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HAGUE INTERNATIONAL TRIBUNALS

The *Bosnia Genocide* Case

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Abstract

The *Bosnia Genocide* case dealt with several important matters of international law, apart from the issue of responsibility proper for genocide. The Court began by addressing issues of state succession in order to identify the proper respondent. It then found that the objection to jurisdiction raised by the respondent was *res judicata*. It held that the Genocide Convention created state responsibility in addition to international criminal responsibility of the individual. The contribution of the judgment to the law of evidence, in particular with reference to the standard and methods of proof, is significant. Finally, the Court applied the codification by the International Law Commission of attribution in state responsibility to the situation before it in deciding that the genocidal acts subject of the case were not attributable to Serbia, while also holding that Serbia was, nevertheless, responsible for omitting to prevent genocide.

Key words

attribution in state responsibility; Genocide Convention and state responsibility; matters and standard of proof; parties; *res judicata* and jurisdictional issues

In the *Bosnia Genocide* case[1] the International Court of Justice (ICJ) had to deal with the crime of genocide allegedly committed in 1995 by Serbia in respect of Bosnian Muslims. The governing instrument concerned with genocide was the Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention). The Court, by sizeable majorities, *inter alia*

1. rejected the objections contained in the final submissions made by the respondent to the effect that the Court had no jurisdiction; and affirmed that it had 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;
2. found that Serbia had not committed genocide, through its organs or persons whose acts engaged its responsibility under customary international law, in

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1. *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Merits, Judgment of 26 February 2007 (not yet published) (hereinafter *Bosnia Genocide* case).

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violation of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide;

3. found that Serbia had 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;
4. found that Serbia had not been complicit in genocide, in violation of its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide;
5. found that Serbia had 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; and
6. found that Serbia had 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 had failed fully to co-operate with that Tribunal.[2]

The issues and aspects which are of particular interest in the case related broadly to

1. the identification of the respondent party;
2. jurisdiction and *res judicata*;
3. state responsibility under the Genocide Convention;
4. matters of proof; and
5. the attribution to the state of responsibility for wrongs committed.

1. Identification of the respondent party

The Court first proceeded to identify the respondent party before it in the proceedings. Such identification was necessary because of events supervening since the filing of the application. It observed that after the close of the oral proceedings, by a letter date 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. On 28 June 2006, by its Resolution 60/264, the General Assembly admitted the Republic of Montenegro as a new member of the United Nations.

The Court observed that the facts and events on which the final submissions of Bosnia and Herzegovina were based occurred at a period of time when

2. The three remaining conclusions related to compliance with a provisional measures order, compliance with the obligation to turn in war criminals to the ICTY, and satisfaction as a remedy.

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Serbia and Montenegro constituted a single state. It noted that Serbia had accepted 'continuity between Serbia and Montenegro and the Republic of Serbia', and had assumed responsibility for 'its commitments deriving from international treaties concluded by Serbia and Montenegro', thus including commitments under the Genocide Convention.[3] Montenegro, on the other hand, did not claim to be the continuator of Serbia and Montenegro.

The Court recalled a fundamental principle that no state may be subject to its jurisdiction without its consent. It stated that the events related clearly showed that the Republic of Montenegro does not continue the legal personality of Serbia and Montenegro; it could not therefore have acquired, on that basis, the status of respondent in the case.[4] It was also clear that Montenegro did not give its consent to the jurisdiction of the Court over it for the purposes of the dispute. Furthermore, the applicant did not assert that Montenegro was still a party to the present case; it merely emphasized its views as to the joint and several liability of Serbia and of Montenegro.

The Court, thus, indicated that the Republic of Serbia remained a respondent in the case, and at the date of the current judgment in the case was, indeed, the only respondent. Accordingly, any findings that the Court made in the operative paragraph of the judgment were addressed to Serbia. However, the Court also recalled that any responsibility for past events determined in the current judgment involved at the relevant time the state of Serbia and Montenegro, and observed that the Republic of Montenegro was a party to the Genocide Convention and that parties to that Convention had undertaken the obligations flowing from it, in particular the obligation to co-operate in order to punish the perpetrators of genocide.[5]

These conclusions of the Court on the issue, it may be remarked, were sound.

2. The Court's jurisdiction and *res judicata*

The respondent again raised objections to the Court's jurisdiction.

The Court proceeded to examine an important issue of a jurisdictional character raised by the 'Initiative to Reconsider *ex officio* Jurisdiction over Yugoslavia' filed by the respondent in 2001 (the Initiative). It explained that the central question raised by the respondent was whether at the time of the filing of the application instituting proceedings the respondent was or was not the continuator of the Federal Republic of Yugoslavia (FRY). The respondent now contended that it was not a continuator state, and therefore not only was it not a party to the Genocide Convention when the proceedings were instituted, but it was not then a party to the Statute of the Court by virtue of membership of 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.

3. *Bosnia Genocide* case, supra note 1, at para. 75.
4. Ibid., at para. 76.
5. Ibid., at para. 79.

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The Court recalled the circumstances underlying that Initiative. Briefly stated, the situation was that the respondent, after claiming that since the break-up of the FRY in 1992 it was the continuator of that state, and as such maintained the membership of the FRY of 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 United Nations as a new member, thereby in effect relinquishing its previous claim.

In order to clarify the background to these issues, the Court reviewed the history of the status of the respondent with regard to the United Nations from the break-up of the FRY to the admission of Serbia and Montenegro on 1 November 2000 as a new member.

The Court then observed that the applicant contended that the Court should not examine the question raised by the respondent in its Initiative. Bosnia and Herzegovina first argued that the respondent should have raised the issue of whether the FRY 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 judgments[6] on those objections prevents it from reopening the issue. Bosnia and Herzegovina maintained, second, 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 could not call into question the authority of its decisions as *res judicata*.

With respect to the first contention of Bosnia and Herzegovina, the Court rightly 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. The Court stated that it did not find it necessary to consider whether the conduct of the respondent could be held to have constituted acquiescence in the jurisdiction of the Court.[7] Such acquiescence, if established, could be relevant to questions of consensual jurisdiction, but not to the question whether a state had the capacity under the Statute to be a party to proceedings before the Court. The Court observed that 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 was not a matter of the consent of the parties. It followed that, whether or not the respondent should be held to have acquiesced in the jurisdiction of the Court in the case, such acquiescence would in no way debar the Court from examining and ruling on the question that had been raised.[8] The same reasoning applied to the argument that the respondent was estopped from raising the matter again at the merits stage or debarred from doing so by considerations of good faith.

The Court therefore turned to examine the second contention of Bosnia and Herzegovina, that the question of the capacity of the respondent to be a party to

6. *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Preliminary Objections, Judgment of 11 July 1996, [1996] ICJ Rep. 595.
7. *Bosnia Genocide* case, supra note 1, at para. 102.
8. Ibid., at para. 103.

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proceedings before the Court had already been resolved as a matter of *res judicata* by the 1996 judgment on jurisdiction.

The Court recalled that the principle of *res judicata* was embedded in the terms of the Statute of the Court and the Charter of the United Nations. That principle signified that the decisions of the Court were not only binding on the parties, but were final, in the sense that they could not be reopened by the parties as regards the issues that had been determined, save by procedures of an exceptional nature specially laid down for that purpose (the procedure for revision in Article 61 of the Statute). In the view of the Court, two purposes underlay the principle of *res judicata*: first, the stability of legal relations required that litigation come to an end; second, it was in the interest of each party that an issue which had already been adjudicated in favour of either party be not argued again.[9]

The Court observed that it has 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. The respondent contended that the latter 'do not and cannot have the same consequences as decisions on the merits'. The Court explained that the decision on questions of jurisdiction 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. The Court did not uphold the other arguments of the respondent in respect of *res judicata*. It stated 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 Statute provided for only one procedure: that under Article 61, which offered the possibility of the revision of judgments, subject to the restrictions stated in that Article. In this regard, it recalled that the respondent's application for revision of the 1996 Judgment[10] in the case was dismissed, as not meeting the conditions of Article 61.

2.1. Application of the principle of *res judicata* to the 1996 Judgment

The Court recalled that the operative part of a judgment of the Court possessed the force of *res judicata*. The operative part of the 1996 Judgment stated 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'. According to the Court, that jurisdiction was 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 was to call into question the force as *res judicata* of the operative clause of the Judgment. Therefore,

9. Ibid., at para. 116.
10. 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 of 3 February 2003, [2003] ICJ Rep. 7.

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the Court did not need to examine the respondent's objection to jurisdiction based on its contention as to its lack of status in 1993.

The respondent had, however, advanced a number of arguments tending to show that the 1996 Judgment was not conclusive on the matter. It had been *inter alia* suggested that, for the purposes of applying the principle of *res judicata* to a judgment on preliminary objections, the operative clause 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 Court did not uphold this contention, explaining that it does not 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.[11] If any question arose 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. It may be necessary to distinguish between, first, the issues which had been decided with the force of *res judicata*, or which are necessarily entailed in the decision of those issues; second, any peripheral or subsidiary matters, or *obiter dicta*; and, finally, matters which have not been ruled upon at all.

The Court noted that the fact that it has dealt, in a number of past cases, 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*.[12] There is an essential difference between those cases mentioned in paragraph 127 of the Judgment and the present case: 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. By contrast, the contentions of the respondent in the present case would, if upheld, effectively reverse the 1996 Judgment.

Addressing the argument of the respondent that the issue of whether the FRY had access to the Court had not been decided in the 1996 Judgment, the Court notes that the statements it made in the 2004 Judgments in the *Legality of Use of Force* cases did not signify that in 1996 the Court was unaware of the fact that the solution adopted in the United Nations as to the question of continuation of the membership of the Socialist Federal Republic of Yugoslavia (SFRY) '[was] not free from legal difficulties'. As the Court recognized in the 2004 Judgments, 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. Although 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 affirmed its jurisdiction to adjudicate upon the dispute and since the question of a state's capacity to be a party to proceedings is a matter which the Court must, if necessary, raise ex officio, 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

11. *Bosnia Genocide* case, *supra* note 1, at para. 125.
12. Ibid., at para. 128.

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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 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. 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.[13]

Judge Anzilotti's dissenting opinion in the *Chorzów Factory* case is a good starting point for the consideration of the World Court's approach to the principle of *res judicata*. It enunciated the implications of the principle of *res judicata*. In acknowledging that the principle applied, he stated: 'we have here the three traditional elements for identification, *persona*, *petitum*, *causa pretendi*, for it is clear that "that particular case" (*le cas qui a été décidé*) covers both the object and the grounds of the claim'.[14] The explanation of this cryptic statement is that, when a plea that a complaint is barred by the doctrine or principle or *res judicata* is upheld, it means that a further ruling on claims is precluded, where such claims are identical in substance to claims on which the tribunal has already passed judgment,[15] and that the doctrine becomes applicable where an earlier complaint has been dismissed if three conditions are fulfilled simultaneously, namely that (i) the parties are the same, (ii) the substance of the claims is the same, and (iii) the cause of action is the same.[16]

In *Hubeau*, where the applicant questioned the step at which he had been placed upon being promoted, the respondent raised the plea of *res judicata*. The tribunal held that, even though the applicant was a party in both cases, the substance of the applicant's claim was not the same as that of the complaint in an earlier case challenging an agreement relating to the integration of the International Patent Institute (IPI) into the European Patent Organisation (EPO) and, therefore, the matter was not *res judicata*.[17] Clearly, in the case of jurisdictional matters there is no cause of action which touches the merits as such, but there is a *causa petendi* in that the respondent seeks to establish a point relating to jurisdiction.

It was in the *Corfu Channel* and *Asylum* series of cases that the ICJ first explained the law as it applied to situations that came before it. The *Corfu Channel* case dealt with *res judicata* in regard to matters of jurisdiction, as does the *Bosnia Genocide* case. After the judgment on the merits in the *Corfu Channel* case, which reserved for later consideration the question of compensation, Albania challenged the jurisdiction of the Court. In its written observations the United Kingdom pleaded on this issue

13. Ibid., at para. 135.
14. *Factory at Chorzów (Poland v. Germany)*, 1927 PCIJ Rep. Series A No. 12, at 23 (Judge Anzilotti, Dissenting Opinion).
15. In re *Hubeau*, ILOAT Judgment No. 574 [1983], at 3. For a discussion of *res judicata* in general, see Amerasinghe, *The Law of the International Civil Service* (1994), Vol. I., at 241.
16. In re *Hubeau*, *supra* note 15, at 4.
17. Ibid.

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that the matter was *res judicata*, citing Articles 36(6) and 60 of the Statute and the judgment on the merits. No observations were filed by Albania, which took no further part in this stage of the proceedings, and thus the issue of compensation came up for judgment by default. In its judgment in the *Corfu Channel* case the Court applied the principle of *res judicata* to exclude a re-examination of the jurisdictional issue, stating,

> [T]he Albanian Government disputed the jurisdiction of the Court with regard to the assessment of damages. The Court may confine itself to stating that this jurisdiction was established by its Judgment of April 9th, 1949; that, in accordance with the Statute (article 60), which, for the settlement of the present dispute, is binding upon the Albanian Government, that Judgment is final and without appeal, and that therefore the matter is *res judicata*.[18]

The Court thus went ahead, interpreted the special agreement, and awarded damages. The operative part of the earlier judgment decided the question of jurisdiction. That the parties had not argued the matter was not relevant, because they had the opportunity to argue it after it was raised. The case, *inter alia*, established that the doctrine applied to jurisdictional questions.

In the present case the Court concluded, after examining the facts and argument in respect of the contention that the respondent was not, on the date of the filing of the application instituting proceedings, a state having the capacity to come before the Court under the Statute, that the principle of *res judicata* precluded any reopening of the decision embodied in the 1996 Judgment. The respondent, however, also argued that the 1996 Judgment was not *res judicata* as to the further question of whether the FRY was, at the time of the institution of proceedings, a party to the Genocide Convention, and had sought to show that at that time it was not, and could not have been, such a party. The Court, however, considered that the reasons given for holding that the 1996 Judgment settled the question of jurisdiction in this case with the force of *res judicata* were applicable *a fortiori* as regards this contention, since on this point the 1996 Judgment was quite specific. The Court thus concluded that, as stated in the 1996 Judgment, it had jurisdiction, under Article IX of the Genocide Convention, to adjudicate upon the dispute.

The application of the principle of *res judicata* to the facts in the present case cannot be questioned. The findings in the previous case on jurisdiction clearly created a situation of *res judicata*, as concluded by the Court.[19]

3. State responsibility under the Genocide Convention[20]

The Court observed that there was a dispute between the parties as to the meaning and the legal scope of Article IX of the Genocide Convention, especially as to whether the obligations the Convention imposed upon the parties were limited to legislate, and to prosecute or extradite, or whether the obligations of the states parties

18. *Corfu Channel (United Kingdom v. Albania)*, Compensation, Judgment of 15 December 1949, [1949] ICJ Rep. 244, at 248.
19. *Bosnia Genocide* case, *supra* note 1, at paras. 80–141.
20. Ibid., at paras. 155–82.

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extend to the obligation not to commit genocide and the other acts enumerated in Article III. This raised a question of interpretation of the Convention.

The Court stated that what obligations the Convention imposed upon the parties to it depended on the ordinary meaning of the terms of the Convention read in their context and in the light of its object and purpose. It reviewed the wording of Article I, which provided *inter alia* that '[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.' The Court found that Article I, in particular its undertaking to prevent, created obligations distinct from those which appeared in the subsequent Articles.[21] This finding was confirmed by the preparatory work of the Convention and the circumstances of its conclusion.

The Court considered whether the parties were under an obligation not to commit genocide themselves, since such an obligation was not expressly imposed by the actual terms of the Convention. In the view of the Court, taking into account the established purpose of the Convention, the effect of Article I was to prohibit states from themselves committing genocide.[22] Such a prohibition followed, first, from the fact that Article I categorized 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. Second, it followed from the expressly stated obligation to prevent the commission of acts of genocide. It would be paradoxical if states were thus under an obligation to prevent, but were not forbidden to commit, such acts through their own organs or persons over whom they had 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 commission of genocide. The Court noted that its conclusion was confirmed by one unusual feature of the wording of Article IX, namely the phrase 'including those [disputes] relating to the responsibility of a state for genocide or any of the other acts enumerated in Article III'. According to the English text of the Convention, the responsibility contemplated is responsibility 'for genocide', not merely responsibility 'for failing to prevent or punish genocide'. The particular terms of the phrase as a whole confirmed that contracting parties may be held responsible for genocide and the other acts enumerated in Article III of the Convention.

The Court then discussed three further arguments 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 was that, as a matter of 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. The Court observed 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, and that the obligations in question and the responsibilities of states that would arise from

21. Ibid., at para. 162.
22. Ibid., at paras. 166–167.

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breach of such obligations were obligations and responsibilities under international law. They were not of a criminal nature.[23]

The second argument was that the nature of the Convention was such as to exclude from its scope state responsibility for genocide and the other enumerated acts. The Convention, it was said, is a standard international criminal law convention focused essentially on the criminal prosecution and punishment of individuals and not on the responsibility of states. However, the Court saw 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 imposed obligations on states distinct from the obligations which the Convention required them to place on individuals.

Concerning the third and final argument, the Court examined the drafting history of the Convention, in the Sixth Committee of the General Assembly, which was said to show that there was no question of direct responsibility of the State for acts of genocide. However, having reviewed the history, the Court concluded that it could be seen as supporting the conclusion that contracting parties are bound not to commit genocide, through the actions of their organs or persons or groups whose acts are attributable to them.

A related issue was 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. The Court observed that if a state was to be responsible because it had breached its obligation not to commit genocide, it must be shown that genocide as defined in the Convention had been committed. That would also be the case with conspiracy under Article III(b) and complicity under Article III(e); and for the purposes of the obligation to prevent genocide.

According to the respondent, the condition sine qua non for establishing state responsibility was the prior establishment, according to the rules of criminal law, of the individual responsibility of a perpetrator engaging the state's responsibility.

In the view of the Court the different procedures followed by, and powers available to, the Court and 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 had been committed.[24] Under its Statute the Court had the capacity to undertake that task, while applying the standard of proof appropriate to charges of exceptional gravity. Turning to the terms of the Convention itself, the Court had already held that it had jurisdiction to find a state responsible if genocide or other acts enumerated in Article III were committed by its organs, or persons or groups whose acts were attributable to it.

The Court, therefore, rightly concluded that state responsibility can arise under the Convention for genocide conspiracy and complicity, without an individual being convicted of the crime or an associated one.

23. Ibid., at para. 170.
24. Ibid., at para. 181.

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4. Matters of proof

Three important issues relating to proof of facts were addressed by the Court. These were:

1. the burden of proof, and the place of inferences;
2. the standard of proof; and
3. methods of proof.

The court showed concern in these three areas because many allegations of fact made by the applicant state were disputed by the respondent, even though there was increasing agreement between the parties on certain matters through the course of the proceedings. The Court pointed out that

> 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.[25]

4.1. The burden of proof

On the burden or onus of proof the Court held that it was well established in general that the applicant must establish its case and that a party asserting a fact must establish it – *actori incumbit onus probandi*. It cited the *Nicaragua* case.[26] Not only is this a general principle of law but it has been endorsed by the Permanent Court of International Justice (PCIJ) and the ICJ in several other cases.[27]

In the current case the applicant failed to establish the facts required to enable the Court to conclude that the respondent had committed genocide or had conspired to commit genocide or had been an accomplice in the commission of genocide. Thus the applicant failed on the claims made by it in this regard. On the other hand, there was adequate evidence to support the conclusions that the respondent had failed to prevent genocide and had failed to transfer Ratko Mladić to the International Criminal Tribunal for the former Yugoslavia (ICTY).

In connection with the burden of proof, while agreeing with the above general proposition, the applicant made two points with which the Court had to deal.[28] The first related to the claim that burden of proof was reversed, because the respondent had refused to produce the full (unredacted) texts of certain documents, on the

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25. Ibid., at para. 202.
26. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment of 26 November 1984, [1984] ICJ Rep. 392, at 437, para. 101.
27. See C. F. Amerasinghe, *Evidence in International Litigation* (2005), 65–6, 67.
28. *Bosnia Genocide* case, *supra* note 1, at paras. 204–207, 370–376.

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ground that it was a matter of a national security interest that the full documents not be given to the applicant and the Court. Clearly, the Court did not agree that the burden of proof was reversed. However, it did indicate that it could 'draw its own conclusions' pursuant to Article 49 of the Statute of the Court, which, however, states merely that 'formal note' shall be taken of any refusal to produce evidence that may be in the possession of the respondent. It is a progressive step not taken before that in the interpretation of Article 49 the Court did imply that it could make 'adverse inferences' rather than merely take formal note of a refusal to produce evidence.

The Court, however, did not in the case resort to an adverse inference. It was also of the view that there was plenty of other documentary evidence to which the applicant and the Court had access. This included ICTY records. It is clear that in this area it was not prepared on the evidence to draw an adverse inference, while it did take note of the respondent's refusal.

The second point related to the claim made by the applicant that the Court should draw 'inferences', notably about specific intent (*dolus specialis*), from established facts – that is, from what the applicant referred to as a 'pattern of acts' which 'speaks for itself'. The Court examined the evidence but was unable to draw the required inferences relating to the intent to commit genocide on the evidence. It found that the evidence was compatible with a different intent not including the specific intent to commit genocide.[29] What is important from the point of view of the law of evidence is the fact that the Court implicitly accepted that in an appropriate situation 'inferences' could be drawn in order to facilitate the *onus probandi*.[30]

4.2. The standard of proof

There was an issue raised by the parties about the standard of proof to be applied. The Court, consistently with its previous jurisprudence, applied a very high standard. It is sufficient to quote what the Court said on this matter, in deciding, negatively, that proof on the balance of probabilities was inadequate and, positively, that a high degree of certainty was required.

> 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, ICJ 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,

29. Ibid., at paras. 370–376.
30. See Amerasinghe, *supra* note 27, ch. 11.

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> the Court requires proof at a high level of certainty appropriate to the seriousness of the allegation.[31]

Whether the Court desired to apply two different standards, both beyond the balance of probabilities, to different sets of circumstances is not clear. What is clear is that it did not accept at all the balance of probabilities as an applicable standard in the case. In regard to the standards it applied, the Court referred, on the one hand, to evidence which is 'fully conclusive' and stated that this meant that the Court had to be 'fully convinced' that the allegations made in the proceedings had been clearly established.[32] It chose this standard in regard to proof in establishing the crime of genocide or other acts enumerated in Article III of the Genocide Convention and in attributing such acts to the state. On the other hand, in regard to breach of the conventional obligation to prevent genocide and to punish and extradite persons charged with genocide, it required 'a high level of certainty' appropriate to the gravity of the allegation.[33]

That a higher standard than the balance of probabilities is to be applied has been acknowledged by the Court, as it pointed out, in previous cases, particularly where charges of exceptional gravity against a state are made. This is nothing new. On the other hand, in effect it is possible that the higher standard requires proof at a high level of certainty, even though the language used may refer to fully conclusive evidence. Or must we conclude that the standard requiring fully conclusive evidence is a higher standard than that requiring a high level of certainty? The answer to the question is not clearly indicated by the Court. Suffice it to say that in regard to the commission of genocide, the attribution of genocide to the respondent state, and the breach of Article III of the Genocide Convention, the Court concluded on the evidence that it was not fully convinced that the burden of proof had been discharged,[20] while in regard to the failure to prevent the crime of genocide and to punish and extradite persons charged with genocide, the burden of proof had been discharged by the claimant, namely the applicant.[34]

4.3. Methods of proof and types of evidence[35]

The Court recalled that the parties submitted a vast array of material, from different sources. It included reports, resolutions, and findings by various UN organs; documents from other intergovernmental organizations; documents, evidence, and decisions from the ICTY; publications from governments; documents from non-governmental organizations; and media reports, articles, and books. They also called witnesses, experts, and witness-experts.

The Court stated that it must itself make its own determination of the facts which were relevant to the law which the applicant claimed the respondent had breached.

31. *Bosnia Genocide* case, *supra* note 1, paras. 208–210.
32. Ibid., at para. 209.
33. For a discussion of higher standards of proof than the balance of probabilities see Amerasinghe, *supra* note 27, at 232.
34. Dissenting judges disagreed with the findings of the Court on this aspect. See, e.g., *Bosnia Genocide* case, *supra* note 1, at paras. 3, 34 (Judge Al-Kasawneh, Dissenting Opinion).
35. *Bosnia Genocide* case, *supra* note 1, at paras. 211–230.

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It acknowledged, however, that the present case had an unusual feature, because many of the allegations before it had already been the subject of the processes and decisions of the ICTY. The Court had thus to consider the significance of the latter processes and decisions. It recalled that in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, it notably said 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 stated that the fact-finding process of the ICTY fell 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. After having set out the arguments of the parties on the weight to be given to the ICTY material and after having reviewed the various ICTY processes, the Court concluded 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.[36] 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, was also entitled to due weight.

The Court finally commented on some of the other evidence submitted to it. Evoking, *inter alia*, the report entitled 'The Fall of Srebrenica', which the UN Secretary-General submitted in November 1999 to the General Assembly, it observed that the care taken in preparing this report, its comprehensive sources, and the independence of those responsible for its preparation all lent considerable authority to it. It gave the assurance that it had gained substantial assistance from the report.[37]

The special feature of the *Bosnia Genocide* case in regard to the types of evidence considered by the Court was the inclusion of ICTY judgments and the report of the UN Secretary-General. The bottom line is that such indirect evidence was regarded as admissible by the Court, in addition to other modes of proof, there being a very liberal approach to the taking into account of evidence produced as available. This liberalism is to be welcomed, on the assumption that the weight to be given to every piece of evidence was subject to assessment by the Court.

The evaluation by the Court of the evidence produced and available in coming to the conclusions recounted at the beginning of this article can hardly be faulted, although a very few dissenting judges may have dissented on some points.[38]

5. Attribution to the respondent state of responsibility

On the basis that the respondent had not admitted responsibility for genocide committed at Srebrenica, the Court was of the view that, in order to ascertain whether the international responsibility of the respondent could have been incurred, in

36. Ibid., at para. 223.
37. Ibid., at para. 230.
38. It is beyond the scope of this article to re-evaluate the evidence in the place of the Court. Suffice it to note that the Court's evaluation of the evidence in coming to its conclusions was agreed to by a sizeable majority of the judges.

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connection with the massacres committed in the Srebrenica area during the period in question, the Court needed to determine whether the acts of genocide could be attributed to the respondent on the basis that those acts were committed by its *organs* or persons whose acts were attributable to it under customary rules of state responsibility.[39] This question related 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 is reflected in Article 4 of the International Law Commission's 2001 Articles on State Responsibility, as was observed by the Court. The rule called for a determination whether the acts of genocide committed in Srebrenica were perpetrated by 'persons or entities' having the status of organs of the FRY (as the respondent was known at the time) under its internal law, as then in force. The Court said that there was nothing which could justify an affirmative response to this question.[40]

It had not been shown that the FRY army took part in the massacres, or 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 was 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. It had not been shown, however, that there was any such participation in relation to the massacres committed at Srebrenica. Further, neither the Republika Srpska, nor the Vojska Republike Srpske (VRS – Bosnian Serb Army) was a *de jure* organ of the FRY, since neither of them had the status of an organ of that state under its internal law. With regard to the particular situation of General Mladić, the Court noted 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 in Belgrade were, according to the internal law of the respondent, officers of the army of the respondent – a *de jure* organ of the respondent. Nor had it been conclusively established that General Mladić was one of those officers; and even on the assumption that he might have been, the Court did 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 was no doubt that the FRY was providing substantial support, *inter alia* financial support, to the Republika Srpska, and that one of the forms that support took was payment of salaries and other benefits to some officers of the VRS, but the Court considered that this did not automatically make them organs of the FRY. The particular situation of General Mladić, or of any other VRS officer present at Srebrenica who may have been 'administered' from Belgrade, was not such as to lead the Court to modify the conclusion referred to above.[41]

39. *Bosnia Genocide* case, *supra* note 1, at paras. 377–415.
40. Ibid., at para. 386.
41. Ibid., at para. 388.

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The issue also arose as to whether the respondent might bear responsibility for the acts of the paramilitary militia known as the 'Scorpions' in the Srebrenica area. On the basis of materials submitted to it, the Court was unable to find that the Scorpions militia – referred to as 'a unit of the Ministry of Interior of Serbia' in those documents – was, in mid-1995, a *de jure* organ of the respondent. Furthermore, the Court noted 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.[42]

The Court next observed that, according to its jurisprudence (notably its 1986 Judgment in the *Nicaragua* case), 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 acted in 'complete dependence' on the state, of which they are ultimately merely the instrument. In the present case, the Court said that it could not find that the persons or entities that committed the acts of genocide at Srebrenica had such ties with the FRY that they could be deemed to have been completely dependent on it. At the relevant time – July 1995 – therefore, 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. The Court further stated that it has not been presented with materials indicating that the Scorpions were in fact acting in complete dependence on the respondent.

The Court therefore found that the acts of genocide at Srebrenica could not be attributed to the respondent as having been committed by its organs or by persons or entities wholly dependent upon it, and thus did not on this basis entail the respondent's international responsibility.[43]

There was a subsidiary question which arose, namely whether the Srebrenica genocide could be attributed to the respondent on the basis of direction or control. The Court cited Article 8 of the ILC's 2001 Articles as supporting attribution in such circumstances. The Court then determined whether the massacres at Srebrenica were committed by persons who, although not having the status of organs of the respondent, nevertheless acted on its instructions or under its direction or control. The Court made an important contribution on this aspect in explaining what was meant by direction and control under Article 8 referred to above. The Court stated:

> 399. This provision (Article 8) must be understood in the light of the Court's jurisprudence on the subject, particularly that of the 1986 Judgement in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* . . . 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' (*ICJ Reports 1986*, p. 64, para. 115); this led to the following significant conclusion:

42. Ibid., at para. 389.
43. Ibid., at para. 395.

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For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that the 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 . . . 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 a 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 Judgment of the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America).* 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 that 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, Judgement, 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 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 criterion was satisfied in the case on this point, *ibid*., para 145).

. . .

404. . . . [T]he ICTY presented the 'overall control' test 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.

. . .

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

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> 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.[44]

On the basis of the law as explained, the Court found that the respondent state did not, as required by Article 8, instruct, direct, or control the armed groups in issue which were not its organs. As pointed out by the Court, where control is the test of attribution it is effective and not overall control that matters.

There were other violations of international obligations under the Genocide Convention in respect of which the issue of the responsibility of the respondent state had been raised but it is in regard to the commission of genocide that the matter of attribution was explained and was important from the point of view of the law applied.

6. CONCLUSION

It is difficult to criticize in the abstract the findings of fact by the ICJ in this case resulting from the appropriate approach to evidence. The approach to evidence, which was very liberal, and such other matters is to be welcomed. In addition the Court made a decisive and distinctive contribution to the explanation of the law of state responsibility. Of particular interest in this regard is its approval of Articles 4 and 8 of the ILC's draft Articles on State Responsibility and its application of them.

44. Ibid., at paras. 399–407.

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