

SEPARATE OPINION OF JUDGE *AD HOC* KREČA

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PART ONE

JURISDICTIONAL ISSUES

I. General considerations in respect of the *res judicata* rule

1. The expression *res judicata* has more than one meaning. It is used to mean an issue decided by a court of law; a judgment which cannot be refuted by ordinary legal vehicles; and, also, a decision which is immutable and irrevocable.

The broad use of the expression *res judicata* could be attributed to a certain confusion about the very quality of a judicial decision and its effects both subjective and objective. Occasionally and especially as regards some kinds of judgments, account is not taken of the difference existing between irrefutability and irrevocability. If, bearing in mind the absence of ordinary legal vehicles provided by the Statute and the Rules of Court to a dissatisfied party for overturning the judgment, it could be said that in general the judgments of the Court are irrefutable. It could not however be said that they are irrevocable as well, owing not only to the rule on revision embodied in Article 61 of the Statute, as an extraordinary legal vehicle, but also due to some other judicial vehicles existing in the law of the Court, such as the principle *compétence de la compétence* in regard to jurisdictional issues as well as non-preliminary objections to the jurisdiction of the Court.

2. Two components may be discerned in the substance of *res judicata* as provided in the Statute of the Court:

- (i) procedural, which implies that: “The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party” (Art. 60); and
- (ii) substantive, according to which: “The decision of the Court has no binding force except between the parties and in respect of that particular case.” (Art. 59).

3. The primary effect of *res judicata* in the procedural sense is claim preclusion — meaning that a future lawsuit on the same cause of action is precluded (*non bis in idem*), whereas the effect of *res judicata* in the substantive sense is mainly related to the legal validity of the Court’s decision as an individualization of objective law in the concrete matter — *pro veritate accipitur* — and, also, to the exclusion of the application of the principle of *stare decisis*.

4. Two components of *res judicata* — procedural and substantive — do not necessarily go hand in hand in each particular case. Each decision of the Court — be it judgment or order — is binding upon the parties, although not in an identical way, but such characteristic of the decision of the Court is not necessarily followed by its finality.

The relationship between these two components of *res judicata* is not static and *a priori* defined because it reflects the balancing power of the considerations underlying the procedural and substantive aspects of *res judicata* rule, respectively.

The considerations underlying the substantive aspect of *res judicata* essentially protect the authority of the Court as a court of law and the legitimacy of its decisions. Hence, it is possible to say that the binding force of the Court’s decisions derives from the very nature of the judicial function irrespective of the nature and content of a Court’s decision. As the Court established in

the *Northern Cameroons* case (*I.C.J. Reports* 1963, p. 38), the effect of *res judicata* extends also to the judgment of the Court establishing the impossibility of changing the created legal situation.

Underlying *res judicata* in the procedural sense are, in fact, considerations of legal security and predictability combined with economy of the judicial process.

5. The distinction between characteristic of a judicial decision and its effect derives from contrasting *res judicata* in its abstract normative meaning and its application within the body of law regulating the judicial activity of the Court, i.e. its legal meaning *in casu*.

Although it is a rule of fundamental importance, forming part of the legal system of all civilized nations, *res judicata* is certainly not a fetish of, or seen as a *deus ex machina* by, courts of law, including the International Court of Justice.

The *res judicata* rule operates within the law that the Court applies in parallel with other rules having an objective nature. In other words, the *res judicata* rule, just like other fundamental rules governing judicial activity of the Court, is only a part, however important it may be, of the normative milieu in which the Court operates and which, as a whole, determines the effect of a Court's decision. A possible effect that the other rules of an objective nature have upon *res judicata* might be summarized as follows: "Finality itself . . . is rather a plastic term that need not prohibit re-examination"¹. It seems clear that revision in accordance with the conditions specified in Article 61 of the Statute "constitutes direct exception to the principle *res judicata*, affecting the validity of a final judgment"². It is equally true that the operation of the principle of *compétence de la compétence* and non-preliminary objections to the affirmed jurisdiction of the Court may result in a reversal of one sort of Court judgment, i.e., judgments on preliminary objections.

6. In that regard, none of the legal vehicles designed to challenge or capable of use to challenge a matter already decided derogates the existence of the *res judicata* rule as such, for they are based on the authority of the law which the Court applies in its totality and are made operational in the form of a binding decision by which the previous decision of the Court is repudiated — *judicium posterior derogat priori*. As the effects of *res judicata* attach only to decisions brought *lege artis*, in accordance with the rules, procedural and substantive, of the law applied by the Court, it could be said that the exceptions to the finality of a Court judgment constitute a part of the substance of *res judicata*.

Consequently, finality of the Court's judgments within the law applied by the Court may be relative or absolute. Only for the latter can it be said that finality is tantamount to *res judicata* in terms of irrevocability.

The judgment (*sententia*) and *res judicata* in the sense of a final and irrevocable decision of the Court obviously are not identical notions. The judgment as such is *res judicans* while *res judicata est causa sine finem controversiae accepit*.

As a judicial act, every judgment of a court of law has a potential of *res judicata* in terms of irrevocability which may be materialized or not, depending on the outcome of procedures and weapons designed to challenge the decision of the court. So, the intrinsic quality of *res judicata* is, in fact, the end point in the development of the authority which is inherent in every judgment, the point in which *jugement passe en force de la chose jugée*, judgment becomes enforceable.

¹M. Reisman, *Nullity and Revision*, 1971, p. 341.

²B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, 1953, p. 372.

II. *Res judicata* as regards jurisdictional decisions

7. The full effect of the *res judicata* rule is in principle attached to “a final decision of an international tribunal” (Permanent Court of Arbitration (*Trial Smelter* case), 3. *RIAA*, pp. 1950-1951). In his separate opinion in the *Fisheries Jurisdiction* case, Judge Waldock stated, “[u]nder Article 60 of the Statute the Judgment is ‘final and without appeal.’ It thus constitutes a final disposal of the case brought before the Court by the Application of 14 April 1972” (*I.C.J. Reports 1974*, p. 125, para. 46)³.

However, it does not follow *a contrario* that the Court’s judgments on preliminary objections are excluded from the scope of Articles 59 and 60 of the Statute of the Court. Such an interpretation would obviously run counter to the general determination made in these Articles.

8. It appears that the effects of judgments on preliminary objections, or at least some types of judgment on preliminary objections, with respect to both their binding force and finality, are of a specific character distinguishable to some extent from the effects of judgments on the merits of the case.

The meaning of the characterization “final” in regard to a judgment on a preliminary objection lies solely in the fact that, after it is pronounced, all the parties are precluded from raising any preliminary objections whatsoever leading to revival or restitution of the preliminary objection proceeding, as provided for in Article 79 of the Rules of Court.

But a preliminary objection as such is not the only legal vehicle in the body of law of the Court designed to challenge a decision of the Court. Therefore, it is difficult to say that the judgment on the preliminary objections raised by a party to a dispute before the Court puts a final end to the issue of jurisdiction, so that the issue of jurisdiction can never be raised. In the jurisprudence of the Court, and on the basis of Article 79, paragraph 1, of the Rules, the notion of non-preliminary objection to the jurisdiction of the Court has developed, which proves, by itself, that the notion of objection to jurisdiction is broader than the notion of preliminary objection. The fundamental principle *compétence de la compétence* may also give rise to reconsideration of the jurisdictional decision taken.

As long as it is the *functus officio* in the case, the Court, as a court of law, has the inherent power to re-open and reconsider any issue of law and fact decided. That power would be devoid of substance if not accompanied by the power of the Court to reverse its earlier jurisdictional decision under special circumstances.

9. The uncritical ascribing of immutability to every judgment is fetishist and may find a model only in some long-abandoned decisions under Langobardic law⁴. Since the Roman Law (in the Roman Law the character of *res judicata* could be given only to final decisions *in meritum*⁵), the solution has been adopted that the authority of *res judicata* belongs, as a rule, only to decision on the merits of a case. For instance, in French law, decisions on incidental questions may not acquire the *autorité de la chose jugée*, unless that is indispensable for the interpretation of the

³A. V. Freeman, *International Responsibility of States for Denial of Justice*, 1938, p. 975; Bin Cheng, *op.cit.*, 1953, p. 337; Schwarzenberger, *International Law*, I, 1949, pp. 454-455.

⁴Capitula 370 Edictum Langobardorum stipulated that an adjudicated case *semper in eadem deliberatione debeant permanere*, although there existed the possibility of its rejection by a higher instance — Pugliese, *Giudicato civile*, Enciclopedia di diritto XVI, 1969, p. 158.

⁵Pugliese, *op. cit.*, p. 752; Kaser, *Das römische Zivilprozessrecht*, MCMLXVI, p. 504.

dispositifs of the decision *in meritum* or they are its “*soutien nécessaire*”⁶. The Italian judiciary also tends to perceive *res judicata* to cover the solution of the dispute which the parties submitted to the court⁷. Paragraph 322 of the German *Zivilprozessordnung* (*Materielle Rechtskraft*) states that only those decisions which on the demand (*Anspruch*) which is stipulated in the accusation or counteraccusation may be effective.

In English law as well, *res judicata* indicates the final judicial decision adopted by the judicial tribunal competent for the *causa*, or the matter in litigation⁸. Also, the existence of the competent jurisdiction is considered a condition of validity of every *res judicata*⁹.

Therefore, the view that the application of *res judicata* is objectively limited to the issues decided by the final judicial decision is dominant in the law of civilized nations.

10. In that regard three types of judgments on preliminary objections may be distinguished:

- judgments by which a preliminary objection, irrespective of its nature, is accepted and the dispute *ipso facto* ended;
- judgments by which the objection is rejected and the Court is declared competent to entertain the merits of the case; and
- judgments by which a preliminary objection raised is determined to be an objection which does not possess an exclusively preliminary character.

The effects of *res judicata* such as those characterizing a judgment on the merits of a case are possessed only by those judgments on preliminary objections by which an objection is accepted. In contrast to the other two remaining jurisdictional decisions, which are both constituent parts of the pending case, this kind of jurisdictional decision puts an end to a case, thus assuming the full effects of the *res judicata* rule attaching to a final judgment in the case. There are certain differences as regards *res judicata* effects between the two remaining kinds of judgments on preliminary objections, on the one hand, and judgments on the merits, on the other.

11. The difference in finality between jurisdictional decisions, on the one hand, and decisions on the merits, on the other, is, in principle, quantitative rather than qualitative in nature. The finality of jurisdictional decisions is more relative owing to a larger number of legal weapons by which they can be challenged. It is reflected in the fact that a jurisdictional decision may be challenged not only through revision proceeding under Article 61 of the Statute but also in the further course of the proceedings and by a non-preliminary objection, i.e., by an objection which is raised to the Court’s jurisdiction¹⁰ after the preliminary objection procedure has been completed by the delivery of the judgment.

In the practice of international courts, in particular that of the International Court of Justice, this difference assumes qualitative proportions. Reversal of judgments on the merits, as opposed to

⁶Perrot, *Chose jugée, Répertoire de procédure civile et commerciale*, 1955,1, Nos. 8, 45, 78-87; Vincent, *Procédure civile*, 1978, p. 98, No. 76.

⁷Pugliese, *op. cit.*, 834.

⁸Bower-Turner, *op. cit.*, p.1., Walker & Walker, *The English Legal System*, 1885, Vol. 6, p. 589.

⁹Bower-Turner, *The Doctrine of Res Judicata*, 1969, II, p. 92.

¹⁰The word “jurisdiction” is used in its generic sense comprising both general, i.e., *locus standi in iudicio*, and special jurisdiction.

jurisdictional decisions, is unknown in the jurisprudence of the International Court of Justice, unlike that of arbitration courts¹¹.

12. The question as to whether the tribunal is irrevocably bound by its preliminary objection judgment was raised for the first time in the *Tiedemann* case (1926) before the Polish-German Mixed Arbitral Tribunal.

Sedes materiae of the matter, the Tribunal explained succinctly and convincingly:

“the Tribunal considers that, in the interests of legal security, it is important that a judgment, once rendered, should in principle be held to be final.

However, the question takes on a special complexion when the preliminary judgment rendered is a judgment upholding the Tribunal’s jurisdiction and the latter finds subsequently, but prior to the judgment on the merits, that in fact it lacks jurisdiction. In such a case, if it were obliged to regard itself as being bound by its first decision, it would be required to rule on a matter which it nevertheless acknowledges to stand outside its jurisdiction. And when — as in the instant case — it has in the meantime ruled that it has no jurisdiction in cases of the same nature, it would totally contradict itself by nevertheless ruling on the merits, and it would expose itself to the risk that the respondent State might take advantage of the Tribunal’s own acknowledgment of its lack of jurisdiction, in order to refuse to execute its judgment . . .

In other words, in order to remain faithful to the *res judicata* principle, it would have to commit a manifest abuse of authority.”¹²

The principle that a court of law hearing a case which has proceeded beyond a judgment on preliminary objections is not irrevocably bound by that judgment has also been confirmed by the jurisprudence of the Court.

13. In the *Nottebohm* case (Preliminary Objections) the Court rejected by its Judgment of 18 November 1953 Guatemala’s preliminary objection to its jurisdiction and resumed proceedings on the Merits (*I.C.J. Reports* 1953, p. 124). Guatemala, however, raised a number of objections to admissibility in its Counter-Memorial, in its Reply and in the course of the oral proceedings on the merits but treated them as subsidiary to the subject of the dispute. In its Judgment of 6 April 1955, the Court accepted one of the objections, which related to the admissibility of Liechtenstein’s claim given that at the time of naturalization no “genuine link” had existed between Nottebohm and Liechtenstein (*I.C.J. Reports* 1955, pp. 4-65).

The *Nottebohm* case can be taken as an example of reversal of the preliminary objection judgment upon a non-preliminary objection raised by the Respondent.

14. On the other hand, the *South West Africa* cases (Second Phase) illustrate the pattern of reversal of the judgment on preliminary objections by action of the Court *proprio motu*.

In the preliminary objections phase (*I.C.J. Reports* 1962, p. 319), the Court rejected four South African objections, amongst others the objection concerning the standing (*locus standi*) of the Applicant as well as its interests. South Africa pointed out, *inter alia*, that:

¹¹See J.L. Simpson, M. Fox, *International Arbitration — Law and Practice*, 1959, pp. 250 *et seq.*

¹²*Von Tiedemann v. Polish State, Rec. TAM, t. VI*, pp. 997-1003; see also CR 2006/44, Varady, translation.

“*Secondly*, neither the Government of Ethiopia nor the Government of Liberia is ‘another Member of the League of Nations’, as required for *locus standi* by Article 7 of the Mandate for South West Africa; *Thirdly*, . . . more particularly in that no material interests of the Governments of Ethiopia and/or Liberia . . . are involved therein or affected thereby;” (*I.C.J. Reports 1962*, pp. 326-327).

In the merits phase the Court returned to the determination made in its 1962 Judgment and found that, in fact, the Applicants did not have standing in the proceedings (*I.C.J. Reports 1966*, pp. 36-38). Namely, in its Judgment on Preliminary Objections of 21 December 1962, the Court established *inter alia* that:

“*For the manifest scope and purport of the provisions of this Article indicate that the Members of the League were understood to have a legal right or interest in the observance by the Mandatory of its obligations both toward the inhabitants of the Mandated Territory, and toward the League of Nations and its Members*”, and that:

“Protection of the material interests of the Members or their nationals is of course included within its compass, *but the well-being and development of the inhabitants of the Mandated territory are not less important*” (*I.C.J. Reports 1962*, pp. 343-344; emphasis added).

In essence, the Court explained the reversal of its previous finding by describing the nature of the decision on preliminary objection. The Court stated *inter alia*:

“As regards the issue of preclusion, the Court finds it unnecessary to pronounce on various issues which have been raised in this connection, such as whether a decision on preliminary objection constitutes a *res judicata* in the proper sense of that term, whether it ranks as a ‘decision’ for the purposes of Article 59 of the Court’s Statute, or as ‘final’ within the meaning of Article 60. *The essential point is that a decision on a preliminary objection can never be preclusive of a matter appertaining to the merits, whether or not it has in fact been dealt with in connexion with the preliminary objection.*” (*I.C.J. Reports 1966*, pp. 36-37, para. 59; emphasis added.)

However, reasoning further about the preclusive effect of the 1962 Judgment, the Court characterized — albeit indirectly — jurisdictional decisions, finding that:

“Since *decisions of an interlocutory character* cannot pre-judge questions of merits, there can be no contradiction between a decision allowing that the Applicants had the capacity to invoke the jurisdictional clause . . . *and a decision that the Applicants have not established the legal basis of their claim on the merits*” (*I.C.J. Reports 1966*, p. 38, para. 61; emphasis added).

In the merits phase the Court returned to the determination made in its 1962 Judgment and found that, in fact, the Applicants did not have standing in the proceedings (*I.C.J. Reports 1966*, pp. 36-38).

15. The legal basis for reconsideration of a preliminary objection judgment and, possibly, a reversal of an affirmative finding on jurisdiction lies in the inherent power of the Court to determine its own jurisdiction (the principle of *compétence de la compétence*), in both its narrow and broad meanings.

In the narrow sense, as expressed in Article 36, paragraph 6 of the Statute, the Court takes jurisdictional decisions in cases of disputes between the parties as regards its jurisdiction. Jurisdictional decisions of the Court under Article 36, paragraph 6, may be of either of two types:

judgments on preliminary objection raised in accordance with Article 79 of the Rules of Court; and decisions taken upon non-preliminary objection. Characteristic of decisions on non-preliminary objections is that they are taken in phases of the proceedings other than the preliminary objection stage, generally in the phase which should be on the merits and which is determined in the practice of the Court to be a Judgment on jurisdiction (*Nottebohm* case) or simply a Judgment in the Second Phase (*South West Africa* cases). The real meaning of the last expression is in fact the second jurisdictional phase, given that the judgment upon preliminary objection was adopted previously.

However, as commonly observed, the Court is bound to remain attentive to the issue of jurisdiction independently from the actions of the parties in the litigation. The Court achieves this by application of the principle *compétence de la compétence* in its wider form (*Nottebohm* case, *I.C.J. Reports* 1953, p. 120) as the basis for *proprio motu* action of the Court.

“Remain attentive” as such, without proper action of the Court, has no practical effect on the fundamental question — whether the Court has jurisdiction *in casu*. The Court, bearing in mind *ex officio* its competence from the moment the proceedings are begun until their end, undertakes various decisions in that regard. Specifically, the Court’s *compétence de la compétence*:

“is not limited to verifying in each case whether the Court can deal with the merits . . . By extending the scope of the power in issue [*compétence de la compétence*] to all matters within the incidental jurisdiction of the Court, the Court has established this power as the most pre-preliminary function the Court undertakes”¹³.

The very seisin of the Court as a first step of a procedural nature implies the operation of the principle *compétence de la compétence* by *proprio motu* action of the Court. The need to resort to the principle *compétence de la compétence* results directly from the fact that the seisin of the Court is not the automatic consequence of the proper actions of the parties to a dispute, and the seisin of the Court is not a pure fact but a judicial act linked to the jurisdiction of the Court (see *Nottebohm*, *I.C.J. Reports* 1953, p. 122; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (*Qatar v. Bahrain*), Jurisdiction and Admissibility, 1995, p. 23, para. 43).

Without the operation of the principle *compétence de la compétence* as a principle of general international law, it would be legally impossible to establish the competence of the Court to indicate provisional measures, for the objections to the Court’s jurisdiction, pursuant to Article 79 of the Rules, may be submitted by the Respondent within the time-limit fixed for the delivery of the Counter-Memorial and by a party other than the Respondent within the time-limit fixed for the delivery of the first pleading. The operation of the principle in this case results in the judicial presumption on proper jurisdiction of the Court in the form of “prima facie jurisdiction” (*Legality of Use of Force, Preliminary Objections, I.C.J. Reports* 2004, *Separate Opinion of Judge Kreća*, para. 12; emphasis added).

16. The special position of a judgment on preliminary objection exists in respect of both aspects of the *res judicata* rule — its binding force and finality.

A perception of distinct relativity of a jurisdictional decision of the Court pervades the body of law regulating the Court’s activity. The rules regarding preliminary objections are grouped in Subsection 2 of Section D of the Rules of Court, entitled “Incidental Proceedings”. Such placement of the rules on preliminary objections suggests, as the Court stated in the *South West Africa* cases (Second Phase) (*I.C.J. Reports* 1966, p. 38, para. 61), that judgment on a preliminary objection is “of an interlocutory character”, which implies a provisional, rather than final, character. Furthermore, Article 79, paragraph 1, of the Rules of Court, providing that “[a]ny objection . . . to the jurisdiction of the Court or to the admissibility . . . or other objection the

¹³Shihata, *op. cit.* p. 41-42; emphasis added.

decision upon which is requested before any further proceedings on the merits” (emphasis added), *per se* expresses the relative finality of a judgment on preliminary objections. Preliminary objections as such do not, however, exhaust objections to the jurisdiction of the Court. As early as the 1980s, the jurisprudence of the Court, supported by State practice, developed to the effect that the formal preliminary objection procedure is not exhaustive of the matter¹⁴, as well as that non-preliminary objections to jurisdiction are also capable of reversing a judgment on preliminary objections as demonstrated in the *Nottebohm* case. Non-preliminary objections to the jurisdiction of the Court give rise to application of the principle of *compétence de la compétence* understood, as I have noted before (*Legality of Use of Force (Serbia and Montenegro v. Belgium)*, *Judgment*, paras. 43-50), in the narrow sense.

Finally, the principle of *compétence de la compétence* understood in a general sense can be seen in the Resolution Concerning the Internal Judicial Practice of the Court in its provision stating that “the Court *may proceed to entertain the merits of the case or, if that stage has already been reached, on the global question of whether, finally, the Court is competent or the claim admissible*” (Art. 8 (ii) (b); emphasis added). It seems clear that the “global question” is “one which would normally arise only after all the previous questions and the merits have been pleaded (that is to say, the *substance of any particular phase [has] thus been decided*)”¹⁵.

17. With regard to the binding force of a judgment on preliminary objections, it seems clear that it does not create legal obligations *stricto sensu* which parties in the proceedings are required to comply with. The party that raised a preliminary objection rejected by the Court does not suffer any legal consequences if, for instance, it decides not to participate in the proceedings for which the Court declared itself competent. An affirmative judgment in the preliminary objection procedure creates for that party a processual burden rather than a legal duty *stricto sensu*. Moreover, the Applicant has no legal obligation to proceed to plead the claim either. While an affirmative jurisdictional decision creates a processual burden for the Respondent, vis-à-vis the Applicant it constitutes a pure processual entitlement which the Applicant uses with absolute discretion (*discretio legalis*) without suffering any sanctions in proceedings of failure to comply with the letter of affirmative jurisdictional decisions.

In fact, an affirmative judgment in the preliminary objections phase creates a duty for the Court only to proceed to the merits phase, but judicial action by the Court in that regard is dependent upon proper actions by the parties to a case.

In contrast to a jurisdictional judgment, a judgment on the merits of a case possesses binding effect in terms of creating legal duties for the parties, so that “neither party can by unilateral means free itself from its obligation under international law to carry out the judgment in good faith”¹⁶.

18. The more relative character of jurisdictional decisions of the Court as compared with the finality of a judgment on the merits of the case is justified on a number of grounds.

Jurisdictional issues are not, as a rule, core issues of cases before the Court, nor are they the *raison d’être* of recourse to the Court by the parties to a dispute. Cases, such as the *Appeal Relating to the Jurisdiction of the ICAO Council (I.C.J. Reports 1972)*, in which the Court acts as a court of appeal, are the only exceptions.

¹⁴See Shabtai Rosenne, *The reconceptualization of objections in the ICJ, Comunicazioni e studi*, volume quattordicesimo, 1975, pp. 735-761.

¹⁵Shabtai Rosenne, *Procedure in the International Court, A commentary on the 1978 Rules of the International Court of Justice*, 1983, p. 232; emphasis added.

¹⁶*Société Commerciale de Belgique (1939), P.C.I.J., Series A/B, No. 78*, p. 176.

The parties to a dispute turn to the Court to protect a subjective right or interest in the sense of substantive law, not because of the issue of jurisdiction as such. An affirmative judgment on jurisdictional issues establishes only the necessary prerequisite for resolving the main issue and it concerns substantive law in terms of conferring or imposing upon the parties a legal right or obligation of a positive or negative nature. In this sense, a judgment on jurisdictional issues is of “a purely declaratory nature and it can never create a right i.e., bestow on the Court itself a jurisdiction which is not supported by applicable rules of law either general or particular”. (*Dissenting Opinion of Judge Rostworowski, Certain German Interests in Polish Upper Silesia, P.C.I.J., Series A, No. 6, p. 32*). In other words, a judgment on jurisdictional issues is adjective rather than substantive in its nature and, consequently, in its effects as well. It does not create a new legal situation in terms of substantive law nor gives an order to perform an act as it does not state how the law disputed between the parties is to be applied. (For classification of international judgments, see *Encyclopedia of Public International Law*, III, 1997, p. 33-34).

The reversal by a court of law acting within its judicial prerogatives of the jurisdictional judgment in a pending case does not substantially, if at all, affect stability and predictability as the *rationale* of finality of the judgment, as advocated by the majority (Judgment, paragraph 116). This is because the subject matter here is not substantive rights and obligations of the parties. As an affirmative jurisdictional decision merely confers entitlement to have a claim entertained and decided by the court, it is hard to say that its reversal may result in disturbing jural relations under substantive law. The only disturbance that can be spoken of in case of a reversal of an affirmative jurisdictional decision is the disturbance in the processual relationship established by the jurisdictional decision, disturbance which is a matter of the subjective expectations of the parties to a dispute rather than a matter of public policy underlying the finality of the Court’s decision.

On the contrary, if, after adopting a jurisdictional decision and before handing down its judgment on the merits, the Court found that its decision was erroneous for any reason, it would commit a manifest abuse of its power if it were to abide by the *res judicata* rule. Thus, rather than strengthening the *res judicata* rule, insistence on the finality of jurisdictional decisions in all circumstances would be to its detriment, paralyzing, and even nullifying, the activity of the Court as a court of law and justice, for, besides the intrinsic, constituent elements of the *res judicata* rule, there exists the fundamental extrinsic condition, the requisite validity of the Court’s decision in terms of substantive and procedural law.

Finally, the more relative character of jurisdictional decisions, as regards finality, results or may result from the operation of the principle of *compétence de la compétence*. Specifically, the principle of *compétence de la compétence* operates exclusively in respect of jurisdictional issues.

19. In practical terms, the relativity of jurisdictional decisions, especially judgments on preliminary objections as a formal type of jurisdictional decision might result from balancing two considerations which differ by nature:

- (i) special circumstances forming an objective element deriving from legality which dictate reversal of the jurisdictional decision; and
- (ii) a subjective element, which implies the readiness of a court of law to address the matter.

As regards this element, while somewhat pathetic, the warning is essentially correct that the “future of international adjudication, if not global peace, may paradoxically depend on the capacity of our supreme judicial organ to say *mea culpa*”¹⁷.

III. Application of the *res judicata* rule to the 1996 Judgment

20. The position taken by the majority on the application of *res judicata* to the 1996 Judgment of the Court suffers from two basic weaknesses:

- (a) a narrow and fetishist perception of the *res judicata* rule;
- (b) an erroneous assessment of the relevant conditions for its application *in casu*.

As a consequence, it can be said that the perception of the *res judicata* rule as well as its application to the 1996 Judgment is completely misguided.

1. Perception of the *res judicata* rule

21. The dual, organically linked, structure of the *res judicata* rule as designed in Articles 59 and 60 of the Statute has been reduced by the majority to only one element — its binding force, although the crucial question in the case at hand is, in fact, the finality of the 1996 Judgment. In that regard, it is said that the “Statute . . . declares, in Article 60, the *res judicata* principle without exception” (para. 19).

The essence of the perception can be expressed as follows:

“Article 59 of the Statute, notwithstanding its negative wording, has as *its core the positive statement that the parties are bound by the decision of the Court* in respect of the particular case. Article 60 of the Statute provides that the judgment is final and without appeal; Article 61 places close limits of time and substance on the ability of the parties to seek the revision of the judgment.” (Judgment, paragraph 115; emphasis added.)

This reasoning seems to confuse the characteristics and effects of the *res judicata* rule.

The binding force of the Court’s decision most certainly constitutes its substantive aspect. But, such a characteristic of the decision of the Court does not necessarily imply its finality, which is a matter of the procedural effects of the Court’s decision.

In fact, each decision of the Court, being a proper expression of the judicial power, possesses binding force. In the formula *auctoritas res judicata* or *l’autorité de la chose jugée*, *auctoritas* does not *per se* mean finality, but rather the specific weight or credit of a judicial decision serving as a basis for its finality. Finality is never an attribute of the *auctoritas* itself. It may be the attribute of the *auctoritas* of the judgment after exhausting legal avenues, either regular or extraordinary, by which the judgment can be challenged.

¹⁷W. M. Reisman, “Revision of West South Africa Cases — An Analysis of the Grounds of Nullity in the Decision of 18 July 1966 and Methods of Revision”, *The Virginia Journal of International Law*, 1966, Vol. 7, No. 1, p. 4.

22. According to the majority view, the 1996 Judgment is considered final, for

“[t]he Statute provides for only one procedure in such an event: the procedure under Article 61, which offers the possibility for the revision of judgments . . .” (paragraph 120)

and, furthermore,

“Subject *only* to this possibility of revision, the applicable principle is *res judicata pro veritate habetur*, that is to say that the findings of a judgment are, for the purposes of the case and between the parties, to be taken as correct, *and may not be reopened on the basis of claims that doubt has been thrown on them by subsequent events*” (*ibidem.*; emphasis added).

Such a perception of the finality of a judgment seems too narrow, because it obviously does not take into account all legal vehicles available, either to the parties or to the Court itself, for the purpose of reconsideration of the issue of jurisdiction. The law of the Court knows, in addition to revision under Article 61 of the Statute, two legal vehicles which are relevant in that regard. As stated above, these are the principle of *compétence de la compétence* in terms of both Article 36, paragraph 5, of the Statute and the rule of general international law (*Nottebohm* case, *I.C.J. Reports 1953*, pp. 119-120) and non-preliminary objections to the jurisdiction of the Court.

23. The principle *compétence de la compétence* is “indispensably necessary to the discharge of any . . . duties”¹⁸ of any judicial authority. Although, in contrast to jurisdictional objections raised by the parties, it is not specifically designed to challenge the jurisdiction of the Court, its operation, either *proprio motu* or upon an objection by a party, always affects, positively or negatively, the jurisdiction of the Court.

The power of the Court to determine whether it has jurisdiction, emanating from the principle of *compétence de la compétence*, is an inherent right and duty of the Court and it knows no bounds (*Dissenting Opinion by Mr. Urrutia, Electricity Company of Sofia and Bulgaria, 1939, P.C.I.J., Series A/B, No. 77*, pp. 102-103). The Court exercises its inherent power from beginning to end of the proceedings with a view to establishing whether it possesses jurisdiction or not in the particular case. In reality, the Court exercises its inherent power in two ways:

(a) by taking a quiet, informal decision as to the existence of the processual requirements for jurisdiction through *prima facie* assessment, this being substantively a judicial presumption of jurisdiction; and

(b) by adopting a formal decision on jurisdiction.

In that sense, the Court’s power to determine whether it has jurisdiction in a given case seems absolute, considering that the Court, even if it declares that it has no jurisdiction *in casu*, exercises that inherent power.

24. Accordingly, the exercise of that power cannot be limited *ratione temporis* as long as the Court is *functus officio* in the case. Inherent in the power of the Court to determine whether it has jurisdiction *ad casum* is the proper right to re-open and reconsider the issue of jurisdiction, either *proprio motu* or upon jurisdictional objection by a party to a dispute, as clearly demonstrated in the *Nottebohm* case (para. 13 above) and the *South West Africa* cases (para. 14 above).

¹⁸US Commissioner Gore in the *Betsey* case (1797), J.B. Moore (ed.) *International Adjudications, Ancient and Modern History and Documents*, Modern Series, Vol. IV, p. 183.

This, of course, does not mean, as the Judgment correctly stated, that “jurisdictional decisions remain reviewable indefinitely . . .” (Judgment, paragraph 118).

There exist clear limits, both temporal and substantive, within which jurisdictional decisions are reviewable. As regards temporal limits, the jurisdictional decision is reviewable until the Court is *functus officio* in a given case, whereas substantive limits concern the nature of the circumstances which justify reconsideration. They must be of a special nature affecting legality as the primary value and ultimate purpose of judicial decisions of any court of law, for

“The Commission is a tribunal sitting continuously with all the attributes and functions of a continuing tribunal until its work shall have been closed. Where the Commission has misinterpreted the evidence, or made a mistake in calculation, or where its decision does not follow its fact findings, or where in any other respect the decision does not comport with the record as made, or where the decision involves a material error of law, the Commission not only has power, but is under the duty, upon a proper showing, to re-open and correct a decision to accord with the facts and the applicable legal rules” (Mixed Claims Commission — United States of America and Germany, AJIL 1940, Vol. 34, No. 1, p. 154).

Such inherent power and, even, a duty emanate from the very nature of the judicial function, for, as Commissioner Owen Roberts stated,

“No tribunal worthy of its name or of any respect may allow its decision to stand if such allegations are well-founded” (*ibid.*, p. 164).

25. The unjustifiably narrow interpretation of the *res judicata* rule inevitably leads to a striking conclusion that

“Subject only to [the] possibility of revision, the applicable principle is *res judicata pro veritate habetur*, that is to say that the findings of a judgment are, for the purposes of the case and between the parties, to be taken as correct, *and may not be reopened on the basis of claims that doubt has been thrown on them by subsequent events.*” (Judgment, paragraph 120)

Considering the Court’s findings to be immutable even in the face of subsequent events throwing doubt on their veracity, the majority view neglects the aspect of legality in the substance of the *res judicata* rule.

As subsequent events can hardly be considered as “a new fact” under Article 61 of the Statute, it appears that the Court as a rule takes decisions *ex iure proprio*, independently of international law, so that the legal situation determined by the Court is, *ex definitione*, the true position under international law.

Such a view can only be seen as judicial extremism, which cannot but be conducive to absurd results. A good illustration in that regard is precisely this particular case.

If the findings of the Court are to be taken as correct, whatever doubt may be thrown on them by subsequent events, the conclusion that follows is that the Respondent State in the case at hand is the Federal Republic of Yugoslavia because the Court so decided in its 1996 Judgment, which, according to the finding by the majority of the Court, is *res judicata*.

26. A non-preliminary objection, as a vehicle for challenging a judgment on preliminary objections, brings into play the principle of *compétence de la compétence* in accordance with paragraph 6 of Article 36 of the Statute.

That is exactly what happened in the present case.

In May 2001, the Federal Republic of Yugoslavia submitted a document entitled “Initiative to the Court to Reconsider *Ex Officio* Jurisdiction over Yugoslavia”, requesting the Court to adjudge and declare that it had no jurisdiction *ratione personae* over it. The request was based on the argument that the Federal Republic of Yugoslavia had not been a party to the Statute of the Court until its admission to the United Nations on 1 November 2000 and that it had not been a party to the Genocide Convention (paragraph 26). In addition, Yugoslavia asked the Court to suspend the proceedings on the merits until the decision on the Initiative was rendered. (*ibid.*).

In a letter of 3 December 2001, Bosnia and Herzegovina requested the Court, *inter alia*, to “respond in the negative to the request embodied in the ‘Initiative’” (Judgment, paragraph 28).

Acting on this matter, the Court decided, as shown by a letter from the Registrar dated 12 June 2003, that it could not effect a suspension of the proceedings.

As regards the issue of reconsideration by the Court of its jurisdiction in the case, it was stated *inter alia*:

“The Court . . . as was in fact observed by Serbia and Montenegro in the ‘Initiative’ document, and as the Court has emphasized in the past, is entitled to consider jurisdictional issues *proprio motu*, and must ‘always be satisfied that it has jurisdiction.’ (*Appeal Relating to the Jurisdiction of the ICAO Council*, *I.C.J. Reports* 1972, p. 52). *It goes without saying that the Court will not give judgment on the merits of the present case unless it is satisfied that it has jurisdiction. Should Serbia and Montenegro wish to present further argument to the Court on jurisdictional questions during the oral proceedings on the merits, it will be free to do so*” (letter of 12 June 2003).

In a word, the view of the majority that “[s]ubject only to [the] possibility of revision, the applicable principle is *res judicata pro veritate habetur*. . .” (Judgment, paragraph 120) seems to run *contra factum proprium*.

2. Erroneous assessment of the relevant conditions for its application *in casu*

27. The conditions for the application of the *res judicata* rule can be divided into two categories: intrinsic and extrinsic. As regards the intrinsic one, according to the classic formula, *res judicata* applies only where there is an identity of parties (*eadem personae*) and an identity of the question at issue (*eadem res*). The latter element is sometimes divided into the object (*petitum*) and the grounds advanced (*causa petendi*), for example, *Chorzow Factory Case (Interpretation)* 1927, *P.C.I.J., Series A, No. 13, Dissenting Opinion of Judge Anzilotti*, p. 23; *P.C.I.J., Series B, No. 11*, p. 30.

The extrinsic condition for applying the *res judicata* rule, assuming the intrinsic elements are present, is the validity of the judgment. In the *Administrative Tribunal* case, the Court clearly set out the requirement of validity by construing the question put to it by the General Assembly as referring “only to awards of compensation made by the Administrative Tribunal, properly constituted and acting within the limits of its statutory competence” (*I.C.J Reports* 1954, p. 55).

28. The “Long March” on the part of the majority of the Court through the issue of the Respondent’s *jus standi*, ended, after almost 14 years, by its adoption of a third successive position, a position sharing a negative characteristic with the preceding two. That is to say, it has not provided any answer to the question which is the *sedes materiae* of the jurisdictional complex in the present case, whether the Respondent, under Article 35 of the Statute of the Court, possesses the right to appear before the Court or not.

The Court’s first position, embodied in the 1996 Judgment, could be characterized as that of clearly avoiding the question. The majority simply closed their eyes to the relevant issue, as if it did not exist at all. A characteristic feature of the second position, elaborated in the Judgment in *Application for Revision of the Judgment of 11 July 1996 (2001)*, is the attempt to construct a *sui generis* position of the Respondent vis-à-vis the United Nations in the period 1992-2000. It is some type of explanation for the tacit treatment of the Respondent as a State having *jus standi* before the Court. In the present Judgment, the majority has formulated a third position, one that can be described, from the substantive point of view, as a return to a modified avoidance position. Specifically, the third position accepts the incontestable fact that the Respondent was admitted, by decision of the competent political organs of the United Nations, to membership of the world Organization on 1 November 2000 (paragraph 99) as a new member, but it avoids accepting the necessary consequences of that fact as regards the Respondent’s *jus standi* relying on an erroneous perception of the *res judicata* rule.

However, in another dispute in which Serbia and Montenegro was involved, namely, the *Legality of Use of Force* cases, the Court decided that the act of admission of Serbia and Montenegro to United Nations membership was determinative as regards *jus standi*.

This sharp contradiction in determining the legal consequences of the admission of Serbia and Montenegro as regards its *jus standi* before the Court perhaps vindicates, Honoré de Balzac’s cynicism in observing that “Les lois sont des toiles d’araignées à travers lesquelles passent les grosses mouches et où restent les petites.”¹⁹

29. The issue of *jus standi* deserves a more detailed elaboration due to its crucial importance in the present case.

3. *Jus standi*²⁰ as an autonomous processual condition

30. *Jus standi*, in relation to jurisdiction understood in the standard sense to be the Court’s power to solve concrete disputes, is an autonomous and separate processual condition. Substantively, it means a general, potential right of a State entitling it, under the additional proviso of the existence of a proper jurisdictional instrument, to participate in a case before the Court in the capacity of a party, either as an Applicant or as a Respondent, or as an intervening party. As such, *jus standi* is a general, positive processual condition. It is materialized if a State possessing *jus standi* brings legal action, has an action brought against it, or, in accordance with the relevant rules of the Court, intervenes in proceedings pending before the Court. Being autonomous, *jus standi* belongs to a State even if the State is not a party to the dispute or a party to the proceedings pending before the Court.

¹⁹Honoré de Balzac, *La Maison Nucingen* (<http://www.citationspolitiques.com/recherche.php3?recherche=Les+lois+sont+des+toiles+d%92araign%92es>).

²⁰ The expression “*locus standi*” or “*locus standi in iudicio*” is usually used. However the expression “*ius standi*” appears to be more appropriate since it directly addresses the right established by Art. 35 of the Statute. The expression “*locus standi*” is used when it is, as such, employed in the jurisprudence of the Court.

There is no direct, organic link between *jus standi* before the Court and the jurisdiction of the Court. As the Court stated in the *South West Africa* cases (Second Phase):

“It is a universal and necessary, but yet almost elementary principle of procedural law *that a distinction has to be made between . . . the right to activate a court and the right of the court to examine the merits of the claim,*” (*South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 39, para. 64; *Jurisdiction Fisheries, Judgment, I.C.J. Reports 1973*, p.53, para. 11; emphasis added).

Accordingly, the Court does not acquire jurisdiction in the concrete dispute *eo ipso*, simply because the parties to the dispute possess *jus standi* before the Court, just as vice versa the existence of a proper jurisdictional instrument in force between the parties to the dispute does not imply *jus standi* of the parties to the dispute before the Court.

31. In relation to the issue of jurisdiction, *jus standi* is antecedent in nature, being a pre-condition for the establishment of the Court’s jurisdiction *in casu*. In the absence of *jus standi* of a State (or States) in the dispute, it is legally impossible for the Court to establish its jurisdiction, for “only those States which have access to the Court can confer jurisdiction upon it” (*Legality of Use of Force (Serbia and Montenegro v. Netherlands), I.C.J. Reports 2004*, para. 45). Moreover, in such a case the Court would not be authorized either to take into consideration the issue of its jurisdiction or to take any judicial action of a substantive nature.

Not only is a State, without *jus standi* precluded from being a party in the proceedings before the Court, but the Court cannot *stricti iuris* even have any dealings with such a State in the judicial, as opposed to administrative, sphere. The Court cannot have recourse to the exercise of the power, vis-à-vis such a State, of determining its jurisdiction (*compétence de la compétence*), nor can it indicate provisional measures of protection or exercise any of the powers inherent in the judicial function.

Consequently actions of the Court, with the exception of those aimed at establishing the *jus standi* of a State to a dispute are not legally founded in the law of the Court. It could not even be said of any such actions that they had been taken *ultra vires*, because the effect of *ultra vires* implies a measure of judicial *vires* which the Court, has exceeded in the concrete case, but rather the legally non-existent, factual actions had been taken *sine vires*.

Accordingly, the absence of *jus standi* would be a reason for the absolute nullity of Court actions purporting to be judicial in nature.

3.1. Legal force of the *jus standi* rule

32. Article 35, paragraph 1, of the Statute is of a constitutional nature, an integral part of the public order established by the Charter of the United Nations. As such, together with other provisions of the Statute of such a nature, it represents a *jus cogens*²¹, incapable of any modification even by the Court itself. Therefore,

“The function of the Court to enquire into the matter and reach its own conclusion is thus mandatory upon the Court irrespective of the consent of the parties and is in no way incompatible with the principle that the jurisdiction of the Court

²¹G. Schwarzenberger, *International Law As Applied by International Courts and Tribunals*, Vol. IV, *International Judicial Law*, 1986, pp. 434-435; R. Kolb, *Théorie du jus cogens international*, *Essai de relecture du concept*, 2001, pp. 344-348 ; Fachiri, *The Permanent Court of International Justice*, 1932, p. 63.

depends on consent.” (*Legality of Use of Force (Serbia and Montenegro v. Netherlands)*, I.C.J. Reports 2004, para. 35).

Article 35 of the Statute provides:

- “1) The Court *shall be open* to the States parties to the present Statute.
- 2) The conditions under which the Court *shall be open* to other States shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, but in no case shall such conditions place the parties in a position of inequality before the Court.” (emphasis added).

The imperative form of the provisions of Article 35, paragraphs 1 and 2, of the Statute carries with it a dual — permissive and prohibitive — meaning.

On the one hand, the provisions authorize a party to the Statute — and a State not party to the Statute, on the condition that it accept the general jurisdiction of the Court in conformity with Security Council resolution 9 (1946) — to gain access the Court. On the other, they prohibit access to the Court by a non-party to the Statute which has not accepted the general jurisdiction of the Court pursuant to Security Council resolution 9 (1946).

The combined effects of Article 35, paragraphs 1 and 2, of the Statute together with Article 34, paragraph 1, of the Statute express the limited nature of the right to judicial protection before the International Court of Justice.

The limited right to judicial protection before the International Court of Justice is part of the public order of the Organization of the United Nations, whose principal judicial organ is the Court. In Article 93 (1) and (2) the Charter provides:

- “1) All Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice.
- 2) A State which is not a Member of the United Nations may become a party to the Statute of the International Court of Justice on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council.”

This should be read in conjunction with Articles 34(1) and 35(1) and (2) of the Statute of the Court, which is itself “an integral part of the present Charter” (Art. 92 of the Charter).

As such, paragraphs 1 and 2 of Article 93 of the Statute are mandatory and the Court is bound to apply them *ex officio*. In respect of the temporal element in the application of the rules, given the antecedent nature of *jus standi*, the Court is under an obligation to establish the *jus standi* of the parties to the dispute before any proceedings whatsoever, and to take account of it throughout the entire proceedings. For instance, it is possible that a party in the case before the Court ceases to exist as a State in the course of the proceedings.

33. A proper pattern of *ex lege* reasoning of the Court, in the otherwise modest jurisprudence of the Court relating to *jus standi*, is offered by the Judgment in the *Fisheries Jurisdiction* case:

“the Minister for Foreign Affairs of Iceland seemed to suggest that the timing of the declaration of the Federal Republic of Germany of 29 October 1971, deposited with the Registrar on 22 November 1971, may have had some effect on the binding force of the agreement contained in the Exchange of Notes of 19 July 1961 *or on the right of access to the Court of the Federal Republic of Germany*. As to the first point, it is

clear that the binding force of the agreement between the two Governments, which is to be examined in the present Judgment, *bears no relation to the date on which the declaration required by the Security Council resolution of 15 October 1946 was deposited with the Registrar: the former is designed to establish the jurisdiction of the Court over a particular kind of dispute; the latter provides for access to the Court of States which are not parties to the Statute. As to the second point (i.e., the question of the Federal Republic's right of access to the Court), according to the Security Council resolution, a declaration, which may be either particular or general, must be filed by the State which is not a party to the Statute, previously to its appearance before the Court. This was done.*" (I.C.J. Reports 1973, p. 53, para. 11; emphasis added).

The pattern was followed by the Court in the *Legality of Use of Force* cases as well:

"the question whether Serbia and Montenegro was or was not a party to the Statute of the Court at the time of the institution of the present proceedings is fundamental; *for if it were not such a party, the Court would not be open to it under Article 35, paragraph 1, of the Statute. In that situation, subject to any application of paragraph 2 of that Article, Serbia and Montenegro could not have properly seised the Court, whatever title of jurisdiction it might have invoked, for the simple reason that Serbia and Montenegro did not have the right to appear before the Court.*

The Court can exercise its judicial function only in respect of those States which have access to it under Article 35 of the Statute. And only those States which have access to the Court can confer jurisdiction upon it." (I.C.J. Reports 2004, *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, p. 299, para. 46; emphasis added).

3.2. *Differentia specifica between jus standi and jurisdiction of the Court ratione personae*

34. Both notions — *jus standi* and jurisdiction *ratione personae* — share the characteristic of belonging to the *corpus* of processual conditions necessary for the validity of proceedings — whether incidental or on the merits — before the Court and with respect to the reference of disputes to the Court for decision. They also share the attribute of being absolute processual conditions that must be satisfied in every case and both are positive requirements in that, if they are not satisfied, the Court cannot entertain the claims made.

35. The differences between them, however, are considerably greater, making them distinct processual conditions. *Primo*, they reflect the different aspects of the legal nature of the Court. While jurisdiction *ratione personae*, as one of the relevant aspects of jurisdiction, expresses the consensual nature of the Court's jurisdiction, *jus standi* derives from the fact that the International Court of Justice, in contrast to arbitration courts, is not a fully open court of law. Access to the Court is limited in two respects on the basis of Articles 34, paragraph 1, and Article 35, paragraphs 1 and 2, of the Statute of the Court. *Tertio*, although both jurisdiction *ratione personae* and *jus standi* are regulated by the rules of the Statute having an objective, constitutional character, there exists a fundamental difference in the application of these rules. The rules of the Statute which concern *jus standi* are applied by the Court *ex lege*, while the corresponding rules concerning jurisdiction *ratione personae* are applied on the basis of the consent of the States to the dispute. In its Judgments in the *Legality of Use of Force* cases, the Court stated, *inter alia*, that "a question of jurisdiction . . . relates to the consent of a party and the question of the right of a party to appear before the Court under the requirements of the Statute, which is not a matter of consent" (I.C.J. Reports 2004, *Serbia and Montenegro v. Netherlands*, para. 35). Therefore, it can be said that in substance the jurisdiction of the Court is governed by the law in force between the parties, while *jus standi* is governed by objective rules of the Statute as such.

Quatro, the differing natures of *jus standi*, on the one hand, and jurisdiction *ratione personae*, on the other, generate corresponding legal consequences in the proceedings. A lack of *jus standi* possesses an automatic effect, since, as a rule, it cannot be overcome in the proceedings before the Court, while a lack of jurisdiction *ratione personae* is surmountable as the parties may either confer jurisdiction upon the Court in the course of the proceedings or perfect it — for instance, by express agreement or by *forum prorogatum*.

As a consequence, in contrast to a lack of *jus standi*, the absence of jurisdiction *ratione personae* does not preclude valid seisin of the Court.

Quinto, the competence or special jurisdiction in the particular case of the International Court of Justice, as a semi-open court of law with jurisdiction based on consent of the parties to a dispute, implies twofold consent by States:

- (a) consent that the Court is “an organ instituted for the purpose *jus dicere*” (*Corfu Channel, Preliminary Objection, Judgment, 1948, I.C.J. Reports 1948, Dissenting Opinion of Dr. Daxner*, p. 39). This consent is expressed indirectly, through membership of the United Nations, or directly, in the case of a non-Member of the United Nations either by adhering to the Statute of the Court or by accepting the general jurisdiction of the Court in conformity with Security Council resolution 9 (1946), as a preliminary condition; and
- (b) consent that the Court is competent to deal with the particular dispute or type of dispute which is given through relevant jurisdictional bases under Article 36 of the Statute, as a substantive but qualified condition.

As the Court stated in the *Nottebohm* case: “under the system of the Statute the seisin of the Court by means of an Application is not *ipso facto* open to all States parties to the Statute, it is only open to the extent defined in the applicable Declarations.” (*Nottebohm, Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 122.). The principle was further elaborated by the Court in the *Legality of the Use of Force* case:

“Whereas the Court, under its Statute, *does not automatically have jurisdiction over legal disputes between States parties to that Statute or between other States to whom access to the Court has been granted* . . . whereas the Court can therefore exercise jurisdiction only between States parties to a dispute *who not only have access to the Court but also have accepted the jurisdiction of the Court*, either in general form or for the individual dispute concerned”. (*Provisional Measures, I.C.J. Reports 1999 (I)*, pp. 549-550, para. 20; emphasis added).

36. In the application of the two autonomous rules — jurisdiction *ratione personae* and *jus standi* — with their own objects and effects, the latter possesses logical and normative priority. *Jus standi*, as an expression of the right to judicial protection is antecedent in nature, is a preliminary question which “should be taken in *advance* of any question of competence” (*Separate Opinion of Sir G. Fitzmaurice, Northern Cameroons, I.C.J. Reports, 1963*, p. 105; emphasis in the original.)
For

“The Court can exercise its judicial function only in respect of those States which have access to it under Article 35 of the Statute. And only those States which have access to the Court can confer jurisdiction upon it.” (*Legality of Use of Force (Serbia and Montenegro v. Netherlands), I.C.J. Reports 2004*, p. 1030, para. 45).

4. Assessment of the Respondent's *jus standi* by the majority

37. The majority assessment of the Respondent's *jus standi* is somewhat confused and significantly self-contradictory, mostly because it seeks to reconcile the irreconcilable.

As regards the nature of *jus standi*, i.e., whether or not it is an autonomous processual requirement, the position of the majority is that it “may be regarded as an issue prior to that of jurisdiction *ratione personae*, or as one constitutive element within the concept of jurisdiction *ratione personae*” (Judgment, paragraph 102).

The finding could be considered correct if it related to the terminology used in relation to these two notions, but not in the present context.

If, as pointed out, *jus standi*, in contrast to jurisdictional issues, “is not a matter of the consent of the parties” (*ibid.*), then obviously the latter understanding does not apply. Like any other processual requirement, *jus standi* cannot simultaneously be based on the consent of the parties and on the requirements of the Statute, which is not a matter of consent, as stated in the Judgment in the *Legality of Use of Force* cases (*Serbia and Montenegro v. Belgium*), (*I.C.J. Reports 2004*, p. 295, para. 36) to which reference is made.

After all, in further reasoning the Judgment determines *jus standi* in negative terms as a distinct condition by saying that “the capacity to appear before the Court . . . 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” (Judgment, paragraph 135; emphasis added). If *jus standi* is indeed an element of jurisdiction *ratione personae*, then there is probably no need for any “logical construction” on the basis of which *jus standi*, although unstated, should be read into the judgment. It appears, however, that the legal situation is a different one. As the Court stated in the *South West Africa* cases (Second Phase):

“It is a universal and necessary, but yet almost elementary principle of procedural law that a distinction has to be made between . . . the right to activate a court and the right of a court to examine the merits of the claim,” (*South West Africa, Second Phase Judgment, I.C.J. Reports 1966*, p. 39, para. 64; *Fisheries Jurisdiction, Judgment, I.C.J. Reports 1973*, p. 53, para. 11).

Jus standi can be perceived as an element of jurisdiction *ratione personae* only if in a descriptive sense or if jurisdiction *ratione personae* is understood *lato senso* to comprise different legal concepts set out in Articles 35 and 36 of the Statute.

38. *In casu*, the relevant issue is not jurisdiction *ratione personae*, but the issue of the right of Serbia to appear before the Court. The *petitum* non-preliminary objection of Serbia is its *jus standi* and not jurisdiction *ratione personae*, and *causa petendi* is Article 35 of the Statute and not its Article 36. In that sense, the finding of the Court in *Asylum* Case seems applicable. In the said case, the Court, *inter alia*, found:

“the question of the surrender of the refugee was not decided by the Judgment of November 20th. This question is new . . . There is consequently no *res judicata* upon the question of surrender” (*I.C.J. Reports 1951*, p. 80).

It is true that the Respondent, while invoking the lack of *jus standi* on its part, uses also the expression “jurisdiction *ratione personae*”. But, that fact can hardly be excusable for the Court because involved here is a *questio iuris* which falls within the ambit of the rule of *iura novit curia*.

39. The Judgment correctly recognizes that the capacity of the Federal Republic of Yugoslavia to appear before the Court in accordance with the Statute “was unstated” in the 1996 Judgment, that is, that “[n]othing was stated in the 1996 Judgment about . . . whether it [Federal Republic of Yugoslavia] could participate in proceedings before the Court . . .” (Judgment, paragraph 122). The matter is clearly self-evident.

And it is self-evident not only as regards the *dispositif* of the Judgment, at that. The reasons in point of law which served as the basis for the *dispositif* of the Judgment are basically limited to the question whether the parties to the dispute could have been considered parties to the Genocide Convention (1996 Judgment, paras. 17-20), and to such related issues as automatic succession in relation to certain types of international treaties and conventions (*ibid.*, paras. 21, 23), the nature of the Genocide Convention (*ibid.*, para. 22) and the effect of non-recognition of the contractual *nexus* between parties to a multilateral treaty (*ibid.*, paras. 25, 26).

Ergo, the evidence appears to be incontrovertible: the Court’s Judgment of 11 July 1996 did not, either in the *dispositif* or in the principles underlying it, touch upon, let alone decide, the issue of the *jus standi* of the Federal Republic of Yugoslavia before the Court.

Moreover, there is no trace in other components of the 1996 Judgment — the headnote setting out the main issues discussed, the summary of the proceedings, including the parties’ submissions — indicating that the Court at least considered the issue.

However, the majority has not drawn the necessary consequences from *factum proprium*. Regardless of possible differences in the perception of the *res judicata* rule as regards its nature and effects, there remain the classic intrinsic conditions for the application of the rule *in casu*. And it is obvious, on the basis of the majority view itself, that one of the elements — identity of the question at issue *eadem res* — is lacking, which automatically disqualifies the rule from application in relation to the 1996 Judgment.

40. The judgment has been construed by inference, which, combined with a peculiar perception of the *res judicata* rule, is supposed to avert the necessary consequences of the Respondent’s lack of *jus standi* in the present case.

The main elements of the reasoning come down to the following:

The operative part of the 1996 Judgment saying that “on the basis of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, [the Court] has jurisdiction to decide upon the dispute”, being *res judicata*, established the jurisdiction of the Court *in casu*

“with the full weight of the Court’s judicial authority. For a party to assert today that, at the date the 1996 Judgment was given, the Court had no power to give it, because one of the parties can now be seen to have been unable to come before the Court is . . . to call in question the force as *res judicata* of the operative clause of the Judgment.” (Judgment, paragraph 123.)

The fact that the Court has given no consideration to, let alone decided upon, the *jus standi* of the Respondent is of no significance, because it must be considered

“by necessary implication, to mean that the Court at that time perceived the Respondent as being in a position to participate in cases before the Court. On that basis, it proceeded to make a finding on jurisdiction which would have the force of *res judicata*” (Judgment, paragraph 132).

The reasoning arising by “necessary implication” continues, so that

“the express finding in the 1996 Judgment that the Court had jurisdiction in the case *ratione materiae*, . . . is a finding which is only consistent, in law and logic, with the proposition that, in relation to both parties, it had jurisdiction *ratione personae* in its comprehensive sense, that is to say, that the status of each of them was such as to comply with the provisions of the Statute concerning the capacity of States to be parties before the Court” (Judgment, paragraph 133).

The “necessary implication” underlying the reasoning referred to above is, in fact, an attempt to incorporate inferential judgment, or judgment by implication, into the sphere of judicial reasoning.

Given the very concept of judgment, i.e., that “[n]othing was stated in the 1996 Judgment about . . . whether it [Federal Republic of Yugoslavia] could participate in proceedings before the Court . . .” (Judgment, paragraph 122), the requirements relating to the content and structure of judgments, as laid down in Article 56, paragraph 1 of the Statute and Article 95, paragraph 1 of the Rules, the underlying legal considerations and, even common sense, the interpretation of the Judgment by inference is, at the very least, *contradictio in adiecto*. In particular, in relation to the issue of *jus standi*, which can by no means be said to be dependent on, or for that matter an aspect of, the issue of jurisdiction *ratione personae* which was formally decided. It is not only a distinct and autonomous issue but also one that determines objective limits of the judicial power of the Court, legality of its actions in terms of objective international law.

41. The wording of the Judgment suggests that the reason why the Court did not consider and decide upon *jus standi* of the Respondent was the position taken in that regard by Parties to the dispute, but particularly the Respondent.

“Nothing was stated in the 1996 Judgment about . . . the question whether it [FRY] could participate in proceedings before the Court; for . . . both Parties had chosen to refrain from asking for a decision on these matters.” (Judgment, paragraph 122.)

The Respondent raised seven preliminary objections, but “[n]one of these objections were however founded on a contention that the FRY was not a party to the Statute at the relevant time; that was not a contention specifically advanced in the proceedings on the preliminary objections.” (Judgment, paragraph 106)

Owing to the nature of the issue of jurisdiction, the reason is not effective as an excuse and has no legal effect in the matter at hand.

42. In view of the fact that “the establishment or otherwise of jurisdiction is not a matter for the parties but for the Court itself” (*Fisheries Jurisdiction (Spain v. Canada)*, *Jurisdiction of the Court*, Judgment, *I.C.J. Reports 1998*, p. 450, para. 37; also, individual opinion of President McNair in the jurisdiction phase of the case concerning *Anglo-Iranian Oil Co.*, in which he stated that “[a]n international tribunal cannot regard a question of jurisdiction solely as a question *inter partes*” (*Preliminary Objection*, Judgment, *I.C.J. Reports 1952*, p. 116)), the dispute between the parties as to the jurisdiction in the preliminary objection phase is not a necessary condition for the Court to address the issue of jurisdiction and, *a fortiori*, the issue of *jus standi*.

Preliminary objections raised by a party are only a tool, a procedurally designed weapon for the establishment of the jurisdiction of the Court, *suo nomine et suo vigore*, for it is under an obligation to do so *ex officio*. The legal significance of proceedings on preliminary objections was

defined by the Court in the case concerning *Rights of Minorities in Upper Silesia (Minority Schools)* (hereinafter referred to as “*Minority Schools*” as follows:

“the raising of an objection by one Party *merely draws the attention of the Court to an objection to the jurisdiction which it must ex officio consider*”(Rights of Minorities in Upper Silesia (Minority Schools), Judgment No. 12, 1928, P.C.I.J., Series A, No. 15, p. 23; emphasis added).

Or, as stated by the Court in the *Genocide Convention* case:

“[t]he Court must, in each case submitted to it, verify whether it has jurisdiction to deal with the case, . . . [s]uch objections as are raised by the Respondent may *be useful to clarify* the legal situation” (*Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 622, para. 46; emphasis added).

Accordingly, the establishment by the Court of its jurisdiction *in casu* is not necessarily linked with the dispute as to jurisdiction. If the Court is under a duty to verify its jurisdiction in each specific case whether or not there is a preliminary objection as such, then the pleadings of the parties in the proceedings are not *a fortiori* of decisive importance in that respect. If, as Shabtai. Rosenne, commenting on the case concerning *Monetary Gold Removed from Rome in 1943* (hereinafter referred to as “*Monetary Gold*”) says:

“[t]he fact that an objection is made does not mean — in the eyes of the Court — that the Court is being asked not to determine the merits of the claim under any circumstances”²²,

then the contrary is equally valid, i.e., that the Court is being asked not to determine the merits of the claim if an objection to the preliminary objection is not made. Extensive practice of the Court to this effect has been established.

The Court’s *dictum* in the case concerning the *Appeal Relating to the Jurisdiction of the ICAO Council* (hereinafter referred to as “*ICAO Council*”) may be taken as a synthesis of that practice: “[t]he Court must however always be satisfied that it has jurisdiction, and must if necessary go into that matter *proprio motu*” (*Judgment, I.C.J. Reports 1972*, p. 52, para. 13). This is also reflected in the opinions of judges. In the case concerning *Mavrommatis Palestine Concessions*, Judge Moore in his dissenting opinion stated that “even though the Parties be silent, the tribunal, if it finds that competence is lacking, is bound of its own motion to dismiss the case” (*Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 58); in the *Minority Schools* case, Judge Huber in his dissenting opinion found that the Court “must *ex officio* ascertain on what legal foundation it is to base its judgment upon the claims of the Parties” (*Judgment No. 12, 1928, P.C.I.J., Series A, No. 15*, p. 54); and in the case concerning the *Free Zones of Upper Savoy and the District of Gex*, Judge Kellogg pointed out in his observations attached to the Order of 6 December 1930 that it was not necessary that the question of jurisdiction be raised by one of the parties, since “[i]t may and should be raised by the Court on its own initiative, as was done in the Eastern Carelia case” (*Order of 6 December 1930, P.C.I.J., Series A, No. 24*, p. 43).

²²Shabtai Rosenne, *The Law and Practice of the International Court, 1920-1996*, 3rd ed., Vol. II, Jurisdiction, Martinus Nijhoff Publishers, Leiden/Boston, 1997, p. 863.

43. As a *questio iuris*²³, the jurisdiction of the Court is within the scope of the principle *iura novit curia*. In the case concerning *Territorial Jurisdiction of the International Commission of the River Oder* (hereinafter referred to as “*River Oder*”) it was not until the oral proceedings that the Polish Government contended that the Barcelona Convention had not been ratified by Poland. The six Respondents asked the Court to reject the Polish contention *a limine*, for having been submitted at such an advanced stage of the proceedings. The Court dismissed the objection as untenable for “[t]he fact that Poland has not ratified the Barcelona Convention not being contested, it is evident that the matter is purely one of law such as the Court . . . should examine *ex officio*” (*Judgment No. 16, 1929, P.C.I.J., Series A, No. 23*, p. 19).

Being bound by law, the Court is not bound by the arguments of the parties. This follows clearly from the principle *iura novit curia* addressed by the Court in its Judgments in the cases concerning *Fisheries Jurisdiction (United Kingdom v. Iceland)* and *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*:

“The Court . . . as an international judicial organ, is deemed to take judicial notice of international law, and is therefore required in a case falling under Article 53 of the Statute, *as in any other case*, to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute . . . for the law lies within the judicial knowledge of the Court.” (*Merits, Judgment, I.C.J. Reports 1974*, p. 9, para. 17; *ibid.*, p. 181, para. 18; emphasis added.)

The principle has also been confirmed in the *Nicaragua* case by a *dictum*:

“[f]or the purpose of deciding whether the claim is well founded in law, the principle *iura novit curia* signifies that the Court is not solely dependent on the argument of the parties before it with respect to the applicable law” (*Merits, Judgment, I.C.J. Reports 1986*, p. 24, para. 29; cf. “*Lotus*”, *Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 31).

Consequently, the rule according to which a party seeking to assert a fact must bear the burden of proving it “has no relevance for the establishment of the Court’s jurisdiction” (*Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 450, para. 37).

44. Accordingly, in these circumstances, in its 1996 Judgment the Court proceeded from the “assumption” that the FRY possessed the right to appear before the Court in accordance with the Statute (paragraph 135). That assumption “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” (*ibid.*). It does not, however, follow that “that element is not one which can at any time be reopened and re-examined . . .” (*ibid.*).

The reasoning seems to fail to take into account the differences between legal assumptions (*praesumptio iuris*) and judicial (*praesumptio facti vel homine*), into which category the “assumption” regarding the Federal Republic of Yugoslavia’s *jus standi* before the Court actually falls.

²³ “The existence of jurisdiction of the Court in a given case is . . . not a question of fact, but a question of law to be resolved in the light of the relevant facts.” (*Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 76, para. 16.) The question of the Court’s jurisdiction is “necessarily an antecedent and independent one an objective question of law which cannot be governed by preclusive considerations capable of being so expressed as to tell against either Party or both Parties.” (*Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports 1972*, p. 54, para. 16 (c)).

Judicial presumption, along with legal presumption²⁴, is one of the main sorts of presumption in international law. It means that a certain fact or state of affairs, even though it has not been proved, is taken by an international tribunal as truthful. As such it does not necessarily coincide with, or is not equivalent to, the fact or the state of affairs.

Considerations of a practical nature prevail in the rationale for the use of judicial presumption.

Judicial presumption is a tool used to preclude a long wait in discovering the full facts and exact situation on which depends the existence, content or cessation of the right where such protracted periods would have adverse consequences for the parties concerned or would impede the due course of legal proceedings.

45. As a sort of presumption, a judicial presumption has some specific features differentiating it from a legal presumption (*praesumptio iuris*).

Two principal features of judicial presumption should be mentioned in this regard.

Primo, judicial presumption is, as a rule, a natural, factual presumption (*praesumptio facti vel homine*) having no basis in the particular rules that constitute the law of the international tribunal or the law it is applying. It is an inherent element of the legal reasoning of the international tribunal in interpreting and applying the rules of law.

Secundo, in contrast to legal presumptions which can be irrefutable (*praesumptio iuris et de iure*), judicial presumptions as natural or factual ones are, by definition, refutable. Their refutability is, however, specific in nature.

Given that it is a part of the reasoning of the international tribunal, a judicial presumption cannot be refutable in the same way that a legal presumption can be. A judicial presumption, as such, is in fact capable of being abandoned or replaced by the international tribunal.

In its legal reasoning the international tribunal abandons it, or replaces it, by another presumption or established fact. In the strict sense, only those findings or decisions of the international tribunal that are based on legal presumptions are refutable. However, judicial presumptions lose the *ratio* of their existence when the international tribunal identifies the controversial matter in controversy which constitutes its object. They then fall away by themselves because they are deprived of their subject. But even then it is the duty of the international tribunal to refute, in the proper proceedings, its own finding or decision based on presumption.

Also, in contrast to a legal presumption, a judicial presumption is not, and by its effects cannot be equated with, a judicial finding of the Court, being its factual substitute. Hence, it cannot

²⁴Better known than judicial presumptions, legal presumptions (*praesumptio iuris*) are widely applied in international law. International tribunals are used to resorting to proof by inferences of fact (*présomption de fait*) or circumstantial evidence (*Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 18). For legal presumption in the practice of the Inter-American Court of Human Rights, see T. Buergenthal, R. Norris, D. Shelton, *Protecting Human Rights in the Americas, Selected Problems*, 2nd ed., 1986, pp. 130-132 and pp. 139-144. The practice of international courts abounds in presumptions based on general principles of international law, whether positive such as presumptions of good faith (*exempli causa, Mavrommatis Jerusalem Concessions, Judgment No. 5, 1925, P.C.I.J., Series A, No. 5*, p. 43) or negative such as presumptions of abuse of right (*Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, p. 30; *Free Zones of Upper Savoy and the District of Gex, Second Phase, 1930, P.C.I.J., Series A, No. 24*, p. 12; *Corfu Channel, Merits, Judgment, 1949, I.C.J. Reports 1949*, p. 4 at p. 119: dissenting opinion of Judge Ecer). They possess special weight in the interpretation of treaties since the function of treaty interpretation is to discover "what was, or what may reasonably be presumed to have been, the intention of the parties to a treaty when they concluded it" (Harvard Law School, *Research in International Law, Part III, Law of Treaties*, Art. 19, p. 940; emphasis added).

be considered that, by relying on that particular presumption, the Court has taken a decision on the Respondent's *jus standi*. Rather, the Court has done so factually as an element of its reasoning.

46. The *rationale* of judicial presumptions is provisionally to substitute for proven facts or circumstances in order to avert delay in identifying the exact facts and situations where such delay is likely to have adverse consequences for the parties to a dispute or to impede the due course of legal proceedings.

However, after the true facts and circumstances have been established, judicial presumptions should be abandoned and replaced by proven facts. *A contrario*, if a court of law stands by legal presumptions in preference to proven facts, it maintains a judicial fiction, its own truth, in the face of facts and situations in terms of law.

The Court is doing exactly this by clinging to the assumption about the Respondent's *jus standi*, and the inextricably related issue of the Respondent's membership in the United Nations in the period 1992-2000.

5. The effects of the 2004 Judgment

47. The question of the Respondent's United Nations membership as determinative in regard to its *jus standi* before the Court, in the circumstances surrounding the issue, seems, considering its being of a status nature, to have been solved by the Court's Judgment in the *Legality of Use of Force* cases in 2004. Also, the majority holds the view that the FRY was admitted to the United Nations "as a new member in 2000 (Judgment, paragraph 109). However, the Court has not drawn from that fact, a fact of decisive jurisdictional significance *in casu*, necessary consequences regarding the *jus standi* of the Respondent. The reason for this has been found in the recognition of the Parties that these Judgments "do not constitute *res judicata* for the purposes of the present proceedings" (Judgment, paragraph 84). Two observations may be made in respect of this determination of the effects of the 2004 Judgments. *Primo*, the question of the effects of the Court's judgments is a *questio iuris* and, as such, within the ambit of the principle of *iura novit curia* signifying that the Court is not dependent on the agreement of the parties with respect to the applicable law. *Secundo*, the effects of a judgment are not fully exhausted by the rule of *res judicata*.

48. It is hardly necessary to say that the Court's Judgment of 15 December 2004 in the *Legality of Use of Force* cases does not produce the effects of *res judicata* in the present case, given that one of the intrinsic elements of the *res judicata* rule — *eadem personae* — is lacking. Bosnia and Herzegovina was not a party in the *Legality of Use of Force* cases. Consequently, it is not bound by the Court's decision in those cases *qua* decision.

49. That is one point. The material effects of the 2004 Judgment on the case at hand are another. It is clearly established in the jurisprudence of the Court that the material effects of a decision of the Court are not necessarily limited to the case decided and therefore may, depending on circumstances, occasionally extend beyond it.

In the *Aegean Sea* case the Court stated *inter alia*:

"Although under Article 59 of the Statute 'the decision of the Court has no binding force except between the parties and in respect of that particular case', it is evident that any pronouncement of the Court as to the status of the 1928 [General Act for the Pacific Settlement of International Disputes], whether it were found to be a

convention in force or to be no longer in force, *may have implications in relations between States other than Greece and Turkey* [Parties to the present proceedings].” (*I.C.J. Reports 1978*, pp. 17-18, para. 39; emphasis added.)

Narrow interpretation of Article 59 simply does not fit into the corpus of the Court’s law²⁵.

50. Accordingly, the real question *in concreto* is not whether there are material effects of the 2004 Judgment on the case at hand, but “whether, in this case, there is cause not to follow the reasoning and conclusions of earlier cases” (*Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, I.C.J. Reports 1998*, para. 28), or to treat the 2004 Judgment “as a statement of what the Court regarded as the correct legal position” (*Temple of Preah Vihear, Preliminary Objections, I.C.J. Reports 1961*, p. 27) in the matter.

51. It appears not only that such cause does not exist, but that there are moreover several reasons why the Court should follow its earlier reasoning, which inevitably leads to the conclusions adapted by the Court in its 2004 Judgment

First of all, the relevant issue — was the Respondent a member of the United Nations at the material point in time and, as such, a party to the Statute of the Court — in the identical form, followed by identical legal consequences, is posed in both cases. The *locus standi* of Serbia and Montenegro in the present proceedings is, exactly as in the *Legality of Use of Force* cases, inextricably linked with membership in the United Nations, owing to the fact that Serbia and Montenegro could not be considered to be a party to the Statute on any basis other than membership in the United Nations the fact that its *locus standi* cannot be based on the conditions set forth in Article 35, paragraph 2, of the Statute. As a rule, a given factual state and legal status occurring in two different cases demands equal treatment under the principles of consistency of judicial reasoning and equality before the Court.

Furthermore, the Court, by finding that “at the time of filing of its Application to institute . . . proceedings before the Court on 29 April 1999, the Applicant in the present case, Serbia and Montenegro, was not a Member of the United Nations” (*Legality of Use of Force (Serbia and Montenegro v. Portugal), I.C.J. Reports 2004*, p. 1195, para. 90), basically took judicial notice of a fact objectively established by the competent organs of the United Nations, which in the context of the case operated as a jurisdictional fact of decisive significance. United Nations General Assembly resolution 55/12 as such has created an objective legal status which is *erga omnes* in character. Even if we leave aside the binding force of resolution 55/12, that part of the Judgment of the Court concerning the determination of the status of Serbia and Montenegro vis-à-vis the United Nations in the relevant period of time remains none the less, by its nature, a declaratory judgment *in rem* producing conclusive effects at least as regards States parties to the Statute of the Court. As such, the Judgment cannot, in that part, be treated as a judgment *in personam*, having conclusive effects only between the parties to the case, because its subject matter is the status of Serbia and Montenegro both in relation to the United Nations itself and in relation to the Members of the United Nations.

²⁵“If it is true that a Judgment of the Court is clothed with authority of *res judicata* only in the case which has been decided, that would mean that if the *lis* concerns the interpretation of a clause of a treaty, the interpretation given could be used again in arguments in any future *lis* concerning the same clause of a treaty. Such a result would not only be absurd; it would put Article 59 in irreconcilable contradiction with the last sentence of Article 63 of the same Statute, which provides that when a third state intervenes in a case in which there is in question the construction of a multilateral convention to which it and the States concerned in the case are parties, the construction given by the Court will be equally binding on that state.” (*Lighthouses Arbitration (France, Greece), Permanent Court of Arbitration, 23 ILR 81 at 86 (1956)*). Also, Judge Oda in his *Separate Opinion in the Continental Shelf case (Application by Malta for Permission to Intervene), I.C.J. Reports 1981*, p. 30, para. 14; *Continental Shelf (Libyan Arab Jamahiriya/Malta), International Court of Justice 1984, Dissenting Opinion of Judge Jennings*, pp. 157-160; *idem.*, *Dissenting Opinion of Vice-President Sette-Camara*, p. 87, para. 81; *idem.*, *Dissenting Opinion of Judge Schwebel*, p. 134, paras. 9-10).

52. Resolution 55/12 belongs to the *species* of United Nations General Assembly resolutions having a definitive and binding effect within the United Nations structure as a whole.

“Article 18 [of the Charter] deals with ‘*decisions*’ of the General Assembly ‘on important questions’. These ‘decisions’ do indeed include certain recommendations, but others *have dispositive force and effect*. Among these latter decisions, Article 18²⁶ includes suspension of rights and privileges of membership, expulsion of Members . . . In connection with the suspension of rights and privileges of membership and expulsion from membership under Articles 5 and 6, it is the Security Council which has only the power to recommend and *it is the General Assembly which decides* and whose decision determines status.” (*Certain Expenses, Advisory Opinion, I.C.J. Reports 1962*, p. 163; emphasis added.)

On the basis of Article 4, paragraph 2 of the Charter “The admission of any . . . State to membership in the United Nations will be effected by a *decision* of the General Assembly upon the recommendation of the Security Council” (emphasis added).

53. Lying within the exclusive competence of two principal political organs of the United Nations, the Security Council and the General Assembly, decisions on the admission of a State to the United Nations are a part of international law which “[the Court] . . . is bound to respect” (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie, Order, I.C.J. Reports 1992, Separate Opinion of Judge Lachs*, p. 26). In the system of functional parallelism, it must be assumed as a governing principle of relations between the principal organs of the United Nations that the “Court must cooperate in the attainment of the aims of the Organization and strive to give effect to the decisions of other principal organs and not to achieve results which would render them nugatory”²⁷.

The determination that the Respondent enjoyed the status of member as from 1 November 2004 became a part of the objective reality established in the United Nations structures as a whole. In a letter to the President of the United Nations General Assembly, dated 27 December 2001, United Nations Secretary-General Kofi Annan stated:

“I have the honour to refer to General Assembly resolution 55/12 of 1 November 2000, in which the Assembly decided to admit the Federal Republic of Yugoslavia to membership in the United Nations. This decision necessarily and automatically terminated the membership in the Organization of the *former* Yugoslavia, the State admitted to membership in 1945”²⁸.

Under the heading “Historical Information on Multilateral Treaties Deposited with the Secretary-General”²⁹, it is stated *expressis verbis* that the “Yugoslavia” to which the Legal Counsel referred in his letter of 29 September 1992 as the State whose membership in the Organization “the resolution neither terminates nor suspends”, was the *former* Yugoslavia, i.e., the Socialist Federal Republic of Yugoslavia, not the Federal Republic of Yugoslavia: “The Legal Counsel took the

²⁶Article 18 of the Charter reads: “2. Decisions of the General Assembly on important questions shall be made by a two-thirds majority of the members present and voting. These questions shall include: . . . the admission of new Members to the United Nations, the suspension of the rights and privileges of membership, the expulsion of Members . . .”.

²⁷Shabtai Rosenne, *The Law and Practice of the International Court, 1920-2005*, 3rd ed., Vol. I, The Court and the United Nations, Martinus Nijhoff Publishers, Leiden/Boston, 1997, pp. 69-70.

²⁸United Nations doc. A/56/767; emphasis added.

²⁹See Historical Information, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/historicalinfo.asp> under the heading “former Yugoslavia”.

view, however, that this resolution of the General Assembly neither terminated nor suspended the membership of the *former* Yugoslavia in the United Nations.”

It is also relevant that no State has objected to the legal opinion of the United Nations Legal Counsel referred to above, in contrast to the position of United Nations Member States with respect to the description of the Federal Republic of Yugoslavia as a predecessor State made in the “Summary of Practice of the Secretary-General as depositary of Multilateral Treaties”³⁰; in response to the objections raised, the Legal Counsel issued “Errata”³¹ which, *inter alia*, deleted the description of the Federal Republic of Yugoslavia as a predecessor State.

54. This fact taken *per se* evidences universal acceptance both by the Member States of the United Nations and by the organs of the Organization of the legal consequences of the admission of the Federal Republic of Yugoslavia to membership of the United Nations. The Court summarized these as follows:

“The Applicant [Serbia and Montenegro] thus has the status of membership in the United Nations as from 1 November 2000. However, its admission to the United Nations did not have, and could not have had, the effect of dating back to the time when the Socialist Federal Republic of Yugoslavia broke up and disappeared; there was in 2000 no question of restoring the membership rights of the Socialist Federal Republic of Yugoslavia for the benefit of the Federal Republic of Yugoslavia.” (*Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Judgment of 15 December 2004, para. 78.)

55. This interpretation of the meaning of resolution 47/1 is not a new one. It should be noted that it was advocated in the literature as well. In an article entitled “The New United Nations and Former Yugoslavia”, Professor Rosalyn Higgins wrote:

“The Assembly did recommend that the *new Federal Republic (Serbia-Montenegro)* should apply for membership of the United Nations. But the resolution did not either suspend, or terminate, Yugoslavia’s *membership* in the UN. The outcome has been anomalous in the extreme. The seat and nameplate remain as before. The old Yugoslav flag continues to fly on the 42nd Street. ‘*Yugoslavia remains a member of the UN, i.e., not Serbia and Montenegro, but Yugoslavia in its entirety.*’”³²

56. Although it limited itself in the *dispositif* to the determination of its jurisdiction to entertain the case, the Court essentially dealt, in the reasoning part of the 2004 Judgment, with the question of the Federal Republic of Yugoslavia’s membership in the United Nations in the relevant time period. The Court’s finding that the Federal Republic of Yugoslavia was not a member of the United Nations before its admission to the Organization in November 2000 was of fundamental importance in the circumstances surrounding the issue of the Court’s competence *in casu*.

57. The *dispositif* in the 2004 Judgment was not the result of the reasoning by the Court in selecting among alternatives or choosing one of several different interpretations for which the relevant jurisdictional fact would provide a motive; it was the unavoidable result of the Federal Republic of Yugoslavia’s non-membership status in the United Nations or, in other words, a kind

³⁰ST/LEG. 8, p. 89, para. 297.

³¹United Nations doc. LA41TR/220.

³²69 *International Affairs*, 1993, 465, p. 479; emphasis added.

of judicial notice of the fact established by the principal political organs in the exercise of their exclusive competence under the United Nations Charter, which, in the circumstances of the present case, operates as the jurisdictional fact of decisive importance.

Resolutions of the United Nations General Assembly, like resolution 55/12, create an objective legal situation, a status with *erga omnes* effects. This fact is reflected in the effects of the Judgments of the Court by which such a status is established *ad casum*.

58. Judgments of the Court on the status issue, in their effect *ratione personae*, cannot, unlike other judgments, be limited to the Parties to a dispute. Their material effects surpass the effects of the judgment defined in Article 60 of the Statute. By the very nature of their object, judgments on status issues, which do not allow for uncertainty and insecurity, act *intra partes*. The effect of a judgment on status, i.e., the creation of an objective legal situation (*situation légale objective*)³³, is incorporated in the national laws of civilized nations³⁴.

However, this is not a question of the technical effect, under Article 59 of the Statute, of judgments on status issues *intra partes* but a question of the material, reflective effect of such judgments on third States. It is binding *erga omnes* not as a judicial act in the formal sense, but as a result of its intrinsic persuasive force, in parallel with the mandatory force of the judgment in the technical sense, based on the presumption of truthfulness — *pro veritate accipitur* — which must, in questions of status, as absolute law, have universal effect. This is especially valid for judgments of the Court, like the Judgment in the *Legality of Use of Force* cases, which, basically, merely gives judicial confirmation to the status conclusively determined by the competent organs of the United Nations (see paras. 401 *et seq.*).

59. It seems crystal clear that the Respondent's *jus standi in casu* is, as in the *Legality of Use of Force* cases, organically linked to its membership in the United Nations owing to the fact that the Respondent could not be considered to be a party to the Statute on any basis apart from that of being a Member State of the United Nations and to the fact that its *jus standi* cannot be based on the conditions set forth in Article 35, paragraph 2, of the Statute of the Court.

The majority approach to this “twin” issue is truly astonishing.

On the one hand, it is recognized that “in 1999 — and even more so in 1996 — *it was by no means so clear then as the Court found it to be in 2004 that the Respondent was not a Member of the United Nations*” (Judgment, paragraph 132; emphasis added).

On the other,

“*as a matter of law*, no possibility that the Court might render “its final decision with respect to a party over which it cannot exercise its judicial function; because the question whether a State is or is not a party subject to the jurisdiction of the Court is one which is reserved for the sole and authoritative decision of the Court . . . the operation of the ‘mandatory requirements of the Statute’ falls to be determined by the Court in each case before it; and once the Court has determined, with the force of *res judicata*, that it has jurisdiction, then for the purposes of that case no question of *ultra*

³³Dugguit, *Traité de droit constitutionnel*, 1923 II.

³⁴For instance, the novel Art. 311 of the Code civil (law of 1972), see Vincent, *op. cit.*, p. 108 No. 79; in Italian law it is traditionally considered that decisions on status matters act *erga omnes* — for examples of judgments by Italian courts, see Pugliese, *op. cit.*, p. 888; British law has, in that sense, the special notion “judgments in rem” (see Bower, Troner, *The Doctrine of Res Judicata*, 1965, pp. 213 *et seq.*).

vires can arise, the Court having sole competence to determine such matters under the Statute” (Judgment, paragraphs 138 and 139).

The reasoning suggests that *quidquid iudicii placuit, habet legis vigorem*. It reflects the anachronistic and totally unacceptable idea that the Court is not the guardian but the creator of legality and, in fact, that the Court makes decisions independently from objective law established by its Statute.

It *nolens volens* leads to the creation of the Court’s own, judicial reality in contrast to the objective legal one, producing a proper *judicium illusorum*.

The erroneous perception of the *res judicata* rule embodied in this Judgment gives rise to an absurd ambivalence in respect of the Respondent’s status in the United Nations.

In contrast to the *erga omnes* effects of General Assembly resolution 55/12, the Court’s Judgment is, as provided by Article 59 of the Statute, binding only on the Parties to the case. This logically means that in the context of the dispute before the Court the Respondent is considered, at least tacitly, to have been a United Nations member in the period 1992-2000 as far as the Court and the Applicant are concerned, whereas for the Organisation itself it was not a member and even for Bosnia and Herzegovina, it was not a member in respect of any other matter than this case itself. In addition, in the eyes of the Court, the Respondent is considered a member of the United Nations in the present case and a non-member in the *Legality of Use of Force* cases.

60. The pronouncement that “in 1999 — and even more so in 1996 — it was by no means so clear then as the Court found it to be in 2004 that the Respondent was not a Member of the United Nations”, opens a very unpleasant question of the activity of the Court in the present case in the light of the principle of *bona fidae* which, as a peremptory one, is at least equally valid for the Court as it is for States.

If, for more than a decade, it was so clear to the Court that the Respondent was not a Member of the United Nations, and the quality of being a Member of the United Nations is the only basis on which the Respondent could have been considered a party to the Statute of the Court, it follows that the Court deliberately avoided recognizing the jurisdictional fact affecting the very legality of the totality of its actions *in casu*. Such a conduct of the Court could be termed judicial arbitrariness, close or in the zone of abuse of judicial power of the Court rather than judicial discretion resulting in judicial indecision.

6. 1992 Declaration

61. In its 1996 Judgment, the Court found jurisdiction *ratione personae* in the formal Declaration of 27 April 1992 adopted by the participants of the Joint Session of the SFRY Assembly, the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro. The Court perceived it as a unilateral act that produces legal consequences relevant as regards its jurisdiction *ratione personae*. This determination appears dubious and, it seems to me, requires reconsideration in the light of the relevant rules of international law and the jurisprudence of the Court, respectively. Namely, reconsideration not only as regards the presumption of the legal identity and continuity of the Respondent with the SFRY, which proved unacceptable by the international community and served as the basis for the finding of the Court, but also as regards the characterization of the nature and effects of the Declaration.

62. Did the Declaration adopted on 27 April 1992 meet the relevant requirements to be considered as a unilateral act producing legal consequences?

63. It seems obvious that the issue of an act by a single state cannot by itself qualify as a unilateral act capable of producing legal effects *in foro externo*. The unilateral nature of an act is but one extrinsic element which, when coupled with other elements, both extrinsic and intrinsic, forms a unilateral legal act in terms of international law.

64. In the circumstances of the case at hand a number of elements are of special relevance. The primary extrinsic element concerns the capacity of the participants in the Joint Session of the SFRY Assembly, the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro to perform unilateral acts in the sense of international law. The Joint Session of the SFRY Assembly, the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro was not constituted as the Parliament of the Federal Republic of Yugoslavia; rather it was a body of representatives *in statu nascendi*. Even if, *arguendo*, it represented the Parliament, it was obviously not a State organ possessing the capacity to perform unilateral acts on behalf of the State. Representatives of a State for purposes of formulating unilateral legal acts are heads of State, heads of Government and ministers of foreign affairs³⁵. The rule has also been confirmed in the jurisprudence of the Court (*Legal Status of Eastern Greenland (P.C.I.J., Series A/B, No. 53, p. 22)*). Consequently, it appears that the Declaration, if designed as a unilateral legal act *in foro externo*, was issued by an incompetent organ under international law and, as such, produced no legal effects³⁶.

65. True, the Declaration, as the Court found, “was confirmed in an official Note of 27 April 1992 from the Permanent Mission of Yugoslavia to the United Nations, addressed to the Secretary-General.” (*I.C.J. Reports 1996 (II)*, p. 610, para. 17) The word “confirmed” in the present context may have two meanings: a descriptive one in the sense that the letter from the Permanent Representative reproduced the text of the Declaration and a meaning as a “*terminus technicus*”, signifying confirmation of a unilateral act of an unauthorized State organ. Neither of these two possible meanings of the word “confirmed” can be accepted *in concreto*. In respect of the descriptive meaning of the word “confirmed”, it is obvious that the letter from the Permanent Representative³⁷ reproduces the text of the Declaration only in part, i.e., citing only a small part thereof relating exclusively to legal identity and continuity.

By definition, the limited powers held by heads of permanent missions to international organizations, including permanent missions to the United Nations, negate the possibility of the official Note of the Permanent Mission of Yugoslavia of 27 April 1992 being understood as “confirmation” of an act issued by an organ — if at the material point in time it was an organ — incompetent under international law to perform legal acts on behalf of the State.

66. Hence, the proper characterization of the Note of the Yugoslav Permanent Mission of 27 April 1992 is that of a *transmission* of the Declaration followed by the corresponding reproduction of a part of the Declaration directly connected with the Federal Republic of

³⁵Art. 4, Report on Unilateral Acts of States, Yearbook of the International Law Commission, 1998, II, Part One, doc. A/CN.4/486; United Nations doc. A/CN.4/500 and Add. 1.

³⁶See Art. 4 (Subsequent confirmation of an act formulated by a person not authorized for that purpose) in the Third Report of the Special Rapporteur, Yearbook of the International Law Commission, 2000, I, p. 96.

³⁷The text of the letter reads: “The Assembly of the Socialist Federal Republic of Yugoslavia, at its session held on 27 April 1992, promulgated the Constitution of the Federal Republic of Yugoslavia. Under the Constitution, on the basis of the continuing personality of Yugoslavia and the legitimate decisions by Serbia and Montenegro to continue to live together in Yugoslavia, the Socialist Federal Republic of Yugoslavia, consisting of the Republic of Serbia and the Republic of Montenegro. Strictly respecting the continuity of the international personality of Yugoslavia, the Federal Republic of Yugoslavia shall continue to fulfil all the rights conferred to, and obligations assumed by, the Socialist Federal Republic of Yugoslavia in international relations, including its membership in all international organizations and participation in international treaties ratified or acceded to by Yugoslavia.” (United Nations doc. A/46/915, Ann.I.).

Yugoslavia's proclaimed legal identity with and continuation of the former SFRY vis-à-vis the United Nations.

67. This characterization of the Note of the Yugoslav Permanent Mission suggests that the Declaration of 27 April 1992 and the Note of the Permanent Mission are two distinct, yet not totally separate acts, both by their nature and by their effects. For its part, the Declaration is basically a general statement of policy with respect to matters directly or indirectly connected with the issue of the proclaimed legal identity and state continuity of the Federal Republic of Yugoslavia, while the Note seems to be primarily a notification in the standard sense. Evidence to this effect is found in the fact that the addressee of the Note was the Secretary-General, who was requested to circulate the Declaration and the Note as an official document of the General Assembly³⁸, whereas the Declaration as such was addressed *urbi et orbi*.

68. Several intrinsic elements of the Declaration merit attention in this particular context: its scope *ratione materiae*, the intention of the author of the Declaration and its possible effects.

69. As regards its scope *ratione materiae*, the Declaration covers several different matters.

The Declaration reads as follows:

“The representatives of the people of the Republic of Serbia and the Republic of Montenegro Expressing the will of the citizens of their respective Republics to stay in the common state of Yugoslavia, Accepting all basic principles of the Charter of the United Nations and the CSCE Helsinki Final Act and the Paris Charter, and particularly the principles of parliamentary democracy, market economy and respect for human rights and the rights of national minorities, Remaining strictly committed to a peaceful resolution of the Yugoslav crisis, wish to state in this Declaration their views on the basic, immediate and lasting objectives of the policy of their common state, and on its relations with the former Yugoslav Republics.

In that regard, the representatives of the people of the Republic of Serbia and the Republic of Montenegro declare:

1. The Federal Republic of Yugoslavia, continuing the state, international legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all the commitments that the SFR of Yugoslavia assumed internationally. At the same time, it is ready to fully respect the rights and interests of the Yugoslav Republics which declared independence. The recognition of the newly-formed States will follow after all the outstanding questions negotiated on within the Conference on Yugoslavia have been settled, Remaining bound by all obligations to international organizations and institutions whose member it is, the Federal Republic of Yugoslavia shall not obstruct the newly-formed States to join these organizations and institutions, particularly the United Nations and its specialized agencies. The Federal Republic of Yugoslavia shall respect and fulfil the rights and obligations the SFR of Yugoslavia assumed vis-à-vis the territories of Krajina which have been placed, within the framework of the United Nations peace-keeping operation, under the protection of the world Organization.

The Federal Republic of Yugoslavia also remains ready to negotiate, within the Conference on Yugoslavia, all problems related to the division of assets, which

³⁸United Nations doc. A/46/915.

means both to assets and debts acquired jointly. In case of a dispute regarding these issues, the Federal Republic of Yugoslavia shall be ready to accept the arbitration of the Permanent Court of Arbitration in the Hague.

2. The diplomatic and consular missions of the Federal Republic of Yugoslavia abroad shall continue without interruption to perform their functions of representing and protecting the interests of Yugoslavia. Until further notice, they shall continue to take care of all the assets of Yugoslavia abroad. They shall also extend consular protection to all nationals of the SFR of Yugoslavia whenever they request them to do so until a final regulation of their nationality status. The Federal Republic of Yugoslavia recognizes, at the same time, the full continuity of the representation of foreign states by their diplomatic and consular missions in its territory.
3. The Federal Republic of Yugoslavia is interested in the reinstatement of economic, transport, energy and other flows and ties in the territory of the SFR of Yugoslavia. It is ready to make its full contribution to that end.
4. The Federal Republic of Yugoslavia has no territorial aspirations towards any of its neighbours. Respecting the objectives and principles of the United Nations Charter and CSCE documents, it remains strictly committed to the principle of *nonuse* of force in settling any outstanding issues.
5. The Federal Republic of Yugoslavia shall ensure the highest standards of the protection of human rights and the rights of national minorities provided for in international legal instruments and CSCE documents. In addition, the Federal Republic of Yugoslavia is ready to grant the national minorities in its territory all those rights which would be recognized to and enjoyed by the national minorities in other CSCE participating States.
6. In its foreign relations, the Federal Republic of Yugoslavia shall be guided by the principles of the United Nations Charter, as well as the principles of CSCE documents, particularly the Paris Charter for New Europe. As the founding member of the Movement of non-aligned countries, it shall remain committed to the principles and objectives of the policy of nonalignment.

It shall develop relations of confidence and understanding with its neighbours proceeding from the principle of good neighbourliness.

The Federal Republic of Yugoslavia shall, as a State of free citizens, be guided in its democratic development by the standards and achievements of the Council of Europe, the European Community and other European institutions, with an orientation to join them in the foreseeable future.” (United Nations doc. A/46/915, Ann. I; emphasis added.)

It appears that, if viewed in isolation, only a part of the Declaration — the extension of “consular protection to all nationals of the SFR of Yugoslavia” — is capable *per se* of producing, certain effects, under certain conditions. Although not addressed to third States, it can, in a broader context, be subsumed under the “power of auto-limitation which States enjoyed under international law, in other words, their ability in the exercise of their sovereignty to subject themselves to international legal obligations”³⁹.

³⁹V. Rodrigues Cedeno, Special Rapporteur, Yearbook of the International Law Commission 1998, II, Part Two, p. 53, para. 140.

In the part of the Declaration concerning “commitments that the SFRY assumed internationally”, which is relevant for the assessment as to whether the Federal Republic of Yugoslavia could be considered bound by the Genocide Convention, things are, however, fundamentally different.

70. Can the formulation “shall strictly abide by all the commitments . . .” as such be understood as consent by the Federal Republic of Yugoslavia to be bound by the Genocide Convention? That interpretation appears totally erroneous in the light of the rule of interpretation of unilateral legal acts accepted in the Court’s jurisprudence. Where unilateral acts of States are to be interpreted, “declarations . . . are to be read as a whole” and “interpreted as a unity” (*Fisheries Jurisdiction*, I.C.J. Reports 1998, pp. 452-454, paras. 47 and 44). Further, unilateral acts “must be interpreted as [they stand], having regard to the words actually used.” (*Anglo-Iranian Oil Co., Preliminary Objections, Judgment*, I.C.J. Reports 1952, p. 105).

The intention of the author of the Declaration is of key concern, since “[w]hen it is the intention of the State making the declaration that *it should become bound according to its terms*, that intention confers on the declaration the character of a legal undertaking” (*Nuclear Tests (Australia v. France, Judgment)*, I.C.J. Reports 1974, p. 267, para. 43; *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p. 472, para. 46; *Frontier Dispute, Judgment*, I.C.J. Reports 1986, pp. 573-574, paras. 39-40; emphasis added). When States “make statements by which their freedom of action is to be limited, *a restrictive interpretation is called for*” (*Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, p. 267, para. 44; *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, pp. 472-473, para. 47; emphasis added).

71. In the light of the rules of construction of unilateral legal acts, the question naturally arises whether the Federal Republic of Yugoslavia had the intention to assume obligations *ex foro externo* by the Declaration.

72. If the Declaration is read as a whole and interpreted as a unity, the answer must, it seems, be in the negative. It is set out in the introduction part that the participants in the Joint Session of the SFRY Assembly, the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro “wish to state in this Declaration *their views* on the basic, immediate and lasting *objectives of the policy* of their common state and its relations with the former Yugoslav Republics” (emphasis added). Statements of policy objectives are rarely found in the sphere of international law. In the *Nicaragua* case the Court, considering the issue as to whether any legal undertaking could be inferred from communications from the Junta of the Government of National Reconstruction of Nicaragua to the Secretary-General of the Organization of American States accompanied by the “Plan to secure peace”, found *inter alia*:

“This was an *essentially political pledge*, made not only to the Organization, but also to the people of Nicaragua, intended to be its first beneficiaries. . . . This part of the resolution *is a mere statement which does not comprise any formal offer which if accepted would constitute a promise in law, and hence a legal obligation.*” (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 132, para. 261; emphasis added.)

Furthermore, if, *ex hypothesi*, the participants had intended the Declaration to produce legal effects, these effects would have been expressed as the confirmation or safeguarding of existing rights and obligations rather than as the assumption of obligations *pro futuro*. The interpretation of the Declaration “according to its own terms” “as they stand” inevitably leads to the conclusion, as also inferred by the Court itself, that the intention was “to *remain bound* by international treaties to which the former Yugoslavia was a party” (*I.C.J. Reports 1996*, p. 610, para. 17; emphasis added).

And that pursuant to both legal considerations and the Declaration itself means the Federal Republic of Yugoslavia's legal identity and continuity with the former SFRY. If, on the other hand, legal identity and continuity was a condition on which depended the status of the Federal Republic of Yugoslavia as a party to multilateral conventions, including the Genocide Convention, another highly relevant question emerges: namely, is the Declaration as such capable of producing legal effects without having been accepted, expressly or tacitly, by other international subjects, including the United Nations? Obviously not, because declarations, like other unilateral acts, used to carry out obligations in relation to treaties, are governed by the law of treaties as applied to the particular convention. In general, unilateral legal acts as such, being self-contained, are not in the nature of synallagmatic obligations which form the substance of treaties.

73. The Convention on the Prevention and Punishment of the Crime of Genocide (1948) stipulates in Article XI:

“The present Convention shall be open until 31 December 1949 for signature on behalf of any Member of the United Nations and of any non-member State to which an invitation to sign has been addressed by the General Assembly.

The present Convention shall be ratified, and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

After 1 January 1950, the present Convention may be acceded to on behalf of any Member of the United Nations and of any non-member State which has received an invitation as aforesaid.

Instruments of accession shall be deposited with the Secretary-General of the United Nations.”

It would appear that ratification and accession are the sole means of expressing consent to be bound by the Convention. Article XI expresses the intention of the authors of the Convention:

“The Secretariat's draft provided as an alternative solution accessions only, on the theory that the approval of the Convention by the representatives of the governments in the General Assembly may obviate the necessity for signature. The *Ad hoc* Committee, however, preferred the usual procedure of signature followed by ratification, for the original members.”⁴⁰

74. It appears that the Court in addition strongly relied on the finding that: “it has not been contested that Yugoslavia was party to the Genocide Convention” (*I.C.J. Reports 1996*, p. 610, para. 17). However, that finding does not seem convincing in the light of the legal nature of the issue of jurisdiction (paras. 41-44 above).

7. The issue of the Respondent Party

Serbia has been designated as the Respondent Party on the basis of two premises:

- (i) the positive status of the predecessor State vis-à-vis the State Union of Serbia and Montenegro; and

⁴⁰N. Robinson, *The Genocide Convention*, 1949, p. 47.

- (ii) the view that *ipso facto* implicated the Republic of Montenegro is not as a successor State under the rules of criminal responsibility.

However, neither one of these two premises has been applied consistently.

As regards the first premise, it seems clear that Serbia is the legal continuator of the State Union of Serbia/Montenegro. A delicate question, not even touched upon by the Judgment, is that of the legal status of Serbia and Montenegro from 2000 onwards.

75. At the end of the year 2000 the FRY, acting in the appropriate context, did two things:

- (i) renounced the continuity claim and accepted the status of successor State to the former SFRY; and
- (ii) proceeding on the bases of this new capacity — as the successor State — submitted an application for admission to membership in the United Nations.

76. The State, as a notion of international law, comprises two elements, i.e., has two facets:

- (i) statehood in the sense of the relevant attributes such as a defined territory, a stable population and sovereign power;
- (ii) legal personality, i.e., status as a subject of international law equipped with a corpus of rights and obligations. In the light of the relevant circumstances, the legal personality of the Federal Republic of Yugoslavia can be either inferential and derivative in nature — based on legal identity with and continuation of the Socialist Federal Republic of Yugoslavia — or inherent and original in nature — based on status as a new State.

77. By submitting an application for admission to membership in the United Nations, Yugoslavia not only renounced the claim to legal identity and continuity; it sought at the same time to be recognized as a new State, one with a different legal personality — a successor State as opposed to the partial continuation of the former Socialist Federal Republic of Yugoslavia — from the one claimed until the year 2000. In fact, it accepted the claim qualified as the claim put forward as that of the international comment when the Federal Republic of Yugoslavia was formally proclaimed in April 1992. A claim which the relevant international organizations and States, acting individually or *in corpore* as members of organizations, did not however implement either formally or substantively. Instead, they opted for solutions based on pragmatic political considerations rather than on considerations under international law. Thus arose a legal “Rashomon” as to Yugoslavia’s juristic character — was it a new State or the old State? And as to its status in the United Nations — was it a Member of the United Nations or not?

78. Yugoslavia’s admission to membership of the United Nations from 1 November 2000 also meant acceptance of its claim to recognition as a new State, in the sense of a new international personality different from its controversial, hybrid personality in the period 1992-2000. The claim was accepted by way of a series of collateral agreements in simplified form, or a general collateral agreement in simplified form, between the Federal Republic of Yugoslavia, on the one hand, and the Member States of the United Nations and the world Organization itself, on the other, embodied tacitly in the letter and spirit of General Assembly resolution 55/12 and subsequent consistent practice of the Organization (*exempli causa*, the letter of the Under-Secretary-General and Legal Counsel of the United Nations of 8 December 2000 and the list of Member States with the dates of their admission to the United Nations (United Nations Press Release ORG/1317 updated

18 December 2000). The subject of the series of collateral agreements, or of the general collateral agreement, is in fact recognition of the Federal Republic of Yugoslavia as a new personality, a personality being the successor State of the former SFRY, and its admission in that capacity to the world Organization as a Member. Thus, Yugoslavia, although the “old State” in the statehood sense, was universally recognized as a “new State” in the sense of its international legal personality. In view of the fact that recognition of a State has *ex definitione* retroactive effect, it necessarily follows that all pronouncements and decisions taken relate to the FRY claiming continuity with the SFRY. And, as the Federal Republic of Yugoslavia after the year 2000, its legal existence as a new international legal personality started in November 2000 with its admission to membership of the United Nations.

The second premise, on the other hand, has not been consistently followed in relation to the Republic of Montenegro. It has been applied to parts of the Judgment, but not to the Judgment as a whole. Thus, the Republic of Montenegro must immediately take effective steps to ensure full compliance with its obligation under Articles I and VI of the Convention on the Prevention and Punishment of the Crime of Genocide to punish acts of genocide as defined by Article II of the Convention, or any of the other acts proscribed by Article III of the 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 the Tribunal. Incidentally, this fact, too, could be taken as evidence of oversensitivity to the factual and political aspect of the whole matter.

PART TWO

SUBSTANTIVE ISSUES

I. Genocide Convention as applicable law

1. Genocidal intent as *conditio sine qua non* of the crime of genocide

79. A genocidal act can exist only under conditions defined by the body of law established by the Convention. Acts enumerated in Article II, in sub-paragraphs (a) to (e), are not genocidal acts in themselves, but only the physical or material expression of specific, genocidal intent. In the absence of a direct *nexus* with genocidal intent, acts enumerated in Article II of the Convention are simply punishable acts falling within the purview of other crimes, *exempli causa* war crimes or crimes against humanity.

80. Genocide as a distinct crime is characterized by the subjective element — intent to destroy a national, ethnical, racial and religious group as such — an element which represents the *differentia specifica* distinguishing genocide from other international crimes with which it shares substantially the same objective element⁴¹. In the absence of that intent, whatever the degree of atrocity of an act and however similar it might be to the acts referred to in the Convention, that act can still not be called genocide⁴².

⁴¹N. Robinson, *The Genocide Convention*, 1949, p. 15; Drost, *Genocide*, II, 1959, p. 82; *Study of the Question of the Prevention and Punishment of the Crime of Genocide*, prepared by Mr. N. Ruhashyankiko, Special Rapporteur, doc. I/CN.4, Sub. 2/416, 4 July 1978, para. 96; *Revised and updated report on the question of the prevention and punishment of the crime of genocide*, prepared by Mr. B. Whitaker, doc. E/CN.4/Sub. 2/1985/6 (2 July 1985), paras. 38-39.

⁴²Official Records of General Assembly, Third Session, Part I, Sixth Committee, 69th meeting.

81. It appears that four elements are distinguishable within genocidal intent: (a) the degree of the intent; (b) destruction; (c) a national, ethnical, racial or religious group; (d) in whole or in part.

Although separate, the four elements make up a legal whole characterizing in their cumulative effect, genocidal intent as the subjective element of the crime of genocide. The absence of any of them disqualifies the intent from being genocidal in nature. As a legal unity, these elements, taken *in corpore*, demonstrate that genocidal intent is not merely something added to physical acts capable of destroying a group of people. It is an integral, permeating quality of these acts taken individually, a quality that transforms them from simple punishable acts into genocidal acts. In other words, such intent is a qualitative feature of genocide distinguishing it from all other crimes, indeed its constituent element *stricto sensu*.

82. Genocidal intent is genuine in nature. It is not simply a guilty mind, but a mind guilty of destruction of a religious, ethnic, national or racial group as such. The distinguishing feature of genocidal intent is not that it is discriminatory because that is only its most general characteristic shared with, for instance, crimes against humanity. But, whereas in the case of persecution, an act of crime against humanity, discriminatory intent can take multifarious inhumane forms and manifest itself in a multiplicity of actions, including murder, in the case of genocide, an extreme and the most inhumane form of persecution, that intent must be accompanied by the particular intent to destroy in whole or in part the group to which the victims belong⁴³. “*Mens rea*” in the realm of the crime of genocide is complex and must not be reduced to the standard form of *mens rea* required for criminal offences. It encompasses two levels — the *mens rea* as the pendant to the *actus reus*, i.e., an act constituting genocide pursuant to Article II (subparas. (a), (b), (c), (d) or (e)) and the “intent to destroy” a protected group as such, the specific intent inherent in genocide. It is therefore rightly stressed that “guaranteeing the rule of law and the respect for the principle *nullum crimen sine lege* require that ‘the two intents’ ought to be strictly separated when it comes to prove the facts necessary to establish the innocence or guilt of an accused”⁴⁴. In addition, both parts of *mens rea* are characterized by the existence of two components — conscience (*la conscience*; *Wissen*) and will (*la volonté*; *Wollen*). In their various expressions they offer four different kinds of *mens rea*, in descending order of seriousness — *dolus specialis*, *dolus directus*, *dolus indirectus* (indirect intent) and *dolus eventualis* (conditional intent), which, in general terms, correspond to intention, recklessness and criminal negligence in the common law). *Mens rea* as the pendant to the acts constituting the material element — the *actus reus* — of the crime should exist in the form of *dolus directus*. This means that the perpetrator is conscious of the effect of the act (intellectual element) and has the will to commit the act (voluntary or emotional element).

2. Degree of intent

83. In terms of degree, the intent to destroy the group, as *dolus specialis*, is at the very top of the hierarchy of culpable mental states. As such, it excludes *culpa*, *dolus eventualis* (recklessness) or negligence⁴⁵. The crime of genocide is “unique because of its element of *dolus specialis* (special intent)”⁴⁶, which is in fact the constituent element of the crime of genocide. The degree of *dolus specialis* means that it is not sufficient that the accused “*knows* that his acts will inevitably, or . . .

⁴³ICTY, *Prosecutor v. Kupreskic*, Trial Judgment, para. 636.

⁴⁴Triffterer, “Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such”, *Leiden Journal of International Law*, Vol. 14, No. 2, 2001, p. 400.

⁴⁵Cassese, *Genocide in the Rome Statute of the International Criminal Court*, 2002, I, p. 338.

⁴⁶ICTR, *Prosecutor v. Kambanda*, No. ICTR-97-23-S, 4 September 1998, para. 16.

probably, result in the destruction of the group in question, but that the accused must seek the destruction in whole or in part, of a . . . group”⁴⁷.

In other words, special intent is characterized by the voluntary element, the purposeful and active will to destroy the protected group. Knowledge of the natural and foreseeable consequences of the acts performed is not *per se* sufficient to constitute the intent to destroy. It must be accompanied by the desire to destroy the groups; this is an additional requirement in the structural sense and a dominant one in the normative sense. In order for these to be genocide the acts prohibited in Article II of the Convention must be committed with “intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”.

3. Destruction

84. Under Article II of the Convention, the expression “to destroy” means the material (physical and biological) type of genocide. Physical genocide is addressed in subparagraphs (a), (b) and (c), whereas biological genocide is covered by subparagraph (d).

In subparagraphs (a) and (c) the matter seems self-evident. Whereas the act of killing is a clear *modus operandi* of physical genocide⁴⁸, the expression “physical destruction” employed in subparagraph (c) rules out the possibility of any interpretation to the effect that infliction on the group of any conditions of life other than those leading to the physical destruction of the group may represent an act of genocide. The word “deliberately” was included there to denote a precise intention, i.e., premeditation related to the creation of certain conditions of life⁴⁹. According to the *travaux préparatoires*, such acts would include “putting of a group . . . on a regimen of insufficient food allocation, reducing required medical attention, providing insufficient living accommodation, etc.”⁵⁰, which results in slow death in contrast to immediate death under subparagraph (a) of Article II. The *differentia specifica* between the act of killing and the imposing of destructive conditions of life is, consequently, primarily expressed in the modalities of destruction — the latter case does not involve the temporal immediacy of killing as the means (*modus operandi*) of extermination but does result in extermination over time.

The legislative history of subparagraph (b) also demonstrates that the authors of the Convention understood “serious bodily or mental harm” to be a form of physical genocide. Physical suffering or injury without lethal consequences falls within the ambit of crimes against humanity and torture⁵¹. The expression “mental harm”, on the other hand, has a specific meaning in subparagraph (b). It was included at the insistence of China. Explaining the proposal by reference to the acts committed by Japanese occupying forces against the Chinese nation through the use of narcotics, China pointed out that, although these acts were not as spectacular as mass murders and the gas chambers of Nazi Germany, their results were no less lethal⁵². Accordingly, not every bodily or mental injury is sufficient to constitute the material element of genocide, but, as stated by the International Law Commission, “it must be serious enough to threaten group

⁴⁷ICTY, *Prosecutor v. Jelisić*, paras. 85-86.

⁴⁸Killing of members of the group as the material element in subpara. (a) is shown if the victim has died and the death resulted from an unlawful act or omission (ICTR, *Prosecutor v. Akayesu*, No. ICTR-96-4-T, 1998, para. 588).

⁴⁹A/C.6/SR.82, p. 3; N. Robinson, *op. cit.*, p. 16.

⁵⁰N. Robinson, *op. cit.*, p. 18.

⁵¹ICTY, *Prosecutor v. Delalić et. al.*, Trial Judgement, p. 511.

⁵²General Assembly, Official Records of the Third Session, Part I, Sixth Committee, 69th meeting, pp. 59-60.

destruction”⁵³, as destruction is understood in the Convention, i.e., physical and biological destruction.

Acts such as sterilization of women, castration, prohibition of marriages, etc., subsumed under “measures intended to prevent birth within the group”, constitute biological genocide. The extreme gravity of measures imposed to prevent births within the group with a view to annihilating the group’s national biological power is the criterion for differentiating between the genocidal act defined in subparagraph (b) and measures which may be taken against the will of members of a group within the framework of family planning and birth control programmes, measures which are sometimes descriptively called “genocide by another name” or “black genocide”⁵⁴.

85. Prima facie only the act of forcible transfer of children of the group to another group does not fit into the concept of physical/biological genocide as defined in the Convention. However, it should be emphasized that the act of forcible transfer of children has been included in acts constituting genocide with the explanation that it has physical and biological effects since it imposes on young persons conditions of life likely to cause them serious harm, or even death⁵⁵. In that sense, it is of considerable importance that the proposal to include cultural genocide in the Convention also has been understood to cover a number of acts which spiritually destroy the vital characteristics of a group, as observed in particular in forcible assimilation. The proposal was rejected on a vote of 26 against and 16 in favour with 4 abstentions⁵⁶. Hence, it appears reasonable to assume that the underlying rationale of subparagraph (e) is “to condemn measures intended to destroy a new generation, such action being connected with the destruction of a group that is to say with physical genocide”⁵⁷. Even if it is accepted that the act covered by subparagraph (e) constitutes “cultural” or “sociological” genocide, its meaning is *in concreto* of limited importance. *Primo*, as such it would be an exception to the rule regarding material genocide embodied in Article II of the Convention and, therefore, would be subject to restrictive interpretation. *Secundo*, the Applicant does not refer to “forcible transfer of children” as an act of genocide allegedly committed on its territory.

86. It follows that the difference between the act of killing members of the group and other acts constituting the *actus reus* of the crime of genocide is in the modalities rather than in the final effects. In that sense, the explanation given by the ICTR in the Akayesu case seems proper. It describes the act defined in subparagraph (c) of Article II of the Genocide Convention as “methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction”,⁵⁸ i.e., the so-called slow death.

87. There are two basic legal issues in the interpretation of the word “destruction”:

- (a) whether the destruction must take place in reality, i.e., be actual; and,
- (b) the scope of destruction.

⁵³Draft Code of Crimes against the Peace and Security of Mankind, United Nations GAOR, 51st Session, Supplement No. 10, United Nations doc. A/51/10 (1996), Article 17.

⁵⁴M. Treadwell, “Is Abortion Black Genocide?” *Family Planning Perspectives*, Vol. 4, No. 4/1986, p. 24.

⁵⁵A/C.6/242.

⁵⁶GAOR of the Third Session, Part I, Sixth Committee, 83rd meeting, p. 206.

⁵⁷*Study of the question of the prevention and punishment of the Crime of Genocide*, prepared by N. Ruhashyankiko, Special Rapporteur, (E/CN.4/Sub.2/415, p. 25.

⁵⁸ICTR, *Prosecutor v. Akayesu*, para. 505.

88. Regarding the actual nature of destruction, there is some degree of difference among the various acts enumerated in Article II of the Convention.

The act of “killing” implies actual destruction in terms of the proven result achieved. In that sense, the death of the victim is the essential element of the act of killing. Concerning this element, a vast and nearly uniform jurisprudence has been developed by both Tribunals, at least declaratively, in that, for example, in the *Krstić* case, the “missing” are treated as “dead”⁵⁹.

In contrast to killing, acts of serious bodily or mental harm, and acts of forcible transfer of children, do not imply actual destruction, but a corresponding result, expressed in grievous bodily or mental harm and transfer of children respectively, and leading to destruction. In other words, in these two acts, the required result has a causal connection, in which the effect is deferred, with destruction.

The infliction of destructive conditions of life and the imposition of measures to prevent births, however, do not require any proof of a result; they represent, themselves, the result. For the sake of balance, and of legal security, however, in respect of such acts the intent requirement is more stringent, since they, unlike the acts for which a specific result is required, must be undertaken “deliberately” and must be “calculated”, in the case of infliction of destructive conditions on the group, and must be “intended” to prevent births, in the case of the imposition of measures.

89. The intrinsic differences among the acts enumerated in Article II of the Convention in their relation to the destruction of the protected group as the ultimate *ratio leges* of the Convention require a particularly cautious approach in the determination of the *actus reus* of the crime of genocide.

In contrast to “killing”, all other acts constituting an *actus reus* of genocide, falling short of causing actual destruction, merely have the potential capacity to a greater or lesser extent, to destroy a protected group. Legally, this makes them more akin to an attempt to commit genocide. In reality, these acts, therefore, may be seen more as evidence of intent than as acts of genocide as such. Of course, from the standpoint of criminal policy, genocide may be characterized as any form of denial of a group’s right to survive; the 1948 Convention is indeed a Convention on the Prevention and Punishment of Genocide, but still it is a fact that the line between acts short of actual destruction and attempts to commit genocide may be invisible, especially at the decision-making time.

For the proper application of the Law on Genocide, as embodied in the Convention, acts of genocide, or more precisely the methods and means of execution of acts of genocide short of actual destruction, must be evaluated strictly, not only from the subjective but also from the objective standpoint. The last point of view concerns basically the capability of a particular action or actions to produce genocidal effects. In other words, the destructive capacity in terms of material destruction must be discernible in the action itself, apart from in tandem with the intention of the perpetrator.

3.1. Scope of destruction

90. As far as the required scope of destruction is concerned, two criteria emerged in the emerging case-law of the Tribunals.

⁵⁹Čelebići, Appeal Judgment, paras. 422-423; Blaškić Trial Judgment, para. 217; Kupreškić Trial Judgment, paras. 560-561; Kayishema Trial Judgment, para. 140; Akayesu Trial Judgment, para. 588; Krstić Trial Judgment, para. 485.

One implies the destruction of the group in terms of the sheer size of the group and its homogenous numerical composition, the so-called quantitative approach. As a rule, it is presented in the form of a “substantial” part, which means “a large majority of the group in question”⁶⁰.

The second criterion, however, contemplates the destruction of the elite or of the leadership of the group, which are considered to be of substantial importance for its existence. For this criterion, it is considered sufficient “if the destruction is related to a significant section of the group, such as its leadership”⁶¹.

Alternatively, the qualitative and quantitative scope of the destruction cannot possibly fit into the *genus proximus* of the crime of genocide; moreover, it conflicts with the logical considerations. It is not clear how two by nature diametrically opposite criteria may ensure the sound administration of justice in the specific case. A possible consequence of their combined application might merely be the relativization, due to the disintegration of the constitutive elements of the crime of genocide, of the protection offered by the Convention to the national, ethnic, religious or racial groups. The intention to destroy a group is divided, in the event of the application of both criteria, between the “intention to destroy a group en masse” and to the intention to destroy “a more limited number of persons selected for the impact that their disappearance would have upon the survival of the group . . .”⁶². Introducing the characterization of genocide, even when the intent to exterminate covers only a limited geographic area, particularly allows for subjective and arbitrary delimitations. It could be said that “this degree of indeterminacy places genocide on the outermost boundaries of the *nullem crimen sine lege* principle”⁶³.

In the choice between quantitative and qualitative criteria, it is difficult to find a reason for giving preference to the qualitative criterion.

First of all, the criterion of “leadership” is ambiguous and subjective. It is not clear whether it applies to the political, military or intellectual elite, or whether it has a generic meaning. It also introduces through the back door the consideration that the leaders of the group, regardless of the type of leadership, are subject to special, stronger protection than the other members of the group, in whole or in part, that they constitute, which is in fact a distinct subgroup. Moreover, this criterion has an element of the concealed promotion of the political group to the status of a protected object of the Convention – the subsequent division of the members of the group into elite and ordinary members in modern society has an anachronistic and discriminatory connotation flagrantly at odds with the ideas, which represent the bases of the rights and liberties of individuals and groups. Last but not least, comes understanding part of the group in terms of its leadership, of which there is no trace in the *travaux préparatoires* of the Convention.

Contrary to the so-called qualitative criterion, the quantitative criterion is characterized by objectivity, which derives from its very nature. According to the Law of Big Numbers, in its application, it includes, as a rule, the members of the group to which the qualitative criterion is applied as a parameter of the intent to destroy. It is also more appropriate to the spirit and letter of the Convention, which takes the group as such as the ultimate target or intended victim of the crime.

⁶⁰ICTY, *Prosecutor v. Jelišić*, Trial Judgment, p. 26, para. 82.

⁶¹ICTY, *Prosecutor v. Stakić*, Trial Judgment, p. 149, para. 525; ICTY, *Prosecutor v. Krstić*, Trial Judgment, para. 587.

⁶²ICTY, *Prosecutor v. Jelisić*, Trial Chamber, para. 82.

⁶³P. Akhavan, “Contributions of the International Criminal Tribunals for the Former Yugoslavia and Rwanda to the development of definitions of crimes against humanity and genocide”, *American Society of International Law Proceeding*, April 2000, p. 283.

3.2. The object of destruction

91. The *object of destruction* is a “national, ethnical, racial or religious group as such”. The qualification expresses the specific collective character of the crime. It lies within the common characteristics of the victims — belonging to national, ethnic, racial or religious group — as an exclusive quality by reason of which they are subjected to acts constituting *actus reus* of genocide. The genocide is directed against a number of individuals as a group or at them in their collective capacity and not *ad personam* as such (passive collectivity element). The International Law Commission expressed the idea by saying that:

“the prohibited [genocidal] act must be committed against an individual because of his membership in a particular group and as an incremental step in the overall objective of destroying the group . . . the intention must be to destroy the group ‘as such’, meaning as a separate and distinct entity, *and not merely some individuals because of their membership in a particular group*”⁶⁴.

The ICTY determines relevant protected groups as groups that “may be identified by means of the subjective criterion of the stigmatisation of the group, notably by the perpetrators of the crime”⁶⁵.

92. The subjective criterion in the determination of a “national, ethnic, racial or religious” group is one thing, subjectivism is another.

The subjective criterion as an alternative to, or in combination with the objective one, is the legal criterion established both in international and municipal law as regards national, ethnic, religious or racial groups on the basis of the fact that they roughly correspond “to what was recognized, before the Second World War, as ‘national minorities’”⁶⁶. This includes, as Schabas rightly notes, “races” and “religious groups”⁶⁷ whose meaning has not provoked significant controversies. In relation to ethnic groups, it is the expression, which, in contemporary usage, seems to assume the meaning of a synthetic expression for “national minorities”, “races” and “religious” groups⁶⁸. It was applied by the ICTR in the Akayesu case. The Tribunal found that the Hutus and the Tutsis were “considered both by the authorities and *themselves as belonging to two distinct ethnic groups*”⁶⁹.

In contrast, the “stigmatisation of the group” by the perpetrators of the crime⁷⁰ appears to introduce subjectivism into the determination of the protected group rather than properly applying the subjective criterion as such. Its cumulative effects might be characterized as the nullification of the legal substance of the crime of genocide in one of its constitutive elements — the element of protected groups — which changes from a “national, ethnic, racial or religious” group as such into an abstract, human collectivity determined subjectively. Thus the difference between the groups protected under the Genocide Convention and those, such as political groups, which are not considered protected groups, may be lost. As a consequence, the configuration of international

⁶⁴United Nations GAOR, 51st Session, Suppl. 10, United Nations doc. A/51/10/1996, at 88; emphasis added.

⁶⁵ICTY, *Prosecutor v. Brdjanin*, Trial Judgment, para. 683; ICTY, *Prosecutor v. Krstić*, Trial Judgment, para. 557; ICTY, *Prosecutor v. Jelisić*, Trial Judgment, para. 70.

⁶⁶ICTY, *Prosecutor v. Krstić*, Trial Judgment, p. 195, para. 556; ICTR, *Prosecutor v. Rutaganda*, Trial Judgment, para. 56; ICTR, *Prosecutor v. Kajelijeli*, Trial Judgment, para. 811.

⁶⁷W. Schabas, *Genocide in International Law*, p. 113.

⁶⁸W. Schabas, *idem*.

⁶⁹ICTR, *Prosecutor v. Akayesu*, para. 122, footnote 56; emphasis added

⁷⁰ICTY, *Prosecutor v. Nikolić*, Rule 61, Decision, para. 27; ICTY, *Prosecutor v. Krstić*, Trial Judgment, para. 557; ICTY, *Prosecutor v. Jelisić*, Trial Judgment, para. 70; emphasis added.

crimes is being eroded because the physical acts by which war crimes, crimes against humanity and genocide are committed, are basically the same. Moreover, personal stigmatization as the criterion for the determining the protected group may nullify the objective existence of the “national, ethnic, racial or religious” group and introduce into the context of the protected groups, those groups that are excluded from the scope of the Genocide Convention.

93. The cumulative negative effects of the stigmatization of the perpetrator as the relevant criterion derive from the incongruity, and even open conflict, of this criterion with the generally accepted legal principles and cogent legal considerations.

Primo, the constitutive elements of genocide are a matter of objective law. *As objective law*, even regardless of its legal force, *they cannot*, save in the event of an explicit provision to the contrary, *be determined by the perpetrator of a crime*. It is completely unknown in the province of international criminal law as well as comparative criminal law for the perpetrator of an offence to be in a position to determine the scope of the offence committed. The scope of an offence is a matter of a norm of objective law and not of the perpetrator’s personal value-judgment. The determination of a “national, ethnic, racial or religious” group, as an element of the crime of genocide in the perpetrator’s personal value-judgment is in irreconcilable conflict with the very essence of legal reasoning in the province of criminal law. The qualification “as such” in the formulation of Article II of the Convention affirms that the “national, ethnic, racial or religious” group is a matter of objective reality and not of the personal value-judgment of the perpetrator.

Secundo, by a judicial finding based on the perpetrator’s personal value-judgment, any court of law, in the event of discrepancy between the subjective criterion of stigmatisation and the “national, ethnic, racial or religious group” as such, creates a virtual judicial reality at variance with the objective reality contemplated in Article II of the Convention. Moreover, its possible consequence may be identification as a targeted group — a group that even does not exist in reality⁷¹.

Tertio, the subjective criterion alone may not be sufficient to determine the protected group under the Genocide Convention, for the acts enumerated in subparagraphs (a) to (e) of the Convention must be directed against “members of the group”⁷².

Quatro, in the case of several perpetrators the criterion of stigmatisation can easily lead to uneven, substantively different, identifications of the relevant groups.

Quinto, the perpetrator’s perception of the “national, ethnic, racial or religious” group, if inappropriate, creates *error in personam* which *per se* disqualifies genocidal intent. It is a general principle of criminal law that any person who, while committing a criminal offence, is unaware that a circumstance is part of the legal elements, does not act intentionally. Criminal liability for negligent action, however, remains unaffected.

Sixto, it confers excessive discretionary powers on the Court. Considering the nature of the perpetrator’s perception, it might be said that they go as far as *discretio generalis*.

94. The weak points of the subjective criterion are also demonstrated by the jurisprudence of both Tribunals. In the Brdjanin case the ICTY stated *expressis verbis* that “[t]he *correct determination* of the relevant protected group has to be made on a case-by-case basis, *consulting*

⁷¹W. Schabas, *op. cit.*, p. 110.

⁷²*Ibid.*, p. 111.

both objective and subjective criteria”⁷³. For instance, the ICTR stated, as the objective criterion for the identification of Tutsis, the identification cards indicating ethnic belonging (identification by others) or the subjective criterion of the members of targeted groups (self-identification)⁷⁴. Consequently, it is of paramount importance that the subjective criterion, if applied at all in its “stigmatization” form, must be conceived within the framework of objective legal standards derived from the letter and spirit of the relevant provisions of the Genocide Convention respecting standards established in the corpus of national minorities law.

95. It appears that the criterion of stigmatisation not only cannot be the sole criterion; it cannot even be the primary criterion for the determination of the “national, ethnic, racial or religious” group within the framework of the Genocide Convention. *It is rather a personal perpetrator’s confirmation of the existence of the protected group, and not its creation.* It is interesting to note that in the case of war crimes and crimes against humanity, the ICTY applied the objective criterion for the determination of protected groups⁷⁵.

Basically, the stigmatization of the group understood in that way is of evidential significance as one of the elements for inference of genocidal intent.

96. The “[n]ational, ethnic, racial or religious” group, at least in cases where the State in whose territory the alleged crime of genocide occurred, recognizes the existence of these groups as distinct and separate entities, should be determined on the basis of the criteria established by the internal law of that State. Or on the basis of international treaties in force to which the relevant State is a Party. In a way, one is dealing here with a *renvoi* or reference of the matter to the internal law of Bosnia and Herzegovina. Both because international law has no generally accepted precise criteria for the determination of “national, ethnic, racial or religious” groups and because of the fact that the case concerned actually invoked entities from the internal law and society of Bosnia and Herzegovina. Or, if not a strict *renvoi* to internal law, then at least cognizance of groups that exist under the internal law of Bosnia and Herzegovina and the criteria on the basis of which they have been determined. One more reason for this is the fact that the ICTY itself, when it saw fit, relied on domestic law in determining the elements of international crimes.

The application of the subjective criterion suffers from objective limitations deriving primarily from the basic meaning of the “national, ethnic, racial or religious” group as such. Although the Convention does not offer an explicit definition of these groups, it appears that the basic meaning of the expressions used is relatively clear. The attributes “national”, “ethnic”, “religious”, “racial”, although lacking a precise, universally accepted determination, possess recognizable, generic substance by themselves, elaborated to a certain extent also in other international conventions (*exempli causa*, the International Convention for Elimination of All Forms of Racial Discrimination). The lack of specific distinguishing marks — *differentia specifica* — between these four groups, which may consequently result in their overlapping, cannot have a substantive negative effect on the proper application of the Genocide Convention, for their general generic recognizability clearly shows which groups are not protected under the Convention, or “carries” within itself the exclusion effect, thus preventing the creation of new protected groups outside the frame of “national, ethnic, racial or religious” groups. This is clearly demonstrated just in Bosnia and Herzegovina.

⁷³ICTY, *Prosecutor v. Brdjanin*, Trial Judgment, para. 684; Thus also the ICTR in the Semanza Trial Judgment, para. 317; ICTR, *Prosecutor v. Kajelijeli*, Trial Judgment, para. 811; emphasis added.

⁷⁴ICTR, *Prosecutor v. Kayishema*, Trial Judgment, paras. 90, 98.

⁷⁵Jones, pp. 69, 94.

97. The Applicant asserts that in the present case protected groups under the Genocide Convention are — the “Bosnian people” (Application, MBH, 2.2.1.2.), “mainly Muslim” (*idem.*, 2.2.2.1), “Muslim population” (*idem.*, 2.2.5.13), “national, ethnical or religious groups (within, but not limited to, the territory of the Republic of Bosnia and Herzegovina), including in particular the Muslim population” (*idem.*, Submission under (1), non-Serb population (RBH, 7); the “People and State of Bosnia and Herzegovina” (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Request for the Indication of Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 4, para. 2; “People of Bosnia and Herzegovina”, *Further requests for the Indication of Provisional Measures, Order of 13 September 1993, (ibid.)* p. 332.

As the protective object of genocide, “national, ethnical, religious or racial” groups must be precisely determined. The determination requirement is of overall significance both in the procedural and in the substantive sense.

The expression “non-Serbs” in the ethnic, national or religious environment of Bosnia and Herzegovina has a rather broad and vague meaning, incapable of being incorporated into the frame of “national, ethnical, religious or racial” group as defined by the Genocide Convention. As a general expression encompassing different groups, it runs counter to the essential requirement for the protected group to constitute a separate and distinct entity. Besides Muslims and Croats, the expression necessarily comprises other groups. Not only Yugoslavs, Jews and Roma, but also Montenegrins who were represented in the ethnic and national make-up of Bosnia and Herzegovina as well. As Montenegrins are the leading ethnic community in Montenegro, a former federal unit of the Respondent, it follows that the expression “non-Serb” implies that the Respondent is also charged with alleged auto-genocide. Moreover, the expression includes Serbs in BiH, the relatively largest number of whom declared themselves as Yugoslavs.

The expression “Bosnian people” is based on individuals’ citizenship link with the State of Bosnia and Herzegovina as the objective criterion for the determination of the “national group”. However, the term “Bosnians” does not exist in terms of the “national, ethnic, racial or religious” group, because it reflects the notion of a “national group” in the “political-legal” sense⁷⁶, inapplicable to the rights of States such as Bosnia and Herzegovina which make a distinction between the notions of “nationality” and “citizenship”. In that regard, the characterization “Bosnian people” nullifies the existence of different ethnic, national and religious groups in Bosnia and Herzegovina and as such might be characterized as a discriminatory one. The same applies *mutatis mutandis* to the “Bosnian population”.

The formulation “mainly Bosnian Muslims”, whether conceived as a “people” or “population” is closest to the notion of “national, ethnic, racial or religious” group in terms of the Genocide Convention although it does not correspond *in toto* to the strict requirements of the Convention’s formulation of “a national, ethnic, racial or religious group *as such*” (emphasis added). The term “as such” clearly indicates that the destruction of a group as a distinct and separate entity is the object of genocide. The plain and natural meaning of the formulation “mainly Bosnian” is that the object of the alleged genocide was not Bosnian Muslims as such, as a distinct and separate entity. Furthermore, it means that acts committed against individuals were not directed at them as the personification of a relevant group, in their collective capacity, which is the true, intrinsic, characteristic of genocide. Short of that condition, the criminal intent cannot be characterized as genocidal, in the normative milieu of the law on genocide, as *ius strictum*.

It appears that none of the determinations of the protected group given by the Applicant meets the requirements embodied in the formula “national, ethnic, racial or religious group as such” at least in the proceedings before the International Court of Justice characterized, *inter alia*,

⁷⁶N. Ruhashyankiko, Special Rapporteur, doc. I/CN.4, Sub. 2/416, 4 July 1978, *op. cit.*, paras. 56-61.

by the fundamental principle of *non ultra petita*. As the Court stated in the Asylum Interpretation case:

“One must bear in mind the principle that it is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions” (*I.C.J. Reports 1950*, pp. 395, 402).

In addition, it should be noted that the Applicant, in its submissions in the Memorial, subsumes under protected groups “national, ethnical or religious groups within, *but not limited to the territory of Bosnia and Herzegovina* . . . (Memorial, Part 7, Submission under (1)). In its final submission the Applicant requested the Court to adjudge and declare that Serbia and Montenegro

“has violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide by intentionally destroying *in part the non-Serb national, ethnical or religious group within, but not limited to*, the territory of Bosnia and Herzegovina, *including in particular* the Muslim population”. (Agent Softic, CR 2006/37, p. 59, para. 1).

98. As regards its procedural significance, the Application, as stated in Article 38, paragraph 2, “shall . . . specify the precise nature of the claim”. The determination of the group protected is, in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, the relevant part of the claim as a whole.

In the substantive sense, the protection of the “national, ethnic, racial or religious” group is *ratio legis* of the Convention. An improper determination of the group protected may have far-reaching consequences in the proceedings before the Court. In contrast to the criminal court, this Court, in the performance of its judicial function, is subject, *inter alia*, also to the fundamental principle of *non ultra petitem*. Accordingly, the Court, not being in a position to substitute itself for the party, in the adjudication of the matter is bound by the determination of the protected group given by the Applicant (*P.C.I.J., Series A, No. 7, P. 35; Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, pp. 262-263, paras. 29-30; *Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974*, pp. 466-467, paras. 30-31).

The intent to destroy a group “as such” means the intent to destroy the group as a separate and distinct entity. It follows from the fact that the act of genocide constitutes not just an attack on an individual, but also an attack on the group with which the individual is identified.

The group in terms of a separate and distinct entity may, as a matter of principle, be determined either in a positive or a negative manner.

The jurisprudence of the ICTY is generally against the so-called negative criteria. The negative definition of the group, based on the exclusion formula, has inherent limits in its application. In principle, it is suitable for determining the protected group in terms of a separate and distinct entity in bi-ethnic or, under certain conditions, in tri-ethnic communities, although the question remains open as to whether the negative definition as such is the proper form for the legal determination of matters which belong to *ius strictum* or rather simply a descriptive one. *In multi-ethnic communities consisting of more than three national, ethnic or religious groups, the negative definition is totally incapable of properly determining the protected group under the Convention*. The exclusion principle as the operative principle of the negative definition is clearly powerless to determine the protected group as a distinct and separate group.

4. “As such”

99. The words “as such” are, regarding a “national, ethnic, racial or religious” group in terms of the Genocide Convention — a qualification of a characterization. They establish another aspect of the requirement of intent — that the intent to destroy be directed at the group as a protected group⁷⁷.

The group itself is the ultimate target or intended victim of the crime of genocide. But in order to achieve the overall objective of destroying the group, it is essential for the act to be committed against individuals constituting the group as the direct victims. The fact that the individuals constituting the group are intentionally subject to acts which constitute the *actus reus* of genocide is, however, not sufficient *per se* in the light of the qualification “as such”. As the Trial Chamber stated in the *Krstić* case: “Mere knowledge of the victims’ membership in a distinct group on the part of perpetrators is not sufficient to establish an intention to destroy the group as such”⁷⁸.

To qualify as genocidal, the intention must be aimed at individuals who constitute the group in their collective capacity, the capacity of members of the protected group whose destruction is an incremental step in the realization of the overall objective of destroying the group.

The qualification “as such” serves also as *differentia specifica* between discriminatory intent as suggestive of an element of the crime of persecution, which also may have, as its target for genocidal intent, a racial, excluding ethnic, group⁷⁹.

As a consequence, if prohibited acts under Article II of the Convention targeted a large portion of a protected group such acts would not constitute genocide if they were a part of a random campaign of violence or general pattern of war.

It may be assumed that such an understanding influenced this Court to find in the incidental procedure of provisional measures in the *Legality of Use of Force* cases, that “the bombings . . . indeed entail the element of intent, towards a group as such, required by the provision” (Art. II of the Genocide Convention; *I.C.J. Reports 1999*, p. 138, para. 40).

For “the continued bombing of the whole territory of the State, pollution of soil, air and water, destroying the economy of the country, contaminating the environment with depleted uranium” (*Legality of Use of Force (Yugoslavia v. Belgium) Verbatim Records*, 10 May 1999, Agent Etinski) could have been included in the creation of destructive living conditions at least as much as the forced displacement, encirclement of towns or starvation. The intent behind the acts undertaken was defined by general Wesley Clark as follows:

“We’re going to systematically and progressively attack, disrupt, degrade, devastate, and ultimately, unless President Milosevic complies with the demands of the international community, we’re going to destroy his forces and their facilities and support.”⁸⁰

or, as Michael Gordon in his article entitled “Crisis in the Balkans” quoted the words of General Short saying that he: “hopes that the distress of the Yugoslav public will undermine support for the

⁷⁷Lipman, “The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-five Years Later”, *Temp. Int. Law and Comp. Law Journal*, 7-9/1994, pp. 22-24, note 38.

⁷⁸ICTY, *Prosecutor v. Krstić*, Trial Judgment, para. 561.

⁷⁹ICTY, *Prosecutor v. Brdjanin*, Trial Judgment, para. 992; ICTY, *Prosecutor v. Krnojelac*, Appeal Judgment para. 185.

⁸⁰BBC News, http://news.bbc.co.uk/1/hi/special_report/1998/kosovo2/303641.stm.

authorities in Belgrade”. And he continued: “I think no power to your refrigerator, no gas in your stove, you can’t get to work because the bridge is down. . .”⁸¹.

100. The provision of Article II of the Convention according to which genocide means the destruction of a group “in whole or in part” is not without ambiguities. It is not quite clear whether the qualification “in part” applies to the scope of the intent, or to the scope of the act.

A grammatical interpretation would suggest that the qualification “in part” concerns both elements of the crime — objective and subjective. Such an interpretation, however, does not seem completely satisfactory, mainly because the discriminatory intent is the most general characteristic of the intent to destroy. Namely, it implies that the discriminatory intent is expressed doubly and unequally — on the one hand on the “national, ethnic, religious or racial” group as a distinct and separate entity, and, on the other hand, within that entity, treating some of its parts as if they were distinct and separate entities. In other words, if the qualification “in part” applied only to the scope of intent, it would mean, as the ultimate result of such an interpretation, that a part of a group is a distinct entity within the group to which it belongs.

The basic idea underlying the Genocide Convention is the protection of the right to existence of entire human groups, which *ex definitione* implies the protection of its parts as small groups as well.

The intent to destroy a part of a group is, in fact, *ratione personae* a limited, actual projection of the intent to destroy a group as a whole, dictated by an appropriate factual occasion, rather than by different attitudes toward parts of the protected group. As noted by Professor Pellet “l’élément subjectif du génocide, le *mens rea*, c’est-à-dire l’intention génocidaire, ne peut être que global” (CR 2006/10, p. 47, para. 21).

5. The meaning of ethnic cleansing under the Convention

101. In the case at hand the expression “ethnic cleansing” is used in a number of senses:

- (i) to mean an act constituting an *actus reus* of the crime of genocide;
- (ii) as a synonym or euphemism for the crime of genocide;
- (iii) as substratum or factual matrix for inferences of genocidal intent as the subjective element of the crime of genocide.

102. The situation is clear as to “ethnic cleansing” as an act constituting an *actus reus* of genocide.

Acts constituting the *actus reus* of genocide are listed *a limine* in Article II of the Convention. Article II of the Convention does not include “ethnic cleansing” as an act of genocide.

In the course of the drafting of the Genocide Convention, there were proposals, it is true, for before the acts subsumed under the heading ethnic cleansing as the sixth act of genocide. But these proposals were not accepted. Syria submitted an amendment⁸² to include the imposition of “measures intended to oblige members of a group to abandon their homes in order to escape the

⁸¹New York Times, 13 May 1999, “Crisis in the Balkans”, <http://select.nytimes.com/gst/abstract.html?res=F10711FE3A5B0C708DDDAC0894D1494D81>.

⁸²United Nations doc. A/C.6/234.

threat of subsequent ill-treatment” as an *actus reus* of genocide. The amendment was supported by the Yugoslav representative, Bartos, citing the Nazi displacement of the Slav population from a part of Yugoslavia as an action “tantamount to the deliberate destruction of a group”. He added that “genocide could be committed by forcing members of a group to abandon their homes”⁸³.

The amendment was, however, rejected by a clear majority of 29 votes against and five in favour with eight abstentions⁸⁴, the explanation having been offered that it deviated too much from the concept of genocide⁸⁵. Specifically discussing the contention that forced displacement practiced by the Nazis was tantamount to the deliberate destruction of a group, the Soviet representative Morozov emphasized that this was consequence, not genocide itself⁸⁶.

The exhaustive listing of the acts constituting the *actus reus* of genocide is the proper and cogent expression of the fundamental principle of criminal law, domestic or international: *nullum crimen, nulla poena sine lege*.

During the debate in the Sixth Committee, two amendments were submitted⁸⁷ proposing the adoption of an illustrative definition of acts of genocide. After discussion the amendments were rejected on the basis of the argument that an exhaustive enumeration was necessitated by the fundamental principle *nulla poena sine lege*. It was also observed that an advantage of the exhaustive enumeration method was that it allowed for the subsequent amendment of the Convention by the addition of further acts to the enumeration⁸⁸.

It should be noted that at no time during the drafting Statutes of the two *ad hoc* tribunals or the Rome Statute of the International Criminal Court was it even proposed to expand the list of acts or to deem the enumeration in Article II of the Convention to be non-exhaustive.

The intrinsic, highly complex structure of “ethnic cleansing” also militates against its inclusion among acts of genocide. It encompasses acts belonging to different genera of international crimes that accompany acts which, although violative of internationally recognized human rights, are not *per se* punishable (see para. 201).

103. The Applicant equates genocide and “ethnic cleansing”. *Exempli causa*, in its Reply, the Applicant contends that “the campaign of ethnic purification is indeed tantamount to a further campaign of European genocide in this century . . .” (Reply, para. 703, Ch. 5, Sec. 9 — The policy of ethnic cleansing). This is not an isolated perception. In the confirmation of the second indictment against Karadžić and Mladić — the Srebrenica indictment (IT-95-18-I) of 16 November 1995 — Judge Mahmud Riad says, although more cautiously, that “The policy of ethnic cleansing . . . presents in its ultimate manifestation, genocidal characteristics”⁸⁹.

The answer to the question as to whether genocide and “ethnic cleansing” can be equated is twofold: formal and substantive.

⁸³United Nations doc. A/C.6/SR.82.

⁸⁴*ibid.*

⁸⁵Maktos (United States of America), Fitzmaurice (United Kingdom), *idem*.

⁸⁶*idem*.

⁸⁷A/C.6/232/Rev. 1 and A/C.6/223 and Corr. 1.

⁸⁸N. Ruhashyankiko, Special Rapporteur, doc. I/CN.4, Sub. 2/416, 4 July 1978, *op. cit.*, p. 14.

⁸⁹For other views to that effect, see Schabas, “Ethnic Cleansing” and Genocide, EUMI, Vol. 3, 2003/4, pp. 111-112.

Although the term “ethnic cleansing” emerged immediately after the end of the Second World War as a “direct descendant of the expressions, in particular the term ‘Säuberung’ (cleansing)”⁹⁰, used by the Nazis in their “hygiene programmes”, it did not find a place in the Genocide Convention, not even as an act that would constitute an *actus reus* of genocide (see para. 2) or as a synonym for “genocide”.

Hence the use of “ethnic cleansing” instead of the term genocide implies, from a formal point of view, a redefinition of “genocide” as accepted in the Genocide Convention. Terms used in legislative acts, in particular conventions, such as the Genocide Convention, which lay down objective law with the force of *jus cogens* are not ordinary terms subject to redefinition on the basis of one-sided, subjective assessment or agreement being a part of the substantive law established by the Genocide Convention. Forming a legal whole with the substantive provisions of the Convention, the terminus technicus “genocide” can be changed or replaced by some other term only pursuant to legal procedure analogous to that for amending provisions of the Convention.

In the substantive sense, equating genocide and “ethnic cleansing” may be reasonable only where the latter overlaps *in toto* with the relevant constituent elements — both material and subjective — of the crime of genocide.

There is one common denominator in numerous definitions of “ethnic cleansing”; it is expressed in terms of the goal towards which the perpetrator aspires. In that regard, one can take as the basic definition the one given by the Special Rapporteur Mazowiecki in his Sixth Report. According to the Report, “ethnic cleansing may be equated with the systematic purge of the civilian population based on ethnic criteria, *with the view of forcing it to abandon the territories where it lives.*”⁹¹ The Commission of Experts in their first Interim Report of 10 February 1993 also adopted the same line of reasoning — “ethnic cleansing *means rendering an area ethnically homogeneous by using force and intimidation to remove persons of given groups from the area.*”⁹². Consequently, the *genus proximus* of “ethnic cleansing” should be sought in creating ethnically homogeneous areas by forcing the inhabitants to leave their homes.

The fundamental difference between genocide and ethnic cleansing lies precisely in this point. Whereas genocide involves the extermination of the protected groups, “ethnic cleansing”, if perceived as a crime *per se*, involves the expulsion of the population from a given, as a rule disputed, territory. It follows that, whereas the prohibition of genocide has as its object protecting the physical and biological existence of a group, the prohibition of “ethnic cleansing”, if perceived as a crime *per se*, would have as its object preventing the expulsion of groups.

It follows that, in terms of the subjective element, genocide is characterized by the intent to destroy the targeted group, whereas “ethnic cleansing” is characterized by the intent to expel or remove the civilian population or persons belonging to given groups.

A further difference lies in the acts by which genocide and “ethnic cleansing” are committed.

It appears that “ethnic cleansing” comprises a variety of acts substantially different by nature and effect.

The acts said to be acts of “ethnic cleansing” can, *grosso modo*, be divided into two main groups:

⁹⁰W. Schabas, “Ethnic Cleansing” and Genocide: Similarities and Distinctions, *European Journal of Minority Rights*, Vol. 3, 2003/4, p. 113.

⁹¹Sixth Mazowiecki Report II, point 283 at p. 44; emphasis added.

⁹²United Nations doc. S/25274.

- (a) The first group is made up of acts punishable under international law, such as massive deportation, detention and ill-treatment of civilian population, shooting at selected civilian targets, mass displacement of communities, rape, summary executions, deliberate attack on and blocking of humanitarian aid, deliberate shelling of civilian targets (especially water and transport facilities, means of communication), taking hostages and detention of civilians for exchange, attack on refugee camps.⁹³
- (b) The second group comprises acts which, while illegal, because they violate individuals' or groups' rights lying within the corpus of internationally recognized human rights, are not *per se* punishable under international criminal law.⁹⁴

It follows that acts effecting "ethnic cleansing" are different by nature insofar as "ethnic cleansing" takes on the traits of a plastic omnibus expression rather than those of a coherent, *lege artis* structured criminal offence. As such, "ethnic cleansing" seems to be a non-technical term "used by soldiers, journalists, sociologists, social scientists and others to describe a phenomenon which is not defined by law"⁹⁵. The actions by which "ethnic cleansing" is carried out would possess the latter characteristic only if there were a norm of international law prohibiting the ethnic re-composition (or a deliberate change in the ethnic composition) of a territory by any means — admissible or inadmissible — whatsoever (including, for instance, the granting of benefits or material advantages to certain persons or groups of persons to induce them to abandon the given territory).

In this context, it does not seem to be of decisive importance whether a "policy of ethnic cleansing" or a "campaign of ethnic cleansing" is in question. Because "ethnic cleansing" of a given territory is hardly possible without a plan and the coordinated action of a considerable number of people or state institutions. Perceived in the sense of a "policy" or "campaign", ethnic cleansing is, in fact, but the expression or evidence of intention to expel or remove groups from the territory. As a "policy" or "campaign", it is by nature systematic and widespread, because without these attributes "ethnic cleansing" is not feasible in practical terms. Simultaneous use of these expressions is, to begin with, a pleonasm (for example, "deliberate policy"), which neither adds to nor takes away from the substantive legal definition of "ethnic cleansing" as the removal or expulsion of a group from a given territory.

Although "ethnic cleansing" as such is not an *actus reus* of genocide under the Genocide Convention, let alone a synonym or euphemism for genocide, this does not mean that certain acts of "ethnic cleansing" are not capable of being means or methods of committing acts of genocide. The possibility of overlap between acts of genocide and acts of "ethnic cleansing" does not, however, establish a legal nexus between or the identity of these two notions. It is rather the expression of an inherent instrumental capability of individual physical acts to produce consequences that, in their concrete manifestations, fit into the genus of the crime of genocide or ethnic cleansing or some other crimes such as a crime against humanity or war crime.

Accordingly, what is involved here is the general instrumental capability of certain physical acts to produce consequences whose legal characterization within the configuration of punishable acts under international law must be determined on the basis of the specific characteristics — material and subjective — of international crimes taken individually.

⁹³First Mazowiecki Report I, p. 4, points 15, 16; Fourth Mazowiecki Report II, pp. 8-9, points 26, 29; Sixth Mazowiecki Report II, p. 5, point 13; Fifth Mazowiecki Report II, p. 4, point 15.

⁹⁴Exempli cause, administrative measures like removal of lawfully elected authorities — Third Mazowiecki Report I, p. 8, point 17 (a); dismissal from work — First Mazowiecki Report I, p. 3, point 12; constant identity checking of members of minority ethnic groups — Third Mazowiecki Report I, p. 8, point 17; disconnection of telephones — Fifth Mazowiecki Report II, p. 12, point 84; forced labour, very often including work on the front lines of armed conflict — Fifth Mazowiecki Report II, p. 12, point 84, etc.

⁹⁵K. Mulaj, *Ethnic Cleansing in the Former Yugoslavia in the 1990s: A Euphemism for Genocide?*, p. 696.

Indeed, the objective elements, for instance, of crimes against humanity and the crime of genocide

“may undoubtedly overlap to some extent . . . Killing members of an ethnic or religious group may as such fall under both categories. The same holds true for causing serious bodily or mental harm to members of a racial or religious group, or even for the other three classes of genocide. However, crimes against humanity have a broader scope, for they may encompass acts that do not come within the purview of genocide, for instance, imprisonment and torture”⁹⁶.

In other words, these two categories of crimes are “reciprocally special in that they form overlapping circles which nevertheless intersect only tangentially”⁹⁷.

Equally, the same objective elements can also be assimilated to specific war crimes⁹⁸.

Reasoning viewing any of the physical acts without regard to the totality of specific characteristics — material and subjective — of international crimes basically ignores the difference between the various kinds of international crimes, so that, *exempli causa*, “incendiary bombing of Hamburg, Dresden and Tokyo, and the atomic bombings of Hiroshima and Nagasaki may constitute both genocide and war crimes”, since “[t]he distinctive feature of pattern bombing is that the entire population of a city becomes the target of annihilatory assault.”⁹⁹

104. In principle, the fact that “ethnic cleansing” is carried out, *inter alia*, by physical acts which are also capable of resulting in the commission of the crime of genocide allows for “ethnic cleansing” as a substratum or factual matrix for inference of genocidal intent. This, however, does not signify that genocidal intent may automatically be deduced from proof that “ethnic cleansing” has occurred, since identical punishable physical acts cannot *per se* be equated with acts of a particular crime. *Exempli causa*, mass killings as physical acts may constitute the *actus reus* of crimes against humanity, genocide or war crimes. An act of a particular crime, a concrete physical act, acquires a legal characterization within the framework of the totality of the legal characteristics forming the body of the particular crime.

As regards a possible inference of genocidal intent from proven ethnic cleansing, it appears that “ethnic cleansing” as such cannot be the proper legal substratum for inference of genocidal intent. Owing to the difference between genocide and ethnic cleansing, only those acts of ethnic cleansing which are punishable and capable of producing genocidal effects can be taken as the components of a legal substratum for establishing the existence of genocidal intent by inference. In that regard there is no difference whatsoever between acts of ethnic cleansing and any other punishable acts possessing the instrumental capability to produce genocidal effects.

Inference as such implies *in concreto* the application of the proper standard of proof in relation to the constitutive elements of genocidal intent.

It appears that the ICTY jurisprudence also offers no basis for equating ethnic cleansing with genocide.

⁹⁶The Rome Statute of the ICC: A Commentary, I, 2002, ed. by A. Cassese, P. Gaeta, J. Jenes, p. 339.

⁹⁷*idem*.

⁹⁸Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), United Nations doc. S/35374 (1993), para. 56.

⁹⁹L. Kuper, Theoretical Issues Relating to Genocide: Uses and Abuses in Genocide: Conceptual and Historical Dimension, ed. by G.I. Andreopoulos, p. 34.

This conclusion is suggested by both an affirmative and a negative analysis of the jurisprudence of the Tribunal.

From the negative standpoint, out of roughly a dozen indictments for ethnic cleansing, the Tribunal convicted only General Krstić for complicity in genocide. The case is, however, specific and requires special treatment (see paras. 151-153).

The affirmative analysis of the ICTY jurisprudence in this sense follows, on the other hand, from the Tribunal's legal reasoning on the matter. For instance, in the *Jelisić* case, the Prosecution asserted that Jelisić was "an effective and enthusiastic participant *in the genocidal campaign*" against the group, which was significant "not only because it included all the dignitaries of the Bosnian Muslim community in the region, but also because of its size."¹⁰⁰ The Trial Chamber, however, although finding that "the murders committed by the accused are sufficient to establish the material element of the crime of genocide and it is *a priori* possible to conceive that the accused harboured that a plan to exterminate an entire group" (para. 100) the Trial Chamber adjudged that

"In conclusion, the acts of Goran Jelisić are not the physical expression of an affirmed resolve to destroy in whole or in part a group as such.

All things considered, the Prosecutor has not established beyond all reasonable doubt that genocide was committed in Brcko during the period covered by the indictment. Furthermore, the behaviour of the accused appears to indicate that, although he obviously singled out Muslims, he killed arbitrarily rather than with the clear intention to destroy a group. The Trial Chamber therefore concludes that it has not been proved beyond all reasonable doubt that the accused was motivated by the *dolus specialis* of the crime of genocide. The benefit of the doubt must always go to the accused and, consequently, Goran Jelisić must be found not guilty on this count."¹⁰¹

To the same effect, see Rule 61 Decision in the *Karadžić and Mladić* case. The Trial Chamber mandated in this case an investigation to establish whether "the pattern of conduct of which it is seised, namely 'ethnic cleansing', taken in its totality, reveals such a genocidal intent"¹⁰².

105. The District Court of Jerusalem, in its judgment in the Eichmann case, offered a subtle legal explanation of the difference between "ethnic cleansing" and genocide.

Considering the Nazis anti-Semitic policy, the Court found that until 1941 that policy, a combination of discriminatory laws and acts of violence, such as Kristal nacht of 9-10 November 1938, substantially corresponded to what is nowadays called "ethnic cleansing". Until that time, the Nazi policy towards Jews, although based on various forms of persecution did not qualify as a genocidal one, given that it allowed emigration from Germany, albeit under discriminatory conditions. From mid-1941 onwards, that policy, according to the Court's finding, took the form of the "Final Solution" in the sense of total extermination, connected with the cessation of emigration of Jews from territories under German control¹⁰³. Eichmann was acquitted of genocide for acts committed prior to August 1941, since there remained a doubt as to whether there was the intention to exterminate before that date. And the acts committed against Jews until

¹⁰⁰ICTY, *Prosecutor v. Jelisić*, Oral Ruling of 19 October 1999, p. 1.

¹⁰¹ICTY, *Prosecutor v. Jelisić*, Judgement, Trial Chamber, paras. 107-108.

¹⁰²Karadžić and Mladić case, Rule 61, Decision of 11 July 1996, para. 94.

¹⁰³A.G. *Israel v. Eichmann*, 1968, 36 ILR5 (District Court Jerusalem, para. 80).

that date were subsumed by the Court under the heading crimes against humanity¹⁰⁴ in contrast to the acts committed after that date, characterized by the Court as genocide.

II. Application of the Genocide Convention *in casu*

106. There are three basic, dubious points in the approach of the majority of the Court as regards substantive issues:

- (i) perception of the judicial task of the Court *in casu*, including the approach to the ICTY jurisprudence relevant for the subject of the dispute;
- (ii) interpretation of the duties of the Contracting Parties stemming from the Genocide Convention; and
- (iii) treatment of the issue of the responsibility of the Contracting Parties in the matter of genocide.

1. General remarks about possible approaches of the Court *in casu*

107. The judicial task of the Court *in casu* appears to be unique and unprecedented and, as such, burdened with challenges and difficulties.

Grosso modo the Court faced, at least theoretically, a couple of options.

Primo, to substitute itself for the criminal court and to judge whether genocide has been committed in Bosnia and Herzegovina, as is claimed by the Applicant. A basis for this option, which is peculiar and surprising, might perhaps, be sought in the findings of the Court in the Judgment on Preliminary Objections, in which the Court, ruling on the Respondent's Fifth Preliminary Objection, held that Article IX of the Convention "does not exclude any form of State responsibility" (*I.C.J. Reports 1996*, p. 616, para. 32). If, therefore, a State may be responsible for genocide in terms of criminal law, it is not clear why the Court, at the basis of such an interpretation of Article IX of the Convention, could not proceed as a criminal court. In other words, to ascertain, in proper proceedings, which, admittedly was not the case here, the legal requirements, both objective and subjective, of the crime of genocide analogous to a criminal court as regards individual perpetrations. In that scenario, therefore, the Court would limit itself to the issue of genocide allegedly committed by the Respondent, and would not enter *ab initio* in to an examination of whether the genocide was committed by natural persons — an issue within the competence of the ICTY.

Secundo, to engage in a decision on the Applicant's claim of so-called factual genocide, assessing the result of the actions committed during the civil war in Bosnia and Herzegovina, more or less irrespective of the legal requirements of the crime of genocide enshrined in Article II of the Genocide Convention on the basis, as the counsel of the Applicant stated, of "common knowledge . . . a terrible genocide . . . was perpetrated upon the non-Serb populations of Bosnia and Herzegovina" (Condorelli, CR 2006/9, p. 50, para. 2) or on the basis of inference not based on proper facts but on "common logic and intuition" (Franck, CR 2006/33, p. 41, para. 16).

Tertio, adhering to its position of civil court to adjudge upon the Applicant's claim, relying primarily, if not exclusively, on the jurisprudence of the ICTY as the only judicial findings on the question at issue at the international level. Since the judgments of the ICTY do not have binding force as regards the Court, it would mean that the Court would adopt a corresponding decision by

¹⁰⁴*idem.*, paras. 186-7, 244 (1-3).

treating findings of the ICTY, be they findings of facts or of law, as evidence which should be evaluated in the light of the legal requirements of the crime of genocide as defined by the Genocide Convention and relevant standards of the legal reasoning established by this Court on this matter.

In any event, it appears that the primary duty of the Court *in casu* lay in the strict observance of the Convention on Genocide as the relevant law, both for the sake of legality and for the preservation of the normative integrity of crimes and offences constituting international criminal law.

108. As regards the legality aspect, the competence of the Court in the case at hand is based on Article IX of the Genocide Convention, which envisages the solution of disputes between the contracting parties regarding the “interpretation, application or fulfilment of the present Convention . . .” (emphasis added). Therefore, not on the basis of the law on genocide *in abstracto*, but on the basis of the Convention itself. This fact is of the utmost importance, if we bear in mind that the law on genocide established by the Convention *tractu temporis* included certain modifications in terms of progressive development only in the core element of the crime — both *mens rea* and *actus reus*. There is no need to say that the progressive development, achieved particularly in the jurisprudence of two *ad hoc* tribunals, is irrelevant *in casu*, for in disputes such as this the Court’s task is to apply the law of genocide as established by the Convention.

Such an approach by the Court would also have a collateral positive effect in terms of the actual judicial policy of the World Court as the judicial guardian of international law, *in concreto* of its own area, international criminal law, for the preservation of the normative integrity of the international crimes and offences ascertained.

Indeed an overly broad interpretation of the constitutive elements of the crime of genocide, made with good, yet extralegal intentions in the doctrine¹⁰⁵ sometimes appears in the judicial reasoning of the two tribunals tending to amalgamate the crimes against humanity, and especially persecution and extermination, and war crimes, even common human rights offences into genocide as a single umbrella crime, solely on the basis of their repetition or accumulation. So, counsel of the Applicant, Professor Stern is of the opinion that “an accumulation of crimes against humanity can result in genocide . . .” (CR 2006/7, p. 42, para. 113). We thus come to the phenomenon of the trivialization of genocide¹⁰⁶.

The intrinsic meaning of the trivialization of genocide is expressed in the dilution of the proper legal substance of genocide established by the Convention, on the one hand, and the ruining of the configuration of international crimes and offences as autonomous legal notions on the other.

In that context, the idea underlying the concept is in conflict with one of the relevant rules of interpretation — the rule of effectiveness, according to which a provision or part of a provision cannot be considered as if it were superfluous and pointless¹⁰⁷ and also with the principle of normative economy (*économie des notions*) for any legal system within the confines of two concepts of rules that fulfil essentially the same function or bear divergently on any one situation¹⁰⁸.

¹⁰⁵*Exempli causa*, “Although it is important to acknowledge rape as a crime against humanity, classifying it as genocide is essential in order to prompt state intervention. States are generally not required to intervene when there are violations or crimes against humanity; when acts of genocide occur, however, customary international law imposes a duty to intervene” (MacKinnon, “Rape, Genocide and Human Rights”, 17 *Harvard Women’s Law Journal* 1994, p. 5).

¹⁰⁶W. Schabas, *Genocide in International Law*, p. 114.

¹⁰⁷ICTY, *Prosecutor v. Tadić*, Appeal Judgement, para. 284.

¹⁰⁸*Idem.*, Separate Opinion of Judge Abi-Saab, p. 2.

109. The majority of the Court has, however, taken the course that is both *parum et nimium*.

It is *parum* as regards the approach towards the ICTY jurisprudence relevant for the determination of the crime of genocide, both in normative and in legal terms.

The approach of the majority basically comes down to the treatment of the said part of the ICTY jurisprudence as a matter that is not subject to judicial evaluation by the Court, at least not in a substantive sense. As a consequence, the relevant parts of the Court's Judgment, and in particular Part VII, entitled "Responsibility of the Respondent for Srebrenica", are in fact a general verification of the relevant part of the ICTY jurisprudence.

It appears, however, that the interests of the sound administration of justice and even the substantive legality of the proceedings, before the highest international court declared itself competent to deal with accusations of the crime of genocide, implied a judicial evaluation of the ICTY findings, perceived as a proper evidence of the relevant matter, and the standards of legal reasoning applied to the ICTY, both as regards the applicable law and the conclusions reached.

The law applied by the ICTY as regards the crime of genocide cannot be considered equivalent to the law of genocide established by the Convention. In this regard, the jurisprudence of the ICTY can be said to be a progressive development of the law of genocide enshrined in the Convention, rather than its actual application. Article 4 of the ICTY Statute is but a provision of the Statute as a unilateral act of one of the main political organs of the United Nations that is, by its wording, reciprocal to Article II of the Convention. In view of the fact that it does not contain any *renvoi* to the Genocide Convention, the provision cannot change its nature simply by reproducing the text of Article II of the Convention. Consequently, interpretations of Article 4 of the Statute on the basis of the *travaux préparatoires* of the Convention, on which the ICTY amply draws, are essentially misleading. Both in terms of the actual approach used and of substance, considering that the rules of treaty interpretation and interpretation of unilateral acts do not necessarily coincide.

As stated *expressis verbis* by the Trial Chamber, the Judgment in the *Krstić* case is based on the "customary international law at the time the events in Srebrenica took place"¹⁰⁹. That fact has two consequences.

On the one hand, the characterization of genocide in customary international law as perceived by the ICTY and in the Genocide Convention is not necessarily identical. On the other, the basis of the jurisdiction necessarily affects the applicable law. Where jurisdiction is based on a compromissory clause in a treaty, the Court is empowered only to apply a specific treaty.

The legal reasoning of the ICTY is far from consistent. For instance, as regards the determination of genocidal intent by inference, the reasoning in the *Stakić* case, on the one hand, and in the *Krstić* case on the other, seems to be in sharp contradiction¹¹⁰.

110. The approach of the majority is at the same time also *nimium* in terms of the superfluous but is not solidly based.

Refraining from an autonomous judicial evaluation of the jurisprudence of the ICTY, the majority, by a highly risky operation, also rendered more complicated the interpretations of the duty to prevent genocide in legal terms, including the "duty not to commit genocide" by a State. That operation, bearing in mind the substance of the provisions of the Convention, could not have

¹⁰⁹ICTY, *Prosecutor v. Krstić*, Trial Judgment, para. 541.

¹¹⁰ICTY, *Prosecutor v. Stakić*, Trial Judgment, para. 553; ICTY, *Prosecutor v. Brdjanin*, Trial Judgment, paras. 981, 978-979; ICTY, *Prosecutor v. Krstić*, Trial Judgment, paras. 594-595.

been carried out without to some extent touching upon the legislative or quasi-legislative arena. Even more surprising is the fact that such an interpretation, in certain vital respects, conflicts with common sense and cogent legal considerations.

Hence, it would come as no surprise if this interpretation were to appear as *argumentum ad casum*.

2. Interpretation of the duties of the Contracting Parties on the basis of the Genocide Convention

111. In contrast to the standard understanding that the Genocide Convention imposes upon the Contracting Parties as primary duties — the duty to enact necessary legislation to give effect to the substantive provisions of the Convention (Art. V) and the duty of instituting legal proceedings for punishable acts provided by Article III against persons charged in a competent tribunal of a State in the territory of which the act was committed (Art. VI), the majority view focused on the duty to prevent as a complex duty comprising “a duty to act” and “a duty not to commit” genocide as some sort of mother duty or an umbrella duty in the context of the Convention.

Sedes materiae the view could be summarized as follows:

Prevention is perceived as “the duty to prevent in the context of the Genocide Convention” (para. 409). As regards its nature, the duty 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” (para. 410). A State’s duty to prevent is accompanied by the “corresponding duty to act” in the sense of the duty which

“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. From that moment onwards, if the State has available to it the means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring genocidal intent, it is under a duty to make such use of these means as the circumstances permit” para. 411).

Furthermore, the undertaking to prevent includes the “obligation not to commit genocide and the other acts enumerated in Article III” considering that “Under Article I a Contracting State is bound to prevent such [genocidal] acts being committed by its organs and persons whose acts are attributable to it” (para. 152).

112. Two issues are raised as regards the view taken by the majority:

- (a) what is the proper meaning of “prevention” in criminal law and in terms of the Genocide Convention;
- (b) the nature and scope of the “corresponding duty to act”; and
- (c) does there exist a duty of a State not to commit genocide?

2.1. The duty to prevent

113. As regards the issue of prevention, the understanding of the majority appears to be highly innovative, transcending not only in degree but in kind the standards generally accepted in the *genus* of laws regulating criminal matters.

In criminal law, either national or international, the prevention of a crime in terms of the plain and natural meaning of the word “prevention”— an action keeping something from happening or rendering impossible an anticipated genocidal design — is alien to the very nature of criminal law. The main function of the Genocide Convention, or indeed of any other criminal law norm, lies in protection rather than in prevention. Criminal law, and the Genocide Convention is its part, comes *post factum*, when the object of protection has already been damaged, destroyed or threatened. The protective function of the Genocide Convention does not have the character of direct, actual protection as suggested by the majority perception of prevention. It is of indirect nature having in mind that it is expressed in deterrence. The protective function of the Genocide Convention cannot be equalized with prevention of genocide in terms of legal duty because equalization would mean, *inter alia*, a doubt in the need for the existence of the Genocide Convention as it stands now. Moreover, the determination of the duty to prevent genocide as a distinct legal duty which runs counter to the principle *impossibilia nullum obligatio est* .

The duty to prevent genocide is, in fact, a social, moral, even metaphysical duty, being the goal of social defence action against genocide. Social defence against genocide is *ratione materiae* much broader than the effects of the Genocide Convention itself. It implies a totality of actions in the social, legal, economic, political and cultural spheres aimed at eliminating the real causes of genocidal pathology. It is materialized in the form of national criminal policies as well as the general policy of the competent United Nations organs, especially those referred to in Article VIII of the Convention. In that context it is correct to speak of a duty, either moral or social, to prevent genocide. However, that appears to be the criminological concept of the prevention of genocide in the well-known forms of primary, secondary and tertiary prevention.

114. The effects of the Convention as regards the prevention of genocide are manifested in general deterrence— in the sense of the general, normative meaning of the Convention as an international criminal law norm and its application. The preventive effects of the Convention itself are also emphasized in the *travaux* of the Convention. In the commentary by the Secretariat it was pointed out that a law established by the Convention “tends to deter and prevent actions by persons who might be tempted to commit a crime.”¹¹¹

The application of the Genocide Convention also produces effects in terms of special deterrence, *ratione personae* limited to the perpetrators of the crime leaving potential perpetrators outside of its scope. In that regard, it should be pointed out that the application of the provisions of the Genocide Convention or reciprocal provisions of national criminal legislations *ad casum* is not, *stricti iuris*, the prevention of genocide but its suppression.

115. The revention referred to in Article I of the Convention is the general principle underlying the operative provisions of the Convention rather than a distinct legal duty. In favour of this determination, as well as general reasons concerning the nature of criminal law protection (para. 30 above), there are also specific reasons, which concern the Convention itself.

The undertaking by the Contracting Parties to prevent genocide, stipulated in Article I *in fine*, should be read in connection with the subject and purpose of the Convention, and not in isolation.

The preamble of the Convention states, *inter alia*, that:

“The Contracting Parties

.....

¹¹¹United Nations doc. E/447, p. 45.

Being convinced that, in order to liberate mankind from such an odious scourge, *international co-operation is required* . . . Hereby agree as hereinafter provided”. (emphasis added).

“International cooperation” in the particular context can hardly mean anything else but the defence of the international community against genocide. The Genocide Convention is a proper legal expression and the ingredient of overall international cooperation in the struggle against the odious scourge of genocide.

The essential role of international co-operation in the area of the prevention of genocide is confirmed both in the text of the Convention and in the *travaux préparatoires*.

Article VIII of the Convention referring to the possibility of preventive action by the United Nations called upon by the Contracting Parties “is the only Article in the Convention . . . which deals with the prevention of that crime.”¹¹² As the Convention “creates no independent treaty body with responsibility for [its] implementation”, it appears that in the area of prevention, the only hint of a mandate is that accorded to the ‘competent organs of the United Nations’, pursuant to Article VIII”¹¹³.

In substantive terms, Article VIII merely expresses, normatively, the essence of the *travaux préparatoires* in that regard.

In the Commentary by the Secretariat it is stated, *inter alia*, that:

“if preventive action is to have the maximum chances of success, the Members of the United Nations must not remain passive or indifferent. The Convention for the punishment of crimes of genocide should, therefore, bind the States to do everything in their power *to support any action by the United Nations intended to prevent or stop these crimes.*”¹¹⁴

The proposal by the United States of America was similar:

“The High Contracting Parties . . . agree to concert their actions as such Members *to assure that the United Nations takes such action as may be appropriate under the Charter for the prevention and suppression of genocide*”¹¹⁵.

The position of the USSR might be summarized as follows:

“Any act of genocide was always a threat to international peace and security and as such should be dealt with under Chapters VI and VII of the Charter . . . *Chapters VI and VII of the Charter provided means for the prevention and punishment of genocide, means far more concrete and effective than anything possible in the sphere of international jurisdiction* . . .”¹¹⁶.

¹¹²N. Ruhashyankiko, *op. cit.*, para. 304, p. 79; *Revised and updated report on the question of the prevention and punishment of the crime of genocide*, prepared by Mr. B. Whitaker, doc. E/CN.4/Sub. 2/1985/6 (2 July 1985), para. 66, p. 36.

¹¹³W. Schabas, *Genocide in International Law*, 2000, p. 448.

¹¹⁴United Nations doc. E/447, pp. 45-46.

¹¹⁵Basic Principles of a Convention on Genocide, United Nations doc. E/AC.25/7; emphasis added.

¹¹⁶United Nations doc. A/C.6 SR.101; emphasis added.

The practice of the competent organs of the United Nations as regards the prevention of genocide developed within the framework of the rules provided in Article VIII of the Convention.¹¹⁷

116. The duty to prevent genocide in legal terms is one thing, and the legal duty to take preventive measures in that regard is another.

If the duty to prevent is defined in legal terms, then the bearer of the duty is in the position of guarantor, so that, by the very commission of genocide the bearer is held responsible. Preventive measures are, for that matter, different in nature.

They can be perceived in a broader or a narrower sense.

In a broader sense, they imply positive measures such as the creation of a social and cultural environment that *per se* excludes or reduces to a minimum the creation of genocidal pathology.

In a narrower sense, they can be reduced to acts which, although not constituting actions of commission and, as a rule, not being incriminated, facilitate or make possible the commission of genocide i.e., preparatory acts.

The Secretariat's Draft Convention on the Crime of Genocide contained incrimination of the following preparatory acts:

- “(a) studies and research for the purpose of developing the technique of genocide;
- (b) setting up installations, manufacturing, obtaining, possessing or supplying of articles or substances with the knowledge that they are intended for genocide; and
- (c) issuing instructions or orders, and distributing tasks with a view to committing genocide.”¹¹⁸

The proposal, however, was not accepted, probably following the prevailing practice of national criminal laws not to criminalize acts which are not, from the legal point of view, acts of perpetration, *actus reus*, of the criminal act of genocide. Hence, as noted by the learned author, “the concept of punishing acts preparatory to genocide seems to have been forgotten by both international and domestic lawmakers”, so there is nothing “to authorize criminal repression of acts preparatory to genocide until they reach the threshold of attempts”¹¹⁹.

But probably for the sake of balance the Convention has introduced the criminalization of acts, direct and public incitement to commit genocide or the attempt to commit genocide.

In contrast to the Genocide Convention, some international conventions contain a limited or extensive spectrum of preventive measures, either in a broader or narrower sense or combined. For instance, Article 2 of the International Convention on the Elimination of All Forms of Racial Discrimination (1965), Articles 3 and 4 of the Convention against Discrimination in Education (1960); Articles 1, 3 and 8 of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956); Articles 2 and 3 of the Discrimination (Employment and Occupation) Convention (1958);

¹¹⁷W. Schabas, *op. cit.*, pp. 453-479.

¹¹⁸United Nations doc. E/447, p. 29.

¹¹⁹W. Schabas, *Genocide in International Law*, 2000, pp. 490-491.

There is a substantial difference between the duty to prevent in legal terms on the one hand, and the preventive measures defined by the rules of a convention on the other. While breach of the legal duty to prevent entails the responsibility of the offender in terms of criminal law, the effect of a breach of the duty to undertake the preventive measures stipulated is equivalent to a treaty violation, except where it assumes the characteristics of a criminal offence, such as *exempli causa*, complicity or co-perpetratorship.

117. The majority view as regards the scope *ratione personae* of the supposed legal duty to prevent genocide appears to be highly problematic. It is based on drawing qualitative distinction between the effects of the expression “undertake to prevent” *in fine* of Article I on the one hand, and Article VIII of the Convention on the other. While the expression “undertake to prevent”, is perceived as imposing a “distinct” and “direct obligation [of the Contracting Parties] to prevent genocide” (paragraph 165), it sees the effects of Article VIII in “completing the system by supporting both prevention and suppression, *in this case at the political level rather than as a matter of legal responsibility*” (paragraph 159; emphasis added). In a word, the Convention imposes on the Contracting Parties the legal duty to prevent genocide and on the competent organs of the United Nations referred to in Article VIII of the Convention — a social or political duty to prevent genocide.

Such a duality of the duties is hard to reconcile with the nature of the Genocide Convention. The Convention enshrines rights and obligations of an *erga omnes* character (*I.C.J. Reports 1996*, para. 31), and belongs to *corpus iuris cogentis*. As such it represents a normative expression of substantive, fundamental interests of the international community as a whole, interests which transcend the interests of States taken individually. If genocide “shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations” (Resolution 96 (I) of the General Assembly, December 11th 1946; *ICJ Reports 1951*, p. 23; *ICJ Reports 1996*, p. 616, para. 31), it is unclear how the Contracting Parties and the competent organs of the United Nations, the only ones singled out in that regard in Article VIII of the Convention dealing specifically with the prevention issue, can be placed in a fundamentally different legal position as regards the prevention of genocide. *A fortiori*, bearing in mind that, as a rule of *jus cogens* it should be overriding and absolutely binding in character.

As regards its peremptory nature, it is unclear how a duty that, by definition, has absolute obligatory force and, as such, knows no alternatives or conditions, can be designed in terms of a duty “to take all measures to prevent genocide which were within its power” (paragraph 430 of the Judgment) not being “under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide” (*ibid.*). Thus perceived, it is the duty to act in order to prevent genocide as far as possible rather than the duty to prevent. A duty to prevent that is contingent on a host of factual legal requirements can hardly claim the status of a peremptory norm.

Furthermore, does this imply — bearing in mind that, according to the majority view, the duty to prevent includes “the obligation not to commit genocide and other acts enumerated in Article III” of the Convention — that the organs of the United Nations are not bound in legal terms by the obligation “not to commit genocide and other punishable acts under the Convention”? Or, pursuing the logic underlying the majority view at step further if, *ex hypothesi*, the United Nations were to commit genocide, would that Organization, in contrast to a State, not be directly responsible?

But, apart from the aforementioned controversies involved, it seems clear that the very pronouncement that Article VIII completes “the system by supporting both prevention and suppression, in this case at the political level . . .” (paragraph 159) is, by itself, an argument in favour of the social and political nature of the duty to prevent.

118. Article VIII, as the only operative provision of the Convention concerning the prevention of genocide, has two legal meanings depending on the circumstances:

- (i) in case of suspected genocide on the territory of a State, whether or not a Member of the United Nations, the objection that the matter essentially falls within domestic jurisdiction in terms of Article 2 (7) of the Charter is not acceptable;
- (ii) as regards action by the competent organs of the United Nations, the parties are under an obligation to do everything in their power to give full effect to the actions of the United Nations.

119. Controversies in the majority view regarding the nature of prevention spread with remarkable ease.

If, *arguendo*, the prevention of genocide exists as a legal duty, then its perception as the “obligation . . . of conduct and not . . . of result” (paragraph 430), is *contradiction in adiecto*, because it transforms the duty to prevent into the duty to act with no prevention as a result. The plain and natural meaning of the term “prevention” lies in the action of keeping from happening or rendering impossible an anticipated genocidal design. Hence, the prevention should be *ex definitione* an action of result.

True, the majority perception of the duty to prevent is accompanied by the “corresponding duty to act” but this additional element is of dubious validity.

2.2. Corresponding duty to act

120. As regards its existence, the “corresponding duty to act” appears to be a pure creation of the so-called judicial legislature, having no trace whatsoever either in the text of the Convention or in its *travaux préparatoires*. As such it is a demonstration of a revision of the Convention rather than its proper interpretation.

In abstracto, the common denominator of two reasonable aims of the introduction of a “corresponding duty to act” is the nullification of the existence of the legal duty to prevent genocide in its real and genuine meaning.

One aim could be to confer active force or a sort of enforcement capacity on the duty to prevent. If, however, the prevention of genocide is a distinct legal duty, then any “corresponding duty to act” is superfluous. In that sense, the “corresponding duty to act” in fact deprives the supposed legal duty to prevent of its own normative content and turns it into a general legal principle.

The other aim would be to serve as a means of transforming the prevention in its original and accepted meaning into a relaxed and soft form of using the available means as circumstances permit. Thus, the duty to prevent would be shifted towards the duty to act with an uncertain outcome as regards prevention on the basis of a broad and undefined criterion more suited to civil than to criminal law.

121. The majority view has not escaped certain terminological problems either. If the duty to prevent also includes the duty not to commit genocide, then the term does not seem adequate, at least in relation to this part of the prevention, because it would in effect mean “self-prevention”. The term, however, appears to be devoid of any meaning in this particular context, as how one can self-prevent oneself in legal terms, acting simultaneously as Dr. Jekyll and Mr. Hyde?

If understood as a legal duty, the failure to prevent genocide would belong to the category of criminal offences through the omission to act. For the omission to act to have any meaning, it must have as its object a criminal offence defined in terms of failure to act. As the Model Penal Code expressly states, liability may be based on an omission when “the omission is expressly made sufficient by the law defining the offence” (paragraph 2.01(3)). The Genocide Convention, however, not only does not impose the duty to act *in concreto*, it is a matter of the creative interpretation of the majority — but it has not even included the omission to act in the exhaustive determination of punishable acts in its Article III.

It follows, consequently, that the judicial creation of the duty to prevent, including a “corresponding duty to act”, has been created *ad exemplum legis*, in the manner which preceded the constitution of the principle of legality as the common heritage of modern criminal law. For in order for the construction of the legal duty to prevent genocide to be able to serve as a basis for responsibility at all, it was necessary to have, albeit only tacit, judicial creation of the criminal offence of the failure to act. In that way, the majority view, if anything came dangerously close to the very heart of the principle *nulla crimen sine lege*.

The stringent requirements of legality immanent in criminal law do not tolerate creative, extra-textual interpretations, in particular those which are conducive to the creation of new criminal offences or the expansion of the essence of criminal offences or of any of the constitutive elements of criminal offences. Consequently, the interpretation of the Genocide Convention, as a criminal law treaty must, in principle, be more restrictive and related to the text of the Convention than the interpretation of other international treaties.

122. The duty “not to commit genocide” is, according to the majority view, included in the duty to prevent, perceived as a complex norm, as some kind of umbrella norm in the context of the Convention.

Leaving aside the perception of it as a complex norm from the standpoint of responsibility, the least one can say from the structural point of view is that it is not a coherent construction both in terms of legal technique and substance.

From the standpoint of legal technique it is unusual for the parts of the complex norm to be defined in different ways. While the duty “not to commit” has been defined in a negative way, the duty to prevent, as the mother norm, and the “corresponding duty to act”, have been defined in a positive way.

As regards its substance, the complex rule of prevention, as perceived by the majority, would consist of a variety of obligations. On the one hand, the obligations which concern prevention as such — the duty to prevent and the corresponding duty to act — on the other, the duty “not to commit genocide”, which concerns the very notion of genocide i.e., its perpetrator element.

The heterogeneous nature of the obligations constituting the duty to prevent signifies the artificial nature of the construction, tailored to the purpose. It becomes even more striking if observed in the context of the corresponding offences. As a breach of any duty in terms of criminal law constitutes a criminal offence, in the case at hand we would be dealing with an utterly unusual complex criminal offence (*infractio complexa; zusammengesetztes Verbrechen*) comprised of diverse offences. Thus, *exempli causa*, the perpetration of one act of genocide by a State would produce two consequences within the context of a single complex rule — a breach of the duty “not to commit genocide” would, at the same time, mean a breach of the duty to prevent or, more precisely, the duty to self-prevent, with the accompanying “corresponding duty to act”.

2.2.1. Application of the duty to prevent *in casu*

123. Even if, for the sake of argument, the existence of the legal duty to prevent is accepted, its application as regards the Respondent seems to be erroneous.

The arguments on the basis of which the majority concluded that the Respondent “violated its obligation to prevent the Srebrenica genocide . . .” are:

- (i) that the FRY “was in position of influence over the Bosnian Serbs . . . unlike that of any of the other States parties to the Genocide Convention . . .” (paragraph 434);
- (ii) that the FRY “could hardly have been unaware of the serious risk of it [genocide] once the VRS forces had decided to occupy the Srebrenica enclave” (paragraph 436);
- (iii) that the Respondent has not shown “that it took any initiative to prevent . . .”, the inference being “that the organs of the Respondent did nothing to prevent the Srebrenica massacres . . .” (paragraph 438).

It must be conceded that not one of the arguments put forward seems convincing.

As far as the first argument is concerned, it seems to be based on a certain confusion between notions of “influence” and “power” and their effects in the area of prevention of genocide.

“Influence” as such can hardly be a means of preventing genocide. As a form of indirect power, it could prompt self-prevention action by the alleged perpetrator, but *per se* is incapable of preventing genocide. This is particularly the case where the alleged genocidal intent appeared in an apparently spontaneous way during an operation which lasted a few days. As a means of triggering self-restraint or self-prevention, influence requires a considerably longer time than the duration of the operation in the course of which a massacre was committed.

The reasoning of the majority contemplates actions above the influence in terms of factual and legal power which the Respondent have had in relation to the given event.

The majority attributes critical importance to the notion of “due diligence” in assessing whether a Contracting Party acted in a proper way.

It appears, however, that the notion of due diligence is of little, if any, help *in concreto*. Due diligence, as demonstrated in the jurisprudence of the Court in *Corfu Channel* and *Hostages* cases, operates primarily as regards objects under sovereignty or effective control of the State to which lack of due diligence is imputed. As the Court found out, the Respondent did not exercise effective control over the given territory (Judgment, paragraph 387).

Moreover, measures which a State would have to take in order to avoid getting itself into a situation where it would be charged with lack of due diligence are difficult if not impossible to take while observing the limits permitted by international law as regards the territory of another State.

It is interesting to note that in the passage devoted to the responsibility of the State in paragraph 438 of the Judgment, for breaching the obligation to prevent, the general word “influence” is replaced by the word “power”. It is unclear whether this is a matter of linguistic inconsistency in the text or of an expression of *argumentum ad casum*.

The view that influence of itself constitutes an element of responsibility based on the omission to act is, perhaps, a borrowing from the law of command responsibility. As such, it is totally inapplicable in the area of prevention in the circumstances of the case at hand, bearing in mind, *inter alia*, that, as regards command responsibility, influence is exerted on a person over whom effective control is also exercised. Incidentally, it also demonstrates an uncritical

application of the analogy with criminal law. For with the exception of cases of *analogia legis*, i.e., one established by the legal rule itself, analogies with criminal law cannot be considered acceptable in the light of the principle of legality.

The second argument essentially concerns awareness of the general risk of genocide, considering that, as was concluded, “it [the Court] has not found that the information available to the Belgrade authorities indicated, as a matter of certainty, that genocide was imminent . . .” (paragraph 436). The tragic truth is, however, that in civil wars, particularly in those where the lines of military demarcation coincide to a high degree with ethnical or religious ones, the risk of ethnically motivated crimes, including genocide, is always high and serious. It is simply inherent in this kind of war.

Hence, in the construction termed prevention as a legal duty, awareness of the imminent danger of genocide seems more proper as the basis for action. Especially considering that the general risk of genocide, in light of its frequency in civil wars, in fact shifts the emphasis from preventive actions to the prevention of civil wars. And that is actually the primary prevention of situations leading or likely to lead to genocide, prevention in a criminological or social defence sense, and not prevention in terms of a legal duty.

And finally, the argument that the Respondent has not shown that “it took any initiative to prevent . . .” is not without difficulties as regards both facts and law.

As regards facts, it appears that the Respondent submitted evidence to the effect that Milošević instructed Karadžić that it would be a mistake to take Srebrenica, because there could well be a massacre due to prior events at Bratunac¹²⁰. In addition, as noted by Lord Owen:

“I had rarely heard Milošević so exasperated, but also so worried: he feared that if the Bosnian Serb troops entered Srebrenica there would be a bloodbath because of the tremendous bad blood that existed between two armies. The Bosnian Serbs held the young Muslim commander in Srebrenica, Naser Orić, responsible for a massacre near Bratunac in December 1992 in which many Serb civilians had been killed.”¹²¹

What President Milošević said to Lord Owen, in his capacity as Co-Chairman of the Steering Committee on the Former Yugoslavia, should be understood as a warning of a risk of a massacre in Srebrenica.

The warning, together with the instruction given to the President of Republika Srpska, Karadžić, considering that “every State may only act within the limits permitted by international law” (paragraph 430), seems the only thing the Respondent could do in the circumstances.

It should be noted that in the *Corfu* case Albania was declared responsible because it “neither notified the existence of the minefield, nor warned the British warships of the danger they were approaching” (*Corfu Channel, Merits, I.C.J. Reports 1949*, p. 22). If however, the failure to warn was a basis for holding Albania responsible for the event that occurred in its territory, then it is unclear how President Milošević’s warning does not represent fulfilment of the duty to act, as the warning was in fact the only possible preventive action as regards the territory of the other State. In addition, the application of the anticipated duty to prevent *in casu* requires an additional condition of causality i.e., that the alleged failure to act caused the massacre. The condition was neither proved nor implemented in the Judgment.

¹²⁰Dutch Srebrenica Report, Part II, Ch. 2, Section 5: footnoted as “Confidential Information 43”.

¹²¹Lord Owen, *Balkan Odyssey*, 1995, pp. 134-135.

124. Considering the primary responsibility of the competent organs of the United Nations in the area of genocide prevention, as enshrined in Article VIII of the Convention, the concern expressed by the European Union negotiator, Mr. Bildt, to President Milošević, to which the Judgment particularly draws attention (paragraph 436) hardly has any relevance *in casu* being a pure demonstration of humanitarian concern. As a possible warning by the representative of the organized international community which had a proper factual power and legal capacity to act, moreover, whose military units, on the basis of UN Security Council Resolution, were under a legal obligation to secure the safe-area of Srebrenica, addressed to the head of State which, according to the finding of the Court (paragraph 413 of the Judgment), had no effective control over given territory, having no, in addition, factual power comparable to that possessed by the organized international community, can hardly have an excusable character tacitly suggested by the wording of the formulation. (A qualitatively different conclusion would impose itself only if the authority of the competent international body were delegated to President Milošević on that occasion in due course to act on the territory of Bosnia and Herzegovina with the aim of preventing the massacre in Srebrenica).

125. The argument which was also put forward concerns the Orders of the Court of 8 April 1993, as well as of 13 September 1993, by which the Court indicated provisional measures to the effect that the “FRY was bound by very specific obligations by virtue of the two Orders indicating provisional measures” (paragraph 435).

Two observations can be made regarding the specific finding of the majority.

Primo, the binding character of the Order indicating provisional measures was articulated as late as the *LaGrand* case (*I.C.J. Reports 2001*, p. 503, para. 102). Until that case the position of the Order indicating provisional measures as regards its binding force could not have been considered settled. That fact is confirmed by the Order of 13 September 1993 itself. Paragraph 58 of the Order refers to its previous finding in the *Nicaragua* case that:

“When the Court finds that the situation requires that measures of this kind should be taken, it is incumbent on each party to take the Court’s indication seriously into account . . .” (*Judgment, I.C.J. Reports 1986*, p. 144, para. 289) and stated

“this is particularly so in such a situation as now exists in Bosnia-Herzegovina” (*I.C.J. Reports 1993*, p. 349, Further request for the Indication of Provisional Measures, Order of 13 September 1993).

Secundo, the argument is not a proper one, since the Orders strongly suggest that it is in fact about an interim judgment *par excellence*. The Orders open

“practically unlimited, ill-defined and vague requirements for the exercise of responsibility by the Respondent in fulfilment of the Order of the Court, and lay the Respondent open to unjustifiable blame for failing to comply with this interim measure.” (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Order of 8 April 1993, *I.C.J. Reports 1993*, Declaration of Judge Tarrasov, p. 26).

What is even more striking is that the measures were indicated in the proceedings phase allowing the Court “to entertain a provisional and merely *prima facie* idea of the case” (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Provisional Measures, Order of 14 April 1992, *I.C.J. Reports 1992*, p. 33). The narrow line between such provisional measures and the subject-matter of the case placed the Court in a position of making an estoppel in terms of the alleged facts presented by a party.

It is also difficult to go along with the finding that the said Orders were delivered “following numerous warnings issued by the political organs of the United Nations”. In fact, the Orders, dealing with the events during the civil war in Bosnia and Herzegovina, for the first time used the qualification “genocide”. The word “genocide” appeared in Security Council resolutions for the first time on 16 April 1993 when the Council took note of the Order of 8 April 1993¹²². Even the resolution creating the *ad hoc* Tribunal for the former Yugoslavia of 8 May 1993 did not refer to genocide.

The authority of the Court is obviously tremendous, but it would be appropriate for the Court to strike a balance between its authority and its responsibility in each particular case. Judicial caution and strict observance of its competencies in every phase of the dispute are conducive not only to the desirable but also necessary balance between judicial authority and judicial responsibility. Otherwise, there is a danger of the abuse of the judicial function.

2.3. The duty not to commit genocide

126. According to the majority view, the duty not to commit is an implied duty, “necessarily imp[li]e[d]” by the obligation to prevent. (paragraph 166).

The reasoning behind this view is that

“That obligation [to prevent] requires the States parties, *inter alia*, to employ the means at their disposal . . . to prevent persons or groups not directly under their authority from committing an act of genocide or any of the other acts mentioned in Article III. It would be paradoxical if States were thus under an obligation to prevent, so far as within their power, commission of genocide by persons over whom they have a certain influence, but were not forbidden to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law.” (*ibid.*).

The antecedent question in that regard is whether the duty of a Contracting Party to the Convention, of a criminal law nature, can be imposed by implication?

The answer is if anything negative rather than positive. The interpretation according to which the duty not to commit genocide is necessarily included within the undertaking to prevent, irrespective of the way in which, rightly or wrongly, prevention is perceived, is a demonstration of an impermissibly extensive interpretation of the Convention. Moreover, it runs counter to the very heart of the principle of legality in international criminal law. There is no reason for recourse to an extensive interpretation of the perpetrator of genocide. The provisions of the Convention are quite clear in that regard. The terms used in Articles II-VIII of the Convention are clear on the meaning of the provisions of the Convention (*lex dixit minus quam voluit*), which determine physical persons as the only perpetrators of genocide, so that there are no grounds whatsoever for having recourse to an extensive interpretation.

127. All the more so, as in the case *in concreto*, by extra-textual interpretation ignoring and nullifying the intention of the Contracting Parties clearly expressed in the text of the Convention and confirmed by the *travaux préparatoires*. In this way the interpretation well exceeds the permissible interpretative framework.

The consequence of this would be the imposition of a new obligation upon the Contracting Parties in contradiction with the general principle of international law that the duty of a State

¹²²United Nations doc. S/Res/819 1993.

cannot be presumed but must be unequivocally established, stressed in particular in the area of international criminal law in the light of the strict requirement of *nulla crimen sine lege*.

It is rather about re-writing the Convention, by importing an extraneous duty alien to the intention of the Contracting Parties, than its interpretation properly speaking.

Reference to the object and purpose of the Convention, coupled with reliance on the principle of effectiveness, does not seem convincing. It is designed in an abstract manner, based merely on particular phrases “prevention of genocide”, detached from the Convention as a whole. (See, *Competence of the ILO to Regulate Agricultural Labour*, P.C.I.J. (1922), Series B, Nos. 2 and 3, p. 23). The principle of effectiveness does not seem to be properly interpreted in that regard either, or is not applicable. Because its effects are essentially negative and it is not *per se* sufficient as a basis for a proper interpretation of the purpose of the Convention.

128. The majority view is, it appears, based on a certain confusion between the commission of the crime, i.e., the position of the perpetrator of the crime of genocide and responsibility for its commission.

When it is a matter of States or other legal entities, the status of the perpetrator of a crime may be one thing and criminal responsibility for the crime another.

The obligation of a Contracting Party not to commit genocide is, in fact, a determination in negative terms that a State is a possible perpetrator of genocide.

This determination is strange to say the least. Because it does not take into account what is known as *genus proximus* of any crime, including the crime of genocide.

Any crime is essentially a physical act or omission accompanied by a guilty mind and as such cannot be committed by entities like States, having neither body capable of undertaking physical, corporal acts nor its own will. It is an axiomatic matter that also produces real consequences in the criminal law area.

That a State, like any other legal entity, can be held liable in terms of criminal law for crimes committed by physical persons, is another matter. The criminal responsibility of legal persons is, however, fictional in contrast to the real criminal responsibility of natural persons. It is established as a legal fiction (*fictio legalis*) in the form of a specific legal norm.

A modern offshoot of this legal fiction, developed as far back as canonic and mediaeval law under the influence of Bartolus, is municipal corporate criminal liability based either on the identification of acts of certain natural persons with corporate acts or imputation as a form of vicarious liability.

It seems that, for the majority view, corporate criminal responsibility has served as a basis for analogy. If so, this approach is completely erroneous. Analogy, as a form of interpretation, has only minor application in criminal law, even under the condition that it remain *intra legem* i.e., only if a new rule is not created, which is exactly the case *in concreto*.

But far more important is another aspect. Corporate criminal responsibility, as a legal fiction, is established in national criminal laws by a specific legal rule. Such a legal rule is not known to the Genocide Convention or to positive international law, either.

However, this does not mean that the criminal responsibility of States or international organizations will not in future have a place in positive international law. But the Court “as a court of law, cannot render judgment *sub specie legis ferendae*, or anticipate the law before the legislator has laid it down” (*Fisheries Jurisdiction (United Kingdom v. Iceland)*, Judgment, I.C.J. Reports

1974, pp. 23-24, para. 53; *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, Judgment, I.C.J. Reports 1974, p. 192, para. 45).

129. As regards the responsibility of a State for the commission of genocide, the majority view is not free from legal difficulties either. They are of two kinds.

Primo, if a State as a person is capable of committing genocide, then the *criminal responsibility* of the State as a perpetrator is a natural and inevitable consequence. The Judgment, however, speaks only of the “responsibility” or the “international responsibility” of a State in that regard, which is certainly not irrelevant in the context of the meaning of the expression “responsibility of a State”.

Secundo, the basis for the responsibility of a State for genocide committed is determined in an unclear and contradictory manner.

If, *arguendo*, a State is a potential perpetrator of genocide, then its criminal responsibility is original and genuine.

According to the majority, however, “if an organ of the State, or a person or group whose acts are legally attributable to the State, commits any of the acts proscribed by Article III of the Convention, the international responsibility of that State is incurred” (paragraph 179). The responsibility of a State is, consequently, based on acts of the organs of the State or a personality or group *which have committed* the prohibited acts listed in Article III of the Convention and which are *legally attributable to the State*. Attribution as a legal operation seems unnecessary if the responsibility of the State for genocide is original and genuine, as implied by the determination of the State as a possible perpetrator.

2.4. The duty to punish

130. Some elements of the reasoning of the majority as regards compliance with the duty to punish by the Respondent, are formulated in a manner which, with respect to the standards of judicial reasoning, coincides in too high a degree with the demands of some international political institutions and some States addressed to the Respondent. It acted, *in concreto*, as a principal judicial organ in the formal rather than the substantive sense¹²³.

That high degree of coincidence relating primarily to the findings of the Court with the political demands addressed to the Respondent is conspicuous in particular in paragraph 449 of the Judgment.

Instituting a proper proceeding against persons accused of genocide is one thing, but the duty to punish such persons is quite another. It is particularly striking that the majority passed in silence over this difference affecting the very substance of the fundamental principle of presumption of innocence.

Furthermore, the question is posed whether the Respondent “failed to punish” at all having in mind the assumed international obligations as regards persons indicted by the ICTY.

It is a matter of public knowledge that Presidents Izetbegović, Milošević and Tudjman, at the meeting held in Rome from 17-18 February 1996, convened by the then EU President, S. Agnelli, at which, in addition to the three presidents, also participated US Assistant Secretary of State

¹²³On the difference see, Shabtai Rosenne, *The Law and Practice of the International Court*, 1920-2005, I, p. 107.

R. Holbrooke, High Representative C. Bildt, IFOR Commander Admiral L. Smith, Commander of US forces General Joulman and others, undertook to:

“Persons other than those already indicted by the International Tribunal, may be arrested and detained for serious violations of international humanitarian law only pursuant to previously issued order, warrant or indictment that has been reviewed and deemed consistent with international legal standards by the International Tribunal. Procedures will be developed for expeditious decision by the Tribunal and will be effective immediately upon such action.”¹²⁴

Consequently, the Respondent was not in a legal position to sentence anyone for genocide so far, nor did the Applicant, either. In October 2004, Prosecutor Carla del Ponte completed scrutinizing the applications submitted in Bosnia and Herzegovina and, within framework of the completion strategy of the ICTY, handed to the Government of BiH to be prosecuted or in which criminal proceedings can be instituted.¹²⁵

To charge the Respondent with lack of cooperation with the ICTY on the basis of the fact that one of the indicted persons has not been arrested, and in the absence of credible evidence that he is on the Respondent’s territory, runs counter to the principle that negative facts are not subject to being proved in the judicial proceedings. In particular, if it is borne in mind that the Respondent, either by arresting or by handing over the indicted individuals who gave themselves up voluntarily, clearly demonstrated its attitude to the matter. I am of the opinion that a State that delivered to the ICTY in the described way 37 indicted individuals, including almost the complete political and military leadership, could hardly be accused of lack of cooperation in terms of a proper judicial reasoning.

A kind of formulations resembling those contained in the *communiqués* of international institutions, could be also found in a part of the *dispositif* relating to the particular question. It is stated therein, *inter alia*, that the Respondent shall immediately take effective steps in order “to transfer individuals accused of genocide and any of the other acts prescribed by Article III of the Convention”, although it is a matter of public knowledge that these persons have not been arrested.

In addition, there is the question as to whether the ICTY can be considered an “international penal tribunal” within the meaning of Article VI of the Convention.

The enthusiastic “definitely — yes” is accompanied by a not very convincing explanation:

“The notion of an “international penal tribunal” within the meaning of Article VI *must at least cover all international criminal courts* created after the adoption of the Convention . . . of potentially universal scope and competent to try the perpetrators of genocide or any of the other acts enumerated in Article III. *The nature of the legal instrument by which such a court is established is without importance in this respect.*” (paragraph 445; emphasis added).

Having no intention to concern ourselves with the issue substantively, we cannot help asking how it is possible that “[t]he nature of the legal instrument (is) . . . without importance” without a previous assessment of whether the Security Council resolution is a legal instrument *stricto sensu* or something else, or that “Article VI must at least cover all international criminal courts created . . .” without the qualification that the “creation” should be in accordance with international law.

¹²⁴Rome communiqué, Sec. 5 on “Cooperation on War Crimes and Respect for Human Rights, <http://www.barns-dle.demon.co.uk/bosnia/mostar.html>.

¹²⁵<http://www.un.org/icty/glance-e/index.htm>.

In fact, any interpretation conducive, directly or indirectly, to the legitimization or de-legitimization of the ICTY probably does not accord with the judicial caution dictated by the specific circumstances of the establishment of the ICTY on the one hand, and the contentious nature of the present proceedings on the other.

And, if the intention of the Court was to address the issue substantively in the sense of whether the ICTY is a legally established and competent international criminal court in the terms of Article VI of the Convention or is a judicial body based on selective and vindictive justice, then the Court should have evaluated all the relevant arguments *pro et contra* in order to arrive at the proper conclusion.

For the issue of the legality of the ICTY has even now not been solved in a judicially meritorious way. The only judicial pronouncement on the matter — that of the ICTY itself in the *Tadić* case¹²⁶ — can hardly be taken as meritorious in the light of the fundamental principle of *nemo iudex in causa sua*.

3. Responsibility issue

3.1. The Convention and the issue of responsibility

131. The wording “responsibility of a State for genocide or for any of the other acts enumerated in Article III” is abstract and broad in its vagueness, particularly in terms of the Convention on Criminal Law.

In international law the term “responsibility”¹²⁷ may, and is indeed, used *lato sensu* and *stricto sensu*.

Perceived *lato sensu*, responsibility takes several forms:

- (i) Responsibility in the ordinary sense, meaning that the author of an act bears its consequences. As an illustration one may mention the position of Judge Anzilotti in the *Polish Agrarian Reform* case (Interim Protection) when saying that “a government should bear the consequences of the wording of a document for which it is *responsible*”(PCIJ (1933), *Series A/B*, 58, p. 182);
- (ii) Moral or political responsibility. It implies that the author of an act has a moral or political obligation to repair prejudicial consequences that the act has produced to other persons. *Exempli causa*, the German — United States Mixed Claims Commission (1922) held that “Germany’s responsibility for all loss and damage suffered as a consequence of the war — (is) a *moral responsibility*” (Administrative Decision No. II (1923), para. 5, p. 15. Emphasis of the Commission; also, *Russian Indemnity* case (1912), 1 *H.C.R.*, p. 547).
- (iii) Responsibility in legal terms. This meaning could be taken as signifying responsibility *stricto sensu*. But “responsibility in legal terms” or “legal responsibility” is rather a general expression than precise qualification. It includes two ontologically different forms — civil and criminal responsibility that must be specified in each particular case.

As regards the expression “responsibility of a State for genocide” used in Article IX, it is unclear whether it relates to responsibility *lato sensu* or *stricto sensu*. *A fortiori*, if one has in mind

¹²⁶ *Decision on the Defence Motion on Jurisdiction*, 10 August 1995, paras. 1-40; *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, 2 October 1995, paras. 26-48.

¹²⁷ Bin Cheng, *op. cit.*, pp.

a significant difference between the English and the French versions of the text of Article IX being “equally authentic” under Article X of the Convention. While in the English version of the text of Article IX it is said, *inter alia*, “responsibility of a State for genocide”, in the French text the expression “responsabilité d’un Etat *en matière de génocide*” has been used (emphasis added). The latter expression is much closer to the *lato sensu* than to the *stricto sensu* use of the term “responsibility”.

In particular, if it is borne in mind that reference to State responsibility and jurisdiction of the International Court of Justice was made in order to strengthen the effectiveness of the Convention. For, it was considered that in time of peace it is virtually impossible to exercise any effective international or national jurisdiction over rulers or heads of State (Official Records of the General Assembly, Third Session, Part I, Sixth Committee, 103rd meeting, p. 430 and 104th meeting, pp. 436, 444).

Hence, the term “responsibility” may be understood also in the sense of “obligation”, so that Article IX would give the “International Court of Justice jurisdiction for disputes arising between States parties” about the “interpretation, application and fulfilment” of the various obligations that arise with respect to the specific obligations set out in the Convention, that is, prosecution, extradition and enactment of domestic legislation”.¹²⁸

132. The substantive provisions of the Convention established individual responsibility for genocide exclusively, either directly or indirectly.

A direct reference to individual criminal responsibility is made in Articles IV, V, VI and VII. The *travaux préparatoires*, especially those relating to Articles IV and VI (of particular significance for this particular issue) confirm the plain and natural meaning of the Articles referred to in that regard. In the discussions in the Sixth Committee on Article IV, the United Kingdom submitted an amendment¹²⁹ aimed at establishing State responsibility for genocide. The amendment submitted by Belgium¹³⁰ was along the same lines. The amendments were rejected for reasons summarized by the Special Rapporteur, Mr. Ruhashyankiko, as follows:

“international practice since the Second World War has constantly applied the principle of individual criminal responsibility for crimes of international law, including those of genocide”¹³¹.

An indirect way of expressing the same ideas is found in the provisions of Articles I, II and III. The notion of a “crime under international law”, contained in Article I of the Convention is related, in positive international law — apart from projects *de lege ferenda* — to actions or omissions of the individual exclusively. Articles II and III, dealing specifically with the legal determination of the crime of genocide and punishable acts under the Convention respectively, express, by their style and content, the understanding that a State, as an abstract legal personality without a physical body and its own genuine will, cannot be responsible in terms of criminal law (*societas delinquere non potest*).

It appears that none of the substantive provisions of the Convention provides for any form of responsibility in legal terms for genocide except the criminal responsibility of the individual.

¹²⁸ W. Schabas, *op.cit.*, p. 434.

¹²⁹United Nations doc. A/C.6/236 and Corr. 1.

¹³⁰United Nations doc. 6/SR95.

¹³¹Mr. N. Ruhashyankio, Special Rapporteur, *op. cit.*, P. 36, para 151. Also, the Draft Code of Offences against the Peace and Security of Mankind, Report of the ILC on the work of its thirty-six session, 7 May to 27 July 1984, Doc. A/39/10, YILC (1984), II, Part two, p. 11, para 32.

133. The majority view does not challenge the determination that the text of the Convention does not by itself establish the responsibility of a State. It is pointed out that, *inter alia*,

“It is true that the concepts used in paragraphs (b) to (e) of Article III . . . refer to well known categories of criminal law and, as such, appear particularly well adapted to the exercise of penal sanctions against individuals” (Judgment, paragraph 167).

The responsibility of a State for genocide is found, however, in Article IX of the Convention. It is effected by the duty of a Contracting Party “not to commit genocide” in the area of the rules of the responsibility of States as designed in the ILC Articles expressing present customary international law (paragraph 414), although the position of the ILC seems clear in that regard — the Genocide Convention did not envisage State crime or the criminal responsibility of States in its Article IX¹³².

Is Article IX capable of establishing the responsibility of a State for Genocide? The text of Article IX stipulates:

“Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for Genocide or any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.”

134. Article IX of the Convention is, by its nature, a standard compromissory clause. As such, its purpose is to determine the jurisdiction of the Court within the coordinates of the interpretation, application or fulfilment of the substantive provisions of the Convention. As Manley Hudson correctly concludes

“The article goes further, however, in ‘including’ among such disputes ‘those relating to the responsibility of a State for genocide or any of the other acts enumerated in Article III.’ As no other provision in the Convention deals expressly with State responsibility, it is difficult to see how a dispute concerning such responsibility can be *included* among disputes relating to the interpretation or application or fulfilment of the Convention. In view of the undertaking of the parties in Article I to prevent genocide, it is conceivable that a dispute as to state responsibility may be a dispute as to fulfilment of the Convention. Yet read as a whole, the Convention refers to the punishment of individuals only; the punishment of a State is not adumbrated in any way, and it is excluded from Article V by which the parties undertake to enact punitive legislation. Hence the ‘responsibility of a State’ referred to in Article IX is not criminal liability. [M.M. Whiteman, *Digest of International Law*, 1968, p. 857]” (*I.C.J. Reports 1996*).

Jurisdictional clauses are not capable of modifying or revising substantive law. The principle expressing cogent legal considerations is particularly valid as regards the *species* of conventions which the Genocide Convention belongs to.

The substantive provisions of the Convention belong to *corpus iuris cogentis* and, as a consequence, can be modified “only by a subsequent norm of general international law having the same character” (Art. 53 of the Convention on the Law of Treaties). It is obvious that the rule contained in Article IX is not a “norm of general international law having the same character” but

¹³²Report of the ILC on the work of its Fiftieth Session, 20 April-12 June 1998, 27 July-14 August 1998, United Nations doc. A/53/10 and corr. 1, para. 249.

in fact the rule of *ius dispositivum* from which the Contracting Parties can derogate on the basis of discretion. If Article IX could modify the legal situation established by the substantive provisions of the Convention, that would, in the optic of the dichotomy *jus cogens/ius dispositivum*, be tantamount to saying that at least some particular rules of *ius dispositivum* character possess the capacity to modify the established *jus cogens* regime. Furthermore, as a matter of practical consequences, it would follow that a Contracting Party which has made reservation in regard to Article IX could be relieved of responsibility that Article IX allegedly imports into the substantive provisions of the Convention.

135. If, *arguendo*, we hold that the drafters of the Convention, using the term “responsibility” in Article IX, had in mind responsibility in legal terms, then it may be taken as certain that they did not contemplate criminal responsibility of a State.

The Convention does not specifically provide for civil responsibility of a State for genocide. The text of the Convention, in its operative part, not only does not contain a specific provision in that regard, but the corresponding general qualifications, such as “civil responsibility” or indications as “reparation” or “compensation” and the like are also lacking. It is true that mention has been made of ‘civil responsibility’ in the *travaux préparatoires* of Article IX, but this fact has a limited meaning considering the confirmatory and supportive role of *travaux* in the interpretation of treaties.

Hence, it transpires that the Convention contemplates *sui generis* responsibility more close to responsibility *lato sensu* than *stricto sensu*. It is also supported both by the nature of international criminal law and Article VIII of the Convention as the only Article dealing with suppression and prevention of genocide at the international level. Having in mind that the crime of genocide, as contrary not only to moral law but also to the spirit and aims of the United Nations Charter, constitutes a threat to the international peace and security, the competent political organs of the United Nations, the Security Council in particular, have the obligation to act *proprio motu* in case of suspected genocide.

Consequently, it can be said that responsibility of a State for genocide is primarily of moral and political nature, as well as with respect to other international crimes such as apartheid or aggression, combined with punitive measures undertaken by the competent organs of the United Nations, as a form of collective reaction of decentralized inter-state society. Such a form of responsibility of a State for genocide, reminiscent partly of collective or corporate responsibility, results from the nature of the relatively unorganized, *de facto* character of the international community, on the one hand, and the embryonic phase in which international criminal law finds itself, on the other.

As a matter of principle with respect to the substantive law reasoning, such a perception of responsibility of a State for genocide does not preclude responsibility of a State in terms of civil responsibility. That responsibility, although not primary in relation to international crimes, has its *rationale* in the fact that the perpetration of a criminal offence also bears civil law consequences. Justifiable from the standpoint of substantive law, civil responsibility of State for genocide is highly doubtful from a jurisdictional point of view at least in a case when jurisdiction of the Court is based on Article IX of the Convention as its compromissory clause.

136. As regards the jurisdictional aspect of the matter, the question arises of the applicability of those rules in the light of the principle of *lex specialis derogat legi generali*.

Any treaty in force, serving as a basis of the jurisdiction of the Court, represents the applicable law *in casu* by and for itself. Being a *ius specialis*, any such treaty excludes the application of the rules of general international law. It is to be presumed that the parties to the

Convention were aware of the existing general rules on State responsibility and decided to treat the matter in the manner embodied in the Convention. Had they had a different intention, they would have referred, in accordance with the standard practice applied in international conventions, to the rules of general international law either in the form of incorporation or in the form of *renvoi*.

The principle of *ius specialis* is recognized as a general rule of State responsibility. Article 55 of the Articles on State Responsibility stipulates:

“These Articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law”¹³³.

In the case at hand, special rules of international rules are, most certainly, the substantive rules of the Genocide Convention.

The condition for the application of *ius specialis* is, of course, a conflict between the provisions having a special character and the rules of general international law. The conflict emerges in the event of any inconsistency or difference, either in positive or negative terms, between these two kinds of rules. And, *in concreto*, it does exist, because the Genocide Convention does not address issues of civil responsibility of a State for genocide.

Bearing that in mind, it appears, as pointed out by the Special Rapporteur in his First Report on State Responsibility, that “the parties to it did not undertake to have accepted the Court’s compulsory jurisdiction on this question”¹³⁴.

Only on the basis of the distinction between the responsibility of States taken *in absolute* and as regards the jurisdiction of the Court, can one find a *rationale* for the *dicta* of the Court, when it finds lack of jurisdiction to entertain the claims, according to which:

“[t]here is a fundamental distinction between the acceptance by a State of the Court’s jurisdiction and the compatibility of particular acts with international law . . . Whether or not States accept the jurisdiction of the Court, they remain in all cases responsible for acts attributable to them that violate the rights of other States” (*Fisheries Jurisdiction* case, paras. 55-56; *Aerial Incident of 10 August 1999 (Pakistan v. India)*, para. 51; *Legality of Use of Force* cases).

When, however, the Court comes to the conclusion that it is without jurisdiction to entertain the claims made as regards responsibility, it, as stated in the *Legality of Use of Force* Judgment, that the Court “can make no finding, nor any observation whatever, on the question . . . of any international responsibility incurred”.

137. As regards the substantive aspect of the matter, it is doubtful whether the general rules on State responsibility as it stands are objectively capable of dealing with issues of international crimes.

It is true that international delicts and international crimes possess certain similarities. Both share the characteristic of illegality. In that regard, both notions belong to the *genus* of illegal acts, acts which are in conflict with relevant rules of international law. They differ in other respects making up two distinct *species* of acts within the said *genus*.

¹³³Yearbook of the ILC, 2001, Vol. II, Part 2.

¹³⁴First Report on State Responsibility by Mr. James Crawford, Special Rapporteur, United Nations doc. A/CN.4/490/Add. 2, para. 43.

The general rules on State responsibility, as regards responsibility for the damage caused, have been created in the manner of *ius aequum*. Hence, civil responsibility, in contrast to criminal responsibility, can arise even *sine delicto*. It derives from the violation of the subjective law of the injured State.

Criminal responsibility, for its part, implies responsibility for the criminal offence committed, by which the values of the international community as a whole are protected, public interests expressed in the rules of objective law as such — treated as a *ius strictum*.

The difference in the legal nature between international delicts on the one hand, and international crimes on the other, gives rise to differences in sanctions. In the case of civil responsibility, the sanction essentially consists in restoring the situation that would have existed if the subjective right of the damaged State had not been violated. In contrast to this, the sanction in the case of international crimes, being essentially a legal damage to the objective legal order, consists in the punishment of the perpetrator.

As civil and criminal responsibility are ontologically different, criminal responsibility cannot be transposed into a civil one and vice versa. The attempts at transposition are conducive either to the penalization of civil responsibility or the depenalization of criminal law — two equally unsatisfactory outcomes. As regards genocide such an effort amounts either to a “civil genocide” tort deprived of substance within the context of Article II of the Convention or to little more than an excursion into the field of the criminal responsibility of a State which is non-existent in the primary rules. It seems, however, that the majority of the Court embarked precisely on that path. Articles 1 and 2 of the ILC Draft Articles on State Responsibility, signifying as they do a new approach to the notion of responsibility by moving the classical notions of fault and damage towards the absolute responsibility concept, *prima facie* provide fertile ground for such transposition. But it turns out that it is only an illusion because of the standard regarding the breach which has to be applied as a necessary condition for the existence of an internationally wrongful act attributable to a State. As stated in the commentary to Article 2:

“Whether there has been a breach of a rule may depend on the intention or knowledge of relevant State organs or agents and in that sense may be ‘subjective’. For example Article II of the Genocide Convention states that: ‘In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such . . .’ In other cases, the standard for breach of an obligation may be ‘objective’, in the sense that the advertence or otherwise of relevant State organs or agents may be irrelevant.”¹³⁵

The rules of responsibility, as secondary rules, provide the framework indicating the consequences of a breach, while the determination of the content of an obligation, including the standard for a breach, is reserved for the primary rules. As such, secondary rules cannot modify or derogate from primary rules, which *per se* deprives of substantive effects any attempt at the transposition of criminal law rules into the State responsibility complex.

III. The legal determination of the Srebrenica massacre

The tragic massacre in Srebrenica is the object of two ICTY Judgments in the Krstić and the Blagojević cases. In the legal determination of the Srebrenica massacre the Court relies on both judgments equally although the latter is appealable.

¹³⁵J. Crawford (ed.), *The ILC's Articles on State Responsibility, Introduction, Text and Commentaries*, 2003, pp. 81-82, para. 3.

1. The components of the genocidal intent

It appears that none of the components distinguishable within the genocidal intent was satisfied in the *Krstić* Judgment.

1.1. Level of intent

138. Both Chambers of the ICTY — the Trial Chamber as well as the Appeals Chamber — perceived, in the *Krstić* case, alleged genocidal intent in terms of “knowledge” or “awareness”.

For instance, the Trial Chamber found that “the Bosnian Serb forces *had to be aware* of the catastrophic impact that the disappearance of two or three generations of men would have on the survival”¹³⁶. Or,

“The Bosnian Serb forces *knew*, by the time they decided to kill all of the military aged men, that the combination of those killings with the forcible transfer of the women, children and elderly would inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica.”¹³⁷

For its part, the Appeals Chamber held “that the Bosnian Serb forces *were aware* of these consequences when they decided to systematically eliminate the captured Muslim men”¹³⁸, and, further:

“The finding that some members of the VRS Main Staff devised the killing of the male prisoners *with full knowledge of the detrimental consequences* it would have for the physical survival of the Bosnian Muslim community in Srebrenica further supports the Trial Chamber’s conclusion that the instigators of that operation *had the requisite genocidal intent*”¹³⁹.

In the *Blagojević* case, the Trial Chamber essentially divorced special intent from acts of genocide, thus destroying the organic unity of the subjective and objective element in the being of the crime of genocide. Having found that “a distinction should be made between the nature of the listed ‘acts’ (of genocide) and the ‘intent’ with which they are done in the sense that “while listed acts indeed must take a physical and biological form, the same is not required for the intent”¹⁴⁰, the Trial Chamber in effect excludes from acts relevant in that case the intent to destroy a protected group. For, “with the exceptions of the acts listed in Article 4(2) and (d), “the Statute itself does not require an intent to cause physical or biological destruction of the group in whole or in part”¹⁴¹.

139. However, “knowledge” or “awareness” is one thing, and “special intent” another. “Knowledge” or “awareness” as the passive, intellectual element of intent in fact constitute *dolus generalis*. In contrast, special intent means *dolus specialis*¹⁴², and such a meaning is made plain in the chapeau to Article 4 (2) of the ICTY Statute. While *dolus generalis* requires that the perpetrator “means to cause” certain consequences or is aware that it will occur in the ordinary

¹³⁶ICTY, *Prosecutor v. Krstić*, Trial Judgement, para. 595; emphasis added.

¹³⁷ICTY, *Prosecutor v. Krstić*, Trial Judgement, para. 595; emphasis added.

¹³⁸ICTY, *Prosecutor v. Krstić*, Appeals Judgement, para. 29; emphasis added.

¹³⁹*Idem.*; emphasis added.

¹⁴⁰ICTY, *Prosecutor v. Blagojević*, Trial Judgment, para. 659.

¹⁴¹*Ibidem.*

¹⁴²ICTY, *Prosecutor v. Jelisić*, Appeals Judgment, para. 51.

course of events (Article 30 (2 b) of the ICC Statute), *dolus specialis* requires that the perpetrator clearly intends the result or clearly seeks to produce the act charged. So the difference lies in the active volitional element which is overriding in the special intent as the subjective constructive element of the crime of genocide.

As regards the protective group, “[m]ere knowledge of the victims’ membership in a distinct group on the part of perpetrators is not sufficient to establish an intention to destroy the group as such”¹⁴³. Even if the perpetrators knew that executing the men would have a lasting impact, it does not necessarily mean that such knowledge formed the basis of the perpetrators’ intent, especially when considered in conjunction with conscious steps taken to preserve the rest of the community¹⁴⁴ relating to the transfer of women, children and the old.

1.2 Type of destruction

140. Destruction, as perceived by the ICTY in the *Krstić* and the *Blagojević* cases is a destruction in social terms rather than in physical or biological terms as legally relevant forms of destruction under the Genocide Convention.

In the *Krstić* case the Trial Chamber found, *inter alia*, that the destruction of a sizeable number of military aged men “would inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica”¹⁴⁵, since “their spouses are unable to remarry and, consequently, to have new children”¹⁴⁶. Such a conclusion, reflecting the idea of social destruction, seems highly doubtful from the legal point of view. Within the context described, the possible procreative implications, even under the assumption that the killings of men have been committed with the intent to produce such implications, they could hardly be qualified as genocidal. It seems obvious that such procreative implications, if they had taken place, could not have as direct cause the killings of men, but the inability of spouses of killed men “to remarry and . . . to have new children” due to “the patriarchal character of the Bosnian Muslim society in Srebrenica”¹⁴⁷. Such a construction is not appropriate for the so called objective imputation (*imputatio facti*), since it implies deliberate interference of the victim as well as of its decision making into the causal course (*Selbstverantwortung*). What is more, it represents a free decision of the victim itself.

The perception of destruction in social terms is even more emphasized in the *Blagojević* case. The Trial Chamber applied “a broader notion of the term “destroy”, encompassing also “acts which may fall short of causing death” (para. 662), an interpretation which does not fit in the understanding of destruction in terms of the Genocide Convention (see paras.). In that sense, the Trial Chamber finds support in the Judgment of the Federal Constitutional Court of Germany, which held *expressis verbis* that

“the statutory definition of genocide defends a supra-individual object of legal protection, i.e. social existence of the group (and that) the intent to destroy the group [. . .] extends beyond physical and biological extermination [. . .] The text of the law

¹⁴³ICTY, *Prosecutor v. Krstić*, Trial Judgement, para. 561.

¹⁴⁴K. Southwick, “Srebrenica as genocide? The Krstić decision and the language of the unspeakable”, *Yale Human Rights and Development Law Journal* 2005, p. 7.

¹⁴⁵ICTY, *Prosecutor v. Krstić*, Trial Judgment, para. 595.

¹⁴⁶ICTY, *Prosecutor v. Krstić*, Appeals Judgment, para. 28.

¹⁴⁷ICTY, *Prosecutor v. Krstić*, Appeals Judgment, para. 28.

does not therefore compel the interpretation that the culprit's intent must be to exterminate physically at least a substantial number of members of the group"¹⁴⁸.

Thus perceived the term "destruction" "in the genocide definition can encompass the forcible transfer of population"¹⁴⁹.

1.3. Targeted group

141. In the *Krstić* case, the Prosecution referred, in its final arguments, to "Bosnian Muslims of Eastern Bosnia" as the targeted group. The Trial Chamber did not accept such a qualification finding that the protected group "within the meaning of Article 4 of the Statute, must be defined, in the present case, as the Bosnian Muslims"¹⁵⁰. In the correct exposition of the idea underlying the provision of Article II of the Genocide Convention, the Trial Chamber held that "[t]he Bosnian Muslims of Srebrenica or the Bosnian Muslims of Eastern Bosnia constitute a part of the protected group under Article 4 (of the Statute literally reproducing Article II of the Genocide Convention — M.K.)"¹⁵¹. It should be noted, however, that the Chambers also found that

"no national, ethnical, racial or religious characteristic makes it possible to differentiate the Bosnian Muslims residing in Srebrenica at the time of the 1995 offensive, from the other Bosnian Muslims. The only distinctive criterion would be their geographical location, *not a criterion contemplated by the Convention*."¹⁵²

The Trial Chamber determined Bosnian Muslims in general terms as the protected group without seeking national, ethnic, religious or racial basis for its qualification of a distinct and separate entity. For, the Trial Chamber interpreted *travaux préparatoires* of the Convention in the sense "that setting out such a list was designed more to describe a single phenomenon, roughly corresponding to what was recognized, before the Second World War, as 'national minorities', rather than to refer to several distinct prototypes of human groups"¹⁵³.

The interpretation should be understood in the sense that it is sufficient if it is a group recognizable in its generic substance and that it is not necessary to "differentiate each of the named groups on the basis of scientifically objective criteria . . . inconsistent with the object and purpose of the Convention"¹⁵⁴. The establishment of scientifically objective criteria is in itself desirable and can only contribute to sound administration of justice on the matter, in particular in relation to the element of genocidal intent. Moreover, in certain cases it is not an unattainable goal, as also demonstrated by the jurisprudence of the ICTR¹⁵⁵. The search for "scientifically objective criteria" could, however, run counter to the object and purpose of the Convention if it were to leave without protection a human group not distinguishable on the basis of national, ethnic, religious or racial criteria taken individually, but which, in a general and generic sense, satisfies the conditions to be taken as a distinct and separate group in the light of the Genocide Convention.

¹⁴⁸ ICTY, *Prosecutor v. Krstić*, Appeals Judgment, para. 28; ICTY, *Prosecutor v. Blagojević*, Trial Judgment, para 664.

¹⁴⁹ *Ibidem*, para 665.

¹⁵⁰ ICTY, *Prosecutor v. Krstić*, Trial Judgment, para. 560.

¹⁵¹ ICTY, *Prosecutor v. Krstić*, Trial Judgment, para. 560.

¹⁵² ICTY, *Prosecutor v. Krstić*, Trial Judgement, para. 559; emphasis added.

¹⁵³ ICTY, *Prosecutor v. Krstić*, Trial Judgement, para. 556.

¹⁵⁴ *Idem*.

¹⁵⁵ ICTR, *Prosecutor v. Akayesu*, Trial Judgement, paras. 510-516.

1.4. In whole or in part

142. The word “part” in the frame of Article II of the Convention does not mean any part of the protected group, but a qualified part. If a part of a group were to be understood as *any* part, “the intent underlying the *actus reus* and the *mens rea* specific to the crime of genocide would overlap, so that the genocidal intent, which constitutes the distinguishing feature of genocide, would disappear”¹⁵⁶.

Within “Bosnian Muslims” as the protected group under the Convention, the Trial Chamber identified the “Bosnian Muslims of Srebrenica” or the “Bosnian Muslims of Eastern Bosnia” as a part of the protected group¹⁵⁷.

Can the “Bosnian Muslims of Srebrenica or the Bosnian Muslims of Eastern Bosnia” be considered as a substantial part of Bosnian Muslims? As a preliminary remark it can be said that, contrary to the diction of the formulation, the expressions “Bosnian Muslims of Srebrenica” and “Bosnian Muslims of Eastern Bosnia” cannot be perceived as synonymous. Although the Muslim population in Srebrenica considerably increased in numbers in the relevant period, it was numerically far from the Muslim population of Eastern Bosnia, which numbered over 170,000.

Bearing in mind that in the critical period some 40,000 Bosnian Muslims were concentrated in Srebrenica, and if we would accept as proven that some 5,000-7,000 people were massacred, then, according to quantitative criterion, they could hardly represent a “substantial part” of the community. Besides, the Trial Chamber, in fact, qualified the targeted group in precise terms as “Bosnian Muslims in Srebrenica or Bosnian Muslims of Eastern Bosnia . . .”

According to the data from the last census in Bosnia and Herzegovina, in 1991, there were, in Eastern Bosnia, over 170,000 Muslims (26,316 in Gorazde, 18,699 in Vlasenica, 21,564 in Bratunac, 4,007 in Cajnice, 30,314 in Bijeljina, 48,208 in Zvornik, 13,438 in Visegrad, 4,140 in Bosanski Brod and 2,248 in Bosanski Samac).

As regards the question whether the “Bosnian Muslims” of Srebrenica or the “Bosnian Muslims of Eastern Bosnia” could be qualified, according to the quantitative criterion, as a substantial part of the Bosnian Muslims as the protected group under the Convention, one should have in mind that Muslim community in Bosnian community in Bosnia and Herzegovina, on the basis of data from the last census in Bosnia and Herzegovina in 1991, comprised over 1,900,000¹⁵⁸.

Regarding the qualitative criterion, the Judgment does not give any specific characterization of leadership who were massacred. It is not clear what leadership is in question — political, military, or intellectual.

It comes out from the dictum of the Trial Chamber, as well as its general reasoning, that the leadership, in fact, consists of the military aged men. For, the military leadership as well, as it is well known, headed by the commander of the division Naser Oric left the town a couple of days before its fall.

In Srebrenica, in the relevant period, there were about 40,000 Bosnian Muslims, including the members of Bosnia and Herzegovina Army. In view of quantitative criteria of the determination of a substantial part of a protected group, it seems obvious that, compared to more than a million and hundred thousand of Bosnian Muslims, the Bosnian Muslims located in Srebrenica could not have constituted its substantial part. The same conclusion imposes itself also

¹⁵⁶C. Tournaye, “Genocidal intent before the ICTY”, *International and Comparative Law Quarterly*, Vol. 52, April 2003, p. 459.

¹⁵⁷ICTY, *Prosecutor v. Krstić*, Trial Judgement, para. 560.

¹⁵⁸See www.FZS.ba/dem.Popis/Nac.StanB.htm.

in the case of the application of the alternative, qualitative criterion, because the political and intellectual elite of the Bosnian Muslims was located in Sarajevo.

143. The number of massacred military aged men in Srebrenica was never precisely determined. Moreover, that number might be significantly smaller than the number used by the Tribunal in the *Krstić* case.

Namely, the Tribunal equalized the missing and the killed military aged men in Srebrenica. Such an equalization does not look questionable only from the legal standard accepted in the jurisprudence of the Tribunal (para. 10 above) but also in the light of some indications not considered at all either by the ICTY or by the Court *exempli causa*. If one compares the Final voters' register of the municipality Srebrenica, prepared by the Organization for European Security and Cooperation (OSCD), and the List of identified bodies of the people buried in the Memorial Complex "Srebrenica — Potocare" (The "Srebrenica Potocare Memorial and Mezaje", Srebrenica, September 2003); Order of burials at JKP "City Cemeteries", Visoko¹⁵⁹ it comes out that over a third of names are present in both documents.

In addition, a number of soldiers of Bosnia and Herzegovina Army buried in the Memorial Complex "Srebrenica-Potocare" were, according to the Army's documents, killed in battles before the events in Srebrenica. For instance, the suggestion and justification of the Command of the 28th division of the Bosnia and Herzegovina Army¹⁶⁰.

144. However, in regard to the special intent, the Trial Chamber introduced another notion of "part" of the protected group based on geographical area criteria. The Trial Chamber held that:

"the intent to destroy a group, even if only in part, means seeking to destroy *a distinct part of the group* as opposed to an accumulation of isolated individuals within it. Although the perpetrators of genocide need not seek to destroy the entire group protected by the Convention, they must view the part of the group they wish to destroy as a distinct entity which must be eliminated as such . . . the *killing of all members of the part of a group* located within a small geographical area, although resulting in a lesser number of victims, would qualify as genocide if carried out with the intent to destroy the part of the group as such located in this small geographical area."¹⁶¹

Such an interpretation could be considered expansionist i.e., in relation to the determination made in Article II of the Genocide Convention, going far beyond its actual meaning. Moreover, it seems that the Trial Chamber intentionally went beyond the scope of the Convention because it held that "[t]he only distinctive criterion would be their geographical location, not a criterion contemplated by the Convention."¹⁶²

Reduction of the "targeted part" to the municipalities could have a distorting effect as held by the Trial Chamber in the *Brdjanin* case¹⁶³ primarily because the intention to destroy a group in part means seeking to destroy a "distinct part" of the group. It is, however, difficult to see how the Bosnian Muslims in Srebrenica constitute a distinct part as opposed to the Bosnian Muslims as a

¹⁵⁹www.gradska.groblja.co.br.srebrenica.html.

¹⁶⁰No. classified 04-16/95 of 30 March 1995, for the award of the order "Golden Lily", Addendum in the "Guide of the chronicle of the Bosnia and Herzegovina Army"; M. Ivanisevic, "Srebrenica, July 1995, Looking For the Truth in the Press".

¹⁶¹ICTY, *Prosecutor v. Krstić*, Trial Judgement, para. 590; emphasis added.

¹⁶²ICTY, *Prosecutor v. Krstić*, Trial Judgement, para. 559.

¹⁶³ICTY, *Prosecutor v. Brdjanin*, Trial Judgement, para. 966.

whole. In terms of the Convention, national, ethnic, or religious group is not an entity comprised of distinct parts, but a distinct entity by itself. The protection provided by the Convention to the group in part is, in fact, protection of the group in its entirety. In that regard, recognition of the part of a group on the basis of its geographical location as a distinct part of the group would diminish the effectiveness of the protection that the group enjoys as a whole. If, however, parts of a group differ in respect of the characteristics which constitute *genus proximus* of the group (for instance, the Sunnites and the Shiites among the Muslims), it is possible to speak about sub-groups which make up an aggregation in contrast to homogeneous groups to which Bosnian Muslims most certainly also belong.

In effect, such interpretation amounts to a transformation of a part of the group into a “sub-group”, being Bosnian Muslims in Srebrenica, on the basis of its alleged perception as a distinct entity by the perpetrators. Consequently, the intent to destroy the Bosnian Muslims in Srebrenica, as a “sub-group”, constitutes an intent to destroy a substantial part of the Bosnian Muslim group. Moreover, the Trial Chamber used the substantial criteria twice successively, with the result that: “The genocidal intent proved in the *Krstić* case is an intent to destroy *a substantial part of a substantial part*”¹⁶⁴, not, as required, a substantial part of the protected group. Namely, in addition to the qualification of the Bosnian Muslims in Srebrenica as a substantial part of the Bosnian Muslims as the protected group, the Trial Chamber held that the intent to destroy the military-aged men within the sub-group means an intent to destroy a substantial part of this sub-group, not only from quantitative viewpoint (Trial Judgement para. 594) but also from qualitative one (Trial Judgement para. 595). In fact the determination of a group “in part” as able-bodied, military aged Muslim men of Srebrenica is based on triple qualification — sex of victims (men only), their age (only or mostly military aged) and as to their geographical origin — Srebrenica and surrounding areas¹⁶⁵. The term itself therefore well exceeds the meaning of the “group in part” as contemplated by Article II of the Trial Chamber itself¹⁶⁶.

1.5. The inference of intent to destroy

145. The Trial Chamber drew the inference of genocidal intent from three different sources.

Primo, the “massacre by the VRS of all men of military age from that community”¹⁶⁷, which is determined as “a selective genocide”¹⁶⁸. Separately from the issue of the basis of the conclusion

¹⁶⁴Tournaye, *op. cit.*, p. 460; emphasis added.

¹⁶⁵G. Mettraux, *International Crimes and the ad hoc Tribunals*, 2005, p. 222.

¹⁶⁶ICTY, *Prosecutor v. Krstić*, Trial Judgement, para. 559.

¹⁶⁷ICTY, *Prosecutor v. Krstić*, Trial Judgment, para. 594; ICTY, *Prosecutor v. Krstić*, Appeals Judgement, para. 26.

¹⁶⁸ICTY, *Prosecutor v. Krstić*, Trial Judgment, para. 593.

according to which “all men of military age” were massacred¹⁶⁹ in order to analyze the concrete aspect of the intent to destroy, the question of whether the military aged men were massacred exclusively on national, ethnic, or religious grounds, is of decisive importance.

The answer to this question is given by the Judgment itself, which refers to “the conclusion that the extermination of those men was not driven *solely* by a military rationale”¹⁷⁰.

It appears that the Trial Chamber excluded the exclusively military rationale as motivation for the massacre on the basis of two circumstances:

- (a) that no distinction was made between the men of military status and civilians; and
- (b) that non-military-aged were among the massacred.

There are, however, arguments which can put those circumstances into perspective. As regards the differentiating between men of military status and civilians, the Srebrenica Report mentions, *inter alia*, the reference by the members of Dutchbat to “a conflict where the distinction between civilians and soldiers was often unclear”¹⁷¹. Such a situation may be understood if one bears in mind the particular concept of defence in the SFRY — the so-called all-people defence. In that concept, the armed forces consisted, besides the regular army, of the territorial defence which included not only military aged men who were not in the regular army, but persons who were outside that range. The Judgment does not give details of the non-military aged men massacred. As regards boys (Appeals Chamber, para. 27), that probably means the elder minors, in contrast to “children” who were displaced. The practice in many countries, however, includes them in conscripts for instance, in the United States of America at the age of 16. The Trial Chamber relied in its disqualification of the military rationale also on the evidence that “some of the victims were severely handicapped and, for that reason, unlikely to have been combatants”¹⁷². However, only one case of that kind is mentioned (*idem*).

Moreover, it seems that the Tribunal’s reasoning allows the interpretation that the persons who were found to be outside the range of military age as well, represent a simple, in contrast to a serious, military threat. Indeed, the Appeals Chamber found:

“Although the younger and older men *could still be capable of bearing arms*, the Trial Chamber was entitled to conclude that they did not present *a serious military threat* . . .” (Appeals Judgment, para. 277; emphasis added).

¹⁶⁹The conclusion is seemingly in contradiction with the established facts. For instance, the Trial Chamber found that the artillery attacks were launched against “the column of Bosnian Muslim men marching toward Tuzla” (Krstić, Trial Judgment, para. 546) and that during “the fatal week of 11 to 16 July, negotiations were undertaken between the Bosnian Muslim and Bosnian Serbs sides” and, as its result, (a group of 3,000) “a portion of the Bosnian Muslim column was eventually let through to government-held territory” (Krstić, Trial Judgment, para. 546). The final finding of the Trial Chamber is that “[o]verall, . . . as many as 8,000 to 10,000 men from the Muslim column of 10,000 to 15,000 men *were eventually reported as missing* (Krstić, Trial Judgment, para. 546; emphasis added). It should be mentioned that the overwhelming majority is still considered as “missing” although the law in force in Bosnia and Herzegovina envisaged the period of two years from the disappearance of the persons during wartime in order to proclaim them as dead. There are bases for reasonable doubt that all persons who are accounted as missing are dead. Ibrahim Mustafic, the Muslim representative in the Bosnian and Federal Parliaments, founder of the SDA in Srebrenica, suggested in the Bosnian Parliament the establishment of a special committee whose task would be to search for the survivors from the enclave, but without reaction in the Parliament. He says that the “present attitude of the authorities towards those people is enough to convince me that the authorities expected that the number of the survivors would be smaller; it seems that the number of the survivors is too high for their calculations. They made me say this: ‘It seems you are afraid of living Srebrenica inhabitants’” (Slobodna Bosna, Sarajevo, 14 July 1996).

¹⁷⁰Appeals Chamber, para. 26.

¹⁷¹Part 2, Ch. 8, Sec. 10, p. 4.

¹⁷²ICTY, *Prosecutor v. Krstić*, Trial Judgment, para. 75.

Secundo, procreative implications of killings of men of the Srebrenica Muslim community.

Tertio, the transfer of women, children and elderly people within their (Bosnian Serb) control to other areas of Muslim-controlled Bosnia. Although “forcible transfer does not constitute in and of itself a genocidal act”¹⁷³, it does not prevent a Trial Chamber from relying on it as evidence of the intentions of the VRS Main Staff.

146. It appears obvious that the intention to destroy Bosnian Muslims in Srebrenica as such is not the only reasonable inference which may be made from the evidence presented. In a case where an inference needs to be drawn it must be the only reasonable inference available in the evidence. *In concreto*, the genocidal intent of the perpetrator of the massacre is not just the only reasonable inference, but to judge by the basis of the Trial Chamber’s conclusion that “the extermination . . . was not driven solely by a military rationale”¹⁷⁴, and on the basis of the accompanying arguments, it could hardly satisfy even a more flexible standard of proof than proof beyond reasonable doubt. The contention “that the intent in killing the men and boys of military age was to eliminate the community as a whole . . . seems an enormous deduction to make on the basis that men and boys of military age were massacred”¹⁷⁵.

The approach of the Trial Chamber to the inference in the *Krstić* case, at odds with the jurisprudence of the Tribunal in the *Jelisić* case (Trial Judgment, paras. 107-108), and the *Brdjanin* case. In that last case, the Trial Chamber concluded, in a way which can be considered a textbook example of the demonstration of the intrinsic requirement of inference that

“The Bosnian Serb forces controlled the territory of the ARK, as shown by the fact that they were capable of mastering the logistic resources to forcibly displace tens of thousands of Bosnian Muslims . . . , resources which, had such been the intent, could have been employed in the destruction of all Bosnian Muslims . . . of the ARK”,

and, therefore,

“the victims of the underlying acts in Article 4(2) to (c) particularly in camps and detention facilities, were predominantly although not only, military aged men. This additional factor could militate further against the conclusion that the existence of genocidal intent is the only reasonable inference that may be drawn from the evidence”¹⁷⁶.

147. The Tribunal’s conclusion according to which the killings of men in Srebrenica bear serious procreative implications for the Bosnian Muslim community, since that destruction “would inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica”¹⁷⁷ through the fact that “their spouses are unable to remarry and, consequently, to have new children”¹⁷⁸ seems highly doubtful from the legal standpoint.

¹⁷³ICTY, *Prosecutor v. Krstić*, Appeals Judgment, para. 33.

¹⁷⁴ICTY, *Prosecutor v. Krstić*, Appeals Judgment, para. 26.

¹⁷⁵W. Schabas, “Was Genocide Committed in Bosnia and Herzegovina?”, 25 *Fordham International Law Journal* 2001, p. 46.

¹⁷⁶ICTY, *Prosecutor v. Brdjanin*, Trial Chamber, paras. 978-979.

¹⁷⁷ICTY, *Prosecutor v. Krstić*, Trial Judgment, para. 595.

¹⁷⁸ICTY, *Prosecutor v. Krstić*, Appeals Judgment, para. 28.

It might also be said that “the physical disappearance of the Bosnian Muslim population at Srebrenica”¹⁷⁹ by itself does not and can not mean physical destruction. This is independently of the legal arguments, that is, as witnessed by the undeniable fact of life — that the Bosnian Muslim community in Srebrenica reconstituted itself after the conclusion of the Dayton Agreement.

148. As regards the transfer of women, children and older persons, the evidence of the transfer can not serve as a proper basis for the inference of genocidal intent, since, according to the finding of the Tribunal itself, it “does not constitute in and of itself a genocidal act”¹⁸⁰. True, the Trial Chamber treated the transfer as supporting its finding that “some members of the VRS Main Staff intended to destroy the Bosnian Muslims in Srebrenica”¹⁸¹. On this point, the general approach of the Tribunal seems expansionist in comparison with the spirit and text of the Genocide Convention. The factual basis for the inference of genocidal intent should, in principle, consist of physical acts which are capable, objectively, of producing genocidal effects. The physical acts which do not have this capacity, such as, *exempli causa* the act of transfer, may only support the inference of genocidal intent already made or confirm its existence. Otherwise, the evidence of transfer should be implicitly treated as evidence of the destruction of the targeted parts of the protected group, which would in fact mean admitting — although by the back door — forcible transfer as an underlying act under Article I of the Genocide Convention. *In concreto*, and bearing in mind the killings of predominantly military aged men in Srebrenica, this does not permit the inference of genocidal intent as the only reasonable inference, relying on the evidence of transfer which transcends the permitted limits of supportive evidence tending to cure its evidential shortcomings for the purpose of inferring genocidal intent or, even, as a substitute for it.

Physical acts which *per se* are not capable of producing genocidal effects, even if motivated by the intent to destroy a protected group, legally represent no more than an improper attempt distinguishable from the attempt to commit genocide in terms of Article III of the Convention and which may be understood as “action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person’s intentions”¹⁸².

149. These means may not be placed on a par with the act of “serious bodily or mental harm” in the sense of Article II of the Convention. Being different by their very nature — some of them including the *actus reus* of the crimes against humanity (inhuman treatment, deportation) while others are distinct international offences (torture, rape) — they are methods which may produce “serious bodily or mental harm” rather than an act in the normative sense. In that respect, “serious bodily or mental harm” appears as a result of the methods or means applied, and not as an act *per se*. In other words, it should be viewed “on the bases of intent and the possibility of implementing this intent by the harm done”¹⁸³.

150. The construction of genocide as regards the Srebrenica massacre made by ICTY in the *Krstić* and the *Blagojević* cases (the latter Judgment being appealable), is based on erroneous reasoning.

In the case of Srebrenica it has not been proved that there existed a genocidal plan, either local or regional, a plan that would be considered effected by the committed massacre. Therefore,

¹⁷⁹ICTY, *Prosecutor v. Krstić*, Trial Judgment, para. 595.

¹⁸⁰ICTY, *Prosecutor v. Stakic*, Trial Judgment, para. 519; ICTY, *Prosecutor v. Krstić*, Appeals Judgment, para. 33.

¹⁸¹ICTY, *Prosecutor v. Krstić*, Appeals Judgment, para. 33.

¹⁸²Article 25 3 (f) of the Statute of the ICC.

¹⁸³N. Robinson, *op. cit.* p. 18.

the Trial Chambers attempted to find alleged genocidal intent in the form of inference from the facts presented.

It appears, however, that the procedure of inference has not been followed *lege artis*, by respecting inherent requirements which inference as such necessarily implies. The substratum from which special intent may be inferred must satisfy with respect to its components the relevant standards, both quantitative and qualitative.

As far as qualitative conditions are concerned, the inferential substratum must consist of acts capable in objective terms of producing genocidal effects or being constitutive of genocide.

It seems obvious, even in the jurisprudence of the Tribunal, that transfer of women, children and elderly, *per se* does not possess such genocidal capacity. In fact, the transfer has served to the Trial Chamber as a subsidiary source for inference of genocidal intent, as the result of the fact that “killings” as primary source of inference have not been sufficient and credible source in that regard. Namely, it appears that both the scope and the object of killing allow only the interpretation expressed in the *Krstić* case that “selective genocide” took place, a notion which, in the light of the requirements established in Article II of the Convention, represents no more than *contradictio in adjecto*. “Selective genocide”, being essentially non-genocide, has been turned into genocide by means of construction of the genocidal intent from sources other than killings, i.e., those consisting of acts which are not constitutive of genocide.

Thus constructed, genocidal intent is then taken as determinable as regards the nature of acts like forced displacement and the loss suffered by survivors (*Krstić*, Trial Judgment, para. 543; *Blagojević*, Trial Judgment, paras. 644, 654), which the majority (?) takes as “the *actus reus* of causing serious bodily or mental harm”, as defined in Article II (b) of the Convention (para 290 of the Judgment).

Such a procedure may be considered as impermissible. Deduction of genocidal intent from acts which *per se* cannot have genocidal effects and, as such, cannot be considered as acts in terms of Article II of the Convention, inevitably leads to the watering down of the notion of genocide as established by the Convention.¹⁸⁴

Acts incapable of producing genocidal effects may have only confirmatory or supportive effects in relation to the already established genocidal intent.

As regards the Srebrenica massacre, ICTY has, in effect, by inferring alleged genocidal intent from an improper substratum, transformed possible confirmatory or supportive effects of inference from such a substratum into constitutive effects. In a word, ICTY resorted to a construction instead of inference of genocidal intent.

Even if, hypothetically, genocidal intent in Srebrenica were proved, it would be possible to speak rather of an attempt to commit genocide than of genocide itself.

It appears that the Trial Chamber proceeded from the distinction that is untenable as regards the nature of ethnic cleansing. Even though it holds *expressis verbis* that ethnic cleansing cannot be equated with genocide, it uses it as a substratum for inference of genocidal intent.

1.6. The true legal meaning of the Judgments of ICTY in *Blagojević* and *Krstić* cases

151. General Krstić was sentenced for complicity in Genocide.

¹⁸⁴William A. Schabas, “Was Genocide Committed in Bosnia and Herzegovina? First Judgments of the International Criminal Tribunal for the Former Yugoslavia”, *Fordham Int’l L.J.*, 47 (2001), pp. 45-46.

By its very nature, complicity in genocide is an accessory offence. Complicity as such is not a cause of consequences, and of acts committed after them, but just a condition, or one of the conditions for them.

The Genocide Convention draws a clear distinction between genocide and complicity in genocide. That distinction is strictly made in Articles III, IV, V, VI, VII and VIII by the use of the formula “genocide and . . . other acts enumerated in Article III.” The expression “acts of genocide” occurs only in Article VIII, indicating that the expression refers to the five subparagraphs of Article II, and not to the “other acts” defined in Article III¹⁸⁵. Being of a qualitative nature, the distinction between genocide and complicity in genocide implies that they are mutually exclusive.

In the absence of a perpetrator of genocide as the principal crime, General Krstić was, in fact, condemned for complicity in the act of killing and not of genocide as such.

True, the act of killing is one of the acts determined by Article II of the Convention as constituting the *actus reus* of genocide in the normative sense, but an act which constitutes a crime of extermination or a war crime.

152. Wrong in the sense of the criminal law is one thing, international crime is another.

The perception that equates a criminal wrong with a crime essentially reduces the notion of crime to illegality as an objective element of crime.

However, the notion of crime is based on a symbiosis of two elements – objective, in terms of illegality of a concrete act or omission, and subjective, in terms of individualized, personalized guilt. The notion of crime thus exists as the result of a linkage of wrong and individualized guilt. Such a concept of crime is common heritage in modern criminal laws on which is also based the very categorization of criminal law. In the matter of international criminal law, for instance, without a subjective element in various forms that a guilty mind may assume, it is not possible to draw a proper distinction between genocide, crime against humanity and war crime. Even in crimes of strict liability a subjective element is necessary applied in the form of absolute presumption of guilt.

International crime implies an accumulation of several components, one of them being a perpetrator of a crime. As the ICTY repeatedly stated:

“In order to establish individual criminal responsibility for planning, instigating, ordering and otherwise aiding and abetting in the planning and preparation of a crime, referred to in Articles 2 to 5 of the Statute, *proof is required that the crime in question has actually been committed by the principal offender(s)*.”¹⁸⁶

The concrete finding of the Tribunal is *a fortiori* valid for crimes characterized by special intent, such as genocide. Without the perpetrator as a person with a mind guilty of the destruction of an ethnic, national, religious or racial group, it is legally impossible to talk about genocide as committed crime.

¹⁸⁵W. Schabas, *Genocide in International Law*, 2000, p. 155.

¹⁸⁶ICTR, *Prosecutor v. Akayesu*, Trial Judgment, para. 473; ICTY, *Prosecutor v. Blaskic*, Trial Judgment, para. 278; ICTY, *Prosecutor v. Kordic*, Trial Judgment, para. 386; ICTY, *Prosecutor v. Stakic*, Trial Judgment, para. 445; ICTY, *Prosecutor v. Tadic*, Appeal Judgment, para. 229; ICTY, *Prosecutor v. Aleksovski*, Appeal Judgment, para. 164; ICTY, *Prosecutor v. Furundzija*, Trial Judgment, para. 235; ICTY, *Prosecutor v. Vasiljevic*, Trial Judgment, para. 70; ICTY, *Prosecutor v. Naletilic*, Trial Judgment, para. 63; ICTY, *Prosecutor v. Simic*, Trial Judgment, para. 161; emphasis added.

The guilt is a subjective element without which there is no crime in the legal sense. The very act is not *per se* sufficient to constitute a crime; it is merely a strong indication of its existence.

As a criminal act does not exist without a perpetrator, so the guilt, as indispensable element of a crime, does not exist in legal terms as abstract, non-individualized guilt. That is the substance of the notion of individual criminal responsibility. As a rule, the physical act, violating criminal law norms, transcends into a crime by fulfilment of the subjective requirement, i.e., the guilty mind of a perpetrator. Without guilt properly established in regard to the person or group of persons, it represents criminal wrong (*Unrecht; illicite criminel*) only.

153. General Krstić was convicted as part of a “joint criminal enterprise”. In the absence of a genocidal plan until the days immediately preceding the killing, as the Trial Chamber found, General Krstić “could only surmise that the original objective of ethnic cleansing by forcible transfer had turned into a lethal plan to destroy the male population of Srebrenica”¹⁸⁷.

Some observations seem to be of crucial importance here.

The notion of “joint criminal enterprise” being based on the natural and foreseeable consequences of the particular act, by its nature belongs to a negligence-type offence hardly reconcilable with the most serious crimes, especially genocide characterized essentially by special intent. As such joint criminal enterprise “is a form of anti-social behaviour judged by a different yardstick than those who commit crimes with malice and premeditation”¹⁸⁸.

What is more important *in casu*, the notion of “joint criminal enterprise” obviously does not belong to the law of genocide established by the Convention. The punishable acts other than genocide enumerated exhaustively in Article III of the Genocide Convention do not comprise a “joint criminal enterprise”. All of them expressing the requirement in the *chapeau* of Article II rest on a subjective standard of the assessment of *mens rea*. In contrast, the “joint criminal enterprise” implies rather an objective standard framed in terms of reasonableness more appropriate to vicarious civil responsibility than to criminal liability. Moreover, it is not enumerated as a form of participation in Article 7 (1) of the ICTY Statute, being, in fact, a creation of judges of the ICTY¹⁸⁹ perhaps disregarding the principle *nullum crimen nulla poena sine lege*. Its effects amount to an expansion of the *mens rea* element of the crime of genocide with dangerous consequences.

As emphasized by the Trial Chamber (Judges May, Bennouna and Robins) in the *Kordic* Judgment:

“Stretching notions of individual *mens rea* too thin may lead to the imposition of criminal liability on individuals for what is actually guilt by association, a result that is at odds with the driving principles behind the creation of this International Tribunal.”¹⁹⁰

The dangers of “guilt by association” were diagnosed by the Tribunal in its first Annual Report. The Tribunal held that it may lead to “collective responsibility” as a primitive and archaic concept meaning that the “whole group will be held guilty of massacres, torture, rape, ethnic cleansing, the wanton destruction of cities and villages”. And history shows “that clinging to

¹⁸⁷ICTY, *Prosecutor v. Krstić*, Trial Judgement, para. 622.

¹⁸⁸W. Schabas, “*Mens rea* and the ICTY”, 37 *New England Law Review*, Summer 2003, p. 1033.

¹⁸⁹ICTY, *Prosecutor v. Furundzija*, Trial Judgement, paras. 199-226; ICTY, *Prosecutor v. Tadic*, Trial Judgement, para. 190.

¹⁹⁰ICTY, *Prosecutor v. Kordic*, Trial Judgement, para. 219.

feelings of 'collective responsibility' easily degenerates into resentment, hatred and frustration and inevitably leads to further violence and new crimes"¹⁹¹.

(Signed) Milenko KREĆA.

¹⁹¹Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, United Nations GAOR/SCOR, 49th Sess., United Nations doc. A/49/342-51994/1007, 1994, para. 16.