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# Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment

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## Abstract

*In its judgment of 26 February 2007 in the Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide, the Court by a majority of 12 to three found the respondent to be in breach only of its obligations under Article I of the Convention, namely the duties of prevention and punishment. Despite the traditional self-restraint professed by the Court, stressing its intention to 'confine itself to determining the specific scope of the duty to prevent in the Genocide Convention, and to the extent that such a determination is necessary to the decision to be given on the dispute before it', in the key passage of its judgment the Court stretched the interpretation of Article I to its maximum possible extent. On the one hand, it audaciously decided to disentangle the obligation to prevent in Article I of the Genocide Convention from any territorial link, substituting the traditional concept of 'jurisdiction' with the new and much more vague one of 'capacity to effectively influence'. On the other hand, it endeavoured to flesh out its general scope. However, after having found Serbia in breach of her duties under Article I of the Genocide Convention, the Court, somehow contradictorily, denied any causal link between Serbia's conduct and the losses resulting from the Srebrenica massacres, and contented itself with a declaratory judgment as a form of satisfaction. The Court's reluctance to address the issue of concomitant causes can be partly explained by the uncertain state of practice and doctrine. Furthermore, Bosnia itself had not asked for monetary compensation for breaches of Article I. Even so, the Court could have shown more creativity and sensitivity with regard to the non-material damage suffered by the surviving heirs or successors of the Srebrenica victims.*

## 1 Introductory Remarks

In its judgment of 26 February 2007 in the *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (hereinafter judgment), the Court by a majority of 12 to three

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found the respondent to be in breach only of its obligations under Article I of the Convention, namely the duties of prevention and punishment.

The Court reached this conclusion after having set aside the applicant's main claim that all the terrible events that took place in Bosnia-Herzegovina in the three years from its declaration of independence in April 1992 to the Dayton Peace Negotiations in September 1995 were to be understood as a single, all-embracing case of genocide against the Muslim part of the population of Bosnia and attributable as a whole to Serbia, directly or through its 'genocidal creation' of the Republika Srpska. Applying strict methods of proof,<sup>1</sup> the Court found that Bosnia had not brought conclusive evidence of the existence of a 'mastermind' genocidal plane that had linked the numerous crimes against humanity committed during the war by the Bosnian Serb authorities.<sup>2</sup> Only in the case of the massacres of Srebrenica in July 1995 did the Court, following the ICTY's qualification in the *Krstic* and *Blagojevic* cases<sup>3</sup>, find that genocide had been committed.<sup>4</sup> However, again for lack of conclusive evidence, it held that it was not attributable to Serbia<sup>5</sup> nor did the Serbian authorities have any knowledge of its commission by the VRS, the Republika Srpska's Army, so as to make them complicit in the crime of the latter.<sup>6</sup>

Whilst the first conclusion is entirely justified on grounds both of law and – at least at the present state of documentary evidence – of fact, the second conclusion of the Court, although consistent with its self-imposed severe standard of proof, could give rise to some doubts.<sup>7</sup> The difficulty emerges in the comparison with the Court's

<sup>1</sup> On this issue see Gattini, 'Evidentiary Issues in the ICJ's *Genocide* Judgment', 6 *J Int'l Criminal Justice* (2007) 889.

<sup>2</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Serbia and Montenegro)*, Judgment of 26 Feb. 2007, para. 373.

<sup>3</sup> Cf. *Prosecutor v. Krstic*, IT 98-33-T, Judgment of 2 Aug. 2001, para. 560, and Appeals Chamber Judgment of 19 Apr. 2004, para. 23; *Prosecutor v. Blagojevic and Jokic*, IT-02-60, Trial Chamber Judgment of 17 Jan. 2005.

<sup>4</sup> Judgment, *supra* note 2, para. 297.

<sup>5</sup> *Ibid.*, para. 415.

<sup>6</sup> *Ibid.*, para. 424.

<sup>7</sup> The Court recognized that the question of complicity is a 'delicate' one (*supra* note 2, para. 418), and indeed this point of the judgment is probably the most debatable one, as is demonstrated by the declarations (actually partially dissenting opinions) of two judges of the majority, Bennouna and Keith. The Court started with a discussion of Art. 16 of the ILC's Arts on State Responsibility concerning aid or assistance in the commission of an internationally wrongful act, assuming that there is no distinction of substance between that concept and that of complicity within the meaning of Art. III, para. (e). This assumption would have deserved a more in-depth elaboration, and not only because of the formalistic reason that Art. 16 concerns a relationship between two states, whereas Art. III does not. Actually, the ICJ did not need to discuss Art. 16 at all. Indeed Art. 16 was relied upon by Bosnia's counsel exactly in order to demonstrate that the 'aid or assistance' given by Serbia to the commission of genocide did not require the specific intent, the *dolus specialis*, which characterizes the crime of genocide. The reason for Bosnia to divert the attention of the Court from the notion of 'complicity' in Art. III, para. (e) of the Genocide Convention to that of 'aid or assistance' of ILC Art. 16 was therefore quite obvious. It is a fact that the ICTY jurisprudence is still unsettled on whether the notion of 'complicity', as distinguished from that of 'aiding and abetting', presupposes that the accomplice shares the specific intent of the principal perpetrator, or it suffices that he is aware of the specific intent of the latter. It will be recalled that the *Krstic* case was decided on the basis of Art. 7 of the Statute (Individual Criminal Responsibility), stating general principles of international criminal law, among which was that of 'aiding and abetting', and not on the arguably

finding of breach by Serbia of its obligation to prevent the commission of genocide. Here the Court, in this author's opinion quite rightly, switched from a criminal standard of proof 'beyond any reasonable doubt' to a somewhat less demanding one of 'proof at a high level of certainty',<sup>8</sup> on the ground, presumably, that breach of the duty of prevention does not itself constitute a violation of *jus cogens* or a crime engaging the individual responsibility of the state organ. Nevertheless, in both cases of complicity and breach of the duty to prevent, the constitutive elements of genocide, *actus reus* and *mens rea*, remain the same. Therefore, the question whether and to what extent it is possible to distinguish between an awareness of genocide occurring that should be proven for the purposes of complicity and an awareness which needs to be proven for the purposes of a breach of the duty to prevent remains a difficult one. The Court endeavoured to make a distinction between the two but, as we will see, its efforts are not fully convincing.

## 2 Breach of the Obligation to Prevent

The part of the judgment dealing with the obligations to prevent and to punish genocide constitutes its core, these being the only obligations of which Serbia had been found in breach. It is easy to predict that, beside the many relevant points of law which arose in the present case, this is the part of the judgment which will be more carefully examined by all states. It is worth recalling that in 1993 Bosnia seriously considered the option to also bring before the Court other states, such as the United Kingdom, for their breach of the duty to prevent the commission of a genocide.<sup>9</sup> In concrete terms, what does the obligation to prevent a genocide, as an obligation *erga omnes*,<sup>10</sup> imply for any single state?

Not surprisingly, once it had reached the heart of the matter, the Court displayed its traditional self-restraint, expressly refusing 'to find whether, apart from the texts applicable to specific fields, there is a general obligation on States to prevent the commission by other persons or entities of acts contrary to certain norms of general international

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narrower basis of Art. 4, para. 3 litt (e) (Complicity in Genocide). Cf. *Prosecutor v. Krstic*, IT 98-33-A, *supra* note 3, para. 140: 'an individual who aids and abets a specific intent offence may be held responsible if he assists the commission of the crime knowing the intent behind the crime'. See, however, the Partial Dissenting Opinion of Judge Shahabudden, para. 59 ff, forcefully making the point that the reference in Art. 4, para. 3 litt. (e) of the Statute to 'complicity in genocide' can and does include 'aiding and abetting'. On this issue cf. Schabas, *Genocide in International Law* (2000), at 293, and at 300 ff. Bosnia's strategy did not eventually prove to be of much use. Without entering into the debate on the appropriate requirement of *mens rea* of the accomplice, the Court noted that at any event a minimum requirement would be that the organ or person acted 'in the full knowledge of the facts', including the specific intent of the principal perpetrator. And here, finally employing without periphrases the 'beyond any doubt' test of evidence (at para. 422), and stressing the importance of the fact that the decision by the Bosnian Serb leaders to commit genocide was taken only shortly before it was actually carried out, the Court concluded that 'the international responsibility of the Respondent is not engaged' (at para. 424).

<sup>8</sup> Judgment, *supra* note 2, para. 210.

<sup>9</sup> Cf. Toufayan, 'The World Court's Distress When Facing Genocide: A Critical Commentary on the Application of the Genocide Convention Case', 40 *Texas Int'l LJ* (2005) 233.

<sup>10</sup> Cf. *Barcelona Traction Light and Power Company, Limited (Belgium v. Spain)*, Judgment, [1970] ICJ Rep 32, at para. 34.

law’, and on the contrary stressing its intention to ‘confine itself to determining the specific scope of the duty to prevent in the Genocide Convention, and to the extent that such a determination is necessary to the decision to be given on the dispute before it’.<sup>11</sup>

As we will see, the Court’s demonstrative prudence did not prevent it from taking a remarkably progressive stance with regard to Article I of the Genocide Convention. It might, however, be wondered whether, by refusing to enlarge the perspective on general international law, the Court missed a major opportunity to give, even through some *obiter dicta*, clear and much needed guidance on the highly debated question of the existence and scope, *de lege lata* or *ferenda*, of the duty or responsibility to protect.<sup>12</sup> Although its normative contours are still vague and debated, and its multifarious implications and consequences are far from having been assessed in all their complexity,<sup>13</sup> the core of the concept is straightforward enough to put forward in a few lines: as a corollary to its sovereignty, every state has not only the right but also the duty towards its own population to protect it as far as possible from grave attacks on its survival, whether their cause be natural or human. If the state is unable or unwilling to cope with its primary responsibility, then it is the turn of the international community to give voice to its concern and to rise to its subsidiary responsibility, primarily through the collective system of the United Nations, but possibly also, and especially so in the case of deadlock in the UN decision process, outside the system through multilateral or even unilateral initiatives.

While it is obvious that the concept of ‘responsibility to protect’ gives rise to concern when it comes to the question whether it could ever justify the use of force outside the UN system of collective security, a much less disquieting, albeit legally not less complex issue would be to resort to it with the purpose of strengthening the accountability of the UN organs for their decisions or lack of them. Again, it is worth recalling that in its application to the ICJ of 20 March 1993, the Government of Bosnia-Herzegovina had, among other things, asked the Court to judge and declare that ‘Bosnia and Herzegovina has the sovereign right to defend Itself and its People’, and for that reason to construe Resolution 713 of the Security Council of September 1991, which had

<sup>11</sup> Judgment, *supra* note 2, at para. 429.

<sup>12</sup> As is well known, after the first impulse provided by the ‘International Commission on Intervention and State Sovereignty’ established by the Canadian Government in 2001, the concept of ‘responsibility to protect’ has somewhat surprisingly quickly taken some important steps in the UN law-making process from the Report of the High-Level Panel on Threats, Challenges and Change of Dec. 2004 (‘A More Secure World: Our Shared Responsibility’, UN Doc. A/59/565), via the Report of the UN General Secretary of Mar. 2005 (‘In Larger Freedom: Towards Development, Security and Human Rights for All’, UN Doc. A/59/2005, esp. at paras 16–22), and the so-called World Summit Outcome of the General Assembly of 24 Oct. 2005 (UN GA Res. 60/1, esp. paras 138–139) to SC Res. 1674 of 28 Apr. 2006 on the protection of civilians in armed conflict, para. 4.

<sup>13</sup> On the whole see Thakur, ‘Intervention, Sovereignty and the Responsibility to Protect: Experiences from ICISS’, 33 *Security Dialogue* (2002) 323; Evans and Sahnoun, ‘The Responsibility to Protect’, *Foreign Affairs*, Nov./Dec. 2002, 99; Williams and Bellamy, ‘The Responsibility to Protect and the Crisis in Darfur’, 36 *Security Dialogue* (2005) 27; Hilpold, ‘The Duty to Protect and the Reform of the United Nations – A New Step in the Development of International Law?’ *Max Planck UN Yearbook* (2006) 35; Boisson de Chazournes and Condorelli, ‘De la “responsabilité de protéger” ou d’une nouvelle parure pour une notion déjà bien établie’, 110 *Revue générale de droit international public* (2006) 11; Stahn, ‘Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?’, 101 *AJIL* (2007) 74.

imposed a weapons embargo on the whole territory of the then Federal Republic of Yugoslavia, in such a way as not to impair Bosnia's right of self-defence. It is striking that the Government of Bosnia found the necessary jurisdictional basis for the Court to adjudicate upon that claim in Article I of the Genocide Convention, because the obligation to prevent had to be read also as the obligation to protect its own population.<sup>14</sup> At that time, however, the Court was obviously reluctant to enter into a debate which would inevitably have involved the thorny issue of the control of the legitimacy of the Security Council's decisions.

It is understandable that Bosnia, in the later stages of its case against Serbia, no longer had any interest in developing the theme of the responsibility to protect, be it its own or that of the UN or other states.<sup>15</sup> But it is perhaps more unfortunate that Bosnia's counsel omitted fully to articulate the issue of Serbia's duty to prevent, for fear that this would have weakened its obsessive case of Serbia's monolithic responsibility for the commission of genocide.<sup>16</sup> Bosnia's simplistic argument was that Serbia's responsibility for lack of prevention was, so to say, 'eclipsed'<sup>17</sup> by the fact of the very commission of genocide, and at any event easy to establish, given the notorious massive Serbian support for the VRS.<sup>18</sup> This view was dictated by the fact that Bosnia considered, like Serbia,<sup>19</sup> that responsibility for lack of prevention, although not territorially bound,<sup>20</sup> was still dependent on the degree of effective control exercised, whether legally or illegally, by a state over a territory outside its border.<sup>21</sup>

As it had done in a previous part of the judgment, in which the Court mainly relied on the duty to prevent in order to demonstrate that, by necessary implication, states themselves are also under the obligation not to commit genocide,<sup>22</sup> again in this key passage of its judgment the Court stretched the interpretation of Article I to its maximum extent. On the one hand it audaciously decided to disentangle the obligation to prevent in Article I of the Genocide Convention from any territorial link,

<sup>14</sup> Cf. Maison, 'Les ordonnances de la CIJ dans l'affaire relative à l'application de la Convention sur la prévention et la répression du crime de génocide', 5 *EJIL* (1994) 381, at 396.

<sup>15</sup> See, however, Prof. Condorelli's brief 'parenthesis' on the concept of responsibility to protect, ICJ CR 2006/11, at 16, paras 3–4.

<sup>16</sup> The question of Serbia's violation of Art. I was first addressed by Bosnia's counsel on the final day of the first round of oral arguments. In the words of Condorelli: '[y]ou might ... find it surprising that the Applicant should wait until this late hour to come forward with its point of view on a subject of such pivotal importance under the Convention. However, it is of course the scale of gravity of the wrongful acts committed by Serbia and Montenegro which has dictated the sequence in which we have laid out our arguments, since it goes without saying that the violations of Art. I, though obviously serious, are considerably less so in relation to the actual crime of genocide perpetrated by the FRY'; *ibid.*, translation, at 9, para. 5.

<sup>17</sup> See Pellet, ICJ CR 2006/8, at 10.

<sup>18</sup> See Condorelli, ICJ CR 2006/34, at 13, para. 6.

<sup>19</sup> See Brownlie, ICJ CR 2006/17, at 43–44, para. 305, for whom an extraterritorial application of the Genocide Convention without any limit would render it 'chaotic and extra-legal'.

<sup>20</sup> The issue had already been decided by the ICJ in its 1996 Judgment on Preliminary Objections, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Serbia and Montenegro)* [1996] ICJ Rep 615, at para. 31.

<sup>21</sup> See Pellet, ICJ CR 2006/11, at 20, para. 12.

<sup>22</sup> Judgment, *supra* note 2, at para. 166.

substituting for the traditional concept of 'jurisdiction' the new and much vaguer one of 'capacity to effectively influence'. On the other hand it endeavoured to flesh out its general scope. This part of the task, in particular, was a daunting one. As has been remarked in international legal literature,<sup>23</sup> the Genocide Convention, like many other conventions dealing with international crimes, does not contain any indication of what is meant by 'prevention'. The only explicit reference is that in Article VIII, where it is said that any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter as they consider appropriate for the prevention and suppression of acts of genocide. Another reference may be read in Article V, in which the Contracting Parties 'undertake to enact ... the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article III'. It seems, therefore, that besides the activation of the UN collective security system, the main, if not the only, preventive aspect of the Convention is intertwined with the repressive ones, namely the general function of dissuading would-be perpetrators through the enactment of effective penalties.

The Court was perfectly aware of this, but nevertheless it forcefully made the point that the obligation on each contracting state to prevent genocide is 'both normative and compelling', that 'it has its own scope', and the states parties were bound by the 'obligation to take such action as they can to prevent genocide from occurring'.<sup>24</sup> In order to demonstrate it, the Court started with some 'introductory remarks and clarifications' on the duty to prevent, before applying them to the merits of the case.

First, the Court took great care to demonstrate that the duty to prevent is not an obligation of result,<sup>25</sup> and that much depends on the circumstances of the particular case. For this purpose the Court relied on the crucial concept of due diligence. It is outside the scope of this contribution to dwell on the significance of the concept in the entire system of state responsibility, whether it is a constituent part of the primary rule or belongs to the conditions for assessing its breach, and above all which is the proper standard. Understandably, the Court did not embark on a theoretical discussion, but it is true that the Court in this concise passage gave short shrift to all those theories pushing too far the attempt to render the standard more objective.<sup>26</sup> The Court started its observations by saying that the due diligence 'calls for an assessment *in concreto*'.<sup>27</sup>

<sup>23</sup> See Sicilianos, 'La responsabilité de l'Etat pour absence de prévention et de répression des crimes internationaux', in Ascensio *et al.* (eds.), *Droit international pénal* (2000), at 115, 119.

<sup>24</sup> Judgment, *supra* note 2, at para. 427. See also paras 162–165 for an analysis of the preparatory work of the Convention with regard to Art. I.

<sup>25</sup> Judgment, *supra* note 2, at para. 430.

<sup>26</sup> For a discussion of the proper standard of due diligence for the purpose of state responsibility see A. Gattini, *Zufall und force majeure im System der Staatenverantwortlichkeit* (1991), at 197 ff; P. Mazzeschi, *La due diligence e responsabilità internazionale degli Stati* (1990), at 69 ff. For a comprehensive overview of the development of the doctrine of due diligence from the angle of attribution, see Hessbruegge, 'The Historical Development of the Doctrines of Attribution and Due Diligence in International Law', 36 *NYU J Int'l L & Politics* (2004) 265.

<sup>27</sup> Judgment, *supra* note 2, at para. 430.

Although the Court stated that 'various parameters' operate when one is called upon to assess the conduct of the state, it mentioned only one,<sup>28</sup> namely, as we have seen, the 'capacity of the State to effectively influence the actions of persons likely to commit genocide'. This capacity, the Court said, 'varies greatly from one State to another', and depends on many elements. Of these elements the Court stressed two, the geographical distance of the state concerned and the strength of the political links, as well as links of all other kinds, between that state and the main actors in the events.

At this juncture, the Court added a third element, namely that capacity must also be assessed by legal criteria, since 'every State may only act within the limits permitted by international law'. It follows for the Court that the state's capacity varies 'depending on its particular legal position vis-à-vis the situations and persons facing the danger, or the reality, of genocide'. The meaning of this sentence remains rather obscure. One could think that the Court meant that a state's responsibility to prevent is greater with respect to its own territory or territory under its control, on the one hand, and with respect to its own organs or persons under its control, on the other hand. However, in this case the sentence would be superfluous, because this meaning is already implied in the two previously mentioned parameters, that of geographical distance and that of political links to the actors. Be that as it may, it seems that the Court's intent was rather to stress the 'limits' imposed by international law on the actions of the states. Here, of course, the mind immediately goes to the already mentioned discussion on the admissibility of a humanitarian intervention without UN mandate to prevent an incumbent genocide, a matter which the Court was not willing to elaborate upon in the context of the present judgment.<sup>29</sup>

A second aspect stressed by the Court is the fact that a state can be held responsible for breaching its obligation to prevent only if the wrongful act, in our case the genocide, is actually committed. The Court referred to Article 14, paragraph 3 of the ILC Articles on State Responsibility, which is formulated in unmistakable terms: '[t]he breach of an international obligation requiring a State to prevent a given event occurs when the event occurs'.<sup>30</sup> Although the Court labelled the article a general rule of the law of state responsibility, an uncertainty in this regard could have arisen because the Court had already stated in its order on provisional measures of 8 April 1993 that the obligation to prevent involves 'positive obligations',<sup>31</sup> i.e., the obligation to do one's best to ensure that such acts do not occur. At that time, this aspect had been positively noted by some commentators, who had welcomed the 'progressive' and 'liberal' interpretation of such an obligation, and had gone so far as to envisage a

<sup>28</sup> See Dupuy, 'Crimes sans chatiment ou mission accompli?', 111 *Revue générale de droit international public* (2007) 243, at 244, for the critical remark 'un usage à éclipses de l'obligation de diligence due'.

<sup>29</sup> A more convenient context would obviously have been the *Legality of the Use of Force* cases, which the Federal Republic of Yugoslavia brought before the Court against 10 NATO states in 1999, had they reached the merits stage.

<sup>30</sup> Art. 26 of the Draft approved in first reading had the same wording.

<sup>31</sup> Cf. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Serbia and Montenegro)*, Provisional Measures Order, [1993] ICJ Rep 22, at para. 45: 'clear obligation to do all in their power to prevent the commission of any such acts in the future': Judgment, at para. 432, and in slightly different language paras 427 and 431.

'collective responsibility' of all states to impede the commission of genocide by another state.<sup>32</sup> Later on, in his reflections on the structure and scope of the obligation to prevent, as an obligation to endeavour, Pierre-Marie Dupuy stressed two factors, first the fact that a breach of the obligation should be judged only by the actual conduct of the responsible state and not by the circumstance of having or not having achieved the result, and secondly the importance of the primary obligation breached in order to determine the *momentum a quo* of the violation of the obligation to prevent such occurrence.<sup>33</sup>

Therefore, one could ask why it should not be possible to hold responsible a state which manifestly breached its obligation to prevent a violation of a peremptory norm of international law, even if the event was averted at the very brink owing to the intervention of third parties. As we have seen, the Court preferred not to leave the well-trodden path of Article 14, paragraph 3. In the Court's defence, one could say that, as a matter of fact, the question raised here could find a satisfactory answer also in keeping with the traditional view, because in a situation such as that described above it will as a rule be possible to hold the state constructively responsible for breaching Article III, paragraph (b), i.e., conspiracy to commit genocide, or paragraph (d), i.e., attempt to commit genocide. Nevertheless, the Court's refusal to embrace a more progressive reading of the time factor of the breach of the duty to prevent is probably the cause of some conceptual difficulties which the Court encountered later when dealing with the questions of causality and reparation.

Finally, being conscious of the conceptual delicacy of the difference between complicity in the commission and breach of the obligation to prevent which, as we have already said, is the pivotal aspect upon which the whole judgment lies, the Court finds it 'especially important to lay stress' on these differences, and identifies two of them. First, the ban on genocide and the other acts listed in Article III of the Genocide Convention, including complicity, places the state under a negative obligation not to directly or indirectly support the commission of genocide, whereas the duty to prevent involves positive obligations. Secondly, and this is a very fine distinction, the *mens rea* of the accomplice requires that he 'must have given support in perpetrating the genocide with full knowledge of the facts', whereas for a finding of breach of the duty to prevent it suffices that the state 'was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed'.<sup>34</sup> The soundness of these arguments, on which the President of the Court, Judge Higgins, found it appropriate to dwell especially in the statement to the press, has met with some scepticism in international legal literature.<sup>35</sup> On the one hand, they do not seem to be borne

<sup>32</sup> Cf. Boisson de Chazournes, 'Les ordonnances en indication de mesures conservatoires dans l'affaire relative à l'application de la convention pour la prévention et la répression du crime de génocide', 39 *Annuaire français de droit international* (1993) 515, at 533.

<sup>33</sup> Cf. Dupuy, 'Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility', 10 *EJIL* (1999) 366, at 384.

<sup>34</sup> Judgment, *supra* note 2, at para. 432.

<sup>35</sup> Cf. Dupuy, *supra* note 33, at 247.



out by international practice; on the other hand they do not appear as decisive as the Court wants us to believe. A glance at domestic criminal legal systems shows that, first, omissive conduct can also be counted for as a form of complicity and, secondly, the threshold of liability for omission will as a general rule be higher than that for conduct, and not the other way round.<sup>36</sup>

Leaving aside any judgment whether the introductory remarks and clarifications which the Court held important to hand down are all pertinent and persuasive, it is noteworthy that, once coming to the facts of the case, in order to ascertain Serbia's responsibility the Court felt it necessary eventually to rely on an even more specific circumstance; namely, the fact that Serbia was under a stricter obligation to prevent, by reason of the compelling text of the two ICJ provisional measures orders of 1993. Indeed, as early as in its first order of 8 April 1993 the Court had made clear that, notwithstanding any definitive findings of attribution, the Federal Republic of Yugoslavia had to 'ensure that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity in genocide'.<sup>37</sup> At that time, that unorthodox language had not failed to attract the attention of some commentators, who had rightly observed how the 'generic and inclusive' terms chosen by the Court opened up various possibilities to engage the responsibility of the FRY.<sup>38</sup> Now, it is clear that, by consciously choosing the non-technical noun 'influence', the Court aimed at specifying and at the same time enlarging the generic obligation to prevent, in the light of the concrete situation prevailing in the region.

As I said in the introduction, even in such a case of a reinforced obligation to prevent, the Court thought it wiser to switch from a criminal standard of proof beyond any reasonable doubt to a somewhat obscure but apparently less demanding standard of proof 'of a high level of certainty'.<sup>39</sup> But, for all their ingenuity, the Court's arguments on Serbia's lack of prevention and the evidence thereof are not entirely convincing, and are somehow weakened by the Court's own findings on the date on which the genocide in Srebrenica was decided upon and started, and about its duration. On the one hand, Serbia's government must have been aware of the risk of impending massacres during the fall of Srebrenica, because of the 'legacy of hatred' between the VRS and the Commander of the Bosnian 28th Corps, Naser Oric.<sup>40</sup> On the other hand, there are the crucial findings of the Court, based on the *Krstic* judgment of the ICTY Trial

<sup>36</sup> Cf. R. Quigley, *The Genocide Convention* (2006), at 135.

<sup>37</sup> See [1993] ICJ Rep 24, at para. 52. The English text uses the 'should' form, but the French text reads 'doit'.

<sup>38</sup> Cf. Boisson de Chazournes, *supra* note 32, at 532, 533.

<sup>39</sup> Cf. *supra* text to notes 7–8.

<sup>40</sup> Cf. Brownlie, ICJ CR 2006/40, 39, at para. 18. In particular, as Lord Owen recalled before the ICTY, Milosevic had already helped to dissuade General Mladic from taking Srebrenica in 1993, because 'he feared that if the Bosnian Serbs troops entered Srebrenica there would be a bloodbath because of the tremendous bad blood that existed between the two armies': *ibid.*, at 43, para. 179.

Chamber,<sup>41</sup> on the most probably spontaneous decision of the Srebrenica genocide just after the taking of the town on 11 July 1995, ‘on about 12 or 13 July’.<sup>42</sup>

If it is true that the duty to prevent a genocide is not temporally limited, and that the states are under a general obligation to do all in their power, through legislative measures or others, to prevent the commission of such acts, it is also true that it is only through some temporally determinable elements, e.g., the presence of a real and serious danger of genocide, that the duty to prevent can be concretized. It is doubtful whether the general awareness of a legacy of hatred over the years in a certain place can be equated with a real and present danger of genocide, especially in view of the fact, attested by the Court, of the lack of a genocidal plan before 12 July. It follows that, rather than the time before that date, what really seems decisive in order to evaluate Serbia’s responsibility is the behaviour of the Serbian authorities afterwards, i.e., once the genocide started. This poses a conceptual problem about the temporal extension of the duty to prevent, which the Court did not address and which could be solved only if one assumes that the violation of the duty to prevent is a continuing one, so that the occurrence of the event and its continuation, far from bringing the duty to prevent to an end, will determine the aggravation of its violation.<sup>43</sup> A dogmatically firmer approach would be, however, to assess the conduct of the state no longer on the ground of its duty to prevent, but on the different ground of its obligation not to render any aid or assistance or to recognize the situation resulting from a serious breach of a preemptory norm of general international law in the terms of Article 41, paragraph 2 of the ILC Articles on State Responsibility. But, by doing so, one is brought back to the broader issue of complicity, which the Court had already disposed of.

Moreover, when focusing on the events ‘on about 12 or 13 July’, the evidentiary ground becomes slippery. One can only wonder why Milosevic did not exert the same pressure in 1995 as he did two years earlier, in order to convince Mladic and his troops to refrain from committing excesses in the days after the fall of Srebrenica, as the knowledge of the crimes began to surface in the international media. The tone of resignation which Milosevic struck during those terrible events, claiming that the VRS ‘did not listen to him’ and that ‘he did not have control over the matter’,<sup>44</sup> might

<sup>41</sup> Cf. *Krstic*, IT-98-33-T, *supra* note 3, at para. 87: ‘[t]he Trial Chamber finds that, following the take over of Srebrenica in July 1995, the Bosnian Serbs devised and implemented a plan to execute as many as possible of the military aged Bosnian Muslim men present in the enclave’. Another account is given by the Trial Chamber in the *Blagojevic* Judgment, which regards the ‘Krivaja 95’ operation, which was planned on 2 July 1995 for the take-over of Srebrenica, as reflecting ‘one single scheme to commit genocide’: IT-02-60-T, *supra* note 3, at para. 674. However, this assumption does not seem unambiguously supported by the mere reading of the objectives of the Operation, which was intended to ‘separate and reduce in size the Srebrenica and Zepa enclaves, to improve the tactical position of the forces in depth of the area, and to create conditions for the elimination of the enclaves’.

<sup>42</sup> Cf. Judgment, *supra* note 2, at paras 295, 423.

<sup>43</sup> Cf. *ibid.*, at para. 438: ‘[y]et, the Respondent has not shown that it took any initiative to prevent what happened, or any action on its part to avert the atrocities which were committed’.

<sup>44</sup> Cf. Report of the Secretary General pursuant to GA Res. 53/35 on ‘The Fall of Srebrenica’ (UN Doc. A/54/549), para. 292, which dates the two statements respectively to the night of 12 July and 14 July.

not sound very convincing, but the Court also did not succeed in demonstrating what Serbia should *in concreto* have done in order to compel the VRS to stop the ongoing genocide.<sup>45</sup>

Of course, one could think of different answers, all of them practicable and sensible, from cutting financial ties to imposing sanctions, but it is the Court itself which in a way throws doubt on their efficacy when it recognizes that the genocidal events 'took a very short time', 'essentially between 13 and 16 July'.<sup>46</sup>

In fact, the Court managed to eschew the delicate question of the content of the positive obligation to prevent the genocide, or in other words of 'the means' to do so, which Serbia had allegedly had at its disposal, by stating that the respondent 'did nothing'.<sup>47</sup> As for that matter, one could observe that the Dutch Batcorp, too, which was entrusted by UNPROFOR to defend the safe area of Srebrenica and for that reason was also under a reinforced duty to prevent, did not do much. Indeed, following the chronology of events endorsed by the Court and in the light of the factual situation prevailing at the time on the ground, some doubts linger on the extent to which a more resolute behaviour from Belgrade, short of military intervention, would have reduced the size of the catastrophe, a question which the Court was well aware of, as we will see later when dealing with the issue of reparation.

In his declaration appended to the judgment, Judge Skotnikov vigorously criticized the Court, because, instead of interpreting Article I of the Genocide Convention according to customary international law, it 'came up with an initiative' not requested by the parties, with the commendable, but rather vague and politically motivated, goal of appealing to the nations of the world to do all they could to prevent genocide.<sup>48</sup> This criticism may go too far. However, most arguments of the Court leave the impression that they were rather conveniently tailored to the case at hand. In fact, if not for the sophisticated distinctions which the Court had made between the degree of knowledge in the case of complicity and in that of breach of the duty to prevent, and the relative standards of proof, it would be practically impossible to understand why the evidence which the Court found insufficient for the purpose of complicity would be sufficient for lack of prevention, or the other way round. Therefore, it is not surprising that both operative clauses 4 and 5 of the judgment, the first denying complicity and

<sup>45</sup> The point was addressed, albeit from different perspectives, in the declarations and separate opinions of some judges. On one hand, in their joint declaration judges Shi and Koroma lamented the fact that the Judgment did not consider the passing by the Security Council of Res. 1004 on 12 July 2005, by which the SC demanded with binding force the withdrawal of the Bosnian Serb forces from the area around Srebrenica and unimpeded access for international humanitarian agencies. For the two judges that resolution had clearly identified a 'moment of opportunity', which Serbia had blatantly missed (para. 6). On the other hand, Judge Tomka in his Separate Opinion pointed to the factual findings of the ICTY in the *Krstić* case, explicitly shared by the ICJ, in order to demonstrate that the Serbian authorities 'could not have prevented the terrible massacres in Srebrenica': (para. 68).

<sup>46</sup> Judgment, *supra* note 2, at para. 423.

<sup>47</sup> *Ibid.*, at para. 438.

<sup>48</sup> Declaration of Judge Skotnikov, at 10.

the second affirming breach of the duty of prevention, lost each two of the judges of the majority.<sup>49</sup>

### 3 Issues of Reparation

Having found Serbia to be in breach of her duties under Article I of the Genocide Convention, the Court addressed the issue of reparation. As is well known, the question of the reparation due to victims of grave breaches of humanitarian law and international human rights law has been the subject of a lively debate in international law doctrine in recent years, and the recent Resolution 60/147 of the UN General Assembly has added even more fuel to it.<sup>50</sup> In particular, a significant part of the doctrine maintains that every serious violation of humanitarian law necessarily entails a duty of reparation to the direct benefit of the victims.<sup>51</sup> Without entering here into the details of the debate, in my opinion this view cannot be upheld lightly. Suffice it to recall the uncertainties surrounding the direct applicability of Article 3 of the IV Hague Convention (or Article 91 of the 1977 First Optional Protocol to the Geneva Conventions) concerning the responsibility (by which is meant the duty to compensate) of the state for all acts committed by its armed forces,<sup>52</sup> or the delicate question of the renunciation of the state of nationality of the victims.<sup>53</sup>

It is therefore somehow surprising that Bosnia's counsel did not choose to argue in some depth the consequences of a violation of the duties of prevention and punishment under Article I of the Genocide Convention, and, on the contrary, appeared to be fully

<sup>49</sup> Judges Keith and Bennouna in the Fourth Operative Clause (beside Vice-President Al-Khasawneh and Judge ad hoc Mahiou, who consistently voted against all operative clauses which rejected the claims against Serbia); Judges Tomka and Skotnikov in the Fifth Operative Clause (besides Judge ad hoc Kréca, who consistently voted against all operative clauses condemning Serbia).

<sup>50</sup> UN GA Res. 60/147: 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law', adopted by consensus on 16 Dec. 2005. As is well known, the origins of the Res. are to be found in the reports of Prof. Theo van Boven, appointed by the Sub-Commission on the Prevention of Discrimination and Protection of Minorities (E/CN.4/Sub.2/1993/8, rev. E/CN.4/1997/104), later replaced by another independent expert, Prof. Cherif Bassiouni (E/CN.4/2000/62). The Reports were successively re-elaborated in three special consultative meetings in the Commission of Human Rights under the chair of Ambassador Alejandro Salinas of Chile. For a critical appraisal of the resolution: see d'Argent, 'Le droit de la responsabilité internationale complété? Examen des *Principes fondamentaux et directives concernant le droit à un recours et à réparation des victimes de violations flagrantes du droit international des droits de l'homme et de violations graves du droit international humanitaire*', 51 *Annuaire français de droit international* (2005) 27; Tomuschat, 'Reparation in Favour of Individual Victims of Gross Violations of Human Rights and International Humanitarian Law', in M. Kohen (ed.), *Liber Amicorum Cafilisch* (2007), 569.

<sup>51</sup> Now possibly arguing from Art. 33, para. 2 of the 2001 ILC Arts on State Responsibility. For some critical remarks see Gattini, 'Alcune osservazioni sulla tutela degli interessi individuali nei progetti di codificazione della Commissione del diritto internazionale sulla responsabilità internazionale e sulla protezione diplomatica', in M. Spinedi et al. (eds.), *La codificazione della responsabilità internazionale degli Stati alla prova dei fatti* (2006), 431.

<sup>52</sup> Cf. Gattini, 'To what Extent are State Immunity and Non-justiciability Major Hurdles for War Reparation Claims of Individuals?', 2 *J Int'l Criminal Justice* (2003).

<sup>53</sup> Cf. d'Argent, *supra* note 50, at 54; Gattini, 'La renonciation au droit d'invoquer la responsabilité internationale', in P.M. Dupuy et al. (eds.), *Essays in Honour of Tomuschat* (2006), 317.

in agreement with Serbia's counsel on the fact that for such breaches 'the appropriate remedy is a declaratory judgment' under the heading of satisfaction.<sup>54</sup> Furthermore, although Bosnia, in its final submissions presented on 24 April 2006 at the beginning of the second round of the hearings, requested the Court to adjudge and declare, among others, that Serbia 'must redress the consequences of its international wrongful acts, and, as a result ... must pay ... full compensation for the damages and losses caused', it did so only with reference to the 'financially assessable damage' caused or related to the acts enumerated in Article III of the Genocide Convention.<sup>55</sup>

The Court was somehow puzzled by Bosnia's procedural conduct, as shown by its observation that Bosnia's final submissions relating to compensation 'were predicated on the basis that the Court would have upheld, not merely that part of the Applicant's claim as related to the obligation of prevention and punishment, but also the claim that the Respondent has violated its substantive obligation not to commit genocide'.<sup>56</sup> However, even if Bosnia's final submissions had been less equivocal, it is doubtful whether, in the light of the aforementioned debate on the rightfulness of the disposal by the applicant state of a claim concerning victims of grave violations of human rights, the Court could have limited itself to upholding the shared view of the parties, or even strictly applying the principle of *ne ultra petita*. Therefore, it was inevitable that the Court would address the question of the appropriate form of reparation due for the breach of a duty to prevent, and not limit itself to a simple declaratory judgment.<sup>57</sup>

The Court had already stated that, given its character of an obligation of means, it is not necessary to prove that the state concerned definitely had the power to prevent the genocide in order to find a breach of that obligation.<sup>58</sup> At this stage of the judgment, in order to decide the question of reparation, the Court deemed it necessary to turn its attention to the issue of causality, with the argument that the finding of a breach of the duty to prevent does not mean that the acts of genocide would not have

<sup>54</sup> Cf. Brownlie, ICJ CR 2006/17, at 43, para. 304. The Counsel for Bosnia, Prof. Pellet, had stated that the injury suffered by Bosnia because of Serbia's breach of the obligation to prevent and punish genocide did not lend itself to 'pecuniary appraisal' (ICJ CR 2006/11, at 26, para. 18), and that 'the most natural mode of reparation in this regard would be satisfaction in the form of a declaration by the Court' (*ibid.*, para. 20). In the first round of oral pleadings Bosnia's main interest was to stress the duty of Serbia to pay full monetary compensation for the commission of genocide, which seems somehow excessive if one considers that the asserted goal of Bosnian action was to facilitate the reconciliation of the two countries through the establishment of truth.

<sup>55</sup> Cf. para. 6(b) of Bosnia's final submissions, quoted in Judgment, *supra* note 2, at para. 66. This point escaped the attention of Tomuschat, 'Reparation in Cases of Genocide', 6 *Journal of International Criminal Justice* (2007) 905, who strongly criticized the Court's decision not to award Bosnia any monetary compensation for the 'moral injury suffered by Bosnia and Herzegovina', with the argument that such injury 'is clearly encompassed by the phrase "damages and losses"'.  
<sup>56</sup> Cf. Judgment, *supra* note 2, at para. 459.

<sup>57</sup> Furthermore, this latter course would have had the inconvenience of leaving the option open for Bosnia to claim, as an afterthought, compensation for all the alleged damage caused by Serbia's lack of prevention, so dragging the controversy with Serbia out for another unforeseeable time span. For the role of declaratory judgments in keeping open the issue of reparation see Wittich, 'Das Feststellungsurteil im Verfahren vor dem Internationalen Gerichtshof', 44 *Archiv des Völkerrechts* (2006) 1, at 13.

<sup>58</sup> Cf. Judgment, *supra* note 2, at para. 438.

occurred anyway. This observation may be true for itself, but it is not clear how far this would or should change the parameters of causality in the Court's reasoning.

It is well known that in international law practice there is no single, unanimously accepted standard of causality. This conclusion may even be inescapable, because causality remains finally a question of fact, and every arbitrator retains full, even discretionary, powers of appraisal of this issue.<sup>59</sup> Moreover, every arbitrator seems to take for granted the concepts prevailing in his/her own legal system. It follows that awards more influenced by common law perceptions make extensive use of the 'proximity' standard,<sup>60</sup> whereas awards more indebted to a civil law tradition make use of criteria such as that of the '*conditio sine qua non*'<sup>61</sup> or that of the 'adequacy' of the causal connection.<sup>62</sup> Some awards also choose a generic formulation such as 'line of natural sequences',<sup>63</sup> or 'natural and normal sequences'.<sup>64</sup> Other theories try to develop more innovative paths, such as that of the 'ambit of the purpose' of the rule breached.<sup>65</sup>

It is a fact that the ILC did not really manage to give an unequivocal meaning to the requirement of Article 31 of its Articles on State Responsibility, that the injury to be repaired must have been 'caused' by the internationally wrongful act of the state. The commentary on the article lists a miscellaneous collection of cases adopting the most different formulae, and ends with the remark that 'the requirement of a causal link is

<sup>59</sup> Cf. J. Personnaz, *La réparation du préjudice en droit international public* (1938), at 135; B. Bollecker Stern, *Le préjudice dans la théorie de la responsabilité internationale* (1973), at 189, for whom causality in itself is '*une notion imprégnée de subjectivité*'.

<sup>60</sup> Cf. *Administrative Decision Nr. II* (United States–Germany Mixed Claims Commission 1923), VII UNRIAA, 30.

<sup>61</sup> In spite of all the criticism levelled against it in the course of decennials, this classical causality theory, first developed in criminal law by von Buri, *Die Kausalität und ihre strafrechtlichen Beziehungen* (1885), remains by far the predominant one, at least as a rule of thumb.

<sup>62</sup> Although first introduced in criminal law (cf. von Kries, 'Über den Begriff der Wahrscheinlichkeit und Möglichkeit und ihre Bedeutung im Strafrecht', 9 *Zeitschrift für Strafwissenschaft* (1889), 528), this causality theory met with greater success in civil law. However, the more recent legal literature does not see in it so much a causality theory, as a device to limit the scope of liability. In fact, the 'adequacy' of a certain course of conduct to bring about a certain result depends considerably on the angle of perspective chosen by the interpreter.

<sup>63</sup> Cf. *Maninat case* (France/Venezuela 1902), X UNRIAA, 81.

<sup>64</sup> Cf. *Eisenbach Brothers v. Germany* (United States–Germany Mixed Claims Commission 1925), VII UNRIAA, 199.

<sup>65</sup> This theory has also been developed in German law, '*Normschutzzweckstheorie*'. What is meant by this formula is that causality in a legal sense is excluded if the injury is not the realization of the risk prohibited by the norm violated by the author of a certain conduct, but of a different norm. On the contrary causality is achieved if by his conduct the author has increased the risk that the norm will be violated by third persons. Cf. in German civil law E. von Caemmerer, *Das Problem des Kausalzusammenhangs* (1956); Larenz, 'Zum heutigen Stand der Lehre von der objektiven Zurechnung im Schadenersatzrecht', in *Festschrift für Honig* (1970), 79; in German criminal law see Roxin, 'Gedanken zur Problematik der Zurechnung im Strafrecht', in *ibid.* at 133. As I tried to show elsewhere (cf. Gattini, *supra* note 26, at 58), some well known and apparently complicated cases, such as those of the *Lighthouses Concessions of the Ottoman Empire* (France/Greece 1956, claims nr. 15 and 19, XII UNRIAA, 218) or the so-called *Naulilaa case* (*Responsibility of Germany for damage caused in the Portuguese colonies in the south of Africa*, Portugal v. Germany 1928, II UNRIAA, 1011, at 1031) may be more easily explained by this theory. For an express application of the theory cf. the decision of the Iran–United States Claims Tribunal in *Islamic Republic of Iran v. United States of America*, Cases Nos. A15(IV) and A24, Award No. 590-A15(IV)/A24-FT (28 Dec. 1998).

not necessarily the same in relation to every breach of an international obligation'.<sup>66</sup> Therefore, it should neither be a surprise nor a scandal that even the Court did not succeed in dispelling an impression of arbitrariness. But what deserves criticism is the fact that the Court omitted plainly to illustrate its reasoning and that this reasoning appears to be self-defeating.

The argument of the Court boils down to the question of what difference a more decisive stance on the part of Serbia in preventing the commission of the genocide in Srebrenica would have made. Once it had ascertained that Serbia's omissions had not been a *conditio sine qua non*, i.e., that the genocide would most probably have been committed anyway by the organs of the Republika Srpska, the Court did not see itself as being in a position to establish any causality of Serbia's behaviour in the resulting losses of the dramatic events of those days.<sup>67</sup>

Certainly, the issue of causality of an omission is a particularly tricky one, being based as it is on hypothetical factors.<sup>68</sup> But in denying any causality, the Court apparently did not realize that it was contradicting its own previous finding of breach of the obligation to prevent and that it reduced to *nihil* the same duty to prevent, which the Court itself had emphasized in so many words.<sup>69</sup> As the ILC had said in its commentary on Article 23 on State Responsibility adopted at first reading and dealing with the breach of an obligation to prevent, breach of an obligation to prevent can be asserted to exist only if there is 'a causal link such that the said conduct may be regarded as a *sine qua non* of the event'.<sup>70</sup> In other words, once the causal nexus between omissive conduct and the event is broken, there can no longer be any place for a finding of breach of the duty to prevent, unless, contrary to the ILC, one takes the view that breach of such a duty can occur regardless of the occurrence of the event, a view, though, which was explicitly discarded by the ICJ.<sup>71</sup>

<sup>66</sup> ILC Commentary to Art. 31, at para. 10.

<sup>67</sup> Judgment, *supra* note 2, at para. 462.

<sup>68</sup> Cf. Rigaux, 'International Responsibility and the Principle of Causality', in M. Ragazzi (ed.), *International Responsibility Today. Essays in Memory of Schachter* (2005), at 81, 82. Cf. Ago, 'Le délit international', *Recueil des Cours de l'Académie de droit international de la Haye* 1939 (II), 68, at 503, to whom in the case of omission the causality can be assessed only in purely normative terms.

<sup>69</sup> Cf. Forlati, 'Violazione dell'obbligo di prevenire il genocidio e riparazione nell'affare *Bosnia-Erzegovina c. Serbia*', *Rivista di diritto internazionale* (2007) 425, for a stringent criticism of the Court's reasoning on causality.

<sup>70</sup> Cf. *Report of the International Law Commission on the Work of Its Thirtieth Session*, YILC 1978, Vol. II, Second Part, at 85, para. 14. With regard to the ECtHR's jurisprudence on obligations of prevention see Conforti, 'Exploring the Strasbourg Case-law: Reflections on State Responsibility for the Breach of Positive Obligations', in M. Fitzmaurice and D. Sarooshi (eds.), *Issues of State Responsibility before International Judicial Institutions* (2004), 129, for whom (at 131) 'a conclusion that can be drawn from the Strasbourg case-law is that no violation is found in cases where there is lack of a casual link between the behaviour of the State and the event'.

<sup>71</sup> It is for this reason that one cannot apply to the Court's arguments the distinction, well known in some legal systems such as the German civil law, between causality giving ground to liability for the violation as such ('*Haftungs begründende Kausalität*') and a subsequent causality giving ground to the duty of reparation of the losses incurred ('*Haftungsausfüllende Kausalität*'): see K. Larenz, *Lehrbuch des Schuldrechts, Erster Band Allgemeiner Teil* (14 Aufl (1987), at 432; E. Schmidt, *Schuldrecht, Band I, Allgemeiner Teil*, 8 Aufl. (2000), at 62.

The real cause of the Court's unconvincing argument is that it purportedly eschewed the central question of the consequences of 'concomitant causation', i.e., the fact that the same loss can be linked to more than one cause.<sup>72</sup> To say that the genocide would have been committed anyway is not equivalent to saying that the genocide would have been committed with the same modalities. Furthermore, the fact that Serbia's omission was not the *only* cause does mean that it was *no* cause at all. The Court consciously changed the terms of reference, in asking whether there was 'a sufficiently direct and certain causal nexus between the wrongful act ... and the injury suffered by the Applicant, consisting of *all* damage of any type, material or moral, caused by the acts of genocide'.<sup>73</sup> Put in these extreme terms, the answer cannot but be negative. But the point was exactly to determine which part of the damage, be it material or moral, had been caused by the omissions of a state which, to use the same words of the Court, although aware of the grave risk of a genocide and having the means whereby it could at least have tried to prevent it, 'manifestly refrained from employing them'.<sup>74</sup>

The Court's reluctance squarely to address the issue of concomitant causes can be partially explained, but by no means justified, by the uncertain state of practice and doctrine.<sup>75</sup> The conceptual framework for dealing with the question of concurrent causes, one consisting in an omission, was given by the ICJ as early as in the *Corfu Channel* case. There the Court did not even try to impute to Albania the laying of the mines, which had in fact been laid by Yugoslavia, but nevertheless held Albania responsible for its grave omissions,<sup>76</sup> and condemned it 'for the damage and human loss that resulted thereof [*sic*]'.<sup>77</sup> This precedent led the ILC's special rapporteur James Crawford to maintain that there is no partial reduction of a state's liability in cases of concurrent causes,<sup>78</sup> contrary to the opinion previously expressed by the former ILC special rapporteur Gaetano Arangio-Ruiz, according to whom in all cases of concurrent causation the state's liability should be proportionally reduced.<sup>79</sup> The commentary on Article 31 of the ILC Articles on State Responsibility reflects Crawford's view, although the ILC tried to compose both opinions by noting that 'cases can occur where an identifiable element of injury can properly be allocated to one of several concurrently operating causes alone'.<sup>80</sup> However, in the commentary on Article 47 dealing

<sup>72</sup> Cf. Forlati, *supra* note 69, at 430.

<sup>73</sup> Judgment, *supra* note 2, at para. 462 (emphasis added).

<sup>74</sup> *Ibid.*, at para. 461.

<sup>75</sup> Cf. Bollecker Stern, *supra* note 59, at 270 ff, who distinguishes between '*intervention cumulative*' (where each intervening cause, taken alone, would not have caused the damage), '*intervention parallèle*' (where the damage would have been caused anyway by another external cause), and '*intervention complémentaire*' (where each cause generates damage of the same nature). The author concludes that the answer to be given to the issue of reparation in the first category of concomitant causes depends on the causality theory adopted (equivalence or adequacy), whereas for the second category reparation should be excluded and for the third category proportionally reduced. However, practice does not seem to fit so neatly in the proposed scheme.

<sup>76</sup> [1949] ICJ Rep, at 23.

<sup>77</sup> *Ibid.*, at 36, first operative clause.

<sup>78</sup> Crawford, 'Third Report on State Responsibility', *Ybk Int'l Law Commission* (2000), Vol. II, Pt One, at para. 34.

<sup>79</sup> Cf. Arangio-Ruiz, 'Second Report on State Responsibility', *Ybk Int'l Law Commission* (1989), Vol. II, Pt One, at para. 44 ff.

<sup>80</sup> Cf. ILC Commentary to Art. 31, at 229, para. 13.



with the different question of a 'plurality of responsible States' in relation to the same internationally wrongful act, the ILC, after having stated the general principle of joint and several responsibility, distinguished the case in which several states, by separate internationally wrongful acts, contributed to cause the same damage, and referred again to the *Corfu Channel* case, with the somewhat equivocal sentence that 'in such cases, the responsibility of each participating State is determined individually, on the basis of its own conduct and by reference to its own international obligations'.<sup>81</sup>

At any event, had the consequence of full reparation for the Srebrenica genocide on the part of Serbia appeared unpalatable to the Court, in consideration of the fact that Serbia was not even an accomplice to it, it could easily have distinguished the *Corfu* precedent, on the ground that the event had not occurred on the territory of the responsible state.

In conclusion, even if the Court's decision not to grant financial compensation might have been motivated by the laudable intent of sending a message to the parties to look forward and endeavour to reconcile, instead of remaining stuck in the desire to prevaricate one upon the other,<sup>82</sup> on the whole the Court's decision to dispose of the matter of reparation by means of a simple declaration in the judgment as a form of satisfaction seems to have been quite rushed, and unfortunately gives the whole judgment a flavour of half-heartedness. Admittedly, Bosnia had not asked for any compensation for breaches of Article I, and, as the Court did not fail to note,<sup>83</sup> it was the applicant itself (but actually only through its counsel<sup>84</sup>) that had suggested a declaration as 'the most appropriate form' of satisfaction. But even so, in the light of the exceptional gravity of the crimes under consideration, the Court could have shown more creativity and sensitivity with regard to the 'non-material damage suffered by the surviving heirs or successors [of the victims] and their dependants', as Bosnia had requested, even if referring to the 'wrong' Article.

The award of some kind of reparation of the now so-called restorative justice would have captured the essence of Serbia's wrong, i.e., its failure to prevent, and its 'collective' dimension. One could have thought of the financing of some programmes for the benefit of the survivors and the relatives of the victims of Srebrenica, such as measures of rehabilitation, psycho-therapeutical treatment, the creation of documentation centres, and various measures for honouring and keeping alive the memory of the victims.<sup>85</sup>

<sup>81</sup> ILC Commentary to Art. 47, at 317, para. 8. Therefore, it would be a case of '*intervention complémentaire*' in the meaning of Bollecker Stern, *supra* note 59, at 281.

<sup>82</sup> Cf. Gill, 'The "Genocide" Case: Reflections on the ICJ's Decision in Bosnia and Herzegovina v. Serbia', 2 *Hague Justice Journal/Journal Judiciaire de la Haye* (2007) 43, at 47 for the observation that 'under the circumstances, it was – on balance – probably the wisest thing to put the case to rest after fourteen years of litigation and trust to future developments to provide any additional form of admission of responsibility and possible compensation as part of the process of reconciliation'.

<sup>83</sup> Cf. Judgment, *supra* note 2, at para. 463.

<sup>84</sup> Cf. *supra* text to note 55.

<sup>85</sup> The examples are taken from UN GA Res. 60/147, 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law', 16 Dec. 2005, para. 22.

Admittedly, the ICJ is totally inexperienced in this field of redress, but by the same token it also has little experience in all aspects of classical reparation.<sup>86</sup> A look at the jurisprudence of the Inter-American Court of Human Rights could have provided a useful source of inspiration.<sup>87</sup>

## 4 Conclusions

‘When they have to condemn a State, international courts prefer to do it at the lowest possible moral cost for the State in question.’<sup>88</sup> This resigned observation by Rigaux has never proven truer than in the present case. But one could also ask whether a wiser decision than in the present case has ever been taken either.

With the distance of time, and in the overall light of the historical facts as they are now known, the moment finally arrived for international justice to speak. And, as a whole, such words were clear: the norms and concepts of international law are not interchangeable at will, and cannot be inflated in order to match the emotional needs of a public audience in search of a scapegoat to soothe its lingering feelings of guilt and impotence. In other words, a state does not need to commit genocide in order to be blamed for the breach of innumerable norms of international humanitarian and human rights law. The violent disintegration of a state in the middle of Europe, the upsurge of a civil war at the end of the 20th century in which unspeakable atrocities were committed on all sides, has been enough of a shock to the civilized world, without the need to add the dubious and ghastly thrill of a ‘genocide label’. On the other hand, neither can a state hide behind technicalities of procedure in order to escape a judgment on its failure to prevent the commission of a genocide, to the extent that one was actually committed, regardless of the concrete relevance of its own acts or omissions in its causation.

<sup>86</sup> Cf. Brownlie, ‘Remedies in the ICJ’, in V. Lowe *et al.* (eds.), *Essays in Honour of Sir Robert Jennings* (1996), 557; C. Gray, *Judicial Remedies in International Law* (1990), at 77 ff.

<sup>87</sup> As is well known, in its most recent judgments, the Inter-American Court developed innovative forms of reparation, which do not substitute for the more traditional ones of compensation for damages, but take a more and more central place alongside the guarantees of non repetition. Just to recall a few examples, in the decision of 5 July 2006 in the *Montero-Aranguren y otros v. Venezuela (Retén de Catia)* case (cf. Serie C No. 150, available at: [www.corteidh.or.cr/pais.cfm?id\\_Pais=13](http://www.corteidh.or.cr/pais.cfm?id_Pais=13).) the Court condemned Venezuela to holding within 6 months a public and solemn ceremony of atonement (*acto publico de reconocimiento de responsabilidad y pedida de esculpa*) by the highest state officials and in the presence of the relatives of the victims, at the Detention Centre at Catia, the same place where the facts giving rise to its responsibility, the extrajudicial killing of 37 detainees in 1992, had happened. In the decision of 22 Sept. 2006 in the *Goiiburú y otros v. Paraguay* case (cf. Serie C No. 153, available at [www.corteidh.or.cr/pais.cfm?id\\_Pais=5](http://www.corteidh.or.cr/pais.cfm?id_Pais=5)), concerning the *desaparecidos* of Operation Condor in Paraguay in the 1970s, the Court took notice of various measures already taken by Paraguay, among which were the establishment of a Commission for Truth and Justice, the establishment of a Documentation and Archive Centre denominated ‘*Archivo del terror*’, the naming of a public square in memory of the *desaparecidos*, and indicated a whole series of measures, from the therapeutical treatment of relatives of the victims, the construction of monuments, public ceremonies of excuses, alongside more general and wider ranging measures such as the dissemination of a human rights culture in schools and institutions, and changes in the criminal code.

<sup>88</sup> Rigaux, *supra* note 68, at 91.

That said, the judgment missed a historic opportunity to give the international community some guidance on the content of the positive obligations to prevent the occurrence of what constitutes the gravest of crimes against humanity, and on the appropriate measures for redress and rehabilitation of its victims.

The judgment's shortcomings, however, should not cause one to lose sight of the importance of the two essential findings; first, that a genocide was indeed committed in Srebrenica and, secondly, that all states had, at least *in abstracto*, a duty to prevent it. Not all the potential consequences and implications of these two findings have yet been detected. A foretaste of what is likely to happen can already be seen in the legal action that a group known as The Mothers of Srebrenica began on 4 June 2007 in the Hague against the United Nations and the Dutch government for their failure to protect the civilians of Srebrenica in July 1995.<sup>89</sup>

<sup>89</sup> Cf. *International Herald Tribune*, 5 June 2007.