INTERNATIONAL LAW CML 3117SC

CASE NOTE ASSIGNMENT

FALL 2014

Instructions

1) This case note assignment is graded out of 30 marks. It is worth 30 % of your final grade in this course.

2) The main requirements are that you summarize the excerpt of the ICJ case below (Part I) and that you answer a question in relation to that case (Part II).

3) The word limit for this assignment is 3500 words and it is strictly applied. Please use your word processing software to count the words in the assignment and include this word count on your cover page. For the essay part, you may adopt any referencing style but you are required to use a consistent referencing style that provides full referencing details (either in footnotes or in a detailed reference list at the end of the document). The word count does not include footnotes. There is to be no substantive content in your footnotes. You are allowed to use abbreviations for key cases and legislation, but you must clearly indicate what you mean by this abbreviation, using the format indicated inthe document posted on the course website (i.e., "Accepted terms and abbreviations. International legislation and case law").

4) Please double space your work (use Times New Roman, size 12 font, 1-inch margins) and number your pages. Include a cover page and a bibliography page.

5) You will have two weeks to complete this assignment: November 04 to November 18. **The case note must be submitted before 4:30 p.m. on Tuesday, November 18, 2014**. The case note should be handed in directly to me in class or handed in to an academic assistant at the SIDGS reception desk (FSS Hall, room 8005; please ensure that your paper is stamped once you give it to one of the academic assistants). Only hard copies of

this assignment will be accepted. Under no circumstances should papers be left under my office door.

6) Extensions for submission of the assignment will only be given for valid reasons approved by the instructor. Otherwise, there will be a 5 % deduction applied for each day the submission is late (weekends not excluded).

Detailed instructions

PART I: CASE SUMMARY (10 marks total; should not exceed 1400 words)

To make it easier for you to read the ICJ case included below, some of the Court's footnotes/citations have been omitted and paragraphs 1-376 have been summarized (in italics). Paragraphs 377-378 and 471 of the ICJ case and excerpts from Judge Al-Khasawneh's and Judge Keith's dissenting opinions have also been reproduced below to facilitate your overall understanding of the case. **You are requested to summarize paragraphs 379-450 of the ICJ case ONLY- not the whole ICJ case.** If you do not follow this rule, marks will be deducted.

In assessing this work I am looking for:

- An understanding of the central legal issue(s) at stake in this case (i.e., key legal question(s) before the court).
- A clear summary of the ICJ decision, (i.e., court's finding and court's reasoning to reach its decision).
- Conciseness, clarity, brevity and writing skills (including proper grammar, punctuation, and style).

My expectation for this assignment is NOT that you mention all the sources of law used by the ICJ, but rather that you *briefly identify the most important sources used by the Court to sustain its analysis (i.e., key underlying legal principles and/or key previous ICJ cases ONLY*).

PART II: ESSAY QUESTION (20 marks total)

Answer question A <u>OR</u> question B.

<u>Question A</u>:

Luban writes about the 2007 International Court of Justice's *Bosnian Genocide* Case:

> "If Serbia's actions don't amount to state complicity in genocide, it is hard to envision what would. The Court's reluctance to hold a state accountable for crimes goes to the very heart of international law, which is itself a creature of states. States don't like to be accused of criminal wrongdoing. It offends their sovereign dignity and majesty."

Discuss this statement, and state whether or not you agree. In your answer, consider: 1) whether the ICJ could have ruled otherwise, taking into account, amongst other elements, the ICJ's role and the international legal definition of genocide; and 2) whether this decision will (or not) increase the political pressure on genocidal regimes for change.

<u>OR</u>

<u>Question B</u>

Diane F. Orentlicher writes about the 2007 International Court of Justice's *Bosnian Genocide* Case:

> "The Court put to rest States' all-too-familiar claim that it is unclear whether they must act to prevent genocide in the face of ambiguous facts that are unambiguously menacing: If they wait until it is legally certain that genocide has occurred, the Court found, they have waited too long to prevent it."

In light of this statement, do you think that the ICJ's requirement (that states take "all measures" (para. 430) to prevent genocide) could be interpreted as putting the United Nations Security Council and other "powerful" states with an increased responsibility to prevent genocide? Why and how?

For the essay answer, <u>quality is preferred over quantity</u>. Your essay should not be purely descriptive and you are expected to state a thesis (the central argument of the paper) and develop that thesis in the paper. Use only 2 or 3 main ideas in support of your thesis but make sure that each idea is well-developed and well-sustained using strong examples. My expectation is an in-

depth and convincing analysis of the topic. Avoid writing everything you have in mind in a disorganized manner.

The conclusion and introduction should tie your whole paper together. In the introduction, state the thesis of your paper clearly. State also how you plan to approach your topic by explaining briefly the main points you plan to cover in your paper. In conclusion, re-state your thesis by summarizing your arguments and explaining why you have come to this particular conclusion.

The essay part will be evaluated on: your demonstrated understanding of the topic; the depth of your critical analysis; and your organization, clarity and writing skills (including proper grammar, punctuation, and style).

Checklist:

1. Do my introduction and conclusion tie the whole paper together?
2. Is my thesis statement clear and concise?
3. Did I follow my outline? Did I miss anything?
4. Have I proved my thesis with strong supporting arguments?
5. Are my arguments presented in a logical sequence?
6. Have I made my arguments and points clear in this essay?
7. Have I followed a consistent and acceptable citation format?

INTERNATIONAL COURT OF JUSTICE

YEAR 2007

26 February 2007

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

(BOSNIA AND HERZEGOVINA v. SERBIA AND MONTENEGRO)

JUDGMENT

[The case, filed by Bosnia and Herzegovina in 1993, alleges that during the 1992–1995 armed conflict, the Federal Republic of Yugoslavia (FRY) (which after 2001 became known as "Serbia and Montenegro", and later as "Serbia", following the secession of Montenegro in June 2006) was responsible for mass killings and other atrocities committed against Bosnian Muslims in violation of the Genocide Convention.[1] *In its application to the ICJ, Bosnia claims that [Serbia]:*

> *"...directly, or through the use of its surrogates, has violated and is violating the Convention on the Prevention and Punishment of the Crime of Genocide, by destroying in part, and attempting to destroy in whole, national, ethnical or religious groups within the, but not limited to the, territory of the Republic of Bosnia and Herzegovina, including in particular the Muslim population, by*
> *— killing members of the group;*
> *— causing deliberate bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part ;*
> *— imposing measures intended to prevent births within the group" (para. 65)*

More specifically, Bosnia alleges that "under the guise of protecting the Serbian population of Bosnia and Herzegovina, [Serbia] in fact conceived and shared with them the vision of a 'Greater Serbia,' in pursuit of which it gave its support to those persons and groups responsible for the activities which constitute the genocidal acts complained of." (para. 237)

Although Serbia disputes certain facts, such as the actual number of deaths in Srebrenica, it does not deny that crimes were committed during the conflict. In fact, it concedes that certain acts could be "characterized as war crimes and certain even as crimes against humanity." (para. 249). However, Serbia disputes the allegation by Bosnia that these acts had been committed with the requisite genocidal intent and could be attributed to Serbia, as they had been carried out by the army of the Republika Srpska (VRS), the Bosnian Serb entity that retained de facto control over a substantial part of territory after Bosnia and Herzegovina's secession from the former Yugoslavia (para. 278).

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[1] *Convention on the Prevention and Punishment of Genocide*, done Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) [hereinafter *Genocide Convention*]. The text of the *Genocide Convention* is posted on the course website.

After having held that the Court has jurisdiction over Serbia to hear the claim, the Court notes that it is limited to assessing Serbia's responsibility for alleged acts of genocide:

> *"147. The jurisdiction of the Court in this case is based solely on Article IX of the [Genocide Convention] [...] It follows that the Court may rule only on the disputes between the Parties to which that provision refers [...] It has no power to rule on alleged breaches of other obligations under international law, not amounting to genocide, particularly those protecting human rights in armed conflict.*

Thus, the ICJ decision does not deal with Serbia's responsibility for war crimes or crimes against humanity.

The Court then finds that massive killings and other crimes referred to in Bosnia's application occurred across the country (paras. 246-253; para. 276). However, according to the court, only the Massacre of Bosnian Muslims at Srebrenica in July 1995 amounted to genocide. The Court explains:

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

Yet, the judgment eliminates any doubt about whether Bosnian Muslims suffered atrocious harms during the conflict. The Court affirms that it "has been established by fully conclusive evidence that members of the protected group were systematically victims of massive mistreatment, beatings, rape, and torture causing serious bodily and mental harm, during the conflict and, in particular, in the detention camps." (para. 319)

Now that it has been established that the massacre of Bosnian Muslims at Srebrenica in July 1995 amounted to genocide, the Court turns to examine whether Serbia is responsible for the massacre at Srebrenica...]

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

(1) The Alleged Admission

377. The Court first notes that the Applicant contends that the Respondent has in fact recognized that genocide was committed at Srebrenica, and has accepted legal responsibility for it. The Applicant called attention to the following official declaration made by the Council of Ministers of the Respondent on 15 June 2005, following the showing on a Belgrade television channel on 2 June 2005 of a video-recording of the murder by a paramilitary unit of six Bosnian Muslim prisoners near Srebrenica (paragraph 289 above). The statement reads as follows:

> "Those who committed the killings in Srebrenica, as well as those who ordered and organized that massacre represented neither Serbia nor Montenegro, but an undemocratic regime of terror and death, against whom the majority of citizens of Serbia and Montenegro put up the strongest resistance. Our condemnation of crimes

> in Srebrenica does not end with the direct perpetrators. We demand the criminal responsibility of all who committed war crimes, organized them or ordered them, and not only in Srebrenica. Criminals must not be heroes. Any protection of the war criminals, for whatever reason, is also a crime."

The Applicant requests the Court to declare that this declaration "be regarded as a form of admission and as having decisive probative force regarding the attributability to the Yugoslav State of the Srebrenica massacre".

378. It is for the Court to determine whether the Respondent is responsible for any acts of genocide which may be established. For purposes of a finding of this kind the Court may take into account any statements made by either party that appear to bear upon the matters in issue, and have been brought to its attention (cf. Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974, pp. 263 ff., paras. 32 ff., and Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974, pp. 465ff., paras. 27ff. ; Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986, pp. 573-574, paras. 38-39), and may accord to them such legal effect as may be appropriate. However, in the present case, it appears to the Court that the declaration of 15 June 2005 was of a political nature; it was clearly not intended as an admission, which would have had a legal effect in complete contradiction to the submissions made by the Respondent before this Court, both at the time of the declaration and subsequently. The Court therefore does not find the statement of 15 June 2005 of assistance to it in determining the issues before it in the case.

[Excerpt to summarize starts here]

(2) The Test of Responsibility

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

380. These three issues must be addressed in the order set out above, because they are so interrelated that the answer on one point may affect the relevance or significance of the others.

Thus, if and to the extent that consideration of the first issue were to lead to the conclusion that some acts of genocide are attributable to the Respondent, it would be unnecessary to determine whether it may also have incurred responsibility under Article III, paragraphs *(b)* to *(e)*, of the [Genocide Convention] for the same acts. Even though it is theoretically possible for the same acts to result in the attribution to a State of acts of genocide (contemplated by Art. III, para. *(a)*), conspiracy to commit genocide (Art. III, para. (*b*)), and direct and public incitement to commit genocide (Art. III, para. *(c)*), there would be little point, where the requirements for attribution are fulfilled under *(a)*, in making a judicial finding that they are also satisfied under (*b*) and *(c)*, since responsibility under *(a)* absorbs that under the other two. The idea of holding the same State responsible by attributing to it acts of "genocide" (Art. III, para. *(a)*), "attempt to commit genocide" (Art. III, para. (*d*)), and "complicity in genocide" (Art. III, para. *(e)*), in relation to the same actions, must be rejected as untenable both logically and legally.

381. On the other hand, there is no doubt that a finding by the Court that no acts that constitute genocide, within the meaning of Article II and Article III, paragraph *(a)*, of the [Genocide Convention], can be attributed to the Respondent will not free the Court from the obligation to determine whether the Respondent's responsibility may nevertheless have been incurred through the attribution to it of the acts, or some of the acts, referred to in Article III, paragraphs (*b*) to *(e)*. In particular, it is clear that acts of complicity in genocide can be attributed to a State to which no act of genocide could be attributed under the rules of State responsibility, the content of which will be considered below.

382. Furthermore, the question whether the Respondent has complied with its obligations to prevent and punish genocide arises in different terms, depending on the replies to the two preceding questions. It is only if the Court answers the first two questions in the negative that it will have to consider whether the Respondent fulfilled its obligation of prevention, in relation to the whole accumulation of facts constituting genocide. If a State is held responsible for an act of genocide (because it was committed by a person or organ whose conduct is attributable to the State), or for one of the other acts referred to in Article III of the [Genocide Convention] (for the same reason), then there is no point in asking whether it complied with its obligation of prevention in respect of the same acts, because logic dictates that a State cannot have satisfied an obligation to prevent genocide in which it actively participated. On the other hand, it is self-evident, as the Parties recognize, that if a State is not responsible for any of the acts referred to in Article III, paragraphs *(a)* to *(e)*, of the [Genocide Convention], this does not mean that its responsibility cannot be sought for a violation of the obligation to prevent genocide and the other acts referred to in Article III.

383. Finally, it should be made clear that, while, as noted above, a State's responsibility deriving from any of those acts renders moot the question whether it satisfied its obligation of prevention in respect of the same conduct, it does not necessarily render superfluous the question whether the State complied with its obligation to punish the perpetrators of the acts in question. It is perfectly possible for a State to incur responsibility at once for an act of genocide (or complicity in genocide, incitement to commit genocide, or any of the other acts enumerated in Article III) committed by a person or organ whose conduct is attributable to it, and for the breach by the State of its obligation to punish the perpetrator of the act : these are two distinct internationally

wrongful acts attributable to the State, and both can be asserted against it as bases for its international responsibility.

384. Having thus explained the interrelationship among the three issues set out above (paragraph 379), the Court will now proceed to consider the first of them. This is the question whether the massacres committed at Srebrenica during the period in question, which constitute the crime of genocide within the meaning of Articles II and III, paragraph *(a)*, of the [Genocide Convention], are attributable, in whole or in part, to the Respondent. This question has in fact two aspects, which the Court must consider separately. First, it should be ascertained whether the acts committed at Srebrenica were perpetrated by organs of the Respondent, i.e., by persons or entities whose conduct is necessarily attributable to it, because they are in fact the instruments of its action. Next, if the preceding question is answered in the negative, it should be ascertained whether the acts in question were committed by persons who, while not organs of the Respondent, did nevertheless act on the instructions of, or under the direction or control of, the Respondent.

(3) The Question of Attribution of the Srebrenica Genocide to the Respondent on the Basis of the Conduct of Its Organs

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

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

386. When applied to the present case, this rule first calls for a determination whether the acts of genocide committed in Srebrenica were perpetrated by "persons or entities" having the status of organs of the Federal Republic of Yugoslavia (as the Respondent was known at the time) under its internal law, as then in force. It must be said that there is nothing which could justify an affirmative response to this question. It has not been shown that the FRY army took part in the massacres, nor that the political leaders of the FRY had a hand in preparing, planning or in any way carrying out the massacres. It is true that there is much evidence of direct or indirect participation by the official army of the FRY, along with the Bosnian Serb armed forces, in military operations in Bosnia and Herzegovina in the years prior to the events at Srebrenica. That participation was repeatedly condemned by the political organs of the United Nations, which

demanded that the FRY put an end to it (see, for example, Security Council resolutions 752 (1992), 757 (1992), 762 (1992), 819 (1993), 838 (1993)). It has however not been shown that there was any such participation in relation to the massacres committed at Srebrenica [...] Further, neither the Republika Srpska, nor the VRS were *de jure* organs of the FRY, since none of them had the status of organ of that State under its internal law.

387. The Applicant has however claimed that all officers in the VRS [...] remained under FRY military administration, and that their salaries were paid from Belgrade right up to 2002, and accordingly contends that these officers "were *de jure* organs of [the FRY], intended by their superiors to serve in Bosnia and Herzegovina with the VRS". On this basis it has been alleged by the Applicant that those officers, in addition to being officers of the VRS, remained officers of the VJ,[2] and were thus *de jure* organs of the Respondent [...] The Respondent however asserts that only some of the VRS officers were being "administered" by the 30th Personnel Centre in Belgrade, so that matters like their payment, promotion, pension, etc., were being handled from the FRY [...]

388. The Court notes first that no evidence has been presented that [...] any of the [...] officers whose affairs were handled by the 30th Personnel Centre were, according to the internal law of the Respondent, officers of the army of the Respondent — a *de jure* organ of the Respondent [...] There is no doubt that the FRY was providing substantial support, *inter alia*, financial support, to the Republika Srpska [...] and that one of the forms that support took was payment of salaries and other benefits to some officers of the VRS, but this did not automatically make them organs of the FRY. Those officers were appointed to their commands by the President of the Republika Srpska, and were subordinated to the political leadership of the Republika Srpska. In the absence of evidence to the contrary, those officers must be taken to have received their orders from the Republika Srpska or the VRS, not from the FRY. The expression "State organ", as used in customary international law and in Article 4 of the ILC Articles, applies to one or other of the individual or collective entities which make up the organization of the State and act on its behalf (cf. ILC Commentary to Art. 4, para. (1)). The functions of the VRS officers [...] were however to act on behalf of the Bosnian Serb authorities, in particular the Republika Srpska, not on behalf of the FRY; they exercised elements of the public authority of the Republika Srpska.

[…]

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

[2] VJ : "Yugoslav Army" (Army of the FRY, under the Constitution of 27 April 1992). VJ succeeded to the JNA: "Yugoslav People's Army". This was the army of the Socialist Federal Republic of Yugoslavia (which ceased to exist on 27 April 1992, with the creation of the VJ)

391. The first issue raised by this argument is whether it is possible in principle to attribute to a State conduct of persons — or groups of persons — who, while they do not have the legal status of State organs, in fact act under such strict control by the State that they must be treated as its organs for purposes of the necessary attribution leading to the State's responsibility for an internationally wrongful act. The Court has in fact already addressed this question, and given an answer to it in principle, in its Judgment of 27 June 1986 in the case concerning *Military and Para- military Activities in and against Nicaragua* (*Nicaragua v. United States of America)* (Merits, Judgment, I.C.J. Reports 1986, pp. 62-64). In paragraph 109 of that Judgment the Court stated that it had to "determine . . . whether or not the relationship of the contras to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the contras, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government" (p. 62). Then, examining the facts in the light of the information in its possession, the Court observed that "there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the contras as acting on its behalf" (para. 109), and went on to conclude that "the evidence available to the Court . . . is insufficient to demonstrate [the contras'] complete dependence on United States aid", so that the Court was "unable to determine that the contra force may be equated for legal purposes with the forces of the United States" (pp. 62-63, para. 110).

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

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

394. The Court can only answer this question in the negative. At the relevant time, July 1995, neither the Republika Srpska nor the VRS could be regarded as mere instruments through which the FRY was acting, and as lacking any real autonomy. While the political, military and logistical relations between the federal authorities in Belgrade and the authorities in Pale, between the Yugoslav army and the VRS, had been strong and close in previous years [...], and these ties undoubtedly remained powerful, they were, at least at the relevant time, not such that

the Bosnian Serbs' political and military organizations should be equated with organs of the FRY. It is even true that differences over strategic options emerged at the time between Yugoslav authorities and Bosnian Serb leaders; at the very least, these are evidence that the latter had some qualified, but real, margin of independence. Nor, notwithstanding the very important support given by the Respondent to the Republika Srpska, without which it could not have "conduct[ed] its crucial or most significant military and paramilitary activities" (I.C.J. *Reports 1986*, p. 63, para. 111), did this signify a total dependence of the Republika Srpska upon the Respondent.

[…]

The Court therefore finds that the acts of genocide at Srebrenica cannot be attributed to the Respondent as having been committed by its organs or by persons or entities wholly dependent upon it, and thus do not on this basis entail the Respondent's international responsibility.

(4) The Question of Attribution of the Srebrenica Genocide to the Respondent on the Basis of Direction or Control

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

397. The Court must emphasize, at this stage in its reasoning, that the question just stated is not the same as those dealt with thus far. […] In other words, it is no longer a question of ascertaining whether the persons who directly committed the genocide were acting as organs of the FRY, or could be equated with those organs — this question having already been answered in the negative. What must be determined is whether FRY organs — incontestably having that status under the FRY's internal law — originated the genocide by issuing instructions to the perpetrators or exercising direction or control, and whether, as a result, the conduct of organs of the Respondent, having been the cause of the commission of acts in breach of its international obligations, constituted a violation of those obligations.

398. On this subject the applicable rule, which is one of customary law of international responsibility, is laid down in Article 8 of the ILC Articles on State Responsibility as follows:

> "*Article 8*
> *Conduct directed or controlled by a State*
> The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."

399. This provision must be understood in the light of the Court's jurisprudence on the subject, particularly that of the 1986 Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America*) referred to above (paragraph 391). In that Judgment the Court, as noted above, after 'having rejected the argument

that the contras were to be equated with organs of the United States because they were "completely dependent" on it, added that the responsibility of the Respondent could still arise if it were proved that it had itself "directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State" (*I.C.J. Reports 1986*, p. 64, para. 115) ; this led to the following significant conclusion:

> "For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed." (*Ibid.*, p. 65.)

400. The test thus formulated differs in two respects from the test —described above — to determine whether a person or entity may be equated with a State organ even if not having that status under internal law. First, in this context it is not necessary to show that the persons who performed the acts alleged to have violated international law were in general in a relationship of "complete dependence" on the respondent State; it has to be proved that they acted in accordance with that State's instructions or under its "effective control". It must however be shown that this "effective control" was exercised, or that the State's instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.

401. The Applicant has, it is true, contended that the crime of genocide has a particular nature, in that it may be composed of a considerable number of specific acts separate, to a greater or lesser extent, in time and space. According to the Applicant, this particular nature would justify, among other consequences, assessing the "effective control" of the State allegedly responsible, not in relation to each of these specific acts, but in relation to the whole body of operations carried out by the direct perpetrators of the genocide. The Court is however of the view that the particular characteristics of genocide do not justify the Court in departing from the criterion elaborated in the Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America*) (see paragraph 399 above). The rules for attributing alleged internationally wrongful conduct to a State do not vary with the nature of the wrongful act in question in the absence of a clearly expressed *lex specialis*. Genocide will be considered as attributable to a State if and to the extent that the physical acts constitutive of genocide that have been committed by organs or persons other than the State's own agents were carried out, wholly or in part, on the instructions or directions of the State, or under its effective control. This is the state of customary international law, as reflected in the ILC Articles on State Responsibility.

402. The Court notes however that the Applicant has further questioned the validity of applying, in the present case, the criterion adopted in the *Military and Paramilitary Activities* Judgment. It has drawn attention to the Judgment of the International Criminal Tribunal for the former Yugoslavia [hereafter ICTY] Appeals Chamber in the *Tadic´* case (IT-94-1 A, Judgment, 15 July 1999). In that case the Chamber did not follow the jurisprudence of the Court in the *Military and Paramilitary Activities* case: it held that the appropriate criterion, applicable in its view both to the characterization of the armed conflict in Bosnia and Herzegovina as international, and to imputing the acts committed by Bosnian Serbs to the FRY under the law of State responsibility,

was that of the "overall control" exercised over the Bosnian Serbs by the FRY; and further that that criterion was satisfied in the case [...] In other words, the Appeals Chamber took the view that acts committed by Bosnian Serbs could give rise to international responsibility of the FRY on the basis of the overall control exercised by the FRY over the Republika Srpska and the VRS, without there being any need to prove that each operation during which acts were committed in breach of international law was carried out on the FRY's instructions, or under its effective control.

403. The Court has given careful consideration to the Appeals Chamber's reasoning in support of the foregoing conclusion, but finds itself unable to subscribe to the Chamber's view. First, the Court observes that the ICTY was not called upon in the *Tadic´* case, nor is it in general called upon, to rule on questions of State responsibility, since its jurisdiction is criminal and extends over persons only. Thus, in that Judgment the Tribunal addressed an issue which was not indispensable for the exercise of its jurisdiction. As stated above, the Court attaches the utmost importance to the factual and legal findings made by the ICTY in ruling on the criminal liability of the accused before it and, in the present case, the Court takes fullest account of the ICTY's trial and appellate judgments dealing with the events underlying the dispute. The situation is not the same for positions adopted by the ICTY on issues of general international law which do not lie within the specific purview of its jurisdiction and, moreover, the resolution of which is not always necessary for deciding the criminal cases before it.

404. […]. Insofar as the "overall control" test is employed to determine whether or not an armed conflict is international, which was the sole question which the Appeals Chamber was called upon to decide, it may well be that the test is applicable and suitable; the Court does not however think it appropriate to take a position on the point in the present case, as there is no need to resolve it for purposes of the present Judgment. On the other hand, the ICTY presented the "overall control" test as equally applicable under the law of State responsibility for the purpose of determining — as the Court is required to do in the present case — when a State is responsible for acts committed by paramilitary units, armed forces which are not among its official organs. In this context, the argument in favour of that test is unpersuasive.

405. It should first be observed that logic does not require the same test to be adopted in resolving the two issues, which are very different in nature: the degree and nature of a State's involvement in an armed conflict on another State's territory which is required for the conflict to be characterized as international, can very well, and without logical inconsistency, differ from the degree and nature of involvement required to give rise to that State's responsibility for a specific act committed in the course of the conflict.

406. It must next be noted that the "overall control" test has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf. That is true of acts carried out by its official organs, and also by persons or entities which are not formally recognized as official organs under internal law but which must nevertheless be equated with State organs because they are in a relationship of complete dependence on the State. Apart from these cases, a State's responsibility can be incurred for acts committed by persons or groups of persons — neither

State organs nor to be equated with such organs — only if, assuming those acts to be internationally wrongful, they are attributable to it under the rule of customary international law reflected in Article 8 cited above (paragraph 398). This is so where an organ of the State gave the instructions or provided the direction pursuant to which the perpetrators of the wrongful act acted or where it exercised effective control over the action during which the wrong was committed. In this regard the "overall control" test is unsuitable, for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a State's organs and its international responsibility.

407. Thus it is on the basis of its settled jurisprudence that the Court will determine whether the Respondent has incurred responsibility under the rule of customary international law set out in Article 8 of the ILC Articles on State Responsibility.

408. The Respondent has emphasized that in the final judgments of the Chambers of the ICTY relating to genocide in Srebrenica, none of its leaders have been found to have been implicated. The Applicant does not challenge that reading, but makes the point that that issue has not been before the ICTY for decision. The Court observes that the ICTY has indeed not up to the present been directly concerned in final judgments with the question whether those leaders might bear responsibility in that respect.

[…]

(5) Conclusion as to Responsibility for Events at Srebrenica under Article III, Paragraph *(a)*, of the Genocide Convention

413. In the light of the information available to it, the Court finds […] that it has not been established that the massacres at Srebrenica were committed by persons or entities ranking as organs of the Respondent (see paragraph 395 above). It finds also that it has not been established that those massacres were committed on the instructions or under the direction of organs of the respondent State, nor that the Respondent exercised effective control over the operations in the course of which those massacres, which […] constituted the crime of genocide, were perpetrated. The Applicant has not proved that instructions were issued by the federal authorities in Belgrade, or by any other organ of the FRY, to commit the massacres, still less that any such instructions were given with the specific intent (*dolus specialis*) characterizing the crime of genocide, which would have had to be present in order for the Respondent to be held responsible on this basis. All indications are to the contrary: that the decision to kill the adult male population of the Muslim community in Srebrenica was taken by some members of the VRS Main Staff, but without instructions from or effective control by the FRY […]

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

VIII. THE QUESTION OF RESPONSIBILITY, IN RESPECT OF SREBRENICA, FOR ACTS ENUMERATED IN ARTICLE III, PARAGRAPHS *(b)* TO *(e)*, OF

THE GENOCIDE CONVENTION

416. The Court now comes to the second of the questions set out in paragraph 379 above, namely, that relating to the Respondent's possible responsibility on the ground of one of the acts related to genocide enumerated in Article III of the [Genocide Convention]. These are: conspiracy to commit genocide (Art. III, para. *(b)*), direct and public incitement to commit genocide (Art. III, para. *(c)*), attempt to commit genocide (Art. III, para. *(d)*) — though no claim is made under this head in the Applicant's final submissions in the present case — and complicity in genocide (Art. III, para. *(e)*). For the reasons already stated (paragraph 380 above), the Court must make a finding on this matter inasmuch as it has replied in the negative to the previous question, that of the Respondent's responsibility in the commission of the genocide itself.

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

418. A more delicate question is whether it can be accepted that acts which could be characterized as "complicity in genocide", within the meaning of Article III, paragraph *(e)*, can be attributed to organs of the Respondent or to persons acting under its instructions or under its effective control. This question calls for some preliminary comment.

419. First, the question of "complicity" is to be distinguished from the question, already considered and answered in the negative, whether the perpetrators of the acts of genocide committed in Srebrenica acted on the instructions of or under the direction or effective control of the organs of the FRY. It is true that in certain national systems of criminal law, giving instructions or orders to persons to commit a criminal act is considered as the mark of complicity in the commission of that act. However, in the particular context of the application of the law of international responsibility in the domain of genocide, if it were established that a genocidal act had been committed on the instructions or under the direction of a State, the necessary conclusion would be that the genocide was attributable to the State, which would be directly responsible for it, pursuant to the rule referred to above (paragraph 398), and no question of complicity would arise. But, as already stated, that is not the situation in the present case.

However there is no doubt that "complicity", in the sense of Article III, paragraph *(e)*, of the [Genocide Convention], includes the provision of means to enable or facilitate the commission of the crime; it is thus on this aspect that the Court must focus. In this respect, it is noteworthy that, although "complicity", as such, is not a notion which exists in the current terminology of the law of international responsibility, it is similar to a category found among the customary rules constituting the law of State responsibility, that of the "aid or assistance" furnished by one State for the commission of a wrongful act by another State.

420. In this connection, reference should be made to Article 16 of the ILC's Articles on State Responsibility, reflecting a customary rule, which reads as follows:

> *"Article 16*
> *Aid or assistance in the commission of an internationally wrongful act*
>
> A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
> (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
> (b) The act would be internationally wrongful if committed by that State."

Although this provision, because it concerns a situation characterized by a relationship between two States, is not directly relevant to the present case, it nevertheless merits consideration. The Court sees no reason to make any distinction of substance between "complicity in genocide", within the meaning of Article III, paragraph *(e)*, of the Convention, and the "aid or assistance" of a State in the commission of a wrongful act by another State within the meaning of the aforementioned Article 16 [...] In other words, to ascertain whether the Respondent is responsible for "complicity in genocide" within the meaning of Article III, paragraph *(e)*, which is what the Court now has to do, it must examine whether organs of the respondent State, or persons acting on its instructions or under its direction or effective control, furnished "aid or assistance" in the commission of the genocide in Srebrenica, in a sense not significantly different from that of those concepts in the general law of international responsibility.

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

422. The Court is not convinced by the evidence furnished by the Applicant that the above conditions were met. Undoubtedly, the quite substantial aid of a political, military and financial nature provided by the FRY to the Republika Srpska and the VRS, beginning long before the tragic events of Srebrenica, continued during those events. There is thus little doubt that the atrocities in Srebrenica were committed, at least in part, with the resources which the perpetrators of those acts possessed as a result of the general policy of aid and assistance pursued towards them by the FRY. However, the sole task of the Court is to establish the legal responsibility of the Respondent, a responsibility which is subject to very specific conditions. One of those conditions is not fulfilled, because it is not established beyond any doubt in the argument between the Parties whether the authorities of the FRY supplied — and continued to supply — the VRS leaders who decided upon and carried out those acts of genocide with their aid and assistance, at a time when those authorities were clearly aware that genocide was about to take place or was under way; in other words that not only were massacres about to be carried out or already under way, but that their perpetrators had the specific intent characterizing genocide, namely, the intent to destroy, in whole or in part, a human group, as such.

423. A point which is clearly decisive in this connection is that it was not conclusively shown that the decision to eliminate physically the adult male population of the Muslim community from Srebrenica was brought to the attention of the Belgrade authorities when it was taken [...] It has therefore not been conclusively established that, at the crucial time, the FRY supplied aid to the perpetrators of the genocide in full awareness that the aid supplied would be used to commit genocide.

424. The Court concludes from the above that the international responsibility of the Respondent is not engaged for acts of complicity in genocide mentioned in Article III, paragraph *(e)*, of the Convention. In the light of this finding, and of the findings above relating to the other paragraphs of Article III, the international responsibility of the Respondent is not engaged under Article III as a whole.

IX. THE QUESTION OF RESPONSIBILITY FOR BREACH OF THE OBLIGATIONS TO PREVENT AND PUNISH GENOCIDE

425. The Court now turns to the third and last of the questions set out in paragraph 379 above: has the respondent State complied with its obligations to prevent and punish genocide under Article I of the [Genocide Convention]?
Despite the clear links between the duty to prevent genocide and the duty to punish its perpetrators, these are, in the view of the Court, two distinct yet connected obligations, each of which must be considered in turn.

426. It is true that, simply by its wording, Article I of the [Genocide Convention] brings out the close link between prevention and punishment: “The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.” It is also true that one of the most effective ways of preventing criminal acts, in general, is to provide penalties for persons committing such acts, and to impose those penalties effectively on those who commit the acts one is trying to prevent.

Lastly, it is true that, although in the subsequent Articles, the [Genocide Convention] includes fairly detailed provisions concerning the duty to punish (Articles III to VII), it reverts to the obligation of prevention, stated as a principle in Article I, only in Article VIII:

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

[…]

427. However, it is not the case that the obligation to prevent has no separate legal existence of its own […] The obligation on each contracting State to prevent genocide is both normative and compelling. It is not merged in the duty to punish, nor can it be regarded as simply a component of that duty. It has its own scope, which extends beyond the particular case envisaged in Article VIII, namely reference to the competent organs of the United Nations, for them to take such action as they deem appropriate. Even if and when these organs have been called upon, this does not mean that the States parties to the Convention are relieved of the obligation to take such action as they can to prevent genocide from occurring, while respecting the United Nations Charter and any decisions that may have been taken by its competent organs.

(1) The Obligation to Prevent Genocide

428. As regards the obligation to prevent genocide, the Court thinks it necessary to begin with the following introductory remarks and clarifications, amplifying the observations already made above.

429. First, the Genocide Convention is not the only international instrument providing for an obligation on the States parties to it to take certain steps to prevent the acts it seeks to prohibit. […] The decision of the Court does not, in this case, purport to establish a general jurisprudence applicable to all cases where a treaty instrument, or other binding legal norm, includes an obligation for States to prevent certain acts. Still less does the decision of the Court purport to find whether, apart from the texts applicable to specific fields, there is a general obligation on States to prevent the commission by other persons or entities of acts contrary to certain norms of general international law. The Court will therefore confine itself to determining the specific scope of the duty to prevent in the Genocide Convention, and to the extent that such a determination is necessary to the decision to be given on the dispute before it.

430. Secondly, it is clear that the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible. A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide […]

431. Thirdly, a State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed [...] In this respect, the Court refers to a general rule of

the law of State responsibility, stated by the ILC in Article 14, paragraph 3, of its Articles on State Responsibility:

> "
> . . . . . .
> 3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation."

This obviously does not mean that the obligation to prevent genocide only comes into being when perpetration of genocide commences; that would be absurd, since the whole point of the obligation is to prevent, or attempt to prevent, the occurrence of the act. In fact, a State's obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed. From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent (*dolus specialis*), it is under a duty to make such use of these means as the circumstances permit. However, if neither genocide nor any of the other acts listed in Article III of the Convention are ultimately carried out, then a State that omitted to act when it could have done so cannot be held responsible *a posteriori*, since the event did not happen which, under the rule set out above, must occur for there to be a violation of the obligation to prevent.

In consequence, in the present case the Court will have to consider the Respondent's conduct, in the light of its duty to prevent, solely in connection with the massacres at Srebrenica, because these are the only acts in respect of which the Court has concluded in this case that genocide was committed.

432. Fourth and finally […] while complicity results from commission, violation of the obligation to prevent results from omission; this is merely the reflection of the notion that the ban on genocide and the other acts listed in Article III, including complicity, places States under a negative obligation, the obligation not to commit the prohibited acts, while the duty to prevent places States under positive obligations, to do their best to ensure that such acts do not occur. [As also noted above], there cannot be a finding of complicity against a State unless [it can be established that this state gave its support] in perpetrating the genocide with full knowledge of the facts. By contrast, a State may be found to have violated its obligation to prevent even though it had no certainty, at the time when it should have acted, but failed to do so, that genocide was about to be committed or was under way; for it to incur responsibility on this basis it is enough that the State was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed […]

433. In light of the foregoing, the Court will now consider the facts of the case. For the reasons stated above (paragraph 431), it will confine itself to the FRY's conduct vis-à-vis the Srebrenica massacres.

[…]

438. In view of their undeniable influence and of the information, voicing serious concern, in their possession, the Yugoslav federal authorities should, in the view of the Court, have made the

best efforts within their power to try and prevent the tragic events then taking shape, whose scale, though it could not have been foreseen with certainty, might at least have been surmised. The FRY leadership, and President Miloševic´ above all, were fully aware of the climate of deep-seated hatred which reigned between the Bosnian Serbs and the Muslims in the Srebrenica region. As the Court has noted in paragraph 423 above, it has not been shown that the decision to eliminate physically the whole of the adult male population of the Muslim community of Srebrenica was brought to the attention of the Belgrade authorities. Nevertheless, given all the international concern about what looked likely to happen at Srebrenica [...], which made it clear that the dangers were known and that these dangers seemed to be of an order that could suggest intent to commit genocide, unless brought under control, it must have been clear that there was a serious risk of genocide in Srebrenica. Yet the Respondent has not shown that it took any initiative to prevent what happened, or any action on its part to avert the atrocities which were committed. It must therefore be concluded that the organs of the Respondent did nothing to prevent the Srebrenica massacres, claiming that they were powerless to do so, which hardly tallies with their known influence over the VRS. As indicated above, for a State to be held responsible for breaching its obligation of prevention, it does not need to be proven that the State concerned definitely had the power to prevent the genocide; it is sufficient that it had the means to do so and that it manifestly refrained from using them.

Such is the case here. In view of the foregoing, the Court concludes that the Respondent violated its obligation to prevent the Srebrenica genocide in such a manner as to engage its international responsibility.

(2) The Obligation to Punish Genocide

[...]

448. Turning now to the facts of the case, the question the Court must answer is whether the Respondent has fully co-operated with the ICTY, in particular by arresting and handing over to the Tribunal any persons accused of genocide as a result of the Srebrenica genocide and finding themselves on its territory [...]

449. It therefore appears to the Court sufficiently established that the Respondent failed in its duty to co-operate fully with the ICTY. This failure constitutes a violation by the Respondent of its duties as [...] a Member of the United Nations, and accordingly a violation of its obligations under Article VI of the Genocide Convention. The Court is of course without jurisdiction in the present case to declare that the Respondent has breached any obligations other than those under the [Genocide Convention]. But as the Court has jurisdiction to declare a breach of Article VI insofar as it obliges States to co-operate with the "international penal tribunal", the Court may find for that purpose that the requirements for the existence of such a breach have been met. One of those requirements is that the State whose responsibility is in issue must have "accepted [the] jurisdiction" of that "international penal tribunal"; the Court thus finds that the Respondent was under a duty to co-operate with the tribunal concerned pursuant to international instruments other than the [Genocide Convention], and failed in that duty [...]

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

[Excerpt to summarize ends here]

XII. OPERATIVE CLAUSE

471. For these reasons,

THE COURT,

(1) by ten votes to five,

Rejects the objections contained in the final submissions made by the Respondent to the effect that the Court has no jurisdiction; and affirms that it has jurisdiction, on the basis of Article IX of the *Convention on the Prevention and Punishment of the Crime of Genocide*, to adjudicate upon the dispute brought before it on 20 March 1993 by the Republic of Bosnia and Herzegovina;

IN FAVOUR: President Higgins ; Vice-President Al-Khasawneh; Judges Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna; Judge ad hoc Mahiou;
AGAINST : Judges Ranjeva, Shi, Koroma, Skotnikov; Judge ad hoc Krec´a;

(2) by thirteen votes to two,

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

IN FAVOUR: President Higgins ; Judges Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judge ad hoc Krec´a;
AGAINST : Vice-President Al-Khasawneh; Judge ad hoc Mahiou;

(3) by thirteen votes to two,

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

IN FAVOUR: President Higgins ; Judges Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judge ad hoc Krec´a;

AGAINST : Vice-President Al-Khasawneh; Judge ad hoc Mahiou;

(4) by eleven votes to four,
Finds that Serbia has not been complicit in genocide, in violation of its obligations under the *Convention on the Prevention and Punishment of the Crime of Genocide*;

IN FAVOUR: President Higgins ; Judges Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Sepúlveda-Amor, Skotnikov; Judge ad hoc Krec´a;
AGAINST : Vice-President Al-Khasawneh; Judges Keith, Bennouna; Judge ad hoc Mahiou;

(5) by twelve votes to three,
Finds that Serbia has violated the obligation to prevent genocide, under the *Convention on the Prevention and Punishment of the Crime of Genocide*, in respect of the genocide that occurred in Srebrenica in July 1995;

IN FAVOUR: President Higgins ; Vice-President Al-Khasawneh; Judges Ran- , Shi, Koroma, Owada, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna; Judge ad hoc Mahiou;
AGAINST : Judges Tomka, Skotnikov; Judge ad hoc Krec´a;

(6) by fourteen votes to one,
Finds that Serbia has violated its obligations under the *Convention on the Prevention and Punishment of the Crime of Genocide* by having failed to transfer Ratko Mladic´, indicted for genocide and complicity in genocide, for trial by the International Criminal Tribunal for the former Yugoslavia, and thus having failed fully to co-operate with that Tribunal ;

IN FAVOUR: President Higgins ; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judge ad hoc Mahiou;
AGAINST : Judge ad hoc Krec´a;

(7) by thirteen votes to two,
Finds that Serbia has violated its obligation to comply with the provisional measures ordered by the Court on 8 April and 13 September 1993 in this case, inasmuch as it failed to take all measures

IN FAVOUR: President Higgins ; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna; Judge ad hoc Mahiou;
AGAINST : Judge Skotnikov; Judge ad hoc Krec´a;

(8) by fourteen votes to one,

Decides that Serbia shall immediately take effective steps to ensure full compliance with its obligation under the *Convention on the Prevention and Punishment of the Crime of Genocide* to

punish acts of genocide as defined by Article II of the [Genocide Convention] , or any of the other acts proscribed by Article III of the [Genocide Convention] , and to transfer individuals accused of genocide or any of those other acts for trial by the International Criminal Tribunal for the former Yugoslavia, and to co-operate fully with that Tribunal ;

IN FAVOUR: President Higgins ; Vice-President Al-Khasawneh; Judges Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judge ad hoc Mahiou;
AGAINST : Judge ad hoc Krec´a;

(9) by thirteen votes to two,
Finds that, as regards the breaches by Serbia of the obligations referred to in subparagraphs (5) and (7) above, the Court's findings in those paragraphs constitute appropriate satisfaction, and that the case is not one in which an order for payment of compensation, or, in respect of the violation referred to in subparagraph (5), a direction to provide assurances and guarantees of non-repetition, would be appropriate.

IN FAVOUR: President Higgins ; Judges Ranjeva, Shi, Koroma, Owada, Simma, Tomka, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov; Judge ad hoc Krec´a;
AGAINST : Vice-President Al-Khasawneh; Judge ad hoc Mahiou.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-sixth day of February, two thousand and seven, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of Bosnia and Herzegovina and the Government of Serbia, respectively.

(Signed) Rosalyn HIGGINS,
President.
(Signed) Philippe COUVREUR,
Registrar.

DISSENTING OPINION OF VICE-PRESIDENT AL-KHASAWNEH

1. I feel that I should explain the nature of my dissent before explaining the reasons for it. I am not in total disagreement with the majority regarding jurisdiction, I come to the same conclusion contained in paragraph 1 of the dispositive that the Court's jurisdiction is established [...]

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

[...]

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

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

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

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

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

35. In the first place, the Court was alerted by the Applicant to the existence of "redacted" sections of documents of the Supreme Defence Council of the Respondent. Regrettably, the Court failed to act although, under Article 49 of its Statute, it has the power to do so. It is a reasonable expectation that those documents would have shed light on the central questions of intent and attributability [...]

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

37. However, with great respect to the majority, a strong case can be made for the proposition that the test of control is a variable one. It would be recalled that some ILC members drew attention to the fact of there being varying degrees of sufficient control required in specific legal contexts.

[...]

38. However, it should be recalled that the Appeals Chamber in *Tadic´* had in fact framed the question as one of State responsibility, in particular whether the FRY was responsible for the acts of the VRS, and therefore considered itself to be applying the rules of attribution under international law (*Tadic´*, ICTY Judgment, IT-94-1-A, 15 July 1999, para. 98).

39. Unfortunately, the Court's rejection of the standard in the *Tadic´* case fails to address the crucial issue raised therein — namely that different types of activities, particularly in the ever-evolving nature of armed conflict, may call for subtle variations in the rules of attribution. In the *Nicaragua* case, the Court noted that the United States and the *Contras* shared the same objectives — namely the overthrowing of the Nicaraguan Government. These objectives, however, were achievable without the commission of war crimes or crimes against humanity. The *Contras* could indeed have limited themselves to military targets in the accomplishment of their objectives. As such, in order to attribute crimes against humanity in furtherance of the common objective, the Court *held that the crimes* themselves should be the object of control. When, however, the shared objective is the commission of international crimes, to require both control over the non-State actors and the specific operations in the context of which international crimes were committed is too high a threshold. The inherent danger in such an approach is that it gives States the opportunity to carry out criminal policies through non-state actors or surrogates without incurring direct responsibility therefore. The statement in paragraph 406 of the Judgment to the effect that the "'overall control' test is unsuitable, for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a State's organs and its international responsibility" is, with respect, singularly unconvincing because it fails to consider that such a link has to account for situations in which there is a common criminal purpose. It is also far from self-evident that the overall control test is always not proximate enough to trigger State responsibility.

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

[...]

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

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

[...]

51. General Mladic´'s decisive role in the Srebrenica genocide, the close relationship between General Mladic´ and President Miloševic´, the influential part President Miloševic´ played in negotiations regarding Srebrenica (both before and after the genocide), and his own statements as set forth above, each taken alone, might not amount to proof of President Miloševic´'s knowledge of the genocide set to unfold in Srebrenica. Taken together, these facts clearly establish that Belgrade was, if not fully integrated in, then fully aware of, the decision-making processes regarding Srebrenica, while the Republika Srpska itself was excluded. Even after the fact, negotiations following the fall of Srebrenica and the genocide committed there were held simultaneously with General Mladic´ and President Miloševic´. There can be

no doubt that President Miloševic´ was fully appraised of General Mladic´'s (and the Bosnian Serb army's) activities in Srebrenica throughout the takeover and massacres

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

> "Those who committed the killings in Srebrenica, as well as those who ordered and organized that massacre represented neither Serbia nor Montenegro, but an undemocratic régime of terror and death, against whom the great majority of citizens of Serbia and Montenegro put up the strongest resistance. Our condemnation of crimes in Srebrenica does not end with the direct perpetrators. We demand the criminal responsibility of all who committed war crimes, organized them or ordered them, and not only in Srebrenica. Criminals must not be heroes. Any protection of the war criminals, for whatever reason, is also a crime."

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

58. Indeed, the opposite conclusion from that reached by the Court in paragraph 378 is supported by the cited jurisprudence. To the extent that the effect of a unilateral act depends on the intent behind it and the context within which it was made, one need only consider this : the Serbian Government at the time was attempting to distance itself — as a new and democratic régime — from the régime which had come before it [...]The intent was to acknowledge the previous régime's responsibility for those crimes, and to make a fresh start by distancing the new régime therefrom. A clearer intention to "admit" past wrongs cannot be had.

[...]

60. The Council of Ministers unambiguously admits that the previous Government of Serbia and Montenegro (internationally recognized and unquestionably acting on behalf of the Serbian State for the purposes of State responsibility) had "ordered and organized" the killings in Srebrenica.

Given the continuity of State responsibility, despite the change in régime, this statement certainly acknowledge[s] facts or conduct unfavourable to the State making the statement, and on the basis of Nicaragua thereby amounts to a form of admission, or at the very least, evidence of the truth of the facts it asserts. This conclusion is in keeping with the Court's recent decision in *Democratic Republic of the Congo v. Uganda*, in which the Court observed that it would

> "give particular attention to reliable evidence acknowledging facts or conduct unfavourable to the State represented by the person making them. . ." (Armed Activities on the Territory of the Congo (Demo*cratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 201, para. 61.)

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

III. CONCLUSION

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

(Signed) Awn Shawkat AL-KHASAWNEH.

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* *

DECLARATION OF JUDGE KEITH

1. This declaration explains my vote on the alleged complicity of the Respondent, in breach of Article III *(e)* of the Genocide Convention, in the genocide committed at Srebrenica in July 1995. In summary, my position on the law is that the Respondent, as an alleged accomplice, must be proved to have knowledge of the genocidal intent of the principal perpetrator (but need not share that intent) and, with that knowledge, to have provided aid and assistance to the perpetrator. My position on the facts is that those two elements are proved to the necessary standard.

2. The reasons for my conclusion on the law that it is sufficient in terms of Article III (e) to establish that the accomplice knew that the principal perpetrator had genocidal intent, relate to the definition and the nature of complicity in unlawful acts, the purpose of the prohibition on complicity in genocide, and the case law.

[...]

8. I now turn to the facts and to the question whether the Applicant has shown that the Respondent, knowing of the perpetrator's genocidal intent, continued to supply the perpetrators with the means to facilitate the realization of that intent. There can be no possible dispute about that supply and its continuation. It is seen in the very extensive involvement of the Respondent in the actions of Republika

Srpska and the VRS in Bosnia and Herzegovina, notably in the provision from late 1991, and especially from 19 May 1992, of 1,800 officers to the VRS and their continued support (including "rehatting", housing, promotion and discipline), of material, both initially and subsequently, of joint operations and the involvement of the Ministry of the Interior, and of funding including the huge budget support and the integrating of the central banks. Extensive documentation of that was presented to the Court. One revealing acknowledgment is provided by President Karadžic´ speaking at a session of the Assembly of Republika Srpska in May 1994 — "[w]ithout Serbia nothing would have happened, we don't have the resources and would not have been able to make war". Or, as the Court concludes, had the Respondent chosen to withdraw its military and financial support from the Republika Srpska, this would have greatly constrained the options available to the authorities of Republika Srpska (Judgment, para. 241).

9. But did the Respondent have the necessary knowledge in the very short time the Srebrenica massacre was undertaken, essentially from 13 to 16 July 1995? My primary specific source in answering that question is the 1999 Report of the United Nations Secretary-General, "The Fall of Srebrenica" (A/54/549, Ch. VIII); see paragraphs 228-230 of the Judgment of the Court.

10. That specific information is to be understood in the context of the more general information about the very close relationships between the leaderships in Belgrade and in Pale and especially between President Miloševic ´ and President Karadžic´ and General Mladic´, and particularly between President Miloševic´ and General Mladic´. The Court had extensive evidence of those relationships, for instance from two of the UNPROFOR Commanders, General Dannatt and General Rose. As the Court says, the leadership of the Federal Republic of Yugoslavia, and President Miloševic´ above all, were fully aware of the climate of deep seated hatred which reigned between the Bosnian Serbs and Muslims of the Srebrenica region (Judgment, paragraph 438). More specifically they were aware of the dire and deteriorating situation in Srebrenica in the first part of 1995.

11. Coming closer to the time of the atrocities, not just the leadership in Belgrade but also the wider international community was alerted to the deterioration of the security situation in Srebrenica by Security Council resolution 1004 (1995) adopted on 12 July 1995 under Chapter VII of the Charter. The Council expressed grave concern at the plight of the civilian population "in and around the safe area of Srebrenica". It demanded, with binding force, the withdrawal of the Bosnian Serb forces from the area and the allowing of unimpeded access for international humanitarian agencies to the area to alleviate the plight of the civilian population.

12. On the following day, 13 July, United Nations military observers reported that General Mladic´ had told them that there were several hundred bodies of dead Bosnian soldiers in one part of the enclave. There were other reports of murders and other atrocities that day. On that day the Chargé d'Affaires of Bosnia and Herzegovina in New York officially expressed his government's concern about the fate of detainees and fears of their execution in a letter to the Secretary-General. The 1999 Report provides this summary:

> "Thus, on 13 July, strong alarm was expressed at various levels that abuses might have been or were being committed against the men of Srebrenica, but none had been confirmed as having taken place at that time. Efforts were nevertheless focused at the highest levels to try to address the situation." (A/54/549, para. 359.)

Also on that day the Secretary-General's Special Envoy, Thorvald Stoltenberg, was given instructions on how he was to proceed with high level negotiations with the Bosnian Serbs and, if appropriate, with the authorities in Belgrade. Among other things he was to obtain commitments for humane treatment of the refugees and displaced persons. He was urged to co-ordinate with the Special Representative of the Secretary- General and the European Union negotiator, Carl Bildt, who was hopeful of "be[ing] able to

offer assistance through contact[s] with the authorities of the Federal Republic of Yugoslavia" (*ibid.*, para. 360).

13. The mass executions began the next day, 14 July, and continued until 16 or 17 July. On 14 July Mr. Bildt met President Miloševic´ in Belgrade:

> "According to Mr. Bildt's public account of that second meeting, he pressed the President to arrange immediate access for UNHCR to assist the people of Srebrenica, and for ICRC to start to register those who were being treated by the BSA as prisoners of war." (A/54/549, para. 372; the "public account" is in Carl Bildt, *Peace Journey: The Struggle for Peace in Bosnia* (1998), p. 61.)

(The meeting is referred to as a second meeting because Mr. Bildt had met President Miloševic´ and General Mladic´ at the same place the previous week (*ibid.*, pp. 52-54).) Mr. Bildt also made a number of other demands as the 1999 Report records:

> "President Miloševic´ apparently acceded to the various demands, but also claimed that he did not have control over the matter. Miloševic´ had also apparently explained, earlier in the meeting, that the whole incident had been provoked by escalating Muslim attacks from the enclave, in violation of the 1993 demilitarization agreement.
>
> A few hours into the meeting, General Mladic´ arrived at Dobanovci. Mr. Bildt noted that General Mladic´ readily agreed to most of the demands on Srebrenica, but remained opposed to some of the arrangements pertaining to the other enclaves, Sarajevo in particular. Eventually, with President Miloševic´'s intervention, it appeared that an agreement in principle had been reached. It was decided that another meeting would be held the next day in order to confirm the arrangements. Mr. Bildt had already arranged with Mr. Stoltenberg and Mr. Akashi [the Special Representative of the Secretary-General] that they would join him in Belgrade. He also requested that the UNPROFOR Commander also come to Belgrade in order to finalize some of the military details with Mladic´." (A/54/549, paras. 372-373.)

On the same day, 14 July, the Security Council had again convened and adopted a presidential statement expressing deep concern about the ongoing forced relocation of tens of thousands of civilians which it characterized as a clear violation of the rights of the civilian population.

> "The Council was 'especially concerned about reports that up to 4,000 men and boys had been forcibly removed by the Bosnian Serb party from the Srebrenica safe area'. It demanded that 'in conformity with internationally recognized standards of conduct and international law the Bosnian Serb party release them immediately, respect fully the rights of the civilian population of the Srebrenica safe area and other persons protected under international humanitarian law and permit access by the International Committee of the Red Cross'." (*Ibid.*, para. 374.)

14. On 15 July Mr. Bildt briefed senior international officials on the result of his meeting the previous day with President Miloševic´ and General Mladic´, who also joined the officials for a largely ceremonial meeting over lunch. The UNPROFOR Commander and General Mladic´ then met to finalize the details. At that point, while the international officials were aware of reports that grave human rights abuses might have been committed against the men and boys of Srebrenica, they were unaware that systematic executions had begun (*ibid.*, para. 375). The points of agreement on Srebrenica were as follows:

> "Full access to the area for UNHCR and ICRC; ICRC to have immediate access to 'prisoners of war' to assess their welfare, register them, and review procedures at Bosnian Serb reception centres in accordance with the Geneva Conventions; UNPROFOR requests for resupply of Srebrenica, via Belgrade, Ljubovija and Bratunac, to be submitted on 17 July;

> Dutchbat troops in Srebrenica to be free to leave with their equipment on 21 July or shortly thereafter via Bratunac (both the UNPROFOR Commander and Mladic´ to observe the move);
> UNPROFOR to organize immediate evacuation of injured persons from Potocˇari and Bratunac, including provision of ambulances; UNPROFOR presence, 'in one form or another' [was] agreed for 'key areas'." (A/54/549, para. 377.

General Mladic´ plainly did not honour those agreements over the following days (*ibid.*, paras. 383-390).

15. Those agreements were of course between UNPROFOR and General Mladic´ on behalf of the Pale authorities. Their significance for me, however, is that they followed directly from the discussions and negotiations between President Miloševic´ and General Mladic´ on the one hand and Mr. Bildt on the other. Given President Miloševic´'s overall role in the Balkan wars and his knowledge, his specific relationship with General Mladic´, and his involvement in the detail of the negotiations of 14 and 15 July, by that time he must have known of the change in plans made by the VRS command on 12 or 13 July and consequently he must have known that they had formed the intent to destroy in part the protected group. I am convinced that that knowledge of the Respondent is proved to the necessary standard stated by the Court in its Judgment (para. 209).

16. Accordingly, I conclude that the Respondent was complicit in the genocide committed at Srebrenica in July 1995 in breach of Article III *(e)* of the Genocide Convention.

(Signed) Kenneth KEITH.