

# DECISIONS OF INTERNATIONAL TRIBUNALS

Edited by J Craig Barker

## INTERNATIONAL COURT OF JUSTICE

- I. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v Serbia and Montenegro*)**
- II. Cases Before the Court**
- III. Other Developments**

### I. APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE (*BOSNIA AND HERZEGOVINA v SERBIA AND MONTENEGRO*)

#### CASE CONCERNING THE APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE (*BOSNIA AND HERZEGOVINA v SERBIA AND MONTENEGRO*), JUDGMENT OF 26 FEBRUARY 2007

##### *A. Introduction*

The judgment in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* ('Genocide case') was handed down on 26 February 2007.<sup>1</sup> Broadcast live across Bosnia and Herzegovina and Serbia and making front-page news,<sup>2</sup> it is a landmark opinion of considerable substance that contains a whole host of interesting international legal issues. The judgment and individual opinions attached thereto contain many important points on evidence, the law on genocide and state responsibility. This comment will touch upon only some of the many issues raised. In order to do so, though, it is first necessary to recall the history of the case.

##### *B. Background*

The case is set against the conflict that ravaged the Balkans during and after the break-up of the Socialist Federal Republic of Yugoslavia ('SFRY') in the early 1990s. Bosnia and Herzegovina filed an application instituting proceedings against the Federal Republic of Yugoslavia ('FRY') on 20 March 1993 in respect of alleged violations of

<sup>1</sup> *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Rep. available at <<http://www.icj-cij.org>>.

<sup>2</sup> See eg M Simons 'Serbs failed to stop Bosnia genocide' *International Herald Tribune* (27 Feb 2007) 1.

the Convention on the Prevention and Punishment of the Crime of Genocide ('Genocide Convention' or 'Convention'). On the same day, Bosnia and Herzegovina also submitted a request for the indication of provisional measures, a request that was later followed by a similar one from the FRY. The Court indicated certain provisional measures and reaffirmed them a few months later in response to a further request for the indication of provisional measures by Bosnia and Herzegovina and the FRY.<sup>3</sup> Preliminary objections of the FRY were dismissed in a judgment of 11 July 1996 at which time the Court found that it had jurisdiction to hear the case and that the application was admissible.<sup>4</sup> An application for revision of the judgment on preliminary objections filed by the FRY was found inadmissible on 3 February 2003.<sup>5</sup> Hearings on the merits lasted from 27 February 2006 until 9 May 2006 and the judgment was handed down on 26 February 2007.

### *C. Principal findings and comment*

#### *1. Jurisdiction*

Serbia and Montenegro<sup>6</sup> argued that it was not a continuator state of the SFRY and therefore was neither a party to the Genocide Convention nor to the Statute of the Court through membership of the United Nations until it was admitted as a new member on 1 November 2000. As such, it did not have access to the Court and the Court did not have jurisdiction *ratione personae* over it at the relevant time. In light of these arguments, the Court had to revisit its jurisdiction, which it ultimately upheld, though this was the issue on which the greatest number of negative votes was cast.

After the 2004 judgment on preliminary objections in the *Legality of Use of Force* cases, the issue was always going to be difficult. In that case, the Court held that it did not have jurisdiction to hear Serbia and Montenegro's application as, at the time of filing its application 'Serbia and Montenegro was not a Member of the United Nations, and in that capacity a State party to the Statute of the International Court of Justice', hence Serbia and Montenegro did not have access to the Court.<sup>7</sup> Thus, either the Court would have to follow its 2004 judgment and hold that Serbia did not have access to the Court, departing in the process from its 1996 judgment on preliminary objections in the present case, which upheld the jurisdiction of the Court, or, the Court would have to follow its 1996 judgment and explain away its 2004 judgment.

<sup>3</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures* [1993] ICJ Rep 3; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures* [1993] ICJ Rep 325.

<sup>4</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections* [1996] ICJ Rep 595.

<sup>5</sup> *Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)*, Preliminary Objections (*Yugoslavia v Bosnia and Herzegovina*) [2003] ICJ Rep 7; noted by N Tsagourias (2004) 53 ICLQ 731.

<sup>6</sup> At the time of oral argument, the FRY had changed its name to Serbia and Montenegro. At the date of the delivery of the judgment, Montenegro had declared its independence and Serbia had accepted continuity between itself and Serbia and Montenegro. As such, the Court considered the Republic of Serbia to be the only respondent: *Genocide* (n 1) para 77.

<sup>7</sup> *Case Concerning Legality of Use of Force (Serbia and Montenegro v Belgium)*, Preliminary Objections [2004] ICJ Rep, paras 79 and 127.

In the end, the Court opted for the latter, holding that the principle of *res judicata*, which applied to judgments on preliminary objections that determine jurisdiction as well as judgments on the merits, prevented it from reopening its 1996 judgment on preliminary objections in which it held that it had jurisdiction to hear the case on the basis of Article IX of the Genocide Convention. As the issue of access to the Court preceded the question of jurisdiction *ratione materiae*, the Court in 1996 must have considered the FRY to have had access to it: '[t]hat the FRY had the capacity to appear before the Court in accordance with the Statute was an element in the reasoning of the 1996 Judgment which can—and indeed must—be read into the Judgment as a matter of logical construction.'<sup>8</sup> The Court continued that there was no need for it to look behind its earlier decision to consider whether it could satisfy itself on that matter.<sup>9</sup>

To rely upon 'findings' that may or may not actually have been found—and certainly not expressly held—and to rest upon determinations that may have been assumed rather than reasoned is somewhat problematic. In the words of Judges Ranjeva, Shi and Koroma, '*res judicata* applies to a matter that has been adjudicated and decided. A matter that the Court has not decided cannot be qualified as *res judicata*.'<sup>10</sup> Further, regardless of the principle of *res judicata*, the fact remains that Serbia was held unable to bring a case before the Court yet a case could be brought against it for events arising out of the same period. This is problematic and the Court did not explain away the discrepancy. However, as the problems relate, in this author's view at least, to the 2004 judgment in the *Legality of Use of Force* cases rather than to the 1996 judgment on preliminary objections, the matter will not be pursued here.<sup>11</sup>

## 2. Genocide

After upholding its jurisdiction, the Court proceeded to consider Bosnia and Herzegovina's central arguments that Serbia and Montenegro, through its organs or entities under its control, committed genocide, was complicit in genocide, aided and abetted entities engaged in genocide, conspired to commit genocide, incited genocide, failed to prevent genocide and failed to punish genocide. In so doing, the Court made some important contributions to the substantive law on genocide. It held that the protected group is to be defined positively rather than negatively, limiting the protected group in the case before it to the Bosnian Muslims and not the wider non-Serb group as submitted by Bosnia and Herzegovina;<sup>12</sup> and observed that, in considering the group requirement, regard may be had to the nature of the individuals targeted, any geographical limitations and most importantly the number of individuals targeted.<sup>13</sup>

The Court commenced its analysis by examining the evidence before it to establish whether the atrocities alleged by Bosnia and Herzegovina had indeed occurred and if so whether they fell within the scope of Article II of the Genocide Convention. The Court first turned to evidence of killings of members of the protected group (Article II(a) of the Convention) in the various regions of Bosnia—excluding Srebrenica, which

<sup>8</sup> *Genocide* (n 1) para 135.

<sup>9</sup> *ibid* paras 121–39.

<sup>10</sup> *ibid* Joint Dissenting Opinion of Judges Ranjeva, Shi and Koroma, para 3.

<sup>11</sup> For comment on the judgment in the *Legality of Use of Force* cases, see C Gray 'Legality of Use of Force: Preliminary Objections Judgment of 15 December 2004' (2005) 54 ICLQ 787.

<sup>12</sup> *Genocide* (n 1) para 196.

<sup>13</sup> *ibid* paras 197–201.

it considered separately—and in the various detention camps of those regions. The Court found it ‘established by overwhelming evidence that massive killings’ took place, that ‘the victims were in large majority members of the protected group, which suggests that they may have been systematically targeted by the killings’ and that the underlying genocidal act had been committed.<sup>14</sup> However, in the view of the Court, it had not been established conclusively that members of the protected group were killed with the intent to destroy in whole or in part the group as such as required by the Convention.<sup>15</sup>

A similar conclusion was reached in relation to causing serious bodily or mental harm to members of the protected group (Article II(b)) and deliberately inflicting on the group conditions of life calculated to bring about its physical destruction (Article II(c)).<sup>16</sup> The Court also reserved its position as to whether encirclement, shelling and starvation; and deportation and expulsion fell within Article II(c) while holding that the destruction of the historical, religious and cultural heritage of the protected group fell outside altogether.<sup>17</sup> The Court also held that allegations of imposing measures to prevent births within the protected group and forcibly transferring children of the protected group to another group (Article II(d) and (e) respectively) had not been made out.<sup>18</sup>

As jurisdiction was founded solely upon the Genocide Convention, the Court could not characterise these atrocities as war crimes or crimes against humanity, however, in practice, it came close to doing precisely that.

In relation to the events at Srebrenica, the Court concluded that the acts there committed fell within Article II(a) and (b) of the Convention and were committed with the requisite intent. Accordingly, ‘these were acts of genocide, committed by members of the VRS [Army of the Republika Srpska] in and around Srebrenica from about 13 July 1995’.<sup>19</sup>

Having found it unproven that the individual atrocities, save for those at Srebrenica, were not committed with genocidal intent, the Court considered whether the intent could be located from wider circumstances. As to whether it could be found from an official statement in the Decision on Strategic Goals issued on 12 May 1992 by Momčilo Krajišnik, the President of the National Assembly of Republika Srpska, the Court concluded in the negative.<sup>20</sup> The Court also held that genocidal intent could not be inferred from the pattern of atrocities. In order for such an inference to be made, the pattern ‘would have to be such that it could only point to the existence of such intent’ but it had not established that this was the case.<sup>21</sup> As such, in the view of the Court, only the events at Srebrenica were proved to be genocide.

Of particular importance is the means by which the Court reached its conclusion that genocidal intent could not be inferred from the pattern of conduct at issue. The Court’s test that the pattern ‘would have to be such that it could only point to the existence of such intent’ is consistent with the holding of the International Criminal Tribunal for the former Yugoslavia (‘ICTY’ or ‘Tribunal’) that genocidal intent may be inferred when it is ‘the only reasonable inference available on the evidence’.<sup>22</sup>

<sup>14</sup> *ibid* para 276.

<sup>15</sup> *ibid* para 277.

<sup>16</sup> *ibid* paras 319 and 354 respectively.

<sup>17</sup> *ibid* paras 328, 334 and 344 respectively.

<sup>18</sup> *ibid* paras 361 and 367 respectively.

<sup>19</sup> *ibid* para 297.

<sup>20</sup> *ibid* para 372.

<sup>21</sup> *ibid* paras 373.

<sup>22</sup> See eg *Prosecutor v Brdanin* Judgment IT-99-36-T (1 Sept 2004) para 970.

However, it is one thing for the Tribunal to adopt such a principle; it is quite another for the Court to do so. The principle is inextricably linked with the standard of proof. The ICTY, applying the standard of beyond reasonable doubt, necessarily requires the intent to be the only reasonable inference available on the evidence. However, the same is not true for the Court applying its standard of conclusive proof.

Even assuming that it were appropriate for the Court to have recourse to this principle—and it should be noted that the Court may simply have been following its *dictum* in *Corfu Channel* in this regard<sup>23</sup>—without elaboration to the facts before it, the Court concluded that intent was not proven to be present.<sup>24</sup> The Tribunal and the International Criminal Tribunal for Rwanda have considered in some depth from which factors intent may be inferred. For example in *Jelisić*, the Appeals Chamber noted that intent may be inferred from ‘the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts’.<sup>25</sup> Yet the Court did not apply this to, in its words, the ‘massive killings’ of ‘in large majority members of the protected group, which suggests that they may have been systematically targeted by the killings’, the ‘massive mistreatment, beatings, rape and torture causing serious bodily and mental harm’, ‘the deportations and expulsions of members of the protected group’ and the ‘terrible conditions . . . inflicted upon detainees of the camps’.<sup>26</sup> Nor did the Court suggest what other possible reason there may have been to account for these atrocities. Rather, the Court stated that, ‘[f]urthermore, and again significantly, the proposition is not consistent with the findings of the ICTY relating to genocide or with the actions of the Prosecutor.’<sup>27</sup>

The findings of the ICTY and the actions of the Prosecutor to which the Court referred were grouped into (a) convictions on charges of genocide relating to the atrocities at Srebrenica; (b) plea agreements in which charges of genocide were dropped; (c) acquittals on charges of genocide; (d) withdrawal of charges of genocide; (e) individuals charged with genocide and related crimes in Srebrenica and elsewhere who died during proceedings; (f) individuals charged with genocide who died before or during proceedings; (g) pending cases involving charges of genocide and related crimes in Srebrenica and elsewhere; (h) pending cases involving charges of genocide and related crimes in Srebrenica.

It is clear that group (a) and groups (e) through (h) do not support the position of the Court; at best they are neutral. Cases in which individuals were convicted of charges of genocide relating to the atrocities at Srebrenica cannot, without more, stand for the proposition that genocide was not committed outside of Srebrenica. Similarly, nothing can be read into cases involving individuals charged with genocide who died before proceedings could be concluded. What are left are those cases in which charges

<sup>23</sup> In the *Corfu Channel Case* [1949] ICJ Rep 4, 18 the Court stated that: ‘The proof may be drawn from inferences of fact, provided that they leave *no room* for reasonable doubt’ (emphasis in original).

<sup>24</sup> *Genocide* (n 1) para 376.

<sup>25</sup> *Prosecutor v Jelisić* Judgment IT-95-10-A (5 July 2001) para 47. See also eg *Prosecutor v Krstić* Judgment IT-98-33-A (19 Apr 2004) para 21; *Prosecutor v Akayesu* Judgment ICTR-96-4-T (2 Sept 1998) para 523.

<sup>26</sup> *Genocide* (n 1) paras 276, 319, 334 and 354 respectively.

<sup>27</sup> *ibid* para 374.

of genocide were withdrawn, whether due to a plea agreement (group (b)) or for other reasons (group (d)) and acquittals on genocide related charges (group (c)). These groups of cases need to be considered in some detail for it would seem that they prevented genocidal intent from being inferred by the Court.

In relation to plea agreements in which charges of genocide were dropped, it is important to bear in mind the reason behind such agreements. They avoid lengthy and expensive trials, they spare witnesses and victims from the burden of testifying and they benefit the accused.<sup>28</sup> The prosecutor may also benefit from accepting a guilty plea in exchange for the withdrawal of charges, for example due to the 'strength of the case; benefits to be gained in subsequent prosecutions by having the defendant agree to testify in related cases; [and] consideration of available resources.'<sup>29</sup> Thus, withdrawal of a charge at the plea bargaining stage should not be taken as meaning that the offence charged was not committed. Indeed, in the case of *Momir Nikolić*, listed by the Court under group (b), the Trial Chamber expressed concern over the withdrawal of a genocide charge, stating that '[o]nce a charge of genocide has been confirmed, it should not simply be bargained away.'<sup>30</sup>

As regards withdrawal of charges of genocide for other reasons, the position may be considered analogous with the withdrawal of charges of grave breaches of the Geneva Conventions. Charges of grave breaches of the Geneva Conventions have been less and less present in indictments and have been withdrawn due to difficulties of proof.<sup>31</sup> This does not mean that grave breaches were not committed or that the Prosecution does not believe them to have been committed; it is simply a matter of trial tactics. Indeed, the entire charging practice of the Prosecutor of the ICTY is purely a matter of prosecutorial policy and should not have impacted upon the decision of the Court.

If the withdrawal of charges of genocide do not support the position of the Court, what about the acquittals on charges of genocide? The scope of any particular judgment of the Tribunal is necessarily limited by the individual before it and the allegations brought against that individual. Thus, only pertinent evidence relating to that individual will be introduced and any factual determinations will be case specific.<sup>32</sup> Indeed, a criticism of the idea that the work of an international criminal tribunal serves as a historical record is the individualistic nature of such a tribunal and its inability to explore the overall picture of events. This is not true of the Court, which was specifically tasked with taking a look at the bigger picture. The need to see the whole picture also comes across in the *Stakić* appeal judgment. In that case, the Appeals Chamber suggested that adopting a global overview rather than a process of division and isolation of events may lead to a different outcome as far as the inference of intent is concerned.<sup>33</sup> Said in the context of a case against an individual, it is all the more true

<sup>28</sup> *Prosecutor v Erdemović* Judgment IT-96-22-A (7 Oct 1997) Separate and Dissenting Opinion of Judge Cassese para 8.

<sup>29</sup> *Prosecutor v Momir Nikolić* Sentencing Judgment IT-02-60/1-S (2 Dec 2003) para 63, n 110. See also *Genocide* (n 1) Dissenting Opinion of Vice President Al-Khasawneh para 42.

<sup>30</sup> *Momir Nikolić* *ibid* paras 63–5.

<sup>31</sup> G Mettraux *International Crimes and the ad hoc Tribunals* (OUP Oxford 2005) 59.

<sup>32</sup> See also *Genocide* (n 1) Dissenting Opinion of Vice President Al-Khasawneh para 42.

<sup>33</sup> On the facts, the Appeals Chamber did not consider the Trial Chamber's finding so unreasonable as to warrant overturning. However, it stopped short of endorsing the findings: *Prosecutor v Stakić* Judgment IT-97-24-A (22 Mar 2006) para 56.

of the case before the Court. Further, as the Trial Chamber in *Brdanin* stressed, it was only on the basis of the evidence in the concrete case before it, ‘temporally and geographically limited, that it reach[ed] the conclusion that genocidal intent [was] not the only reasonable inference that may be drawn from the Strategic Plan.’<sup>34</sup> It is thus unfortunate that the Court chose to state that it is ‘significant that in cases in which the Prosecutor has put the Strategic Goals in issue [*Brdanin* and *Stakić*] the ICTY has not characterised them as genocidal’,<sup>35</sup> for this misses the particular context of which the *Brdanin* Trial Chamber spoke.

All this is not to say that genocidal intent should have been found; simply that the Court was too dismissive of the argument and that the justifications it did put forward are not compelling.

### 3. State responsibility

Having already concluded that Article 1 of the Genocide Convention created an obligation on states parties not to commit genocide,<sup>36</sup> the Court turned to consider whether the genocide at Srebrenica was attributable to Serbia. In the view of the Court, there was no evidence to suggest that any *de jure* organ of the FRY was involved in the genocide—it had not been proven that the FRY’s army or political leaders were involved in the genocide nor had it been proven that General Mladić or the paramilitary group, the ‘Scorpions’, was a *de jure* organ of the FRY.<sup>37</sup> In relation to *de facto* organs, the Court, applying the test it had laid down in *Nicaragua*, held that there was no evidence before it to suggest that the Republika Srpska, the VRS or the ‘Scorpions’ acted in ‘complete dependence’ on the FRY.<sup>38</sup> Accordingly, the acts of genocide were not attributable to Serbia through its organs or persons or entities completely dependent upon it.

The Court then moved on to consider whether the genocide at Srebrenica could be attributed to Serbia on the basis of it being committed by persons who acted on the FRY’s instructions or under its direction or control. In so considering, the Court was faced with the stark choice between the conflicting tests espoused in *Nicaragua* and *Tadić* relating to the requisite level of control to be exercised over such persons. Preferring the *Nicaragua* test, the Court held that the requisite level of ‘effective control’ had not been exercised and that the decision to kill the adult males of the Muslim population in Srebrenica was taken by some members of the VRS Main Staff without instructions from or effective control by the FRY.<sup>39</sup>

#### ‘Effective control’ or ‘overall control’?

In *Nicaragua*, after concluding that the *contras* were not acting with ‘complete dependence’ on the United States, the Court held that nevertheless breaches of international humanitarian law committed by the *contras* may be attributed to the United States if it ‘had effective control of the military or paramilitary operations in the course of which the alleged violations were committed’.<sup>40</sup> As is well known, this test was not followed by the Appeals Chamber of the ICTY in *Tadić*. In that case, the Appeals Chamber had

<sup>34</sup> *Brdanin* (n 22) para 981.

<sup>36</sup> *ibid* paras 155–79.

<sup>38</sup> *ibid* paras 390–5.

<sup>40</sup> *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14 para 115.

<sup>35</sup> *Genocide* (n 1) para 372.

<sup>37</sup> *ibid* paras 386–9.

<sup>39</sup> *ibid* paras 396–412.

to decide whether the conflict in Bosnia was an international one. In so deciding, it considered when armed forces fighting in a *prima facie* internal conflict could be regarded as acting on behalf of a foreign state and held that this depended on the level of control exercised by the foreign state. Finding international humanitarian law unhelpful on this question, the Chamber turned to the general international law of state responsibility and the 'effective control' test of the Court. However, the Chamber, preferring a test of 'overall control', considered the effective control test to be against the logic of the system of state responsibility and at variance with state and judicial practice. Importantly, the Chamber considered there to be a single test for determining the internationality of a conflict as well as for the attribution of acts of an individual to the state for the purposes of attracting state responsibility, thus casting doubt on the *Nicaragua* effective control standard.<sup>41</sup>

In a rebuke to the position taken by the Appeals Chamber, the Court observed that 'the ICTY was not called upon in the *Tadić* case, nor is it in general called upon, to rule on questions of State responsibility, since its jurisdiction is criminal and extends over persons only. Thus, in that Judgment the Tribunal addressed an issue which was not indispensable for the exercise of its jurisdiction.' The Court continued: while it attaches 'utmost importance' to the findings of the ICTY and takes 'fullest account' of its judgments, '[t]he 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.'<sup>42</sup>

The overall control test may very well be correct for the purposes of determining the internationality of a conflict, a point which the Court itself noted,<sup>43</sup> but its purported application to the general law of state responsibility was unnecessary. The effective control test related to the attribution of certain acts of the *contras* to the United States and not to the determination of the internationality of the conflict; the question before the Appeals Chamber was not a question of attribution but the internationality of the conflict.<sup>44</sup> Thus, there was no need to distinguish the effective control test for it was simply not applicable to the issue before it.

The Appeals Chamber took the view that it was necessary to consider the test for attribution, as attribution determined when armed forces could be said to be fighting on behalf of a foreign state and therefore when a conflict was of an international character.<sup>45</sup> But this is to mix the attribution of acts of an individual to a state for the purposes of generating state responsibility, with attribution for determining whether individuals were acting as *de facto* state officials thereby rendering the conflict international. The Tribunal required there to be complete congruence between the two,<sup>46</sup> but it is not clear why this should be so. First, one relates to the internationality of a conflict and therefore the applicable law; the other to potential breaches of that applicable law by a state. As Judge Shahabuddeen noted, the question is not 'whether the FRY was responsible for any breaches of international humanitarian law committed by the VRS'; rather it is 'whether the FRY was using force through the VRS against BH'.<sup>47</sup> Secondly, as noted by the Court, 'the degree and nature of a state's involvement in an armed conflict on

<sup>41</sup> *Prosecutor v Tadić*, Judgment IT-94-1-A (15 July 1999) paras 83–145.

<sup>42</sup> *Genocide* (n 1) para 403.

<sup>44</sup> See also M Milanović 'State Responsibility for Genocide' (2006) 17 EJIL 553, 585.

<sup>45</sup> *Tadić* (n 41) para 87.

<sup>47</sup> *ibid* Separate Opinion of Judge Shahabuddeen para 17.

<sup>43</sup> *ibid* para 404.

<sup>46</sup> *ibid* para 104.



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.<sup>48</sup> Thirdly, this does not mean that a state is left free to act through a non-state entity in a third country without incurring any responsibility whatsoever. If the level of control is not met, a state may still be held responsible for its aid and assistance to that entity.<sup>49</sup>

Regardless of the process by which the Appeals Chamber came to its conclusion, it should nevertheless be considered whether the overall control test is the most appropriate. In his dissenting opinion, Vice-President Al-Khasawneh took the view that there may be different degrees of control and that the situation before the Court differed from that in *Nicaragua* as '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.'<sup>50</sup> There may very well be different degrees of control; however there may also be different levels of control within the effective control standard. The concept need not be a fixed, stagnant one but may be fluid so as to adapt to the different situations to which it is applied. The effective control test is, essentially, context specific.<sup>51</sup> The Court was therefore correct, it is submitted, to reaffirm the position it took in *Nicaragua*. However, the matter is not without controversy, with the Court's position already provoking considerable consternation among commentators.<sup>52</sup>

#### *Complicity in genocide and the obligation to prevent genocide*

Having thus concluded, the Court turned to complicity in genocide. Likening complicity to aiding or assisting in the law of state responsibility, the Court required proof that organs of the FRY or persons acting under its instructions or direction or control furnished aid or assistance in the commission of the genocide and did so, at the very least, with the awareness of the specific intent of the perpetrator. After considering the evidence before it, the Court concluded that it had not been established that the authorities of the FRY supplied the VRS leaders who carried out the genocide with their aid and assistance at a time when the authorities were aware that genocide was about to take place or was under way.<sup>53</sup> Accordingly, Serbia was not liable for acts of complicity in genocide.

The Court then considered whether any liability attached to Serbia for breach of its obligations to prevent and punish genocide. Turning first to the obligation to prevent genocide, the Court held that the obligation was one of conduct and not of result. The Court stated that responsibility would attach if 'the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have

<sup>48</sup> *Genocide* (n 1) para 405.

<sup>49</sup> Cf *Tadić* (n 41) Separate Opinion of Judge Shahabuddeen para 20.

<sup>50</sup> *Genocide* (n 1) Dissenting Opinion of Vice-President Al-Khasawneh para 37. See also *Tadić* (n 41) paras 117 and 137.

<sup>51</sup> See also *Tadić* (n 41) Separate Opinion of Judge Shahabuddeen para 19; International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, Commentary to Art 8 in J Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP, Cambridge, 2002) 112.

<sup>52</sup> See eg A Cassese, 'A judicial massacre' *Guardian Unlimited* (27 Feb 2007) available at <[http://commentisfree.guardian.co.uk/antonio\\_cassese/2007/02/the\\_judicial\\_massacre\\_of\\_srebr.html](http://commentisfree.guardian.co.uk/antonio_cassese/2007/02/the_judicial_massacre_of_srebr.html)>; R Wedgwood 'Slobodan Milosevic's Last Waltz' *New York Times* (12 Mar 2007).

<sup>53</sup> *Genocide* (n 1) paras 416–24.

contributed to preventing the genocide.<sup>54</sup> The Court found the notion of ‘due diligence’ to be ‘of critical importance’ and considered the capacity of a state to influence persons committing the genocide to be crucial.<sup>55</sup> The Court also specified that the obligation to prevent arises ‘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’.<sup>56</sup> After considering the evidence, the Court determined that during the period under consideration, the FRY was in a position of influence over the Bosnian Serbs who devised and implemented the genocide and the FRY authorities could hardly have been unaware of the serious risk of genocide once the VRS forces had decided to occupy Srebrenica. Accordingly, ‘[i]n view of their undeniable influence and of the information, voicing serious concern, in their possession, the Yugoslav federal authorities should . . . have made the best efforts within their power to try and prevent the tragic events then taking shape’ and in doing nothing, Serbia breached its obligation of prevention.<sup>57</sup>

The idea of obligations arising from control is not new,<sup>58</sup> and although it caused some unease amongst certain judges,<sup>59</sup> the linkage between influence and obligations is gaining currency. For example, in the *dispositif* of the first Order granting provisional measures in the present case, the Court required the FRY to take measures in relation to ‘organizations and persons which may be subject to its control, direction or influence’.<sup>60</sup> Similarly, the European Court of Human Rights has espoused the notion of obligations arising from influence in its finding that the applicants in *Ilaşcu* came within the jurisdiction of Russia for acts taking place in the Moldavian Republic of Transnistria (MRT) as Russia exercised ‘decisive influence’ at the very least over the MRT.<sup>61</sup> Obligations arising from influence are a natural outgrowth of those that arise from control; indeed influence may be seen as a variation of control. As long as the obligations vary depending on the precise nature of the control or influence exercised, it should not matter whether the issue was one of influence or control.<sup>62</sup> In particular, it is not clear why the concept of influence should be seen as any more subjective or legally vague than the notion of control.<sup>63</sup>

More interesting is the manner in which the Court distinguished complicity in genocide from the obligation to prevent genocide. The Court first noted that ‘while complicity results from commission, violation of the obligation to prevent results from omission.’<sup>64</sup> This is not an absolute distinction, for it is both possible to aid and assist

<sup>54</sup> *ibid* para 430.

<sup>55</sup> *ibid*.

<sup>56</sup> *ibid* para 431.

<sup>57</sup> *ibid* para 438.

<sup>58</sup> See eg *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* [1971] ICJ Rep 16 para 118.

<sup>59</sup> *Genocide* (n 1) Separate Opinion of Judge Tomka para 67; Declaration of Judge Skotnikov 10.

<sup>60</sup> Provisional Measures Order (n 3) para 52A(2).

<sup>61</sup> *Case of Ilaşcu v Moldova and Russia* ECHR App No 48787/99 paras 376–94. The matter was a jurisdictional one however the pertinent point for our purposes is unaffected.

<sup>62</sup> On the varying relationship between control and obligation, see eg C de Visscher, *Theory and Reality in Public International Law* (Princeton, 1968) 285–6; C Eagleton ‘International Organization and The Law of Responsibility’ 1950-I Rec des Cours 319, 386.

<sup>63</sup> Cf *Genocide* (n 1) Declaration of Judge Skotnikov 10.

<sup>64</sup> *Genocide* (n 1) para 432.

by omission,<sup>65</sup> as well as fail to prevent genocide by taking insufficient measures, which would be a case of malfeasance rather than nonfeasance. A more important distinction offered by the Court was that complicity required that the aider or assistor ‘acted knowingly, that is to say, in particular, was aware of the specific intent (*dolus specialis*) of the principal perpetrator’ and therefore that genocide was taking place or was about to take place,<sup>66</sup> whereas for a violation of the obligation to prevent genocide, it was ‘enough that the State was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed’.<sup>67</sup>

The distinction is, then, between awareness that genocide was taking place or about to take place (complicity) and awareness of the serious danger of genocide (obligation to prevent). The difference between knowing that if you act in a particular way there is a serious danger of genocide and knowing that if you act in that same way genocide will take place is one of the likelihood that genocide will occur. In the former situation, there is a risk of genocide and an assumption of that risk whereas in the latter, genocide is a virtually certain consequence. In the criminal law, in the United Kingdom at least, the former would amount to recklessness while the latter to oblique intent.<sup>68</sup> In many States recklessness as to the principal’s *mens rea* would not suffice for a conviction based on aiding and abetting.<sup>69</sup> The line between recklessness and actual knowledge is a fine one and much turns on the evidence, which may explain why certain judges fell on the other side of the line from the majority,<sup>70</sup> and for whose view it is easy to have a certain sympathy.

The result is that if a State knows that there is a serious danger of genocide, it may go ahead and furnish aid or assistance to those responsible for the commission of the genocide without engaging its complicity in the genocide though it may very well be held to have violated its obligation to prevent that genocide. The problem, if any, is not in the result but in the view afforded to breach of the obligation to prevent, the sense that it is but a ‘consolation prize’.<sup>71</sup> The fact remains that a State was aware of the serious danger of genocide but did not seek to prevent it when it had the power to do so.

As to the obligation to punish genocide, the Court considered that the ICTY constituted an ‘international penal tribunal’ within the meaning of Article VI of the Convention and Serbia had ‘accepted the jurisdiction’ of that Tribunal at the latest at the date of signing and entry into force of the Dayton Agreement (14 December 1995), which included an obligation of cooperation with the Tribunal. Bearing in mind the

<sup>65</sup> The Appeals Chamber left this open in *Prosecutor v Blaškić* Judgment IT-95-14-A (29 July 2004) para 47. Other Chambers have considered the possibility eg *Prosecutor v Limaj, Bala and Musilu* Judgment IT-03-66-T (30 Nov 2005) para 517.

<sup>66</sup> *Genocide* (n 1) paras 421–2. Interestingly, the summary of the judgment refers to ‘was aware or should have been aware of the specific intent’. Had this been the standard used, it may have led to a very different conclusion.

<sup>67</sup> *ibid* para 432.

<sup>68</sup> *R v Woollin* [1998] 4 All ER 103; *R v Cunningham* [1982] AC 566. I am indebted to Robert Cryer for this point and for helpful conversations on this comment more generally.

<sup>69</sup> See eg *Giogianni* (1984) 156 CLR 473 (Australia); *Crooks* [1981] 2 NZLR 53 (New Zealand); *Dunlop and Sylvester* (1979) 47 CCC 93 (Canada) but cf *Carter v Richardson* [1974] RTR 314 (England and Wales). See generally A Simester, ‘The Mental Element in Complicity’ (2006) 122 LQR 578, 586–8.

<sup>70</sup> *Genocide* (n 1) Declaration of Judge Keith; Declaration of Judge Bennouna; Dissenting Opinion of Judge ad hoc Mahiou.

<sup>71</sup> The description is that of Cassese (n 52). Admittedly, this is not helped by a declaratory judgment on the one hand and a likely substantial monetary award on the other.

information suggesting that General Mladić was on Serbian territory on several occasions and for substantial periods during the last few years and is still there now without the Serb authorities doing what they reasonably could to arrest him, the Court held that Serbia failed in its duty to cooperate fully with the ICTY thus breaching its duties under the Dayton Agreement and as a Member of the UN and accordingly in violation of Article VI of the Convention.<sup>72</sup>

Finally, the Court considered whether Serbia had breached the Court's Orders indicating provisional measures. The Court considered that in respect of the massacres at Srebrenica, Serbia failed to fulfil its obligation to 'take all measures within its power to prevent commission of the crime of genocide' as provided in the Court's Orders.<sup>73</sup> Serbia also failed to comply with that aspect of the Orders that required it to 'ensure that any . . . organizations and persons which may be subject to its . . . influence . . . do not commit any acts of genocide'.<sup>74</sup>

#### 4. *Reparation*

In considering Bosnia and Herzegovina's claim for reparation, the Court concluded that satisfaction was the most appropriate form and that this would take the shape of various declarations in the judgment, namely that Serbia failed to comply with its obligation to prevent genocide, that Serbia has outstanding obligations in relation to the transfer of persons accused of genocide, particularly General Ratko Mladić, to the ICTY, and that Serbia failed to comply with the Court's Orders indicating provisional measures.<sup>75</sup> This was so held in the *dispositif*.

#### 5. *Evidence*

It is noteworthy that the judgment contains a section on evidence; it is rare for the Court to lay down evidentiary rules even though disputed facts are frequently before it. Of the evidentiary matters considered in the case, one of the most novel was the Court's treatment of the standard of proof. For the first time, the Court explicitly laid down the standard of proof it was applying in the particular case before it, stating that it 'has long recognized that claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive'.<sup>76</sup> Other evidentiary matters in the case included Bosnia and Herzegovina's request to the Court to instruct Serbia and Montenegro to produce unedited copies of documents that had been submitted to the Court with portions redacted,<sup>77</sup> and the hearing of witnesses, experts and witness experts.

The most striking thing about the judgment is the extent to which the Court references findings of the ICTY. The use of such findings is of little surprise after the Court's statement in *Armed Activities on the Territory of the Congo* that 'evidence obtained by examination of persons directly involved, and who were subsequently cross-examined by judges skilled in examination and experienced in assessing large amounts of factual information, some of it of a technical nature, merits special atten-

<sup>72</sup> *Genocide* (n 1) paras 439–49.

<sup>74</sup> *ibid.*

<sup>76</sup> *ibid* para 209.

<sup>77</sup> *ibid* para 206 and Dissenting Opinion of Vice President Al-Khasawneh para 35.

<sup>73</sup> *ibid* para 456.

<sup>75</sup> *ibid* paras 459–70.

tion'.<sup>78</sup> However, the extent to which the Court referred to findings of the Tribunal could not have been predicted.

Factual findings of the ICTY or evaluations thereof were used in different ways. At times, they were used to support a holding of the Court; at others, they were endorsed by the Court; at still others, pure reliance was placed upon them.<sup>79</sup> Further, on occasion, the Court held that there was no reason to depart from the findings of the Tribunal,<sup>80</sup> suggesting that the burden on the party seeking to disturb a Tribunal finding was going to be onerous. A considerable degree of deference was thus paid to factual findings of the Tribunal. Indeed, the Court's finding that the atrocities committed in Srebrenica amounted to genocide was based in large part on the findings of the Tribunal in *Krstić* and *Blagojević*.<sup>81</sup> Reliance on *Krstić* is understandable; more surprising are the extensive references to the *Blagojević* trial judgment, which is currently under appeal and therefore susceptible to findings on which the Court relied being overturned.

The use of Tribunal jurisprudence was not limited to its findings of fact; the Tribunal's legal findings were also used, as were those of the International Criminal Tribunal for Rwanda and the International Military Tribunal at Nuremberg.<sup>82</sup> This is a valuable lesson in the positive role of multiple international courts and tribunals; no longer should their proliferation be seen as inherently negative.

The Court was clear on the weight to be ascribed to factual findings of the Tribunal—these should, in principle, be accepted as 'highly persuasive'<sup>83</sup>—though in a later passage the Court expressed itself in stronger terms: '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.'<sup>84</sup>

However, a note of caution should be sounded for there is a danger of over-reliance on findings of the Tribunal. Placing too much reliance on its findings may obscure evidence from other sources, devalue such evidence and skew the threshold of proof. The result may be that a lack of a finding on the part of the Tribunal is taken as determinative. Thus, it may not be simply co-incidence that where there was no relevant Tribunal finding on point, the Court held that the relevant facts had not been proven.<sup>85</sup>

The case also reveals the relationship between an international court of general jurisdiction and one of specific jurisdiction. The court of general jurisdiction refrained from taking a position on the suitability of the overall control test for determining the internationality of a conflict as that was a matter not before it and one that was within the competence of the tribunal of specific jurisdiction. The court of general jurisdiction also reproached the tribunal of specific jurisdiction for stepping outside its particular competence and intruding into matters of general international law.<sup>86</sup> Accordingly,

<sup>78</sup> *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep para 61. Such use was also foreshadowed by R Higgins 'A Babel of Judicial Voices? Ruminations From the Bench' (2006) 55 ICLQ 791, 804.

<sup>79</sup> See eg *Genocide* (n 1) paras 328, 344, and 232 respectively.

<sup>80</sup> *ibid* paras 295, 296.

<sup>82</sup> *ibid* paras 172 and 300.

<sup>84</sup> *ibid* para 403.

<sup>86</sup> The Court (para 403) did state that it gave 'careful consideration' to the reasoning of the Appeals Chamber. However, there is a tendency to refer to 'careful consideration' or some such

<sup>81</sup> *ibid* paras 278–97.

<sup>83</sup> *ibid* para 223.

<sup>85</sup> See eg *ibid* para 374.

pronouncements of a court of limited jurisdiction on matters of law falling within its competence will be considered weighty, as the Court's use of statements of the Tribunal on international criminal law show, but any pronouncements on matters falling outside its specific competence will be accorded less weight. And so it should be—deference should be given to the views of a specialist but strictly to the extent that those views are within the ambit of the specialist's expertise. The relationship is confirmed through the Tribunal's use of Court jurisprudence on matters of general international law as well as international humanitarian law and genocide.<sup>87</sup>

#### D. Conclusion

Regardless of the slight quarrels commentators may have with the judgment of the Court, it is an important one. It confirmed the view of the ICTY that the atrocities at Srebrenica amounted to genocide, a view not universally shared; it held that a state may commit genocide; and it may aid regional reconciliation, though the extent to which it will is yet to be seen.<sup>88</sup>

The case took 14 years from application to judgment. Despite the rather protracted proceedings, which may be characterised by the extension of time limits and the use of near every form of incidental proceeding, the judgment remains timely as post-judgment discussion shows. Ironically for the Applicant, had the case been heard earlier, the Court would not have had the benefit of the work of the Tribunal and a very different judgment may have been handed down. Similarly, had the case been heard later, the Court may have had the benefit of further findings from the Tribunal, for example relating to the paramilitary group, the 'Scorpions', and its relationship with Serbia.<sup>89</sup> The long running saga of the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* may not be over. The possibility of a request for revision remains.

SANDESH SIVAKUMARAN\*

## II. CASES BEFORE THE COURT

### 1. Gabčíkovo-Nagymaros Project (*Hungary/Slovakia*)

On 2 July 1993, in pursuance of a Special Agreement of 7 April 1993, Hungary and

before going on to depart from the relevant reasoning or finding. See eg *Prosecutor v Mucic et al* Judgment IT-96-21-A (20 Feb 2001) para 24 (on *Nicaragua*); *Sanchez-Llamas v Oregon* 126 S Ct 2669, 2683 following *Breard v Greene* 523 US 371, 375 (on *Avena and other Mexican Nationals (Mexico v United States of America)* [2004] ICJ Rep); *Mara'abe v Prime Minister of Israel* HCJ 7957/04 para 56 (on *Legality of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep).

<sup>87</sup> See eg *Prosecutor v Mucic et al* (n 86) paras 76–7 citing the judgments in *Certain German Interests in Polish Upper Silesia* and *Nottebohm*; *Prosecutor v Kupreškić et al* Judgment IT-95-16-T (14 Jan 2000) para 524 citing the judgments in *Nicaragua*, *Nuclear Weapons* and *Corfu Channel*.

<sup>88</sup> For one view, see M Glennly 'The greater of two goods' *Guardian Unlimited* (26 Feb 2007) available at <[http://commentisfree.guardian.co.uk/misha\\_glennly/2007/02/the\\_greater\\_of\\_two\\_goods.html](http://commentisfree.guardian.co.uk/misha_glennly/2007/02/the_greater_of_two_goods.html)>.

<sup>89</sup> *Prosecutor v Stanišić and Simatović* IT-03-69; this was recognized by the Court at para 395.

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