily reverse it. The same seven judges appending a joint declaration to that Judgment felt it

“astonishing that the Court found it necessary to rule on the scope of Article 35, paragraph 2, whereas the Applicant did not invoke this text” (*Legality of Use of Force (Serbia and Montenegro v. Belgium) Preliminary Objections, Judgment, I.C.J. Reports 2004*, p. 333, para. 11, joint declaration of Vice-President Ranjeva, Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby).

19. But beyond this, the reasoning followed by the Court in the 2004 *Legality of Use of Force* Judgments leads to the collapse of the unity of purpose of Articles 35, 36 and 37 of the Statute — for in Articles 35 and 36 the term “treaties in force” indisputably means in force at the time of the institution of proceedings. No justification for such a result is offered.

20. The Court’s conclusion in the *Legality of Use of Force* Judgment is based mainly on the *travaux préparatoires* of Article 35, paragraph 2, of the Statute of the Permanent Court, its own Statute’s *travaux préparatoires* yielding no firm conclusions. All that need be said in this regard is that the conclusion of the Court is at best possible but not conclusive.

21. Moreover, it is disconcerting that whilst the Court was more than ready to delve into the *travaux préparatoires* of a bygone era and draw conclusions by analogy (though such analogy is open to doubts given that there were no general peace treaties after the Second World War), there is no reference to the much more relevant fact that the FRY,

whether or not a Member of the United Nations, was a party to the Genocide Convention. The FRY's 27 April 1992 declaration accepting the SFRY treaty obligations amounts to its acceptance of the Genocide Convention obligations. In this respect, reference should be made to the fact that the United Nations Office of Legal Affairs considers that General Assembly resolution 43/138 (1988) amounts to a general invitation to non-Members to become a party to the Genocide Convention<sup>14</sup>. The Democratic People's Republic of Korea's instrument of accession to the Genocide Convention was accepted on 31 January 1989 (more than two years before it became a United Nations Member) on this basis. No special invitation to become a party to the Genocide Convention was addressed to the DPRK by the General Assembly. In other words, given the FRY's express acceptance of the obligations set forth in the Genocide Convention in 1992, neither its purported non-Member status nor the failure of the General Assembly to specifically invite the FRY to become a party acts as a bar to finding that the FRY was a party to the Genocide Convention at the time it filed the Application.

## 2. *The Initiative*

22. The Court's Statute admits of only two ways for States unhappy with its judgments to deal with them: revision under Article 61 with all the attendant limitations and conditions wisely designed to safeguard the stability and integrity of judgments and/or a request for interpretation under Article 60 which can only explain but not change that which the Court has already settled with binding force.

23. The Respondent sought revision unsuccessfully in 2003 and could have sought interpretation — indeed the nature of its claims regarding the meaning of jurisdiction and access would lend themselves to resolution through such a request. Instead, simultaneously with its 2001 Application for revision, the Respondent presented an "Initiative" to the Court to reconsider its jurisdiction *ex officio*. Curiously, the reasoning and contents of the Initiative were virtually identical with the Application for revision. While the Court rejected the Application for revision on 3 February 2003, the same Court, some four months later, invited the Respondent to present new jurisdictional arguments at the merits phase. (Letter from the Registrar to the Respondent dated 12 June 2003.) This, notwithstanding that the Court itself had some seven years earlier satisfied itself that: "having established its jurisdiction under Article IX of the

<sup>14</sup> Paragraph 5 of General Assembly resolution 43/138 (8 December 1988) urges those States which have not yet become parties to the Convention to ratify it or accede thereto without further delay.

Genocide Convention. . . it may now proceed to consider the merits of the case on that basis” (*Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*), p. 622, para. 46).

24. It is plain that the “Initiative” was irregular and had no place under the Statute of the Court, not because the Court could not make mistakes or refuse to rectify them, but because its Statute struck the right compromise between the fallibility of men and courts on the one hand and the need to safeguard the reasonable and legitimate expectations regarding the integrity and stability of its judgments on the other. That compromise was struck, as already mentioned, by allowing for the possibility of seeking interpretation and/or revision. It is of course true that “[t]he Court must however always be satisfied that it has jurisdiction. . .” (*Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan), Judgment, I.C.J. Reports 1972*, p. 52, para. 13). But, that satisfaction, no doubt motivated by a need to be meticulous in dispensing justice, must be achieved in an orderly and timely manner. Once the Court has satisfied itself that it has jurisdiction, it should move on to consider the merits — which was exactly what the Court said in 1996.

25. The serious misgivings I have, in principle, about the irregular “Initiative” are reinforced by the fact that there is nothing in the Court’s jurisprudence to support the proposition that jurisdictional issues that have been decided with the force of *res judicata* may be reopened. Thus, in the *ICAO Council* case, there was no separate preliminary objections phase, nor any question of “re-examining” what had already been decided. In that case, Pakistan simply raised an objection very late in the oral proceedings after it had exhausted its ability to raise preliminary objections. The decision on jurisdiction, which was made under the Court’s general powers, did not amount to re-examining jurisdiction because it had never been previously examined.

26. Similarly, in another case cited by the proponents of the objective access theory: *South West Africa (Ethiopia v. South Africa), Second Phase*, the Court found that the standing of the Applicant before the Court itself, i.e., the *locus standi ratione personae*, which had been the subject of the Court’s decision in 1962 *could not be reopened*, but that the Applicant’s standing regarding the subject-matter of the case and therefore the merits *could be reopened*. In other words the Court avoided reopening what had been decided<sup>15</sup>.

27. This conclusion is not weakened by the claim, in fact made by the

<sup>15</sup> For an analysis of other cases supporting the proposition that decided jurisdictional matters may not be reopened see in particular paragraphs 127-128 of the Judgment.

Respondent, that it was making a new jurisdictional argument. One would expect any respondent in the same position to claim that it was not repeating old arguments. Again, if those new arguments are about crucial unknown facts, the Court's Statute designates a procedure to deal with them; if there is obscurity in the Judgment, interpretation under Article 60 of the Court's Statute can cure it.

28. This being the case, it was curious and, with great respect to my colleagues, regrettable, that the Court should have acceded — in an unprecedented move — to the Respondent's irregular request to present additional jurisdictional arguments at the merits phase. By doing so, the Court contributed to a further delay in justice regarding something so shocking to decent people as allegations of genocide. Moreover, the mis-conceived idea of allowing the Respondent to make new jurisdictional arguments at the merits phase, after jurisdiction had been decided with the force of *res judicata* has, together with its 2004 *Legality of Use of Force* Judgments, contributed to confusion and contradictions between its different cases and indeed the different phases in the present case with the result that, with the contagion spreading, and those contradictions being quoted back at the Court, the only thing the present Judgment could do was to take refuge in the formalism of *res judicata*, paragraphs 129-138 being a case in point.

29. Before ending this part on jurisdiction, I should say a few words about the concept of "access". I believe that the most important application of this concept is with regard to the lack of capacity of non-State actors and unrecognized entities to appear before the Court. This is of course to be expected in an international community made up of States. The debates in the Security Council and the General Assembly regarding non-Member States becoming parties to the Court's Statute centred on the requirement that the relevant entity be a State<sup>16</sup> — and not on the conditions for participation in the Statute. Apart from the need to ensure equality for the parties before the Court, I fail to see that the distinction between access and jurisdiction entails any significant consequences. Thus, a court is required to ascertain its jurisdiction independently of the consent of the parties, for example when one party does not appear. Moreover, it is not insignificant that while the Respondent was arguing in terms of lack of access, its submission was made in terms of lack of jurisdiction. A contextual approach based on common sense rather than dialectic reasoning should be the guiding criterion in these matters.

<sup>16</sup> Shabtai Rosenne, *The Law and Practice of the International Court, 1920-2005*, Vol. II, p. 599.

## II. MERITS

30. I am of the opinion that the involvement or implication of the FRY in the genocide that took place in Bosnia and Herzegovina in the 1990s was both more serious in nature and more extensive in territorial scope than the mere failure to prevent genocide in Srebrenica conveys.

31. This implies that the charge that genocide took place also in other parts of Bosnia and Herzegovina and that the FRY was responsible not only for its failure to prevent genocide but for being actively involved in it either as a principal or alternatively as an accomplice or by way of conspiracy or incitement would in all probability have been proven had the Court not adopted the methodology discussed below.

32. It implies also that the fact of FRY responsibility for genocide in Srebrenica was proven to a satisfactory standard.

33. In stating this, I am not oblivious to the fact that the ICTY has not, so far, established that the crime of genocide or the other ancillary crimes enumerated in the Genocide Convention have taken place in Bosnia and Herzegovina (apart from Srebrenica) and consequently that genocide is more difficult, though not impossible, to prove. Neither am I unaware that additional difficulties in this regard stem from the elusiveness of the elements of genocidal intent *dolus specialis* and from the need to apply high standards of proof given the gravity of the charge of genocide.

34. I believe, however, that the Court could have found genocide and FRY responsibility therefor had it followed a different methodology without of course in any way detracting from the high standard of proof or the rigour of its reasoning.

35. *In the first place*, the Court was alerted by the Applicant to the existence of “redacted” sections of documents of the Supreme Defence Council of the Respondent. Regrettably, the Court failed to act although, under Article 49 of its Statute, it has the power to do so. It is a reasonable expectation that those documents would have shed light on the central questions of intent and attributability. The reasoning given by the Court in paragraph 206 of the Judgment, “[o]n this matter, the Court observes that the Applicant has extensive documentation and other evidence available to it, especially from the readily accessible ICTY records. . .”, is worse than its failure to act. To add to this, at the end of paragraph 206, the Court states:

“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.*" (Emphasis added.)

It should be observed that Article 49 of the Statute provides that "formal note should be taken of any refusal" and not of the Applicant's suggestion. In addition to this completely unbalanced statement that does not meet the requirement of Article 49, no conclusions whatsoever were drawn from noting the Respondent's refusal to divulge the contents of the unedited documents. It would normally be expected that the consequences of the note taken by the Court would be to shift the *onus probandi* or to allow a more liberal recourse to inference as the Court's past practice and considerations of common sense and fairness would all demand. This was expressed very clearly by the Court in its *Corfu Channel* Judgment:

"On the other hand, the fact of this exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion." (*Corfu Channel (United Kingdom v. Albania)*, *Merits, Judgment, I.C.J. Reports 1949*, p. 18.)

36. *Secondly*, the Court applied the effective-control test to a situation different from that presented in the *Nicaragua* case. In the present case, there was a unity of goals, unity of ethnicity and a common ideology, such that effective control over non-State actors would not be necessary. In applying the effective control test, the Court followed Article 8 of the International Law Commission Articles on State Responsibility (Judgment, paras. 402-407).

37. However, with great respect to the majority, a strong case can be made for the proposition that the test of control is a variable one. It would be recalled that some ILC members drew attention to the fact of there being varying degrees of sufficient control required in specific legal contexts<sup>17</sup>. The ICTY Appeals Chamber decision in the *Tadić* case, as

<sup>17</sup> Report of the International Law Commission on the Work of its Fiftieth Session, United Nations, *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10*, United Nations doc. A/53/10 and Corr.1, para. 395.

reaffirmed in the *Celebici* case, takes this approach. In the *Celebici* case, the Appeals Chamber held that:

“the ‘overall control’ test could thus be fulfilled even if the armed forces acting on behalf of the ‘controlling state’ had autonomous choices of means and tactics although participating in a common strategy along with the controlling State” (*Prosecutor v. Delalic*, ICTY Appeals Chamber, 20 February 2001, para. 47).

38. In rejecting the ICTY’s context-sensitive approach, the ILC Commentary to Article 8 does little more than note a distinction between the rules of attribution for the purposes of State responsibility on the one hand, and the rules of international humanitarian law for the purposes of individual criminal responsibility on the other<sup>18</sup>. However, it should be recalled that the Appeals Chamber in *Tadić* had in fact framed the question as one of State responsibility, in particular whether the FRY was responsible for the acts of the VRS, and therefore considered itself to be applying the rules of attribution under international law (*Tadić*, ICTY Judgment, IT-94-1-A, 15 July 1999, para. 98).

39. Unfortunately, the Court’s rejection of the standard in the *Tadić* case fails to address the crucial issue raised therein — namely that different types of activities, particularly in the ever-evolving nature of armed conflict, may call for subtle variations in the rules of attribution. In the *Nicaragua* case, the Court noted that the United States and the *Contras* shared the same objectives — namely the overthrowing of the Nicaraguan Government. These objectives, however, were achievable without the commission of war crimes or crimes against humanity. The *Contras* could indeed have limited themselves to military targets in the accomplishment of their objectives. As such, in order to attribute crimes against humanity in furtherance of the common objective, the Court held that the crimes themselves should be the object of control. When, however, the shared objective is the commission of international crimes, to require both control over the non-State actors and the specific operations in the context of which international crimes were committed is too high a threshold. The inherent danger in such an approach is that it gives States the opportunity to carry out criminal policies through non-state actors or surrogates without incurring direct responsibility therefore. The statement in paragraph 406 of the Judgment to the effect that the “‘overall control’ test is unsuitable, for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a State’s organs and its international responsibility” is, with respect, singularly unconvincing because it fails to consider that such a link has to account

<sup>18</sup> J. Crawford, *International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries*, 2002, p. 112.

for situations in which there is a common criminal purpose. It is also far from self-evident that the overall control test is always not proximate enough to trigger State responsibility.

40. *Thirdly*, the Court has refused to infer genocidal intent from the consistent pattern of conduct in Bosnia and Herzegovina. In its reasoning, the Court relies heavily on several arguments, each of which is inadequate for the purpose, and contradictory to the consistent jurisprudence of the international criminal tribunals.

41. The Court first considers whether the Strategic Goals of the Serbian People in Bosnia and Herzegovina<sup>19</sup> evidence genocidal intent, but concludes that the goals “were capable of being achieved by the displacement of the population and by territory being acquired” (Judgment, para. 372). The Court further notes that the motive of creating a Greater Serbia “did not necessarily require the destruction of the Bosnian Muslims and other communities, but their expulsion” (*ibid.*). The Court essentially ignores the facts and substitutes its own assessment of how the Bosnian Serbs could have hypothetically best achieved their macabre Strategic Goals. The Applicant is not asking the Court to evaluate whether the Bosnian Serbs were efficient in achieving their objectives. The Applicant is asking the Court to look at the pattern of conduct and draw the logically necessary inferences. The jurisprudence of the international criminal tribunals on this point is less amenable to artificial distinctions between the intent relevant to genocide and that relevant to ethnic cleansing than the Court. The Appeal Chamber in *Krstić* has clearly held that the pattern of conduct known as ethnic cleansing may be relied on as evidence of the *mens rea* of genocide<sup>20</sup>. Coupled with population transfers, what other inference is there to draw from the overwhelming evidence of massive killings systematically targeting the Bosnian

<sup>19</sup> The Strategic Goals were as follows: (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; and (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 (Judgment, para. 371).

<sup>20</sup> *Krstić*, IT-98-33-A, para. 34. On this basis, the Appeal Chamber held that

“[s]ome other members of the VRS Main Staff harboured the same intent to carry out forcible displacement, but viewed this displacement as a step in the accomplishment of their genocidal objective. [To some other members of the VRS Main Staff], the forcible displacement was a means of advancing the genocidal plan.” (*Ibid.*, para. 133.)

See also *Krajisnik*, IT-00-39-T, Judgment of 27 September 2006, para. 854.

Muslims than genocidal intent? If the only objective was to move the Muslim population, and the Court is willing to assume that the Bosnian Serbs did only that which is strictly necessary in order to achieve this objective, then what to make of the mass murder? If the Court cannot ignore that population transfer was one way of achieving the Strategic Goals, then why should it ignore that, in fact, the Bosnian Serbs used this method as one of many — including massive killings of members of the protected group.

42. The second argument the Court relies on bears on the conduct of the ICTY's Prosecutor and the Tribunal's jurisprudence on genocide. The Court rejects the Applicant's argument that the pattern of atrocities committed over many communities demonstrates the necessary intent because it "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" (Judgment, para. 374). That the ICTY has not found genocide based on patterns of conduct in the whole of Bosnia is of course not in the least surprising. The Tribunal only has jurisdiction to judge the individual criminal liability of particular persons accused before it, and the relevant evidence will therefore be limited to the sphere of operations of the accused. In addition, prosecutorial conduct is often based on expediency and therefore no conclusions can be drawn from the prosecution's acceptance of a plea bargain or failure to charge a particular person with genocide. While the Court is intent on adopting the burden of proof relevant to criminal trials, it is not willing to recognize that there is a fundamental distinction between a single person's criminal trial and a case involving State responsibility for genocide. The Court can look at patterns of conduct throughout Bosnia because it is not constrained by the sphere of operations of any particular accused — and it should have done so.

43. The consistent jurisprudence of the international criminal tribunals is clear on the permissibility (and even the necessity) of relying on facts and circumstances from which to infer genocidal intent. The ICTY Appeal Chamber held that proof of specific genocidal intent

"may, in the absence of direct explicit evidence, be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic

targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts”<sup>21</sup>.

44. Relying on the decision in *Jelisić*, the Appeal Chamber in *Krstić* also held that “[w]hen direct evidence of genocidal intent is absent, the intent may still be inferred from the factual circumstances of the crime”<sup>22</sup>.

45. The ICTR has also consistently relied on inference as a means of establishing the requisite genocidal *mens rea*. In *Rutaganda*, the ICTR Appeal Chamber affirmed the Trial Chamber’s approach to inferring genocidal intent:

“The Chamber considers that it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act.”<sup>23</sup>

46. The ICTR Appeal Chamber also held that, while making anti-Tutsi utterances or being affiliated to an extremist anti-Tutsi group is not a *sine qua non* for establishing the *dolus specialis* of genocide, establishing such a fact may, nonetheless, facilitate proof of specific intent<sup>24</sup>. In *Musema*, the ICTR Appeal Chamber held that “in practice, intent can be, on a case-by-case basis, inferred from the material evidence submitted to the Chamber, including the evidence which demonstrates a consistent pattern of conduct by the Accused”<sup>25</sup>. Finally, in *Kayishema* (the reasoning of which the Appeal Chamber affirmed)<sup>26</sup>, the ICTR held that

“[t]he perpetrator’s actions, including circumstantial evidence, however may provide sufficient evidence of intent. . . The Chamber finds that the intent can be inferred either from words or deeds and may

<sup>21</sup> *Jelisić*, IT-95-10-A, Judgment of 5 July 2001, para. 47; *Jelisić*, IT-95-10, Judgment of 14 December 1999, para. 73.

<sup>22</sup> *Krstić*, *supra* footnote 20, para. 34.

<sup>23</sup> *Akayesu*, ICTR-96-4, Judgment of 2 September 1998, para. 523, and *Georges Rutaganda*, ICTR-96-3, Judgment of 6 December 1999, para. 398, both as affirmed in *Georges Rutaganda*, ICTR-96-3-A, Judgment of 26 May 2003, para. 528.

<sup>24</sup> *Georges Rutaganda*, ICTR-96-3-A, Judgment of 26 May 2003, para. 525.

<sup>25</sup> *Musema*, ICTR-96-13-A, Judgment of 27 January 2000, para. 167.

<sup>26</sup> *Kayishema*, ICTR-95-1-A, Judgment of 1 June 2001, para. 148.

be demonstrated by a pattern of purposeful action. In particular, the Chamber considers evidence such as the physical targeting of the group or their property; the use of derogatory language toward members of the targeted group; the weapons employed and the extent of bodily injury; the methodical way of planning, the systematic manner of killing. Furthermore, the number of victims from the group is also important.”<sup>27</sup>

47. It is regrettable that the Court’s approach to proof of genocidal intent did not reflect more closely this relevant jurisprudence.

48. *Fourthly*, genocide is definitionally a complex crime in the sense that unlike homicide it takes time to achieve, requires repetitiveness, and is committed by many persons and organs acting in concert. As such, it cannot be appreciated in a disconnected manner. Unfortunately, there are instances in the Judgment where this happens, including on crucial issues such as FRY responsibility for the genocide at Srebrenica.

49. Belgrade’s knowledge of the more general operations in Srebrenica — those geared toward “taking the town” — is amply established<sup>28</sup>. In addition, Carl Bildt (European negotiator) met twice with President Milošević and General Mladić together in the midst of the takeover of Srebrenica and the subsequent massacre<sup>29</sup>. As regards General Mladić, it is accepted that his promotion to the rank of Colonel General was handled in Belgrade, and the Respondent’s claim that this was no more than some administrative confirmation of a decision made in Pale is unconvincing. The Secretary-General’s report on the fall of Srebrenica relates that Mr. Bildt was joined in his meeting with President Milošević on 14 July by General Mladić — which is the period during which the Court determined that the decision to eliminate physically the whole of the adult male population of the Muslim community of Srebrenica was taken (Judgment, para. 423). The Report also highlights that President Karadžić (President of the Republika Srpska) was unaware of the meetings between Mr. Bildt, President Milošević and General Mladić<sup>30</sup>.

<sup>27</sup> *Kayishema*, ICTR-95-1, Judgment of 21 May 1999, para. 93.

<sup>28</sup> Netherlands Institute for War Documentation, *Srebrenica — a ‘safe’ area. Reconstruction, background, consequences and analyses of the fall of the Safe Area*, 10 April 2002, Chap. 7.

<sup>29</sup> Report of the Secretary-General pursuant to General Assembly resolution 53/35, “The Fall of Srebrenica”, United Nations doc. A/54/549 (1999), p. 81, para. 372.

<sup>30</sup> *Ibid.*, p. 82, paras. 373-376.

50. Finally, in regard specifically to the massacres in Srebrenica, General Clark testified in Milošević's trial to the following conversation he had with the President of the FRY:

“Well, all I can confirm, Your Honour, is the discussion that I had. I went to Milošević and I asked him. I said, ‘If you have so much influence over these 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 of the publicity at the time about the Srebrenica massacre. Now, I did not use the word ‘massacre’, and I did not specifically use the word ‘civilian’, but the context of the conversation was extremely clear and timely at that point.”<sup>31</sup>

51. General Mladić's decisive role in the Srebrenica genocide, the close relationship between General Mladić and President Milošević, the influential part President Milošević played in negotiations regarding Srebrenica (both before and after the genocide), and his own statements as set forth above, each taken alone, might not amount to proof of President Milošević's knowledge of the genocide set to unfold in Srebrenica. Taken together, these facts clearly establish that Belgrade was, if not fully integrated in, then fully aware of, the decision-making processes regarding Srebrenica, while the Republika Srpska itself was excluded. Even after the fact, negotiations following the fall of Srebrenica and the genocide committed there were held simultaneously with General Mladić and President Milošević<sup>32</sup>. There can be no doubt that President Milošević was fully appraised of General Mladić's (and the Bosnian Serb army's) activities in Srebrenica throughout the takeover and massacres.

52. An even more disturbing feature in the Court's reasoning is evident in its treatment of the Serbian paramilitary units known as the “Scorpions” (Judgment, paras. 289, 389 and 395).

53. Thus, paragraph 389 of the Judgment considers two documents presented by the Applicant, in which there is reference to the “Scorpions”

<sup>31</sup> *Prosecutor v. Milošević*, ICTY Judgment, No. IT-02-54, Transcript of 16 December 2003, pp. 30494-30495.

<sup>32</sup> Report of the Secretary-General pursuant to General Assembly resolution 53/35, “The Fall of Srebrenica”, United Nations doc. A/54/549 (1999), p. 85, para. 392.

as “MUP of Serbia” and a “unit of Ministry of Interiors of Serbia”. The paragraph notes that the authenticity of the documents was disputed by the Respondent presumably because “they were copies of intercepts, but not originals”. But it is plain that if the Court insisted on original documents, it would never be able to render any judgments. Be this as it may, the other reason advanced to undermine the importance of these documents is that they are not addressed to Belgrade, the senders being “officials of the police forces of the Republika Srpska”. But this in itself does not deny their probative value. When an official of the Republika Srpska sends a telegram to his superior in which the Scorpions are described as “MUP of Serbia” or “a unit of Ministry of Interiors of Serbia”, there is no reason to doubt the veracity of this statement.

54. Consequently, we have here a case of a unit which had been incorporated into the forces of the Respondent — though the date for that incorporation is in dispute — yet the Court concludes that they are not to be treated as *de jure* organs of the Respondent in 1995, notwithstanding evidence that they were perceived to be such by the Republika Srpska officials. Equally surprising is the Court’s treatment of the statement by the Government of Serbia and Montenegro — after President Milošević’s fall from power — to the effect that what happened in Srebrenica was not the work of Serbia, but of the ousted régime. This statement was in fact occasioned by the showing, on national and international television, of the shocking images of the brutal execution of six Muslim prisoners in Trnovo, near Srebrenica, by the Scorpions. The Court failed to take account of this closely connected fact in its appreciation of the status of the Scorpions.

55. Lastly, with regard to the Scorpions, the Court goes on in paragraph 389 to say:

“Furthermore, the Court notes that in any event the act of an organ placed by a State at the disposal of another public authority by a state 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.”

However, while the spirit of Article 6 of the ILC’s Articles on State Responsibility is faithfully reflected, it must be noted that on this important question of fact, there is no evidence that the Scorpions were placed at the disposal of another public authority.

56. *Fifthly*, the Court’s treatment of the statement by the Government of Serbia and Montenegro alluded to above leaves much to be desired. In view of the importance of this statement, it bears being recalled in full:

“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 régime of terror and death, against whom the great 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.”

57. The Court has concluded that this statement was of a political nature and does not amount to an admission of Serbian responsibility for the massacres in Srebrenica. To support its refusal to take at face value the plain language of the Serbian Council of Ministers, the Court invokes its decisions in the *Nuclear Tests* and *Frontier Dispute (Burkina Faso/Republic of Mali)* cases. These Judgments, however, are neutral in their support for the conclusions the Court draws in paragraph 378. In these Judgments the Court held that declarations made by way of unilateral acts, in particular by highly placed government officials<sup>33</sup>, can have binding legal consequences. In determining these consequences, the Court has consistently considered whether the language employed reveals a clear intention (*Nuclear Tests (New Zealand v. France)*, *Judgment, I.C.J. Reports 1974*, p. 473, para. 47; see also *Temple of Preah Vihear (Cambodia v. Thailand)*, *Preliminary Objections, Judgment, I.C.J. Reports 1961*, pp. 31-32). And intention must be considered in the context in which the statements were made (the Court is not to presume that the statements were not made *in vacuo*) (*Nuclear Tests (New Zealand v. France)*, *Judgment, I.C.J. Reports 1974*, p. 474, para. 52)), and in the general framework of international discourse.

58. Indeed, the opposite conclusion from that reached by the Court in paragraph 378 is supported by the cited jurisprudence. To the extent that the effect of a unilateral act depends on the intent behind it and the context within which it was made, one need only consider this: the Serbian Government at the time was attempting to distance itself — as a new and democratic régime — from the régime which had come before it, in light of the revelation of horrible crimes committed by paramilitary units (the

<sup>33</sup> In *Nuclear Tests (New Zealand v. France)*, the Court specifically holds that

“there can be no doubt, in view of [the French President’s] functions, that his public communications or statements, oral or written, as Head of State, are in international relations acts of the French State” (*Judgment, I.C.J. Reports 1974*, p. 474, para. 51).

Scorpions) on national Serbian and international television. The intent was to acknowledge the previous régime's responsibility for those crimes, and to make a fresh start by distancing the new régime therefrom. A clearer intention to "admit" past wrongs cannot be had.

59. Of equal note is the Court's failure to address its decisions in *Nicaragua* and *Democratic Republic of the Congo v. Uganda* — both of which were invoked in the Applicant's pleadings on this subject (CR 2006/11, pp. 10-15 (Condorelli)). In *Nicaragua*, the Court considered what legal consequences could be drawn from the United States characterization of its conduct in Nicaragua as "self-defence". In so doing, the Court had this to say:

"statements of this kind, emanating from high-ranking official political figures, sometimes indeed of the highest rank, are of particular probative value *when they acknowledge facts or conduct unfavourable to the State* represented by the person who made them. They may then be construed as a *form of admission*." (*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; emphasis added.)

"Among the legal effects which such declarations may have is that they may be regarded *as evidence of the truth of facts*, as evidence that such facts are attributable to the State the authorities of which are the authors of these declarations, and, to a lesser degree, as evidence for the legal qualification of these facts." (*Ibid.*, p. 43, para. 71; emphasis added.)

60. The Court's reasoning in *Nicaragua* is highly relevant in its application to the statement made by the Serbian Council of Ministers. The Council of Ministers unambiguously admits that the previous Government of Serbia and Montenegro (internationally recognized and unquestionably acting on behalf of the Serbian State for the purposes of State responsibility) had "ordered and organized" the killings in Srebrenica. Given the continuity of State responsibility, despite the change in régime, this statement certainly *acknowledge[s] facts or conduct unfavourable to the State making the statement*, and on the basis of *Nicaragua* thereby amounts to a form of admission, or at the very least, evidence of the truth of the facts it asserts. This conclusion is in keeping with the Court's recent decision in *Democratic Republic of the Congo v. Uganda*, in which the Court observed that it would

"give particular attention to reliable evidence *acknowledging facts or conduct unfavourable to the State* represented by the person making them. . ." (*Armed Activities on the Territory of the Congo (Demo-*

*cratic Republic of the Congo v. Uganda*), *Judgment, I.C.J. Reports 2005*, p. 201, para. 61.)

61. The Court's lack of application of the jurisprudence it does invoke, and failure to invoke jurisprudence more directly on point is unfortunate. The Serbian Council of Ministers' statement, taken in the context of the other evidence available to the Court, certainly amounts to an admission of the responsibility of President Milošević's régime for the massacres in Srebrenica, which the Court has determined amount to genocide.

### III. CONCLUSION

62. The Court has absolved Serbia from responsibility for genocide in Bosnia and Herzegovina — save for responsibility for failure to prevent genocide in Srebrenica. It achieved this extraordinary result in the face of vast and compelling evidence to the contrary. This result was however a product of a combination of methods and techniques the Court adopted that could not but have led to this result. In the first place the Court refused to inform itself regarding the twin questions of intent and attributability, the most elusive points in proving the crime of genocide and engaging State responsibility for it. At the same time, the Court refused to translate its taking note of the refusal to divulge redacted materials into concrete steps regarding the onus and standard of proof, thereby putting the Applicant at a huge disadvantage. If this was not enough, it required in addition too high a threshold for control and one that did not accord with the facts of this case nor with the relevant jurisprudence of the ICTY. The Court likewise failed to appreciate the definitional complexity of the crime of genocide and the need for a comprehensive approach in appreciating closely related facts, the role of General Mladić and the Scorpions in Srebrenica being a prime example. Moreover, where certain facts did not fit the Court's conclusions, they were dismissed with no justification, the statement of the new Government of Serbia being also a case in point. I am certain that as far as Srebrenica is concerned, FRY responsibility as a principal or as an accomplice is satisfied on the facts and in law. I am of the opinion also that with regard to other parts of Bosnia and Herzegovina, had the Court followed more appropriate methods for assessing the facts, there would have been, in all probability, positive findings as to Serbia's international responsibility.

(Signed) Awn Shawkat AL-KHASAWNEH.

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