SEPARATE OPINION OF JUDGE TOMKA

The Court's jurisdiction — Court informed FRY in 2003 that it could present further argument on jurisdiction at merits stage — Court Statute and Rules do not prohibit objections to jurisdiction at merits stage and Court must examine such issues proprio motu *if necessary — Principle of* res judicata *does not bar Court's reconsideration of its jurisdiction — Court's Judgment of 11 July 1996 did not address the jurisdictional question now raised (whether FRY was party to the Statute by virtue of United Nations membership when the Application was filed in March 1993) and is thus not preclusive — Reviewing jurisdiction* de novo, *Court has jurisdiction — Access to the Court under Article 35 distinguished from jurisdiction* ratione personae *— Access requirement now met because FRY became a Member of the United Nations on 1 November 2000, and has therefore had access to the Court since that date — Jurisdiction* ratione personae *established because FRY has been party to Genocide Convention since April 1992 under rule of* ipso jure *succession as applied to cases of State dissolution — Fact that FRY did not have access to Court when Application filed is remediable defect which does not, once remedied, preclude exercise of jurisdiction.*

Interpretation of Genocide Convention — Convention primarily instrument of international criminal law which compels States to undertake to prevent genocide and to punish its perpetrators — Drafting history of Convention does not support view that States can be criminally responsible for genocide — Court's jurisdiction under Article IX encompasses the determination of whether a State has breached its obligations under the Convention and the international responsibility it incurs, but not the determination of whether the crime of genocide was committed — Regarding obligation to prevent genocide, evidence has not established that FRY authorities knew in advance of plan to execute Bosnian Muslim men in Srebrenica, and thus could have acted to prevent it — FRY failed to comply with some of the provisional measures ordered by the Court in 1993.

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INTRODUCTION

1. The Judgment of the Court closes a particularly tragic case. When the Court was seised of this case, the fratricidal war in Bosnia and Herzegovina was looming. Over a period of more than four years, the Parties now agree, the war claimed about 100,000 human lives, wounded countless others, and inflicted enormous material damage. It deeply affected people in the region, further generating mistrust and sometimes outright hatred between different ethnic and religious communities. It should never have happened. Unfortunately, it did.

2. The Government of Bosnia and Herzegovina turned to the Court 14 years ago, in March 1993, in the midst of the bloody conflict which ravaged on its territory. Among its most serious allegations, the Applicant, the Republic of Bosnia and Herzegovina, claimed that the Respondent, Yugoslavia (Serbia and Montenegro), engaged in multiple violations of obligations under Articles I to V of the Genocide Convention. The Government of Bosnia and Herzegovina also requested the Court twice in 1993 to indicate provisional measures. The Court did so. Unfortunately, the measures did not prevent further atrocities from being committed. The Court has now found that the breach of the obligations under Article I of the Genocide Convention occurred in July 1995. Yet, it was unable to prevent that breach or the ensuing violence.

3. The courts are usually powerless to stop wars. Wars always involve more than just legal disputes. In the United Nations system of collective security, it is the Security Council which bears primary responsibility for the maintenance of international peace and security. Courts usually can only sort out *ex post* the legal consequences of the wars provided they have jurisdiction over the particular case, and always within the strict limits of such jurisdiction.

4. The dispute before the Court has involved two States, but it is not only an inter-State dispute. It also has an intra-State dimension within Bosnia and Herzegovina. Political representatives of the Bosnian Serbs attempted in 1999 to withdraw the case, and have remained opposed to its continuance (see Judgment, paragraphs 19-25). On the day of the opening of the hearings 27 February 2006 the Court received a letter from Mr. Paravac, then Member of the Presidency of Bosnia and Herzegovina from the Republika Srpska. He informed the Court that the Parliament of Bosnia and Herzegovina did not approve financing for the expenses of Bosnia and Herzegovina's legal team in the case from the federal budget, and that he had seised the Constitutional Court of Bosnia and Herzegovina to decide whether the authorization to institute proceedings in the International Court of Justice granted in 1993 by President Izetbegović was in conformity with the Constitution. No further communication on this issue was received by the Court. This dimension of the case however did not have any bearing on its consideration and adjudication by the Court.

I. THE COURT'S JURISDICTION

5. The Court in the Judgment affirms its jurisdiction on the ground that "the principle of *res judicata* precludes any reopening of the decision embodied in the 1996 Judgment" (Judgment, paragraph 140). I have serious misgivings about the Court's reasoning and feel compelled to elaborate my views thereon. However, because I ultimately find, although on a different ground, that the Court has jurisdiction over this case, I have voted in favour of the first paragraph of the *dispositif*.

6. My misgivings are caused by the fact that the Court in 2003, after it had considered the "Initiative of Serbia and Montenegro to the Court to Reconsider ex officio Jurisdiction over Yugoslavia", dated 4 May 2001, informed the Parties that "[s]hould Serbia and Montenegro wish to present further argument to the Court on jurisdictional questions during the oral proceedings on the merits, it w[ould] be free to do so" (letter of the Registrar of 12 June 2003, the text of which was approved by the Court, Judgment, paragraph 82). The Parties were also informed that, "as the Court has emphasized in the past, [it] is entitled to consider jurisdictional issues *proprio motu*", and "must . . . always be satisfied that it has jurisdiction, and must if necessary go into that matter *proprio motu*" (*Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972*, p. 52, para. 13). Finally the Court assured the Parties that it "w[ould] not give judgment on the merits in the present case unless it [was] satisfied that it ha[d] jurisdiction" (Judgment, paragraph 82).

7. The Court thus allowed the Respondent to raise the issue of its jurisdiction at the merits stage despite having upheld its jurisdiction in 1996 (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 623, para. 47), and having found the request for revision inadmissible in February 2003 (*Application for Revision of the Judgment of 11 July 1996 in the Case concerning* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia), Preliminary Objections *(Yugoslavia* v. *Bosnia and Herzegovina), Judgment, I.C.J. Reports 2003*, p. 32, para. 75).

8. The position the Court communicated to the Parties in its June 2003 letter was in conformity with its jurisprudence and practice. For example, the Court stated in the *Appeal Relating to the Jurisdiction of the ICAO Council* that "[i]t is certainly to be *desired* that objections to the jurisdiction of the Court should be put forward as preliminary objections for separate decision in advance of the proceedings on the merits" (*Judgment, I.C.J. Reports 1972*, p. 52, para. 13; emphasis added). The Court's language indicates that such timing is merely a *desideratum*, not a legal requirement. The Court later explained in *Avena and Other Mexican Nationals (Mexico* v. *United States of America)* that Article 79 of the Rules of Court, which states that any objection by the Respondent to the Court's jurisdiction shall be made within three months of the delivery of the Memorial, "applies only to *preliminary* objections, as is indicated by the title of the subsection of the Rules which it constitutes" (*Judgment, I.C.J. Reports 2004*, p. 29, para. 24; emphasis added). As the Court further explained, "[a]n objection that is not presented as a preliminary objection in accordance with paragraph 1 of Article 79 does not thereby become inadmissible" *(ibid.)*. And it added, "[h]owever, apart from such circumstances, a party failing to avail itself of the Article 79 procedure may forfeit the right to bring about a suspension of the proceedings on the merits, but *can still* argue the objection along with the merits" (*ibid*.; emphasis added).

9. The Court now states that "once [it] has made a determination . . . on a question of its own jurisdiction, that determination is definitive both for the parties to the case, in respect of the case (Article 59 of the Statute), and for the Court itself in the context of that case" (Judgment, paragraph 138). This statement of the Court seems to be a statement of a legal principle. Was the Court not aware of such a principle — although *iura novit curia* — when in June 2003 it informed the Parties that "[s]hould Serbia and Montenegro wish to present *further argument* to the Court on *jurisdictional questions* during the oral proceedings on the merits, it w[ould] be *free* to do so"? (Judgment, paragraph 82; emphasis added.) Moreover, the Court already in 2003 knew what arguments the Respondent intended to raise since they were developed in the 2001 Initiative. The key argument of the Court against the reconsideration of its jurisdiction is now based on the principle of *res judicata*. I do not believe that the issue can be resolved so simply.

10. The primary question which requires an answer is whether a party may raise a series of objections in successive phases of a case. This question is particularly relevant in the present case, since the Respondent (called the Federal Republic of Yugoslavia at that time) put forward in June 1995 seven preliminary objections concerning the Court's jurisdiction to entertain the case and the Application's admissibility. The Court dismissed six of these objections in its Judgment of 11 July 1996; the remaining one had been withdrawn by the Respondent during the oral proceedings on the preliminary issues of jurisdiction and admissibility. The question raised is not regulated by the Statute or the Rules of Court. But as a leading commentator on the work of the Court has suggested, "in an appropriate case, *objections can be raised after the Court has upheld its jurisdiction* in preliminary objection proceedings and after the proceedings on the merits have been resumed"[1]. In his view, "[t]he condition for this is that the new objection does not raise issues that have been decided with the force of *res judicata* in the judgment on the preliminary objections and does not require a further suspension of the proceedings on the merits"[2]. I find this view correct and it seems that the Court's position in June 2003, as reflected in the Registrar's letter, lends a further support to it.

(1) *Res judicata*: what is its scope as far as the 1996 Judgment is concerned?

11. This brings me to the second major question — what is the scope of the *res judicata* nature of the 1996 Judgment? In that Judgment the Court rejected the following six preliminary objections of the Federal Republic of Yugoslavia:

(i) that the Application was not admissible because "the events in Bosnia and Herzegovina to which [it] refer[red] constituted a civil war" and therefore "no international dispute exist[ed] within the terms of Article IX of the 1948 [Genocide] Convention";

(ii) that the Application was not admissible because "Mr. Alija Izetbegović did not serve as the President of the Republic at the time when he granted the authorization to initiate proceedings" (the Court however did not specifically address another element of this objection, namely that "the authorization for the initiation and conduct of proceedings was granted in violation of the rules of internal law of fundamental significance");

(iii) that the Court had no jurisdiction because the Applicant was not a party to the 1948 Genocide Convention;

(iv) that the Court had no jurisdiction because "the case in point [was] an internal conflict between three sides in which the FR of Yugoslavia was not taking part" and because "the

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[1] S. Rosenne, *The Law and Practice of the International Court, 1920-2005,* 4th ed., Vol. II, Jurisdiction, Martinus Nijhoff Publishers, 2006, p. 865, para. II. 225 (emphasis added).

[2] *Ibid.*

claims contained in the 'Submissions' [were] based on allegations of State responsibility which f[ell] outside the scope of the Convention and of its compromissory clause", and further because "there [was] no international dispute under Article IX of the 1948 [Genocide] Convention";

(v) that the Court lacked competence over the case before 14 December 1995, the date on which the two Parties recognized each other, and alternatively before 29 March 1993, the date on which Bosnia and Herzegovina's notification of succession of 29 December 1992, which the Federal Republic of Yugoslavia considered to be the notification of accession, could have produced its effect;

(vi) that the Applicant's claims pertaining to the alleged acts or facts which occurred prior to 18 March 1993 — the date on which the Secretary-General of the United Nations sent to the parties of the Genocide Convention the depository notification informing of Bosnia and Herzegovina's notification of succession — did not fall within the competence of the Court (*I.C.J. Reports 1996 (II)*, pp. 606-608, para. 15).

The Court considered the above-mentioned preliminary objections and rejected them all, thus finding "that, on the basis of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, it ha[d] jurisdiction to adjudicate upon the dispute" and "the Application . . . [was] admissible" (*I.C.J. Reports 1996 (II)*, pp. 623-624, para. 47).

12. The conclusions of the Court regarding its jurisdiction are based on its consideration of the six preliminary objections raised. The principle of *res judicata* prevents the Respondent from raising again those issues which the Court already dealt with when it rejected the Federal Republic of Yugoslavia's preliminary objections.

It is useful to recall what the Court stated in the said Judgment:

> "The Court must, in each case submitted to it, *verify whether it has jurisdiction to deal with the case*, and, if necessary, whether the Application is admissible, and such *objections* as are raised by the Respondent *may be useful to clarify the legal situation*. As matters now stand, the preliminary objections presented by Yugoslavia have served that purpose. Having established its jurisdiction under Article IX of the Genocide Convention, and having concluded that the Application is admissible, the Court may now proceed to consider the merits of the case on that basis." (*I.C.J. Reports 1996 (II),* p. 622, para. 46; emphasis added.)

Although the Court speaks of its duty to verify that it has jurisdiction, and notes that the objections raised may be useful for that purpose, the Court has seemingly limited the exercise of its duty of verification to the consideration and rejection of the Respondent's preliminary objections.

13. As the Court now acknowledges, "[n]one of these objections was 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). Apparently this was because:

> "Neither party raised the matter before the Court: Bosnia and Herzegovina as Applicant, while denying that the FRY was a Member of the United Nations as a continuator of the SFRY, was asserting before this Court that the FRY was nevertheless a party to the Statute . . .; and for the FRY to raise the issue would have involved undermining or abandoning its claim to be the continuator of the SFRY as the basis for continuing membership of the United Nations." (*Ibid.*, paragraph 106.)

I am convinced that the Court has not addressed this particular issue whether the Federal Republic of Yugoslavia was a party to the Statute[3]. Therefore, in my view, the Court's 1996 decision can have no preclusive effect on the consideration of such issue at this stage.

(2) Access and jurisdiction

14. In assessing whether this Court may adjudicate a case, it is important to recognize that the concept of access to the Court is not identical to that of jurisdiction *ratione personae*.

15. These two distinct concepts are reflected in the Court's jurisprudence. In *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland)*, the Court distinguished between jurisdiction and access to the Court by ascribing different purposes to two different acts. Specifically, the Court determined that while the bilateral Exchange of Notes of 19 July 1961 between the Governments of the Federal Republic of Germany and Iceland was "designed to establish jurisdiction of the Court over a particular kind of dispute", the declaration of the Federal Republic of Germany of 29 October 1971, deposited with the Registrar on 22 November 1971, "provide[d] for access to the Court of States which are not parties to the Statute", as required by Security Council resolution 9 of 15 October 1946 (*I.C.J. Reports 1973*, p. 53, para. 11).

In its Order of 2 June 1999 in *Legality of Use of Force (Yugoslavia* v. *Belgium),* the Court also distinguished between jurisdiction and access when it stated that:

> "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 has repeatedly stated 'that one of the fundamental principles of its Statute is that it cannot decide a dispute between States without the consent of those States to its jurisdiction' (*East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 101, para. 26); and 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" (*Legality of Use of Force (Yugoslavia* v. *Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*, p. 132, para. 20; emphasis added).

In its Order of 10 July 2002 in *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda),* the Court made the same distinction (*Provisional Measures*, *I.C.J. Reports 2002*, p. 241, para. 57).

In the *Legality of Use of Force* cases, the Court stated that "a distinction has to be made between a question of jurisdiction that 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" (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium)*, *Preliminary Objections, Judgment, I.C.J. Reports 2004,* p. 295, para. 36). The Court then continued:

> "The question is whether *as a matter of law* Serbia and Montenegro was entitled to seise the Court as a party to the Statute at the time when it instituted proceedings in these cases. Since that question is independent of the views or wishes of the Parties, even if they were now to have arrived at a shared view on the point, the Court would not have to accept the view as necessarily the correct one." (*Ibid.*; emphasis in the original.)

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[3]See the joint dissenting opinion of three Members of the Court appended to this Judgment who were the only Members of the current Court also sitting on the Bench when the Court rendered its 1996 Judgment.

And the Court concluded with an important dictum:

> "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 depends on consent." (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium)*, *Preliminary Objections, Judgment, I.C.J. Reports 2004,* p. 295, para. 36).

The Court further clarified the relationship between access and jurisdiction in the *Legality of Use of Force* Judgments when it stated:

> "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.
>
> It is the view of the Court that it is incumbent upon it to examine first of all the question whether the Applicant meets the conditions laid down in Articles 34 and 35 of the Statute and whether the Court is thus open to it. Only if the answer to that question is in the affirmative will the Court have to deal with the issues relating to the conditions laid down in Articles 36 and 37 of the Statute of the Court." (*Ibid.*, p. 299, para. 46.)

(3) Did the Federal Republic of Yugoslavia have access to the Court in March 1993?

16. The issue of the Federal Republic of Yugoslavia's access to the Court was not dealt with by the Court in its 1996 Judgment, either explicitly or implicitly. There was no doubt that Bosnia and Herzegovina was a Member of the United Nations in 1993, and *ipso facto* a party to the Statute of the Court. Accordingly the Court was then open to the Applicant. The status of the Federal Republic of Yugoslavia in the United Nations remained unclear and ambiguous. The Court was *fully aware* of that situation. In its Order of 8 April 1993 on provisional measures, having referred to Security Council resolution 777 (1992) and General Assembly resolution 47/1, as well as to the letter of interpretation of 29 September 1992 by the Legal Counsel of the United Nations (paras. 16 and 17 of the Order), the Court noted that

> "while the solution adopted [in the United Nations] is not free from legal difficulties, the question whether or not Yugoslavia is a Member of the United Nations and as such a party to the Statute of the Court is one which *the Court does not need to determine definitively* at the *present* stage of the proceedings" (*I.C.J. Reports 1993*, p. 14, para. 18; emphasis added).

But when has the Court definitively determined in the present case whether or not the Federal Republic of Yugoslavia was a Member of the United Nations on 20 March 1993, and as such a party to the Statute? In its 11 July 1996 Judgment on jurisdiction? I fail to see any paragraph in that Judgment dealing with this issue. As the Court plainly admits "[n]othing was stated in the 1996 Judgment about the status of the FRY in relation to the United Nations, or the question whether it could participate in proceedings before the Court" (Judgment, paragraph 122).

I believe that the Court avoided the determination of that question since the situation remained unclear and ambiguous and the two competent political organs of the United Nations in matters of membership, the Security Council and the General Assembly, did nothing to further

clarify the membership status of the Federal Republic of Yugoslavia by the time the Court rendered its decision in 1996. So, the Court did not address the issue in order not to pre-empt (or prejudge) the position the Security Council and the General Assembly might have taken subsequently[4].

17. The Court instead could have relied on its preliminary view expressed in paragraph 19 of its 8 April 1993 Order. In that paragraph, after quoting the text of Article 35, paragraph 2, of the Statute, it stated:

> "the Court therefore considers that proceedings may validly be instituted by a State against a State which is a party to such a special provision in a treaty in force, but is not party to the Statute, and independently of the conditions laid down by the Security Council in its resolution 9 of 1946" (*I.C.J. Reports 1993*, p. 14, para. 19).

The Court then continued that "Article IX of the Genocide Convention relied on by Bosnia-Herzegovina in the present case, *could*, in the view of the Court, *be regarded prima facie* as a special provision contained in a treaty in force" (*ibid.*; emphasis added). The Court concluded, "accordingly if Bosnia-Herzegovina and Yugoslavia are both parties to the Genocide Convention, disputes to which Article IX applies are in any event *prima facie* within the jurisdiction *ratione personae* of the Court" *(ibid.)*.

The text itself indicates that such a view of the Court on Article IX of the Genocide Convention in its possible relation to Article 35, paragraph 2, of the Statute was a provisional one ("prima facie"), and not conclusive of the matter[5].

In these circumstances one would have expected the Court to deal with the matter in more depth in its 1996 Judgment. But since the matter was not raised by the Parties, the Court, although aware of its only prima facie view in the 1993 Order, did not determine the matter definitively. In fact, no attention was paid to the issue in the text of the 1996 Judgment.

18. The Court did not consider the issue of a "special provision in a treaty in force" until 2004 when several respondents in the *Legality of Use of Force* cases contended that Serbia and Montenegro could not rely upon the text of Article 35, paragraph 2, and that the view of the Court on this issue in its Order of 8 April 1993 was only provisional.

The Court therefore considered it appropriate, in the circumstances of the *Legality of Use of Force* cases, to examine in detail Article 35, paragraph 2, of the Statute and interpreted it, on the basis of a detailed study of the *travaux préparatoires*, concluding that

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[4]As an informed commentator who served as Legal Adviser of the United Kingdom's Permanent Mission to the United Nations between 1991-1994 (writing in his personal capacity with a usual disclaimer), opined,

> "the Council and Assembly have not tied themselves to any particular resolution of the matter. At some point the political momentum will exist to regularize the FRY's position in the United Nations. There would seem to be essentially two ways of doing this. The FRY could apply for membership as the other former Yugoslav states have done. This appears to be what was envisaged by the Council and the Assembly in 1992, and in the Legal Counsel's letter . . . In the alternative, the relevant organs might accept continued FRY membership without insisting on a formal application, for example by reversing the non-participation decisions of 1992 and 1993. This would probably be explicitly 'without prejudice to questions of State succession'. It could be done by a decision of the relevant organs as a pragmatic solution to a difficult situation." (M. C. Wood, "Participation of Former Yugoslav States in the United Nations and in Multilateral Treaties", in *Max Planck Yearbook of United Nations Law*, Vol. 1, 1997, pp. 250-251.)

[5]S. Rosenne, *The Law and Practice of the International Court, 1920-1996,* 3rd ed., Vol. II, Jurisdiction, Martinus Nijhoff Publishers, 1997, p. 630.

> "the reference in Article 35, paragraph 2, of the Statute to 'the special provisions contained in treaties in force' applies only to treaties in force at the date of the entry into force of the Statute, and not to any treaties concluded since that date" (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium)*, *Preliminary Objections, Judgment*, *I.C.J. Reports 2004,* p. 324, para. 113).

On this reasoning, Article 35, paragraph 2, of the Statute thus could not have provided the Federal Republic of Yugoslavia with access to the Court at any point in time for matters relating to the Genocide Convention because the Convention was not concluded until after the Court's Statute entered into force.

19. The Court has once more recounted the intriguing history of the status of the Federal Republic of Yugoslavia vis-à-vis the United Nations (Judgment, paragraphs 88-99). But while in the *Legality of Use of Force* cases the Court determined that the Federal Republic of Yugoslavia "has the status of membership in the United Nations as from 1 November 2000" and that "the *sui generis* position" of the Federal Republic of Yugoslavia, referred to in the *Application for Revision* Judgment, "could not have amounted to its membership in the Organization" and, on the basis of that determination, concluded that "Serbia and Montenegro was not a Member of the United Nations, and in that capacity a State party to the Statute of the International Court of Justice, at the time of filing its Application to institute the . . . proceedings before the Court on 29 April 1999" (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium)*, *Judgment*, *I.C.J. Reports 2004*, p. 35, paras. 78 and 79), in its current recount, for the purposes of the present case, the Court ends "the story" with the 2003 Judgment in the *Application for Revision* case.

20. The majority of the Court is unable to demonstrate that in the 1996 Judgment the Court determined that the Federal Republic of Yugoslavia had access to the Court. The Court itself acknowledged this fact when it observed in the Judgments rendered on 15 December 2004 in the *Legality of Use of Force* cases that "in its Judgment on Preliminary Objections of 11 July 1996 . . . [t]he question of the *status* of the Federal Republic of Yugoslavia in relation to Article 35 of the Statute was *not raised* and the Court saw *no reason to examine it*" (*ibid.*, para. 82; emphasis added). Further, in those eight Judgments, it stated that

> "[t]he Court did not commit itself into a definitive position on the issue of the legal status of the Federal Republic of Yugoslavia in relation to the Charter and the Statute in its pronouncements in incidental proceedings, in the cases [one of them being the present one] involving this issue which came before the Court during this [1992-2000] period" (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium)*, *Judgment*, *I.C.J. Reports 2004*, p. 309, para. 74).

21. Now the Court tells the Parties to accept the determination in the 1996 Judgment "that it had jurisdiction under the Genocide Convention is . . . to be interpreted as incorporating a determination that all the conditions relating to the capacity of the parties to appear before it had been met" (Judgment, paragraph 133).

It is so because, in the view of the majority, the finding of the Court that it has jurisdiction "must as a *matter* of *construction* be understood, by *necessary implication*, to mean that the Court at *that time perceived* the Respondent as being in a position to participate in cases before the Court" (*ibid.*, paragraph 132; emphasis added). The reality apparently has no relevance for the majority; what is decisive is *the perception* the Court might have had in 1996, which is now being explained *ex post* by way of *construction* by *implication*. I am not convinced by this strained reasoning.

22. The Respondent suggested that the Federal Republic of Yugoslavia's capacity to appear before the Court was merely an "assumption" in the 1996 Judgment (*ibid.*, paragraph 134). The majority, while not denying that assumption, replies that the Federal Republic of Yugoslavia's "capacity to appear before the Court in accordance with the Statute was an *element* in the reasoning" of the 1996 Judgment (*ibid.*, paragraph 135; emphasis added). That element is nowhere to be found in the 1996 Judgment. But this is of no consequence since, according to the majority, this element "can and indeed *must* be read into the judgment" (*ibid.*, paragraph 135, emphasis added). The majority operates a distinction between the "judicial truth" and reality. How otherwise can one understand the insistence on the maxim "*res judicata pro veritate habetur*, that is to say that the findings of a judgment are . . . to be taken as correct", whatever doubt may be "thrown on them by subsequent events" (*ibid.*, paragraph 120).

23. The majority now acknowledges only one exception to the finality of the Court's judgments, both on jurisdiction and on the merits — that of a revision procedure under the Statute. The Court, on 3 February 2003, rejected the Respondent's request for the revision. I remain puzzled as to why then, on 12 June 2003, it allowed one of the Parties to raise additional arguments on jurisdiction during the oral proceedings on the merits of the case. Was it then not aware that such an attempt would be destined to fail since once the Court determined the "judicial truth", it was "subject only to the provision in the Statute for revision of judgments" (Judgment, paragraph 139)? In my conscience I am unable to follow such an approach and, to my regret, to subscribe to the reasoning advanced by the majority.

(4) Ascertaining of the Court's jurisdiction *de novo*

24. The Court, in my view, should have determined *de novo* whether it has or lacks jurisdiction in the present case. By revisiting the issue of its jurisdiction the Court would have acted in line with the assurances it gave to the Parties in June 2003 that it "w[ould] not give judgment on the merits in the present case unless it [was] satisfied that it ha[d] jurisdiction" (Judgment, paragraph 82). My point of departure is the Court's determination that the Federal Republic of Yugoslavia became a Member of the United Nations as from 1 November 2000 (*ibid.*, paragraph 83, with reference to *Legality of Use of Force, I.C.J. Reports 2004*, p. 311, para. 79), and that the Federal Republic of Yugoslavia's *sui generis* position, during 1992-2000, in the United Nations "could not have amounted to its membership in the Organization" (*I.C.J. Reports 2004*, p. 310, para. 78). The Federal Republic of Yugoslavia was thus not a party to the Statute of the Court during that period and it has become party to it only as from 1 November 2000. As such, the Federal Republic of Yugoslavia was not a party to the Statute when the Court rendered its 1993 Orders on interim measures of protection and the 1996 Judgment on jurisdiction and admissibility. What is the source of the binding nature of these Court's decisions on the Federal Republic of Yugoslavia if not the Statute? But when they were rendered the Federal Republic of Yugoslavia was not a party to it.

25. The key question is whether the Federal Republic of Yugoslavia was a party to the Genocide Convention in 1993 since the Applicant claims that the Court has jurisdiction under Article IX of that Convention. It is the compromissory clause contained therein which confers jurisdiction on the Court. By being a party to the Statute of the Court a State does not *eo ipso* consent to the Court's jurisdiction. That consent is to be expressed through a different act. But being a party to the Statute is an important prerequisite for the exercise of the Court's jurisdiction and its judicial function. As the Court explained, it "can exercise its judicial function only in respect of those States which have access to it under Article 35 of the Statute" (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium)*, *Preliminary Objections, Judgment*, *I.C.J. Reports 2004*, p. 299, para. 46). Since the Federal Republic of Yugoslavia was not a party to the Statute until 1 November 2000, the Court should not have exercised, in 1993 or in 1996, its judicial

function in relation to the Federal Republic of Yugoslavia even if it might have had jurisdiction over it. Since 1 November 2000, the date on which the Federal Republic of Yugoslavia became a Member of the United Nations, and *ipso facto* party to the Statute of the Court, there has been no bar for the Court to exercise its judicial function vis-à-vis the Federal Republic of Yugoslavia (Serbia and Montenegro). Therefore the Court has to determine whether the Federal Republic of Yugoslavia was bound by Article IX of the Genocide Convention on 20 March 1993 when Bosnia and Herzegovina filed its Application in the present case. If that was the case, and the Federal Republic of Yugoslavia remained bound by the Genocide Convention through the period relevant to the claims of Bosnia and Herzegovina (1992-1995), all the conditions would now be fulfilled for the adjudication of the case on the merits.

26. The Court, of course, always has to satisfy itself that the requirements of its Statute are fulfilled for the exercise of its judicial function. These requirements are mandatory for the Court as a court of law. On the other side, the Court, like its predecessor the Permanent Court of International Justice, has on several occasions applied the principle that it should not penalize a defect in a procedural act which the applicant could easily remedy, or allow itself to be hampered by a mere defect of form, the removal of which depends on the party concerned (cf. *Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*, p. 14).

In *Mavrommatis Palestine Concessions*, the Permanent Court considered whether the validity of the institution of proceedings could be disputed on the ground that the application was filed before the treaty instrument relied on by the applicant had become applicable. It stated that:

> "[e]ven assuming that before that time the Court had no jurisdiction because the international obligation referred to in Article II was not yet effective, it would always have been possible for the applicant to *re-submit* his *application* in the same terms after the coming into force of the Treaty of Lausanne, and in that case, the argument in question could not have been advanced. Even if the grounds on which the institution of proceedings was based were defective for the reason stated, this would not be an adequate reason for the dismissal of the applicant's suit. The Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law. Even, therefore, if the application were premature because the Treaty of Lausanne had not yet been ratified, *this circumstance would now be covered* by the subsequent deposit of the necessary ratifications." (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 34; emphasis added.)

In *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, when dealing with the United States argument that an attempt to adjust the dispute was a prerequisite of its submission to the Court, as provided for in the compromissory clause, the Court observed that

> "it does not necessarily follow that, because a State has not expressly referred in negotiations with another State to a particular treaty as having been violated by conduct of that other State, it is debarred from invoking a compromissory clause in that treaty. The United States was well aware that Nicaragua alleged that its conduct was a breach of international obligations before the present case was instituted; and it is now aware that specific articles of the 1956 Treaty are alleged to have been violated. It would make *no sense to require* Nicaragua now *to institute fresh proceedings* based on the Treaty, which it would be fully entitled to do." (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, pp. 428-429, para. 83; emphasis added.)

The Court has also applied this principle in the present case. In its 1996 Judgment, leaving aside now any potential repercussions of the Respondent's lack of access to the Court at that time on this decision, the Court, replying to the preliminary objection of the Respondent based on the argument that the Convention was not operative between Bosnia and Herzegovina and the Federal Republic of Yugoslavia prior to their mutual recognition on 14 December 1995, stated that:

> "even if it were established that the Parties, each of which was bound by the Convention when the Application was filed, had only been bound as between themselves with effect from 14 December 1995, the Court could not set aside its jurisdiction on this basis, inasmuch as Bosnia and Herzegovina *might at any time file a new application*, identical to the present one, which would be *unassailable* in this respect." (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 614, para. 26; emphasis added.)

27. Applying this principle, as confirmed by the jurisprudence of the Court, to the present case, Bosnia and Herzegovina could have "resubmitted" its application "in the same terms" at any time since 1 November 2000 but "it would make no sense to require [it] now to institute fresh proceedings . . . which it would be fully entitled to do" and its Application "would be unassailable" in respect of access to the Court. And if the original Application on 20 March 1993 was premature because the Respondent was not then a party to the Statute and did not have access to the Court, "this circumstance would now be covered" by the subsequent admission of the Federal Republic of Yugoslavia to the United Nations and its becoming a party to the Statute of the Court.

28. It is true that in eight *Legality of the Use of Force* cases, once the Court had concluded that the applicant did not have access to the Court at the time of the institution of the proceedings, it determined that such conclusion made it unnecessary to consider the other preliminary objections filed by the respondent to the jurisdiction of the Court (*I.C.J. Reports 2004*, pp. 327-328, para. 127). In those cases, however, whatever title of jurisdiction the applicant might have invoked, it "could not have *properly seised* the Court, . . . for the simple reason that [it] did not have the right to appear before the Court" (*ibid.*, p. 299, para. 46; emphasis added). As Fitzmaurice wrote,

> "if a tribunal has not been duly seised it is incompetent to hear the case. But it does not follow that because the tribunal is duly seised, and has therefore the seisin of the case, it possesses on that account substantive jurisdiction and competence to hear and determine it on the merits. What seisin gives is jurisdiction and competence to determine this very point."[6]

29. In the present case, the Applicant (Bosnia and Herzegovina) had access to the Court on 20 March 1993 when it filed its Application and thus could have "properly seised the Court". The Court therefore has competence to determine whether it has jurisdiction under Article IX of the Genocide Convention. As long as the Respondent was not a party to the Statute, the Court should not have exercised its function in relation to that State, even if it might have had jurisdiction. But now that the Respondent has been, since 1 November 2000, a party to the Statute, there is no impediment for the exercise of the Court's function and jurisdiction in a case in which the Applicant seised it properly.

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[6] G. Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Grotius Publications Ltd., 1986, Vol. II, pp. 440-441.

30. Furthermore in the *Legality of Use of Force* cases the principle that the Court should not penalize a defect in a procedural act which the Applicant could easily remedy was not resorted to because the Applicant could have hardly resubmitted its Application since it asserted in its written observations on the Respondent's preliminary objections that "it was not bound by the Genocide Convention until it acceded to that Convention (with a reservation to Article IX) in March 2001" (*I.C.J. Reports 2004*, p. 293, para. 29). Under Article 38, paragraph 2, of the Rules of the Court, "[t]he application shall specify as far as possible the legal grounds upon which the jurisdiction of the Court is said to be based". What would have been specified as a legal ground for jurisdiction in that new Application? The Applicant contended that "the position of the FRY with regard to international organizations and treaties has been a most intricate and controversial matter", so that "[o]nly a decision of this Court could bring clarity" (*ibid.*, p. 259, para. 37). The Court on this point observed that the function of a decision of the Court is "not to engage in a clarification of a controverted issue" (*ibid.*, pp. 295-296, para. 38).

31. The Court in 1996 concluded that the Federal Republic of "Yugoslavia was bound by the provisions of the [Genocide] Convention on the date of the filing of the Application in the present case, namely, on 20 March 1993" (*I.C.J. Reports 1996 (II)*, p. 610, para. 17). Before reaching that conclusion, the Court first recalled that the Socialist Federal Republic of Yugoslavia signed the Convention and later, on 29 August 1950, deposited its instrument of ratification, without reservation. Then it recalled a formal declaration adopted "[a]t the time of the proclamation of the Federal Republic of Yugoslavia, on 27 April 1992" *(ibid.)*. In that declaration, it was stated that:

> "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 Socialist Federal Republic of Yugoslavia assumed internationally." (*I.C.J. Reports 1996 (II)*, p. 610, para. 17.)

The Court remaining neutral, or rather "mute", on the issue of continuity of the international legal personality, limited itself to the observation that:

> "This intention thus expressed by Yugoslavia to *remain* bound by the international treaties to which the former Yugoslavia was party 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." (*Ibid.*; emphasis added.)

The word *remain* chosen by the Court in 1996, however, can describe both situations: *(a)* when there is the continuity in international legal personality of a State, such State *remains* bound by *its* treaties; but also, *(b)* when a succession of a State occurs in cases of separation of parts of a State, irrespective of whether or not the predecessor State continues to exist, any treaty in force on the date of the succession of States in respect of the territory of the predecessor State *remains* binding in respect of each successor State. To be more precise, Article 34 of the 1978 Vienna Convention on Succession of States in Respect of Treaties uses the term "continues in force".

The Court finally observed that "it has not been contested that Yugoslavia was party to the Genocide Convention" (*I.C.J. Reports 1996 (II),* p. 610, para. 17).

32. The Federal Republic of Yugoslavia's claim of continuing the international legal personality of the former Socialist Federal Republic of Yugoslavia did not prevail[7]. In fact, by

[7]See B. Stern, Les questions de succession d'États dans l'affaire relative à *l'Application de la Convention pour la prévention et la répression du crime de génocide* devant la Cour internationale de Justice, *Liber Amicorum Judge Shigeru Oda*, N. Ando *et al.* (eds.), Vol. 1, 2003, pp. 285-305 and her view that "la Yougoslavie a été admise comme nouveau membre des Nations Unies, toute continuation avec l'ex-Yougoslavie étant ainsi niée" (p. 289).

applying in October 2000 for admission to membership in the United Nations, the Federal Republic of Yugoslavia abandoned that claim. The Federal Republic of Yugoslavia thus could not have remained bound by the Genocide Convention on the basis of continuing the international legal personality of the former Yugoslavia. Has it remained bound by the Genocide Convention on the basis of *ipso jure* succession?

33. Article 34 of the 1978 Vienna Convention on Succession of States in Respect of Treaties in its first paragraph provides:

> "When a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist:
>
> *(a)* any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed."

Since the Vienna Convention was not yet in force in 1992, when the Federal Republic of Yugoslavia's succession occurred, the question to be asked is that of the nature of the rule of *ipso jure* succession laid down by Article 34.

Article 34 of the Convention, under one single heading "Succession of States in cases of separation of parts of a State", deals both with the dissolution of States, in which the predecessor State ceases to exist, and with the separation of part (or several parts) of the territory of a State, in which one or more new States appear but in which the predecessor State continues to exist.

Sir Francis Vallat, the former Special Rapporteur of the International Law Commission (ILC) and the Expert Consultant of the Vienna Codification Conference, explained that, while the 1972 Draft Articles contemplated the application of the principle of continuity in the event of dissolution and that of the "clean slate" for the new State emerging from a secession, the ILC ultimately decided — in the light of the comments by States on the Draft Articles — to make the two categories subject to one single régime, that of the *ipso jure* succession. It found that there is a, "legal nexus between the new State and the territory which had existed prior to the succession, and that it would therefore be contrary to the doctrine of the sanctity of treaties to apply the 'clean slate' principle except in special circumstances"[8].

The "special circumstances", according to the Commission, were those which characterized the secessions effected in conditions similar to those of decolonization, but not cases of dissolution of States[9].

In its Commentary, the ILC, as regards to dissolution, stated that:

> "It considered that today every dissolution of a State which results in the emergence of new individual States should be treated on the same basis for the purpose of the continuance in force of treaties. The Commission concluded that although some discrepancies might be found in State practice, still that practice was sufficiently consistent to support the formulation of a rule which, with the necessary qualifications, would provide that treaties in force at the date of the dissolution should remain in force *ipso jure* with respect to each State emerging from the dissolution.

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[8]United Nations Conference on Succession of States in Respect of Treaties, Vol. II, 47th Meeting, p. 104, para. 36.

[9]*Ibid.*, p. 105, para. 1.

> The fact that the situation may be regarded as one of 'separation of part or parts of a State' rather than one of 'dissolution' does not alter this basic conclusion."[10]

At the Conference, the discussions focused on the question whether the principle of *ipso jure* succession applies to secession or, as the case may be, to secession effected in circumstances similar to those of decolonization, for which certain delegations preferred the "clean slate" principle[11]. Other delegations proposed that the principle of *ipso jure* succession should be extended to include the latter cases also. Many of them indicated that, in their view, the "clean slate" principle only applies in the event of decolonization.

Although the discussions reveal certain divergences regarding the application of the rule of *ipso jure* succession to treaties to all the very diverse situations covered by Article 34, the nucleus of this provision concerning the dissolution of States has not met with any serious objection. Therefore, in my view, the rule of *ipso jure* succession to treaties for cases involving the dissolution of a State may be considered a rule of customary international law[12].

34. The former Socialist Federal Republic of Yugoslavia agreed that the rule of *ipso jure* succession, codified in Article 34 of the Vienna Convention, at least for cases of the dissolution of a State (while for cases of secession it was rather a step in the progressive development of international law), shall be the rule to be applied for future cases of succession of States by signing and later, on 28 April 1980, ratifying the Vienna Convention on Succession of States in Respect of Treaties. Perhaps then it could hardly contemplate that a decade later the issue of succession would become so relevant to its case. It is true that the Vienna Convention did not enter into force until 6 November 1996, and by virtue of its Article 7, paragraph 1, applies only in respect of a succession of States which has occurred after its entry into force.

All five successor States of the former Yugoslavia notified of their succession to the Vienna Convention on Succession of States in Respect of Treaties and are thus parties to it. Serbia and Montenegro did so on 12 March 2001, the same date that it notified of its succession to a great number of conventions deposited with the Secretary-General of the United Nations, and selected from the treaties and conventions deposited with him just one instrument, the Genocide Convention, in relation to which it deposited concurrently its instrument of accession with a reservation to Article IX.

35. There can be no doubt that this decision to notify of the accession to the Genocide Convention, with a reservation to Article IX and not succession (where no reservation is allowed) was motivated by the considerations relating to the present case. It was intended to prevent a claim that Serbia and Montenegro had obligations under the Genocide Convention prior to June 2001 (in particular, substantive obligations in the period of 1992-1995, relevant for the claims of Bosnia and Herzegovina). This decision was also intended to avoid the jurisdiction of the Court under Article IX, not only for that period, but also for the future until the reservation was eventually

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[10] *Yearbook of the International Law Commission 1974,* Vol. II, Part One, p. 265, para. 25.

[11] United Nations Conference on Succession of States in Respect of Treaties, Vol. II, 40th, 42nd, 47th and 49th Meetings, pp. 50 *et seq.*

[12] A. Zimmermann, in his 960-page *Habilitationsschrift*, Staatennachfolge in völkerrechtliche Verträge: Zugleich ein Beitrag zu den Möglichkeiten und Grenzen völkerrechtlicher Kodifikation (Springer, 2000), summarizing his analysis, concluded that:

> "With regard to the principle of universal succession for instances of both, separation or dismemberment, as laid down in Article 34 of the Vienna Convention . . ., a distinction has to be drawn. With regard to complete *dismemberments* of a State, that principle had already in 1978 been strongly rooted in State practice. With regard to *separations*, however, it has to be qualified as one of the novelties of the convention, since in most previous cases the States concerned had applied the *clean slate* rule." (*Op. cit.* p. 860; emphasis in original.)

withdrawn. Bosnia and Herzegovina timely objected to the Federal Republic of Yugoslavia's notification of accession to the Genocide Convention with a reservation to Article IX.

That single notification of accession, in my view, was totally inconsistent with the succession by the Federal Republic of Yugoslavia — notified the very same day to the United Nations Secretary-General as accession to the Genocide Convention — to the Vienna Convention on Succession of States in Respect of Treaties, which in Article 34 provides that the treaties of the predecessor State continue in force in respect of each successor State. By the latter notification of succession, the Federal Republic of Yugoslavia became a contracting State of the Vienna Convention on Succession of States in Respect of Treaties as of April 1992. That Convention entered into force on 6 November 1996. Although not formally applicable to the process of the dissolution of the former Yugoslavia, which occurred in the 1991-1992 period, in light of the fact that the former Yugoslavia consented to be bound by the Vienna Convention already in 1980, and the Federal Republic of Yugoslavia has been a contracting State to that Convention since April 1992, one would not expect, by analogy to Article 18 of the Vienna Convention on the Law of Treaties, a State which, through notification of its accession, expresses its consent to be considered as bound by the Vienna Convention on Succession of States in Respect of Treaties to act in a singular case inconsistently with the rule contained in Article 34 of that Convention, while in a great number of other cases to acting in full conformity with that rule. These considerations, taken together, lead me to the conclusion that the Court should not attach any legal effect to the notification of accession by the Federal Republic of Yugoslavia to the Genocide Convention, and should instead consider it bound by that Convention on the basis of the operation of the customary rule of *ipso jure* succession codified in Article 34 as applied to cases of the dissolution of a State.

36. Since I consider the Respondent to be party to the Genocide Convention since April 1992 and party to the Statute of the Court since 1 November 2000, both conditions (of access and jurisdiction) being thus fulfilled, I can agree with proceeding to the adjudication of the case on its merits.

II. THE MERITS

A. Interpretation of the Genocide Convention

37. In order to determine what kind of obligations the Genocide Convention imposes on its parties it is necessary to interpret its provisions. That interpretation is to be performed in good faith in accordance with the *ordinary meaning to be given to the terms of the Convention read in their context and in the light of its object and purpose*. Further, as the Court recalls, recourse may be had to supplementary means of interpretation which include the preparatory work of the Convention and the circumstances of its conclusion in order either to confirm the meaning resulting from "terms — context — object — purpose" interpretation or to remove the ambiguities, obscurity or manifestly absurd or unreasonable result (cf. Judgment, paragraph 160).

38. Applying these rules of interpretation, I largely agree with the majority's analysis of the provisions contained in Articles V, VI and VII of the Convention. With respect to some other Articles, however, I am unable to fully share the Court's interpretation of certain aspects of the relevant provisions. Before elaborating on my understanding of these issues I consider it important to state my views on the purpose of the Convention.

39. The Genocide Convention belongs to the growing corpus of international criminal law. Its purpose is to oblige States parties to prevent the most serious crime — genocide, which is considered to constitute a crime under international law — from being committed and, where it has

been committed, to punish its perpetrators. It provides a legal definition of the prohibited act (i.e., genocide), imposes obligations on the States parties to the Convention to make that crime punishable under their domestic law, as well as to make punishable conspiracy, incitement and attempt to commit genocide and complicity in genocide. The States parties have an obligation to provide effective penalties for perpetrators of the crime and to enact the necessary legislation to give effect to the provisions of the Convention (including those relating to the competence of their national courts to try the alleged perpetrators). The Convention also contains a provision on the extradition of the alleged perpetrators.

(1) Article I

40. I now turn to my reading of Article I of the Genocide Convention. In Article I, the Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law. The States in the same Article undertake to prevent such crime and to punish the perpetrators in the event that such crime has been committed.

Article I thus, in addition to expressing a legally binding agreement of the States parties that genocide constitutes a crime under international law, contains *two obligations for the States parties*: (1) to prevent the commission of a crime and (2) to punish the perpetrators.

Imposition of the duty of punishment in relation to the crime of genocide implies that this Article contemplates genocide as a crime committed by a person entailing that person's individual criminal responsibility. I cannot imagine that the States parties would have agreed to a duty of one State to "punish" another State for having committed genocide.

41. I am so far in agreement with what the Court states in paragraphs 146 to 151 of the Judgment. But then the Court goes on to the issue "whether the Parties are also under an obligation, by virtue *of the Convention*, not to commit genocide themselves" (Judgment, paragraph 166; emphasis added). The Court cannot but recognize "that such an obligation is not expressly imposed by the actual terms of the Convention" *(ibid.)*. It further states that Article I "does not *expressis verbis* require States to refrain from themselves committing genocide. However, . . . taking into account the established purpose of the Convention, the effect of Article I is to prohibit States from themselves committing genocide." *(Ibid.)* The Court concludes that "the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide" *(ibid.)*. I have doubts whether this is "the ordinary meaning" of the term "prevention" even if interpreted in light of the object and purpose of the Convention, which basically is an international criminal law convention. Clearly, under international law, States are not free to commit such atrocities which may amount to genocide. I fully agree on this point with the Court. The other issue is how States, which elaborated and adopted the Genocide Convention, intended to achieve this noble aim, "to liberate mankind from such an odious scourge" (in the words of the Convention's Preamble). The majority takes the view that the obligation of States not to commit genocide is necessarily implied by the obligation to prevent genocide because any other reading would be paradoxical (*ibid.*). The majority further reasons that, because the act of genocide is included in the list of punishable acts in Article III, its interpretation of Article I "must also apply to the other acts enumerated in Article III" (*ibid.*, paragraph 167). The majority provides no support for this view from the *travaux préparatoires*; it rather refers to "one unusual feature of the wording of Article IX" (Judgment, paragraph 168), which includes within the jurisdiction of the Court not only disputes relating to the interpretation and application of the Convention, but also disputes relating to the "fulfilment of the . . . Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III" (*ibid.*, paragraph 146). But that is the compromissory clause, which is usually not the source of substantive obligations. The majority infers, from that compromissory clause, that "[t]he responsibility of a party for genocide and the other acts enumerated in Article III arises from its

failure to comply with the obligations imposed by the other provisions of the Convention, and in particular . . . with Article III read with Articles I and II" (*ibid.*, paragraph 169).

42. My understanding of the intention of the States when they elaborated and adopted the Genocide Convention is different. In my view, they intended to achieve the above-mentioned noble aim as set forth in the Preamble by imposing an absolute duty on States parties to hold criminally liable individuals who commit such an odious act and to punish them "whether they are constitutionally responsible rulers, public officials or private individuals" (Article IV of the Convention). A State as an abstract entity cannot act without a concrete person undertaking an act. Subjecting individuals, including those who exercise governmental authority, to international criminal responsibility is arguably an effective way of achieving the goal of the Convention because a State can only act through the conduct of individuals. This exposure to criminal prosecution makes it less likely that such individuals would disregard the obligations of the Genocide Convention, particularly since they may not assert an "act of State" defence to such violations (see para. 48, below).

43. Coming back to the text of Article I and its interpretation, it may be useful to take into account the text of the Preamble, since it forms part of the context. The Preamble refers to the declaration made by the General Assembly in its resolution 96 (I) of 11 December 1946 that:

> "genocide is a crime under international law which the civilized world condemns, and for the commission of which principals and accomplices — whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds — are punishable".

It should be recalled that the proposal of the United Kingdom representative in the Sixth Committee, Sir Hartley Shawcross, to replace paragraph 3 of the original draft resolution with the text that the General Assembly "[d]eclares that genocide is an international crime, for the commission of which principals and accessories, *as well as States*, are individually responsible" (United Nations doc. A/C.6/83; emphasis added), was not accepted.

Following the intervention of the French delegate, who referred to the fact that the French legal system did not provide for the criminal responsibility of States, the Chair of the Subcommittee of the Sixth Committee entrusted with the task of preparing a draft resolution explained that "the question of fixing State responsibility, as distinguished from the responsibility of private individuals, public officials, or statesmen, was a matter more properly to be considered at such time as a convention on the subject of genocide is prepared" (United Nations doc. A/C.6/120).

44. The text of resolution 96 (I) provides no support for the position that when the General Assembly asked the United Nations Economic and Social Council (ECOSOC) "to undertake the necessary studies, with a view to drawing up a draft convention on the crime of genocide", it contemplated that such a draft convention should also cover genocide as a crime committed by the State itself. Rather, several passages in the resolution, such as "[t]he punishment of the crime of genocide is a matter of international concern"; or "genocide is a crime under international law . . . for the commission of which principals and accomplices — whether private individuals, public officials or statesmen . . . — are punishable"; or, further, "[i]nvites the Member States to enact the necessary legislation for the prevention and punishment"; or, finally, "[r]ecommends that international co-operation be organized between States with a view to facilitating the speedy prevention and punishment of the crime of genocide", indicate that what was intended was proclaiming genocide as a crime under international law and inducing the enactment of its

prohibition in internal criminal laws of the States parties which would provide a necessary legal basis for the punishment of its perpetrators irrespective of the position they may have held in the State at the time of the commission of the crime.

45. All of the above leads me to the conclusion that genocide in Article I of the Convention is conceived as a crime of individuals, and not of a State. The States parties have the obligation to prevent the commission of such crime and, if it was committed, to punish the perpetrators.

(2) Article II

46. Article II contains a legal definition *stricto sensu* of the crime of genocide. It is a crime which requires a specific intent *(dolus specialis)* "to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". Article II describes the act itself but not its perpetrators.

(3) Article III

47. Article III makes punishable not only the act of genocide itself but also four forms of participation in the crime (conspiracy, direct and public incitement, attempt and complicity). The "punishability" of the prohibited acts, as envisaged in Article III, provides a solid basis for the view that this Article is limited — *ratione personae* — to individuals and does not include States. Otherwise one would have to accept that States are subject to punishment *quod non*. The notion of punishment is linked with criminal responsibility, which has not been accepted as applicable to States.

(4) Article IV

48. Article IV of the Convention is limited only to individuals and their personal responsibility for genocide ("[p]ersons committing genocide . . . shall be punished . . ."). Moreover they may be held criminally responsible for the act irrespective of the position they may have held. Article IV provides that "[p]ersons committing genocide . . . shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals". No defence based on an act of State can successfully shield an individual from being held criminally accountable for his involvement in genocide.

The text of Article IV — for the purposes of its interpretation — is thus quite unambiguous: it does not contemplate the responsibility of a State. This conclusion is reinforced by the fact that the United Kingdom amendment to include the criminal responsibility of a State in the text of this provision was rejected. In the Sixth Committee, the United Kingdom proposed to amend draft Article V, as submitted by the *Ad Hoc* Committee on Genocide of ECOSOC [now Article IV of the Convention], to state:

> "*Criminal responsibility* for any act of genocide as specified in Articles II and IV shall extend not only to all private persons or associations, but also *to States*, governments, or organs or authorities of the state or government, by whom such acts are committed. Such *acts committed by* or on behalf of *States* or governments constitute a breach of the present Convention." (United Nations doc. A/C.6/236 and Corr. 1, in *Official Records of the General Assembly, Part I, Sixth Committee, Annexes*, 1948, p. 24; emphasis added.)

The United Kingdom amendment was rejected by 24 votes to 22.

The Court's observation that "the responsibility of a State for acts of its organs" is not "excluded by Article IV of the Convention, which contemplates the commission of an act of genocide by 'rulers' or 'public officials'" (*I.C.J. Reports 1996 (II)*, p. 616, para. 32) does not alter the conclusion that the responsibility of a State for genocide is not contemplated in Article IV. The subject-matter of Article IV is rather the State's duty to punish the perpetrator of genocide irrespective of the position that person may have within the State.

(5) Article VI

49. Article VI is concerned with the jurisdiction in which "[p]ersons charged with genocide . . . shall be tried". Such persons shall primarily be tried "by a competent tribunal of the State in the territory of which the act was committed".

The Article also contemplates international prosecution of the offender by providing that he or she shall be tried "by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction".

It is useful to recall that the United Kingdom submitted an amendment to draft Article VII [now Article VI of the Convention]. It suggested the deletion of the draft article "because, in the first place, there is no international criminal court and secondly, the reference to national courts is unnecessary in view of Article VI" [Article V of the Convention]. Instead, the following text was proposed by the United Kingdom:

> "Where the act of genocide as specified by articles II and IV is, or is alleged to be the act of the State or government itself or of any organ or authority of the State or government, the matter shall, at the request of any other party to the present Convention, be referred to the International Court of Justice, whose decision shall be final and binding. Any acts or measures found by the Court to constitute acts of genocide shall be immediately discontinued or rescinded and if already suspended shall not be resumed or reimposed." (United Nations doc. A/C.6/236 and Corr. 1, in *Official Records of the General Assembly, Part I, Sixth Committee, Annexes*, 1948, p. 25.)

The United Kingdom amendment was not adopted. The amendment was withdrawn in view of the objections, in particular by the United States, that it "was not in order, in that it amounted to a proposal to go back on a decision already taken" referring to the defeat of the United Kingdom amendment to draft Article V [Article IV of the Convention], (see para. 48 of this opinion) (United Nations doc. A/633, *Official Records of the General Assembly, Part I, Sixth Committee,* 99th meeting, p. 392). The United Kingdom delegate (Fitzmaurice) eventually withdrew this amendment in favour of the joint amendment submitted by Belgium and the United Kingdom to draft Article X [Article IX of the Convention] (see *ibid.*, p. 394). Fitzmaurice later acknowledged that "[t]he debate had clearly shown the Committee's desire to confine the provisions of Article VII [now Article VI of the Convention] to the responsibility of individuals" (United Nations doc. A/C.6/SR.103, p. 430).

(6) Article IX

50. Article IX is the key provision for the purposes of the present case. Its text reads as follows:

> "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 for any of the other acts enumerated in Article III*, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute." (Emphasis added.)

This jurisdictional clause is, as Judge Oda put it,

> "unique as compared with the compromissory clauses found in other multilateral treaties which provide for submission to the International Court of Justice of such disputes between the Contracting Parties as relate to the *interpretation or application* of the treaties in question" (*I.C.J. Reports 1996 (II)*, p. 627, para. 5; emphasis in the original.)

In fact the draft Convention, as prepared by the *Ad Hoc* Committee and submitted to the Sixth Committee, contained the usual compromissory clause, which contemplated the compulsory jurisdiction of the Court for disputes "relating to the interpretation, or application of the present Convention".

What is the meaning of the additional words: "or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide"?

(a) Disputes relating to the fulfilment of the Convention

51. The addition of the word "fulfilment" does not appear to the Court to be significant (Judgment, paragraph 168). I agree on this point. A review of the *travaux préparatoires* convinces me that the word "fulfilment" adds nothing legally relevant to the obligation to apply the Convention. By applying the Convention in good faith, a State party contributes to the fulfilment of the purpose of the Convention to prevent genocide, which purpose is clearly stated in the Preamble ("to liberate mankind from such an odious scourge", i.e., the crime of genocide) and in Article I. It was in connection with this undertaking that the word "fulfilment" was used for the first time in drafting the Genocide Convention (see the Belgian amendment, United Nations doc. A/C.6/252).

52. In my view the addition of the formulation "fulfilment of the present Convention" in the compromissory clause does not add anything to the substantive obligations of the parties to the Convention and does not expand the jurisdiction *ratione materiae* of the Court in comparison with the concept of "application of the Convention" as it appears in Article IX (and in a great number of jurisdictional or compromissory clauses in other instruments). It merely places an additional emphasis on one aspect of the Convention, namely its overall purpose to prevent the "odious scourge" of genocide.

(b) Disputes relating to the responsibility of a State for genocide

53. It remains to deal with that part of the compromissory clause in Article IX which contemplates "disputes . . . including those relating to the responsibility of a State for genocide or any of the other acts enumerated in Article III" as falling within the jurisdiction of the Court.

The French version of this clause differs slightly. It reads as follows: "les différends . . . y compris ceux relatifs à la responsabilité d'un Etat en *matière de* génocide ou de l'un quelconque des autres actes énumérés à l'article III" (emphasis added).

This particular provision raises a number of issues, specifically that of its meaning. It can be interpreted in at least three different ways.

54. First, the provision can be understood as simply contemplating the jurisdiction of the Court to determine the responsibility of a State for the breach of one its obligations under the Convention. The jurisdiction of the Court with respect to the application of a treaty however also includes jurisdiction to determine the consequences for a State resulting from its non-compliance with treaty obligations, i.e., its international responsibility (cf. *Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 21). Therefore "it would be superfluous to add [the formula into the compromissory clause] unless the Parties had something else in mind" (*Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 24). The principle of effectiveness in treaty interpretation, although not provided for *as such* in the Vienna Convention on the Law of Treaties on which the Court routinely relies, suggests that such interpretation would be too narrow. The *travaux préparatoires*, revealing a rather lengthy and sometimes confused debate (see paras. 57 and 58 below), reaffirm that such interpretation should not be retained.

55. Second, the clause under consideration can also be understood as empowering this Court to determine that a State has committed genocide, which is the crime "singled out for special condemnation and opprobrium", "horrific in its scope", constituting a "crime against all of humankind"[13]. But that interpretation would implicate the criminal responsibility of States in international law — a concept previously rejected by a significant majority of States, and more recently abandoned by the ILC, in finalizing the Articles on Responsibility of States for Internationally Wrongful Acts between 1998 and 2001.

56. Third, the clause can also be understood as the power of the Court to determine that in a particular case a State has to bear the consequences of the crime of genocide, committed by an individual found to be criminally liable, because a certain relationship existed between the individual perpetrator of the genocide and the State in question. In other words, the Court has been given jurisdiction to determine the responsibility of a State for genocide under the rules of international law, on the basis of attribution to the State of the genocidal acts perpetrated by persons. It seems to me that this interpretation is the most plausible considering not only the English text of Article IX ("the responsibility of a State for genocide"), but also its French text ("la responsabilité d'un Etat en matière de génocide"), and the sometimes confused debate on the draft in the Sixth Committee in November 1948.

57. The deliberations and revisions underlying the Sixth Committee's drafting process despite their tempered confusion, lend support to this third and favoured construction. The drafting history of Article IX of the Convention reveals that the United Kingdom and Belgian delegations originated this text. It emerged after previous, unsuccessful attempts by both States to revise other provisions. The United Kingdom failed to gather sufficient support for its amendments to draft Article V [Article IV of the Convention] to extend criminal responsibility "also to States, governments or organs or authorities of the state or government" (for the text of the amendment, see para. 48 above), and to draft Article VII [Article VI of the Convention] (for the text of the amendment, see para. 49 above). Likewise, Belgium did not succeed in putting through its amendment to the United Kingdom amendment to draft Article VII. Following these non-successes, the two delegations submitted a joint amendment to draft Article X [now Article IX of the Convention], proposing the following text for that Article (original in English and French):

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[13]ICTY, Prosecutor *v.* Radislav Krstić, IT-98-33-A, Judgment of the Appeals Chamber, 19 April 2004, para. 36.

"Any dispute between the High Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including disputes relating to the responsibility of a State for any of the acts enumerated in Articles II and IV, shall be submitted to the International Court of Justice at the request of any of the High Contracting Parties." (United Nations doc. A/C.6/258, p. 28.)

In French the text reads as follows:

"Tout différend entre les Hautes Parties contractantes relatif à l'interprétation, l'application ou l'exécution de la présente Convention, y compris les différends relatifs à la responsabilité d'un Etat dans les actes énumérés aux articles II et IV, sera soumis à la Cour internationale de Justice, à la requête d'une Haute Partie contractante." *(Ibid.)*

58. The ensuing debate in the Sixth Committee reveals the following pertaining to the joint amendment:

(i) It was discussed at the moment when the reference to "a competent international tribunal" for the trial of persons charged was deleted from draft Article VII, so that the only jurisdiction then contemplated was a domestic tribunal of the State in the territory in which the act was committed. The reference to "such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction" was inserted into Article VI of the Convention only at a late stage in the work of the Sixth Committee, well after the debate on draft Article X [now Article IX of the Convention] was over and decisions on various amendments, including the joint United Kingdom/Belgian amendment, had been made.

(ii) It was in this setting that some delegations were ready to accept the joint United Kingdom/Belgian amendment. The French delegate who had earlier opposed the United Kingdom amendment to draft Article V seeking to extend criminal responsibility to States, said in the debate on the joint United Kingdom/Belgian amendment to draft Article X that:

"[i]t would certainly have been preferable to provide for such punishment [of the genocide] on the direct basis of criminal law instead of confining its scope to States alone on the basis of civil law; but, inadequate as it was, the joint amendment was preferable to the absence of any text confirming competence to an international court" (United Nations doc. A/C.6/SR.103, p. 431).

Similarly,

"[t]he delegation of Brazil was prepared to accept the joint amendment, provided the second part of Article X of the draft remained deleted, so that it would conform to article VII, from which mention of a competent international tribunal had been deleted" (*ibid.*, p. 432).

Similar views were expressed by Uruguay (*ibid.*, p. 433).

(iii) The responsibility of a State, envisaged by the co-authors of the joint amendment, was not a criminal one. Fitzmaurice, as the United Kingdom's representative, replying to the Canadian delegate's request for clarification, said "that the responsibility envisaged by the joint Belgian and United Kingdom amendment was the international responsibility of States following a violation of the convention". As he explained, "[t]hat was civil responsibility, not criminal responsibility" (United Nations doc. A/C.6/SR.103, p. 440).

(iv) There were several preliminary votes before the vote on the joint amendment as a whole. First, the Sixth Committee, by 30 votes to 9 with 8 abstentions, adopted the Indian amendment to substitute the words "at the request of any of the parties to the dispute" for the words "at the request of any of the High Contracting Parties" in the joint amendment (United Nations doc. A/C.6/SR.104, p. 447).

Second, by 27 votes to 10 with 8 abstentions, the proposal to delete the word "fulfilment" from the joint amendment was rejected *(ibid.)*.

Third, the deletion of the words "including disputes relating to the responsibility of a State for any of the acts enumerated in Articles II and IV" from the joint amendment was rejected by a close vote of 19 votes to 17, with 8 abstentions *(ibid.)*.

Finally, the joint amendment of the United Kingdom and Belgium, as amended by India, was adopted by 23 votes to 13, with 8 abstentions *(ibid.)*.

(v) The drafting committee of the Sixth Committee introduced a few stylistic emendations[14] to the joint amendment and renumbered it as Article IX (United Nations doc. A/C.6 289 and Corr. 1).

(vi) India then again attempted unsuccessfully to delete the words "including those relating to the responsibility of a State for genocide or any of the other acts enumerated in Article III" (for the Indian amendment, see United Nations doc. A/C.6/299). The United Kingdom, Belgium and the United States proposed an alternative draft of Article IX. It read as follows (English and French being the original texts):

> "Disputes between Contracting Parties relating to the interpretation, application or implementation of this Convention, including *disputes arising from a charge by a Contracting Party that the crime of genocide or any other of the acts enumerated in Article III has been committed within the jurisdiction* of *another Contracting Party*, shall be submitted to the International Court of Justice at the request of one of the parties to the dispute." (United Nations doc. A/C.6/305; emphasis added.)
>
> In French:
>
> "Les différends entre Parties contractantes relatifs à l'interprétation, l'application ou l'exécution de la présente Convention, y compris *ceux résultant de l'allégation par une Partie contractante que le crime de génocide ou l'un quelconque des autres actes énumérés à l'article III a été commis dans la juridiction d'une autre Partie contractante*, seront soumis à la Cour internationale de Justice, à la requête d'une partie au différend." (*Ibid.*, les italiques sont de moi.)

The three co-authors of this amendment did not consider it to be an amendment of substance, but only "an alternative drafting", the object of which "was the deletion of the word 'responsibility', which appeared ambiguous to certain delegations" (United Nations doc. A/C.6/SR.131, p. 687). They were of the view that the Indian amendment "was an

[14]The Drafting Committee deleted the words "Any" at the very beginning of the text and "High" before "Contracting Parties"; substituted "those" for "disputes" after the word "including"; and used the language "for genocide or any of the other acts enumerated in Article III" instead of "for any of the acts enumerated in articles II and IV".

amendment of substance" and it was "for the Indian representative alone to ask for a reconsideration of Article IX" (United Nations doc. A/C.6/SR.131, p. 687). After a prolonged debate, the Chairman of the Sixth Committee[15]

> "ruled that the amendment concerned the substance of the article. Thus it was provided in article IX that those disputes, among others, which concerned the responsibility of a State for genocide or for any of the acts enumerated in article III, should be submitted to the International Court of Justice." (United Nations doc. A/C.6/SR.131, p. 690.)

He continued that

> "According to the joint amendment [of Belgium, the United Kingdom and the United States], on the other hand, the disputes would not be those which concerned the responsibility of the State but those which resulted from an accusation to the effect that the crime had been committed in the territory of one of the contracting parties." *(Ibid.)*

He concluded, "[t]hat being so, the Committee could not consider the joint amendment of Belgium, the United Kingdom and the United States or the Indian amendment unless it decided in favour of reconsideration of article IX" *(ibid.)*.

That ruling of the Chairman remained unchallenged. The Chairman then put to the vote a motion for reconsideration of Article IX. The motion was not adopted, having failed to obtain the required two-thirds majority (16 votes in favour of reconsideration, 13 against and 11 abstentions) (*ibid.*, p. 690).

59. In light of the drafting history of Article IX of the Genocide Convention, and in light of the ruling of the Chairman of the Sixth Committee on the joint United Kingdom, Belgian and United States proposal (United Nations doc. A/C.6/305), it is difficult to conclude that the jurisdiction of the Court under Article IX would also cover a charge "that the crime of genocide or any other of the acts enumerated in article III has been committed".

60. The Court has no criminal jurisdiction. One may wonder how a Court conceived as a judicial organ for the adjudication of inter-State disputes, with no criminal jurisdiction, whose procedure (Rules of Court) is not tailored to the requirements (or needs) of a criminal case, and which has no Rules of Evidence, could determine that a crime (i.e., genocide, requiring specific intent *(dolus specialis)*) has been committed. Is it possible for the commission of a crime to be established within a procedure which provides for no appeal? These are, in my view, important considerations which militate against construing Article IX of the Convention so as to enable charges by one State that another has committed genocide to be brought within the Court's jurisdiction.

(7) Conclusions on the interpretation of the Convention

61. Having analysed and interpreted different provisions of the Genocide Convention it is now appropriate to draw the relevant conclusions. They are, in my view, as follows:

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[15] R. J. Alfaro, who later became Judge (1959-1964) and Vice-President (1961-1964) of the International Court of Justice.

(i) The Convention was intended as an instrument for the prevention and punishment of the crime of genocide.

(ii) Genocide, as a crime under international law, is construed in the Convention as a criminal offence whose perpetrators bear individual criminal responsibility and shall thus be punished irrespective of their position.

(iii) The Convention does *not* conceive genocide as a criminal act of a State[16].

(iv) The Convention establishes a number of obligations for the States parties. These are the following obligations:

(a) to prevent genocide (Art. I);

(b) to punish the perpetrator(s) of genocide (Arts. I and IV);

(c) to enact the necessary legislation (Art. V);

(d) to exercise jurisdiction by a competent tribunal of a territorial State (Art. VI);

(e) to extradite the perpetrator(s) (Art. VII).

(v) The failure of a State to comply with one of the above obligations stemming from the Convention constitutes an unlawful act and entails the international responsibility of a State. The jurisdiction of the Court under Article IX of the Convention encompasses the determination of whether a State has complied with the above obligations, and of the international responsibility of a State for the breach of any of the above obligations (see point (iv) *(a)* to *(e)* above).

(vi) The jurisdiction of the Court, as a consequence of the addition of the words "including those [disputes] relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III" into the compromissory clause in Article IX, is broader and it includes the power of the Court to determine international "responsibility of a State for genocide" on the basis of attribution to the State of the criminal act of genocide perpetrated by a person. This Court, however, is not the proper forum in which to make a legally binding pronouncement that a *crime* of genocide was committed. Such a finding is to be made within the framework of a criminal procedure which also provides for a right of appeal. This Court has no criminal jurisdiction and its procedure is *not* a criminal one.

B. Comments on some of the Court's findings

(1) The obligation to prevent

62. The Court has found that the Respondent breached its obligation to prevent genocide under Article I of the Genocide Convention. In order to reach this conclusion, it first qualified this obligation as a kind of "due diligence" obligation (Judgment, paragraph 430) and identified "the capacity to *influence* effectively the action of persons likely to commit, or already committing, genocide" (*ibid.*; emphasis added) as a relevant criterion for "assessing whether a State has duly discharged the obligation concerned" *(ibid.)*. The Court considered that "the FRY was in a position of influence, over the Bosnian Serbs" (*ibid.*, paragraph 434). Although the Court "has not found

[16]One should not lose sight of the fact that the Convention was drafted in the aftermath of the Nuremberg Tribunal. That Tribunal said that "[c]rimes against international law are committed by men, not abstract entities". (France et al. *v.* Goering et al., (1946) 22 *IMT* 203, p. 466.)

that the information available to the Belgrade authorities indicated, as a matter of certainty, that genocide was imminent . . ., they could hardly have been unaware of the serious risk of it" (Judgment, paragraph 436). The scale of the tragic events, "though it could not have been foreseen with certainty, *might* at least have been *surmised*" (*ibid.*, paragraph 438; emphasis added). The Court found that since "the Respondent has not shown that it took any initiative to prevent what happened", it "violated its obligation to prevent the Srebrenica genocide" *(ibid.)*. It does not matter for the Court whether the Respondent "definitely had the power to prevent the genocide; it is sufficient that it had the means to do so and that it manifestly refrained from using them" *(ibid.)*. The Court does not specify what kind of "means" it has in mind, but has apparently contemplated the Federal Republic of Yugoslavia's influence over the Bosnian Serbs.

63. What is conspicuous in this part of the Judgment is the fact that scarcely any attention is paid to the arguments of the Parties. I feel compelled to offer my views on the issues they have raised.

64. Serbia and Montenegro argued that "the Genocide Convention can only apply when the State concerned has territorial jurisdiction or control in the areas in which the breaches of the Convention are alleged to have occurred" (CR 2006/16, p. 15). It further points out that:

> "[t]he duties to mobilize the domestic law of Contracting States, and to prevent and punish acts of genocide committed by individuals, are inevitably related to the exercise of legislative and enforcement jurisdiction within State territory, or areas under the control of the State. The principles of State responsibility require an ability to exercise control over the area concerned." (*Ibid.*, p. 19.)

Bosnia and Herzegovina quoted from the Judgment of the Court on the jurisdiction in the present case "that the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention" (*I.C.J. Reports 1996 (II)*, p. 616, para. 31). But Bosnia and Herzegovina also acknowledged that a State has to exercise at least some control over the territory or activities in question when it stated:

> "In short, the question that needs to be asked is the following: did the Respondent, *in relation to the territory of Bosnia and Herzegovina*, exercise *functions*, *powers* or *activities* which would have enabled it to prevent or halt the genocide, or at least attempt to do so? It is obvious that if . . . the reply to that question were to be affirmative, it would then follow that the obligation to act in order to prevent and halt the genocide was fully applicable to the Respondent." (CR 2006/34, p. 7; emphasis added.)

65. In my view, the dictum of the Court that "the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention" has to be interpreted in a reasonable way.

First, as the Court now rightly states, "the duty to prevent genocide and the duty to punish its perpetrators . . . are . . . two distinct yet connected obligations, each of which must be considered in turn" (Judgment, paragraph 425). Second, with respect to the territorial scope of these two obligations, I shall start with the obligation of punishment for which one finds a clearer answer in the text of the Convention and in the *travaux préparatoires* leading to its adoption. That obligation *is* territorially limited, as the Court *now* rightly notes (Judgment, paragraph 184). The principle of universality for the obligation of punishment, originally envisaged in Article VII of the Secretariat draft, was abandoned by the *Ad Hoc* Committee in its draft Article VII, which opted for the principle of territoriality, complemented with the jurisdiction of a competent international tribunal

to be established. This solution was, in principle, retained in Article VI of the Genocide Convention. Thus, strictly speaking, the Convention imposes the *obligation* to punish on the State in whose territory the crime of genocide was committed. On the other side, the practice of States clearly confirms that they recognize a State's *right* to exercise its criminal jurisdiction when the crime of genocide was committed outside its territory, irrespective of the nationality of the alleged perpetrator(s) and victims. Regardless of how desirable it may be that a State exercises its criminal jurisdiction to punish genocide, this does not transform such a right into a State obligation, unless of course, the genocide was committed in its territory.

66. Turning now to the obligation of prevention, the debate in the Sixth Committee is not very illuminating. Not surprisingly the leading author on genocide wrote that "[p]erhaps the most intriguing phrase in Article I is the obligation upon States to prevent and punish genocide". He continued that: "while the final Convention has much to say about punishment of genocide, there is little to suggest what prevention of genocide really means. Certainly, nothing in the debates about Article I provides the slightest clue as to the scope of the obligation to prevent."[17]

The Court itself acknowledges that while "the Convention includes fairly detailed provisions concerning the duty to punish (Articles III to VII), it reverts to the obligation of prevention, stated as a *principle* in Article I, only in Article VIII" (Judgment, paragraph 426; emphasis added).

The latter Article affirms the possibility for a State to bring to the attention of the competent organs of the United Nations a situation which such State views as amounting to genocide or involving a risk leading to genocide. But, unfortunately, the Article does not establish a firm obligation for the competent organ to act. It is for these United Nations organs to consider what action would be appropriate for the prevention or suppression of genocide, or situations which may degenerate into it. Any such action is to be based on the Charter of the United Nations.

Article VIII is primarily aimed at the Security Council, which bears "primary responsibility for the maintenance of international peace and security" and is authorized under the Charter to decide what measures shall be taken to maintain or restore international peace and security. The other organ possibly contemplated under Article VIII of the Genocide Convention is the General Assembly.

When they adopted the Genocide Convention, States expressed in its Preamble their conviction that, "in order to liberate mankind from such an odious scourge [i.e., genocide], international co-operation is required".

Article VIII of the Convention gives a normative expression to this conviction by contemplating a role for the competent United Nations organs in the prevention and suppression of acts of genocide. This is understandable since one of the purposes of the United Nations, as stated in Article 1 of the Charter, is "[t]o be a centre for harmonizing the actions of nations in the attainment of [their] common ends", among them the maintenance of international peace and security, the promotion and encouragement of respect for human rights, and fundamental freedom for all.

But if Article VIII does not impose a legal obligation on the competent organs to act, can the obligation of prevention in Article I be interpreted as requiring a State to act *outside* of its territory in order to prevent or suppress the acts of genocide? I have serious doubts. Such a broad construction of this obligation would mean that preventative action undertaken by one State in the territory of another should be viewed as lawful. But in practice, unilateral or plurilateral actions undertaken without the authorization of the Security Council still remain controversial. At present, only actions authorized by the Council are undoubtedly lawful and legitimate.

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[17] W. A. Schabas, *Genocide in International Law*, Cambridge University Press 2000, p. 72.

67. This said, however, I am convinced that under Article I of the Genocide Convention the State does have an obligation to prevent genocide outside its territory to the extent that it exercises jurisdiction outside its territory, or exercises control over certain persons in their activities abroad. This obligation exists in addition to the unequivocal duty to prevent the commission of genocide within its territory.

68. In this case, it has not been established that the Federal Republic of Yugoslavia exercised jurisdiction in the areas surrounding Srebrenica where atrocious mass killings took place. Nor has it been established that it exercised control over the perpetrators who conducted these killings outside the territory of the Federal Republic of Yugoslavia.

The plan to execute as many as possible of the military aged Bosnian Muslim men present in the Srebrenica enclave was devised and implemented by the Bosnian Serbs following the takeover of Srebrenica in July 1995. That was the factual finding of the International Criminal Tribunal for the former Yugoslavia (ICTY)[18]. It has not been established as a matter of fact before this Court that the Federal Republic of Yugoslavia authorities knew in advance of this plan. In such a situation they could not have prevented the terrible massacres in Srebrenica.

Thus, to my regret, I cannot support the conclusion of my colleagues in the majority, although I understand the motives, which, at the end of the day, may have led them to reaching it.

(2) The responsibility for non-compliance with the Orders indicating provisional measures

69. In the part of this opinion in which I dealt with the Court's jurisdiction, I took the position that the Federal Republic of Yugoslavia was not a party to the Statute of the Court during the 1992-2000 period and has become party to it only as from 1 November 2000 (paras. 25-36 above). In my view, these facts have implications both for the 1993 Orders on interim measures of protection, and for the 1996 Judgment on jurisdiction and admissibility because their binding nature is based on the Statute (Arts. 41 and 59). I have already explained my views on the problematic implications for the 1996 Judgment since it was rendered when the Federal Republic of Yugoslavia was not party to the Statute, and the consequent need to determine the jurisdiction of the Court *de novo* (paras. 16-25 above). It remains to offer a few observations on the Orders indicating provisional measures.

70. One of the conditions for indicating the requested measures is that the provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court *might* be established. Article IX of the Genocide Convention "appear[ed] to the Court to afford a basis on which the jurisdiction of the Court might be founded" (*I.C.J. Reports 1993*, p. 16, para. 26).

Orders on provisional measures, rendered on the prima facie ascertainment of the Court's jurisdiction, produce their effects from the moment of their notification to the Parties and remain in force until the Court either by a judgment on preliminary objections finds that it has no jurisdiction to entertain the case or finds the Application inadmissible, or renders its judgment on the merits, i.e. until the final judgment in the case is delivered (Art. 41 of the Statute). In its Judgment in the *Anglo-Iranian Oil Co. (United Kingdom* v. *Iran)* case, once the Court found that it lacked jurisdiction in the case, it observed that it followed from this finding that the Order on the provisional measures rendered earlier "ceased to be operative [upon the delivery of this Judgment]

[18]ICTY, Prosecutor *v.* Krstić, IT-98-33-T, Judgment of the Trial Chamber, 2 August 2001, para. 87.

and that the Provisional Measures lapsed at the same time" (*I.C.J. Reports 1952*, p. 114)[19] This statement seems to indicate that the lapse of the provisional measures was prospective; they were not invalidated or declared void *ab initio*. Similarly, in the *Southern Bluefin Tuna* case, the Arbitral Tribunal having found itself without jurisdiction to rule on the merits decided "that provisional measures in force by Order of the International Tribunal for the Law of the Sea . . . [were] revoked from the day of the signature of [the] Award"[20]. The Tribunal explained that the Order prescribing provisional measures "cease[d] to have effect as of the date of the signing of [the] Award"[21] and added that "[h]owever, revocation of the Order . . . does not mean that the Parties may disregard the effects of that Order"[22].

71. The Orders of the Court of 8 April and 13 September 1993 have produced their effects. Rendered on the prima facie ascertainment of jurisdiction, the Parties were to comply with the provisional measures indicated therein. The 1993-1995 period is relevant for the consideration of the compliance with these measures. At that time, the Federal Republic of Yugoslavia claimed to be a Member of the United Nations and, on that basis, party to the Statute. Despite the fact that this claim subsequently did not prevail, at the time the Orders were rendered the Federal Republic of Yugoslavia should have perceived itself as bound by those Orders. The Federal Republic of Yugoslavia was not party to the Statute until 1 November 2000 when it was admitted to membership in the United Nations. Formally, therefore, it had no legal obligations under the Statute during the period from 27 April 1992 through 31 October 2000. For that reason, I believe that the text of the Judgment would have been more accurate had it employed alternative language, avoiding the term "obligation" (Judgment, paragraphs 435 and 471 (7)). But since the Orders produced their effects, and the Federal Republic of Yugoslavia's authorities did not, during the relevant period of 1993-1995, take the requirements of those Orders seriously into account, I agree with the conclusions of the majority that the Respondent failed to comply with some of the provisional measures. I have therefore voted in favour of paragraph 7 of the operative clause.

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Concluding remarks

72. The Judgment closes a particularly lengthy case. Its intriguing procedural history which started almost 14 years ago is summarized in the *qualités* of the Judgment. The complexity of this case is further reflected in the most extensive written pleadings in the Court's history. Views were expressed that the case had awaited adjudication for too long. In the meantime, the Trial and Appeals Chambers of the ICTY have rendered a great number of judgments on which both Parties relied in the present proceedings. The Court has given serious consideration to the ICTY's judgments and to the evidence produced in the trials before its Chambers to which the Parties

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[19] In the *Nuclear Tests* cases, the Court, having found that the claims no longer had any object and it was therefore not called upon to give a decision thereon, with respect to Orders indicating provisional measures repeated the same formula (*I.C.J. Reports 1974*, p. 272, para. 61 and pp. 477-478, para. 64).

[20] *International Law Reports*, Vol. 119, p. 556, para. 72.

[21] *Ibid.*, p. 554, para. 66.

[22] *Ibid.*, p. 555, para. 67.

referred. Without the work accomplished by the ICTY, it would have been much more difficult for the Court to discharge its role in the present case. Cases involving the "responsibility of a State for genocide" are too serious to be adjudicated simply on the basis of the allegations by the Parties.

73. As the Court observes, "the duality of responsibility continues to be a constant feature of international law" (Judgment, paragraph 173). This Court and the ICTY have two different missions but one common objective.

The ICTY has to determine the personal guilt and individual criminal responsibility of those indicted for the crime of genocide, crimes against humanity and war crimes. It has no jurisdiction over States as such and thus cannot make any pronouncement on the responsibility of States for the many serious atrocities committed during the Balkan wars since 1991.

The International Court of Justice has no jurisdiction over the individual perpetrators of those serious atrocities. Article IX of the Genocide Convention confers on the Court jurisdiction to determine whether the Respondent complied with its obligations under the Genocide Convention. In making this determination in the present case, the Court was entitled to draw legal consequences from the judgments of the ICTY, particularly those which dealt with charges of genocide or any of the other acts proscribed in Article III. Only if the acts of the persons involved in the commission of such crimes were attributable to the Respondent could its responsibility have been entailed.

The activity of the Court has thus complemented the judicial activity of the ICTY in fulfilling the Court's role in the field of State responsibility for genocide, over which the ICTY has no jurisdiction. Hopefully, the activities of these two judicial institutions of the United Nations, the Court remaining the principal judicial organ of the Organization, contribute in their respective fields to their common objective — the achievement of international justice — however imperfect it may be perceived.

(Signed) Peter TOMKA.