
State Responsibility for Genocide: A Follow-Up

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Abstract

The article comments on the recent judgment of the International Court of Justice in the Genocide case, and discusses several issues which arise from it. It first briefly explains the several constraints under which the Court had to operate in deciding this case, most notably its limited jurisdiction, the legally very strict definition of genocide, and the litigation strategies of the two parties. The article then turns to examining two specific issues that the Court did not address in a fully satisfactory manner, namely the question of Serbia's responsibility for the acts of the Scorpions paramilitary group, as well as the Court's refusal to ask Serbia to produce certain confidential military documents. The Court's analysis of state responsibility for complicity in genocide and state responsibility for failing to prevent genocide is then addressed. The article finally criticizes the Court's reasoning when it comes to reparation and remedies.

1 Introduction

The *Genocide* judgment¹ of the International Court of Justice has come and gone, and it was, from a purely academic point of view, well worth the wait. The bottom line of the judgment is that Serbia² is responsible under the Genocide Convention³ for failing to prevent the genocide committed by the Bosnian Serb army (VRS) in the Bosnian town

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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)*, Judgment of 27 Feb. 2007, hereinafter the *Genocide* judgment.

² The respondent in the case went through three transformations while the case was pending. It was first called the Federal Republic of Yugoslavia (FRY), following the break-up of the Socialist Federal Republic of Yugoslavia in 1992. It then changed its name to Serbia and Montenegro after the overthrow of Milošević in 2000, while it is now Serbia, since Montenegro declared independence in 2006. For the sake of simplicity it will be referred to throughout this article as Serbia, while the applicant will be referred to solely as Bosnia.

³ Convention on the Prevention and Punishment of the Crime of Genocide, 9 Dec. 1948, 78 UNTS 277.

of Srebrenica in July 1995, and for not cooperating with the International Criminal Tribunal for the Former Yugoslavia (ICTY) in punishing the perpetrators of this atrocity. The ICJ indeed followed the ICTY in ruling that the only crime committed during the Bosnian war which amounted to genocide was the Srebrenica massacre. However, the Court also found that Serbia is neither directly responsible for the Srebrenica genocide itself, nor is it complicit in it. With certain significant exceptions, the judgment seems to be legally unimpeachable when it comes to the Court findings on genocide in Bosnia, and particularly in its application of the law of state responsibility.

The judgment truly excels as a final validation of the attribution model of state responsibility, as envisaged decades ago by Roberto Ago, and now codified in the International Law Commission Articles on State Responsibility,⁴ and predicated on the methodological separation between primary and secondary rules of international law.⁵ The Court also made several significant pronouncements regarding state responsibility for acts of non-state actors, in this case the responsibility of Serbia for the genocide committed by the VRS/Republika Srpska. Most importantly for the future, the Court correctly applied the two tests of attribution that it formulated in its *Nicaragua* judgment, those of complete control and effective control, while rejecting the overall control test proposed by the ICTY Appeals Chamber in the *Tadić* case. These issues will not be dealt with here in detail.⁶

The judgment itself has already been called ‘timid justice’ and ‘wishy-washy’,⁷ as well as ‘perverse’⁸ by some commentators. These are strong words indeed, and for the most part misplaced: the Court’s most prominent critics so far have failed to appreciate the principal legal constraints under which the Court had to operate, while they have also failed to comment on those parts of the judgment which are indeed deserving of strong criticism.

That being said, Section 2 of this article briefly comments on some of the constraints upon the Court, which defined the scope of the *Genocide* judgment and its final outcome, most notably the Court’s limited jurisdiction, the legally very strict definition of genocide, and the litigation strategies of the two parties, the overly ambitious approach of Bosnia in particular. Sections 3 and 4 examine two important questions of fact and evidence which were not dealt with by the Court in a fully satisfactory manner, namely the Scorpions paramilitary group and certain redacted ICTY documents. The

⁴ See generally *ILC Commentaries to the Draft Articles*, extract from the Report of the International Law Commission on the work of its Fifty-third session, *Official Records of the General Assembly*, 56th session, *Supplement No. 10 (A/56/10)*, chp.IV.E.2), hereinafter *ILC Commentaries*, available at: http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

⁵ I have written on this model’s application to genocide in my previous article on state responsibility for genocide published in this Journal, to which this article will not attempt to provide a truly comprehensive follow-up. See Milanović, ‘State Responsibility for Genocide’, 17 *EJIL* (2006) 553.

⁶ See *ibid.*, at 575–588, arguing that, first, the Appeals Chamber in *Tadić* (IT-94-1, judgment of 15 July 1999) misread the ICJ’s *Nicaragua* judgment ([1986] ICJ Rep 14) by holding that it promulgated only the effective control test, when it in fact also elaborated on the complete control test, and, secondly, that the overall control test has no basis in international jurisprudence or state practice. See, however, Professor Cassese’s article on *Nicaragua v. Tadić* in this issue of the Journal.

⁷ Luban, ‘Timid Justice’, *Slate Magazine*, 28 Feb. 2007, available at: www.slate.com/id/2160835/.

⁸ Shaw, ‘The International Court of Justice: Serbia, Bosnia, and Genocide’, *Open Democracy*, 28 Feb. 2007, available at: www.opendemocracy.net/globalization-institutions_government/icj_bosnia_serbia_4392.jsp.

article argues that the Court's examination of these issues was at best cursory, but also counter-productive when it comes to the Court's credibility in the affected region.

Section 5 deals with the Court's analysis of Serbia's alleged responsibility for complicity in the Srebrenica genocide, and concludes that the Court evaded the question of what was the level of *mens rea* required for complicity in genocide, even though that was the legal question placed squarely before it. It also suggests that it arguably could have drawn some different factual conclusions from the evidence put before it. Section 6 examines the Court's pronouncements on Serbia's responsibility for failing to prevent and punish genocide, this being the most progressive and, at the same time, the most disappointing part of the judgment, chiefly due to the Court's unsatisfactory approach to reparations. Section 7 offers some concluding remarks.

2 Antecedent Constraints on the Court

The most important constraint that the Court had to work under was its limited jurisdiction, which was, pursuant to Article IX⁹ of the Genocide Convention, confined solely to genocide, and to the ancillary obligations thereto. Furthermore, the Court's task was not just to establish the existence of genocide in Bosnia in the abstract, but to distinguish genocide, which is very strictly defined in international law,¹⁰ from other crimes committed during the conflict, most notably crimes against humanity. As its jurisdiction was confined to genocide, if the Court found that a particular crime, however heinous, could not be legally qualified as genocide, it automatically lost its power to pronounce on Serbia's responsibility for it. The Court took great pains to make this point sufficiently clear.¹¹

⁹ Art. IX stipulates that '[d]isputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute'.

¹⁰ Art. II of the Genocide Convention, *supra* note 3, defines genocide as 'any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.' See generally W. Schabas, *Genocide in International Law: The Crime of Crimes* (2000).

¹¹ In the Court's own words: '[the Court] has no power to rule on alleged breaches of other obligations under international law, not amounting to genocide, particularly those protecting human rights in armed conflict. That is so even if the alleged breaches are of obligations under peremptory norms, or of obligations which protect essential humanitarian values, and which may be owed *erga omnes*': *Genocide* judgment, *supra* note 1, para. 147. This point was also emphasized by ICJ President Higgins in her address to the press after the reading of the judgment – see Statement to the Press by H.E. Judge Rosalyn Higgins, President of the International Court of Justice, 26 Feb. 2007, available at: www.icj-cij.org/court/index.php?pr=1898&pt=3&p1=1&p2=3&p3=1: '[T]he Court has no authority to rule on alleged breaches of obligations under international law other than genocide, as defined by the Genocide Convention. This is important to understand because in this case we were confronted with substantial evidence of events in Bosnia and Herzegovina that may amount to war crimes or crimes against humanity – but we had no jurisdiction to make findings in that regard. We have been concerned *only* with genocide – and, I may add, genocide in the legal sense of that term, not in the broad use of that term that is sometimes made.'

Bearing this jurisdictional picture in mind, one can better understand the legal strategies of the two opposing parties before the Court. Bosnia argued that the totality of all crimes committed by the Bosnian Serbs during the conflict amounted to genocide, with specific crimes, such as the Srebrenica massacre, the siege of Sarajevo, or atrocities in the Prijedor municipality and prison camps, serving only as illustrations of this genocidal pattern.¹² The Bosnian litigation strategy was thus designed to turn the *Genocide* case into a case about *the Bosnian war as a whole*, and was so designed for two principal reasons. First, the Bosnian team probably hoped that this approach would improve their prospects in the case, as they knew full well that the ICTY found genocide only in Srebrenica.¹³ Secondly, this approach was the only one which would have been acceptable to Bosnian politicians, since they would have been unable to explain to their electorate how the dead of Srebrenica were victims of genocide, while the dead of Sarajevo were not.

For its part, the ICJ could find no reason why a pattern of crimes against humanity should be treated as a single crime of genocide, absent a clearly proven genocidal plan.¹⁴ The Court thus followed the ICTY in pronouncing the Srebrenica massacres alone as genocide.

It is only, therefore, if the *Genocide* judgment is analysed from the standpoint of Serbia's indisputably extensive and criminal involvement in the entire Bosnian war that the judgment is perceived to be lacking, even if there is nothing that the Court could have done in that regard short of misinterpreting the Genocide Convention. The judgment has thus been exposed to some rather unfair criticism. Professor Wedgwood writes, for instance, that the

the ethnic conflagration [in Bosnia] had already raged for three years, with countless acts of nationalist violence [by Bosnian Serbs] aimed at expelling Muslims from the north, south and east of Bosnia. Yet the International Court of Justice shrinks from recognition, failing to explain why the deliberate slaughter of civilians in the riverside town of Brcko in 1992, or the torture and execution of Muslim civilians in Foca, were legally different in kind from the Srebrenica murders.¹⁵

Strangely, this same criticism could also be levelled against the ICTY, yet it has not been. The relevant legal difference, of course, is that for all these other acts there was insufficient proof of genocidal intent. For this intent to be proven, it must be established not only that people were being killed because they were Bosnian Muslims, it must also be proven that they were being killed in order to destroy the Bosnian Muslim *group as such* – this is the legal difference between genocide and crimes against humanity, even if such legal distinction sometimes leads to morally absurd results. The *Genocide* case was not about the 'ethnic conflagration' in Bosnia, but about the *genocide* in Bosnia. The fact that there was a pattern of crimes committed by the Bosnian Serbs changes little or nothing when it comes to the legal qualification of those

¹² See, e.g., *Genocide* case, *supra* note 1, CR 2006/2, at 28 ff; CR 2006/4, at 21 ff; CR 2006/5, at 19–20, 33 ff; Reply of Bosnia and Herzegovina, 23 Apr. 1998, at 77–373.

¹³ In *Prosecutor v. Krstić*, IT-98-33, Trial Chamber judgment, 2 Aug. 2001; Appeals Chamber judgment, 19 Apr. 2004.

¹⁴ *Genocide* judgment, *supra* note 1, para. 373.

¹⁵ Wedgwood, 'Slobodan Milošević's Last Waltz', *New York Times*, 12 Mar. 2007.

crimes. In both the *Brdjanin* and *Stakić* cases, for example, the ICTY established the existence of a pattern of atrocities. In both of these cases the ICTY was trying the most high-ranking members of the Bosnian Serb leadership in the relevant area. In neither of these cases, however, did the ICTY infer the existence of a genocidal intent, at whatever level, from the evident pattern of persecution or crimes of humanity.¹⁶ One could also recall the findings of the UN Commission of Inquiry for Darfur, chaired by Professor Cassese, which determined that there was insufficient evidence that the ongoing atrocities there were being committed with genocidal intent, and could accordingly not be qualified as genocide.¹⁷ If Darfur is not genocide within the meaning of Article II of the 1948 Genocide Convention, how could Bosnia as a whole possibly be?

Most of the criticism directed against the Court is therefore misplaced, since it fails to take into account both the legally very strict definition of genocide and the Court's limited jurisdiction. Since when, it might also be asked, are war crimes and crimes against humanity, such as persecution and extermination, to be treated morally as mere misdemeanours, with genocide supposedly being the only word which can adequately describe mass atrocities? The victims of these crimes are victims no less than those of genocide. Whatever the Court was doing, it was certainly not denigrating the people of Sarajevo, Prijedor, Brčko or Foča, whom the Bosnian Serb soldiers and Serbian paramilitaries despoiled, raped and killed in their thousands.

3 The Scorpions: Facts and State Responsibility

That being said, I come to my first disagreements with the Court with regard to Serbia's lack of direct responsibility for the commission of genocide in Srebrenica, on one point of fact and one related point of law: namely, the Court concluded that neither the Republika Srpska in general nor the VRS in particular could be considered to be *de jure* organs of Serbia, as they had no such status under Serbia's internal law.¹⁸ The Court also rejected Bosnia's argument that many VRS officers were indeed organs of Serbia, as they received their salaries from the so-called 30th Personnel Centre of the FRY army. The Court did so because there was no evidence that these payments conferred organ status to these officers under Serbian law, and because there was no

¹⁶ *Prosecutor v. Radoslav Brdjanin*, IT-99-36-T, Trial Chamber Judgment, 1 Sept. 2004, at para. 984: '[w]hile the general and widespread nature of the atrocities committed is evidence of a campaign of persecutions, the Trial Chamber holds that, in the circumstances of this case, it is not possible to conclude from it that the specific intent required for the crime of genocide is satisfied.' *Prosecutor v. Milomir Stakić*, IT-97-24-T, Trial Chamber Judgment, 31 July 2003, at para. 546: '[t]he Trial Chamber has reviewed its factual findings ... and a comprehensive pattern of atrocities against Muslims in Prijedor municipality in 1992 emerges that has been proved beyond reasonable doubt. However, in order to prove Dr. Stakić's involvement in the commission of these acts as a co-perpetrator of genocide, the Trial Chamber must be satisfied that he had the requisite intent. Thus, the key and primary question that falls to be considered by the Trial Chamber is whether or not Dr. Stakić possessed the *dolus specialis* for genocide, this *dolus specialis* being the core element of the crime.'

¹⁷ Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Geneva, 25 Jan. 2005, available at: www.un.org/News/dh/sudan/com_inq_darfur.pdf.

¹⁸ *Genocide* judgment, *supra* note 1, at para. 386.

evidence that these officers acted on behalf of Serbia, and not on behalf of the Republika Srpska.¹⁹ Both of these conclusions seem to be correct. What disturbs the Court's neat analysis, however, is evidence, considered almost *en passant* by the Court, of the involvement of a paramilitary group from Serbia, the Scorpions, in the Srebrenica massacre.

This group is known to have committed serious crimes in the Trnovo area, located close to Srebrenica, where members of this group are shown on film (which they made themselves) executing several teenage boys from Srebrenica.²⁰ This deeply disturbing video was procured by an NGO, the Humanitarian Law Centre in Belgrade, led by Ms. Nataša Kandić, from a member of the Scorpions. It was shown at the Milošević trial before the ICTY, as well as on Serbian TV, producing an intense reaction among the Serbian public. The film was also shown to the judges of the ICJ during the oral arguments in the *Genocide* case, while members of the Scorpions themselves were arrested by Serbian authorities and have recently been convicted for war crimes before the District Court of Belgrade.²¹

What was not conclusively established before any court, however, was the exact position of the Scorpions in relation to Serbia. While most of the members of the Scorpions are known to have resided in Serbia and worked for the Serbian police after the war, their exact relationship with Belgrade authorities during the war remains unclear. They were alleged by the Belgrade prosecutors, for example, to have been formed as the security forces of an oil company in the Republika Srpska Krajina (the Croatian Serb separatist republic), and then incorporated into Croatian Serb armed forces which were put at the disposal of the Bosnian Serbs in 1995 after the fall of Krajina to the Croatian army. In other words, they were claimed not to have been a unit of the Serbian army or (secret) police, even though some members of this unit did join the Serbian police forces in 1996 and 1999. This qualification has now been accepted by the war crimes chamber of the Belgrade District Court.²² The Humanitarian Law Centre in Belgrade criticized the Belgrade District Court's judgment in this regard, claiming that the lack of motivation on the part of the Serbian prosecutors and the judiciary to explore the relationship between the Scorpions and Serbia was directly related to the proceedings before the ICJ.²³

For its part, Bosnia produced several documents before the ICJ, namely military dispatches from the Republika Srpska Ministry of Interior (police) headquarters to the police commander in the Trnovo area, and vice versa, which refer to the Scorpions as a unit of the Serbian Ministry of the Interior ('MUP Srbije'). This evidence, initially collected by

¹⁹ *Ibid.*, at para. 388.

²⁰ The video as presented at the Milošević trial is available at: <http://jurist.law.pitt.edu/monitor/2005/06/srebrenica-killings-video-icty.php>.

²¹ See 'Jail for Serb video death squad', *BBC News*, 10 Apr. 2007, available at: <http://news.bbc.co.uk/2/hi/europe/6540645.stm>.

²² The judgment itself is not available online, but has been extensively reported in the Serbian press. See, e.g., Tagirov, 'Presuda Škorpionima: Istina, ali samo pravosudna', *Vreme*, No. 849, available at: www.vreme.com/cms/view.php?id=494573 (in Serbian only).

²³ See 'HLC: Scorpions verdict politically motivated', *B92*, 12 Apr. 2007, available at: www.b92.net/eng/news/society-article.php?yyyy=2007&mm=04&dd=12&nav_category=113&nav_id=40642.

the ICTY, was also produced before the Belgrade District Court. Indeed, the Belgrade Court summoned Mr. Tomislav Kovač, in 1995 the Deputy Minister of the Interior of the Republika Srpska to whom and from whom these dispatches were sent, as a witness.²⁴ He testified that the documents deliberately falsely referred to the Scorpions as a unit of the Serbian MUP, with the purpose of raising the battle morale of the troops in the field, since this ruse would lead them to believe that Serbia was supporting them, when Serbia was at the time actually blockading the Republika Srpska and denying it assistance.²⁵ This is, of course, a rather ridiculous explanation – as if soldiers in the field were privy to confidential dispatches between their own commanders and the highest Bosnian Serb police officials, and as if a couple of references in these documents to the Serbian MUP could somehow magically improve the soldiers' morale.²⁶

Be that as it may, though these documents certainly implicate Serbia in the Srebrenica genocide, the ICJ did not view them as being fully conclusive:

In two of the intercepted documents presented by the Applicant (the authenticity of which was queried – see paragraph 289 above), there is reference to the 'Scorpions' as 'MUP of Serbia' and 'a unit of Ministry of Interiors of Serbia'. The Respondent identified the senders of these communications, Ljubiša Borovčanin and Savo Cvjetinović, as being 'officials of the police forces of Republika Srpska'. The Court observes that neither of these communications was addressed to Belgrade. Judging on the basis of these materials, the Court is unable to find that the 'Scorpions' were, in mid-1995, *de jure* organs of the Respondent. Furthermore, *the Court notes that in any event the act of an organ placed by a State at the disposal of another public authority shall not be considered an act of that State if the organ was acting on behalf of the public authority at whose disposal it had been placed.*²⁷

It is one thing to say that there is insufficient evidence to find Serbia directly involved in Srebrenica only on the basis of two inconclusive documents, though it must be noted that there was absolutely nothing preventing the Court from asking for further evidence on the matter *proprio motu*, for instance by ordering Serbia to produce the persons named in these documents, including Tomislav Kovač, as witnesses. The Court has such powers under Articles 48 and 49 of its Statute,²⁸ and it should have exercised them. It is something else, however, when the Court actually says that even if the documents could conclusively establish that the Scorpions were *de jure* organs of Serbia, the Scorpions were in any event put at the disposal of the Republika Srpska and were acting on its behalf, thereby rendering their acts unattributable to Serbia. Indeed, the documents themselves show that the Scorpions were under the command of the Republika Srpska Ministry of Interior, but it is still questionable whether the legal rule that the Court announced was the appropriate one.

²⁴ Verbatim transcript of hearings held on 3 July 2006, available at: www.hlc-rdc.org/storage/docs/14bbddabba275714fe99c682be5853d9.pdf (in Serbian).

²⁵ *Ibid.*, at 32–33, 38.

²⁶ The testimony of Mr. Kovač contains many more contradictions, which are too numerous to be listed here. Suffice it to say that the witness is severely lacking in credibility. It should be noted, however, that he at no point challenged the authenticity of the documents.

²⁷ *Genocide* judgment, *supra* note 1, para. 389 (emphasis added).

²⁸ See generally Tams, 'Article 49', in A. Zimmerman *et al.* (eds.), *The Statute of International Court of Justice: A Commentary* (2006), at 1099–1108.

The Court simply took Article 6 of the ILC Articles on State Responsibility, which deals with the situation of an organ of one state being put at the disposal of another state, and changed the references to this second state to some other ‘public authority’. It is doubtful that the rule in Article 6 can truly be expanded to cover non-state actors in such an off-hand way as the Court did in paragraph 389 of its judgment. There is certainly very little state practice to rely on, and the Court provides no justification or reasoning for using such an analogy.²⁹ José Alvarez, for instance, has rightly criticized the ILC for using such analogies with rules applicable solely to states in respect of international organizations, as not all international organizations are the same.³⁰ This criticism rings even more loudly when it comes to non-state actors, as international organizations are at least generally considered to possess some legal personality under international law.

To be sure, the Court does not expand Article 6 by analogy to all non-state actors, but only to ‘public authorities’, and one could, therefore, in the absence of further evidence of Serbia’s involvement, accept the Court’s ultimate conclusion, as the Republika Srpska did very closely resemble a state, primarily lacking only international recognition. One should still, however, accept the Court’s conclusion with utmost caution, not only because the Court provided no reasoning for its position, but also because it exposes a hole in the ILC Articles on State Responsibility, which, comprehensive though they may be, still do not provide all the answers to questions of state responsibility for acts of non-state actors.

The principal reason behind the Court’s holding is simple: the evidence before it, and particularly the evidence coming from the ICTY, was not sufficient to prove Serbia’s direct involvement in the Srebrenica genocide. This is so not only because the Milošević trial was not completed, but also because the proceedings against Jovica Stanišić and Franko Simatović, the chief and deputy-chief of the Serbian secret police, and Momčilo Perišić, the FRY army chief of staff, are still in the very early stages.³¹ It is precisely in these cases that new evidence regarding the Scorpions in particular might come into light. The ICJ seems to have been aware of this possibility, and it does say that it is basing its decision only on the evidence currently before it.³² This almost explicitly leaves open to Bosnia the possibility to ask for a revision of the *Genocide* judgment if new evidence regarding the Scorpions is made public in the *Stanišić* or in the *Perišić* case. Indeed, the Bosnian agent before the Court has publicly stated several times now that Bosnia might ask for revision of the judgment if new evidence comes to light in the next 10 years.³³

However, for any request for revision to have even a remote chance of succeeding, the new evidence would have to be exceptionally strong. Because the Court chose to apply the rule in Article 6 of the ILC Articles by analogy to the relationship between

²⁹ The ILC does not mention any such cases even hypothetically – see ILC Commentaries, *supra* note 4, at 95–98.

³⁰ See Alvarez, ‘International Organizations: Accountability or Responsibility?’, address to the Canadian Council on International Law, 27 Oct. 2006, available at: www.asil.org/aboutasil/documents/CCLspeech061102.pdf.

³¹ *Prosecutor v. Stanišić and Simatović*, IT-03-69; *Prosecutor v. Perišić*, IT-04-81.

³² *Genocide* judgment, *supra* note 1, para. 395.

³³ See, e.g., at www.javno.com/en/world/clanak.php?id=24340, <http://www.24sata.info/3971>.

Serbia and the Republika Srpska, it would not even suffice for Bosnia to prove that the Scorpions were indeed a *de jure* or *de facto* organ of Serbia. Bosnia would actually have to prove that the Scorpions were *not* put at the disposal of the Republika Srpska, but were still acting on behalf of Serbia itself, which retained operational control over them, or that Serbia knew that the Scorpions would be used for genocide when it put them at the disposal of the Republika Srpska. Needless to say, it is unlikely that this kind of ‘smoking gun’ evidence will come to light, but we should be aware that a request for revision is possible, in no small part due to the internal politics in Bosnia.

4 The Redacted Documents

Revision appears even more likely when one takes into account the ongoing controversy surrounding several redacted ICTY documents. Some two months before the oral hearings in the *Genocide* case, Bosnia demanded of Serbia that it provide full transcripts of several meetings of the Supreme Defence Council (SDC) of the FRY,³⁴ which had already been disclosed by Serbia to the ICTY in the *Milošević* case. These documents were publicly available only in a heavily redacted, blacked-out form, as Serbia requested protective measures from the ICTY for reasons of national security.³⁵ Bosnia had expected that these minutes would prove Serbia’s participation in the Srebrenica massacre. For its part, Serbia refused to provide these documents, saying that they contained sensitive national security information and that the request itself had not been made in a timely manner. Serbia also argued that the ICTY Trial Chamber had ordered the documents to be held secret, and that by providing these documents it would violate the binding confidentiality order of the ICTY.³⁶

It is, of course, rather cynical of Serbia to argue that the disclosure of the documents would violate an ICTY order when it was precisely Serbia who had asked for this confidentiality order to be made, and when it is precisely Serbia in whose favour the privilege exists and Serbia who can waive it. On the other hand, a state can hardly be expected to furnish self-incriminating evidence on its own initiative, or to fully disclose information that it considers prejudicial to its security interests. The basic problem here is not so much Serbia’s conduct, but rather the ICJ’s long-entrenched general passivity in fact-finding. Upon Serbia’s refusal to provide unredacted versions of the documents, Bosnia asked the Court to order Serbia to do so, pursuant to Article 49 of the Statute and Article 61 of the Rules of Court, a request that the Court denied without much explanation.³⁷ In its judgment, the Court even goes so far as to justify its

³⁴ The Council consisted of the Presidents of the FRY and the Republics of Serbia and Montenegro, with participation from the army chief of staff and other high-ranking officers. The Council was constitutionally the highest authority over the military, a collective commander-in-chief, though actual power was solely in the hands of Milošević.

³⁵ See further Sadovic, ‘Could Key Records Have Altered ICJ Ruling?’, *IWPR Tribunal Update*, No. 492, 9 Mar. 2007, available at: http://iwpr.net/?p=tri&s=f&o=333964&apc_state=henpri; Simons, ‘Genocide Court Ruled for Serbia Without Seeing Full War Archive’, *New York Times*, 9 Apr. 2007.

³⁶ *Genocide* case, *supra* note 1, CR 2006/43, at 27–30.

³⁷ *Ibid.*, at paras. 44, 205, and 206.

refusal by saying that Bosnia had ‘extensive documentation and other evidence available to it, especially from the readily accessible ICTY records’.³⁸ But that is precisely the point – this particular group of documents was *not* readily available from ICTY records, as these had been made confidential on Serbia’s request. There was nobody else but Serbia who could have provided these particular documents to the Court, and these documents, even if probably not ‘smoking gun’ evidence of Serbia’s responsibility,³⁹ were at least *prima facie* relevant for the issue of Serbia’s knowledge of the genocidal intent of the VRS leadership. Additionally, Serbia’s legitimate security concerns probably could have been accommodated in one way or another; for example, by not disclosing the contents of the documents in the judgment if the Court had not found them directly relevant, or by initially assessing the evidence *ex parte*.

The Court’s appraisal of the facts, correct though it ultimately probably is, is to some extent marred by its less than energetic fact-finding. Regrettably, Bosnia also did not insist vigorously enough on the production of these documents, nor did it make it sufficiently clear to the Court that the documents were central to its case. Moreover, Bosnia failed to make its request early enough, asking for the documents only just prior to the oral hearings, although the existence of these transcripts was known well beforehand, at least in 2003.

If the Court had indeed ordered Serbia to produce the documents, Serbia would likely have complied, as there were no objective reasons for making them available to the ICTY and not to the ICJ. Even though the ICJ, unlike the ICTY,⁴⁰ possesses no subpoena power, if Serbia had failed to abide by the Court’s order it would have had to suffer the consequences, since the Court would have been able to have much greater recourse to inferences in order to establish Serbia’s knowledge of the genocide.⁴¹ It could have inferred, for example, from General Mladić’s presence in Belgrade on 14 July 1995 that the Serbian authorities had knowledge of the then ongoing Srebrenica genocide.

Again, it is not so much that the Court refused to ask for these documents, as it unlikely that their inclusion would have changed the result of the case.⁴² The problem is that the Court’s understandable desire to avoid any confrontation which might weaken its authority actually served to undermine that authority in the long-run.

³⁸ *Ibid.*, at para. 206.

³⁹ But see Simons, *supra* note 35, which quotes anonymous sources allegedly familiar with the documents as saying that ‘the archives showed in verbatim records and summaries of meetings that Serbian forces, including secret police, played a role in the takeover of Srebrenica and in the preparation of the massacre there’. However, the contents of two of the redacted documents have now been published in the Croatian press, and they seem to relate only to events from 1994 and the so-called 30th Personnel Centre of the FRY army.

⁴⁰ See Rule 54*bis* of the ICTY Rules of Procedure and Evidence, as well as *Prosecutor v. Blaskic*, IT-95-14-A, Judgment on the Request of the Republic of Croatia for the Review of the Decision of Trial Chamber II of 18 July 1997, Appeals Chamber, 2 Oct. 1997.

⁴¹ See Tams, *supra* note 28, at 1106–1107.

⁴² See also Clifford, ‘Del Ponte Denies Belgrade Deal Claims’, *IWPR Tribunal Update*, No. 498, 20 Apr. 2007, available at: www.iwpr.net/?p=tri&s=f&o=335026&pc_state=henh.

The Court's refusal to ask for the documents has already produced an intense political reaction in Bosnia and in Croatia, with rumours of a possible request for revision mounting by the day.⁴³

At the time of writing of this article, in a further and rather bizarre development, the former counsel for the prosecution in the *Milošević* case, Geoffrey Nice, publicly accused the ICTY Chief Prosecutor Carla Del Ponte of making a deal with the Serbian Government to keep the SDC minutes confidential, even though he initiated subpoena proceedings against Serbia before the *Milošević* Trial Chamber in order to produce these documents in open court.⁴⁴ According to Nice, this deal allowed Serbia to hide its involvement in Srebrenica from the ICJ. Ms Del Ponte, however, vigorously denies that any such deal was made, stating that protective measures on confidentiality could have been made and were made solely by the Trial Chamber, at Serbia's request.⁴⁵

It is impossible to establish the truth of any of these claims without being privy to confidential ICTY documents. It is certain, though, that a confidentiality order was indeed made by the Trial Chamber in the *Milošević* case, though the decision itself is also confidential.⁴⁶ It is unclear from the Trial Chamber's publicly available Rule 54*bis* decisions whether the prosecution opposed Serbia's request for protective measures or not. Mr Nice says that it did not, pursuant to Ms Del Ponte instructions, as does the recent *New York Times* article on the issue, which quotes Ms Del Ponte as saying in a recent interview that '[i]t was a long fight to get the documents, and in the end because of time constraints we agreed [to Serbia's request]'.⁴⁷ However, no source is provided for this quotation, nor does an Internet search for the quotation give any results but the *New York Times* article itself. It has been reported, though, that Ms Del Ponte has now asked the ICTY to lift some of the protective measures from their own confidential orders pursuant to Rule 54*bis*,⁴⁸ which might clear up this controversy, at least partially.

⁴³ It should be noted, though, that any request for revision would probably be obstructed by the Bosnian Serb member of the Presidency of Bosnia. See, e.g., Alic, 'Bosnia vs Serbia: The Evidence Scandal', *ISN Security Watch*, 24 Apr. 2007, available at: www.isn.ethz.ch/news/sw/details.cfm?id=17528.

⁴⁴ This allegation was first made in a letter from Mr Nice to a Croatian newspaper, *Jutarnji list*, on 14 Apr. 2007. The letter is available in Croatian at: www.jutarnji.hr/dogadjaji_dana/clanak/art-2007,4,14,Nice_Ponte,70438.jl. See also 'Del Ponte made deal with Serbia', *B92*, 16 Apr. 2007, available at: www.b92.net/eng/news/comments.php?nav_id=40711. The letter has also been republished in English in a somewhat modified form in the *International Herald Tribune* of 16 Apr. 2007, available at: www.iht.com/articles/2007/04/16/opinion/edlet.php.

⁴⁵ See Statement of the Office of the Prosecutor, 16 Apr. 2007, available at: www.un.org/icty/pressreal/2007/pr1156e.htm.

⁴⁶ The Trial Chamber made at least 13 decisions pursuant to Rule 54*bis*, and at least two of these order protective measures: *Prosecutor v. Milošević*, IT-02-54-T, (Fourth) Decision on Serbia and Montenegro's Request for Protective Measures Pursuant to Rule 54*bis*, 30 July 2003, and Ninth Decision on Applications Pursuant to Rule 54*bis* of Prosecution and Serbia and Montenegro, 15 Oct. 2003. Both of these decisions remain confidential and are not available at the ICTY's website, but they are referred to by the Second Decision on Admissibility of Supreme Defence Council Materials, 23 Sept. 2004, which is publicly available.

⁴⁷ Simons, *supra* note 35.

⁴⁸ See the statement of the spokesperson of the OTP, Ms Olga Kavran, 2 May 2007, available at: www.un.org/icty/briefing/2007/pb070502.htm.

Yet, even if Carla Del Ponte decided not to object to Serbia's confidentiality request in order to be able to prosecute Milošević more effectively, such behaviour would have been neither illegal nor unethical. Compromise of that sort is inevitable in proceedings of such magnitude; evidence is routinely produced before the ICTY in sessions which are closed to the public. The ICJ's reluctance to issue an evidentiary order to Serbia has led to an immense ruckus in the general publics of Serbia, Bosnia and Croatia, with the Bosnians and Croats now believing more and more that the ICJ deliberately let Serbia off the hook and that its *Genocide* judgment is fundamentally unfair. That is truly a regrettable outcome, which is made even more regrettable by the fact that it could have been easily avoided, especially if Bosnia's counsel had made a proper and timely request for the production of these documents.

5 State Responsibility for Complicity in Genocide

The question of Serbia's responsibility for complicity in the Srebrenica genocide was one of those on which the Court's judgment might have turned either way. This is so most of all because the evidentiary burden on Bosnia was considerably lighter, not only because Serbia's involvement in the genocide would not have had to be as direct as with commission, but also because the *mens rea* requirement for complicity, as opposed to the commission of genocide, would arguably be lower.

Before the Court, Serbia argued that complicity in genocide under Article III(e) of the Genocide Convention requires a showing of specific, genocidal intent on the part of the accomplice, as well as for the principal perpetrator.⁴⁹ For its part, Bosnia relied on a rather intricate and at times incomprehensible distinction between *complicité dans le génocide* and *complicité de génocide*, each carrying a different level of *mens rea*.⁵⁰ This confusion was further compounded by the drafters of the ICTY and ICTR Statutes, who, fearing that they may leave a loophole, copied and pasted Articles II and III of the Genocide Convention to Articles 4 and 2 of the ICTY and ICTR Statutes respectively, while at the same time including a general provision on accomplice liability in Articles 7(1) and 6(1) of the Statutes which also applied to genocide.⁵¹ This then led to widely conflicting case law within the ICTY and the ICTR when it came to distinguishing between complicity in genocide and aiding and abetting genocide, with some Chambers concluding that there is an overlap between complicity and aiding and abetting genocide, and others attempting to manufacture a distinction, arguing that the drafters of the Statutes must have meant *something* when they included both a special provision on complicity in genocide and a general provision on aiding and abetting.⁵²

Furthermore, the ICTY Appeals Chamber in *Krstić* established that aiding and abetting genocide required only that knowledge of the principal perpetrator's genocidal

⁴⁹ See, e.g., *Genocide case*, *supra* note 1, CR 2006/42 and CR 2006/43.

⁵⁰ See, e.g., *ibid.*, CR 2006/31.

⁵¹ See W. Schabas, *The UN International Criminal Tribunals* (2006), at 183.

⁵² See generally Eboe-Osuji, "'Complicity in Genocide' versus 'Aiding and Abetting Genocide' Construing the Difference in the ICTR and ICTY Statutes', 3 *J Int'l Criminal Justice* (2005) 56.

intent be demonstrated, and accordingly found VRS General Krstić responsible.⁵³ It is precisely this aiding and abetting genocide, requiring only knowledge, that Serbia argued had no place under Article III(e) of the Genocide Convention.⁵⁴

The Court was thus confronted with a complete and total conceptual mess of the kind only lawyers can make and relish, yet the Court unfortunately did nothing to clear it up. Even though it found that Serbia did in fact provide a large amount of aid and assistance to the Republika Srpska, which was invariably used in the commission of the Srebrenica genocide, the Court made no final pronouncement on the *mens rea* requirement:

Before the Court turns to an examination of the facts, one further comment is required. It concerns the link between the specific intent (*dolus specialis*) which characterizes the crime of genocide and the motives which inspire the actions of an accomplice (meaning a person providing aid or assistance to the direct perpetrators of the crime): the question arises whether complicity presupposes that the accomplice shares the specific intent (*dolus specialis*) of the principal perpetrator. But whatever the reply to this question, there is no doubt that the conduct of an organ or a person furnishing aid or assistance to a perpetrator of the crime of genocide cannot be treated as complicity in genocide unless at the least that organ or person acted knowingly, that is to say, in particular, was aware of the specific intent (*dolus specialis*) of the principal perpetrator. If that condition is not fulfilled, that is sufficient to exclude categorization as complicity. The Court will thus first consider whether this latter condition is met in the present case. It is only if it replies to that question of fact in the affirmative that it will need to determine the legal point referred to above.⁵⁵

To put it briefly, the Court says, remarkably, that it does not need to decide whether the *mens rea* requirement for complicity is specific intent or knowledge, as in any case it has not been conclusively proven that Serbia's organs knew of the genocidal intent of the VRS leadership in Srebrenica, primarily because the decision to commit the genocide was made and effected over a very short time period, from 13 to 16 July 1995.⁵⁶ Even assuming that the Court's appraisal of the facts, i.e., Serbia's lack of knowledge of the commission of genocide in Srebrenica, was correct, there is still no justification for the Court's refusal to answer a basic legal question which was put before it.

The Court, in my view, errs by treating complicity as a uniform concept, describing a single form of participation in a crime as a matter of international criminal law, instead of as a generic, umbrella term. It must be borne in mind that the point of the Genocide Convention was not to define a single concept of complicity for the purposes of individual criminal responsibility at the international level, as that type of responsibility does not even exist under the Convention, but rather under customary law.⁵⁷

⁵³ *Prosecutor v. Krstić*, IT-98-33, Appeals Chamber Judgment, 19 Apr. 2004, at paras. 138 ff.

⁵⁴ *Genocide case*, *supra* note 1, CR 2006/43, at 63.

⁵⁵ *Genocide judgment*, *supra* note 1, para. 421.

⁵⁶ *Ibid.*, at paras. 422 and 423.

⁵⁷ The Genocide Convention, *supra* note 3, as such does not create individual criminal responsibility for genocide at the international level, but obliges states parties to create such responsibility in their own domestic law. *International* criminal responsibility for genocide exists solely under customary law, as is clear from Art. I of the Convention, according to which the states parties 'confirm that genocide ... is a crime under international law' (emphasis added). Individual responsibility for other crimes is likewise not created by treaty, but through customary law. Formally speaking, the Statutes of the ICTY and the ICTR do not define international crimes for the purpose of creating individual responsibility, but for establishing each tribunal's *subject-matter jurisdiction* over crimes which are pre-existing under customary law. See, e.g., Schabas, *supra* note 51, at 84.

The term ‘complicity’ was used generically to describe various types and models of accessory responsibility which exist in municipal law, as the contracting states were indeed obliged to make genocide a crime under their own laws, while adapting the modes of participation in genocide to their own rules of criminal law.⁵⁸

It is precisely to these principles of criminal law that one must turn to determine the meaning of the term ‘complicity’, and one can then clearly see that complicity takes many shapes and forms, ranging from instigation to providing assistance before and after the fact. Complicity can indeed be *more* than aiding or abetting (or assisting), but it certainly *includes* aiding and abetting. Aiding and abetting genocide is, in other words, a form of complicity in genocide.

This is precisely the approach adopted by the ICTY Appeals Chamber in *Krstić*, which concluded that the ‘terms “complicity” and “accomplice” may encompass conduct broader than that of aiding and abetting’,⁵⁹ while conducting an extensive review of English, French and German law to show that the aider and abettor in a specific intent crime need not share the specific intent of the principal perpetrator.⁶⁰ The Chamber also states that ‘there is authority to suggest that complicity in genocide, *where it prohibits conduct broader than aiding and abetting*, requires proof that the accomplice had the specific intent to destroy a protected group’.⁶¹ The ICTR Appeals Chamber has also stated that it considers aiding and abetting to be a form (but not necessarily the only form) of complicity in genocide.⁶² It indeed may be the case that other types of complicity in genocide, such as instigation, might require the presence of genocidal intent, but aiding and abetting certainly does not. As Judge Bennouna cautions in his separate opinion, requiring proof of specific intent for all forms of complicity simply reduces complicity to co-perpetration.⁶³

The *mens rea* requirement for complicity therefore cannot be a single requirement, as complicity is not a distinct criminal offence but a general term for various forms of participation in an offence.⁶⁴ *Mens rea* depends entirely on the type of complicity in question. If one needs an example of aiding and abetting as a form of complicity in genocide, the best one would be that of an unscrupulous businessman selling poison

⁵⁸ This is best seen from the practice of contracting states when implementing the Convention. To the author’s knowledge, no state has introduced a separate offence, or even a specific mode of participation, called ‘complicity in genocide’. On the contrary, the penal laws of all states that I have surveyed, including those of the US, Canada, Germany, France, the UK, Serbia, and the former Yugoslavia, apply their general rules on accomplice liability, and the various types thereof known in their domestic law, to the crime of genocide.

⁵⁹ *Prosecutor v. Krstić*, *supra* note 53, at para. 139.

⁶⁰ *Ibid.*, at paras. 140 and 141.

⁶¹ *Ibid.*, at para. 142 (emphasis added).

⁶² *Prosecutor v. Ntakirutimana*, ICTR-96-10, Appeals Chamber Judgment, 13 Dec. 2004, at para. 500.

⁶³ *Genocide* judgment, *supra* note 1, Declaration of Judge Bennouna, at 3. See also the Declaration of Judge Keith, at paras. 1–7.

⁶⁴ See also *Prosecutor v. Blagojević and Jokić*, IT-02-60, Trial Chamber judgment, 17 Jan. 2005, at paras. 776–779.

gas to Auschwitz – he is certainly aware of the genocidal intent of those running the extermination camp, but he need not share it to be an accomplice in genocide.⁶⁵

The Court may have failed to reach a decision on the *mens rea* requirement(s) for complicity for one additional reason: the *travaux préparatoires* of the Genocide Convention clearly support the contention that complicity in genocide must be deliberate, as was noted by the ICTY Appeals Chamber itself in *Krstić*.⁶⁶ If this was indeed the real reason for the Court's circumspection, it would still have been misplaced, as it would have been based on a failure to comprehend the fundamental distinction between (general) intent and specific intent. In our example of the businessman selling gas to Auschwitz and thereby aiding and abetting genocide, that businessman might not share in the specific intent – he does not care what the gas is used for. However, he is still acting intentionally, deliberately, as he *intends to provide the poison*, but is indifferent to the consequences. In other words, aiding and abetting genocide is always deliberate, even if not committed with specific intent – aiding and abetting genocide cannot be negligent and that is what the *travaux* refer to. The intent which is always there is to furnish the aid and assistance in question, but the specific, genocidal intent need not be present.

That complicity in genocide is merely an umbrella term for several different types of participation in the crime of genocide short of co-perpetration has also been recognized by the ILC in its work on the Draft Code on Crimes against the Peace and Security of Mankind,⁶⁷ as well as by the drafters of the Rome Statute of the International Criminal Court (ICC).⁶⁸ Neither the Draft Code nor the Rome Statute follow the ICTY and ICTR Statutes in copy/pasting Article III of the Genocide Convention, but deal with complicity in genocide in the same way as with other international crimes, through their general provisions on various forms of accomplice liability, such as aiding and abetting.⁶⁹

There was therefore no good reason for the Court not to pronounce on the issue of *mens rea* for complicity. On the contrary, it is precisely an issue which is still in dire need of explanation and which practically cried out to the Court for clarification.

When it comes to the facts of the case relevant for Serbia's possible complicity in the Srebrenica genocide, the Court made several findings. There was no doubt that Serbia furnished aid and assistance which was used in the commission of the genocide.⁷⁰ There was also no doubt that the Serbian leadership knew that Srebrenica was about to be attacked in July 1995, as the attack itself was pre-planned, in the so-called 'Krivaja 95' operation.⁷¹ The only question on which Serbia's responsibility turned

⁶⁵ See in that regard *United Kingdom v. Tesch et al.* ('Zyklon B case') (1947) 1 L Rep Trib War Crimes 93. A further distinction should be made between intent and motive – in this case the businessman's motive would be monetary in nature, but genocide as such can also be committed with a variety of motives, ranging from ethnic hatred and revenge to the acquisition of power and territory.

⁶⁶ *Prosecutor v. Krstić*, *supra* note 53, at para. 142.

⁶⁷ See Report of the Commission to the General Assembly on the work of its 48th session, [1996] II *Yearbook of the International Law Commission*, Pt. 2, UN Doc. A/CN.4/SER.A/1996/Add.1 (Pt. 2).

⁶⁸ 2187 UNTS 90, which entered into force on 1 July 2002.

⁶⁹ See Art. 2 of the Draft Code [1996] *Yearbook of the Int'l L Commission*, ii, pt 2, and Art. 25 of the Rome Statute.

⁷⁰ *Genocide judgment*, *supra* note 1, at para. 422.

⁷¹ See *Prosecutor v. Krstić*, *supra* note 2, at paras. 118 ff.

was whether the Serbian leadership was aware of the specific, genocidal intent of the VRS leadership regarding Srebrenica.

The Court found that it was not conclusively proven that the Serbian leadership possessed actual knowledge that acts of genocide, and not crimes against humanity, were being committed in Srebrenica. The Court's previous finding that the decision to commit genocide in Srebrenica, as opposed to 'mere' ethnic cleansing, was made and implemented by the VRS in a very short time frame⁷² was decisive on this issue as well.⁷³

For all that we know the Court's ultimate conclusion on Serbia's complicity is probably correct. There certainly were indications that the Serbian leadership was aghast upon realizing the scope of the atrocities perpetrated in Srebrenica, and no positive proof has been produced before the ICJ or before the ICTY to show that they were aware of the VRS decision to commit genocide in Srebrenica.⁷⁴ There are, however, also serious indications to the contrary, most of all the fact that, as already mentioned, General Mladić met with Milošević and the EU negotiator Carl Bildt in Dobanovci near Belgrade on 14 July 1995, *while the genocide was actually underway*.⁷⁵ At any rate, there is enough room for reasonable disagreement with the Court's appraisal of the facts, with four judges dissenting on the issue of Serbia's complicity.⁷⁶

6 State Responsibility for Failing to Prevent and Punish Genocide

A Scope of the Obligation to Prevent Genocide

This now brings us to the only two violations that the Court actually found in the *Genocide* case – Serbia's failure to prevent the Srebrenica genocide and to punish the perpetrators. Of these two, the former is far more interesting, as the Court had to deal with a fundamental question to which the text of the Genocide Convention provides no answer – when and under what conditions does the obligation to prevent genocide arise?

Before answering this question, the Court made two preliminary points. Firstly, obligations to prevent certain acts exist in a number of different treaties, including most human rights conventions, as well as conventions for the suppression of certain crimes. In this particular case, however, the Court was interpreting only the Genocide Convention and it did not purport to establish a general jurisprudence applicable to all

⁷² *Genocide* judgment, *supra* note 1, at para. 295.

⁷³ *Ibid.*, at para. 423.

⁷⁴ Thus the Netherlands Institute for War Documentation (NIOD) Report on the Srebrenica genocide states that upon hearing reports of the crimes committed upon the fall of the enclave, 'the mood in Belgrade was one of incredulity and total disbelief', while 'there is no evidence to suggest participation in the preparations for the executions on the part of Yugoslav military personnel or the security agency (RDB)'. See at http://213.222.3.5/srebrenica/toc/p4_c02_s020_b01.html.

⁷⁵ See the Report of the UN Secretary-General, 'The Fall of Srebrenica', UN Doc. A/54/549 (1999), at 81, paras 371–374.

⁷⁶ See the *Genocide* judgment, *supra* note 1, Dissenting Opinion of Vice-President Al-Khasawneh, at paras 48–55; Declaration of Judge Keith, at paras 8–16; Declaration of Judge Bennouna, at 4–5; Dissenting Opinion of Judge *ad hoc* Mahiou.

cases where a treaty instrument, or other binding legal norm, includes an obligation for states to prevent certain acts, nor was it making any pronouncements on whether an obligation to prevent certain crimes exists under customary law.⁷⁷ Secondly, the Court made it clear that the obligation to prevent genocide is by nature a due diligence obligation, and is one of conduct, which is to be assessed in light of the totality of the circumstances. It is not one of result. In other words, a state is not under an obligation to succeed in preventing genocide at all costs, but it must employ all means which are reasonably available to it to do so.⁷⁸

While it is, on the one hand, clear that states have an obligation to prevent genocide within their territory, it is far from clear from state practice what their obligations are in regards to a genocide occurring somewhere else in the world. For example, did the United States, or France, or the Netherlands have an obligation to prevent the genocides in Srebrenica or Rwanda? The Court said the following on the scope of the state obligation to prevent genocide:

A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide. In this area the notion of 'due diligence', which calls for an assessment *in concreto*, is of critical importance. Various parameters operate when assessing whether a State has duly discharged the obligation concerned. The first, which varies greatly from one State to another, is clearly the capacity to influence effectively the action of persons likely to commit, or already committing, genocide. This capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events. The State's capacity to influence must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law; seen thus, a State's capacity to influence may vary depending on its particular legal position vis-à-vis the situations and persons facing the danger, or the reality, of genocide.⁷⁹

The quoted passage makes one thing perfectly clear: the state's positive obligation to prevent genocide is not territorially limited, nor is it dependent on any other single threshold criterion. This makes the obligation to prevent genocide vastly different from other due diligence obligations. The positive obligation under most human rights treaties, for example, to 'secure' or 'ensure' their application is contingent upon a state *having jurisdiction* over a certain person or territory.⁸⁰ Thus, the European

⁷⁷ *Genocide* judgment, *supra* note 1, at para. 429.

⁷⁸ *Ibid.*, at para. 430.

⁷⁹ *Ibid.*

⁸⁰ See, e.g., Art. 1 of the European Convention on Human Rights, ETS No. 5, 213 UNTS 222, which entered into force on 3 Sept. 1953 (ECtHR); Art. 1(1) of the American Convention on Human Rights, OAS Treaty Series No. 36, 1144 UNTS 123, which entered into force on 18 July 1978; Art. 2(1) of the International Covenant on Civil and Political Rights (ICCPR), GA Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966), 999 UNTS 171, which entered into force on 23 Mar. 1976; Art. 2(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res. 39/46 (annex, 39 UN GAOR Supp. (No. 51) at 197, UN Doc. A/39/51 (1984)), which entered into force on 26 June 1987; Art. 2(1) of the Convention on the Rights of the Child, GA Res. 44/25, annex, 44 UN GAOR Supp. (No. 49) at 167, UN Doc. A/44/49 (1989), which entered into force on 2 Sept. 1990.

Court of Human Rights found in the *Loizidou*⁸¹ and *Ilascu*⁸² cases that Turkey and Russia, respectively, had a positive, due diligence obligation to secure the human rights of persons in the separatist entities of Northern Cyprus and Transnistria, which were under these states' 'effective overall control'.⁸³

No threshold criterion of application such as state jurisdiction is mentioned in the text of the Genocide Convention, nor has the Court found it implicitly built in⁸⁴ – the scope of a state's obligation to prevent genocide is directly proportionate to the state's ability and influence over the relevant actors.⁸⁵ A minor state could probably be considered to have only the obligation to cooperate with other states, most of all diplomatically, in attempting to put pressure on a genocidal actor. This obligation would be similar in scope to the ones proposed by the ILC in Article 41 of its Articles on State Responsibility, regulating the aggravated regime of state responsibility for serious breaches of peremptory norms of international law.⁸⁶ A great power, on the other hand, would have to be much more active in order to discharge this obligation, while a state which is in one way or another directly involved in the events, for instance by proving assistance and support to the genocidal actors, as Serbia was in Bosnia, would have greater obligations yet. To put it somewhat differently, the obligation to prevent genocide would work a lot like state obligations under treaties enshrining socio-economic rights, which are supposed to be realized gradually, to the maximum of a state's available resources.

⁸¹ App. no. 15318/89, *Loizidou v. Turkey*, Judgment (preliminary objections) of 23 Feb. 1995, Judgment (merits) of 28 Nov. 1996.

⁸² App. No. 48787/99, *Ilascu and Others v. Moldova and Russia*, Judgment of 8 July 2004.

⁸³ 'Effective overall control' is a test used by the European Court of Human Rights (ECtHR) for the purposes of establishing state jurisdiction, but it has nothing to do with the attribution tests of effective control (*Nicaragua*, *supra* note 6) or overall control (*Tadić*, *supra* note 6). See Milanović, *supra* note 5, at 586.

⁸⁴ Judge Tomka argues forcefully for such an implicit limitation – see *Genocide* judgment, *supra* note 1, Separate Opinion of Judge Tomka, at para. 67. See also the Declaration of Judge Skotnikov, at 10.

⁸⁵ A similar approach was rejected by the ECtHR in App. No. 52207/99, *Banković and others v. Belgium and others*, Decision on Admissibility, 12 Dec. 2001. In this case the applicants argued that the material scope of obligations under the ECHR varies according to the state's abilities and control over an area. Therefore, a state fully in control of an area would have the positive obligation to secure all the human rights of the area's inhabitants, while a state engaging in intense aerial bombardment of an area would have only the negative obligation to respect basic human rights such as the right to life: *ibid.*, at para. 47). The Court disagreed, saying: '[T]he applicants' submission is tantamount to arguing that anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purpose of Article 1 of the Convention. ... the Court is of the view that the wording of Article 1 does not provide any support for the applicants' suggestion that the positive obligation in Article 1 to secure "the rights and freedoms defined in Section I of this Convention" can be divided and tailored in accordance with the particular circumstances of the extra-territorial act in question and, it considers its view in this respect supported by the text of Article 19 of the Convention. Indeed the applicants' approach does not explain the application of the words "within their jurisdiction" in Article 1 and it even goes so far as to render those words superfluous and devoid of any purpose': *ibid.*, at para. 75.

⁸⁶ ILC Art. 41(1) provides that '[s]tates shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40', while Art. 41(2) stipulates that '[n]o State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation'. See generally *ILC Commentary*, *supra* note 4, at 286–292.

The approach taken by the Court is therefore extremely progressive. Indeed, it comes closer to the 'responsibility to protect' than any other judicial pronouncement so far, if only in respect of genocide and not other international crimes – legal advisers in the ministries of foreign affairs of the major powers should take due note. It should be borne in mind, however, that the Court is not saying that powerful states have an explicit obligation to use force in order to prevent a genocide by engaging in a humanitarian intervention. It is in fact hinting to the contrary when it says that states 'may only act within the limits permitted by international law'.⁸⁷ That being said, the more a state can do, the more it must do.

Now that the ICJ has made it clear that every state in the world has an obligation to prevent any genocide, albeit to a greater or to a lesser extent, the question remains as to when that obligation arises, i.e., what is its temporal scope? The Court found that, first, a state can be held responsible for breaching the obligation to prevent genocide only if genocide is actually committed, pursuant to a general rule of the law of state responsibility, as codified in Article 14(3) of the ILC Articles.⁸⁸ However, 'a State's obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a *serious risk that genocide will be committed*.'⁸⁹ This is in fact the principal distinction between state complicity in genocide and its failure to prevent genocide.⁹⁰ For a state to be complicit in genocide, it must possess actual knowledge that a genocide is imminent or ongoing, and provide aid and assistance to the perpetrators of that genocide. On the other hand, for a state to be responsible for failing to prevent genocide it must only know of a serious risk that genocide will be committed. Additionally, complicity will usually (though not always) involve a positive act, while failing to prevent is always an act of omission.⁹¹

There is a slight, if unavoidable, contradiction in defining the scope of the duty to prevent genocide as arising whenever there is awareness of a serious risk of genocide, yet requiring that genocide actually be committed in order that state responsibility for a breach of the obligation to prevent should ensue. That is particularly so when grievous crimes are in fact committed, yet they do not amount to genocide due to lack of specific intent, but solely to crimes against humanity. For example, it could certainly be argued that there was a serious risk of genocide in several other municipalities in Bosnia other

⁸⁷ *Genocide judgment*, *supra* note 1, at para. 430.

⁸⁸ *Ibid.*, at para. 431.

⁸⁹ *Ibid.*, emphasis added.

⁹⁰ In her statement to the press President Higgins made this point quite clear: see Higgins, *supra* note 11: '[i]t is not so easy to grasp the distinction in law between complicity in genocide and the breach of the duty to prevent genocide. Let me try to explain in a few words. The Court did find it conclusively proven that the FRY leadership, and President Milošević above all, were fully aware of the climate of deep-seated hatred which reigned between the Bosnian Serbs and the Muslims in the Srebrenica region, and that massacres there were likely to occur. They may not have had knowledge of the specific intent to commit genocide, but it must have been clear that there was a *serious risk of genocide* in Srebrenica. This factor is important because it activates the obligation to prevent genocide, which is enshrined in Article I of the Genocide Convention.'

⁹¹ *Genocide judgment*, *supra* note 1, at para. 432.

than Srebrenica, most notably in the area around Prijedor,⁹² yet Serbia could still not be held responsible as ultimately genocide was not committed in Prijedor.

This still does not mean that this dual nature of the obligation to prevent, with it arising whenever there is a serious risk of genocide, but capable of being breached only when there actually is genocide, cannot be put to some good use. Sudan, for example, acceded to the Genocide Convention on 13 October 2003,⁹³ but has – strangely – made no reservation to the compromisory clause in Article IX of the Convention, which grants jurisdiction to the ICJ.⁹⁴ There is therefore no obstacle to prevent a state, or a group of states, from initiating proceedings against Sudan before the Court in relation to the ongoing massive atrocities in Darfur, as the obligations involved are by their nature *erga omnes*. Even if such a case might ultimately fail due to the difficulties in proving specific genocidal intent in relation to Darfur,⁹⁵ a *prima facie* case of genocide for the purposes of jurisdiction could still be made. Not only would this force Sudan to defend its actions before the principal judicial organ of the UN, but it would also allow the applicant state(s) to request the indication of provisional measures from the Court, which it would in all likelihood grant.⁹⁶ Even if these measures proved to be of more symbolic than of practical import, they could still prove to be a decent substitute for the deplorable, absolutely atrocious lack of activity regarding Darfur on the part of the UN Human Rights Council.

B *Application to the Facts of the Case and Reparation*

On the facts of the *Genocide* case, the Court established that Serbia was in a position of influence over the Bosnian Serbs, with whom it had very close political, financial and military ties, unlike any other state.⁹⁷ The Court also found that Serbia was put on notice of its obligation to prevent genocide by the Court's orders on provisional measures.⁹⁸ Most importantly, the Court determined that Serbian authorities must have been aware of a serious risk of genocide in Srebrenica if the VRS forces were allowed to occupy the enclave, especially due to the climate of deep-seated hatred which reigned between the Bosnian Serbs and Muslims in the Srebrenica area.⁹⁹ As Serbian authorities manifestly refrained from using any of the resources at their

⁹² For instance, the ICTY Trial Chamber in the *Milošević* case lists several municipalities in Bosnia for which it says that a reasonable trier of fact could establish genocide beyond reasonable doubt in its Decision on the Motion for Judgment of Acquittal, IT-02-54, 16 June 2004, at paras 117 ff.

⁹³ The depositary notification by the UN Secretary-General is available at: <http://preventgenocide.org/law/convention/SudanDepositaryNotification13Oct2003.doc>.

⁹⁴ See the status of ratifications at www.ohchr.org/english/countries/ratification/1.htm.

⁹⁵ See *supra* note 17, referring to the report of the UN Commission of Inquiry on Darfur.

⁹⁶ The Court would surely apply the same standard that it used in the *Genocide* case, where it considered that in 'circumstances ... in which there is a grave risk of acts of genocide being committed, Yugoslavia and Bosnia-Herzegovina, whether or not any such acts in the past may be legally imputable to them, are under a clear obligation to do all in their power to prevent the commission of any such acts in the future': *Genocide* judgment, Preliminary Measures, Order of 8 Apr. 1993 [1993] ICJ Rep 3, at 22, para. 45, and where it considered these circumstances to warrant the indication of provisional measures under Art. 41 of the ICJ Statute: *ibid.*, at 23, para. 50.

⁹⁷ *Genocide* judgment, *supra* note 1, at para. 434.

⁹⁸ *Ibid.*, at para. 435.

⁹⁹ *Ibid.*, at paras 436–438.

disposal to prevent the Srebrenica genocide, the Court accordingly found Serbia in breach of its obligations.¹⁰⁰

The Court's reasoning so far cannot be faulted, but this unfortunately brings us to the only part of its judgment which appears to be indefensible. Namely, the Court ruled that compensation would not be an appropriate remedy for Serbia's violation to prevent the Srebrenica genocide, saying that:

The question is whether there is a sufficiently direct and certain causal nexus between the wrongful act, the Respondent's breach of the obligation to prevent genocide, and the injury suffered by the Applicant, consisting of all damage of any type, material or moral, caused by the acts of genocide. Such a nexus could be considered established only if the Court were able to conclude from the case as a whole and with a sufficient degree of certainty that the genocide at Srebrenica would in fact have been averted if the Respondent had acted in compliance with its legal obligations. However, the Court clearly cannot do so.¹⁰¹

Given this finding, the Court held that the only form of reparation that Bosnia is entitled to is satisfaction, and that the Court's declaratory judgment on Serbia's breach of the obligation to prevent is satisfaction enough.¹⁰² Now, it is one thing to say that in the circumstances of this particular case it would have been inappropriate to award compensation. It is quite another to say that compensation would be the appropriate form of reparation in a case involving a failure to prevent if, and only if, it could be proven that Serbia would have prevented the genocide if it had indeed acted. There is in principle nothing wrong in requiring causality for damages, be it proximate or otherwise – though causality by omission has always been a philosophically tricky concept. In this context, however, requiring some sort of reverse 'but for', *sine qua non* causality for omission does seem to be excessive.

First of all, proving such a type of causality is impossible in practice. What was Bosnia supposed to prove – that Serbia possessed a magical switch which it could flip at will, and which would turn General Mladić and the other VRS *génocidaires* on or off? That level of control would probably already have led to the attribution of the Srebrenica genocide to Serbia under either of the two *Nicaragua* tests, and it has no place at the level of prevention alone.

Secondly, there is no evidence in customary law and jurisprudence that compensation for wrongful omission to act would be an appropriate remedy only if 'but for' causality could be established. The Court, moreover, cites absolutely no authority for its position. There is, on the other hand, ample evidence to the contrary, most notably in human rights jurisprudence. Both the European Court of Human Rights and the Inter-American Court have in a number of cases awarded compensation against states that failed to secure the human rights of persons within their jurisdiction and to prevent violations against these persons by third parties, for example in the aforementioned *Ilascu* case,¹⁰³ or in the even more well-known *Velasquez Rodriguez* case.¹⁰⁴

¹⁰⁰ *Ibid.*, at para. 438.

¹⁰¹ *Ibid.*, at para. 462 (emphasis added).

¹⁰² *Ibid.*, at para. 463.

¹⁰³ *Supra* note 82.

¹⁰⁴ *Velasquez Rodriguez Case*, Judgment of 29 July 1988, Inter-AmCtHR (Ser. C) No. 4 (1988), especially at paras. 166, 172–177.

In neither of these two cases did the courts require the applicants to show that the violations of their human rights perpetrated by a private actor, whose activities the state tolerated, would *certainly* have been prevented if the state had acted to the best of its ability.

Thirdly, the internationally wrongful act for which reparation was sought was not the commission of the Srebrenica genocide as such, but Serbia's failure to prevent it. Serbia's responsibility for failing to prevent genocide would not in the end amount to the same duty of reparation as if it had been found guilty of the commission of genocide itself. These two breaches are not the same, and the magnitude of compensation should certainly be less than for the failure to prevent than for commission.

Fourthly, the ILC Articles on State Responsibility make no distinction between the different forms of reparation – restitution, compensation, satisfaction – on the basis of causality. Indeed, the Commentaries actually discuss the issue of causality under the general heading of reparation, not under the specific article relating to compensation.¹⁰⁵ The three forms of reparation differ in their suitability to alleviate the injury or damages caused, not in the causal proximity of the wrongful act to the injury. Causality is in fact the necessary condition for any form of reparation,¹⁰⁶ not just compensation – it just does not have to be 'but for' causality when it comes to acts of omission. In other words, there cannot in the same case be enough causality for satisfaction, but insufficient causality for compensation.

Finally, it must also be borne in mind that Serbia was not just a passive observer of Srebrenica. It did in fact provide massive assistance and support to the Republika Srpska and its army, and this assistance was used for the Srebrenica massacre, as was established by the Court itself.¹⁰⁷ If not a fully-knowing accomplice, Serbia was still aware of the serious risk that the genocide would take place. In other words, Serbia's behaviour was not the passive behaviour of the Dutchbat peacekeepers – it did in fact actively contribute to the commission of the Srebrenica genocide, even if it was not directly responsible for it.

There is thus no justification for the position taken by the Court. It is simply not well grounded in the legal concept of causality when it comes to wrongful acts of omission. If one were examining, for instance, the responsibility of a doctor for the death of a patient and it was found that he had deliberately failed to provide an indicated medical treatment to that sick patient, one would not have to prove that the treatment would *in fact certainly have worked* in order for the doctor's responsibility to accrue. Just as logically, as the scope of the obligation to prevent genocide varies with the state's ability and influence, so should the scope of any reparation for failure to discharge this

¹⁰⁵ *ILC Commentary*, *supra* note 4, at 227–228.

¹⁰⁶ *Ibid.*, at 227, paras 9 and 10.

¹⁰⁷ *Genocide judgment*, *supra* note 1, at para. 422: '[t]here is thus little doubt that the atrocities in Srebrenica were committed, at least in part, with the resources which the perpetrators of those acts possessed as a result of the general policy of aid and assistance pursued towards them by the FRY.'

obligation be proportionate to that influence. If we say that the United States failed to fulfil its legal obligation to prevent the genocide in Rwanda, a declaratory judgment as a form of satisfaction probably would be the only appropriate remedy. Such a situation is qualitatively different from that of Serbia in relation to Bosnia, however, as Serbia was directly involved in the Bosnian conflict, possessed unparalleled influence over the Bosnian Serbs, and the Srebrenica genocide itself was committed with the aid that Serbia had provided.

It is to be regretted that the part of the judgment which deals with the obligation to prevent genocide is at the same time the most promising and the most disappointing. With one hand the Court makes the obligation to prevent genocide a truly global duty of every state to do what it reasonably can, while with the other the Court emasculates this obligation by deciding that in any practically conceivable set of circumstances a declaratory judgment would be the only appropriate remedy.

It would have been far, far better for the Court to provide no explanation at all as to why it was not awarding compensation in this concrete case than for it to give the particular justification that it did. Furthermore, even if the moral and legal injury sustained by Bosnia due to Serbia's breach of its duty to prevent the Srebrenica genocide was not well suited to reparation by compensation, satisfaction itself can take many different forms short of a judicial declaration. To see what a missed opportunity this decision on the remedies represented, one need not look very far as another court, besides the ICJ and the ICTY, dealt with the consequences of the Srebrenica genocide: the Human Rights Chamber of Bosnia and Herzegovina, a now defunct internationalized human rights tribunal created by the Dayton Peace Agreement and empowered to apply to the European Convention on Human Rights and several other treaties.¹⁰⁸ As the jurisdiction of the Chamber was temporally limited, it could not rule on human rights violations committed during the Bosnian conflict, including the Srebrenica genocide. It did, however, pronounce on a number of applications submitted by the family members of those slaughtered at Srebrenica, who asserted that the Republika Srpska violated their human rights under Articles 3 and 8 of the ECHR by not informing them of the fates of their loved ones and by failing to conduct any effective investigation into their fate. The Chamber ruled that the Republika Srpska was indeed responsible, and ordered it to pay approximately two million euros for the construction of the genocide memorial in Potočari, near Srebrenica, as well as to conduct an effective investigation into the massacre.¹⁰⁹ This order of the Chamber, coupled with intense international pressure, caused the Government of the Republika Srpska to form a special commission of inquiry on Srebrenica, and to acknowledge, for the first time, its responsibility for the massacre, even though it was not labelled as genocide.¹¹⁰

¹⁰⁸ General information about the Chamber, as well as its decisions, can be found at www.hrc.ba/english/default.htm.

¹⁰⁹ *Ferida Selimović et al. v. the Republika Srpska*, Decision on Admissibility and the Merits, 7 Mar. 2003.

¹¹⁰ The Government Commission's Report on Srebrenica, as well as the apology of the Republika Srpska Government, is available in English at: www.vladars.net/pdf/srebrenicajun2004engl.pdf, www.vladars.net/pdf/srebr_final_e.pdf, and www.vladars.net/pdf/srbren_zaklj_e.pdf.

Something similar would have been the most appropriate form of reparation for Serbia's breach of one of its most fundamental obligations. Such a remedy would probably have contributed more to the process of reconciliation in the Balkans than any judicial declaration or the blunt instrument of compensation that would have put price-tags on the lives of the victims of Srebrenica. That being said, however, it is somewhat unrealistic to expect the ICJ to turn into a human rights court and to conjure up remedies out of thin air – especially as none of this was ever argued by Bosnia. On the contrary, Bosnia's own counsel explicitly stated that Serbia's responsibility for failing to prevent genocide was 'eclipsed' by its responsibility for the commission of genocide, and that, in any event, a formal declaration by the Court would be the appropriate remedy for a breach of the duty to prevent.¹¹¹ Therefore, even assuming that the Court's hands were not tied by the *ne ultra petita* rule, it still, due to Bosnia's litigation strategy, lacked any incentive to pursue a creative and innovative remedy.

C *Obligation to Punish Genocide*

When it comes to state responsibility for failing to punish genocide, Article VI of the Convention sets down that states only have an obligation to punish the perpetrators of genocide committed within their territory, and have no such obligation if the genocide was perpetrated elsewhere, even if a *génocidaire* is actually in their custody.¹¹² As the Srebrenica genocide was committed outside Serbian territory, there was only one basis for Serbia's responsibility for failing to punish genocide: its lack of full cooperation with the ICTY, which the ICJ found to be an 'international penal tribunal' within the meaning of the second clause of Article VI.¹¹³ The ICJ also found that the further requirement mentioned in Article VI, namely that the state must have accepted the Tribunal's jurisdiction, was also satisfied, as regardless of the issue of Serbia's accession to the UN Charter it had signed the Dayton Peace Agreement in 1995, which had ended the Bosnian war, Annex 1A of which clearly prescribed an obligation of cooperation of the contracting states with the ICTY.¹¹⁴ Accordingly, the Court established that General Mladić, the person most responsible for the Srebrenica massacre and indicted by the ICTY, was living in Serbia and still continues to do so, and has not yet been apprehended.¹¹⁵ The Court therefore found Serbia in violation of Article VI of the Convention, and ordered it to cooperate fully with the Tribunal.¹¹⁶ It should be noted that, as a general matter, the Court's decision now opens up the possibility of a state being held responsible under Article VI of the Genocide Convention if it fails to cooperate fully with a genocide investigation or prosecution by the ICC.

¹¹¹ *Genocide judgment*, *supra* note 1, at para. 156; CR 2006/11, at 36, para. 20.

¹¹² *Genocide judgment*, *supra* note 1, at para. 442.

¹¹³ *Ibid.*, at para. 445.

¹¹⁴ *Ibid.*, at para. 447.

¹¹⁵ *Ibid.*, at para. 448.

¹¹⁶ *Ibid.*, at para. 471(8).

7 Conclusion

It is impossible to understand the *Genocide* judgment without appreciating the constraints within which the Court had to operate, most notably the strict definition of genocide in international law and the Court's restricted jurisdiction. The judgment has been most disappointing to those who have viewed the *Genocide* case as an adjudication on the totality of the Bosnian conflict, which it simply was not and could not have been. Most of the criticism made so far against the judgment therefore misses the mark.

It is very interesting to observe how the ICJ interacted with other authoritative interpreters of international law, most of all the ILC and the ICTY. The Court basically treated the ILC Articles on State Responsibility as holy scripture,¹¹⁷ despite them not being a treaty or any sort of binding legal instrument, in a development that at least one author presciently foresaw.¹¹⁸ Yet, in a further paradox, the Court actually exposes some holes in the ILC's work, mainly in regard to the relationship between states and non-state actors, as seen most notably in the Court's discussion of complicity and in its application by analogy of Article 6 of the ILC Articles to all public authorities. These Articles should therefore not be seen as the international equivalent of the *Code civil*, but only as a sometimes imperfect snapshot of customary law.

The Court's interaction with the ICTY is even more interesting, and it takes place at four different levels. First, the Court cites the ICTY (and the ICTR) on points of law regarding genocide – on what is the *mens rea* requirement, how to define the protected group and so on. This is a practice which is extremely rare for the ICJ, as it usually invokes only its own jurisprudence. Secondly, the Court cites the ICTY on points of fact – the ICJ did very little fact-finding of its own, but relied almost entirely on the ICTY, in fact never disagreeing with its assessment of the facts. Thirdly, the Court also relies on the ICTY when it comes to the legal qualification of these facts, mainly as to whether a particular crime can be qualified as genocide, with the result that only Srebrenica is so defined. Finally, when it comes to state responsibility, the ICJ rightly rejects the ICTY Appeal Chamber's overall control test from *Tadić*, applying instead its own two *Nicaragua* tests of complete dependence and control and of effective control. This interaction between the ICJ and the ICTY shows extremely well at least one way in which potential conflicts between proliferating international courts and tribunals can be resolved – by the deference of the generalist to the specialist. In this case the ICJ is the generalist, dabbling in everything but not specializing in anything, and deferring to the ICTY in its particular area of expertise. However, as the only international court of general jurisdiction, and as the principal judicial organ of the UN, the ICJ is the one authority whose pronouncements on structural principles of public international law should be followed, and state responsibility is precisely one of those areas in which the ICJ's expertise is paramount.

¹¹⁷ One could also note in this regard the fact that half the current ICJ Judges are former members of the ILC.

¹¹⁸ See Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority', 96 *AJIL* (2002) 857.

As a matter of policy, it is also necessary to assuage those who fear that the Court's insistence on the twofold paradigm of complete dependence and effective control sets the bar too high for attribution, as it would let states possessing overall control completely off the hook. This is simply not so. If it fails both *Nicaragua* tests, a state having only overall control would still be responsible either for complicity or for failing to prevent genocide, depending on the level of its awareness of the specific intent of the *génocidaires* and on whether it actively provides them with aid and assistance or not. This is indeed precisely what happens in the human rights context, in cases such as *Loizidou* or *Ilascu* before the European Court of Human Rights, in which a state is held responsible for violations committed by a non-state actor which it supports – it is not held responsible for the violations themselves as there is insufficient basis for attribution, but for its own failure to fulfil its due diligence obligation to secure the human rights of those within its jurisdiction.

This now leads us to the mixed bag that is the Court's interpretation of the state obligation to prevent genocide. On the one hand, the Court interprets this obligation in a very expansive way, by saying that every state in the world has the obligation to prevent genocide, wherever it might happen, within the confines of its ability and influence, with this obligation arising whenever a state becomes aware of a serious risk that genocide will be committed. On the other hand, the Court reduces this obligation to mere symbolism, by setting aside any truly meaningful form of reparation. If the *Genocide* judgment should be criticized for anything, this would be it.

One should finally emphasize what was both the first and the final constraint that the Court had to deal with – it, after all, operates in an adversarial proceeding, and it can work only with what the parties put before it. In this respect, it must be said that, regrettably, the Bosnian litigation strategy was a failure. Any litigation strategy must involve offering viable, realistic solutions to a court, but in the *Genocide* case the Bosnian side played a game of all or nothing, and they indeed got almost nothing. They offered no truly alternative solution to the Court in the event that their primary case, that all of Bosnia was engulfed in genocide and that Serbia was responsible for all of it, should fail – as it did, and as was in fact most likely.

Bosnia's strategy was a failure because it did not make complicity and prevention the primary argument, in substance if not in form, and because it did not truly focus on Srebrenica and on the Serbian involvement in these events. It was a failure because it did not insist on fact-finding independent of the ICTY, mainly in relation to areas which the ICTY has not yet touched upon, and that is precisely the involvement of the high-ranking Serbian leadership in the Bosnian conflict in general and in the Srebrenica genocide in particular. The possibility for revision of the judgment remains after the ICTY decides the *Perišić* and the *Stanišić and Simatović* cases, but the bar set for revision is indeed very high. Lastly, Bosnia's strategy was a failure because they neglected to argue any alternative remedies, especially in regard to complicity and prevention. What Bosnia failed to realize, in other words, is that in a matter such as this one, an applicant state should not strive to make its maximal case, but its best one.